UNITED STATES DEPARTMENT OF THE INTERIOR
WASHINGTON, D.C. 20240

Secretary of the Interior . . . . . Rogers C. B. Morton
Office of Hearings and Appeals . . . James M. Day, *Director*
Office of the Solicitor . . . Mitchell Melich, *Solicitor*

DECISIONS OF THE UNITED STATES DEPARTMENT OF THE INTERIOR

Edited by
Vera E. Burgin
Henry D. Myers

VOLUME 78

JANUARY-DECEMBER 1971

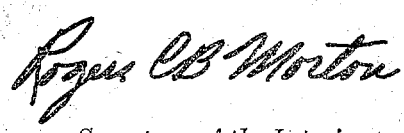
U.S. GOVERNMENT PRINTING OFFICE, WASHINGTON : 1972

PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1971 to December 31, 1971. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Rogers C. B. Morton served as Secretary of the Interior during the period covered by this volume; Mr. William T. Pecora served as Under Secretary; Messrs. Richard F. Bodman, Hollis M. Dole, John Larson, Harrison Loesch, Nathaniel Reed, James R. Smith served as Assistant Secretaries of the Interior; Mr. Mitchell Melich served as Solicitor of the Department of the Interior and Mr. Raymond C. Coulter as Deputy Solicitor. Mr. James M. Day, served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "78 I.D."



Secretary of the Interior.

CONTENTS

ERRATA

Page 33—Par. 2, Correct citation, Lester J. *Hamel*, 74 I.D. 125 (1967).

Page 38—Par. 2, line 16, Correct Citation to read, J. M. Beard (on Rehearing), 52 L. D. 451 (1928).

Page 56—Pars. 3 and 4, lines 2 and 4 delete *00* from time, correct to read *5 p.m.*

Page 71—Topical Index Heading should read, *Mining Claims: Common Varieties of Minerals:* Generally.

Page 82—Correct Topical Index Heading to read, *Sodium Leases and Permits: Rentals.*

Pages 107, 135, 145, 147, 148, 150, 151 and 152, note change *"Office of Appeals and Hearings,"* Bureau of Land Management.

Page 153—Delete colon preceding date.

Page 175—3d Par., 4th line correct legal citation to read *Castle* v. *Womble.*

Page 220—3d Par. 3d line correct the *Act* to read, *June 17, 1902.*

Page 240—Line 10, Correct citation to read Estate of Joe (Joseph) Sherwood, IA–P–20 (November 19, *1969*).

Page 248—Footnote 9—line 3, correct citation to read Tooahnippah (*Goombi*) * * *.

Page 254—Line 12, delete *for*, the phrase should read, *settled heirship rights* * * *.

Line 19, correct date to January 25, 1970.

Page 297—Par. 7, line 5 correct spelling for *National* and Par. 8, line 2 correct spelling for *Director.*

Page 303—Footnote 3, par. 5—line 1 correct date of Act to May *17*, 1906.

Page 333—Par. 2, line 3, correct Allotter to *Allottee.*

Page 394—Par. 2—lines 5 & 6 legal citation should read United States v. *Loyd* Ramstad * * *.

Page 398—Line 9 correct citation to read *Madge V. Rodda* * * *.

Par. 2, line 9, correct citation (S.D. Cal. *1950*)–

TABLE OF DECISIONS REPORTED

TABLE OF OPINIONS REPORTED

CHRONOLOGICAL TABLE OF DECISIONS AND OPINIONS REPORTED

EDITOR'S NOTE: All decisions rendered prior to 7/1/70 from the Boards, Indians, Lands and Mines will no longer be cited by docket no. in citing refer to volume, designated board and page no.

NUMERICAL TABLE OF DECISIONS AND OPINIONS REPORTED

IBCA—Interior Board of Contract Appeals
IBIA—Interior Board of Indian Appeals
IBLA—Interior Board of Land Appeals
IBMA—Interior Board of Mine Operations
M—Solicitor's Opinion

TABLE OF SUITS FOR JUDICIAL REVIEW OF PUBLISHED DEPARTMENTAL DECISIONS

CUMULATIVE INDEX TO SUITS FOR JUDICIAL REVIEW OF DEPARTMENTAL DECISIONS PUBLISHED IN INTERIOR DECISIONS

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

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

Alder Construction Co. v. *U.S.*, Cong. 10–60. Dismissed, 423 F. 2d 1362 (1970); rehearing denied, July 15, 1970; *cert. denied*, 400 U.S. 993 (1970); rehearing denied, 401 U.S. 949 (1971).

Adler Construction Co. v. *U.S.*, Cong. 5–70. Suit pending.

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

Dolly Custer Akers v. *The Dept. of the Interior*, Civil No. 907, D. Mont. Judgment for defendant, September 17, 1971; order staying execution of judgment for 30 days issued October 15, 1971.

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

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

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

Allied Contractors, Inc. v. *U.S.*, Ct. Cl. No. 163–63. Stipulation of settlement filed March 3, 1967; compromised.

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

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

462–392—72——2

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

Max Barash v. *Douglas McKay*, Civil No. 939–56. Judgment for defendant, June 13, 1957; rev'd. & remanded, 256 F. 2d 714 (1958); judgment for plaintiff, December 18, 1958. Supplemental decision, 66 I.D. 11 (1959); no petition.

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

Barnard-Curtiss Co. v. *U.S.*, Ct. Cl. No. 491–59. Judgment for plaintiff, 301 F. 2d 909 (1962).

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

Katherine S. Foster & Brook H. Duncan, II v. *Stewart L. Udall*, Civil No. 5258, D. N.M. Judgment for defendant, January 8, 1964; rev'd., 335 F. 2d 828 (10th Cir. 1964); no petition.

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

Sam Bergesen v. *U.S.*, Civil No. 2044, D. Wash. Complaint dismissed March 11, 1958; no appeal.

BLM–A–045569, 70 I.D. 231 (1963)

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

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

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

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

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

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

R. C. Buch v. *Stewart L. Udall*, Civil No. 68–1358–PH, C.D. Cal. Judgment for plaintiff, 298 F. Supp. 381 (1969); rev'd., August 31, 1971; rehearing denied, September 29, 1971.

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

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

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

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

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

Carson Construction Co. v. *U.S.*, Ct. Cl. No. 487–59. Judgment for plaintiff, December 14, 1961; no appeal.

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

Shell Oil Co. v. *Udall*, Civil No. 216–67. Stipulation of dismissal filed August 19, 1968.

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

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

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

Stephen H. Clarkson v. *U.S.*, Cong. Ref. 5–68. Trial Commr's. report adverse to U.S. issued December 16, 1970; Chief Commr's. report concurring with the Trial Commr's. report issued April 13, 1971.

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

Hannah and Abram Cohen v. *U.S.*, Civil No. 3158, D. R. I. Compromised.

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

Barney R. Colson, et al. v. *Stewart L. Udall*, Civil No. 63–26–Civ.–Oc. M.D. Fla. Dismissed with prejudice, 278 F. Supp. 826 (1968); aff'd., 428 F. 2d 1046 (5th Cir. 1970); *cert. denied*, 401 U.S. 911 (1971).

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

Merwin E. Liss v. *Fred A. Seaton*, Civil No. 3233–56. Judgment for defendant, January 9, 1958; appeal dismissed for want of prosecution, September 18, 1958, D.C. Cir. No. 14,647.

Appeal by the Confederated Salish & Kootenai Tribes of the Flathead Reservation, in the Matter of the Enrollment of Mrs. Elverna Y. Clairmont Baciarelli, 77 I.D. 116 (1970)

Elverna Yevonne Clairmont Baciarelli v. *Walter J. Hickel*, Civil No. C–70–2200, D. Cal. Judgment for defendant, August 27, 1971; appeal docketed October 22, 1971.

Appeal of Continental Oil Co., 68 I.D. 337 (1961)

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

Autrice C. Copeland

See Leslie N. Baker *et al.*

Appeal of Cosmo Construction Co., 73 I.D. 229 (1966)

Cosmo Construction Co., et al. v. *U.S.*, Ct. Cl. 119–68, Ct. opinion setting case for trial on the merits issued March 19, 1971.

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

Patrick A. McKenna v. *Clarence A. Davis*, Civil No. 2125–56. Judgment for defendant, June 20, 1957; aff'd., 259 F. 2d 780 (1958); *cert denied*, 358 U.S. 385 (1958).

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

The Dredge Corp. v. *J. Russell Penny*, Civil No. 475, D. Nev. Judgment for defendant, September 9, 1964; aff'd., 362 F. 2d 889 (9th Cir. 1966); no petition. See also *Dredge Co.* v. *Husite Co.*, 369 P. 2d 676 (1962); *cert. denied*, 371 U.S. 821 (1962).

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

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

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

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

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

Raymond J. Hansen v. *Fred A. Seaton*, Civil No. 2810–59. Judgment for plaintiff, August 2, 1960 (opinion); no appeal.

See *Safarik* v. *Udall*, 304 F. 2d 944 (1962); cert. denied, 371 U.S. 901 (1962).

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

Gabbs Exploration Co. v *Stewart L. Udall*, Civil No. 219–61. Judgment for defendant, December 1, 1961; aff'd., 315 F. 2d 37 (1963); *cert. denied*, 375 U.S. 822 (1963).

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

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

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

General Excavating Co. v. *U.S.*, Ct. Cl. No. 170–62. Dismissed with prejudice December 16, 1963.

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

Nelson A. Gerttula v. *Stewart L. Udall*, Civil No. 685–60. Judgment for defendant, June 20, 1961; motion for rehearing denied, August 3, 1961; aff'd., 309 F. 2d 653 (1962); no petition.

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

Pan American Petroleum Corp. & Charles B. Gonsales v. *Stewart L. Udall*, Civil No. 5246, D. N.M. Judgment for defendant, June 4, 1964; aff'd., 352 F. 2d 32 (10th Cir. 1965); no petition.

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

Southwestern Petroleum Corp. v. *Stewart L. Udall*, Civil No. 2209–62. Judgment for defendant, October 19, 1962; aff'd., 325 F. 2d 633 (1963); no petition.

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

Guthrie Electrical Construction Co. v. *U.S.*, Ct. Cl. No. 129–58. Stipulation of settlement filed September 11, 1958. Compromised offer accepted and case closed October 10, 1958.

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

Edwin Still, et al. v. *U.S.*, Civil No. 7897, D. Colo. Compromise accepted.

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

Raymond J. Hansen, et al. v. *Stewart L. Udall*, Civil No. 3902–60. Judgment for defendant, June 23, 1961; aff'd., 304 F. 2d 944 (1962); *cert. denied*, 371 U.S. 901 (1962).

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

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

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

Hope Natural Gas Co., 70 I.D. 228 (1963)

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

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

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

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

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

Wallace Reed, et al. v. *Dept. of the Interior, et al.*, Civil No. 1–65–86, D. Idaho. Order denying preliminary injunction, September 3, 1965; dismissed, November 10, 1965; judgment adverse to U.S., July 10, 1970; appeal docketed February 9, 1971.

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

Floyd A. Wallis v. *Stewart L. Udall*, Civil No. 3089–63. Dismissed with prejudice, March 27, 1968.

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

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

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

J. D. Armstrong, Inc. v. *U.S.*, Ct. Cl. No. 490–56. Plaintiff's motion to dismiss petition allowed, June 26, 1959.

Anquita L. Kluenter, et al., A–30483 (November 18, 1965)

See Bobby Lee Moore, *et al.*

Leo J. Kottas, Earl Lutzenhiser, 73 I.D. 123 (1966)

Earl M. Lutzenhiser and Leo J. Kottas v. *Stewart L. Udall, et al.*, Civil No. 1371, D. Mont. Judgment for defendant, June 7, 1968; aff'd., 432 F. 2d 328 (9th Cir. 1970); no petition.

Max L. Krueger, Vaughan B. Connelly, 65 I.D. 185 (1958)

Max Krueger v. *Fred A. Seaton*, Civil No. 3106–58. Complain dismissed by plaintiff, June 22, 1959.

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

W. Dalton La Rue, Sr. v. *Stewart L. Udall*, Civil No. 2784–62. Judgment for defendant, March 6, 1963; aff'd., 324 F. 2d 428 (1963); *cert. denied*, 376 U.S. 907 (1964).

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

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

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

Bernard E. Darling v. *Stewart L. Udall*, Civil No. 474–64. Judgment for defendant, October 5, 1964; appeal voluntarily dismissed, March 26, 1965.

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

Kenneth McGahan v. *Stewart L. Udall*, Civil No. A–21–63, D. Alas. Dismissed on merits, April 24, 1964; stipulated dismissal of appeal with prejudice, October 5, 1964.

Merwin E. Liss, et al., 70 I.D. 228 (1963)

Hope Natural Gas Co. v. *Stewart L. Udall*, Civil No. 2132–63.
Consolidated Gas Supply Corp. v. *Stewart L. Udall, et al.*, Civil No. 2109–63. Judgment for defendant, September 20, 1965; per curiam dec., aff'd., April 28, 1966; no petition.

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

Bess May Lutey, et al. v. *Dept. of Agriculture, BLM, et al.*, Civil No. 1817, D. Mont. Judgment for defendant, December 10, 1970; no appeal.

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

Mrs. Elgin A. McKenna as Executrix of the Estate of Patrick A. McKenna, Deceased v. *Udall*, Civil No. 2001–67. Judgment for defendant, February 14, 1968; aff'd., 418 F. 2d 1171 (1969); no petition.

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

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

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

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

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

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

Wade McNeil v. *Stewart L. Udall, Civil* No. 678–62. Judgment for defendant, December 13, 1963 (opinion); aff'd., 340 F. 2d 801 (1964); *cert. denied*, 381 U.S. 904 (1965).

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

Salvatore Megna, Guardian etc. v. *Fred A. Seaton*, Civil No. 468–58. Judgment for plaintiff, November 16, 1959; motion for reconsideration denied, December 2, 1959; no appeal.

Philip T. Garigan v. *Stewart L. Udall*, Civil No. 1577 Tuc., D. Ariz. Preliminary injunction against defendant, July 27, 1966; supplemental dec. rendered September 7, 1966; judgment for plaintiff, May 16, 1967; no appeal.

MevA Corp., 76 I.D. 205 (1969)

MevA Corp. v. *U.S.*, Ct. Cl. No. 492–69. Suit pending.

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

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

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

Duncan Miller v. *Stewart L. Udall*, Civil No. 931–63. Dismissed for lack of prosecution, April 21, 1966; no appeal.

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

Samuel W. McIntosh v. *Stewart L. Udall*, Civil No. 1522–64. Judgment for defendant, June 29, 1965; no appeal.

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

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

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

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

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

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

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

Morrison-Knudsen Co. v. *U.S.*, Ct. Cl. No. 239–61. Remanded to Trial Comm'r., 345 F. 2d 833 (1965); Commr's. report adverse to U.S. issued June 20, 1967; judgment for plaintiff, 397 F. 2d 826 (1968); part remanded to the Board of Contract Appeals; stipulated dismissal on October 6, 1969; judgment for plaintiff, February 17, 1970.

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

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

Oil and Gas Leasing on Lands Withdrawn by Executive Orders for Indian Purposes in Alaska, 70 I.D. 166 (1963)

Mrs. Louise A. Pease v. *Stewart L. Udall*, Civil No. 760–63, D. Alas. Withdrawn April 18, 1963.

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

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

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

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

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

Paul Jarvis, Inc. v. *U.S.*, Ct. Cl. No. 40–58. Stipulated judgment for plaintiff, December 19, 1958.

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

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

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

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

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

Port Blakely Mill Co. v. *U.S.*, Civil No. 6205, W.D. Wash. Dismissed with prejudice, December 7, 1964.

Ray D. Bolander Co., 72 I.D. 449 (1965)

Ray D. Bolander Co. Inc. v. *U.S.*, Ct. Cl. 51–66. Judgment for plaintiff, December 13, 1968; subsequent Contract Officer's dec., December 3, 1969; interim dec., December 2, 1969; Order to Stay Proceedings until March 31, 1970; dismissed with prejudice, August 3, 1970.

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

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

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

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

Estate of William Cecil Robedeaux, 78 I.D. 234 (1971)

Oneta Lamb Robedeaux, et al. v. *Rogers C. B. Morton*, Civil No. 71–646, D. Okla. Suit pending.

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

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

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

Seal & Co. Inc. v. *U.S.*, Ct. Cl. 274–62. Judgment for plaintiff, January 31, 1964; no appeal.

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

Shell Oil Co. v. *Udall*, Civil No. 216–67. Stipulated dismissal, August 19, 1968.

Sinclair Oil & Gas Co., 75 I.D. 155 (1968)

Sinclair Oil & Gas Co. v. *Stewart L. Udall, Secretary of the Interior, et al.*, Civil No. 5277, D. Wyo. Judgment for defendant, sub nom. *Atlantic Richfield Co.* v. *Walter J. Hickel*, 303 F. Supp. 724 (1969); aff'd., 432 F. 2d 587 (10th Cir. 1970); no petition.

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

Southern Pacific Co. v. *Walter J. Hickel, Secretary of the Interior*, Civil No. S–1274, D. Cal. Judgment for defendant, December 2, 1970 (opinion); no appeal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Joe Hayes v. *Fred A. Seaton, Secretary of the Interior*, Civil No. 859–581. Judgment for defendant, September 18, 1958; aff'd., 270 F. 2d 319 (1959); *cert. denied*, 364 U.S. 814 (1960); rehearing denied, 364 U.S. 906 (1960).

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

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

See also:

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

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

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

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

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

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

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

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

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

Penelope Chase Brown, et al. v. *Stewart Udall*, Civil No. 9202, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); rev'd & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., March 12, 1971.

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

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

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

Barnette T. Napier, et al. v. *Secretary of the Interior*, Civil No. 8691, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); rev'd. & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., March 12, 1971.

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

The Oil Shale Corp., et al. v. *Secretary of the Interior*, Civil No. 8680, D. Colo. Judgment for plaintiff, 261 F .Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); rev'd. & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., March 12, 1971.

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

Joseph B. Umpleby, et al. v. *Stewart L. Udall*, Civil No. 8685, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); rev'd. & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., March 12, 1971.

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

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

Union Oil Co. of California v. *Stewart L. Udall*, Civil No. 2595–64. Judgment for defendant, December 27, 1965; no appeal.

Union Pacific R.R., 72 I.D. 76 (1965)

The State of Wyoming and Gulf Oil Corp. v. *Stewart L. Udall, etc.*, Civil No. 4913, D. Wyo. Dismissed with prejudice, 255 F. Supp. 481 (1966); aff'd., 379 F. 2d 635 (10th Cir. 1967); *cert. denied*, 389 U.S. 985 (1967).

U.S. v. *Alonzo A. Adams, et al.*, 64 I.D. 221 (1957), A–27364 (July 1, 1957)

Alonzo A. Adams, et al. v. *Paul B. Witmer, et al.*, Civil No. 1222–57–Y, S.D. Cal. Complaint dismissed, November 27, 1957 (opinion); rev'd. & remanded, 271 F. 2d 29 (9th Cir. 1958); on rehearing, appeal dismissed as to Witmer; petition for rehearing by Berriman denied, 271 F. 2d 37 (9th Cir. 1959).

U.S. v. *Alonzo Adams*, Civil No. 187–60–WM, S.D. Cal. Judgment for plaintiff, January 29, 1962 (opinion); judgment modified, 318 F. 2d 861 (9th Cir. 1963); no petition.

U.S. v. *E. A. Barrows and Esther Barrows*, 76 I.D. 299 (1969)

Esther Barrows, as an Individual and as Executrix of the Last Will of E. A. Barrows, Deceased v. *Walter J. Hickel*, Civil No. 70–215–CC, C.D. Cal. Judgment for defendant, April 20, 1970; aff'd., 447 F. 2d 80 (9th Cir. 1971).

U.S. v. *Alice A. & Carrie H. Boyle*, 76 I.D. 61, 318 (1969). Reconsideration denied, January 22, 1970.

Alice A. & Carrie H. Boyle v. *Rogers C. B. Morton, Secretary of the Interior*, Civil No. Civ–71–491 Phx WEC, D. Ariz. Suit pending.

U.S. v. *Ford M. Converse*, 72 I.D. 141 (1965)

Ford M. Converse v. *Stewart Udall*, Civil No. 65–581, D. Ore. Judgment for defendant, 262 F. Supp. 583 (1966); aff'd., 399 F. 2d 616 (9th Cir. 1968); *cert. denied*, 393 U.S. 1025 (1969).

U.S. v. *Alvis F. Denison, et al.*, 71 I.D. 144 (1964), 76 I.D. 233 (1969)

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

Leo E. Shoup v. *Stewart L. Udall*, Civil No. 5822–Phx., D. Ariz. Suit pending.

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

U.S. v. *Everett Foster, et al.*, 65 I.D. 1 (1958)

Everett Foster, et al. v. *Fred A. Seaton*, Civil No. 344–58. Judgment for defendants, December 5, 1958 (opinion); aff'd., 271 F. 2d 836 (1959); no petition.

U.S. v. *Henault Mining Co.*, 73 I.D. 184 (1966)

Henault Mining Co. v. *Harold Tysk, et al.*, Civil No. 634, D. Mont. Judgment for plaintiff, 271 F. Supp. 474 (1967); rev'd. & remanded for further proceedings, 419 F. 2d 766 (9th Cir. 1969); *cert. denied*, 398 U.S. 950 (1970); judgment for defendant, October 6, 1970.

U.S. v. *Charles H. Henrikson, et al.*, 70 I.D. 212 (1963)

Charles H. Henrikson, et al. v. *Stewart L. Udall, et al.*, Civil No. 41749, N.D. Cal. Judgment for defendant, 229 F. Supp. 510 (1964); aff'd., 350 F. 2d 949 (9th Cir. 1965); *cert. denied*, 384 U.S. 940 (1966).

U.S. v. *Independent Quick Silver Co.*, 72 I.D. 367 (1965)

Independent Quick Silver Co., an Oregon Corp. v. *Stewart L. Udall*, Civil No. 65–590, D. Ore. Judgment for defendant, 262 F. Supp. 583 (1966); appeal dismissed.

U.S. v. *Richard Dean Lance*, 73 I.D. 218 (1966)

Richard Dean Lance v. *Stewart L. Udall, et al.*, Civil No. 1864, D. Nev. Judgment for defendant, January 23, 1968; no appeal.

U.S. v. *Mary A. Mattey*, 67 I.D. 63 (1960)

U.S. v. *Edison R. Nogueira, et al.*, Civil No. 65–220–PH, C.D. Cal. Judgment for defendant, November 16, 1966; rev'd. & remanded, 403 F. 2d 816 (1968); no petition.

U.S. v. *Kenneth McClarty*, 71 I.D. 331 (1964), 76 I.D. 193 (1969)

Kenneth McClarty v. *Stewart L. Udall, et al.*, Civil No. 2116, E.D. Wash. Judgment for defendant, May 26, 1966; rev'd. & remanded, 408 F. 2d 907 (9th Cir. 1969); remanded to the Secretary, May 7, 1969; vacated & remanded to Bureau of Land Management, August 13, 1969.

U.S. v. *Frank & Wanita Melluzzo, et al.*, 76 I.D. 181 (1969). Reconsideration, 77 I.D. 172 (1970)

WJM Mining & Development Co., et al. v. *Walter Hickel*, Civil No. 70–679, D. Ariz. Judgment for defendant, November 9, 1971.

U.S. v. *New Jersey Zinc Company*, 74 I.D. 191 (1967)

The New Jersey Zinc Corp., a Del. Corp. v. *Stewart L. Udall*, Civil No. 67–C–404, D. Colo. Dismissed with prejudice, January 5, 1970.

U.S. v. *J. R. Osborne, et al.*, 77 I.D. 83 (1970)

J. R. Osborne v. *Rogers C. B. Morton*, Civil No. 1564, D. Nev. Suit pending.

U.S. v. *E. V. Pressentin and Devisees of the H. S. Martin Estate*, 71 I.D. 447 (1964)

E. V. Pressentin, Fred J. Martin, Admin. of H. A. Martin Estate v. *Stewart L. Udall & Charles Stoddard*, Civil No. 1194–65. Judgment for defendant March 19, 1969; no appeal.

U.S. v. Ollie Mae Shearman, et al., 73 I.D. 386 (1966)

U.S. v. *Hood Corp., et al.*, Civil No. 1–67–97, S.D. Idaho. Suit pending.

U.S. v. *C. F. Snyder, et al.*, 72 I.D. 223 (1965)

Ruth Snyder, Adm'r [x] of the Estate of C. F. Snyder, Deceased, et al. v. *Stewart L. Udall*, Civil No. 66–C–131, D. Colo. Judgment for plaintiff, 267 F. Supp. 110 (1967); rev'd., 405 F. 2d 1179 (10th Cir. 1968); *cert. denied*, 396 U.S. 819 (1969).

U.S. v. *Southern Pacific Co.*, 77 I.D. 41 (1970)

Southern Pacific Co., et al. v. *Dept. of the Interior, et al.*, Civil No. S–2155, E. D. Calif. Suit pending.

U.S. v. *Clarence T. & Mary D. Stevens*, 77 I.D. 97 (1970)

Clarence T. & Mary D. Stevens v. *Walter J. Hickel*, Civil No. 1–70–94, D. Idaho. Judgment for defendant, June 4, 1971.

E. A. Vaughey, 63 I.D. 85 (1956)

E. A. Vaughey v. *Fred A. Seaton*, Civil No. 1744–56. Dismissed by stipulation, April 18, 1957; no appeal.

U.S. v. *Alfred N. Verrue*, 75 I.D. 300 (1968)

Alfred N. Verrue v. *Secretary of the Interior*, Civil No. 6898 Phx., D. Ariz. Remanded, December 29, 1970; appeal docketed February 23, 1971.

U.S. v. *Vernon O. & Ina C. White*, 72 I.D. 522 (1965)

Vernon O. White & Ina C. White v. *Stewart L. Udall*, Civil No. 1–65–122, D. Idaho. Judgment for defendant, January 6, 1967; aff'd., 404 F. 2d 334 (9th Cir. 1968); no petition.

Burt A. Wackerli, et al., 73 I.D. 280 (1966)

Burt & Lueva G. Wackerli, et al. v. *Stewart L. Udall, et al.*, Civil No. 1–66–92, D. Idaho. Suit pending.

Weardco Construction Corp., 64 I.D. 376 (1957)

Weardco Construction Corp. v. *U.S.*, Civil No. 278–59–PH, S.D. Cal. Judgment for plaintiff, October 26, 1959; satisfaction of judgment entered February 9, 1960.

Estate of Mary Ursula Rock Wellknown, 78 I.D. 179 (1971)

William T. Shaw, Jr., et al. v. *Rogers C. B. Morton*, et al., Civil No. 974, D. Mont. Suit pending.

Frank Winegar, Shell Oil Co. & D. A. Shale Inc., 74 I.D. 161 (1967)

Shell Oil Co., et al. v. *Udall, et al.*, Civil No. 67–C–321, D. Colo. Judgment for plaintiff, September 18, 1967; no appeal.

Estate of Wook-Kah-Nah, Comanche Allottee No. 1927, 65 I.D. 436 (1958)

Thomas J. Huff, Adm. with will annexed of the Estate of Wook-Kah-Nah, Deceased, Comanche Enrolled Restricted Indian No. 1927 v. *Jane Asenap, Wilfred*

Tabbytite, J. R. Graves, Examiner of Inheritance, Bureau of Indian Affairs, Dept. of the Interior, & Earl R. Wiseman, District Director of Internal Revenue, Civil No. 8281, W.D. Okla. Dismissed as to the Examiner of Inheritance; plaintiff dismissed suit without prejudice as to the other defendants.

Thomas J. Huff, Adm. with will annexed of the Estate of Wook-Kah-Nah v. Stewart L. Udall, Civil No. 2595–60. Judgment for defendant, June 5, 1962; remanded, 312 F. 2d 358 (1962).

TABLE OF CASES CITED

462–392—72——3

TABLE OF OVERRULED AND MODIFIED CASES[1]

Volume 1 to 78, inclusive

[Cases marked with star (*) are now authority.]

Administrative Ruling (43 L.D. 293); modified, 48 L.D. 98.

Administrative Ruling (46 L.D. 32); vacated, 51 L.D. 287.

Administrative Ruling (52 L.D. 359); distinguished, 59 I.D. 4, 5.

Administrative Ruling, March 13, 1935; overruled, 58 I.D. 65, 81 (See 59 I.D. 69, 76).

Alaska Commercial Company (39 L.D. 597); vacated, 41 L.D. 75.

Alaska Copper Company (32 L.D. 128); overruled in part, 37 L.D. 674; 42 L.D. 255.

Alaska-Dano Mines Co. (52 L.D. 550); overruled so far as in conflct, 57 I.D. 244.

Aldrich *v.* Anderson (2 L.D. 71); overruled, 15 L.D. 201.

Alheit, Rosa (40 L.D. 145); overruled so far as in conflict, 43 L.D. 342.

Allen, Henry J. (37 L.D. 596); modified, 54 I.D. 4.

Allen, Sarah E. (40 L.D. 586); modified, 44 L.D. 331.

Americus *v.* Hall (29 L.D. 677); vacated, 30 L.D. 388.

*Amidon *v.* Hegdale (39 L.D. 131); overruled, 40 L.D. 259 (See 42 L.D. 557).

*Anderson, Andrew *et al.* (1 L.D. 1); overruled, 34 L.D. 606 (See 36 L.D. 14).

Anderson *v.* Tannehill *et al.* (10 L.D. 388); overruled, 18 L.D. 586.

Armstrong *v.* Matthews (40 L.D. 496); overruled so far as in conflict, 44 L.D. 156.

Arnold *v.* Burger (45 L.D. 453); modified, 46 L.D. 320.

Arundell, Thomas F. (33 L.D. 76); overruled so far as in conflict, 51 L.D. 51.

Ashton, Fred W. (31 L.D. 356); overruled, 42 L.D. 215.

Atlantic and Pacific R.R. Co. (5 L.D. 269); overruled, 27 L.D. 241.

*Auerbach, Samuel H. *et al.* (29 L.D. 208); overruled, 36 L.D. 36 (See 37 L.D. 715).

Baca Float No. 3 (5 L.D. 705; 12 L.D. 676; 13 L.D. 624); vacated so far as in conflict, 29 L.D. 44.

Bailey, John W. *et al.* (3 L.D. 386); modified, 5 L.D. 513.

*Baker *v.* Hurst (7 L.D. 457); overruled, 8 L.D. 110 (See 9 L.D. 360).

Barbour *v.* Wilson *et al.* (23 L.D. 462); vacated, 28 L.D. 62.

Barbut, James (9 L.D. 514); overruled so far as in conflict, 29 L.D. 698.

Barlow, S. L. M. (5 L.D. 695); *contra*, 6 L.D. 648.

Barnhurst *v.* State of Utah (30 L.D. 314); modified, 47 L.D. 359.

Bartch *v.* Kennedy (3 L.D. 437); overruled, 6 L.D. 217.

Beery *v.* Northern Pacific Ry. Co. *et al.* (41 L.D. 121); overruled, 43 L.D. 536.

Bennet, Peter W. (6 L.D. 672); overruled, 29 L.D. 565.

Bernardini, Eugene J. *et al.* (62 I.D. 231); distinguished, 63 I.D. 102.

Big Lark (48 L.D. 479); distinguished, 58 I.D. 680, 682.

Birkholz, John (27 L.D. 59); overruled so far as in conflict, 43 L.D. 221.

Birkland, Bertha M. (45 L.D. 104); overruled, 46 L.D. 110.

[1] For abbreviations used in this title, see Editor's note at foot of page LXV.

Bivins *v.* Shelly (2 L.D. 282) ; modified, 4 L.D. 583.

*Black, L. C. (3 L.D. 101) ; overruled, 34 L.D. 606 (See 36 L.D. 14).

Blenkner *v.* Sloggy (2 L.D. 267) ; overruled, 6 L.D. 217.

Boeschem, Conrad William (41 L.D. 309) ; vacated, 42 L.D. 244.

Bosch, Gottlieb (8 L.D. 45) ; overruled, 13 L.D. 42.

Box *v.* Ulstein (3 L.D. 143) ; overruled, 6 L.D. 217.

Boyle, William (38 L.D. 603) ; overruled so far as in conflict, 44 L.D. 331.

Braasch, William C. and Christ C. Prange (48 L.D. 448) ; overruled so far as in conflict, 60 I.D. 417, 419.

Bradford, J. L. (31 L.D. 132) ; overruled, 35 L.D. 399.

Bradstreet *et al v.* Rehm (21 L.D. 30) ; reversed, 21 L.D. 544.

Brady *v.* Southern Pacific R.R. Co. (5 L.D. 407 and 658) ; overruled, 20 L.D. 259.

Brandt, William W. (31 L.D. 277) ; overruled, 50 L.D. 161.

Braucht *et al. v.* Northern Pacific Ry. Co. *et al.* (43 L.D. 536) ; modified, 44 L.D. 225.

Brayton, Homer E. (31 L.D. 364) ; overruled so far as in conflict, 51 L.D. 305.

Brick Pomeroy Mill Site (34 L.D. 320) ; overruled, 37 L.D. 674.

Brown *v.* Cagle (30 L.D. 8) ; vacated, 30 L.D. 148 (See 47 L.D. 406).

*Brown, Joseph T. (21 L.D. 47) ; overruled so far as in conflict, 31 L.D. 222 (See 35 L.D. 399).

Browning, John W. (42 L.D. 1) ; overruled so far as in conflict, 43 L.D. 342.

Bruns, Henry A. (15 L.D. 170) ; overruled so far as in conflict, 51 L.D. 454.

Bundy *v.* Livingston (1 L.D. 152) ; overruled, 6 L.D. 284.

Burdick, Charles W. (34 L.D. 345) ; modified, 42 L.D. 472.

Burgess, Allen L. (24 L.D. 11) ; overruled so far as in conflict, 42 L.D. 321.

Burkholder *v.* Skagen (4 L.D. 166) ; overruled, 9 L.D. 153.

Burnham Chemical Co. *v.* United States Borax Co. *et al.* (54 I.D. 183) ; overruled in substance, 58 I.D. 426, 429.

Burns, Frank (10 L.D. 365) ; overruled so far as in conflict, 51 L.D. 454.

Burns *v.* Vergh's Heirs (37 L.D. 161) ; vacated, 51 L.D. 268.

Buttery *v.* Sprout (2 L.D. 293) ; overruled, 5 L.D. 591.

Cagle *v.* Mendenhall (20 L.D. 447) ; overruled, 23 L.D. 533.

Cain *et al. v.* Addenda Mining Co. (24 L.D. 18) ; vacated, 29 L.D. 62.

California and Oregon Land Co. (21 L.D. 344) ; overruled, 26 L.D. 453.

California, State of (14 L.D. 253) ; vacated, 23 L.D. 230.

California, State of (15 L.D. 10) ; overruled, 23 L.D. 423.

California, State of (19 L.D. 585) ; vacated, 28 L.D. 57.

California, State of (22 L.D. 428) ; overruled, 32 L.D. 34.

*California, State of (32 L.D. 346) ; vacated, 50 L.D. 628 (See 37 L.D. 499 and 46 L.D. 396).

California, State of (44 L.D. 118) ; overruled, 48 L.D. 98.

California, State of (44 L.D. 468) ; overruled, 48 L.D. 98.

California, State of *v.* Moccettini (19 L.D. 359) ; overruled, 31 L.D. 335.

California, State of *v.* Pierce (9 C.L.O. 118) ; modified, 2 L.D. 854.

California, State of *v.* Smith (5 L.D. 543) ; overruled, 18 L.D. 343.

Call *v.* Swain (3 L.D. 46) ; overruled, 18 L.D. 373.

Cameron Lode (13 L.D. 369) ; overruled so far as in conflict, 25 L.D. 518.

Camplan *v.* Northern Pacific R.R. Co. (28 L.D. 118) ; overruled so far as in conflict, 29 L.D. 550.

Case *v.* Church (17 L.D. 578) ; overruled, 26 L.D. 453.

Case *v.* Kuperschmidt (30 L.D. 9) ; overruled so far as in conflict, 47 L.D. 406.

Castello *v.* Bonnie (20 L.D. 311) ; overruled, 22 L.D. 174.

Cate *v.* Northern Pacific Ry. Co. (41 L.D. 316) ; overruled so far as in conflict, 43 L.D. 60.

Cawood *v.* Dumas (22 L.D. 585) ; vacated, 25 L.D. 526.

Centerville Mining and Milling Co. (39 L.D. 80) ; no longer controlling, 48 L.D. 17.

Central Pacific R.R. Co. (29 L.D. 589) ; modified, 48 L.D. 58.

Central Pacific R.R. Co. *v.* Orr (2 L.D. 525) ; overruled, 11 L.D. 445.

Chapman *v.* Willamette Valley and Cascade Mountain Wagon Road Co. (13 L.D. 61) ; overruled, 20 L.D. 259.

Chappell *v.* Clark (27 L.D. 334) ; modified, 27 L.D. 532.

Chicago Placer Mining Claim (34 L.D. 9) ; overruled, 42 L.D. 543.

Childress *et al. v.* Smith (15 L.D. 89) ; overruled, 26 L.D. 453.

Chittenden, Frank O., and Interstate Oil Corp. (50 L.D. 262) ; overruled so far as in conflict, 53 I.D. 228.

Christofferson, Peter (3 L.D. 329) ; modified, 6 L.D. 284, 624.

Clafin *v.* Thompson (28 L.D. 279) ; overruled, 29 L.D. 693.

Claney *v.* Ragland (38 L.D. 550) (See 43 L.D. 485).

Clark, Yulu S. *et al.* (A–22852) February 20, 1941, unreported; overruled so far as in conflict, 59 I.D. 258, 260.

Clarke, C. W. (32 L.D. 233) ; overruled so far as in conflict, 51 L.D. 51.

Clayton, Phebus (48 L.D. 128) (1921) ; overruled to extent inconsistent, 70 I.D. 159.

Cline *v.* Urban (29 L.D. 96) ; overruled, 46 L.D. 492.

Clipper Mining Co. (22 L.D. 527) ; no longer followed in part, 67 I.D. 417.

Clipper Mining Co. *v.* The Eli Mining and Land Co. *et al.* (33 L.D. 660) ; no longer followed in part, 67 I.D. 417.

Cochran *v.* Dwyer (9 L.D. 478) (See 39 L.D. 162, 225).

Coffin, Edgar A. (33 L.D. 245) ; overruled so far as in conflict, 52 L.D. 153.

Coffin, Mary E. (34 L.D. 564) ; overruled so far as in conflict, 51 L.D. 51.

Colorado, State of (7 L.D. 490) ; overruled, 9 L.D. 408.

Condict, W. C. *et al.* (A–23366) June 24, 1942, unreported ; overruled so far as in conflict, 59 I.D. 258–260.

Cook, Thomas C. (10 L.D. 324) (See 39 L.D. 162, 225).

Cooke *v.* Villa (17 L.D. 210) ; vacated, 19 L.D. 442.

Cooper, John W. (15 L.D. 285) ; overruled, 25 L.D. 113.

Copper Bullion and Morning Star Lode Mining Claims (35 L.D. 27) (See 39 L.D. 574).

Copper Glance Lode (29 L.D. 542) ; overruled so far as in conflict, 55 I.D. 348.

Corlis *v.* Northern Pacific R.R. Co. (23 L.D. 265) ; vacated, 26 L.D. 652.

Cornell *v.* Chilton (1 L.D. 153) ; overruled, 6 L.D. 483.

Cowles *v.* Huff (24 L.D. 81) ; modified, 28 L.D. 515.

Cox, Allen H. (30 L.D. 90, 468) ; vacated, 31 L.D. 114.

Crowston *v.* Seal (5 L.D. 213) ; overruled, 18 L.D. 586.

Culligan *v.* State of Minnesota (34 L.D. 22) ; modified, 34 L.D. 151.

Cunningham, John (32 L.D. 207) ; modified, 32 L.D. 456.

Dailey Clay Products Co., The (48 L.D. 429, 431) ; overruled so far as in conflict, 50 L.D. 656.

Dakota Central R.R. Co. *v.* Downey (8 L.D. 115) ; modified, 20 L.D. 131.

Davis, Heirs of (40 L.D. 573) ; overruled, 46 L.D. 110.

DeLong *v.* Clarke (41 L.D. 278) ; modified so far as in conflict, 45 L.D. 54.

Dempsey, Charles H. (42 L.D. 215) ; modified, 43 L.D. 300.

Denison and Willits (11 C.L.O. 261) ; overruled so far as in conflict, 26 L.D. 122.

Deseret Irrigation Co. *et al. v.* Sevier River Land and Water Co. (40 L.D. 463) ; overruled, 51 L.D. 27.

Devoe, Lizzie A. (5 L.D. 4) ; modified, 5 L.D. 429.

Dickey, Ella I. (22 L.D. 351) ; overruled, 32 L.D. 331.

Dierks, Herbert (36 L.D. 367) ; overruled by the unreported case of Thomas J. Guigham, March 11, 1909.

Dixon *v.* Dry Gulch Irrigation Co. (45 L.D. 4) ; overruled, 51 L.D. 27.

Douglas and Other Lodes (34 L.D. 556) ; modified, 43 L.D. 128.

Dowman *v.* Moss (19 L.D. 526) ; overruled, 25 L.D. 82.

Dudymott *v.* Kansas Pacific R.R. Co. (5 C.L.O. 69) ; overruled so far as in conflict, 1 L.D. 345.

Dumphy, Elijah M. (8 L.D. 102) ; overruled so far as in conflict, 36 L.D. 561.

Dyche *v.* Beleele (24 L.D. 494) ; modified, 43 L.D. 56.

Dysart, Francis J. (23 L.D. 282) ; modified, 25 L.D. 188.

Easton, Francis E. (27 L.D. 600) ; overruled, 30 L.D. 355.

East Tintic Consolidated Mining Co. (41 L.D. 255) ; vacated, 43 L.D. 80.

*Elliot *v.* Ryan (7 L.D. 322) ; overruled, 8 L.D. 110 (See 9 L.D. 360).

El Paso Brick Co. (37 L.D. 155) ; overruled so far as in conflict, 40 L.D. 199.

Elson, William C. (6 L.D. 797) ; overruled, 37 L.D. 330.

Emblem *v.* Reed (16 L.D. 28) ; modified, 17 L.D. 220.

Epley *v.* Trick (8 L.D. 110) ; overruled, 9 L.D. 360.

Erhardt, Finsans (36 L.D. 154) ; overruled, 38 L.D. 406.

Esping *v.* Johnson (37 L.D. 709) ; overruled, 41 L.D. 289.

Ewing *v.* Rickard (1 L.D. 146) ; overruled, 6 L.D. 483.

Falconer *v.* Price (19 L.D. 167) ; overruled, 24 L.D. 264.

Fargo No. 2 Lode Claims (37 L.D. 404) ; modified, 43 L.D. 128; overruled so far as in conflict, 55 I.D. 348.

Farrill, John W. (13 L.D. 713) ; overruled so far as in conflict, 52 L.D. 473.

Febes, James H. (37 L.D. 210) ; overruled, 43 L.D. 183.

Federal Shale Oil Co. (53 I.D. 213) ; overruled so far as in conflict, 55 I.D. 290.

Ferrell *et al. v.* Hoge *et al.* (18 L.D. 81) ; overruled, 25 L.D. 351.

Fette *v.* Christiansen (29 L.D. 710) ; overruled, 34 L.D. 167.

Field, William C. (1 L.D. 68) ; overruled so far as in conflict, 52 L.D. 473.

Filtrol Company *v.* Brittan and Echart (51 L.D. 649) ; distinguished, 55 I.D. 605.

Fish, Mary (10 L.D. 606) ; modified, 13 L.D. 511.

Fisher *v.* Heirs of Rule (42 L.D. 62, 64) ; vacated, 43 L.D. 217.

Fitch *v.* Sioux City and Pacific R.R. Co. (216 L. and R. 184) ; overruled, 17 L.D. 43.

Fleming *v.* Bowe (13 L.D. 78) ; overruled, 23 L.D. 175.

Florida Mesa Ditch Co. (14 L.D. 265) ; overruled, 27 L.D. 421.

Florida Railway and Navigation Co. *v.* Miller (3 L.D. 324) ; modified, 6 L.D. 716; overruled, 9 L.D. 237.

Florida, State of (17 L.D. 355) ; reversed, 19 L.D. 76.

Florida, State of (47 L.D. 92, 93) ; overruled so far as in conflict, 51 L.D. 291.

Forgeot, Margaret (7 L.D. 280) ; overruled, 10 L.D. 629.

Fort Boise Hay Reservation (6 L.D. 16) ; overruled, 27 L.D. 505.

Franco-Western Oil Company *et al.* (Supp.), 65 I.D. 427, is adhered to, 66 I.D. 362.

Freeman, Flossie (40 L.D. 106) ; overruled, 41 L.D. 63.

Freeman *v.* Texas and Pacific Ry. Co. (2 L.D. 550) ; overruled, 7 L.D. 18.

Fry, Silas A. (45 L.D. 20) ; modified, 51 L.D. 581.

Fults, Bill, 61 I.D. 437 (1954) ; overruled, 69 I.D. 181.

Galliher, Maria (8 C.L.O. 137) ; overruled, 1 L.D. 57.

Gallup *v.* Northern Pacific Ry. Co. (unpublished); overruled so far as in conflict, 47 L.D. 304.

Gariss *v.* Borin (21 L.D. 542) (See 39 L.D. 162, 225).

Garrett, Joshua (7 C.L.O. 55); overruled, 5 L.D. 158.

Garvey *v.* Tuiska (41 L.D. 510); modified, 43 L.D. 229.

Gates *v.* California and Oregon R.R. Co. (5 C.L.O. 150); overruled, 1 L.D. 336.

Gauger, Henry (10 L.D. 221); overruled, 24 L.D. 81.

Glassford, A. W. *et al.* 56 I.D. 88 (1937); overruled to extent inconsistent, 70 I.D. 159.

Gleason *v.* Pent (14 L.D. 375; 15 L.D. 286); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422.

Gohrman *v.* Ford (8 C.L.O. 6); overruled so far as in conflict, 4 L.D. 580.

Golden Chief "A" Placer Claim (35 L.D. 557); modified, 37 L.D. 250.

Goldstein *v.* Juneau Townsite (23 L.D. 417); vacated, 31 L.D. 88.

Goodale *v.* Olney (12 L.D. 324); distinguished, 55 I.D. 580.

Gotebo Townsite *v.* Jones (35 L.D. 18); modified, 37 L.D. 560.

Gowdy *v.* Connell (27 L.D. 56); vacated, 28 L.D. 240.

Gowdy *v.* Gilbert (19 L.D. 17); overruled, 26 L.D. 453.

Gowdy *et al. v.* Kismet Gold Mining Co. (22 L.D. 624); modified, 24 L.D. 191.

Grampian Lode (1 L.D. 544); overruled, 25 L.D. 495.

Gregg *et al. v.* State of Colorado (15 L.D. 151); modified, 30 L.D. 310.

Grinnel *v.* Southern Pacific R.R. Co. (22 L.D. 438); vacated, 23 L.D. 489.

*Ground Hog Lode *v.* Parole and Morning Star Lodes (8 L.D. 430); overruled, 34 L.D. 568 (See R. R. Rousseau, 47 L.D. 590).

Guidney, Alcide (8 C.L.O. 157); overruled, 40 L.D. 399.

Gulf and Ship Island RR. Co. (16 L.D. 236); modified, 19 L.D. 534.

Gustafson, Olof (45 L.D. 456); modified, 46 L.D. 442.

Gwyn, James R. (A–26806) December 17, 1953, unreported; distinguished, 66 I.D. 275.

Hagood, L. N., *et al.*, 65 I.D. 405 (1958); overruled, Beard Oil Company, 1, IBLA 42, 77 I.D. 166 (1970).

Halvorson, Halvor K. (39 L.D. 456); overruled, 41 L.D. 505.

Hansbrough, Henry C. (5 L.D. 155); overruled, 29 L.D. 59.

Hardee, D. C. (7 L.D. 1); overruled so far as in conflict, 29 L.D. 698.

Hardee *v.* United States (8 L.D. 391; 16 L.D. 499); overruled so far as in conflict, 29 L.D. 698.

Hardin, James A. (10 L.D. 313); revoked, 14 L.D. 233.

Harris, James G. (28 L.D. 90); overruled, 39 L.D. 93.

Harrison, Luther (4 L.D. 179); overruled, 17 L.D. 216.

Harrison, W. R. (19 L.D. 299); overruled, 33 L.D. 539.

Hart *v.* Cox (42 L.D. 592); vacated, 260 U.S. 427 (See 49 L.D. 413).

Hastings and Dakota Ry. Co. *v.* Christenson *et al.* (22 L.D. 257); overruled, 28 L.D. 572.

Hausman, Peter A. C. (37 L.D. 352); modified, 48 L.D. 629.

Hayden *v.* Jamison (24 L.D. 403); vacated, 26 L.D. 373.

Haynes *v.* Smith (50 L.D. 208); overruled so far as in conflict, 54 I.D. 150.

Heilman *v.* Syverson (15 L.D. 184); overruled, 23 L.D. 119.

Heinzman *et al. v.* Letroadec's Heirs *et al.* (28 L.D. 497); overruled, 38 L.D. 253.

Heirs of Davis (40 L.D. 573); overruled, 46 L.D. 110.

Heirs of Mulnix, Philip (33 L.D. 331); overruled, 43 L.D. 532.

*Heirs of Stevenson *v.* Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).

Heirs of Talkington *v.* Hempfling (2 L.D. 46); overruled, 14 L.D. 200.

Heirs of Vradenberg *et al. v.* Orr *et al.* (25 L.D. 232); overruled, 38 L.D. 253.

Helmer, Inkerman (34 L.D. 341); modified, 42 L.D. 472.

Helphrey *v.* Coil (49 L.D. 624) ; overruled, Dennis *v.* Jean (A–20899), July 24, 1937, unreported.

Henderson, John W. (40 L.D. 518) ; vacated, 43 L.D. 106 (See 44 L.D. 112 and 49 L.D. 484).

Hennig, Nellie J. (38 L.D. 443, 445) ; recalled and vacated, 39 L.D. 211.

Hensel, Ohmer V. (45 L.D. 557) ; distinguished, 66 I.D. 275.

Herman *v.* Chase *et al.* (37 L.D. 590) ; overruled, 43 L.D. 246.

Herrick, Wallace H. (24 L.D. 23) ; overruled, 25 L.D. 113.

Hess, Hoy, Assignee (46 L.D. 421) ; overruled, 51 L.D. 287.

Hickey, M. A. *et al.* (3 L.D. 83) ; modified, 5 L.D. 256.

Hildreth, Henry (45 L.D. 464) ; vacated, 46 L.D. 17.

Hindman, Ada I. (42 L.D. 327) ; vacated in part, 43 L.D. 191.

Hoglund, Svan (42 L.D. 405) ; vacated, 43 L.D. 538.

Holden, Thomas A. (16 L.D. 493) ; overruled, 29 L.D. 166.

Holland, G. W. (6 L.D. 20) ; overruled, 6 L.D. 639 ; 12 L.D. 436.

Holland, William C. (M–27696) ; decided April 26, 1934; overruled in part, 55 I.D. 221.

Hollensteiner, Walter (38 L.D. 319) ; overruled, 47 L.D. 260.

Holman *v.* Central Montana Mines Co. (34 L.D. 568) ; overruled so far as in conflict, 47 L.D. 590.

Hon. *v.* Martinas (41 L.D. 119) ; modified, 43 L.D. 197.

Hooper, Henry (6 L.D. 624) ; modified, 19 L.D. 86, 284.

Howard *v.* Northern Pacific R.R. Co. (23 L.D. 6) ; overruled, 28 L.D. 126.

Howard, Thomas (3 L.D. 409) (See 39 L.D. 162, 225).

Howell, John H. (24 L.D. 35) ; overruled, 28 L.D. 204.

Howell, L. C. (39 L.D. 92) (See 39 L.D. 411).

Hoy, Assignee of Hess (46 L.D. 421) ; overruled, 51 L.D. 287.

*Hughes *v.* Greathead (43 L.D. 497) ; overruled, 49 L.D. 413 (See 260 U.S. 427).

Hull *et al. v.* Ingle (24 L.D. 214) ; overruled, 30 L.D. 258.

Huls, Clara (9 L.D. 401) ; modified, 21 L.D. 377.

Humble Oil & Refining Co. (64 I.D. 5) ; distinguished, 65 I.D. 316.

Hunter, Charles H. (60 I.D. 395) ; distinguished, 63 I.D. 65.

Hurley, Bertha C. (TA–66 (Ir.)), March 21, 1952, unreported; overruled, 62 I.D. 12.

Hyde, F. A. (27 L.D. 472) ; vacated, 28 L.D. 284.

Hyde, F. A. *et al.* (40 L.D. 284) ; overruled, 43 L.D. 381.

*Hyde *et al. v.* Warren *et al.* (14 L.D. 576; 15 L.D. 415) (See 19 L.D. 64).

*Ingram, John D. (37 L.D. 475) (See 43 L.D. 544).

Inman *v.* Northern Pacific R.R. Co. (24 L.D. 318) ; overruled, 28 L.D. 95.

*Instructions (32 L.D. 604) ; overruled so far as in conflict, 50 L.D. 628 ; 53 I.D. 365 ; Lillian M. Peterson *et al.* (A–20411), August 5, 1937, unreported (See 59 I.D. 282, 286).

Instructions (51 L.D. 51) ; overruled so far as in conflict, 54 I.D. 36.

Interstate Oil Corp. and Frank O. Chittenden (50 L.D. 262) ; overruled so far as in conflict, 53 I.D. 228.

Iowa Railroad Land Co. (23 L.D. 79 ; 24 L.D. 125) ; vacated, 29 L.D. 79.

Jacks *v.* Belard *et al.* (29 L.D. 369) ; vacated, 30 L.D. 345.

Jackson Oil Co. *v.* Southern Pacific Ry. Co. (40 L.D. 528) ; overruled, 42 L.D. 317.

Johnson *v.* South Dakota (17 L.D. 411) ; overruled so far as in conflict, 41 L.D. 22.

Jones, James A. (3 L.D. 176) ; overruled, 8 L.D. 448.

Jones v. Kennett (6 L.D. 688) ; overruled, 14 L.D. 429.

Kackmann, Peter (1 L.D. 86) ; overruled, 16 L.D. 464.

Kanawha Oil and Gas Co., Assignee (50 L.D. 639) ; overruled so far as in conflict, 54 I.D. 371.

Kemp, Frank A. (47 L.D. 560); overruled so far as in conflict, 60 I.D. 417, 419.

Kemper *v.* St. Paul and Pacific R.R. Co. (2 C.L.L. 805); overruled, 18 L.D. 101.

Kilner, Harold E. *et al.* (A–21845); February 1, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260.

King *v.* Eastern Oregon Land Co. (23 L.D. 579); modified, 30 L.D. 19.

Kinney, E. C. (44 L.D. 580); overruled so far as in conflict, 53 I.D. 228.

Kinsinger *v.* Peck (11 L.D. 202) (See 39 L.D. 162, 225).

Kiser *v.* Keech (7 L.D. 25); overruled, 23 L.D. 119.

Knight, Albert B. *et al.* (30 L.D. 227); overruled, 31 L.D. 64.

Knight *v.* Heirs of Knight (39 L.D. 362, 491); 40 L.D. 461; overruled, 43 L.D. 242.

Kniskern *v.* Hastings and Dakota R.R. Co. (6 C.L.O. 50); overruled, 1 L.D. 362.

Kolberg, Peter F. (37 L.D. 453); overruled, 43 L.D. 181.

Krighaum, James T. (12 L.D. 617); overruled, 26 L.D. 448.

*Krushnic, Emil L. (52 L.D. 282, 295); vacated, 53 I.D. 42, 45 (See 280 U.S. 306).

Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715.

La Follette, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 I.D. 416, 422.

Lamb *v.* Ullery (10 L.D. 528); overruled, 32 L.D. 331.

Largent, Edward B. *et al.* (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321.

Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242.

Lasselle *v.* Missouri, Kansas and Texas Ry. Co. (3 C.L.O. 10); overruled, 14 L.D. 278.

Las Vegas Grant (13 L.D. 646; 15 L.D. 58); revoked, 27 L.D. 683.

Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361.

Laughlin *v.* Martin (18 L.D. 112); modified, 21 L.D. 40.

Law *v.* State of Utah (29 L.D. 623); overruled, 47 L.D. 359.

Layne and Bowler Export Corp., IBCA–245 (Jan. 18, 1961), 68 I.D. 33, overruled in so far as it conflicts with Schweigert, Inc. *v.* United States, Court of Claims No. 26–66 (Dec. 15, 1967), and Galland-Henning Manufacturing Company, IBCA–534–12–65 (Mar. 29, 1968).

Lemmons, Lawson H. (19 L.D. 37); overruled, 26 L.D. 398.

Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 464.

Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299.

Lindermann *v.* Wait (6 L.D. 689; overruled, 13 L.D. 459.

*Linhart v. Santa Fe Pacific R.R. Co. (36 L.D. 41); overruled, 41 L.D. 284 (See 43 L.D. 536).

Little Pet Lode (4 L.D. 17); overruled, 25 L.D. 550.

Lock Lode (6 L.D. 105); overruled so far as in conflict, 26 L.D. 123.

Lockwood, Francis A. (20 L.D. 361); modified, 21 L.D. 200.

Lonnergran *v.* Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199.

Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157.

Louisiana, State of (24 LD. 231); vacated, 26 L.D. 5.

Louisiana, State of (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291.

Louisiana, State of (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.

Lucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495.

Luse, Jeanette L. *et al.* (61 I.D. 103); distinguished by Richfield Oil Corp., 71 I.D. 243.

Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102.

Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221.

Lynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 713.

Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448.

Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399.

Maginnis, John S. (32 L.D. 14); modified (42 L.D. 472).

Maher, John M. (34 L.D. 342); modified, 42 L.D. 472.

Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313.

Makela, Charles (46 L.D. 509); extended, 49 L.D. 244.

Makemson *v.* Snider's Heirs (22 L.D. 511); overruled, 32 L.D. 650.

Malone Land and Water Co. (41 L.D. 138); overruled in part, 43 L.D. 110.

Maney, John J. (35 L.D. 250); modified, 48 L.D. 153.

Maple, Frank (37 L.D. 107); overruled, 43 L.D. 181.

Martin *v.* Patrick (41 L.D. 284); overruled, 43 L.D. 536.

Mason *v.* Cromwell (24 L.D. 248); vacated, 26 L.D. 369.

Masten, E. C. (22 L.D. 337); overruled, 25 L.D. 111.

Mather *et al. v.* Hackley's Heirs (15 L.D. 487); vacated, 19 L.D. 48.

Maughan, George W. (1 L.D. 25); overruled, 7 L.D. 94.

Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 88.

McBride *v.* Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33.

McCalla *v.* Acker (29 L.D. 203); vacated, 30 L.D. 277.

McCord, W. E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 I.D. 73.

McCornick, William S. (41 L.D. 661, 666); vacated, 43 L.D. 429.

*McCraney *v.* Heirs of Hayes (33 L.D. 21); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).

McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285.

*McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616 (See 35 L.D. 399).

McFadden *et al. v.* Mountain View Mining and Milling Co. (26 L.D. 530); vacated, 27 L.D. 358.

McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166.

McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502.

McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148.

McHarry *v.* Stewart (9 L.D. 344); criticized and distinguished, 56 I.D. 340.

McKernan *v.* Bailey (16 L.D. 368); overruled, 17 L.D. 494.

*McKittrick Oil Co. *v.* Southern Pacific R.R. Co. (37 L.D. 243); overruled so far as in conflict, 40 L.D. 528 (See 42 L.D. 317).

McMiken, Herbert *et al.* (10 L.D. 97; 11 L.D. 96); distinguished, 58 I.D. 257, 260.

McNamara *et al. v.* State of California (17 L.D. 296); overruled, 22 L.D. 666.

McPeek *v.* Sullivan *et al.* (25 L.D. 281); overruled, 36 L.D. 26.

*Mee *v.* Hughart *et al.* (23 L.D. 455); vacated, 28 L.D. 209. In effect reinstated, 44 L.D. 414, 487, 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 660.

*Meeboer *v.* Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).

Mercer *v.* Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649.

Meyer *v.* Brown (15 L.D. 307) (See 39 L.D. 162, 225).

Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436.

Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 I.D. 371.

Mikesell, Henry D., A–24112 (Mar. 11, 1946); *rehearing denied* (June 20, 1946), overruled to extent inconsistent, 70 I.D. 149.

Miller, D. (60 I.D. 161); overruled in part, 62 I.D. 210.

Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181.

Miller *v.* Sebastian (19 L.D. 288); overruled, 26 L.D. 448.

Milner and North Side R.R. Co. (36 L.D. 488); overruled, 40 L.D. 187.

Milton *et al. v.* Lamb (22 L.D. 339); overruled, 25 L.D. 550.

Milwaukee, Lake Shore and Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112.

Miner *v.* Mariott *et al.* (2 L.D. 709); modified, 28 L.D. 224.

Minnesota and Ontario Bridge Company (30 L.D. 77); no longer followed, 50 L.D. 359.

*Mitchell *v.* Brown (3 L.D. 65); over ruled, 41 L.D. 396 (See 43 L.D. 520).

Monitor Lode (18 L.D. 358); overruled, 25 L.D. 495.

Monster Lode (35 L.D. 493); overruled so far as in conflict, 55 I.D. 348.

Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 482.

Morgan *v.* Craig (10 C.L.O. 234); overruled, 5 L.D. 303.

Morgan, Henry S. *et al* (65 I.D. 369); overruled to extent inconsistent, 71 I.D. 22 (1964).

Morgan *v.* Rowland (37 L.D. 90); overruled, 37 L.D. 618.

Moritz *v.* Hinz (36 L.D. 450); vacated, 37 L.D. 382.

Morrison, Charles S. (36 L.D. 126); modified, 36 L.D. 319.

Morrow *et al.* v. State of Oregon *et al.* (32 L.D. 54); modified, 33 L.D. 101.

Moses, Zelmer R. (36 L.D. 473); overruled, 44 L.D. 570.

Mountain Chief Nos. 8 and 9 Lode Claims (36 L.D. 100); overruled in part, 36 L.D. 551.

Mt. Whitney Military Reservation (40 L.D. 315) (See 43 L.D. 33).

Muller, Ernest (46 L.D. 243); overruled, 48 L.D. 163.

Muller, Esberne K. (39 L.D. 72); modified, 39 L.D. 360.

Mulnix, Philip, Heirs of (33 L.D. 331); overruled, 43 L.D. 532.

Myll, Clifton O., 71 I.D. 458 (1964); as supplemented, 71 I.D. 486 (1964), vacated, 72 I.D. 536 (1965).

Nebraska, State of (18 L.D. 124); overruled, 28 L.D. 358.

Nebraska, State of *v.* Dorrington (2 C.L.L. 647); overruled, 26 L.D. 123.

Neilsen *v.* Central Pacific R.R. Co. *et al.* (26 L.D. 252); modified, 30 L.D. 216.

Newbanks *v.* Thompson (22 L.D. 490); overruled, 29 L.D. 108.

Newlon, Robert C. (41 L.D. 421); overruled so far as in conflict, 43 L.D. 364.

New Mexico, State of (46 L.D. 217); overruled, 48 L.D. 98.

New Mexico, State of (49 L.D. 314); overruled, 54 I.D. 159.

Newton, Walter (22 L.D. 322); modified, 25 L.D. 188.

New York Lode and Mill Site (5 L.D. 513); overruled, 27 L.D. 373.

*Nickel, John R. (9 L.D. 388); overruled, 41 L.D. 129 (See 42 L.D. 313).

Northern Pacific R.R. Co. (20 L.D. 191); modified, 22 L.D. 234; overruled so far as in conflict, 29 L.D. 550.

*Northern Pacific R.R. Co. (21 L.D. 412; 23 L.D. 204; 25 L.D. 501); overruled, 53 I.D. 242 (See 26 L.D. 265; 33 L.D. 426; 44 L.D. 218; 117 U.S. 435).

Northern Pacific R.R. Co. *v.* Bowman (7 L.D. 238); modified, 18 L.D. 224.

Northern Pacific R.R. Co. *v.* Burns (6 L.D. 21); overruled, 20 L.D. 191.

Northern Pacific R.R. Co. *v.* Loomis (21 L.D. 395); overruled, 27 L.D. 464.

Northern Pacific R.R. Co. *v.* Marshall *et al.* (17 L.D. 545); overruled, 28 L.D. 174.

Northern Pacific R.R. Co. *v.* Miller (7 L.D. 100); overruled so far as in conflict, 16 L.D. 229.

Northern Pacific R.R. Co. *v.* Sherwood (28 L.D. 126); overruled so far as in conflict, 29 L.D. 550.

Northern Pacific R.R. Co. *v.* Symons (22 L.D. 686); overruled, 28 L.D. 95.

Northern Pacific R.R. Co. *v.* Urquhart (8 L.D. 365); overruled, 28 L.D. 126.

Northern Pacific R.R. Co. *v.* Walters *et al.* (13 L.D. 230); overruled so far as in conflict, 49 L.D. 391.

Northern Pacific R.R. Co. *v.* Yantis (8 L.D. 58); overruled, 12 L.D. 127.

*Northern Pacific Ry. Co. (48 L.D. 573); overruled so far as in conflict, 51 L.D. 196 (See 52 L.D. 58).

Nunez, Roman C. and Serapio (56 I.D. 363); overruled so far as in conflict, 57 I.D. 213.

Nyman *v.* St. Paul, Minneapolis, and Manitoba Ry. Co. (5 L.D. 396); overruled, 6 L.D. 750.

O'Donnell, Thomas J. (28 L.D. 214); overruled, 35 L.D. 411.

Olson *v.* Traver *et al.* (26 L.D. 350, 628); overruled so far as in conflict, 29 L.D. 480; 30 L.D. 382.

Opinion A.A.G. (35 L.D. 277); vacated, 36 L.D. 342.

Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333.

*Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I.D. 331 (See 59 I.D. 346, 350).

Opinion of Associate Solicitor, M-36512 (July 29, 1958); overruled to extent inconsistent, 70 I.D. 159.

Opinion of Associate Solicitor, M-36463, 64 I.D. 351 (1957); overruled, 74 I.D. 165 (1967).

Opinion of Associate Solicitor, Oct. 22, 1947 (M-34999); distinguish, 68 I.D. 433 (1961).

Opinion of Chief Counsel. July 1, 1914 (43 L.D. 339); explained, 68 I.D. 372 (1961).

Opinion of Secretary, 75 I.D. 147 (1968); vacated, 76 I.D. 69 (1969).

Opinion of Solicitor, October 31, 1917 (D-40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96.

Opinion of Solicitor, February 7, 1919 (D-44083); overruled, November 4, 1921 (M-6397) (See 58 I.D. 158, 160).

Opinion of Solicitor, August 8, 1933 (M-27499); overruled so far as in conflict, 54 I.D. 402.

Opinion of Solicitor, June 15, 1934 (54 I.D. 517); overruled in part, February 11, 1957 (M-36410).

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

Opinion of Solicitor, May 8, 1940 (57 I.D. 124); overruled in part, 58 I.D. 562, 567.

Opinion of Solicitor, August 31, 1943 (M-33183); distinguished, 58 I.D. 726, 729.

Opinion of Solicitor, May 2, 1944 (58 I.D. 680); distinguished, 64 I.D. 141.

Opinion of Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433 (1961).

Opinion of Solicitor, March 28, 1949 (M-35093); overruled in part, 64 I.D. 70.

Opinion of Solicitor, 60 I.D. 436 (1950); will not be followed to the extent that it conflicts with these views, 72 I.D. 92 (1965).

Opinion of Solicitor, Jan. 19, 1956 (M-36378); overruled to extent inconsistent, 64 I.D. 57.

Opinion of Solicitor, June 4, 1957 (M-36443); overruled in part, 65 I.D. 316.

Opinion of Solicitor, July 9, 1957 (M-36442); withdrawn and superseded, 65 I.D. 386, 388.

Opinion of Solicitor, Oct. 30, 1957, 64 I.D. 393 (M-36429); no longer followed, 67 I.D. 366 (1960).

Opinion of Solicitor, 64 I.D. 351 (1957); overruled, M-36706, 74 I.D. 165 (1967).

Opinion of Solicitor, 64 I.D. 435 (1957), will not be followed to the extent that it conflicts with these views, M-36456 (Supp.) (Feb. 18, 1969), 76 I.D. 14 (1969).

Opinion of Solicitor, July 29, 1958 (M-36512); overruled to extent inconsistent, 70 I.D. 159 (1963).

Opinion of Solicitor, Oct. 27, 1958 (M-36531); overruled, 69 I.D. 110 (1962).

Opinion of Solicitor, July 20, 1959 (M-36531, Supp.); overruled, 69 I.D. 110 (1962).

Opinion of Solicitor, 68 I.D. 433 (1961); distinguished and limited, 72 I.D. 245 (1965).

Opinion of Solicitor, M-36767 (Nov. 1, 1967) (Supplementing M-36599), 69 I.D. 195 (1962).

Opinions of Solicitor, September 15, 1914, and February 2, 1915; overruled. September 9, 1919 (D-43035, May Caramony) (See 58 I.D. 149, 154-156).

Oregon and California R.R. Co. *v.* Puckett (39 L.D. 169); modified, 53 I.D. 264.

Oregon Central Military Wagon Road Co. *v.* Hart (17 L.D. 480) ; overruled, 18 L.D. 543.

Owens *et al. v.* State of California (22 L.D. 369) ; overruled, 38 L.D. 253.

Pace *v.* Carstarphen *et al.* (50 L.D. 369) ; distinguished, 61 L.D. 459.

Pacific Slope Lode (12 L.D. 686) ; overruled so far as in conflict, 25 L.D. 518.

Papina *v.* Alderson (1 B.L.P. 91) ; modified, 5 L.D. 256.

Patterson, Charles E. (3 L.D. 260) ; modified, 6 L.D. 284, 624.

Paul Jarvis, Inc., Appeal of (64 I.D. 285) ; distinguished, 64 I.D. 388.

Paul Jones Lode (28 L.D. 120) ; modified, 31 L.D. 359.

Paul *v.* Wiseman (21 L.D. 12) ; overruled, 27 L.D. 522.

Pecos Irrigation and Improvement Co. (15 L.D. 470) ; overruled, 18 L.D. 168, 268.

Pennock, Belle L. (42 L.D. 315) ; vacated, 43 L.D. 66.

Perry *v.* Central Pacific R.R. Co. (39 L.D. 5) ; overruled so far as in conflict, 47 L.D. 304.

Phebus, Clayton (48 L.D. 128) ; overruled so far as in conflict, 50 L.D. 281 ; overruled to extent inconsistent, 70 I.D. 159.

Phelps, W. L. (8 C.L.O. 139) ; overruled, 2 L.D. 854.

Phillips, Alonzo (2 L.D. 321) ; overruled, 15 L.D. 424.

Phillips *v.* Breazeale's Heirs (19 L.D. 573) ; overruled, 39 L.D. 93.

Pieper, Agnes C. (35 L.D. 459) ; overruled, 43 L.D. 374.

Pierce, Lewis W. (18 L.D. 328) ; vacated, 53 I.D. 447 ; overruled so far as in conflict, 59 I.D. 416, 442.

Pietkiewicz *et al. v.* Richmond (29 L.D. 195) ; overruled, 37 L.D. 145.

Pike's Peak Lode (10 L.D. 200) ; overruled in part, 20 L.D. 204.

Pike's Peak Lode (14 L.D. 47) ; overruled, 20 L.D. 204.

Popple, James (12 L.D. 433) ; overruled, 13 L.D. 588.

Powell, D. C. (6 L.D. 302) ; modified, 15 L.D. 477.

Prange, Christ C. and William C. Braasch (48 L.D. 488) ; overruled so far as in conflict, 60 I.D. 417, 419.

Premo, George (9 L.D. 70) (See 39 L.D. 162, 225).

Prescott, Henrietta P. (46 L.D. 486) ; overruled, 51 L.D. 287.

Pringle, Wesley (13 L.D. 519) ; overruled, 29 L.D. 599.

Provensal, Victor H. (30 L.D. 616) ; overruled, 35 L.D. 399.

Prue, Widow of Emanuel (6 L.D. 436) ; vacated, 33 L.D. 409.

Pugh, F. M. *et al.* (14 L.D. 274) ; in effect vacated, 232 U.S. 452.

Puyallup Allotment (20 L.D. 157) ; modified, 29 L.D. 628.

Ramsey, George L., Heirs of Edwin C. Philbrick (A–16060), August 6, 1931, unreported ; recalled and vacated, 58 I.D. 272, 275, 290.

Rancho Alisal (1 L.D. 173) ; overruled, 5 L.D. 320.

Rankin, James D. *et al.* (7 L.D. 411) ; overruled, 35 L.D. 32.

Rankin, John M. (20 L.D. 272) ; reversed, 21 L.D. 404.

Rebel Lode (12 L.D. 683) ; overruled, 20 L.D. 204 ; 48 L.D. 523.

*Reed *v.* Buffington (7 L.D. 154) ; overruled, 8 L.D. 110 (See 9 L.D. 360).

Regione *v.* Rosseler (40 L.D. 93) ; vacated, 40 L.D. 420.

Reid, Bettie H., Lucille H. Pipkin (61 I.D. 1) ; overruled, 61 I.D. 355.

Reliable Coal Corp., 1 IBMA 50, 78 I.D. 199 (1971), distinguished, Zeigler Coal Corporation, 1 IBMA 71, 78 I.D. 362 (1971).

Rialto No. 2 Placer Mining Claim (34 L.D. 44) ; overruled, 37 L.D. 250.

Rico Town Site (1 L.D. 556) ; modified, 5 L.D. 256.

Rio Verde Canal Co. (26 L.D. 381) ; vavated, 27 L.D. 421.

Roberts *v.* Oregon Central Military Road Co. (19 L.D. 591) ; overruled, 31 L.D. 174.

Robinson, Stella G. (12 L.D. 443) ; overruled, 13 L.D. 1.

Rogers *v.* Atlantic & Pacific R.R. Co. (6 L.D. 565) ; overruled so far as in conflict, 8 L.D. 165.

Rogers, Fred B. (47 L.D. 325) ; vacated, 53 I.D. 649.

Rogers, Horace B. (10 L.D. 29) ; overruled, 14 L.D. 321.

*Rogers *v.* Lukens (6 L.D. 111) ; overruled, 8 L.D. 110 (See 9 L.D. 360).

Romero *v.* Widow of Knox (48 L.D. 32) ; overruled so far as in conflict, 49 L.D. 244.

Roth, Gottlieb (50 L.D. 196) ; modified, 50 L.D. 197.

Rough Rider and Other Lode Claims (41 L.D. 242, 255) ; vacated, 42 L.D. 584.

St. Clair, Frank (52 L.D. 597) ; modified, 53 I.D. 194.

*St. Paul, Minneapolis and Manitoba Ry. Co. (8 L.D. 255) ; modified, 13 L.D. 354 (See 32 L.D. 21).

St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Fogelberg (29 L.D. 291) ; vacated, 30 L.D. 191.

St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Hagen (20 L.D. 249) ; overruled, 25 L.D. 86.

Salsberry, Carroll (17 L.D. 170) ; overruled, 39 L.D. 93.

Sangre de Cristo and Maxwell Land Grants (46 L.D. 301) ; modified, 48 L.D. 88.

Santa Fe Pacific R.R. Co. *v.* Peterson (39 L.D. 442) ; overruled, 41 L.D. 383.

Satisfaction Extension Mill Site (14 L.D. 173) (See 32 L.D. 128).

*Sayles, Henry P. (2 L.D. 88) ; modified, 6 L.D. 797 (See 37 L.D. 330).

Schweitzer *v.* Hilliard *et al.* (19 L.D. 294) ; overruled so far as in conflict, 26 L.D. 639.

Serrano *v.* Southern Pacific R.R. Co. (6 C.L.O. 93) ; overruled, 1 L.D. 380.

Serry, John J. (27 L.D. 330) ; overruled so far as in conflict, 59 I.D. 416, 422.

Shale Oil Company (See 55 I.D. 287).

Shanley *v.* Moran (1 L.D. 162) ; overruled, 15 L.D. 424.

Shineberger, Joseph (8 L.D. 231) ; overruled, 9 L.D. 202.

Silver Queen Lode (16 L.D. 186) ; overruled, 57 I.D. 63.

Simpson, Lawrence W. (35 L.D. 399, 609) ; modified, 36 L.D. 205.

Sipchen *v.* Ross (1 L.D. 634) ; modified, 4 L.D. 152.

Smead *v.* Southern Pacific R.R. Co. (21 L.D. 432) ; vacated, 29 L.D. 135.

Snook, Noah A., *et al.* (41 L.D. 428) ; overruled so far as in conflict, 43 L.D. 364.

Sorli *v.* Berg (40 L.D. 259) ; overruled, 42 L.D. 557.

Southern Pacific R.R. Co. (15 L.D. 460) ; reversed, 18 L.D. 275.

Southern Pacific R.R. Co. (28 L.D. 281) ; recalled, 32 L.D. 51.

Southern Pacific R.R. Co. (33 L.D. 89) ; recalled, 33 L.D. 528.

Southern Pacific R.R. Co. *v.* Bruns (31 L.D. 272) ; vacated, 37 L.D. 243.

South Star Lode (17 L.D. 280) ; overruled, 20 L.D. 204; 48 L.D. 523.

Spaulding *v.* Northern Pacific R.R. Co. (21 L.D. 57) ; overruled, 31 L.D. 151.

Spencer, James (6 L.D. 217) ; modified. 6 L.D. 772; 8 L.D. 467.

Sprulli, Lelia May (50 L.D. 549) ; overruled, 52 L.D. 339.

Standard Shales Products Co. (52 L.D. 522) ; overruled so far as in conflict, 53 I.D. 42.

Star Gold Mining Co. (47 L.D. 38) ; distinguished by U.S. *v.* Alaska Empire Gold Mining Co., 71 I.D. 273 (1964).

State of California (14 L.D. 253) ; vacated, 23 L.D. 230.

State of California (15 L.D. 10) ; overruled, 23 L.D. 423.

State of California (19 L.D. 585) ; vacated, 28 L.D. 57.

State of California (22 L.D. 428) ; overruled, 32 L.D. 34.

State of California (32 L.D. 346) ; vacated, 50 L.D. 628 (See 37 L.D. 499 and 46 L.D. 396).

State of California (44 L.D. 118) ; overruled, 48 L.D. 98.

State of California (44 L.D. 468) ; overruled, 48 L.D. 98.

State of California *v.* Moccettini (19 L.D. 359) ; overruled, 31 L.D. 335.

State of California *v.* Pierce (3 C.L.O. 118) ; modified, 2 L.D. 854.

State of California *v.* Smith (5 L.D. 543) ; overruled so far as in conflict, 18 L.D. 343.

State of Colorado (7 L.D. 490) ; overruled, 9 L.D. 408.

State of Florida (17 L.D. 355) ; reversed, 19 L.D. 76.

State of Florida (47 L.D. 92, 93) ; overruled so far as in conflict, 51 L.D. 291.

State of Louisiana (8 L.D. 126) ; modified, 9 L.D. 157.

State of Louisiana (24 L.D. 231) ; vacated, 26 L.D. 5.

State of Louisiana (47 L.D. 366) ; overruled so far as in conflict, 51 L.D. 291.

State of Louisiana (48 L.D. 201) ; overruled so far as in conflict, 51 L.D. 291.

State of Nebraska (18 L.D. 124) ; overruled, 28 L.D. 358.

State of Nebraska *v.* Dorrington (2 C.L.L. 467) ; overruled so far as in conflict, 26 L.D. 123.

State of New Mexico (46 L.D. 217) ; overruled, 48 L.D. 98.

State of New Mexico (49 L.D. 314) ; overruled, 54 I.D. 159.

State of Utah (45 L.D. 551) ; overruled, 48 L.D. 98.

*Stevenson, Heirs of *v.* Cunningham (32 L.D. 650) ; overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).

Stewart *et al. v.* Rees *et al.* (21 L.D. 446) ; overruled so far as in conflict, 29 L.D. 401.

Stirling, Lillie E. (39 L.D. 346) ; overruled, 46 L.D. 110.

Stockley, Thomas J. (44 L.D. 178, 180) ; vacated, 260 U.S. 532 (See 49 L.D. 460, 461, 492).

Strain, A. G. (40 L.D. 108) ; overruled so far as in conflict, 51 L.D. 51.

Streit, Arnold (T–476 (Ir.)), August 26, 1962, unreported; overruled, 62 I.D. 12.

Stricker, Lizzie (15 L.D. 74) ; overruled so far as in conflict, 18 L.D. 283.

Stump, Alfred M. *et al.* (39 L.D. 437) ; vacated, 42 L.D. 566.

Sumner *v.* Roberts (23 L.D. 201) ; overruled so far as in conflict, 41 L.D. 173.

Sweeney *v.* Northern Pacific R.R. Co. (20 L.D. 394) ; overruled, 28 L.D. 174.

*Sweet, Eri P. (2 C.L.O. 18) ; overruled, 41 L.D. 129 (See 42 L.D. 313).

Sweeten *v.* Stevenson (2 B.L.P. 42) ; overruled so far as in conflict, 3 L.D. 248.

Taft *v.* Chapin (14 L.D. 593) ; overruled, 17 L.D. 414.

Taggart, William M. (41 L.D. 282) ; overruled, 47 L.D. 370.

Talkington's Heirs *v.* Hempfling (2 L.D. 46) ; overruled, 14 L.D. 200.

Tate, Sarah J. (10 L.D. 469) ; overruled, 21 L.D. 211.

Taylor, Josephine *et al.* (A–21994), June 27, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260.

Taylor *v.* Yates *et al.* (8 L.D. 279) ; reversed, 10 L.D. 242.

*Teller, John C. (26 L.D. 484) ; overruled, 36 L.D. 36 (See 37 L.D. 715).

Thorstenson, Even (45 L.D. 96) ; overruled so far as in conflict, 47 L.D. 258.

Tieck *v.* McNeil (48 L.D. 158) ; modified, 49 L.D. 260.

Toles *v.* Northern Pacific Ry. Co. *et al.* (39 L.D. 371) ; overruled so far as in conflict, 45 L.D. 93.

Tonkins, H. H. (41 L.D. 516) ; overruled, 51 L.D. 27.

Traganza, Mertie C. (40 L.D. 300) ; overruled, 42 L.D. 612.

Traugh *v.* Ernst (2 L.D. 212) ; overruled, 3 L.D. 98.

Tripp *v.* Dumphy (28 L.D. 14) ; modified, 40 L.D. 128.

Tripp *v.* Stewart (7 C.L.O. 39) ; modified, 6 L.D. 795.

Tucker *v.* Florida Ry. & Nav. Co. (19 L.D. 414) ; overruled, 25 L.D. 233.

Tupper *v.* Schwarz (2 L.D. 623; overruled, 6 L.D. 624.

Turner *v.* Cartwright (17 L.D. 414) ; modified, 21 L.D. 40.

Turner *v.* Lang (1 C.L.O. 51) ; modified, 5 L.D. 256.

Tyler, Charles (26 L.D. 699) ; overruled, 35 L.D. 411.

Ulin *v.* Colby (24 L.D. 311) ; overruled, 35 L.D. 549.

Union Pacific R.R. Co. (33 L.D. 89) ; recalled, 33 L.D. 528.

United States *v.* Bush (13 L.D. 529) ; overruled, 18 L.D. 441.

United States *v.* Central Pacific Ry. Co. (52 L.D. 81) ; modified, 52 L.D. 235.

United States *v.* Dana (18 L.D. 161) ; modified, 28 L.D. 45.

United States *v.* McClarty, Kenneth, 71 I.D. 331 (1964), vacated and case remanded, 76 I.D. 193 (1969).

United States *v.* Mouat, M. W. *et al.* (60 I.D. 473) ; modified, 61 I.D. 289.

United States *v.* O'Leary, Keith V., *et al.* (63 I.D. 341) ; distinguished, 64 I.D. 210, 369.

Utah, State of (45 L.D. 551) ; overruled, 48 L.D. 98.

Veatch, Heir of Natter (46 L.D. 496) ; overruled so far as in conflict, 49 L.D. 416 (See 49 L.D. 492 for adherence in part).

Vine, James (14 L.D. 527) ; modified, 14 L.D. 622.

Virginia-Colorado Development Corp. (53 I.D. 666) ; overruled so far as in conflict, 55 I.D. 289.

Vradenburg's Heirs *et al. v.* Orr *et al.* (25 L.D. 323) ; overruled, 38 L.D. 253.

Wagoner *v.* Hanson (50 L.D. 355) ; overruled, 56 I.D. 325, 328.

Wahe, John (41 L.D. 127) ; modified, 41 L.D. 637.

Walker *v.* Prosser (17 L.D. 85) ; reversed, 18 L.D. 425.

Walker *v.* Southern Pacific R.R. Co. (24 L.D. 172) ; overruled, 28 L.D. 174.

Wallis, Floyd A. (65 I.D. 369) ; overruled to the extent that it is inconsistent, 71 I.D. 22.

Walters, David (15 L.D. 136) ; revoked, 24 L.D. 58.

Warren *v.* Northern Pacific R.R. Co. (22 L.D. 568) ; overruled so far as in conflict, 49 L.D. 391.

Wasmund v. Northern Pacific R.R. Co. (23 L.D. 445) ; vacated, 29 L.D. 224.

Wass *v.* Milward (5 L.D. 349) ; no longer followed (See 44 L.D. 72 and unreported case of Ebersold *v.* Dickson, September 25, 1918, D–36502).

Waterhouse, William W. (9 L.D. 131) ; overruled, 18 L.D. 586.

Watson, Thomas E. (4 L.D. 169) ; recalled, 6 L.D. 71.

Weathers, Allen E., Frank N. Hartley (A–25128), May 27, 1949, unreported; overruled in part, 62 I.D. 62.

Weaver, Francis D. (53 I.D. 179) ; overruled so far as in conflict, 55 I.D. 290.

Weber, Peter (7 L.D. 476) ; overruled, 9 L.D. 150.

Weisenborn, Ernest (42 L.D. 533) ; overruled, 43 L.D. 395.

Werden *v.* Schlecht (20 L.D. 523) ; overruled so far as in conflict, 24 L.D. 45.

Western Pacific Ry. Co. (40 L.D. 411; 41 L.D. 599) ; overruled, 43 L.D. 410.

Wheaton *v.* Wallace (24 L.D. 100) ; modified, 34 L.D. 383.

White, Anderson (Probate 13570–35) ; overruled, 58 I.D. 149, 157.

White, Sarah V. (40 L.D. 630) ; overruled in part, 46 L.D. 56.

Whitten *et al. v.* Read (49 L.D. 253, 260; 50 L.D. 10) ; vacated, 53 I.D. 447.

Wickstrom *v.* Calkins (20 L.D. 459) ; modified, 21 L.D. 553; overruled, 22 L.D. 392.

Widow of Emanuel Prue (6 L.D. 436) ; vacated, 33 L.D. 409.

Wiley, George P. (36 L.D. 305) ; modified so far as in conflict, 36 L.D. 417.

*Wilkerson, Jasper N. (41 L.D. 138) ; overruled, 50 L.D. 614 (See 42 L.D. 313).

Wilkins, Benjamin C. (2 L.D. 129) ; modified, 6 L.D. 797.

Williamette Valley and Cascade Mountain Wagon Road Co. *v.* Bruner (22 L.D. 654) ; vacated, 26 L.D. 357.

Williams, John B., Richard and Gertrude Lamb (61 I.D. 31) ; overruled so far as in conflict, 61 I.D. 185.

Willingbeck, Christian P. (3 L.D. 383); modified, 5 L.D. 409.

Willis, Cornelius *et al.* (47 L.D. 135); overruled, 49 L.D. 461.

Willis, Eliza (22 L.D. 426); overruled, 26 L.D. 436.

Wilson *v.* Heirs of Smith (37 L.D. 519); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).

Witbeck *v.* Hardeman (50 L.D. 413); overruled so far as in conflict, 51 L.D. 36.

Wright *et al. v.* Smith (44 L.D. 226); in effect overruled so far as in conflict, 49 L.D. 374.

Zimmerman *v.* Brunson (39 L.D. 310); overruled, 52 L.D. 714.

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

462-392—72——5

TABLE OF STATUTES CITED

(A) ACTS OF CONGRESS

ACTS CITED BY POPULAR NAME

(B) REVISED STATUTES

(C) UNITED STATES CODE

EXECUTIVE ORDERS, PROCLAMATIONS, REORGANIZATION PLAN AND TREATY

PROCLAMATION

REORGANIZATION PLAN

TREATY

DEPARTMENTAL ORDERS AND REGULATIONS CITED

Code of Federal Regulations—Con.

MISCELLANEOUS

DECISIONS OF THE DEPARTMENT OF THE INTERIOR

ORION L. FENTON

IBLA 70-61 *Decided January 4, 1971*

Surveys of Public Lands: Dependent Resurveys

In making a retracement or dependent resurvey, the corners established should be located if possible by considering all the relevant evidence and not simply one or two factors.

Surveys of Public Lands: Dependent Resurveys

A protest against an accepted plat of a dependent resurvey is properly dismissed where the dependent resurvey is based on a detailed evaluation of the physical evidence of a disputed corner and of the corners of that and other surveys while the protestant relies upon one call from one feature, which the U.S. surveyors could not find, to establish the rest of the survey by courses and distances without reference to any other features described in the field notes or other recovered corners.

BOARD OF LAND APPEALS

Orion L. Fenton has appealed to the Secretary of the Interior from a decision dated April 7, 1969, of the Chief, Division of Cadastral Survey, Bureau of Land Management, which affirmed the dismissal of his protest against the official acceptance of the plat of dependent resurvey of section 26, T. 1 S., R. 15 E., Mount Diablo Meridian, California.

Fenton is the owner of the Criss Cross patented lode mining claim and a restaurant-service station and other improvements in the NE¼ section 26, same township and range.

In 1964, the manager of the Sacramento district office requested that a survey be made of the southwest boundary of Mineral Survey 5131, which had been made in connection with the patenting of the Criss Cross, to determine whether the improvements were a trespass on the public domain. Fenton asserts that they lie within his patented land.

Special instructions, January 24, 1964, Group 505, directed the es-

tablishment and dependent resurvey of the boundaries of the Criss Cross Lode Mining Claim Mineral Survey No. 5131. Supplemental instructions, dated November 30, 1965, authorized the retracement and dependent resurvey of the north, south, and east boundaries of section 26. In the course of the work, boundaries of mineral surveys of other patented mining claims adjoining the Criss Cross were also reestablished. The field work was completed in October 1966.

During the course of the field work and the preparation of the field notes and plat, Fenton raised a series of objections to the reestablished lines and corners. The points he raised were discussed in letters and in person by representatives of the Bureau. On August 3, 1967, the Chief, Division of Engineering accepted the plat showing the boundaries of section 26 and Mineral Surveys 5131, 5416, and 5759 and portions of Mineral Survey No. 4043.

The plat reestablishes the boundaries of section 26 and of several patented mining claims. It depicts a group of five claims in the E½, mainly in the NE¼. The Criss Cross is a rectangular claim with its long axis running northwest-southeast. Its southeast corner, No. 1, is common with the corner No. 2 of the Relief claim which adjoins its southeast end line and with corner No. 5 of the Tiger mine whose northeast line departs at this point at a slight angle from the southwest line of the Criss Cross. The rest of the northeast line of the Tiger abuts the southwest line of the Relief. Its southeast end line is common with the northwest end line of the Buffalo quartz claim which also abuts the south line of the Relief.

The southwest line of the Criss Cross runs N 49°14′ W. 22.25 chains (1468.50′) from corner No. 1 to corner No. 2. Fenton's improvements are located less than 60 feet south of line 1–2 in an area about 200 feet from corner No. 2.

In a letter dated September 11, 1967, the State Director, Bureau of Land Management, California State Office informed Fenton that the plat had been approved. He also discussed Fenton's latest objections to the resurvey and found them to be without merit. He then dismissed Fenton's protest and allowed him the right of appeal to the Director.[1]

[1] While the resurvey was being conducted, a mining contest was instituted against Fenton's Desire quartz lode claim on which the land office said the improvements were located. The claim was held invalid, *United States v. Orion L. Fenton*, A–30621 (January 9, 1967).

The records also show that on July 3, 1963, the 1½ acres containing Fenton's improvements, described as a portion of lot 2, sec. 26, were classified under the Small Tract Act of June 1, 1938, as amended, 43 U.S.C. 682d (1964), for lease for residential purposes.

Later in a letter dated July 18, 1967, the State Director wrote Fenton:

"We are in the process of lotting the land on which your improvements lie. This land is not needed for any government programs and is suitable for transfer. The present use of the area can be resolved by your acquiring the parcel you are occupying."

In his appeal Fenton reviewed at length his rationale for justifying the location of the mining claim in the position he says it lies and repeated his criticisms of the dependent resurvey.

The Director's decision noted that the critical issue is the location of corner No. 2 of the Criss Cross claim and listed the several reasons why the survey had correctly located it. Briefly, they are the recovery of the root crowns of two buckeye trees and the courses and distances given in 1914, the date of the original survey, as accessories to the corner; the notation of this point as corner No. 2 in a survey made in 1952 of part of the Criss Cross claim; the similar relation of the corner No. 2 to Cub Gulch in both MS 5131 and the dependent resurveys; and the recovery of corners on the Relief lode, which had been surveyed in MS 5131 simultaneously with the Criss Cross lode, that agreed very well with the original survey. The decision also said that the dependent resurvey is corroborated from direct evidence of the locations of MS 5416 (1918), and MS 5759 (1924), which with MS 5131, form an interrelated block of mineral surveys, namely, a distinctive discovery tunnel on the Tiger mine lode (MS 5416), and a corner on Grizzly Gulch lode (MS 5759), identified by a bearing tree whose fragments were found in 1967, showing an axed face and part of the scribe marks.

All of the evidence, the decision went on, offered by Fenton had been carefully considered and found not to be helpful. It particularly noted the diagram prepared for Fenton by a Walter S. Hardgrove, which indicated the Criss Cross and Relief claims to be in a more southerly location sufficient to place the improvements north of the southwest line (line 1–2) of the Criss Cross. Hardgrove, it said, had accepted rotted wood in rock mounds as corners No. 2 and No. 3 (the northeast corner), on the basis of close agreement of course and distance to those returned in the original survey and on the basis of ties from corner No. 1 and 2 of the Criss Cross and corner No. 1 of the Relief to the corner common to sections 23, 24, 25 and 26. He did not, however, it went on, describe what he found at corner No. 1 of the Criss Cross or corner No. 1 of the Relief. It also found Hardgrove's references to "caved tunnels" on the Criss Cross and Relief unpersuasive because the government surveyors could not locate these tunnels. It then stated:

> From the detailed evaluation of the physical evidence remaining of the original geological location of Cor. 2 of Criss Cross Lode, M.S. 5131, and other corners of this and interrelated mineral surveys, we conclude that our dependent resurvey of Sec. 26, T. 1 S., R. 15 E., M.D.M., California, was correctly executed and the original boundaries of the lode claims shown have been properly identified according to the best available evidence. Therefore, no action will be taken to either cancel the plat or suspend the official filing of the plat.

In his appeal to the Secretary, Fenton says the primary question is the location of corner No. 2 of the Criss Cross lode. Hardgrove, he asserts, found the corner common to the Relief (No. 1), Buffalo Quartz (No. 2), and Tiger Mine (No. 6), by courses and distances from a tunnel on the Relief lode, as described in the field notes of MS 5131 and from there the establishment of the corners of the Criss Cross was merely a matter of running out courses and distance. He then disputes the assertion that corner No. 2 was originally shown as being on or near the bottom of Cub Gulch. Finally, he says Hardgrove's survey is correct and the accepted one is clearly in error.

In making a dependent resurvey, the government undertakes to retrace and reestablish the lines of the original survey in their true original position according to the best available evidence of the positions of the original corners, and the lines of the dependent resurvey in themselves represent the best possible identification of the true legal boundaries of lands patented on the basis of the original survey. *United States* v. *Sidney M. and Esther M. Heyser*, 75 I.D. 14, 18 (1968). In making the retracement or dependent resurvey the corners established should be located, if possible, by considering all the relevant evidence and not simply one or two factors. *Rubicon Properties, Inc., et al.*, A-30748 (May 6, 1968).

A review of the record demonstrates how carefully and thoroughly the dependent resurvey was conducted and how well it is correlated with the corners of this and other interrelated surveys. In rebuttal the appellant offers only two contentions. The first depends on the existence of a tunnel which the government surveyors could not find and a reconstruction of the entire mineral survey from this one point. It makes no reference to any other corners and ignores all other calls in the field notes to other natural features. As the Director pointed out, there are other features more easily and other corners more persuasively recognizable which support the dependent resurvey.

Fenton's other objection bears on the dependent survey's insistence that corner No. 2 is "in Cub Gulch,"—meaning a narrow, well defined channel—and not 120 feet on the hillside above it, where Hardgrove's diagram places it. The original field notes refer to Cub Gulch quite specifically several times in such notations as "crossing Cub Gulch." The dependent resurvey places corner No. 2 at about the same distance from Cub Gulch as did the original survey. This evidence is persuasive.

Thus appellant's objections to the plat do not justify the cancellation of the plat or the suspension of the official filing of the plat.

Therefore, pursuant to the authority delegated to the Board of Land

Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the Bureau of Land Management is affirmed.

MARTIN RITVO, *Member.*

WE CONCUR:

EDWARD W. STUEBING, *Member.*

FRANCIS E. MAYHUE, *Member.*

UNITED STATES
v.
PAUL M. THOMAS ET AL.

IBLA 70-46 *Decided January 12, 1971*

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

To satisfy the requirements for discovery on a placer mining claim located for a common variety of pumiceous material before July 23, 1955, it must be shown that the exposed material could have been removed and marketed at a profit on that date, as well as at the present time; where such a showing is not made, the claim is properly declared null and void.

Mining Claims: Discovery: Marketability

Where it appears that some material was removed from a mining claim and marketed prior to July 23, 1955, but it also appears that the market for such material terminated before that date, and where there is no positive evidence of the removal thereafter of any significant quantity of material from the claim for purposes other than fill material, it is properly concluded that the material was not marketable on July 23, 1955.

Mining Claims: Common Varieties of Minerals: Special Value—Mining Claims: Common Varieties of Minerals: Unique Property

The fact that pumiceous material may occur in nature in pieces having one dimension of two inches or more does not, by itself, establish that the material is "block pumice" which is excluded by statute from the category of common varieties of pumice.

Mining Claims: Common Varieties of Minerals: Special Value—Mining Claims: Common Varieties of Minerals: Unique Property

To determine whether a deposit of pumiceous material is a common variety, there must be a comparison of the material in that deposit with other similar-type materials in order to ascertain whether the material has a property giving it a distinct and special value; where the material can be used for purposes for which common varieties of other materials can be substituted, and where it is not shown that it has any advantage over such substitute materials which is reflected in a higher price in the market place,

it is properly determined that the material is a common variety not subject to location under the mining laws of the United States after July 23, 1955.

BOARD OF LAND APPEALS

Paul M. Thomas, Gilbert E. Olson and Ida L. Thomas, executrix of the estate of Roger C. Thomas, have appealed to the Secretary of the Interior from a decision dated March 21, 1969, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of a hearing examiner rejecting their application, Arizona 033071, for patent to the Bill Williams No. 4, Aluminum Oxide Nos. 1, 2, and 4, and a part of the Aluminum Oxide No. 7 (amd.), placer mining claims and declaring the claims to be null and void.

Appellants' claims were located during the period September 19, 1947, to September 8, 1954 (Exs. 24, 25). They are situated approximately 1¾ to 3 miles south of Williams, Arizona, and embrace lands in secs. 9, 15 and 16, T. 21 N., R. 2 E., G.&S.R.M., Kaibab National Forest, Coconino County, Arizona. According to appellants' patent application, filed on November 7, 1963, the claims contain "a valuable deposit of pumice and cinders which has been and is being marketed as a mineral aggregate."

Upon the recommendation of the Forest Service, United States Department of Agriculture, a contest complaint was filed in the Arizona land office on June 8, 1966, on charges that:

1. A valid mineral discovery, as required by the mining laws of the United States, does not exist within the limits of the Bill Williams Placer Mining Claim #4, Aluminum Oxide #'s 1, 2, 4, and Aluminum Oxide No. 7 (amd.) placer mining claims.

2. The land within the limits of the said placer mining claims is nonmineral in character within the meaning of the mining laws.

A hearing was held at Phoenix, Arizona, on February 1, 2, 3, 6 and 7, 1967. From the evidence developed, the hearing examiner found, in a decision dated May 21, 1968, that, although most of the contestees' witnesses consistently referred to material exposed on the claims as pumice, the contestant's expert witness, Robert E. Wilson, as well as the contestees' expert witness, George A. Kiersch, Chairman of Geological Sciences at Cornell University, described the material as "pumiceous material." Since pumiceous material is not a true pumice, the hearing examiner said, it cannot be classified as "block pumice" which is expressly excepted by section 3 of the act of July 23, 1955, as amended, 30 U.S.C. sec. 611 (1964), from the category of common varieties of pumice. He further found that deposits of pumiceous materials are of widespread occurrence in northern Arizona, that the pumiceous materials on the claims are suitable for many uses, includ-

ing lightweight aggregate, concrete block, precast concrete products, acoustical plaster and base course, but that none of the unusual characteristics ascribed to them by contestees' witnesses had been shown to render the materials suitable for uses over and above the normal uses of the general run of such deposits. The fact that production from the adjacent patented Aluminum Oxide No. 5 claim was phased out in 1954, he stated, and that scoria volcanic cinders were used thereafter in the manufacture of concrete, showed clearly that cinders could be substituted for pumiceous material in such products. He concluded that the pumiceous materials on the claims are of a common variety, not subject to mining location after July 23, 1955, and in order to establish the validity of the claims, the deposits on the claims must be shown to have been marketable prior to that date.

The hearing examiner found the testimony of the Government's witness, Wilson, that no cinders had been removed from the claims, to be unrefuted by specific evidence. He also determined that significant amounts of material had been removed from only two places—the "Massey pit" on the Aluminum Oxide No. 1 claim and the "pumice pit" in the extreme northeast corner of the Aluminum Oxide No. 4 claim. There was no positive evidence, he found, of the use of any significant portion of the material removed from the Massey pit after 1954 in the manufacture of concrete or for any purpose other than as fill.[1] Nor did he find evidence of removal, after that time, of pumiceous aggregate, the bulk of which had been supplied from the patented Aluminum Oxide No. 5 rather than from the contested claims. The market which previously had existed, the hearing examiner found, was supplied after 1954 from other cinder deposits in northern Arizona. From these findings he concluded that the deposits were not marketable on July 23, 1955, and declared the claims null and void for lack of a valid discovery.[2]

The Office of Appeals and Hearings concurred in the findings of the hearing examiner, rejecting arguments raised by appellants before the Director, Bureau of Land Management, that the hearing examiner had erred in applying the act of July 23, 1955, and that the

[1] Material which is valuable primarily for fill use has never qualified as a mineral subject to location under the mining laws. *United States* v. *George W. Black,* 64 I.D. 93 (1957), and cases cited; *United States* v. *E. A. Barrows and Esther Barrows,* 76 I.D. 299 (1969), *aff'd, Esther Barrows* v. *Walter J. Hickel,* Civil No. 70–215–F, in the United States District Court for the Central District of California (April 20, 1970), *appeal docketed,* No. 25944, 9th Cir., May 6, 1970.

[2] The hearing examiner also found that Public Land Order No. 3417 of July 30, 1963 (Ex. 1), withdrew the lands embraced in the Aluminum Oxide Nos. 4 and 7 claims and the north half of the Aluminum Oxide No. 2 claim from mining entry as of July 29, 1955, the date on which the application for withdrawal was filed in the Arizona land office. The fact of the withdrawal is inconsequential unless the validity of those claims rests upon a discovery of an otherwise-locatable mineral after July 23, 1955.

proceedings before the hearing examiner had been so onerous and unfair as to deprive the contestees of due process of law.

In appealing to the Secretary appellants argue, in substance, that:

(1) All of the contested mining claims were located before July 23, 1955, and there is, therefore, no requirement that the mineral deposits on the claims be other than common varieties in order to constitute a valid discovery;

(2) The pumice on the claims is "block pumice" which is expressly excluded from the category of common varieties of pumice;

(3) The mineral deposits on the claims have properties which give them a "distinct and special value" which removes them from the category of common varieties;

(4) The evidence shows continued marketability and production of material from the claims prior to, during and subsequent to July 23, 1955; and

(5) The decisions of the hearing examiner and the Office of Appeals and Hearings are not supported by the evidence and are, therefore, a denial of administrative due process to appellants.

In challenging the applicability of the act of July 23, 1955, to mining claims located prior to that date, appellants assert that the legislative history of section 3 of the act "clearly shows that the Congress had no intention of changing the mining law of the United States so as to affect rights under existing *valid* mining claims." (Italics added.) We have no quarrel with appellants over that assertion. However, appellants assume one of the critical facts in issue, *i.e.*, the validity of the claims on July 23, 1955.

Appellants' contention is one which has been urged and rejected many times. In *United States v. Charles H. Henrikson and Oliver M. Henrikson*, 70 I.D. 212 (1963), *aff'd*, *Henrikson v. Udall*, 350 F.2d 949 (9th Cir. 1965), *cert. denied*, 384 U.S. 940 (1966), as well as in numerous other decisions (*see*, *e.g.*, *United States v. Kenneth F. and George A. Carlile*, 67 I.D. 417 (1960); *United States v. Fisher Contracting Company*, A–28779 (August 21, 1962); *United States v. William M. Hinde et al.*, A–30634 (July 9, 1968); *United States v. E. A. Barrows and Esther Barrows*, *supra*, n. 1), the Department has held the validity of a mining claim located prior to July 23, 1955, for a common variety of sand, gravel or other material specified in the act of that date can be established only by showing the requirements of a discovery were satisfied before the date of the act. Those requirements include a showing that the material on a claim could have been profitably mined and marketed on that date. *United States v. Alfred Coleman*, A–28557 (March 27, 1962), *aff'd*, *United States v. Coleman*, 390 U.S. 599 (1968).

Appellants' attempt to avoid the consequences of the ruling in the

Henrikson case, *supra*, by arguing that, although the Department's decision was affirmed by the United States District Court for the Northern District of California in *Henrikson v. Udall*, 229 F. Supp. 510 (1964), the court "clearly did not affirm the Secretary's erroneous application of 30 U.S.C. sec. 611 to mining claims located prior to the 1955 Act."

Appellants' position is untenable. The *Henrikson* case, *supra*, also, involved the determination of the validity of a mining claim located prior to July 23, 1955, for a material (sand and gravel) of common variety. The primary distinction between that case and the one before us lies in the fact that, whereas in this case there is a question with respect to the marketability of the material on the claims on July 23, 1955, in *Henrikson* the question was whether sufficient work had been done by that date to ascertain the existence of sand and gravel in sufficient quantity to constitute a valuable mineral deposit. The Department's determination in the *Henrikson* case that the claim was invalid could be sustained only upon acceptance of the premise that the location of a mining claim for a deposit of a common variety of sand, gravel or other mineral named in the 1955 act, unperfected by a discovery prior to the date of the act, established no rights against the United States. Accordingly, appellants were properly required to demonstrate a discovery on each of the contested claims prior to July 23, 1955, if the materials found thereon are common varieties of pumice, cinders or other material.

If the materials on appellants' claims are not "common varieties," of course, the significance of a discovery before July 23, 1955, is immaterial. However, it must be shown, in any event, that there was a valid discovery on each claim at the time of the application for patent. That is, irrespective of the date on which a discovery may have been made, the claims are now invalid if, because of exhaustion of the deposits, a change in economic conditions, cessation of a market for the material, or some other equally cogent factor, the value of the minerals will not justify further expenditures for the development of a mine. *See, e.g., Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Adams v. United States*, 318 F.2d 861 (9th Cir. 1963); *Mulkern v. Hammitt*, 326 F.2d 896 (9th Cir. 1964); *United States v. R. W. Wingfield*, A–30642 (February 17, 1967); *United States v. Evelyn M. Kiggins et al.*, A–30827 (July 12, 1968); *United States v. Warren E. Wurts and James E. Harmon*, 76 I.D. 6 (1969).

We note at this point that it was not alleged in the contest complaint that the materials found on appellants' claims were "common varieties." Nor was it expressly charged that a discovery had not been made prior to July 23, 1955. It appears, in fact, that the contestants'

basic premises in contesting the claims were that the materials for which the claims were alleged to be valuable do not occur in sufficient quantity to sustain a commercial operation and the materials cannot now be produced and sold at a profit (*see* Tr. 27–28).

Without making any findings with respect to the quantity of the mineral materials present on the claims or their present marketability, as we have seen, the hearing examiner concluded from the evidence that the materials shown to exist are common varieties for which no market existed on July 23, 1955. This conclusion is not necessarily incongruous, however. The first charge of the complaint (that a "valid discovery, as required by the mining laws of the United States, does not exist" within the limits of the claims) could be sustained upon a finding either that (1) the materials found on the claims cannot presently be mined and marketed at a profit or (2) the materials are common varieties of pumice, or other substance, for which there was no market on July 23, 1955.

We turn now to the question of whether or not the materials on the claims are, in fact, common varieties of pumice, cinders or other material removed from operation of the mining laws by the 1955 act. We do not find it necessary to determine whether, as the hearing examiner and the Office of Appeals and Hearings found, "pumiceous material is not a true pumice." Even if we assume that there is no clear distinction between "pumice" and "pumiceous material," it does not necessarily follow that pumiceous material occurring in nature in pieces having one dimension of two inches or more is "block pumice." [3]

[3] The 1955 act expressly excepts from the category of "common varieties" deposits of "so-called 'block pumice' which occurs in nature in pieces having one dimension of two inches or more." 30 U.S.C. § 611 (1964). The statute does not define "block pumice." Nor have we found the term in any glossary of technical terms. It seems clear, however, that the drafters of the statute contemplated a material of fairly definite specifications which had a recognized use in industry. Thus, in reporting the bill which ultimately became the act of July 23, 1955, the House Committee on Interior and Insular Affairs stated that the clause excluding "block pumice" from common varieties of pumice "recognizes a class of pumice having distinct and special properties." H.R. Rep. No. 730, 84th Cong., 1st Sess. 9 (1955).

It is reported in Bureau of Mines Bulletin 630, *Mineral Facts and Problems* (1965), that:

"Under various conditions pumice competes as a lightweight aggregate with expanded clays and shales, expanded perlite, exfoliated vermiculite, slag, cinders, and diatomite. . . .

"*As an abrasive in block form,* pumice competes in the market with brick made from silicon carbide, aluminum oxide, and natural rock such as novaculite and sandstone.

"Pumice used as a concrete aggregate, railroad balast, and for road surfacing is sold in a low-price market and must compete with many substitutes. Hence the market area for any deposit is limited by transportation costs and the availability of competitive materials. As abrasives, pumice sells at a much higher average unit price; transportation is a smaller part of the total cost, and shipments are made over much greater distances. High-quality pumice is imported from foreign sources in crude form for processing domestically for abrasive purposes." P. 736 (italics added).

It may reasonably be inferred that the "block pumice" which is not a common variety must be of abrasive grade and the term was not intended to embrace all pumiceous materials ocurring in nature in pieces having one dimension of two inches or more. There is no evidence that the material found on appellants' claims is marketable as an abrasive.

As the decisions below stated, appellants' witness, Kiersch, after defining pumice (Tr. 351) and acknowledging that many materials are pumiceous but may not necessarily meet a specific geologic classification of pumice (Tr. 365), stated that he "would prefer" to call material from the claims "pumiceous material" (Tr. 366–367). Although other witnesses referred to material from the claims as pumice, no witness described any of the material as "block pumice." In the absence of competent evidence to that effect we cannot conclude that "block pumice" has been shown to exist anywhere on appellants' claims.

Even if the material is not "block pumice," appellants argue, it is an uncommon variety of pumice because of properties which give it a distinct and special value. The properties which allegedly do this are:

(1) The material is stronger than common pumice;
(2) It is less absorbent than common pumice;
(3) It is more coarse and does not generate fines as does common pumice;
(4) It can be run through a crushing cycle without powdering;
(5) It can be used as a lightweight concrete aggregate; and
(6) It has an extraordinary insulation quality.

The Department has held that, in order to determine whether or not a deposit of stone, or other material, has a unique property which gives it a distinct and special value, there must be a comparison of the material under consideration with other deposits of similar materials. It must then be shown that the material under consideration has some property which gives it value for purposes for which other materials are not suited, or, if the material is to be used for the same purposes as other materials of common occurrence, that it possesses some property which gives it a special value for such uses, which value is reflected by the fact that it commands a higher price in the market place. Differences in chemical composition or physical properties are immaterial if they do not result in a distinct economic advantage of one material over another. *United States* v. *U.S. Minerals Development Corporation*, 75 I.D. 127 (1968); *United States* v. *Gene De Zan et al.*, A–30515 (July 1, 1968); *United States* v. *Alice A. and Carrie H. Boyle*, 76 I.D. 61 (1969), as supplemented, 76 I.D. 318 (1969). Moreover, the comparison is not limited to other deposits of the same material. That is, it may not be enough to show that pumice from a particular deposit can be used for purposes for which ordinary pumice cannot be used. If the special use to which it may be adapted is one for which common varieties of other materials are equally adaptable, and if the price commanded by the pumice is no greater than that paid for other materials, pumice must still be considered a common

variety. *See United States* v. *Norman Rogers*, A–31049 (March 3, 1970). Assuming that material from appellants' claims has all of the characteristics attributed to it and the Williams deposits are, as indicated by appellants' witness, Gilbert Olson, the only source of pumice in the State of Arizona suitable for the manufacture of concrete block (Tr. 101–104), what is the special and distinct value derived from these properties?

As noted, the hearing examiner found the pumiceous materials on appellants' claims are suitable for a number of uses. Whether or not other *pumiceous* materials found in Arizona can be used for all the purposes for which appellants' materials reportedly are adaptable, it is clear from the record that other materials are used for all of the listed uses. There is, in fact, no evidence that material from appellants' claims can be used for any purpose for which a common variety of some material is not already being used or that the material from appellants' claims has any advantage over other materials with which it must compete which is reflected in the market price which it can bring. Accordingly, we cannot conclude from the showing appellants have made that their "pumice" has a distinct and special value.

Appellants suggest that, if the Secretary is not convinced that the pumice from the contested claims commands a higher price at the market place than material not having such special properties, he should remand the case for the development of more complete and full evidence on this issue. The Secretary has, in several recent decisions, remanded cases for the development of additional evidence relating to the market price of material where the evidence bearing upon that question was inconclusive. Appellants, however, have not offered any evidence that material from their claims commands a better price than other materials used for the same purposes. In the absence of an offer of proof, there is no reason for further inquiry into the question.

In support of their contention that the decisions below constitute a denial of due process, appellants argue that there must be support in the record for a decision. The decisions appealed from, appellants charge, clearly are not supported in the record and are, therefore, a denial of administrative due process.

There can be no doubt that an administrative decision must have support in the record. However, there is an enormous gulf between the acceptance of that rule and the conclusion that a particular decision is not supported by the record. Appellants have attempted to bridge that gulf with a single giant step which we are unable to duplicate.

Having concluded that the provisions of the act of July 23, 1955, are applicable in this case and the evidence does not establish the

uncommon nature of the materials found on appellants' claims, there remains only the question of whether or not the deposits were, by virtue of the then-existing market, valuable mineral deposits on July 23, 1955.

Careful review of the record is conclusive that the hearing examiner's factual findings, which have previously been set forth, are supported by the evidence. Those findings justify his conclusion that a discovery, within the meaning of the mining laws of the United States, has not been shown on any of the claims in question. Accordingly, the claims were properly declared null and void.

Appellants have petitioned the Secretary to grant an opportunity to present oral argument in this matter. They have not, however, shown wherein such argument would serve a useful purpose, and the petition is hereby denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals, by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

MARTIN RITVO, *Member.*

WE CONCUR:

EDWARD W. STUEBING, *Member.*

FRANCIS E. MAYHUE, *Member.*

CARLSON OIL COMPANY, INC.

IBLA 70-680 *Decided January 15, 1971*

Rules of Practice: Appeals: Dismissal

An appeal to the Director, Bureau of Land Management, will be dismissed where the appellant did not timely file the notice of appeal in the proper office.

BOARD OF LAND APPEALS

Carlson Oil Company, Inc., has appealed to the Director, Bureau of Land Management,[1] from decisions dated June 24, 1970, by the Bureau's State Office for Alaska which rejected its noncompetitive oil and gas lease offers F 12530, 12531, 12532 and 12533, because the description of the lands sought in each offer did not meet the regulatory requirements.

The decisions were received by Carlson on June 26, 1970. Carlson's combined notice of appeal, addressed to the "Director, Depart-

[1] The Secretary of the Interior, in the exercise of his supervisory authority, transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management, to the Board of Land Appeals, effective July 1, 1970. Circular 2273; 35 F.R. 10009, 10012.

ment of the Interior, Bureau of Land Management," accompanied by the requisite filing fees, was filed in the Departmental mail room, Washington, D.C., on July 6, 1970.

The Department's rules of practice in effect at the time of the State Office decisions provided that appeals to the Director, Bureau of Land Management, be filed, together with payment of a filing fee, in the office of the officer who made the decision appealed from. Each decision here involved specifically directed that any appeal must be filed in the Alaska State Office within 30 days from date of receipt of the decision. When no appeals were received in the Alaska State Office during the period allowed, the cases were closed of record and refunds of the advance rental payments were directed.

The Board of Land Appeals received the notice of appeal by Carlson on July 14, 1970, but did not ascertain that the document should have been filed in the Alaska State Office, Bureau of Land Management, until after July 27, 1970.

The Department has many times been confronted with cases under its rules of practice where the appellant erroneously filed in one office documents which should have been filed in another office, and, by the time the documents had been forwarded to the proper office, the time for filing had expired. Consistently in such cases the Department held that the appeal has not been timely filed. *Malcolm C. Petrie*, 67 I.D. 220 (1960); *Wilbert Phillips et al.*, 64 I.D. 385 (1957); *United States* v. *August Ebbert and Verdabelle Ebbert*, A-30984 (June 3, 1968).

This appeal was improperly filed with the Director, Bureau of Land Management, and by the time it was ascertained that the document should have been filed in the Alaska State Office, Bureau of Land Management, the period for filing the notice of appeal had expired. As the appeal was not forwarded to the proper office so as to be timely received there, it must be dismissed. 43 CFR 1842.4(c).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the appeal is dismissed.

FRANCIS E. MAYHUE, *Member.*

WE CONCUR:

MARTIN RITVO, *Member.*

EDWARD W. STUEBING, *Member.*

W. A. HUDSON, II
W. A. HUDSON
EDWARD R. HUDSON

IBLA 70-334
70-335
70-336

Decided January 15, 1971

Mineral Leasing Act for Acquired Lands: Consent of Agency

The Secretary of the Interior exercises discretion in determining whether or not acquired lands under his jurisdiction should be opened to prospecting for sulphur, and where it is determined by the Bureau of Reclamation that lands under its administrative jurisdiction should not be opened to such prospecting because of potential damage to its surface works, and where the Geological Survey concurs in such recommendation, applications for sulphur prospecting permits on such lands will be rejected in the absence of compelling reasons otherwise.

BOARD OF LAND APPEALS

Separate appeals to the Director, Bureau of Land Management,[1] have been filed by W. A. Hudson, II (IBLA 70-334), W. A. Hudson (IBLA 70-335), and EDWARD R. HUDSON (IBLA 70-336), from separate decisions by the Chief, Branch of Minerals, New Mexico land office, Bureau of Land Management, dated March 25, 1969, which rejected their respective applications for sulphur prospecting permits on 1,386.29 acres of acquired lands of the United States in Tom Green County, Texas, within the San Angelo Project because the Bureau of Reclamation, the agency exercising jurisdiction over the surface of the lands, has refused to give consent to issuance of such permits. Because the three appeals involve identical issues concerning the consent of an agency to an acquired lands prospecting permit, and a joint statement of reasons for the appeals has been submitted, the appeals have been consolidated for the purpose of this decision.

Appellants state that the Bureau of Reclamation refused to consent to issuance of the permits because it feared interference with its surface use of the lands due to subsidence from removal of sulphur at depth. They argue to the contrary, stating:

It is the writer's understanding, based on a reading of attached letters and conversations with geologists familiar with the area, that free sulphur, if it exists on the subject tracts, has been deposited by percolating sulphur-rich ground water in preexisting pore spaces (vugs and Fractures) in the Clearfork limestone. Further, that prior to and during this secondary deposition, the overburden which was supported by the Clearfork formation was greater than it is today, due to subsequent diminution by erosion. Thus, even assuming a super-

[1] The Secretary of the Interior, in the exercise of his supervisory authority, transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management, on July 1, 1970, to the Board of Land Appeals, effective the same date. Circular 2273, 35 F.R. 10009, 10012.

rich concentration of 25% free sulphur, its removal by Frasch process would leave intact the original host rock skeleton, with little or no reduction in its competence.

Sulphur core drilling has occurred in this area, and the largest areal extent of probable commercial sulphur encountered is four to five acres. Mining such a deposit or a somewhat larger one would not cause a threat of subsidence. In the improbable event of encountering a deposit substantially larger than this, further engineering and geological work would be possible based on actual known and existing conditions prior to issuance of the actual lease. A decision based on such information and the probable value of the sulphur to the operator and royalty owner could be made at that time.

Their position is buttressed by written statements from Harry A. Miller, Jr., a geologist, and from Clyde S. McCall, Jr., a consulting engineer.

A supplemental report from the Commissioner of Reclamation agrees generally with the subsurface petrologic data submitted by the appellants, but suggests:

Extraction of sulphur would create voids in a highly skeletonized pattern following fractures, joints, and porous vuggy bedding in the rock. Porosity and permeability would be greatly increased. At the relatively shallow depths of 300 to 1,500 feet, the multitude of voids created by sulphur removal would cause relaxation of the structural framework and weakening of the rocks. This relaxation and weakening would probably result in opening up vertical joints extending downward to depth of sulphur removal. Eventually, surface subsidence might occur. However, more surely, gaping joints and fissures would develop; those in vicinity of Bureau-constructed works and privately owned building would result in damages. Equally important would be pollution of Twin Buttes Reservoir by following artesian sulphur water and salt water welling up along joints and fissures.

The Commissioner indicates that normal prospecting activities could be detrimental to the Bureau of Reclamation programs:

Prospecting, developing, and producing sulphur requires drilling of test holes and wells for injection and mining. Test holes may or may not be permanently cased; moreover, when abandoned they may or may not be effectively sealed permanently. Injection and production wells normally have permanent steel casing cemented in place; nonetheless, over periods of years, steel casing corrodes and fails and furthermore, over the long term cement deteriorates under the attack of sulphur water. Serious pollution problems of flowing sulphur water and salt water from abandoned test holes and wells cannot be discontinued.

He then reiterates his original recommendation that no prospecting permits for sulphur should be allowed for acquired lands in the Twin Buttes Dam and Reservoir area.

The Director, Geological Survey, after reviewing both the appellants' contentions and the Commissioner's supplemental report, states:

In short the Bureau of Reclamation contends that sulfur prospecting or mining operations on these lands could cause damage to surface installations by ground subsidence as well as pollution of reservoir waters by sulfur and other saline compounds.

January 15, 1971

We recognize that sulfur mining operations in the United States which utilize the Frasch process do cause surface subsidence in some instances. Whether or not this would happen on the lands under application is difficult to predict with the information presently available. However, since a possibility of surface subsidence under the reservoir and only a mile from the dam does exist, we believe that the public interest would not be served by the issuance of sulfur prospecting permits which would entitle the permittees to a preference right lease if valuable deposits of sulfur were discovered on the lands.

We feel it would, at this time, be much more equitable to reject the permit applications at the onset rather than to deny or strongly circumscribe subsequent preference right lease applications after time and money have been spent prospecting and sulfur deposits may have been discovered on the lands.

It is within the discretion of the Secretary of the Interior to issue leases or prospecting permits on acquired lands of the United States, subject to the limitations imposed by the Mineral Leasing Act for Acquired Lands, 30 U.S.C. sec. 351, *et seq.* (1964). *Alexander Grinstein*, A–27037 (March 7, 1955).

Even if it could be determined that exploration for and extraction of sulphur from the subject lands would not interfere with surface use thereof by the Bureau of Reclamation, engender subsequent water pollution problems through subsurface seepage, or cause subsidence to the detriment of the adjacent Twin Buttes Dam and other surface structures, and even though the Secretary of the Interior clearly has authority to issue the requested permits, he is not required to do so. His discretionary authority to refuse to issue a prospecting permit is well established. *Pease* v. *Udall*, 332 F.2d 62 (9th Cir. 1964); *Duesing* v. *Udall*, 350 F.2d 748 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966); *cf. Thomas D. Chace*, 72 I.D. 266 (1965).

It has not been shown by the appellants that any compelling public interest requires the issuance of the prospecting permits, nor has it been shown conclusively that impairment to Bureau of Reclamation structures will not occur if prospecting activities are undertaken. Rejection of the applications was well within the Secretary's discretionary authority. The Secretary of the Interior may, in the exercise of his discretion, refuse to issue prospecting permits for lands which are subject to permit and lease under the Mineral Leasing Act for Acquired Lands, *supra*, where such prospecting may cause hidden or latent damage to Bureau of Reclamation structures or projects for which the lands were acquired by the United States. *Cf. H. T. Birr, III, et al.*, A–27947 (July 23, 1959); *John R. Roderick and C. Calvert Knudsen*, A–29044 (March 1, 1963).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decisions appealed from are affirmed.

NEWTON FRISHBERG, *Chairman.*

WE CONCUR:

MARTIN RITVO, *Member.*

EDWARD W. STUEBING, *Member.*

APPLICABILITY OF THE WHOLESOME MEAT ACT OF 1967 ON INDIAN RESERVATIONS

Indian Lands: Generally—Statutes—Act of December 15, 1967

The Secretary of Agriculture is not authorized or required to conduct meat inspection programs on Indian reservations under the provisions of the Wholesome Meat Act of 1967, 81 Stat. 584, 21 U.S.C. secs. 601–691 (Supp. V. 1965–1969).

Indians: Civil Jurisdiction—Indians: Criminal Jurisdiction—Indian Lands: Generally—Statutes—Act of August 15, 1953—Act of December 15, 1967—Regulations: Generally—Act of February 15, 1929

States which have assumed the requisite jurisdiction over Indian country under Public Law 280 (Act of August 15, 1953, 67 Stat. 588, as amended, 18 U.S.C. sec. 1162 and 28 U.S.C. sec. 1360) or under the Civil Rights Act of 1968 (Act of April 11, 1968, 82 Stat. 77–81, 25 U.S.C. secs. 1321–1322 (Supp. V., 1965–1969)) are required by the Wholesome Meat Act of 1967 to enforce their meat inspection laws on Indian reservations if the enforcement does not involve the regulation of property held in trust by the United States for the benefit of the Indians. States which have not assumed the aforementioned jurisdiction over Indian country are not authorized or required by the Wholesome Meat Act of 1967 to enforce their meat inspection laws on Indian reservations unless the Secretary of the Interior were to enact regulations authorizing such enforcement under the authority granted him by the Act of February 15, 1929, 45 Stat. 1185, as amended, 25 U.S.C. sec. 231.

M–36811 *February 1, 1971*

Mr. EDWARD M. SHULMAN, *General Counsel,*
United States Department of Agriculture,
Washington, D.C. 20250.

DEAR MR. SHULMAN:

We have considered your letter of February 25, 1970, requesting our opinion on the applicability on Indian reservations of the Wholesome Meat Act of December 15, 1967, 81 Stat. 584, 21 U.S.C. secs. 601–691

February 1, 1971

(Supp. V. 1965–1969) (originally enacted as the Act of March 4, 1907, 34 Stat. 1260–1265, as amended, 21 U.S.C. secs. 71–91). You raise two questions which for convenience we shall consider in reverse order.

1. *Does the Wholesome Meat Act of 1967 require the Secretary of Agriculture to conduct meat inspection programs on Indian reservations?*

Nowhere in the act or in its legislative history is there any reference to Indians or Indian reservations, thus raising the question of whether legislation which makes no mention of Indians or Indian reservations applies to them. There is case law which indicates that general acts of Congress do not apply to Indians unless Congress has manifested an intent to include them.[1] However, the recent trend indicates that general acts of Congress applying to all persons includes Indians and their property interests.[2] There is, however, limiting language in 21 U.S.C. sec. 601(g) and (h) which indicates that the Secretary of Agriculture is *not* authorized or required to conduct meat inspection programs on Indian reservations.

The act provides that the Secretary of Agriculture must appoint inspectors to conduct ante-mortem and post-mortem examinations and inspections of various animals and meat food products prepared for "commerce" in any slaughtering, meat-canning, salting, packing, rendering or similar establishment. 21 U.S.C. secs. 603, 604 and 606. In the definition, section 21 U.S.C. sec. 601(h) provides:

> The term "commerce" means commerce between any State, and *Territory*, or the District of Columbia, and any place outside thereof; *or within any Territory not organized with a legislative body*, or the District of Columbia. (Italics added)

The act defines "Territory" in 21 U.S.C. sec. 601(g), which states:

> The term "Territory" means Guam, the Virgin Islands of the United States, American Samoa, *and any other territory or possession of the United States*, excluding the Canal Zone. (Italics added)

We do not read these definitions as including Indian reservations. *Ex Parte Morgan*, 20 Fed. 298, 305–306 (W.D. Ark. 1883); *In re Lane*,

---

[1] *Elk* v. *Wilkins*, 112 U.S. 94, 100 (1884); *McCandless* v. *United States ex rel. Diabo*, 25 F. 2d 71 (3d Cir. 1928), *aff'g sub nom, United States ex rel. Diabo* v. *McCandless*, 18 F. 2d 282 (E.D. Pa. 1927); *United States* v. *5,677.94 Acres of Land*, 162 F. Supp. 108, 110–111 (D. Mont. 1958); *Seneca Nation of Indians* v. *Brucker*, 162 F. Supp. 580, 581–582 (D. D.C. 1958), *aff'd*; 262 F. 2d 27 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 909 (1959); and *Nicodemus* v. *Washington Water Power Co.*, 264 F. 2d 614, 617 (9th Cir. 1959).

[2] *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870); *Choteau* v. *Burnet*, 283 U.S. 691 (1931); *Superintendent* v. *Commissioner*, 295 U.S. 418, 420 (1935); *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 115–118, 120 (1960); *Navajo Tribe* v. *N.L.R.B.*, 288 F. 2d 162, 164–165 n. 4 (D.C. Cir. 1961), *cert. denied*, 366 U.S. 928 (1961); *Commissioner* v. *Walker*, 326 F. 2d 261, 263 (9th Cir. 1964); *Colliflower* v. *Garland*, 342 F. 2d 369, 376 (9th Cir. 1965); *Holt* v. *Commissioner*, 364 F. 2d 38, 40 (8th Cir. 1966), *cert. denied*, 386 U.S. 931 (1967); and *Mann* v. *United States*, 399 F. 2d 672, 673 (9th Cir. 1968).

135 U.S. 443, 447–448 (1890). Since an Indian reservation is not included within the definition of "Territory" under 21 U.S.C. sec. 601(g), the definition of "commerce" in 21 U.S.C. sec. 601(h) as "* * * commerce between any * * * Territory * * * and any place outside thereof * * *" cannot mean commerce flowing from or to an Indian reservation and any place within the same state but outside the reservation.

In the exercise of its plenary power over Indian affairs and property, the Congress has assigned the management of Indian affairs to the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior. 25 U.S.C. sec. 2; Reorganization Plan No. 3 of 1950, 5 U.S.C. 1332–15, note. If Congress had intended, through the Wholesome Meat Act, to give the Secretary of Agriculture any regulatory authority over Indian reservations, we think it would have done so by a specific grant of power in the act.

For these reasons, we conclude that the Secretary of Agriculture is not authorized or required to conduct meat inspection programs on Indian reservations under the provisions of the Wholesome Meat Act of 1967, except as hereinafter provided.

2. *Does the Wholesome Meat Act of 1967 require the states to conduct meat inspection programs on Indian reservations within their borders?*

The relevant provisions are contained in 21 U.S.C. sec. 661. This section authorizes the Department of Agriculture to cooperate with appropriate state agencies in developing and administering a state meat inspection program in any state which has enacted a meat inspection law imposing mandatory inspection and sanitation requirements for *intrastate* operators, at least equal to the Federal requirements under 21 U.S.C. ch. 12, subch. I. 21 U.S.C. sec. 661(a)(1). Section 661(c)(1) provides for the extension of the Federal standards to *intrastate* operations and transactions within two years after enactment of the Wholesome Meat Act, if the Secretary believes that a state has failed to develop or is not enforcing with respect to all establishments *within its jurisdiction*, requirements at least equal to those imposed under 21 U.S.C. ch. 12, subchs. I and IV. The adequacy of the state system would be determined by the Secretary after consultation with the governor, and the provisions of 21 U.S.C. ch. 12, subchs. I and IV, would become applicable to *intrastate* transactions 30 days after publication in the *Federal Register* of the Secretary's designation of the state. If the Secretary has reason to believe that the state will activate the requirements within one additional year, he may delay the designation for that period of time. If the state subsequently established a system equal to Federal standards, the designation could be revoked. 21 U.S.C. sec. 661(c)(1). After the initial period, the Fed-

eral system could be made applicable or inapplicable as required by the adequacy or inadequacy of the state system.

As far as the breadth of the state inspection is concerned, the crucial wording is contained in the first part of 21 U.S.C. sec. 661(c)(1):

> If the Secretary has reason to believe, by thirty days prior to the expiration of two years after enactment of the Wholesome Meat Act, that a State has failed to develop or is not enforcing, with respect to all establishments *within its jurisdiction* (except those that would be exempted from Federal inspection under subparagraph (2)) * * * requirements at least equal to those imposed under subchapters I and IV of this chapter, he shall promptly notify the Governor of the State of this fact. If the Secretary determines, after consultation with the Governor of the State, or representative selected by him, that such requirements have not been developed and activated, he shall promptly after the expiration of such two-year period designate such State as one in which the provisions of subchapters I and IV of this chapter shall apply to operations and transactions wholly within such State: * * *. (Italics added)

Since a state must develop and enforce requirements at least equal to the Federal standards on all establishments *within its jurisdiction*, the question is whether such an establishment, if located on an Indian reservation, is within the jurisdiction of the state? A categorical answer cannot be given.

The Act of August 15, 1953, 67 Stat. 588, as amended, 18 U.S.C. sec. 1162 and 28 U.S.C. sec. 1360 (commonly referred to as Public Law 280), invested those states which were granted or have assumed jurisdiction thereunder, with civil and criminal jurisdictiton over the persons and private (non-trust) property of Indians within the Indian country.[3]

This Department has recently held that Public Law 280 invested the State of California with jurisdiction to enforce its health and sanitation laws and regulations against the *person* of Indians in the Indian country. However, we concluded that the State of California does not have authority, directly or indirectly, to enforce such laws against property held in trust by the United States for the benefit of the Indians. See Solicitor's Opinion, M-36768 (February 7, 1969), copy enclosed. On page 28 (Unpublished) of that opinion we stated:

> In our view both the language of Public Law 280 and its legislative history make quite clear that it was not intended to invest the states with jurisdiction over trust property. This Department consistently has held that the statute furnishes no basis for the application of state or local zoning, construction, or

[3] States can no longer unilaterally assume jurisdiction over Indian country under Public Law 280 since this power was repealed by the Act of April 11, 1968, 82 Stat. 77, 79, 25 U.S.C. § 1323(b) (Supp. V, 1965-1969) (commonly known as the Civil Rights Act of 1968). However, this act does grant states the right to assume civil and criminal jurisdiction over Indian country, but *only* with the consent of the Indian tribe. 25 U.S.C. §§ 1321, 1322.

other land use laws, regulations, or standards to trust property. Authority with respect to such property is reposed exclusively in the Federal and tribal governments. See 25 CFR 1.4 and 30 F.R. 8722 (No. 131, July 9, 1965).[4]

Accordingly, those states which have assumed jurisdiction over Indian country under Public Law 280 or under the Civil Rights Act of 1968 are required by the Wholesome Meat Act to enforce their meat inspection laws on Indian reservations, *if* the enforcement does not involve the regulation of trust property in any significant way.[5] In these states, and these states only, we conclude that the operation of meat processing establishments on Indian reservations is *within that state's jurisdiction* as contemplated by 21 U.S.C. sec. 661(c)(1).

What if a state, which has jurisdiction over Indian reservations, refuses to enforce its meat inspection laws on the reservation? Section 661(c)(1) makes it clear that the Secretary of Agriculture can designate that state as one in which the provisions of 21 U.S.C. ch. 12, subchs. I and IV would then become applicable. Since subchs. I and IV require affirmative action on the part of the Secretary of Agriculture, he would have jurisdiction over the Indian reservations in these states to the extent specified in the aforementioned subchapters. To hold otherwise would mean that there would be no penalty for a state which refused to enforce its laws on a particular Indian reservation.

What about states which have not assumed the requisite jurisdiction over Indian country?

Congress has given the Secretary of the Interior discretionary authority to allow state agents to enter upon Indian reservations for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations. Act of February 15, 1929, 45 Stat. 1185, as amended, 25 U.S.C. sec. 231. We believe that meat inspections come within the scope of this section. We do not believe Congress intended, by the passage of the Wholesome Meat Act, to limit the powers already granted to the Secretary of the Interior under 25 U.S.C. sec. 231. The law does not favor repeals by implication. *United States* v. *Healey*, 160 U.S. 136, 146–147 (1895); *United States* v. *Greathouse*, 166 U.S. 601, 605–606 (1897); and *Washington* v. *Miller*, 235 U.S. 422, 428 (1914).

We, therefore, conclude that the Secretary's authority under 25 U.S.C. sec. 231 controls in those states which have not assumed the

[4] See also *Snohomish County* v. *Seattle Disposal Co.*, 425 P.2d 22 (Wash. 1967), *cert. denied*, 389 U.S. 1016 (1967).

[5] A caveat is in order here. Both Public Law 280 and the Civil Rights Act of 1968 provide for *partial* as well as *full* assumption of state jurisdiction over Indian country. A state which has only assumed partial jurisdiction may not have obligated itself to enforce meat inspection laws or laws of a similar nature on the reservations. These states must be treated in the same manner as those which have not assumed jurisdiction under the aforementioned acts.

essential jurisdiction over Indian country under Public Law 280 or under the Civil Rights Act of 1968. Since the Secretary has not adopted any regulations implementing the provisions of this section, these states are without authority to inspect meat processing establishments on Indian reservations within their borders. We could, however, recommend that the Secretary of the Interior adopt such regulations authorizing state agents to enforce such meat inspection standards on Indian reservations as the Secretary of Agriculture deems necessary. Your Department's jurisdiction over those states would then be equivalent to that possessed over states which have assumed jurisdiction under Public Law 280 or under the Civil Rights Act of 1968.

Conclusion

In summary, we are of the opinion that the Secretary of Agriculture, except as hereinafter provided, is *not* authorized or required to conduct meat inspection programs on Indian reservations under the provisions of this act. States which have assumed jurisdiction over Indian country under Public Law 280 or under the Civil Rights Act of 1968 *are* required by 21 U.S.C. sec. 661(c)(1) to enforce their meat inspection laws on Indian reservations, but *only* if the enforcement does not, directly or indirectly, involve the regulation of trust property in any significant way. The Secretary of Agriculture can enforce the provisions of 21 U.S.C. ch. 12, subchs. I and IV, in any of these states which may refuse to enforce their laws on the reservations.

States which have not assumed the aforementioned jurisdiction over Indian country are not authorized or required, by the Wholesome Meat Act, to enforce their meat inspection laws on Indian reservations within their borders. However, we could, if your Department so desires, recommend that the Secretary of the Interior enact regulations authorizing state agents to enforce such meat inspection standards as the Secretary of Agriculture deems necessary.

For your convenience, we have enclosed a list of the states which have assumed some measure of jurisdiction over Indian country under Public Law 280. This list must be reviewed periodically, however, as retrocessions of and additions to state jurisdiction may occur at any time.

Sincerely yours,

RAYMOND C. COULTER,
Deputy Solicitor.

STATES HAVING CIVIL OR CRIMINAL JURISDICTION OVER INDIANS ON THEIR RESERVATIONS

State	Reservation	Type of jurisdiction	Authority
Alaska	All Indian country	Civil	Public Law 280, 67 Stat. 588, 18 U.S.C. § 1162 & 28 U.S.C. § 1360.
	All Indian country, except that on Annette Islands, the Metlakatla Ind. Community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which state jurisdiction has not been extended.	Criminal	Act of Nov. 25, 1970, 84 Stat. 1358.
Arizona	All Indian tribal lands, reservations and allotments.	Enforcement of state laws relating to air & water pollution.	A.R.S. §§ 36-1801, 1865 (pursuant to Public Law 280).
California	All Indian country	Civil and criminal	Public Law 280, 67 Stat. 588, 18 U.S.C. § 1162 & 28 U.S.C. § 1360.
Florida	All Indian reservations	Civil and criminal	F.S.A. § 285.16; P.L. 280.
Idaho	All Indian country (as defined in 18 U.S.C. § 1151).	Civil and criminal enforcement of laws concerning the following matter: A. Compulsory school attendance. B. Juvenile delinquency and youth rehabilitation. C. Dependent, neglected and abused children. D. Insanities & mental illness E. Public assistance F. Domestic relations G. Operation & Management of motor vehicles upon highways & roads maintained by the county or state, or political subdivisions thereof.	Idaho Code §§ 67-5101 to 67-5103.
Iowa	Sac and Fox	Criminal (except U.S. courts retain jurisdiction over offenses defined by the laws of the U.S. committed by or against Indians on Indian reservations).	Act of June 30, 1948, 62 Stat. 1161.
		Civil	I.C.A. §§ 1.12, 1.15 (pursuant to Public Law 280).
Kansas	All Indian reservations	Criminal (except U.S. courts retain jurisdiction over offenses defined by the laws of the U.S. committed by or against Indians on Indian reservations).	Act of June 8, 1940, 54 Stat. 249.

ON INDIAN RESERVATIONS

February 1, 1971

State	Reservation	Type of jurisdiction	Authority
Minnesota	All Indian country except the Red Lake Reservation.	Civil & Criminal	Public Law 280.
Montana	Flathead	Criminal	R.C.M. § 83-801 (pursuant to Public Law 280).
Nebraska	All Indian country within the state. However, Nebraska retroceded all criminal jurisdiction over that part of the Omaha Indian Reservation lying in Thurston County except offenses involving the operation of motor vehicles on public roads or highways. 35 F.R. 16598 (1970).	Civil and Criminal	Public Law 280.
Nevada	Winnemucca Colony, Battle Mountain, Elko Colony, Ruby Valley, South Fork, Odgers Ranch, Ely Colony, Goshute, Reno Sparks Colony, Washoe Tribal Farm, Pine Nut allotments, Dresserville Colony, Carson Colony, Duckwater, Yomba, Lovelock Colony.	Civil and Criminal over all Indian country. However, prior to the effective date of the Nevada statute (90 days after July 1, 1955), a county may petition the governor to exclude the Indian country within that county from state jurisdiction. The governor may then exclude such Indian country from state jurisdiction if he issues a proclamation to that effect before the effective date of the Nevada statute. Any area of Indian country so excluded may, by subsequent proclamation of the governor at the request of a county, become subject to state jurisdiction.	N.R.S. § 41.430 (pursuant to Public Law 280).
New York	All Indian reservations	Civil and Criminal	Act of July 2, 1948, 62 Stat. 1224, 25 U.S.C. § 232 (1964); Act of Sept. 13, 1950, 64 Stat. 845, 25 U.S.C. § 233 (1964).
New Mexico	All Indian reservations	New Mexico claims jurisdiction over Indians committing the following offenses, whether *on or off* the reservation: A. Murder. B. Manslaughter. C. Rape. D. Assault with intent to kill. E. Arson. F. Burglary. G. Larceny. The validity of this assertion of jurisdiction is questionable since Congress has made these crimes committed in Ind. country triable in the federal courts, thus presumably excluding state jurisdiction. 18 U.S.C. § 1153 (1964).	N.M.S.A. (1953) § 41-21-7.

State	Reservation	Type of jurisdiction	Authority
North Carolina	Cherokee	Civil and Criminal	*In re McCoy*, 233 F. Supp. 409 (E.D.N.C. 1964), & authorities cited therein including the Treaty of New Echota of 1835, 7 Stat. 478.
Oklahoma	All (no reservations, trust allotments only remaining).	Civil and Criminal	See Departmental letter of 8-17-42 to Justice Dept. & letter from Governor of Okla. in 1953 (in Pub. Law 280 legislative files).
Oregon	All Indian country except the Warm Springs Reservation.	Civil and Criminal	Public Law 280.
Washington	Chehalis	Civil and Criminal	Ch. 240, Wash. Laws of 1957; Public Law 280.
	Lower Elwha	do	Do.
	Muckleshoot	do	Do.
	Nisqually	do	Do.
	Port Gamble	do	Do.
	Quileute	do	Do.
	Squaxin Island	do	Do.
	Skokomish	do	Do.
	Suquamish	do	Do.
	Tulalip	do	Do.
	Colville	do	Do.
	Swinomish	Criminal only	Do.
	All others	Civil and Criminal only on non-trust land and on trust land in the the following areas: A. Compulsory school laws. B. Public assistance. C. Domestic relations. D. Mental illness. E. Juvenile delinquency. F. Adoption proceedings. G. Dependent children. H. Operation of motor vehicles on public roads.	Ch. 36, Wash. Laws of 1963, Public Law 280.
	Quinault. Washington retroceded all jurisdiction over the Quinault Reservation except as provided under Chapter 36, Laws of 1963 (RCW 37.12.010-37.12.060). 34 F.R. 14288 (1969).		
Wisconsin	All reservations	Civil and Criminal	Public Law 280.

M-36768 *February 7, 1969*

To: Assistant Secretary, Public Land Management.

Subject: Applicability of Health and Sanitation Laws of the State of California on Indian Reservations.

This is in response to your request for an opinion on the questions raised in the letter of March 26, 1968, from Jan Stevens, the Deputy Attorney General of California, to the Secretary. Mr. Stevens raised the same questions directly with this office by a letter dated August 21, 1968. We are advised that representatives of the California Attorney General's Office have also discussed the subject with the Regional Solicitor, Sacramento.

In his letter of March 26, 1968, Mr. Stevens requested the views of this Department on whether the health and sanitation laws and regulations of the State of California are applicable on Indian reservations and trust lands, and whether county health officers may enter such reservations and lands for the purpose of enforcing such laws and regulations. He directed attention to Public Law 280 (Act of August 15, 1953, 67 Stat. 589, as amended, 18 U.S.C. 1162 and 28 U.S.C. 1360).

Also germane is the Act of February 15, 1929, 45 Stat. 1185, as amended, 25 U.S.C. 231, which provides:

> The Secretary of the Interior, under such rules and regulations as he may prescribe, shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments therein (1) for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations * * *.

Generally, it is the position of this Department that Public Law 280 invests the states, which were granted or have assumed jurisdiction thereunder, with civil and criminal jurisdiction over the persons and private (non-trust) property of Indians within the Indian country.

Jurisdiction over trust property, including authority to regulate its use, was largely unaffected by the Act and remains as and where it was prior to its passage. *Snohomish County* v. *Seattle Disposal Company*, 425 P.2d 22 (Wash. 1967), *cert. denied*, 389 U.S. 1016 (1967). Such property, whether real or personal, is owned by the United States and held and administered for the benefit of individual Indians or groups

of Indians for the purpose of carrying out the policies and discharging the responsibilities of the National Government.

Under and subject to the Constitution, Congress possesses plenary power over Indian affairs and property. The trust relationships which exist between the National Government and the Indian people, both groups and individuals, are devices created by Congress to assure that property granted to or reserved by Indians will be preserved in such manner as to be capable of conveyance to the beneficiaries upon termination of the trust free and clear of burdens and impediments. Congress has assigned principal responsibility and authority to the Secretary of the Interior to secure this objective and to discharge the special obligations which the Nation has undertaken to its Indian citizens.

In our view both the language of Public Law 280 and its legislative history make quite clear that it was not intended to invest the states with jurisdiction over trust property. This Department consistently has held that the statute furnishes no basis for the application of state or local zoning, construction, or other land use laws, regulations, or standards to trust property. Authority with respect to such property is reposed exclusively in the Federal and tribal governments. See 25 CFR 1.4 and 30 F.R. 8722 (No. 131, July 9, 1965).

On the other hand, it is equally clear that the statute grants comprehensive jurisdiction to the states over the persons and private property of Indians in the Indian country where it is applicable.

Accordingly, the question whether Public Law 280 authorizes the application of California health and sanitation laws and regulations to Indians in the Indian country cannot be answered categorically. The answer must be that such laws and regulations may be enforced against Indians to the extent they operate upon the person. Except as authorized by the Secretary of the Interior, they may not be applied to Indians if their enforcement, directly or indirectly, would impact or involve the regulation of trust property in any significant way. Act of February 15, 1929, *supra*.

As power to enforce is an incident of jurisdiction to legislate, the authority of state officers to enter upon trust lands depends upon whether the entry is made for the purpose of enforcing laws or regulations to which Indians are legally subject. We perceive no impediment to a state health officer's entry upon trust land for the purpose of enforcing a state law against the person of an Indian. But such officer would be without authority to enter for the purpose of taking action which would interfere with the use or possession of trust land or other trust property.

Needless to say, the state and its officers in the guise of enforcing state laws and regulations against persons cannot take actions which in fact expend themselves upon trust property or affect its use or enjoyment in any substantial way.

The Secretary of the Interior has been given broad powers with respect to Indian trust property in aid of his responsibility to discharge the Nation's trust obligations, including the power to make regulations governing its use. 43 U.S.C. sec. 1457; 25 U.S.C. sec. 2.

Section 231 of Title 25 *supra*, was formerly implemented by a regulation which appeared as 25 CFR 84.78 (1949 ed). It provided:

ENFORCEMENT OF STATE HEALTH LAWS. State health authorities are authorized to enter upon Indian tribal lands, reservations or allotments within the respective States for the purpose of making inspection of health conditions looking to the enforcement, except as hereinafter provided, of sanitation and quarantine regulations of the particular State in like manner as such regulations are enforced in the surrounding territory. In connection with and prior to such proposed enforcement, the physician in charge of each reservation shall schedule the State sanitation and quarantine regulations which ought to be enforced upon the reservation together with a statement of any limitations and conditions which should govern the application of such State regulations. Tribal authorities and individual Indians shall be afforded ample opportunity to submit protests or recommendations with respect to specific State regulations thus proposed for extension to the reservation. It shall be the duty of the Superintendent to transmit to the Secretary of the Interior through the Commissioner of Indian Affairs, the schedule of State regulations thus posted, together with any protests or criticisms made by the Indians with respect thereto. Such State regulations as are approved by the Secretary of the Interior shall thereafter be in force upon the reservation subject to such conditions as the Secretary may prescribe. No State law shall be applied within the jurisdiction of any organized tribe which is in conflict with any ordinance or resolution of the tribe. (45 Stat. 1185; 25 U.S.C. 231.)

This regulation was revoked on July 1, 1955, as part of the action taken to effectuate the Act of August 5, 1954, 68 Stat. 674, which provides in part:

* * * That all functions, responsibilities, authorities, and duties of the Department of the Interior, the Bureau of Indian Affairs * * * relating to the maintenance and operation of hospital and health facilities for Indians and the conservation of the health of Indians, are hereby transferred to, and shall be administered by, the Surgeon General of the United States Public Health Service, under the supervision and direction of the Secretary of Health, Education and Welfare * * *.

This statute has never been construed as transferring any jurisdiction over trust land to the Department of Health, Education and Welfare. Such power as exists to regulate the use of such land in aid of health and sanitation remains in the Secretary of the Interior. The

statute is not self executing and in the absence of implementing regulations cannot serve as a source of authority to enforce state health and sanitation laws in Indian country. Solicitor's Opinion, 57 I.D. 162 (1940); *Superior Sand and Gravel Mining Co.* v. *Territory of Alaska*, 224 F.2d 623 (9th Cir. 1955); *Dredge Corporation* v. *Penny*, 362 F.2d 889 (9th Cir. 1966).

It is within the authority of the Secretary to adopt health and sanitation regulations respecting trust property. He cannot, however, provide for the enforcement of laws or regulations against trust land by the creation of liens or similar encumbering devices.

Our conclusion is that Public Law 280 invests the State of California with jurisdiction to enforce its health and sanitation laws and regulations against the person of Indians in the Indian country, but does not authorize the State, directly or indirectly, to enforce such laws against property held in trust by the United States for the benefit of Indians.

RICHMOND F. ALLAN,
Deputy Solicitor.

NINA R. B. LEVINSON
and
CLARE R. SIGFRID

IBLA 70-49 *Decided February 2, 1971*

Color or Claim of Title: Generally

An application to purchase public land under the Color of Title Act is properly rejected when the applicant is unable to show possession under some claim or color of title derived from some source other than the United States and where the claim was initiated while the land was withdrawn as part of a national forest.

Surveys of Public Lands: Generally

Surveys of the United States, after acceptance, are presumed to be correct, and will not be disturbed, except upon clear proof that they are fraudulent or grossly erroneous. Where a public land applicant challenges the validity of a dependent resurvey he must establish by clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey in order to sustain his position.

BOARD OF LAND APPEALS

Nina R. B. Levinson and Clare L. R. Sigfrid appealed to the Secretary of the Interior from a decision of the Office of Appeals and Hear-

ings, Bureau of Land Management, dated April 4, 1969, which affirmed a decision of the Bureau's Denver, Colorado, land office, rejecting appellants' class 1 color of title application.

On August 23, 1968, appellants filed a class 1 application (Colorado 4636) pursuant to the Color of Title Act of December 22, 1928, as amended, 43 U.S.C. sec. 1068 (1964), to acquire SE¼ NE¼ sec. 27, T. 12 N., R. 82 W., 6th P.M., Colorado. Appellants asserted in their application and appeals that the 40 acre tract described as the SE¼ NE¼ sec. 27, T. 12 N., R. 82 W., 6th P.M., is in fact the same 40 acre tract described as the SW¼ NW¼ sec. 26, in the same township, which was originally conveyed to their father, Cooke Rhea, June 6, 1924, by patent No. 939550. Appellants inherited the SW¼ NW¼ from their father in 1933, and assert that they have continuously occupied the tract, adding improvements of approximately 1 mile of fence of $500 value.

Appellants first learned there was a conflict over the land they had occupied as the SW¼ NW¼ sec. 26, in July of 1957 when a dependent resurvey was conducted by the Bureau of Land Management. Since then they have consistently maintained that the confusion in the legal description of the tract they have applied for is a direct result of error in the dependent resurvey. They submit that discrepancies between the resurvey and the original survey have resulted in the mislocation of their patented 40 acre tract causing a westward shift of the tract from its record position into the Routt National Forest.

In a decision of December 18, 1968, the Denver land office rejected appellants' application stating the applicants had failed to meet two basic requirements for a color of title application: (1) that possession must be based on a claim derived from a source other than the United States and evidenced by a written instrument purporting to convey title, and (2) that the SE¼NE¼ sec. 27 was withdrawn in 1904 for a forest reserve and is still withdrawn for national forest purposes and a color of title application cannot be initiated while the land applied for is withdrawn.

The Office of Appeals and Hearings affirmed the land office rulings as to these two basic deficiencies in this color of title application. The decision also emphasized appellants had not presented substantial or convincing evidence that there is any gross error or fraud in the 1882 survey or the 1957 resurvey or that the SE¼NE¼ sec. 27 became the land patented to their ancestor. It concluded appellants had not refuted the fact that the 1957 resurvey represents the restoration of the 1882 survey corners and lines substantially in agreement with the original 1882 survey.

Upon a complete review of the circumstances of this case we find appellants have failed to establish a proper basis for the relief they seek under the Color of Title Act, *supra*. An application under the Color of Title Act, *supra*, is not a proper vehicle for appellants to quiet title to lands they have occupied pursuant to a patent issued from the United States. The basic premise upon which appellants rely is that the resurvey of 1957 is erroneous and they already hold good title to the applied for lands as described and conveyed within the four corners of the patent to their father. Their argument against the resurvey is inconsistent with the filing of a claim under the Color of Title Act, *supra*. If appellants had successfully proved gross error in the resurvey to the point of establishing that their father did acquire title to all of the land they have been occupying as the SW¼NW¼ sec. 26, then the United States would have already divested itself of all right, title and interest in this land. Consequently, a color of title application could not properly be maintained for land in which the United States would have no interest.

Departmental decisions hold that color of title within the meaning of the act cannot be derived from a patent, but must originate in a source other than the United States. *Sylvan A. Hart*, A–30832 (December 1, 1967); *Bernard J. and Myrle A. Gaffney*, A–30327 (October 28, 1965);[1] *Ingrid T. Allen*, A–28638 (May 24, 1962). Color of title by definition is based upon a writing which "upon its face professing to pass title but which does not, either through want of title in the grantor or a defective mode of conveyance." *See* BLACK'S LAW DICTIONARY 332 (4th ed. rev. 1968). A patent from the United States conveys title to all the land described in the patent. It is a well established principle that a patent in which land is described in accordance with the plat of survey conveys all the land within the limits so specified. *Wildman v. Montgomery*, 20 L.D. 230 (1895).

In the instant case patent No. 939550, issued to appellants' father on June 6, 1924, did in fact vest title to the SW¼NW¼ sec. 26, in the patentee for that tract as described in accordance with the official plat of survey. That document cannot now serve as a source of color of title for additional lands that appellants may have occupied outside the limits of the land described as the SW¼NW¼ sec. 26. Under similar circumstances the Department has specifically held that a claim or color of title cannot run to land outside the area described in the deed on which the claim or color of title is based, even though the

[1] A suit for judicial review of the Gaffney case resulted in a stipulated dismissal without prejudice, January 17, 1969. *Bernard J. Gaffney and Myrle A. Gaffney* v. *Stewart Udall*, Civil No. 3–66–22. (D. Minn.)

claimant and his predecessors in title believed in good faith that it was covered by the description in the conveyance. *Storm Brothers*, A–29023 (October 8, 1962).

The Department's regulations implementing the Color of Title Act, *supra*, define a class 1 claim or color of title as "one which 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 20 years, on which valuable improvements have been placed, or on which some part of the land has been reduced to cultivation." "* * * A claim is not held in peaceful adverse possession * * *" where it was initiated while the land was withdrawn or reserved for Federal purposes. 43 CFR 2540.0–5, 35 F. R. 9592 (formerly 43 CFR 2214.1–1 (b)).

Appellants have failed to show that they have held possession of the SE¼NE¼ sec. 27 under a proper claim or color of title initiated prior to the inclusion of that tract in a national forest. For reasons hereinafter more fully discussed, their case against the dependent resurvey of 1957 is insufficient to negate the fact that the land is in the Routt National Forest. The SE¼NE¼ of sec. 27, T. 12 N., R. 82 W., 6th P.M., Colorado, was included within the boundaries of the Park Range Forest Reserve by Presidential Proclamation of June 12, 1905; changed to the Hayden National Forest July 1, 1908, by Executive Order No. 839 of June 25, 1908; and transferred to the Routt National Forest by Presidential Proclamation No. 1888 of August 2, 1929. Even if there were no other objections to this application, appellants cannot establish the fact of peaceful adverse possession as required by the law and the regulations. As the Bureau correctly pointed out a color of title application cannot be approved or allowed for land which was reserved and set apart as a public reservation of forest land before the initiation of the claims described in the application. *Lester J. Hammel*, 74 I.D. 125 (1967), and cases cited therein.

While the foregoing discussion is dispositive of this matter, the crux of appellants case rests on their challenge of the dependent resurvey of T. 12 N., R. 82 W., 6th P.M., Colorado, as executed by Clyde Duren Jr., in July of 1957, and accepted by the Bureau October 7, 1958. Here, we must first point out that where appellants base their claim on a contention that a government survey is incorrect they have the burden of proving wherein the survey is erroneous. It has long been established by the Department that surveys of the United States, after acceptance, are presumed to be correct, and will not be disturbed, except upon clear proof that they are fraudulent or grossly erroneous. *George S. Whitaker*, 32 L.D. 329 (1903); *State of Louisiana*, 60 I.D. 129

(1948); *Ralph E. May, C. S. McGhee*, A–29014 (January 30, 1962). Appellants have not met this burden. They have completely failed to establish gross error or fraud in the Duren resurvey. They have not shown by clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the original lines of survey for T. 12 N., R. 82 W., 6th P.M., Colorado.

The Duren resurvey of T. 12 N., R. 82 W., was initiated at the request of the Forest Service, U.S. Department of Agriculture. It was conducted in accordance with the established rules of survey as set forth in the U.S. DEPARTMENT OF INTERIOR, BUREAU OF LAND MANAGEMENT, MANUAL OF INSTRUCTIONS FOR THE SURVEYING OF PUBLIC LANDS OF THE UNITED STATES, (1947), hereinafter referred to as the "*Bureau's Survey Manual.*" The purpose of a dependent resurvey as specified in sec. 400 of the *Bureau's Survey Manual* is:

> * * * to accomplish a restoration of what purports to be the original conditions according to the record, based, first upon identified existing corners of the original survey and other recognized and acceptable points of control, and second, upon the restoration of missing corners by proportionate measurement in harmony with the record of the original survey.

In this case it appears from the record that the surveyor followed procedures consistent with accepted surveying practice in order to achieve this purpose.

The resurvey was not intended to change the boundaries of privately owned lands described and patented according to the original survey of T. 12 N., R. 82 W., as executed by Henry G. Gilbert in 1882. The Department has continually adhered to the proposition that the Federal Government is without power to affect, by means of a second survey, the property rights acquired under an official survey. *O. R. Williams*, 60 I.D. 301, 303 (1949); *Nelson D. Jay*, A–27468 (December 4, 1957); *United States* v. *Sidney M. and Esther M. Heyser*, 75 I.D. 14, 18 (1968).

We have thoroughly reviewed all the evidence presented by appellants in conjunction with the official records of the plats of survey and the corresponding field notes having a direct bearing on this case.[2] These records do not support appellants' interpretation of the surveys. Appellants' right to the SW¼ NW¼ sec. 26 T. 12 N., R. 82 W., 6th

[2] Official records of field notes and plats of survey were examined for survey of the south boundary and subdivision of T. 12 N., R. 82 W., 6th P.M., Colorado, Henry G. Gilbert, 1882; Dependent Resurvey of the west boundary of 12 N., R. 81 W., 6th P.M., Colorado, John M. Tufts, 1938; Survey of the Colorado-Wyoming State Boundary, A. V. Richards, 1872; and Dependent Resurvey in T. 12 N., R. 82 W., 6th P.M., Colorado, Clyde Duren, Jr., 1957.

P.M., Colorado, as described and conveyed in the patent to their father according to the official plat of survey have not been affected by the dependent resurvey in question.

The field notes of the Duren resurvey, 309 *Colorado Fieldnotes*, p. 441, indicate that Duren first began his resurvey by retracing the boundaries of the original Gilbert survey of T. 12 N., R. 82 W., in an effort to identify any existent corners. Although he was unable to locate the original section corners he did successfully identify and recover an original monument on the south boundary of the survey at the quarter section corner of secs. 2 and 35, Ts. 11 N., and 12 N., R. 82 W., 6th P.M. He retraced the Colorado-Wyoming state line on the north boundary of T. 12 N., R. 82 W., identifying mileposts 131, 133 and 134 from the original survey of the state line of A. V. Richards. He completed the resurvey of the south boundary of T. 12 N., R. 82 W., reestablishing the section corners at record courses and distances from the identified quarter section corner of secs. 2 and 35. He reestablished the latitudinal positions of all of the remaining corners in the township based upon proportionate measurement between the dependently resurveyed south boundary of the township and the Colorado-Wyoming state line. The longitudinal positions of these same corners were determined by record distances from the resurveyed east boundary of the township. It is to be noted that the beginning point of the measurements of all the longitudinal positions of these corners was the common range line between T. 12 N., Rs. 81 and 82 W., where Duren had located and remarked the monuments for the common boundary as originally set by John M. Tufts in his dependent resurvey of T. 12 N., R. 81 W., in 1938.

By using this accepted method working from these various fixed points of reference Duren was able to reestablish the position of the section corners in almost the exact position of the original survey corners.

The subdivision of the fractional township was completed in the normal order prescribed in the *Bureau's Survey Manual* in secs. 175–182. Beginning with sec. 36 at the southeast corner of the township, Duren worked from south to north reestablishing the position of each section in order, closing on the Colorado-Wyoming state line. He resurveyed the adjacent sections, working from south to north, also intersecting the state line. His closing corner positions on the state line were determined in the regular manner from the recognized mileposts of the original boundary survey.

Examination of the plats of survey in light of information of record confirms the power relative position of the Duren resurvey. The clos-

ing corners on the north boundary of T. 12 N., N., R. 82 W., appear on the original Gilbert Survey along the Colorado-Wyoming state line in sec. 22 at a point 29.80 chs. (chains) east of the 133rd milepost, in sec. 23 at a point 29.65 chs. east of the 132nd milepost, and in sec. 24 at a point 30.10 chs. east of the 131st milepost. As the Bureau of Land Management has previously indicated, these same closing corners are established on the state line on the Duren resurvey at distances "substantially in agreement with those shown on the official plat of the original survey." On the Duren resurvey these same closing corners appear in sec. 22 at a point 29.64 chs. east of the 133rd milepost, in sec. 23 at a point 29.49 chs. east of the reset 132nd milepost, and in sec. 24 at a point 29.87 chs. east of the 131st milepost.

In comparing these critical measurements there is little difference between the original and the resurvey closing distances, no more than .23 chs. (15.18 ft.) in any one measurement. Certainly, such a slight variance could not be interpreted as gross error, nor could it possibly have resulted in a westward shift of appellants' patented tract over a distance of a quarter of a mile. In addition, a check against the plat of the Tufts' resurvey of the adjacent township in 12 N., R. 81 W., verifies the proper east-west position of the Duren resurvey. The closing corner of 12 N., R. 81 W., which is also the northeast corner of 12 N., R. 82 W., appears on the Colorado-Wyoming state line at a point 29.91 chs. east of the 131st milepost. This favorably compares to the same measurement by Duren for the corner common to both townships at a point 29.87 chs. east of the 131st milepost. The difference between the two surveyors' measurements is only .04 chs., less than a distance of 3 feet.

Turning next to appellants' specific charges of discrepancies between the surveyors, we note they refer to the position of the Continental Divide on the original survey of the Colorado-Wyoming boundary, by A. V. Richards in 1872. They maintain the divide appears on the Richards' survey approximately 3½ miles east of the 133rd milepost. In their own comparison of the Duren resurvey they conclude that the 133rd milepost "is very considerably further east of the top of the Continental Divide than 3½ miles." First, these are merely general statements of appelants' own approximations of distances which are unsupported by on-the-ground measurements of a qualified surveyor. Appellants' theoretical comparisons will not control over more precise measurements taken from other fixed points of reference as set forth on the official plats of survey. Second, the Continental Divide has no proper relation to the patented tract on the surveys in question. It was not involved in the area of these surveys

and was not used as a reference point for any location of boundaries in T. 12 N., R. 82 W. Therefore, there are no official measurements on the plat of survey or in the field notes that could be compared or verified from the 133rd milepost to the Continental Divide.

Appellants also point to the location of the Town of Pearl, Colorado, stating "The 1957 resurvey places the Town of Pearl in Range 82." The significance of the alleged position of Pearl is not entirely clear from appellants' brief. However, they have apparently attempted to correlate the alleged change in position of their patented land to the location of the Town of Pearl on general reference maps of the State of Colorado and on a private survey of Pearl.[3] Their argument is both ineffective and confusing. The Town of Pearl does not appear within T. 12 N., R. 82 W., on the plat of resurvey. Appellants have apparently misconstrued the location of a reference on the plat to U.S.C. and G.S. triangulation station "Pearl" (S. 63°06'52" E., 33.71 chs.). This reference places the triangulation station of Pearl in T. 12 N., R. 81 W., 33.71 chains from the corners of secs. 25 and 24 on the east boundary of T. 12 N., R. 82 W. This fact is borne out from an examination of the surveyor's field notes p. 442 where he expressly states:

> The direction of all lines were determined by both the transit and solar methods, with the initial azimuth obtained from the U.S.C. & G.S. second order triangulation station "Pearl", *located in the NW¼ of section 30, T. 12 N., R. 81 W.* (Italics added.)

It is a well settled principle that lands are granted according to the official government survey. The plat, itself, with all its notes, lines, descriptions, and landmarks, becomes as much a part of the grant or deed by which they were conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself. *Cragin* v. *Powell*, 128 U.S. 691 (1888). *Also see Alaska United Gold Mining Co. et al.* v. *Cincinnati-Alaska Mining Co. et al.*, 45 L.D. 330 (1916), and cases cited therein. Therefore, in order to determine the limits of the area passed under a patent it is proper to look to the official plats of survey to determine the true location of the patented land. The alleged location of that land or any adjacent landmark on unofficial sources such as these reference maps or a private survey cannot affect its true location on the ground as depicted in the official government survey.

---

[3] Appellants have submitted copies of maps of parts of the State of Colorado including an unidentified map of Nell's Colorado of 1887, a General Land Office map of the State of Colorado of 1905, and a map of the Hayden National Forest, Forest Service, U.S.D.A., 1926. They also submit a plan of the Town of Pearl, Larimer County, Colorado, prepared by J. Phelps Pim. Mining Engineer, December 1900.

Appellants refer to the location of "Beaver Creek" which they state crosses the tract they have occupied from the southwest corner to the northeast corner and appears in the same location on the original Gilbert survey. A stream does appear to cross the SW¼ NW¼ sec. 26 on the Gilbert survey plat. The same stream appears to cross from the SE¼ NE¼ of sec. 27 continuing into the SW¼ NW¼. This topographical feature is not specifically identified in Gilbert's field notes as "Beaver Creek." [4] If appellants had occupied land outside the area of their patent into the SE¼ NE¼ of sec. 27, the stream would also cross the total area of the occupied land in the same relative position, running in a direction from the southwest to the northeast.

The omission of the stream on the resurvey, by itself, does not necessarily prove appellants' theory of the case. The records indicate the two surveys were conducted at different times of the year (the original survey in February, the resurvey in July). It would not be unusual for a stream to dry up in the summer months. Accordingly, there might not be a topographical reference on a survey to a stream during that season of the year. Going a step further, this one omission does not prove the resurvey to be grossly erroneous or fraudulent. This is a reference to an item of topography which would not be controlling in this matter in the face of conflicting measurements of courses and distances from fixed monuments. It has long been accepted by the Department that "items of topography in the interior of sections" are "based upon estimates by the surveyor, rather than upon actual measurements," and represent only an approximation of the actual positions of natural monuments and are not to prevail over courses and distances. *J. M. Beard (On Rehearing)*, 52 I.D. 451 (1928). While the absence of this one topographical reference is a point well taken, the clear preponderance of the evidence supports the validity of the resurvey.

With respect to appellants' request for a hearing, there is no requirement that a hearing be held prior to an adjudication by the Department of an application under the Color of Title Act, *supra*. Appellants have had ample opportunity to submit evidence they deemed pertinent to their case and have offered nothing to contradict the facts upon which the Bureau of Land Management determined this matter. There being no apparent justification for a hearing the request is denied.

---

[4] Gilbert refers to crossing a stream, 3 links wide, course N.E., at a point 45.20 chs. from the corners of secs. 26, 27, 34, 35, while going north between secs. 26 and 27 in his field notes, 156 *Colorado Fieldnotes*, p. 368.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision of the Bureau of Land Management is affirmed.

FRANCIS E. MAYHUE, *Member.*

WE CONCUR:

MARTIN RITVO, *Member.*

JOAN B. THOMPSON, *Alternate Member.*

APPLICABILITY OF THE LIQUOR LAWS OF THE STATE OF MONTANA ON THE ROCKY BOY'S RESERVATION

Indians: Criminal Jurisdiction—Indians: Law and Order—State Laws

The modification of the Federal Indian liquor laws, permitting the introduction, possession and sale of intoxicating beverages on the reservation with tribal consent (act of August 15, 1953, 67 Stat. 586, 18 U.S.C. sec. 1161 (1964)) does not make Montana liquor laws applicable to the Chippewa Cree Tribe or tribal members on the Rocky Boy's Reservation. Rather, this act requires the state liquor laws to be used as the standard of measurement to define lawful and unlawful activity on the reservation. Actions not in conformity with the provisions of applicable state law would subject a tribal member to prosecution only in the Federal courts, not in state courts. Non-Indians would be subject to prosecution in the Federal and state courts, assuming a double jeopardy question is not presented.

Indian Tribes: Generally—Indians: Law and Order—State Laws

A subordinate tribal entity or tribal member licensed by the Chippewa Cree Tribe to operate a liquor establishment on the Rocky Boy's Reservation does not have to obtain a state liquor license.

M-36815 *February 3, 1971*

TO: COMMISSIONER OF INDIAN AFFAIRS.

SUBJECT: SALE OF LIQUOR—ROCKY BOY'S RESERVATION, MONTANA.

We have received your request for our opinion on the Montana Liquor Control Board's authority over the sale of intoxicating beverages by the Chippewa Cree Tribe on the Rocky Boy's Reservation in Montana.

Before 1953, Congress, through the passage of the Federal Indian liquor laws, prohibited the introduction, possession or sale of intoxicating liquor in "Indian country." 18 U.S.C. secs. 1154, 1156, 3113, 3488, 3618 (1964). In 1953, Congress made the Federal Indian liquor laws inapplicable to:

* * * any act or transaction within any area of Indian country *provided such act or transaction is in conformity both with the laws of the State in which such*

act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register. (Italics added). Act of August 15, 1953, 67 Stat. 586, 18 U.S.C. § 1161 (1964).

The Chippewa Cree Tribe passed Ordinance I–70 which was certified by the Commissioner of Indian Affairs on June 16, 1970, and published in the *Federal Register* on June 25, 1970, authorizing the introduction, sale or possession of intoxicating beverages on the Rocky Boy's Reservation (35 F.R. 10384 (1970)). The tribe then requested a liquor license from the Montana Liquor Control Board. The Attorney General of Montana, in answer to inquiries from the administrator of the Montana Liquor Control Board held that 18 U.S.C. sec. 1161 requires the tribe to comply with all the liquor laws of Montana, including the licensing law and quota system prescribed in secs. 4–403 and 420, R.C.M. 1947. Vol. 33, Opinion No. 23, Attorney General of Montana, June 29, 1970. Since there are no licenses available under the aforementioned quota system, the tribe cannot receive a license from the Montana Liquor Control Board.

The first issue presented is the interpretation of 18 U.S.C. sec. 1161, which makes Federal Indian liquor laws inapplicable to acts or transactions "* * * in conformity * * * with the laws of the States in which such act or transaction occurs * * *."

We do not believe Congress, in enacting this law, intended to make state liquor laws applicable to the tribe or tribal members on a reservation when a tribe wished to terminate Federal prohibition. If Congress had intended to impose state law here with state enforcement jurisdiction, we think Congress would have expressly granted jurisdiction to the states under 18 U.S.C. sec. 1161, which it did not do. Rather, we believe the intent was merely to require the state liquor laws to be used as the standard of measurement to define lawful and unlawful activity on the reservation.[1]

If, for example, a tribe has terminated Federal prohibition, and a tribal member commits an act or engages in a transaction in intoxicating beverages which is not in conformance with state law, the member would be subject to prosecution in the Federal courts for violation of the applicable Federal Indian liquor law. See 18 U.S.C. sec. 1154 (1964). However, the tribal member is not subject to prosecution in state court since Montana has not assumed the requisite jurisdiction

[1] *Warren Trading Post Co.* v. *Arizona Tax Commission,* 380 U.S. 685 (1965), contains dictum from Mr. Justice Black who, in discussing the applicability of state laws on Indian reservations, states in footnote 3 on page 687: "Compare, e.g., 18 U.S.C. § 1161 (1958 ed.) (permitting application of *state* liquor *law standards* within an Indian reservation under certain conditions); 45 Stat. 1185, as amended, 25 U.S.C. § 231 (1958 ed.) (permitting application of *state* health and education *laws* within a reservation under certain conditions; * * *." (Italics added.)

over the Rocky Boy's Reservation under either Public Law 280 (act of August 15, 1953, 67 Stat. 588, as amended, 18 U.S.C. sec. 1162 and 28 U.S.C. sec. 1360), or under the Civil Rights Act of 1968 (act of April 11, 1968, 82 Stat. 77–81, 25 U.S.C. secs. 1321–1322). In such a situation, state criminal law does not apply to an Indian in "Indian country." *Federal Indian Law* (1958) 319–322, 512–513.

However, if a non-Indian does not conform with the liquor laws of Montana while on an Indian reservation, the Federal courts and the state courts may both have jurisdiction over him for violations of separate state and Federal law, assuming a question of double jeopardy is not presented. It is well settled that non-Indians are subject to state law when committing crimes within "Indian country." *United States* v. *McBratney*, 104 U.S. 621 (1881); *Draper* v. *United States*, 164 U.S. 240 (1896); *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946).

The question remains as to whether the Montana liquor licensing laws apply to a liquor establishment on the Rocky Boy's Reservation. The power to license subordinate entities is one of the attributes of any sovereign body, including Indian tribes. Solicitor's Opinion, M–36781 (August 25, 1969); 42 C.J.S. *Indians* sec. 12 p. 665 (1944). We believe the tribe, in the exercise of its inherent powers of sovereignty, can license a subordinate entity or tribal member to operate a liquor establishment on the reservation. In such a case, where the liquor establishment is not owned by a non-Indian, a license from the state would not be required. A non-Indian, however, would be required to obtain a state license, whether licensed by the tribe or not, since state laws still apply to him even while on a reservation, *United States* v. *McBratney*, *supra*; *Draper* v. *United States*, *supra*, *New York ex rel. Ray* v. *Martin*, *supra*, unless the business being conducted is subject to exclusive Federal regulation, *Warren Trading Post* v. *Arizona Tax Commission*, *supra*. If the State of Montana insists that a subordinate tribal entity or tribal member obtain a state license, this would be an unlawful infringement on the right of reservation Indians to make their own laws and be ruled by them. *Williams* v. *Lee*, 358 U.S. 217 (1959); *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962); *Littell* v. *Nakai*, 344 F.2d 486 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966); *Arizona ex rel. Merrill* v. *Turtle*, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970).

The legislative history of 18 U.S.C. sec. 1161 contains a letter from the Assistant Secretary of the Interior to the Director, Bureau of Budget, dated August 7, 1953, recommending passage of H.R. 1055

(which eventually was enacted as 18 U.S.C. sec. 1161), in which the Assistant Secretary stated:

> If the Indians on a given reservation wish Federal prohibition to continue on that reservation, all they have to do is refrain from adopting an ordinance to the contrary. If, on the other hand, they wish to terminate Federal prohibition in whole or in part, they have only to adopt an ordinance specifying what transactions in intoxicating liquors they wish to permit on their reservation. These transactions will thereupon cease to be subject to the Indian liquor laws if, and only if, they are permitted by the liquor laws of the State where the reservation is situated. *Thus, the bill recognizes the principle of tribal self-government, but requires that it be exercised in a manner consistent with the public policy of the state.* (Italics added).

If the tribe is required to obtain a license from the state, we do not think that the principle of maintaining tribal self-government in conjunction with supporting the public policy of the state would be recognized as contemplated by the Assistant Secretary in his letter. So it seems clear that the tribe would decide what transactions in intoxicating beverages would be permissible and those transactions alone would have to conform to state law standards. Thus, the policy of state laws covering such items as hours for sale of liquor and legal age limits for sale must be followed, and if they are not the offender would be subject to prosecution for violation of the Federal Indian liquor laws because the act or transaction would not be in the language of 18 U.S.C. sec. 1161, "in conformity with the laws of the State."

We are aware of the Montana Attorney General's reliance on *State ex rel. Kennerly* v. *District Court*, 466 P. 2d 85 (Mont. 1970), for the proposition that Montana has jurisdiction in certain instances over the affairs of Indians in Indian country. On January 18, 1971, the Supreme Court of the United States vacated the judgment of the Supreme Court of Montana in the *Kennerly* case and remanded it for further proceedings. *Kennerly, et al.* v. *District Court*, No. 5370, October Term, 1970.

The petitioners in the *Kennerly* case were members of the Blackfeet Tribe and residents of the reservation, who purchased groceries on credit at a store located on patented land in the incorporated town of Browning, Montana, but within the exterior boundaries of the Blackfeet Indian Reservation. In a suit to collect the debt, filed in state court, the petitioners moved to dismiss on the ground that state courts had no jurisdiction because the defendants were members of the Blackfeet Tribe and the transaction took place on the reservation. The trial court overruled the motion and the State Supreme Court affirmed, relying in part on a tribal council enactment which purported to give state courts concurrent jurisdiction with the tribal court over all actions in which a tribal member is a defendant.

The Supreme Court of the United States, in a per curiam opinion, held that the Montana courts had no jurisdiction because Montana had neither been given nor had assumed by affirmative legislation, with respect to the Blackfeet Reservation, the civil or criminal jurisdiction provided for by the act of August 15, 1953, 67 Stat. 590, as amended, and Title IV of the Civil Rights Act of 1968, 82 Stat. 79, 25 U.S.C. secs. 1321–1326 (Supp. V, 1965–1969).

Montana has not been given and has not assumed civil or criminal jurisdiction over Rocky Boy's Reservation and we are convinced that the *Kennerly* case is authority for our conclusion that it may not require a state license for sales of intoxicating liquors by the tribe or an Indian tribal licensee within the boundaries of the reservation. Being convinced also that Federal law does not require that a state license be required, but only that the acts or transactions be "in conformity with" the standards prescribed by state law, we believe that the tribe can, under the circumstances here considered, permit the sale of liquor on its reservation without violating Federal law.

We realize that the Chippewa Cree ordinance indicates that all laws governing the sale of intoxicating beverages in Montana apply on the Rocky Boy's Reservation. However, this tribal interpretation of law, with which the tribe now apparently disagrees, cannot confer jurisdiction on the State of Montana.

In addition, we note that a former Solicitor, in a letter to Mr. John W. Stilley of the Arizona State Legislature, dated March 26, 1954, stated in answer to a hypothetical question that an Indian desiring to operate a bar on a reservation would have to obtain a state license. This letter, which does not purport to be an official opinion, was written before the landmark cases of the Supreme Court protecting the right of reservation self-government were decided and must be weighed in that context. See *Williams* v. *Lee*, *supra*, and *Organized Village of Kake* v. *Egan*, *supra*. In any event, the views expressed in the 1954 letter of the Solicitor will not be followed to the extent that they conflict with any of the statements and conclusions contained in this opinion.

In summary, we believe that the Chippewa Cree Tribe may license a liquor establishment owned or controlled by the tribe or tribal members on the Rocky Boy's Reservation without obtaining a license from the State of Montana or abiding by the prescribed quota system. If a tribal member commits an act or engages in a transaction not in conformance with Montana law he may be subject to prosecution for violating the Federal Indian liquor laws. In the case of a violation by

a non-Indian, the Federal courts and the state courts would have jurisdiction over him.

MITCHELL MELICH,
Solicitor.

APPEAL OF THE BREZINA CONSTRUCTION CO., INC.

IBCA-757-1-69 *Decided February 17, 1971*

Rules of Practice: Generally—Rules of Practice: Hearings

A motion for reconsideration, requesting a new hearing because of an *ex parte* communication contrary to the Board's rules, which occurred 18 months prior to the issuance of the principal decision and was not objected to until after that decision was rendered, is denied because appellant has failed to allege or show any error of law or fact in the principal decision, or that any actual prejudice to it resulted from the *ex parte* communication.

BOARD OF CONTRACT APPEALS

Brezina Construction Company, Inc., has filed a timely motion for reconsideration of the Board's decision of November 20, 1970, which found in its favor and awarded an equitable adjustment, based on a jury verdict, of $25,000. The motion for reconsideration requested a new hearing because of an *ex parte* communication during the course of the hearing between the hearing official and an employee of the Bureau of Indian Affairs. The hearing was held June 19–20, 1969, but the Board was not advised of the *ex parte* communication until December 23, 1970. Such an *ex parte* communication would be in violation of the Board's rules of conduct if it concerned the merits of the appeal (Rule 4.33, Standards of Conduct).[1]

The communication in question, which did occur, consisted of one or more telephone calls made by the hearing official during the course of the hearing to an administrative official in the Bureau of Indian Affairs. The phone call, or calls, were an attempt by the hearing official to gain the agreement of the Bureau of Indian Affairs to a settlement of the appeal. There is a conflict among the various statements and affidavits as to what amounts were discussed. The value of

[1] At the time the appeal was docketed the comparable provision in our rules read as follows:

"Sec. 4.3 *Standards of Conduct.* No member of the Board shall consider an appeal if he has participated in the awarding or administration of the contract in question. There shall be no communication between any party to an appeal and a Board member or Board employee concerning the merits of the appeal, unless such communication is also formally served upon the other party to the appeal, or is made in the presence of the other party. The Board also shall exercise care to avoid receiving, except as part of the formally established appeal record, any information having a substantial bearing upon an appeal from persons who do not represent a party in the appeal, but nonetheless have an interest in the decision to be rendered. [31 F.R. 9866, July 21, 1966.]"

a claim certainly concerns its merits. Accordingly, Rule 4.33 was indeed violated.

It is the Board's opinion, however, that under the circumstances of this case a new hearing is not warranted. By letter of January 11, 1971, appellant was asked to respond to eight questions.[2] The letter response dated February 8, 1971, by appellant's counsel fails to specify any error of fact or law in the decision, and does not identify any new evidence which may be introduced at a new hearing. In the usual situation this alone would be enough to deny the motion.[3] Appellant has simply failed to show in what way it was prejudiced either procedurally or substantively by the *ex parte* communication.

Appellant's real complaint is lodged in the following paragraph in its letter of February 8, 1971:

> However, Brezina's position is that the amount granted to it by the Board's Decision of November 20, 1970 is inadequate. The rationale of that Decision, contained in the very last paragraph, explicitly indicates that the $25,000 being granted is "a jury verdict award." No basis is given for the computation nor of the factors and circumstances which were taken into account in reaching that result. The award is without explicit factual or legal underpinnings. It could have just as easily been in a greater amount and not a single word of the last paragraph would have required revision. Because it was a jury verdict award, it is reasonable to assume that it relied upon or was shaped by information gleaned through the *ex parte* communications but, as noted, Brezina is not—and cannot be expected to be—in a position to provide any specific information in this regard.

This paragraph implies that the amount of the award was possibly shaped by the *ex parte* communication.

In this case, the hearing official prepared a rough draft of the decision. This draft was extensively rewritten in the part dealing with

---

[2] The eight questions are as follows:

"1. Quote all findings of fact in the decision of November 20, 1970, which you consider in error because of *ex parte* communications. Explain why the quoted material is in error.

"2. Quote all conclusions of law in the decision of November 20, 1970, which you consider in error because of *ex parte* communications. Explain why the quoted material is in error.

"3. Quote all findings of fact in the decision of November 20, 1970, which you consider not based upon substantial evidence in the present record. Give transcript or record citations to contrary evidence of greater probity.

"4. Quote all findings of fact in the decision of November 20, 1970, which you consider fraudulent, arbitrary, capricious or so grossly erroneous as necessarily to imply bad faith. State whether the quoted material is fraudulent, arbitrary, capricious or so grossly erroneous as necessarily to imply bad faith, and the reason why.

"5. What evidence available to appellant at the time of the hearing held on June 19–20, 1969, in Omaha, Nebraska, was not presented at the hearing. Explain why such evidence was not presented at the hearing.

"6. Was appellant prejudiced in his presentation of evidence at the hearing because of *ex parte* communications; if so, explain how.

"7. What evidence, in addition to that already in the record, would be presented at a new hearing.

"8. Explain why the allegation of improper conduct by the hearing official was not brought to the attention of the Board until after the issuance of the decision of November 20, 1970."

[3] See e.g., *South Portland Engineering Co.*, IBCA–771–4–69 (January 29, 1970), 70–1 BCA par. 8092.

liability. It was also rewritten in the part dealing with quantum after a review of the record by the designated author of the opinion. The quantum part of the hearing official's draft was considered unsatisfactory because it selected $1 per cubic yard as appellant's cost of moving certain amounts of materials with no basis in the record for such a figure. A jury verdict, despite its recognized shortcomings, is a better vehicle for overcoming inadequate proof of costs than resort to unsupported cost assumptions which would not be in accord with Wunderlich Act standards. Contrary to the implication of the letter, the amount of the award was in no way influenced by *ex parte* communications.

In our view a mere *ex parte* communication such as occurred here, without any allegation of actual prejudice, is not sufficient basis for a new hearing. In *Charles P. Parker Construction Co. and Pacific Concrete Co.* v. *The United States*, Ct. Cl. 168–66, decided November 13, 1970, the Court denied a *de novo* review, requested because of alleged *ex parte* communications between Board members and agency personnel, on the grounds that questions of law were reviewable *de novo* in any case, and that under Wunderlich Act standards, there would be review on the record of any tainted questions of fact. It seems to us that under the rationale of the *Parker* case some specific allegation of actual prejudice because of the *ex parte* communication with respect to some findings of fact or law should be prerequisite to the granting of a new hearing. Because of appellant's failure to specify error or actual prejudice, we find no basis here for a new hearing.

We can well understand appellant's unhappiness with the amount of the award. Perhaps his feelings from time to time are shared by other contractors. But we feel that appellant itself is responsible for the disappointment in view of its inadequate proof of costs related specifically to the rainstorm damage.[4] The total cost theory, disfavored by both Boards and Courts, is not an acceptable substitute for such proof.

Conclusion

The motion for reconsideration is denied.

ROBERT L. FONNER, *Member.*

WE CONCUR:

WILLIAM F. MCGRAW, *Chairman.*

SHERMAN P. KIMBALL, *Member.*

SPENCER T. NISSEN, *Member.*

[4] *R. C. Hughes Electric Co., Inc. and Donovan Construction Co.*, IBCA–604–11–66 (June 17, 1969), 69–1 BCA par. 7707.

DAVID H. EVANS
v.
RALPH C. LITTLE

IBLA 70-9 *Decided February 19, 1971*

Homesteads Ordinary: Military Service — Reclamation Homesteads: Generally

The credit for military service which an heir of the original reclamation homestead entryman may use may be applied to both the obligation under the homestead law to cultivate and under the reclamation law to reclaim ¼ of the irrigable area within three full irrigation seasons.

BOARD OF LAND APPEALS

In *David H. Evans* v. *Ralph C. Little*, A–31044 (April 10, 1970), the Department set aside a decision of the Branch of Land Appeals, Bureau of Land Management, which affirmed the cancellation of reclamation homestead entry Idaho 01073 of David H. Evans; it then remanded the case to a hearing examiner for a determination of whether Walter R. Cupp, the original entryman, was entitled to at least one year's credit for cultivation for his service in the armed forces of the United States.

In lieu of a hearing, Little has submitted evidence which establishes that Cupp served more than 17 months on active duty with the armed forces of the United States from July 15, 1916, to October 20, 1916, and from September 10, 1918, to November 29, 1919. Evans does not dispute the facts of Cupp's service, but asserts that such service does not warrant any change in the determination that Little's entry should be canceled.

The Department's decision held that if Cupp had enough service to substitute for one year's cultivation the credit could be supplied by Little as his heir to the third year's obligation, the one year, the decision had found, for which the statutory requirements had not been satisfied. For a reclamation homestead entry subject to the Reclamation Extension Act of August 13, 1914, 43 U.S.C. 440 (1964), the entryman must satisfy not only the cultivation requirements of the homestead act, but must, in addition, reclaim one quarter of the irrigable area of his entry within three full irrigation seasons.

Evans points out that the decision of the Department cited regulations in effect as of its date and asks that the effect of Cupp's service be determined by the regulations in effect from 1949 through 1953. The

pertinent regulation then in effect was 43 CFR 181.2(b) (1949 ed.).[1] It states descriptively the same information cited, to wit:

> A soldier * * * with more than 12 and less than 19 months service * * * must cultivate one-sixteenth of the area the second year; * * *.

The regulation sets out requirements based on the assumption that the entryman will file final proof as soon as he can. If he does not, he must show that the requirements for residence and cultivation have been met or satisfied by military service for each year of the entry until final proof is filed, but he can apply the service credit for cultivation to any year of the entry. *Bullwinkle-Vogler*, 63 I.D. 172 (1956); *Earl D. Deater* v. *John C. Slagle*, A-28121 (May 24, 1960). So here, Little can allocate Cupp's credit for one year's cultivation to the third entry year. Thus Little has been protected from the consequences of failure to cultivate in the third irrigation season. Thereafter Little's own military service relieves him of any obligations to cultivate the entry so long as he remains on active duty.

In addition to the cultivation requirement imposed by the homestead law, Cupp was, as we have seen, also obligated to reclaim at least ¼ of the irrigable land in the entry within three full irrigation seasons, a period ending on October 15, 1953. *David H. Evans et al.*, 63 I.D. 352, 355 (1956). The pertinent regulation provides that while credit for military service may be claimed in connection with entries made under the reclamation law, the entryman will not be entitled to receive a final certificate or patent until the requirements of the reclamation law have been met. 43 CFR 230.53 (1949), now 43 CFR 2515.7(c), 35 F.R. 9578 (formerly 43 CFR 2211.7-6(c) (1970)). In other words, an entryman who is entitled to credit for military service must meet the reclamation requirements but he may postpone his obligation by reliance upon credit for military service. It would indeed be anomalous to excuse an entryman from the requirement that he cultivate ⅛ of the entry in the third entry year and yet require him to reclaim ¼ of the entry that year, particularly when reclamation encompasses cultivation and more. 43 CFR 2515.7(g), 35 F.R. 9579 (formerly 43 CFR 2211.7-6(g) (1970)).

Since Little can avail himself of Cupp's service credit and apply it to the third year's obligation of both cultivation and reclamation, the entry cannot be in default for failure to meet either requirement. Thus, a contest based on a charge that the entryman failed to reclaim ¼ of the entry within three full irrigation seasons must be dismissed.

The contestant also asks that it be determined whether Little was

[1] Now 43 CFR 2096.1-4(b)(2), 35 F.R. 9543 (formerly 43 CFR 2033.1-4(b)(2) (1970)).

granted an extension of one year within which to begin work on the entry. The prior decisions assumed that he had, although, the record was not complete.

It is unnecessary to resolve this point more exactly. As the heir of a deceased reclamation entryman, Little was relieved of the cultivation and residence requirements of the homestead law. 43 CFR 2515.6(a), 35 F.R. 9577 (formerly 43 CFR 2211.7–5(a) (1970)). There was therefore nothing he was bound to do the second entry year. His first requirement, to reclaim ¼ of irrigable land within three full irrigation seasons after entry, did not mature until October 15, 1953. As has been ruled above, he may substitute Cupp's military service for one year of that obligation. Accordingly, it is of no consequence whether or not Little received an extension.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the departmental decision of April 10, 1970, is vacated; the Bureau of Land Management decision is set aside, and the contest is dismissed.

MARTIN RITVO, *Member.*

WE CONCUR:

ANNE POINDEXTER LEWIS, *Member.*

FRANCIS E. MAYHUE, *Member.*

WILLIAM R. WHITE ET AL.

IBLA 70–127 *Decided February 19, 1971*

Rules of Practice: Protests—Sodium Leases and Permits: Leases

A protest against a waiver of the late filing of a sodium preference right lease application is properly dismissed where the protestant has not persuasively demonstrated that the waiver under the provisions of 43 CFR 1821.2–2(g) would be in violation of any express exception therein.

BOARD OF LAND APPEALS

Kerr-McGee Chemical Corporation (Kerr-McGee), formerly American Potash & Chemical Corporation,[1] has appealed to the Secretary of the Interior from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated February 24, 1970. The decision appealed from dismissed Kerr-McGee's protest of the Bureau's de-

[1] American Potash & Chemical Corporation, subsequent to filing its appeal, changed its corporate name to Kerr-McGee Chemical Corporation.

cision of October 16, 1969, which remanded to the Riverside district and land office sodium preference right lease applications R 31, 34 and 35 of William R. White, Mauritz J. Kallerud and Howard J. Winterbottom, respectively. It authorized issuance of the applied for leases and approval of the pending assignments of the prospecting permits to Occidental Petroleum Corporation (Occidental) in the absence of objections other than the late filing of the applications for the preference right leases. The protest was dismissed because of failure to establish any error in the protested decision.

Sodium prospecting permits R 31, 34 and 35 were issued effective November 1, 1966, for a two-year period to White, Kallerud and Winterbottom. On July 25, 1968, assignments of record title to each permit were filed by Occidental, together with requests for their approval and approval of excess acreage. The land office took no action on the latter requests. On October 16, 1968, Kerr-McGee filed a protest against approval of the assignments to Occidental, essentially contending Occidental failed to comply with the Federal regulations governing sodium. By decision of February 18, 1969, the land office dismissed the protest because Kerr-McGee failed to serve a copy of the protest on Occidental or the other persons named as being involved in the protested leases or permits. Kerr-McGee did not appeal from that decision.

A sodium permittee who discovers valuable deposits before his permit expires is entitled to a preference right lease. 30 U.S.C. 262 (1964). The regulations allow a prospecting permittee 30 days after expiration of his permit within which to file an application for a preference right lease. This was formerly provided in 43 CFR 3152.5, and is now substantially repeated in 43 CFR 3520.1–1 and 3521.1–1 (35 F.R. 9502, 9513, 9514). The two-year term of the subject prospecting permits expired on October 31, 1968. Preference right lease applications were filed on December 13, 1968, by White and Kallerud, and on December 18, 1968, by Winterbottom. The lease applications were for less than the total acreage in the respective permits. The land not included in the lease applications was indicated as being included in an application for a right-of-way for a solar pond, referenced by serial number.

Kerr-McGee on January 20, 1969, and other later dates, filed sodium prospecting permit applications and other applications for lands within the area included in the subject preference right lease applications.

The land office on February 20, 1969, held that the subject prospecting permits had expired, rejected the preference right lease applications as not having been timely filed, and declared the assignments to Occidental as moot because the permits expired. Appeals were taken by each permittee and Occidental.

While the appeals were pending, upon request, the Director, Geological Survey, in a memorandum dated October 3, 1969, reported that timely valuable discoveries of sodium deposits were made on the lands involved in the subject permits and recommended the issuance of preference right leases to the applicants.

The Office of Appeals and Hearings, Bureau of Land Management, in a decision rendered October 16, 1969, remanded the cases to the Riverside district and land office, holding the lateness of the filings for preference right leases should be waived and the applications accepted within the purview of 43 CFR 1821.2–2(g). That regulation, in pertinent part, provides:

> When the regulations of this chapter (except Parts 1840 and 1850) provide that a document must be filed * * * within a specified period of time, the filing of the document * * * after the expiration of that period will not prevent the authorized officer from considering the document as being timely filed * * * except where:
>
> 1. The law does not permit him to do so.
> 2. The rights of a third party or parties have intervened.
> 3. The authorized officer determines that further consideration of the document * * * would unduly interfere with the orderly conduct of business.

It is against this decision of the Bureau that Kerr-McGee filed its protest. A subsequent decision of February 24, 1970, by the Office of Appeals and Hearings, Bureau of Land Management, acting for the Director, dismissed the protest of Kerr-McGee, and is the basis for the present appeal to the Secretary.

The decision below, after discussing fully each of the arguments asserted by the protestants, found the review of the land office action on appeal was a proper function under the supervisory authority of the Director, and was not contrary to any regulation or precedent. Kerr-McGee's application for sodium prospecting permits on the lands included in the preference right lease applications did not create any third party rights within the context of 43 CFR 1821.2–2(g). It could not be assumed that the adverse decision by the land office was based on a determination that acceptance of the late filings would unduly interfere with the orderly conduct of business in the office, and it was not improper to remand the cases for acceptance of the late filings under the circumstances presented. The records before that office contained no later assignments, but they did contain information that Searles Lake Chemical Corporation (SLCC) is a wholly owned subsidiary of Occidental, which is recognized as the primary party in interest. When the Bureau's decision of October 16, 1969, was issued, each case file did contain a notice that a discovery of sodium had been made within the permitted area during the life of the permit. There-

fore, since each permittee had earned a statutory right to a sodium lease, late filings for such leases under 43 CFR 1821.2–2(g) should have been accepted. The land office, after action on the preference right lease applications has been concluded, should adjudicate all pending applications for sodium prospecting permits affecting lands contained in the preference right leases. Finally, the action directed by the Bureau decision of October 16, 1969, is consistent with past Bureau practice in similar circumstances.

The arguments presented on appeal to the Secretary are essentially the same as those set forth in the protest considered below. We have carefully considered the decision of the Office of Appeals and Hearings, Bureau of Land Management, acting for the Director, which discusses in detail the points raised by the protestant and find that the discussions and findings are correct. Any further discussion of them would serve no useful purpose.

Protestant's argument, relying on *Superior Oil Company* v. *Udall*, 409 F.2d 1115 (D.C. Cir. 1969), that the land office manager was the "authorized officer" and his decision to reject the subject lease applications was final and not subject to review by the Director, Bureau of Land Management, was properly rejected by the decision below. It is noted that pursuant to an agreement of the parties, 76 I.D. 69 (1969), a joint motion was filed to withdraw the opinion and vacate the judgment in *Superior*, *supra*. On consideration of the joint motion the Court of Appeals ordered the cases remanded to the District Court to dismiss the cases as moot. *Superior Oil Company* v. *Hickel*, 421 F.2d 1089 (D.C. Cir. 1969).

In conclusion, it has not been persuasively demonstrated by the protestant that a waiver of the untimely filing of the subject sodium preference right lease applications under the provisions of 43 CFR 1821.2–2(g) would be in violation of any express exception therein. Accordingly, the protest was properly dismissed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision appealed from is affirmed and the case is remanded to the Bureau of Land Management for appropriate action on the sodium preference right lease applications consistent with this decision.

FRANCIS E. MAYHUE, *Member.*

WE CONCUR:

MARTIN RITVO, *Member.*

EDWARD W. STUEBING, *Member.*

March 1, 1971

APPEAL OF ETS-HOKIN CORPORATION

IBCA-842-6-70 *Decided March 1, 1971*

Rules of Practice: Appeals: Dismissal—Contracts: Construction and Operation: Notices—Rules of Practice: Appeals: Timely Filing

Where appellant's claim for excavation was presented over five years after the work was done and two years after completion of the contract, the Government's motion to dismiss for failure to give timely notice of the claim was denied on the present state of the record in the absence of a clear showing of prejudice to the Government.

BOARD OF CONTRACT APPEALS

The Government has filed a motion to dismiss Claim No. 13.195, one of three claims which are the subject of the above-captioned appeal, on the ground that the contractor's claim is untimely.

Claim No. 13.195 is made in the alternative: (1) that the Government's classification of excavated material was erroneous in that a quantity of rock was classified and paid for as common, and (2) that even if the Government's classification were correct, the ratio of rock to common in the monthly estimates varied so greatly from the approximations in the bid documents on which the contractor relied, as to entitle the contractor to an equitable adjustment. Respecting the first alternative, dismissal is sought by the Government on the ground that the claim is untimely, being presented 5 to 6 years after the actual excavating work and two years after completion of the contract work. It also alleges prejudice because of the present impossibility "to determine from an investigation of the site of the work if the classifications had been correct."

The Government further contends that the last subparagraph of Specifications paragraph 52,[1] provides for the classification of excavated materials under the cognizance of both parties, the procedure for the contractor to object if he disagrees with any monthly estimate, and a waiver of all claims of incorrect classifications if he does not object under this procedure; and that the appellant's claim is barred by his failure to give timely notice of his objections as provided in Specifications paragraph 52.

Respecting the second alternative, the Government's position is that

[1] "The Government's representative and contractor or the contractor's representative shall be present during classification of material excavated. On written request of the contractor, made within 10 days after the receipt of any monthly estimate, a statement of the quantities and classifications of excavation between successive stations or in otherwise designated locations included in said estimate will be furnished to the contractor within 10 days after the receipt of such request. This statement will be considered as satisfactory to the contractor unless specific objections thereto, with reasons therefor, are filed with the contracting officer, in writing, within 10 days after receipt of said statement by the contractor or the contractor's representative on the work. Failure to file such written objections with reasons therefor within said 10 days shall be considered a waiver of all claims based on alleged erroneous estimates of quantities or incorrect classification of materials for the work covered by such statement."

422-964—71

the contract language in Specifications paragraph 4, entitled, "Quantities and Unit Prices,"[2] puts appellant on notice that the bid schedule quantities will be measured and paid for at the unit price bid—and again, that the notice requirements of Clause 4 of the General Provisions, entitled "Changed Conditions" (Standard Form 23A, April 1961 Edition), were not complied with to the prejudice of the Government.

The Board has not been inclined to sustain motions for dismissal based solely on the absence of formal notice,[3] where prejudice of the Government's interest is not shown,[4] and in the absence of compelling circumstances otherwise operating to bar the claim.

The Board is not convinced from the present state of the record that all of the issues raised by appellant's Claim No. 13.195 could be resolved only by a physical examination of the site of the excavation or that such a physical examination is essential to determine all of the issues raised by the appellant in connection therewith. The record does not show such prejudice as would warrant precluding appellant's right, if requested, to a hearing and to have considered any appropriate evidence that will add to the factual situation of the case.

In a recent decision,[5] the Armed Services Board of Contract Appeals addressed both the question of appellant's delay in presentation of his claim and the question of prejudice to the Government's interests resulting from such delay. There, the Board held that appellant's claim was not barred by laches. Noting that appellant's claim was based on the theory of constructive change for which there was no specific time limit for its assertion, the Board stated:

> It may be argued that delay in the assertion of a claim inevitably causes prejudice in some degree. However, we are loathe to bar completely a claim on a basis which is dehors the contract. * * * (Citing *Kaiser Aluminum and Chemical Corportaion* v. *The United States*, 181 Ct. Cl. 902, 906–907 (1967)).

Accordingly, the Government's motion to dismiss is denied without prejudice to the continued assertion of the lack of timely notice as a defense to the claim on the merits.

RUSSELL C. LYNCH, *Member.*

WE CONCUR:

WILLIAM F. MCGRAW, *Chairman.*

SHERMAN P. KIMBALL, *Member.*

---

[2] "The quantities noted in the schedule are approximations for comparing bids, and no claim shall be made against the Government for excess or deficiency therein, actual or relative. Payment at the prices agreed upon will be in full for the completed work and will cover materials, supplies, labor, tools, machinery, and all other expenditures incident to satisfactory compliance with the contract, unless otherwise specifically provided."

[3] *Monarch Lumber Company*, IBCA–217 (May 18, 1960), 60–2 BCA par. 2674.

[4] *Erie Controls, Inc.*, IBCA–350 (November 7, 1963), 1963 BCA par. 3924; *Korshoj Construction Co.*, IBCA–321 (August 27, 1963), 1963 BCA par. 3848; *Accord: B & H Construction Co.*, ASBCA No. 10142 (October 29, 1965), 65–2 BCA par. 5181.

[5] *Hensel Phelps Construction Co.*, ASBCA No. 12976 (December 24, 1970), 71–1 BCA par. 8652.

March 4, 1971

DELBERT AND GEORGE ALLAN, ELDON L. SMITH, ET AL.

IBLA 70-11 *Decided March 4, 1971*

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

An appeal to the Director, Bureau of Land Management, from a decision of a hearing examiner which is received after the period set by the rules of procedure for grazing cases will not be dismissed solely for that reason, but the circumstances surrounding the appeal will be examined to determine whether in the exercise of discretion the late appeal should be accepted.

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

An appeal to the Director, Bureau of Land Management, from a decision of the hearing examiner which is mailed within the appeal period and received one day late will be accepted where there is no prejudice to the other parties and where the filing party derived no advantage from his tardiness.

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

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

Grazing Permits and Licenses: Apportionment of Federal Range

A permittee or licensee has no right to any particular area of the Federal range under the Taylor Grazing Act or the Federal Range Code and, although historical use is a factor to be considered in the determination of grazing privileges, the selection of the particular area in which the range user may exercise his grazing privileges is a matter committed to the discretion of the Department.

BOARD OF LAND APPEALS

Eldon L. Smith has appealed to the Secretary of the Interior from a decision dated August 6, 1968, of the Office of Appeals and Hearings, Branch of Land Appeals, Bureau of Land Management, which affirmed a decision of a hearing examiner allocating grazing privileges to him on public lands in Arizona.

Delbert and George Allan have also appealed to the Secretary of the Interior from the same decision which dismissed their appeal from the decision of the hearing examiner on the ground that it was not timely filed.

We shall consider the Allans' appeal first. The facts are not in dispute. The normal time for filing an appeal to the Director of the

Bureau of Land Management from the decision of the hearing examiner was extended until the Allans could obtain a complete copy of the transcript of the testimony. The record shows that they received it on March 26, 1968. Under the Federal Range Code procedural rules, they then had thirty days from that date, or until April 25, 1968, to file their appeal to the Director in the Office of the Director. 43 CFR 1853.7(b). The appeal was received in the Director's office on April 26, 1968—or one day late.

The Department has consistently held that a notice of appeal filed later than the 30-day period set by the Federal Range Code [1] regulation will be dismissed. *Winnie R. Snapp*, A–31146 (June 26, 1969); *Royal B. Woolley*, A–30936 (March 20, 1968).

The Allans contend that the regulation can be waived under proper circumstances and that the circumstances in the case justify a determination that their appeal was timely filed.

As to the circumstances, they assert that the appeal was mailed on April 23, 1968, at Minden, Nevada and that a letter mailed before 5:00 p.m. and handled in accordance with regular pickup and airmail schedules should have arrived in Washington on the following morning and been delivered to the Bureau of Land Management at some time on the 24th.

The Allans' account of the mailing procedure is somewhat incomplete since the affidavit of their attorney's employee who mailed the appeal does not state the time at which it was deposited at the Minden post office. If it were mailed after 5:00 p.m. or so close to then that it missed the Reno pickup, the suggested scenario could not have been followed.

In any event, the Department has stated repeatedly that unexplained delays in the handling of mail do not excuse a late filing. *Charles F. McCuskey*, 63 I.D. 22 (1956); *Gerhard Evenson*, 63 I.D. 331 (1956).

The regulation governing appeals procedures moderates the strict rule by providing for a grace period of 10 days for documents mailed before the last day for filing but not received on time. 43 CFR 1840.0–6(b). However, it also states explicitly that the grace period does not apply to Subpart 1853 except to 1853.7(c)—that is, it applies in grazing cases only to appeals to the Secretary from a decision of the Director, but not to appeals to the Director from a decision of a hearing examiner.[2]

[1] Hereafter, appeals arising under the Federal Range Code for grazing districts will be referred to as "grazing appeals" and others as "non-grazing appeals."

[2] Effective July 1, 1970, the Secretary of the Interior created the Board of Land Appeals, authorizing it to render final decisions for the Department on appeals in public land cases. Circular 2273, 35 F.R. 10009. Intermediate appeals to the Director, Bureau of Land Management, in cases other than grazing cases were abolished. In the exercise of his supervisory authority, the Secretary transferred jurisdiction over appeals to the Director, taken from decisions arising from the administration of grazing districts, to the Board of Land

It would seem, then, that under the regulation as interpreted and applied in many decisions the dismissal of the Allans' appeal was correct.

However, the results of several court decisions applying an essentially similar provision of the rules relating to appeals in non-grazing cases require a reexamination of the Department's conclusion.

Before examining these decisions, it may be well to compare the two types of appeals. The non-grazing appeal regulations require that a notice of appeal must be filed within 30 days from the date on which the appellant received the decision he is appealing (43 CFR 1842.4(a)).[3] While no extension of time will be granted for filing the notice of appeal (43 CFR 1842.4(b), 35 F.R. 10010 (1970); formerly 43 CFR 1842.4(c) (1970), the notice, if late but transmitted timely, may be accepted as filed timely under the provision for a grace period (43 CFR 1840.0-6(b)).

The appellant must then file a statement of reasons, if he did not file one with the notice of appeal, within 30 days from the date on which he filed the notice of appeal (43 CFR 1842.5-1, 35 F.R. 10010; formerly 43 CFR 1842.5-1 (1970)). Again, the grace period provision applies to the filing of a statement of reasons. *Id.*

In grazing cases a notice of intention to appeal is filed within 10 days of service of the hearing examiner's decision followed by the appeal within 30 days after receipt of the hearing examiner's decision. Since in either case the statement of reasons for the appeal may be filed with or in lieu of the first notice, either type of appeal can be a one or two stage proceeding. The only difference is that the period for completing a grazing appeal to the Director is at most 30 days (unless a request for a copy of the transcript has been made), while other appeals have 60 days.

In *Pressentin et al.* v. *Seaton et al.*, 284 F. 2d 195 (D.C. Cir. 1960), the Court dealt with a non-grazing appeal which arose under the rules of practice before the grace period provision had been added. The Court held that the Secretary had abused his discretion by refusing to entertain an appeal where the statement of reasons was filed after the 30-day period had elapsed. It said that the language of the regulation saying that such appeals "will be subject to summary dismissal" did not make dismissal mandatory but left the disposition of the appeal to the Secretary's discretion.

On March 22, 1958, the rules were modified by the addition of the

---

Appeals for final decision. *Id.*, p. 10012. Since the appeals in the instant cases were filed pursuant to the rules in effect prior to July 1, 1970, the discussion herein relates to the procedural distinction between appeals to the Director and to the Secretary prevailing at that time.

[3] Amended by Circular 2273, 35 F.R. 10009, 10010 (1970), to reflect the changes in the procedure on appeals following the establishment of the Board of Land Appeals.

"grace period" which granted relief in some circumstances to appeals that would otherwise have been found not to have been timely filed. Circular 1997, 23 F.R. 1929, 1930 (1958).

The Department in considering the new provision ruled it so changed the filing procedures that the *Pressentin* case, *supra*, was not controlling and dismissed appeals filed even one day later under the new rule.

In one of these cases, *Tagala* v. *Price*, A–30715 (November 10, 1966), the statement of reasons was mailed one day after the 30-day period. Upon judicial review the United States Court of Appeals for the 9th Circuit held that dismissing an appeal because the statement of reasons was late, absent an exercise of discretion, was improper. It held, citing *Pressentin*, that the Director or Secretary must examine the circumstances of each appeal to determine whether it should be dismissed or the late filing accepted. *Tagala* v. *Gorsuch*, 411 F. 2d 589 (9th Cir. 1969).

Two United States Courts of Appeal having held that the rules of practice cannot be read as requiring dismissal in all cases of late filing of the statement of reasons for appeal, the Department accepts the courts' interpretation as the correct construction of those rules.

The Court decisions treated appeals arising from non-grazing proceedings in the Department. As we have seen the appeal procedure in grazing cases differs in some particulars from that prescribed for other matters. Yet they are comparable and where they differ, the grazing rules are the more stringent. For example, a grazing appeal to the Director must be completed in 30 days as compared to 60 for non-grazing appeals and the grace period provisions do not moderate the time requirements for grazing appeals to the Director as they do in non-grazing cases.

The grazing regulation does not contain a specific provision dealing with the consequences of a late filing. Paragraph 1853.7(b) dealing with appeals to the Director states, however, that: "The appeal in other respects shall be made in accordance with Part 1840, except that no filing fee is required." Whether this provision was intended to incorporate the summary dismissal authorized by 1842.5–1 and 1840.0–7 is not clear. These provisions speak of "notice of appeal" and "statement of reasons," terms which have no direct counterpart in the grazing proceedings. They can be made applicable if "notice of appeal" and "statement of reasons" are read to include, respectively, "notice of intention to appeal" and "appeal and brief" of the grazing proceedings procedure. *See Stanley Garthofner, et al.*, 67 I.D. 4 (1960), *rev'd*, *Garthofner* v. *Udall*, Civil No. 4194–60, in the United States District Court for the District of Columbia, November 27, 1961. If the terms are interpreted in this manner, then the Circuit Court decisions are applicable to them and the dismissal of the Allans' appeal would then have to be examined in accordance with their holdings.

If the two procedures are not merged on this point, there is no specific provision in the grazing appeal regulation governing the consequences of late filings. The Secretary may nonetheless impose a reasonable penalty for the infraction of a mandatory regulation for which no specific penalty is provided. *Cf. Celia R. Kammerman et al.*, 66 I.D. 255, 262, 263 (1959). In grazing appeals the Department has held that the failure to file an appeal within the time allowed by the provisions of the governing regulation warrants dismissal of the appeal. *Bert and Paul Smith*, 67 I.D. 300 (1960). The issue becomes whether the Department should apply the same treatment to late filing in both grazing and non-grazing appeals. Up to now the practice has been the same and no strong considerations occur to us to justify a more stringent practice in the one case than in the other. Under the ruling in the *Tagala* case the Department will not summarily dismiss a late filing of a statement of reasons in a non-grazing case. A similar policy will be followed for grazing cases. Therefore, the Allans' late appeal will not be dismissed outright, but the circumstances will be examined to determine whether in the exercise of discretion it should be allowed or rejected and the appeal dismissed.

On the facts, as we have seen, the appeal was mailed within the appeal period, but arrived in Washington one day late. If this had been a non-grazing appeal, it would have been accepted as timely filed in accordance with the "grace period" provision. If it is desirable, as we think it to be, to keep the appeal procedures similar where possible, then the late filing should be waived here too. Furthermore, there appears to have been no actual prejudice to the other parties involved in the proceeding nor did the Allans, having mailed their appeal several days before the last day for filing, derive any advantage from the delay in transmission. We conclude, then, under the circumstances that the Allans' appeal is to be received as timely filed and considered on the merits.

We now turn to the substantive issues raised by the appeals.

The hearing examiner set out the history of the disputed area as follows:

> The District Manager's decisions from which the appeals were taken allocated among various applicants a grazing area in northwestern Arizona in Townships 32, 33, 34, 35, 36 and 37 North, Ranges 14, 15 and 16 West, Gila and Salt River Meridian. The area was established as a part of the grazing district by order of the Secretary of the Interior, dated June 9, 1935 (exhibit G–14).[4]
>
> The public land involved in this proceeding was governed by a Special Rule signed by the Director on March 23, 1940 (F.R. Doc. 50–2798, filed April 4, 1950), and was thereafter known as the Pakoon Special Rule Area. The Special Rule

[4] The Government's exhibits are identified by the letter "G"; the Allan exhibits by the letter "A"; the Anderson exhibits by the letter "B"; and the Smith exhibits by the letter "C".

provided that base property within the meaning of the Grazing Regulations should not be a requirement or recognized for grazing privileges in the area and that grazing privileges should be allowed, first to applicants who had or whose predecessors in interest had, since the establishment of the grazing district, made substantial use of the area, and secondly, to applicants who had not or whose predecessors in interest had not, since the establishment of the grazing district, made substantial use of the area.

For several years preceding the Special Rule, Appellant Anderson and Intervenors Esplin, Heaton Brothers, and the Brinkerhoffs grazed sheep in the Pakoon Area. The sheep, which were brought principally from base properties in Utah, grazed during the winter and spring months. The area was also grazed by cattle owned by Max C. Layton, Ed Yates, and Wayne Yates, who had adjacent base properties. In 1949, two individual allotments were established by the Bureau for the exclusive use of Ed and Wayne Yates pursuant to an agreement signed by them. One of these allotments, consisting of about 29,900 acres, is adjacent to and on the western boundary of the Special Rule Area, and the other allotment, consisting of approximately 40,600 acres, is two miles to the south. Licenses were thereafter issued to the Yates which restricted their livestock operations to their allotments, except for normal drift into the Pakoon Area. In 1956, the Yates sold the base properties upon which their northern allotment was based to Delbert Allan (exhibit A–8), who transferred a one-third interest to George Allan the following year (exhibit A–10). In 1963, the base property upon which the Yates' southern allotment was based was sold to Appellant Smith (exhibit G–9C). Licenses issued by the Bureau to Appellants Allan and Smith also restricted their Federal range use to their respective allotments except for natural or reasonable drift into the Pakoon Area.

The Special Rule Area was deficient in water. The sheep operators used what pot holes were available and obtained water from adjacent livestock operators. In 1956, pursuant to authorization issued by the Bureau, Appellant Anderson and Intervenors Esplin, Heaton Brothers and the Brinkerhoffs drilled two wells in Pakoon which provided sufficient water for their sheep operations.

The Director of the Bureau of Land Management issued an order revoking the Special Rule in 1964 (F.R. Doc. 84–11878, filed November 19, 1964). The order stated that, "The establishment of base property requirements, the apportionment of grazing privileges, and administration within the area will be in accordance with the applicable provisions of 43 CFR, Part 4110." The District Manager then made his adjudication of the Pakoon Area pursuant to the provisions of these Grazing Regulations.

The Arizona Strip District is classified as water base. Grazing licenses and permits are issued on the basis of ownership or control of a full time water (43 CFR 4111.2–1(b)). A full time water is water which is suitable for consumption by livestock and available, accessible and adequate for a certain number of livestock during those months of the year for which the range is classified as suitable for use (43 CFR 4110.0–5(o)). Owners of prior or class 1 waters have a preference right under the regulations in the allocation of the Federal range (43 CFR 4111.3–1(d)(2)). A prior water is one used as a base for a livestock operation during the priority period from June 29, 1929, to June 28, 1934 (43 CFR 4110.0–5(p)). When the Pakoon Area was adjudicated, the District Manager concluded that all class 1 preference rights had been satisfied. This had been accomplished through signed agreements, and the resulting allocations of individual allotments.

In making the adjudication, the District Manager solicited from all livestock operators applications showing the waters that each operator owned or controlled and upon which he was making a claim for an allotment of the Pakoon Area.

The waters owned or controlled by Appellants Allan and Smith, upon which their individual allotments were based, were considered as class 2 in competition with full time water of other applicants. These waters were considered to have in the aggregate additional water value above that necessary to support all livestock which could properly use their respective allotments.

The mechanics used in allocating Federal range in a water base district is to designate on a map the location of all of qualified full time waters listed in applications of competing applicants and to draw circles from, those waters on the basis of a five-mile radius (the standard service area adopted by the District as being proper for grazing the Federal range from a stock water). Where the circles from competing waters overlap, the arcs are drawn from the intersecting points of the circle so as to divide the Federal range equidistant from the two competing waters. The boundaries of areas thus delineated are modified to form boundaries of a grazing area on a practical and usable basis. The boundaries are also further modified where a natural barrier exists which would inhibit normal grazing operations of livestock from a given qualified water.

The District Manager followed this standard procedure in making the allocations of Pakoon to the competing applicants. Max Layton was awarded an area of approximately 3,200 acres in the northwest portion of the Special Rule Area on the basis of his ownership or control of the water known as the Black Knoll Tank. Intervenors Layton and Cloyd H. Brinkerhoff were awarded an adjacent area of approximately 4,700 acres in the northeast portion on the basis of their ownership or control of a water known as End of the Pipeline. Appellant Anderson and Intervenors Esplin, the Brinkerhoffs and Heaton Brothers were awarded an area of approximately 43,900 acres in the central portion of Pakoon on the basis of ownership and control of water designated as Upper and Lower Wells. Appellant Eldon L. Smith was awarded an area of approximately 53,700 acres in the southern portion on the basis of his ownership or control of Grapevine Springs, Whiskey Springs, Seven Springs, Gyp Wash Reservoir, Tasi Springs, Pigeon Reservoir and Upper Pockets. One water listed by Smith, Yates Tank, was not considered because it was not in serviceable condition at the time of the lifting of the Special Rule. Appellants Allan were awarded an area of approximately 1,780 acres on the northeast border of their previously allotted area of use and an area of approximately 2,110 acres on the southwest border based upon two waters, Wayne's Well and Allan's Lower Well. One of the Allan waters Pakoon Springs, was not considered in the adjudication because a ridge between it and the Pakoon Area constituted a natural barrier impeding the movement of livestock. Two portions of the Pakoon Area were unallotted because they were not within the service area of a qualified water.

The appellants objected to their areas of use thus designated. Their appeals set forth objections in very general terms. At the hearing, the Government and the appellants agreed that the following issues were raised by their various appeals:

Appellant Anderson:

1. Whether Appellant Charles C. Anderson and Intervenors Heaton Brothers, Esplin, and the Brinkerhoffs are entitled, under the Grazing Regulations, to the exclusive use of the Pakoon Area lying north of their designated area of use. (This would include the area of use assigned to Intervenor Layton and Intervenor Brinkerhoff Estate and part of the area assigned to Appellants Allan.) (Tr. 11).

2. Whether Appellant Anderson is entitled to change his operation from sheep to cattle and to have a cattle allotment (Tr. 12, 13).

Appellants Allan:

1. Whether the District Manager followed the procedural requirements of the Grazing Regulations in the award of grazing privileges to Delbert and George Allan (Tr. 17,18).

2. Whether the District Manager was arbitrary and capricious in awarding grazing privileges and an area of use to Delbert and George Allan (Tr. 18, 19).

Appellant Smith:

1. Whether Eldon L. Smith had been awarded all of the Federal range which was in the service area of his base waters as may be modified by competing waters (Tr. 24, 25).

2. Whether any parties, other than Layton, the Allans, and Smith, have grazing privileges within the Pakoon Area (Tr. 25, 26).

3. Whether the District Manager was arbitrary and capricious in awarding grazing privileges to Eldon L. Smith (Tr. 25, 26).

The hearing examiner found that the class 1 preference of the base waters of Smith and the Allans had been satisfied by the award to them of individual allotments pursuant to an agreement entered into by their predecessors, the Yateses, in April 1949. He then held that appellants, in any event, could not now raise the issue as to the class 1 demand of their base waters because they had not appealed from decisions restricting them to the use of the allotments agreed upon. He pointed out that the grazing regulation provides that base property qualifications in whole or in part will be lost for failure for any two consecutive years to include the entire base qualifications in an application for a license, permit or renewal (43 CFR 4115.2–1(e)(9)). Furthermore, he said, the regulation also provides that no adjudication of any license or permit will be made upon the claim of an applicant with respect to the qualifications of the base property where such qualification or allotment has been recognized and a license or permit issued for a period of three consecutive years or more. (43 CFR 4115.2–1(e)(13)). Under either of these provisions, he concluded, the appellants are precluded from challenging the adequacy of their allotments to satisfy the class 1 demand of their properties.

He then held that an applicant does not acquire a right to use a particular portion of the federal range on the ground that he has used it in the past. He next dismissed the appellants' objection to awarding class 2 grazing privileges to Anderson, Esplin, Heaton Brothers and the Brinkerhoffs on the basis of the upper and lower wells drilled in 1959. He said there was no logical reason why the challenged waters could not compete on an equal basis.

He then considered the several water sources offered as qualified base water which the range manager had refused to accept. He agreed that Smith had not presented any evidence to show that either "Ed's Tank" or "Lower Pockets" was qualified or full time water, while the Government's evidence proved that "Ed's Tank" was not in serviceable condition at the time of the lifting of the Special Rule. As to the Allans, he also found that the manager properly refused to assign

a service area to "Pakoon Springs", which would compete with Lower Well for a small area of range, because it was separated from the Pakoon grazing area by a sharp decline which formed a natural barrier.

He then held that Anderson was properly denied an individual allotment carved out of the community allotment but concluded that there was no reason why Anderson could not change his operation from sheep to cattle.

On appeal, the Bureau of Land Management dismissed Smith's appeal and affirmed the hearing examiner's decision as to the other parties.

The appellants assert that the allocation of grazing privileges denies them a preference right based on their past use of the area. The decisions below correctly pointed out that a grazing permittee has no right to any particular area of the federal range, absent an arbitrary or capricious allocation, so long as his base qualifications are satisfied. *Thomas Ormachea and Michael P. Casey*, 73 I.D. 339 (1966). As to preference right, the statute and the regulation give equal weight to owners of water as to owners of land. 43 U.S.C. sec. 315(b); 43 CFR 4111.3–1(c), (d). The appellants can show no better right than the other parties to privileges based on class 2 water nor have they offered any evidence that the allocation was arbitrary or capricious.

The Allans allege that they did not receive an equitable portion of the area made available for allocation upon the revocation of the Special Rule. They point out that they were awarded only 3,800 acres whereas the others were awarded up to 53,700 acres. They also contend that the "sheep operators" were permitted to develop the wells on which their claim to grazing privileges depend very late in the life of the Special Rule, and that they and Layton were denied the right to develop additional water before the Special Rule was terminated. These assertions are vague and general. Appellants do not contend that there was no authority to permit wells to be developed in the Special Rule area, but only that the drilling was allowed over their protests. Their assertion that they were denied an opportunity to develop additional water resources is based only on an informal conversation with the range manager, who said such a move by the Allans would cause tension in the area (Tr. 817–818).[5]

The Allans also assert that the use of a five mile service area is contradicted by the testimony that the cattle drifted naturally much further. The five mile rule, however, is based upon the general practice in the district that has been accepted as a guide in allocating grazing privileges. The fact that at certain times of the year cattle

[5] This and similar references are to the transcript of the hearing.

may go further when forage conditions or the availability of water in temporary water holes are favorable does not invalidate the use of an average radius based upon the usual behavior of cattle (Tr. 46, 47, 55, 246, Ex. G–17, pp. 4, 5).

Finally the Allans urge, as does Smith, that their base waters are entitled to class 1 privileges in the special rule area, or, in other words, that their class 1 preference had not been satisfied by the award of individual allotments to their predecessor.

Perhaps the clearest expression of what was intended to be accomplished by the establishment of individual allocations in the Special Rule area is found in the memorandums from the Acting Regional Administrator to the Director and from the Director to the Secretary recommending the special rule (Exhibit A–7).

In the first, dated November 10, 1949, the Acting Regional Administrator wrote:

> There is transmitted a proposed special rule for the consideration of the Secretary under the provisions of the Federal Range Code for grazing districts (43 C.F.R., Sec. 161.5) with respect to seasonal grazing use in the Pakoon Area of the Arizona Strip Grazing District.
>
> The Pakoon Area has long been recognized and used as a sheep range for intermittent short periods in the Spring during favorable years. It is a rough broken desert area in the southwest corner of Arizona District 1. Perennial vegetation is principally unpalatable black brush and assorted desert shrubs. In years of favorable precipitation annual weeds provide good sheep grazing for periods of from 2 to 6 weeks. The area does not contain livestock water, consequently is suitable for sheep use only during the time when succulent green weeds are available. This type of sheep use antedates the establishment of the grazing district.
>
> At one time it was decided that grazing privileges within the Pakoon Area should be adjudicated on a land base because of the lack of water to service the area. A careful study has convinced us that at this time there are no base lands which can qualify as "dependent by use" or "dependent by location" for grazing privileges in the Pakoon Area without seriously disrupting the existing livestock industry of the district.
>
> Since the establishment of the Arizona Strip Grazing District, grazing privileges in this area have been allowed under temporary licenses, generally on the basis of priority of use, without consideration of either land or water as base property. We have had numerous discussions with the Advisory Board during the past 3 years relative to the need for a special rule, and have exhausted all possibilities of administering the area under the Code without a special rule. The proposal we are now submitting will, in our opinion, stabilize as far as possible and practicable such grazing use of the area as has been recognized through the issuance of temporary licenses since the establishment of the district.
>
> The area described in Advisory Board resolution of June 10, 1949, makes a substantial reduction from the original Pakoon Sheep Area to eliminate any possible competition with existing base properties.

The Director on March 23, 1950, after summarizing that memorandum said:

The Advisory Board has recommended the special rule and in its resolution of June 10, 1949, described the area to be administered thereunder which area has been substantially reduced from the Pakoon Allotment *to eliminate any possible competition with the existing base properties* * * *. (Italics added.)

These memorandums make it clear that the Special Rule area was considered to be an area not subject to class 1 rights and that the class 1 rights of the adjacent cattlemen had been taken care of in their individual allocation.[6]

Since the allotments were unfenced, the Yateses were allowed a normal drift of cattle from their allotment into the adjacent Special Rule area.

The allocation and the normal drift were intended to satisfy all of the Yates' class 1 rights. Wayne Yates testified that he had accepted the range line agreement as representing the full qualified demand for Pakoon Springs in which the Allans operate (Tr. 298). They accepted this determination over a long period of years and they or their successors cannot now challenge it. The grazing regulation precludes a grazing licensee from demanding a readjudication of grazing privileges after they have been held for three years (43 CFR 4115.2–1(e)(13)(i)). The regulation applies not only to formal adjudications made pursuant to 43 CFR 4110.0–5(r), but also to "adjudications" made on the basis of available information and adhered to over a long period of time. *Malvin Pedroli et al.*, 75 I.D. 63, 68, 69 (1968).

There remain the objections to the application of the rule for determining service areas and to the recognition of water sources on which the application of the rule is based.

The Allans objected to the service area assigned to Pakoon Springs. The hearing examiner pointed out that the line used to set off the Allans' area from the Pakoon grazing area follows a sharp decline, which constitutes a natural barrier to the movement of cattle. It is, he said, halfway between Pakoon Springs and the Lower Well, the competing water, and is a natural division point. The Allans have not pointed out any error in this reasoning, and we find none.

Smith, in turn, contends that a reservoir known as "Ed's Tank" and another water source known as "Lower Pockets" were incorrectly refused recognition as qualified base water. The district manager testified that neither one was in a serviceable condition as a water source on the day the Special Rule was revoked. (Tr. 119, 120, 126, 923, 1133.)

[6] In a letter dated August 29, 1961, to a realty company, the Acting District Range Manager, Owen S. Wright, said that the base class 1 waters were satisfied prior to setting up the Pakoon Special Rule area. (Yates file)

Again, in a summary of minutes of a meeting held on July 29, 1960, to discuss the division of the Special Rule area on a class 2 basis, at which Yates and his son-in-law, Gentry, were present, the District Manager wrote: "Mr. Gentry brought up the subject of the Yates base water and ask[ed] why there was no 5 mile radius applied. It was pointed out that Mr. Yates' class 1 allotment was adjudicated by agreement and that he was given the range he requested at the time * * *." (Yates file) *See also* Tr. 108, 109.

Ed's Tank was repaired some time in 1956 and was in service at the time of the hearing (Tr. 123, 1113). It, however, had been out of repair for several years before the revocation date (Tr. 122), and only waters serviceable as of that date were considered.

Accordingly, it was proper not to base any service areas on the possibility that they might be made serviceable in the future.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the Bureau of Land Management dismissing the Allans' appeal is reversed, the decision of the hearing examiner as to the Allans' appeal is affirmed, and the decision of the Bureau of Land Management as to Smith's appeal is affirmed.[7]

MARTIN RITVO, *Member.*

WE CONCUR:

FRANCIS MAYHUE, *Member.*

JOAN B. THOMPSON, *Alternate Member.*

ESTATE OF LUCILLE MATHILDA CALLOUS LEG IRELAND

IBIA 71-6 *Decided March 19, 1971*

Indian Probate: Rehearing: Generally

Regardless of procedural technicalities involved in the adjudication of petitions for rehearing in administrative proceedings, administrative tribunals should give the same priority toward securing a "just result" as is required of the courts in their proceedings.

Indian Probate: Hearing Examiner

In the course of conducting an administrative proceeding, the Hearing Examiner should not assume the role of an adversary or advocate; but he owes a duty, as judge and inquisitor, particularly when a party is not represented by counsel, to elicit for the record all the material facts, both favorable and unfavorable, bearing on the contentions of that party.

Indian Probate: Code of Federal Regulations: Interpretation and Construction

The requirement of clear and convincing proof of a promise to pay for care and support, under 25 CFR 15.23(d), may be fulfilled by oral testimony without the corroboration of documentary evidence.

[7] In an action entitled *Smith v. Hickel, et al.*, Civil No. 69-245 Pct., in the United States District Court for the District of Arizona, Smith sought review of the Bureau's decision of August 6, 1968, and another matter. Defendant's motion to dismiss was granted on February 3, 1970.

Indian Probate: Administrative Procedure Act: Applicability to Indian Probate

The requirement of the Administrative Procedure Act, that all decisions of an Examiner shall include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record, is mandatory and applicable to all decisions of Examiners in Indian probate proceedings.

BOARD OF INDIAN APPEALS

The probate of the estate of Lucille Mathilda Callous Leg Ireland, of the Standing Rock Indian Reservation, was the subject of a hearing, held October 29, 1968. The Examiner determined that the estate of the decedent should be awarded to her only heir, Phyllis K. Ireland, a daughter, and denied a claim filed by Mrs. Laura Silk, the appellant herein, based on an alleged promise to pay for the care and support of Phyllis. The primary question raised by this appeal is whether Mrs. Silk, an unsophisticated person not previously represented by counsel, has been given adequate opportunity and assistance in stating and supporting her claim. We think she has not.

Mrs. Silk's claim was presented by an Affidavit in Support of Claim prepared by filling in blanks on a mimeographed form and attaching thereto three paragraphs in the handwriting of the Claimant. The handwritten attachment states:

> I have taken car of phyllis Ireland since she was 2 years old April 1953.
> 2 drunken women bought her to my home one evening and left her there. one woman said she don't want her because she eats too much and the other woman said she was going to Montana and she don't bother with her. so the next morning I took her to the Welfare Sioux County Welfare. and they told me to keep her for 3 days and 3 days, 3 mo. 3 years. so the Sioux County Welfare start paying me for care, broad & room for 10 years and the last 6 years I support her and now she is 18 years old. and she is not well. she is deaf on one ear. T.B. sat on one ear and 1958 they removed her ear drum.
> The last 6 years I took care for $60.00 a mo The mother Lucille Callous Leg Ireland promise to pay and she never paid. and I am still taking care of her. (sic)

The Claimant, whose full Indian name is Laura Yellow or Fast Horse Silk, appeared at the hearing in person without counsel and was questioned exclusively by the Examiner. The only questions and answers relating to the merits of Mrs. Silk's claim initially appearing in the record are as follows:

Q. You have been the foster mother of Phyllis Ireland: is that true?
A. Yes.
Q. Is it correct that she was born April 4, 1950?
A. She was born April 29.
Q. We will change the date to April 29.
Q. She is the daughter of Lucille Mathilda Callous Leg Ireland?
A. Yes.

Q. The record will show that Mrs. Laura Silk has filed a claim for care at $60 a month for Phyllis from the time she was 12 until she became 18 years of age, for a total amount of $4,320. There is no agreement on file; there is an allegation by Mrs. Silk that the mother, Lucille, promised to pay, but there is nothing to show how much she promised to pay. * * *

After the hearing, on November 13, 1968, the Examiner published an Order Determining Heirs, by which the claim of Laura Silk was disallowed, "for the reason that no proof was offered of an agreement with respect to compensation" for the board, room, and general care of Phyllis K. Ireland, daughter of the decedent.

A Petition for Rehearing, signed and filed by Mrs. Silk on January 10, 1969, indicated that her allegation of a promise or agreement to pay for Phyllis's care and support could be substantiated by the testimony of two witnesses. Although her Petition noted that she was submitting the "depositions" of these two witnesses, the documents were actually in the form of affidavits. The affidavit of one of the witnesses, George Afraid of Hawk, recites his personal knowledge of the family of the decedent and strongly corroborates the position of the claimant that an agreement did in fact exist. The affidavit states that the decedent had asked the affiant to sell some land in which both he and the decedent had an interest, so that a settlement could be made between the decedent and Laura Silk for the care of Phyllis. The affidavit of the second witness, one Leo Cadotte, appears neither to corroborate nor discredit the claimant's allegation.

An Order Denying the Petition for Rehearing was issued on April 14, 1970. This order, in the form of a decision, contained the following analysis:

In her claim filed prior to the hearing, the petitioner asked $60 a month for 6 years or a total of $4,320 and stated therein that the decedent promised to pay her but did not do so. Her petition for rehearing asserts an entirely different claim—that the decedent had agreed to pay $22.25 per month from April 1953 to June 1968, or 194 months, or a total of $4,316.50. She gives no explanation for the changed amount per month and the changed period of time as bases for the claim. Would the petitioner have us believe that she and the decedent entered into alternative agreements?

Neither affidavit in support of the petition corroborates the petitioner's assertion of an agreement such as alleged by the petitioner. Her assertion, as corroborated by the affidavit of George Afraid of Hawk, that the decedent was going to pay for the care of the child out of proceeds from a land sale was not mentioned at the hearings. It is a new allegation.

It is stated in 25 CFR 15.17(a) that if the petition is based upon newly discovered evidence, it must state a justifiable reason for the failure to discover and present the evidence at the hearing. The petition failed to give any reason for not presenting such evidence at the hearing. Accordingly, it is not under consideration in this order. The petition is without merit.

In passing, it may be observed that the petitioner received adequate compensation from other sources for the care given decedent's daughter, a fact she deigned not to mention until confronted therewith at the hearing.

The Examiner said she denied the petition for rehearing; in fact, refused to consider it, because it did not state a justifiable reason for the failure to discover and present evidence at the hearing. We consider such denial to be unduly harsh here. It is obvious that the claimant was not aware of the technical requirements and procedures necessary for a proper preparation or presentation of her claim, and was not so advised by the Examiner. It appears that claimant first learned of these technical requirements from the Examiner's order denying her claim. Then, when claimant attempted to comply upon a petition for rehearing, the Examiner ruled that no justifiable reason was given for not presenting her evidence properly at the first hearing.

The United States Supreme Court, in *Ford Motor Company* v. *National Labor Relations Board*, 305 U.S. 364 (1939), said, among other things, that it (the court) may adjust its relief to the exigencies of the case in accordance with equitable principles governing judicial action, and that "the purpose of the judicial review is consonant with that of the administrative proceeding itself—to secure a just result with a minimum of technical requirements." See also *James J. Williams, Inc.* v. *United States*, 241 F. Supp. 535 (E.D. Wash. 1965); *National Bus Traffic Association* v. *United States*, 212 F. Supp. 659 (N.D. Ill. 1962); and *Fleming* v. *Federal Communications Commission*, 225 F. 2d 523, 525, 526 (D.C. Cir 1955).

In line with the reasoning of the foregoing authorities, we hold that this record, *in toto*, meets the justifiable reason requirement of 25 CFR 15.17(a). The claimant simply did not have the requisite knowledge, background, or understanding and was not represented by counsel. Under such circumstances, the specific allegations technically required by the regulations may be inferred from the petition, the record, and the subsequent incidents and circumstances of the case.

We note also that the Examiner did not ask the basic questions of the claimant which would tend to corroborate the validity of her claim. For example, the question was not asked of claimant whether other persons had knowledge of a promise by decedent to pay for the care and support of the child, Phyllis Ireland. The claimant was not queried on the matter of how the amount of claim was determined. In fact there seems to have been no question of a probing nature asked which might have helped establish material facts supporting the claim of Laura Silk.

The Examiner who conducts an Indian probate hearing, just as an examiner in any other administrative proceeding, has a duty to develop a complete record. When necessary, he must assume the role of interrogator as well as judge, particularly when a party is not represented by counsel, and be extra careful to see that *all* relevant facts and circumstances, *both favorable and unfavorable* to a party or claimant be brought out. He has a duty, without assuming an advocate's role, to

elicit from the witnesses any and all testimony which will allow a full and complete determination of the claimant's contentions. *Coyle* v. *Gardner*, 298 F. Supp. 609 (D. Hawaii 1969); *Hodges* v. *Celebrezze*, 232 F. Supp. 419 (W.D. Ark. 1964).

In the present case, substantial evidence was offered supporting the existence of a promise or agreement to pay for care and support. When all the facts are known, the evidence may fully meet the requirement of "clear and convincing" proof showing that the care was given on a promise of compensation and that compensation was expected, if not for the amounts previously claimed, perhaps for some other amount (see 25 CFR 15.23(d)). The Examiner may have assumed that, as a matter of law, an agreement for compensation must be in writing or supported by written documents. The pertinent regulation does not require written evidence. "Clear and convincing proof" does not necessarily mean uncontradicted proof, and it is sufficient if there is proof of a probative and substantial nature carrying weight of evidence sufficient to convince ordinarily prudent-minded people. *Clemens* v. *Richards*, 304 Ky. 154, 200 S.W. 2d 156 (1947). It is a higher degree of proof than is required under the ordinary rule of a preponderance of the evidence, but may not be stretched to require written evidence.

The initial decision below, and also the order denying rehearing, lack clearly enunciated findings of fact and conclusions of law. As discussed above, it is unclear whether the Examiner concluded that Mrs. Silk's claim, unsupported by written evidence, could not be considered. The order denying rehearing also criticizes the showing made by Mrs. Silk on the grounds that her offer of supplemental evidence (affidavits) was untimely, and observes "in passing" that Mrs. Silk had received adequate compensation from other sources. But whether these passing observations were intended by the Examiner to be findings or conclusions is uncertain.

Findings of fact and conclusions of law should be clearly and succinctly incorporated in every examiner's decision in order to show the factual and legal support for the result reached. Our regulation, 25 CFR 15.15, not only requires this, but it was held in *Estate of Charles White*, 70 I.D. 102, that Indian probate adjudications fall within the provisions of the Administrative Procedure Act. The pertinent part of that act, 5 U.S.C.A. sec. 557, provides:

> (c) * * * All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of —
>
> (A) findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law, or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction relief, or denial thereof.

Wherefore, pursuant to the authority vested in this Board by delegation from the Secretary, 35 F.R. 12081 (July 28, 1970), we reverse the order of Examiner denying claimant's petition for rehearing and

remand this case for further proceedings consistent with this decision, but limited to the claim of Mrs. Laura Silk against the subject estate.

DAVID DOANE, *Alternate Member.*

I CONCUR:
JAMES M. DAY, *Director.*

UNITED STATES
v.
WILLIAM A. McCALL, SR.,
THE DREDGE CORPORATION,
ESTATE OF OLAF H. NELSON, Deceased,
SMALL TRACT APPLICANTS ASSOCIATION, Intervenor

IBLA 70-309 through 70-329 — *Decided March 22, 1971*

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

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

Mining Claims: Discovery: Marketability

To satisfy the requirement that deposits of minerals of widespread occurrence be "marketable" it is not enough that they are only theoretically capable of being sold but it must be shown that the mineral from the particular deposit could have been extracted, sold, and marketed at a profit.

Mining Claims: Discovery: Marketability—Mining Claims: Location

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

Mining Claims: Discovery: Marketability

To satisfy the requirements of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the de-

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

Rules of Practice: Hearings—Mining Claims: Hearings

It is proper to allow a third party to intervene in a proceeding where an interest of the intervenor may be affected by the outcome of the proceeding.

BOARD OF LAND APPEALS

William A. McCall, Sr., and the other contestees have appealed to the Director, Bureau of Land Management,[1] from a decision dated August 15, 1968, whereby a hearing examiner declared the Las Vegas Nos. 3 through 6, 8 through 17, 19 through 23, 25 and 26 placer mining claims null and void on the ground that the sand and gravel for which the claims were located are common varieties within the meaning of section 3 of the Act of July 23, 1955, 30 U.S.C. sec. 611 (1964), and there was no discovery of a valuable mineral deposit on any of the claims because there was no market for the mineral material found on the claims as of the date of the Act. The decision also rejected the application for mineral patent Nevada 012928, and denied the motions by the contestees to dismiss the contest under the act of March 3, 1891, 43 U.S.C. sec. 1165 (1964), and to deny intervention by the Small Tract Applicants Association.

The Las Vegas group of placer mining claims was located March 20, 1948, by Vernon D. Bradley, John W. Bonner, N. C. Bradley, and G. C. Bradley. Each claim includes 80 acres, and *in toto*, these contested claims encompass 1,680 acres, described as all section 15, W½, W½ SE¼ section 22, S½ section 27, S½ NE¼, N½S½ section 28, S½SE¼ section 29, T. 20 S., R. 60 E., M.D.M., Clark County, Nevada. The claims are adjacent to the boundary of Las Vegas City, and are approximately 5 miles from the Clark County Courthouse in the center of Las Vegas.

By an instrument dated June 1, 1948, the four original locators released and quit claimed their interests in the Las Vegas group of claims to Olaf H. Nelson, who subsequently quit claimed an undivided one half interest in these claims to William A. McCall, Sr., in an instrument dated September 24, 1952. Nelson and McCall filed application Nevada 012928, on March 27, 1953, for patent to the Las Vegas group of placer mining claims. The land office manager at Reno, Nevada, issued a final certificate on these claims on October 8, 1954.[2]

[1] The Secretary of the Interior in the exercise of his supervisory authority transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management, to the Board of Land Appeals, effective July 1, 1970. Circular 2273, 35 F.R. 10009, 10012.

[2] Mineral patent application Nevada 012928, filed March 27, 1953, included Las Vegas 1 through 23, 25 through 27 placer mining claims in sections 15, 22, 27, 28 and 29, T. 20 S., R. 60 E., M.D.M., Clark County, Nevada. The land office manager issued a certificate October 8, 1954. Patent 1211178 was issued August 4, 1960, for 40 acres described as SW¼NE¼ section 22, T. 20 S., R. 60 E., M.D.M., in Las Vegas 7, supplanting other

The Las Vegas number 23 claim was conveyed to the Dredge Corporation by a quit claim deed dated March 27, 1959.

The present proceedings arose from complaints, Nevada 3092–3095, 3097–3106, 3108–3113, issued March 18, 1960, by the land office manager against the Las Vegas Nos. 3 through 6, 8 through 17, 19 through 22, 25 and 26 placer mining claims, charging that the land within the limits of each claim is nonmineral in character and that no discovery of valuable mineral has been made within the limits of the claims because the materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for these materials. Complaint Nevada 3224 against the Las Vegas No. 23 claim, issued June 1, 1961, charged that the land embraced within the claim is nonmineral in character, and that no discovery of a valuable mineral has been made within the limits of the claim because no actual market for the mineral materials claimed existed before July 23, 1955, and that these minerals are not considered a valuable mineral deposit under section 3 of the Act of July 23, 1955; therefore, any market for such materials developed after that date does not constitute a valid discovery within the mining laws. The Las Vegas No. 23 claim was consolidated into patent application Nevada 012928 by the Secretary's decision, *United States* v. *McCall, et al.* A–29161 (July 30, 1962).

The contestees filed timely answers denying the charges. On April 20–23, 1965, a hearing on all the complaints was held at Las Vegas, Nevada, before a hearing examiner who set forth his findings and conclusions in the decision of August 15, 1968, the subject of this appeal.

The appellants contend essentially that the hearing examiner's decision is contrary to the evidence, that the provisions of the act of July 23, 1955, 30 U.S.C. sec. 611 (1964), do not apply to these mining claims which were located in 1948, that it is illegal to apply the rule of "marketability at a profit," that the contests are barred by 30 U.S.C. sec. 38, and that it was illegal to allow intervention by the Small Tract Applicants Association.

The contestant filed a brief in support of the hearing examiner's decision generally, and the intervenor filed a brief in support of the hearing examiner's decision insofar as it permitted the intervention.

As the appellants contend the hearing examiner's decision is contrary to the evidence, and the appellee to the opposite effect, we shall set forth the salient points adduced at the hearing.

---

patent 1211178 inadvertently issued on the same date for 400 acres, being all of the land in Las Vegas 1, 2, 7, 18 and 27. Patent 27–65–0095 was issued September 25, 1964, for 190 acres described as SE¼SE¼, S½NE¼SE¼, NE¼NE¼SE¼ section 22 (in Las Vegas 1), SE¼NE¼, E½NE¼NE¼ section 22 (in Las Vegas 2), S½S½NW¼, NE¼SE¼NE¼ section 27 (in Las Vegas 18), and SE¼NE¼NW¼ section 27 (in Las Vegas 27).

Witnesses appearing for the contestant were George O. Scarfe, Jr., a valuation engineer (mining), employed by the Bureau of Land Management, and Lewis G. Chichester, the assistant land office manager for the Branch of Mining, Nevada land office, each qualified as an expert witness. Scarfe testified that he, by himself, had made several examinations of the Las Vegas group of placer mining claims in June, July and August 1959, and again in the company of Chichester in July 1963 and January 1965. He described the claims, identified by reference to established and found cadastral survey corners, as lying on an alluvial fan at an elevation of approximately 2500 feet, with a general slope of 2 percent toward the east. The alluvium is mostly limestone fragments, ranging in size from boulders to silt, and with some aeolian deposits in the top one foot. A caliche capping is present, varying from exposure at the surface to a depth of four feet. There is loose sand and gravel above the caliche throughout the area of the claims, as well as rework gravel in the washes which cross the claims. Scarfe described the caliche as a calcareous cement on the limestone deposits, formed by evaporation of the ground water. The caliche capping can be broken by blasting and, after treatment, the rock can be used as ordinary gravel. The material on these claims is similar to that found extensively in the Las Vegas Valley and is suitable for base course filling in highway construction, bituminous mix, and concrete aggregate. Scarfe submitted a sketch map of sections 15, 22, 27, and 28, T. 20 S., R. 60 E., (Ex. G–14), showing the location of the Las Vegas claims, depth of surface sand and gravel above the caliche layer, development workings such as shafts, trenches and bulldozer cuts on each claim, and surface improvements such as roads and power lines, as they existed on September 20, 1959. He described the shafts as having been dug by means of blasting and backhoe excavation, and the trenches as having been dug by hand. He stated that there was no evidence whatsoever of any mining on the contested Las Vegas claims before his examinations in 1959. He submitted another sketch map, Ex. G–15, showing the same area as Ex. G–14, depicting the locations of 64 pits which had been dug as additional development workings by July 31, 1963. His examination of the new shafts showed much silt-like lacustrine deposits in the Las Vegas Nos. 3, 4, 5, and 6 claims. The caliche-coated material exposed in the shafts could be mined, but would require more treatment at a greater expense to make it satisfactory for use as aggregate. He described a pit which had been opened on the Las Vegas Nos. 12 and 13 claims, in which considerable mining had been done recently, with the material screened and stockpiled on the claims, although there had been some hauling

of finished material during his examination. The screening had developed a large amount of "fines," which do not meet road specifications. The pit operation in the Las Vegas Nos. 12 and 13 claims had been blasted through the caliche, with the excavation about 20 feet deep, where another layer of dense cementation was encountered. The gravel, however, was mineable. Scarfe stated his opinion that most of the material on the contested claims, excepting the lake-bed material and the caliche capping, would make specification gravel. He stated that any operation prior to 1959 would have been compelled to break the caliche by drilling and blasting before excavation would be possible, and these things would have increased greatly the overall cost to obtain usable gravel. The competitors operating in neighboring pits are mining gravels having much less caliche-cement. Overall, though, the material on the Las Vegas claims is very much similar to that found widespread throughout the Las Vegas Valley area. The material on these contested claims has no special or distinct characteristics or properties which make the deposits unique. Scarfe said that one shaft on each claim was sampled for gold, with negative results from each claim. He stated that he recommended the contest proceedings as it was his opinion, considering both the "prudent man rule" and the "marketability rule" and the Act of July 23, 1955, *supra*, that a valid discovery of a valuable mineral deposit had not been made on any of the claims.

Chichester testified that he had accompanied Scarfe in July 1963 to examine the claims, and having heard all the Scarfe testimony, he declared he would have given substantially the same answers in response to the questions asked. He then testified as to Las Vegas No. 23 claim, which Scarfe had not examined, stating that insufficient exploration work had been done by the claimants. This claim, in the S½SE¼ section 29, cornering on the Las Vegas No. 22 claim, is dissected by a major wash some 35 feet deep. Cemented gravels derived from limestone and dolomite are present. He defined "caliche" as "cemented gravels." He gave his opinion that each claim lacks a valid discovery, and added that except for the provisions and limitations of Public Law 167, act of July 23, 1955, *supra*, the Las Vegas Nos. 5, 12 and 13 claims might be considered valid locations as they can be operated profitably in the present Las Vegas area market for sand and gravel. All the other claims have too much blow sand and caliche cementation to support any profitable operations, even if presently subject to mining claim location.

Several witnesses appeared on behalf of the contestees. Vernon D. Bradley, one of the original locators of the Las Vegas group of claims,

testified that in 1948 he was the major producer of sand and gravel in the Las Vegas Valley, and he had located the Las Vegas group of claims as future reserves for his plant on the Best Bet placer mining claim in S½NE¼ section 27, T. 20 S., R. 60 E. This claim has since been patented. He stated he had done the necessary discovery work on each claim and had removed perhaps 50 to 100 yards of material from each claim. He sold the Las Vegas claims to Olaf Nelson, and other adjacent claims to William McCall and to Wells Cargo Company. He was unable to state that Nelson had removed material from the contested claims, although much material was taken from the Las Vegas Nos. 1, 2 and 7. He said he was hired in 1956 or 1957 by Nelson and McCall to dig exploratory holes on each 10-acre subdivision of each of the contested Las Vegas claims. The excavated material was run through the plant on the Best Bet claim, and was used on a job at the Las Vegas City Jail. Bradley stated that before washing plants were installed in the area, most gravel excavation was done in the bottom of dry washes where there was no excess of fines. On cross-examination, Bradley stated that he did not know of the removal of any significant amounts of material from the contested claims although Nelson did take lots of material from the Las Vegas Nos. 1, 2, 7 and 18. (Patents have since been issued for all or parts of these claims.) He said he had done no exploratory work on the Las Vegas Nos. 3, 4, 5, 6, 11, 12, 13 and 14 claims while he owned them, but in 1957 he had dug small pits on each of these claims at the behest of Nelson. The Las Vegas claims have been used as dumping grounds for excess unusable materials from other sources in the past. He stated the Las Vegas claims were located as a source of good gravel close to the City of Las Vegas, but were not operated because the Best Bet provided all the materials he needed for his operations in 1948, although he did take small amounts of surface gravel in the washes on some of these claims, for use in blending with Best Bet gravels.

Stanley Hansen, vice president and general manager of Wells-Stewart Construction Company, highway contractors, testified that his company had been operating on the Las Vegas Nos. 12 and 13 claims since 1963, but had done no work on the claims prior to 1963. He stated that some 400,000 tons of material had been extracted from these claims in 1964. He said that material on these claims could be processed into Type 1 and Type 2 material for roads, and for plant mix surface, but from 3 to 7 percent was wasted as fines in screening for Type 2 material. He testified that hauling costs are a very important factor in supplying aggregate for road construction, and that his company tries to keep the hauling distance under three miles.

Joe W. Wells, president of Wells Cargo Company, a construction firm, testified that he had obtained title to the Best Bet claim in 1949 for a source of sand and gravel for local use, and that he had an agreement dated March 24, 1959, with Nelson and McCall to obtain a 20 percent interest in the Las Vegas group of claims after doing the exploration work on each 10-acre subdivision of each claim. The exploration work cost approximately $25,000. He said that the material on the Las Vegas claims would be processed into sand and gravel meeting all specifications for both highway and building construction. He said he was aware of operations on the Las Vegas claims since 1948, but he had no specific knowledge as to work on any individual claim in this group. He stated that the cemented gravels could be broken by shooting and then processed to meet any standard specifications. Such processing is more expensive and therefore little production of such gravel occurred in the period prior to 1959, but now a big ripper mounted on a heavy "cat" can break the cemented gravels. Water soaking is efficacious to dissolve the "cement," and smaller cats can be used for ripping after such soaking. He stated it is cheaper to drill a water well and soak the cemented material in place than it is to shoot or dry rip. The economics of the situation precluded much blasting to break the cemented gravels prior to 1957. He predicted a much greater need for sand and gravel in the Las Vegas area in upcoming years, so that the Las Vegas claims are ideally situated to supply future construction needs in the area.

Howard Geer, an employee of J. M. Murphy Construction Company, testified that Murphy had operated a plant from 1948 to 1952, producing Type 2 base material on the Las Vegas No. 18 claim, but he could not state that material was extracted from any other of the Las Vegas claims for that operation. He said that all of the contested Las Vegas claims have sand and gravel.

Eton Stout, a contractor, testified that he is operating a hot mix plant on the patented Homesite claim, N½NE¼ section 27, with his pit some 35 feet deep. He is of the opinion that the pit could be deepened another 75 feet through good gravel, but such a depth would damage the property for other uses, leaving only a large hole. Also, he stated the costs of mining would be increased by the lifting haul from the bottom of such a deep pit. He said he had tested materials on the Las Vegas Nos. 19, 20, 25, and 26, finding a little hardpan on top, but very good gravel below. He stated the hardpan had been successfully broken by a D–9 cat with a ripper. In his opinion, the Las Vegas Nos. 3, 4, 5, 6, 11, 12, 13 and 14 in section 15 would be easier to mine as there is less hardpan in that area, and the gravel material is similar to that found throughout the whole area of the claims.

He stated there is no caliche on any of these claims, as caliche is never gravel. The cemented gravels are not caliche. They can be broken by ripping, with or without water soaking, and then run through a crusher and screened into the type material desired.

Elvin Hitchcock, formerly employed by Vernon Bradley, testified that he had heard all of Bradley's testimony and, that if asked the same questions on examination or cross-examination, he would give substantially the same answers.

William C. Hartman, vice president of Wells Cargo, stated that he superintended the drilling of the pits on each 10-acre subdivision of the Las Vegas claims, excepting Las Vegas No. 23, after Wells Cargo had bought a 20-percent interest in the claims in 1959. The pits were drilled to a depth of 10 feet and shot, then cleared by a backhoe. The resulting pits were from 7 to 10 feet wide, 20 to 25 feet long, and at least 12 feet deep. Sand and gravel were found in every hole, but with variations according to the location of the pit on the alluvial fan; that is, some pits had coarser deposits, some finer, but all were substantially sand and gravel from top to bottom. The gravels from these claims are still able to meet the more stringent specifications now imposed. In his opinion, Hartman stated the cemented gravels, after crushing, are equally as good as the loose gravels for either road or other construction. At the present time, horticulture provides a market for the excess fines recovered from screening operations. Hartman defined caliche as a tightly cemented calcereous fine material, very dense and with no rocks. Cemented gravel is variable in composition. The highly cemented gravel is actually a variable conglomerate and resembles ordinary concrete when broken. There are no true caliches in the Las Vegas claims, only cemented gravels.

Howard Greene, one of the intervenors, testified relative to the small tract applications which had been filed for some of the lands embraced in the Las Vegas claims, but submitted nothing bearing on the question of the validity of the mining claims.

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

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. * * * *Castle* v. *Womble*, 19 L.D. 455, 457 (1894); *United States* v. *Coleman*, 390 U.S. 599 (1968).

This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed, and presently

marketed at a profit, the so-called marketability test. *United States* v. *Coleman*, *supra*. This present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, *bona fides* in development, proximity to market, and the existence of a present demand. The marketability test has been specifically held to be applicable in determining the validity of sand and gravel claims in the Las Vegas area. *Palmer* v. *Dredge Corporation*, 398 F. 2d 791 (9th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969); *Foster* v. *Seaton*, 271 F. 2d 836 (D.C. Cir. 1959); *Osborne* v. *Hammit*, Civil No. 414, D. Nev. (August 19, 1964).

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

There is no contention that any of the claims has an uncommon variety of sand or gravel, and, indeed, the evidence shows clearly that the mineral material present is of an ordinary nature and common variety, similar to that found widespread throughout Las Vegas Valley. We turn, therefore, to a consideration of the evidence bearing on the marketability as of July 23, 1955, of the sand and gravel from these contested claims.

The Government's expert witness, Scarfe, testified that he found no evidence of any mining activity when he examined the claims in 1959, and that the caliche-coated material probably could not have been mined, crushed, and processed into material usable for fill except at a much greater cost than would be required to extract and process the unconsolidated sands and gravels on other mining claims in the near vicinity.

Testimony was given that larger equipment now available can break the cemented gravels, so that they are suitable for common usages of sand and gravel, and that water soaking can be employed and the gravels mined with smaller equipment.

The original locator of the Las Vegas claims, a leading purveyor of sand and gravel in the Las Vegas market in 1949, testified that he had satisfied the demand for sand and gravel from other claims adjacent to these contested Las Vegas claims and from sources elsewhere in Las Vegas Valley, and that he had located these Las Vegas claims as a

reserve for future operations, but had taken some small amounts of surface material from the washes that cross these claims.

Testimony was given to the effect that the demand for sand and gravel in the Las Vegas area was increasing so there was a growing need for the materials from these claims. But it was adduced that road contractors, who need large amounts of material, try to find sources of gravel for fill within three miles of the construction area, as hauling costs make up a large part of the cost of sand and gravel, and hauling beyond three miles limits the marketability of sand and gravel for road construction purposes.

Much of the testimony relating to operations and production of sand and gravel prior to July 23, 1955, related to the Las Vegas Nos 1, 2, 7, 18 and 27 claims, rather than to the Las Vegas claims included in these contests.

The best that can be said for the testimony on behalf of the contestees is that there was a general demand for sand and gravel in the Las Vegas area of the type present on these claims, but nothing was adduced to indicate that the cemented gravels prevalent on these claims could have been mined, processed and marketed at a profit before July 23, 1955. The testimony was insufficient to show a discovery because to satisfy the present marketability test the claimants must show the existence of a demand for the material on the specific claims and not simply a general demand for the type of material in question *United States* v. *Harold Ladd Pierce*, 75 I.D. 270 (1968); *United States* v. *Everett Foster*, 65 I.D. 1 (1958); *aff'd in Foster* v. *Seaton*, 271 F. 2d 836 (D.C. Cir. 1959); *United States* v. *Loyd Ramstad and Edith Ramstad*, A–30351 (September 24, 1965); *United States* v. *J. R. Osborne*, 77 I.D. 83 (1970); *United States* v. *William A. McCall and R. J. Kaltenborn*, IBLA–70–379 (Nov. 25, 1970; *United States* v. *Neil Stewart et al.*, IBLA–70–42 (Dec. 9, 1970).

The claimants contend the successful mining operations on similar mineral materials in the adjacent Las Vegas Nos. 1, 2, 7, 18, and 27 claims and in other claims nearby, before July 23, 1955, is adequate proof that these claims could also have been operated at a profit in that period. This is the same type of theoretical evidence which the court in *Osborne* v. *Hammit*, *supra*, found to be insufficient to satisfy the marketability test as to similar placer mining claims in the Las Vegas area. A further discussion of *Osborne* v. *Hammit* is given in *United States* v. *Osborne*, *supra*, *United States* v. *Ramstad*, *supra*, and *United States* v. *Keith J. Humphries*, A–30239 (April 16, 1965).

Obviously the claimants have failed to show that by reason of present demand, *bona fides* in development, proximity to market and accessibility, and other factors, the deposits on these Las Vegas claims were of

such value that they could have been mined, removed and disposed of at a profit as of July 23, 1955.

The hearing examiner correctly found from the evidence that no discovery of any valuable mineral deposit had been made on any of these contested mining claims prior to July 23, 1955.

The contention that it was improper to admit the intervenors into these proceedings is without merit. Although the present rules of practice of this Department do not specify the procedure for intervention, we deem it proper to allow third party intervention where an interest of the intervenor may be affected by the outcome of the proceeding. *See* Fed. R. Civ. P. 24. The hearing examiner was not in error to permit intervention by the Small Tract Applicants Association in these proceedings.

The contention that the Las Vegas claims are valid under Rev. Stat. sec. 2332, 30 U.S.C. sec. 38 (1964), has no merit. This section provides:

> Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

The contestees assert that they have satisfied all the requirements of the statute. Under consistent rulings of this Department and of the courts, a valid discovery of a valuable mineral deposit is essential to establish the validity of a mining claim, even in view of section 2332, Revised Statutes, 30 U.S.C. sec. 38, *Cole* v. *Ralph*, 252 U.S. 286, 307 (1920); *United States* v. *Alice A. and Carrie H. Boyle*, 76 I.D. 318 (1969). Under circumstances as in these proceedings where the evidence falls far short of that required to establish a valid discovery as of July 23, 1955, the claims were properly declared null and void.

Similarly the appellants' contention that they are entitled to a patent pursuant to the provisions of section 7 of the act of March 3, 1891 (26 Stat. 1098) as amended, 43 U.S.C. sec. 1165 (1964) is without merit for that section does not apply to the mining laws. *Palmer* v. *Dredge Corporation*, *supra*.

The contention that the hearing examiner submitted a draft decision to the Department for approval prior to promulgation is not supported by the record. Whatever may have been intended in the hearing examiner's letter of January 12, 1967, to Howard Greene, with copies to the attorneys for the contestant and for the contestees, the decision of August 15, 1968, is the independent conclusion of the hearing examiner made without prior review by the Department.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

MARTIN RITVO, *Member.*

WE CONCUR:

FRANCIS MAYHUE, *Member.*

EDWARD W. STUEBING, *Member.*

SOUTHWEST SALT COMPANY

IBLA 70-59 *Decided March 24, 1971*

Sodium Leases: Rentals

Where a sodium lessee files a relinquishment of the lease after accrual but before payment of the rental for that calendar year, the Secretary is empowered to determine whether the lessee demonstrated reasonable diligence so as to obtain the benefit of proration of rent on a monthly basis pursuant to the act of November 28, 1943; but the act does not confer authority to relieve the lessee of liability for rental accrued for those months prior to the filing of the relinquishment.

Federal Employees and Officers: Authority To Bind Government

Erroneous advice given by personnel of the Bureau of Land Management cannot confer a right not authorized by law.

Words and Phrases

"Calendar year or fraction thereof" as that term is employed by the act of December 11, 1928, refers to a period beginning on January 1 and ending on December 31 of the same year, both dates inclusive.

BOARD OF LAND APPEALS

Southwest Salt Company has appealed from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated May 23, 1969, affirming as modified a decision of the Riverside district and land office dated January 24, 1969. The decision below affirmed that sodium leases LA 0158996 and 0159227 were each in default for lease rental payments due January 1, 1969. In the case of lease LA 0158996, the lessee was directed to pay rental for the calendar year 1969 in the amount of $2,563. In modifying the decision of the Riverside district, the Bureau directed payment of prorated rental for LA 0159227 computed at $214.50, one-twelfth of the annual

rental of $2,574, based on relinquishment of that lease filed on January 30, 1969.

On June 9, 1969, immediately after receiving a copy of the Bureau's decision, appellant filed a Petition for Relinquishment of Sodium Lease LA 0158996 with the Manager, Riverside district and land office.

The record shows that each of the subject leases was issued to Danby Salt Corporation as a preference right lease based on discovery of sodium under a prospecting permit. Lease LA 0158996 was issued effective November 1, 1964; lease LA 0159227 was issued effective February 1, 1963. Assignment of record title to each lease was approved to Southwest Salt Company effective January 1, 1969.

Although the leases were prepared on different editions of the same Bureau form (Form 4–1134), each provides it is issued pursuant to and subject to the terms and provisions of the Act of February 25, 1920 (41 Stat. 437), as amended, and to all reasonable regulations of the Secretary of the Interior now or hereafter in force when not inconsistent with any express and specific provisions of the leases.

Lease LA 0159227 is on Form 4–1134 (Dec. 1958) and provides in section 2(b) for payment of rental annually in advance for the first calendar year or fraction thereof at the rate of $.25 per acre or fraction thereof; for the second, third, fourth, and fifth calendar years, respectively, at the rate of $.50 per acre; and for the sixth and each succeeding year of the lease term at the rate of $1 per acre. Lease LA 0158996 is on Form 4–1134 (Mar. 1964) and provides in section 2(c) for payment of rental annually in advance at the same respective rates of $.25, $.50, and $1, but does not refer to payment on a calendar year basis.[1]

The pertinent part of section 24 of the Mineral Leasing Act, as amended, *supra*, provides and has provided since the amendment approved December 11, 1928 (45 Stat. 1019, 30 U.S.C. 262), that all sodium leases shall be conditioned upon payment in advance by the lessee of a rental of $.25 per acre for the first calendar year or fraction thereof, $.50 per care for the second, third, fourth, and fifth calendar years, respectively, and $1 per acre per annum thereafter during the continuance of the lease.

Each lease file shows that the land office has been sending to the lessee an advance courtesy billing notice fo reach calendar year starting with January 1, 1964 for lease LA 0159227, and with January 1, 1965, for lease LA 0158996, and that the annual rental on a calendar

[1] The current form for sodium leases, Form 3150–2 (Oct. 1966), provides for rental payment in advance on a calendar year basis.

year basis has been paid by the lessee on or before the first business day of January of each year to and including January 1968. No rental for calendar year 1969 has been paid for either lease. The billiing notices for calendar year 1969 were sent to the then lessee of record, Danby Salt Corporation, in November 1968.

In its appeal, Southwest Salt Company raised questions concerning the following issues: (1) The due date under which rental is payable with respect to Sodium Lease No. LA 0158996; (2) The applicability of the doctrine of estoppel against the agents of the Department of the Interior; (3) The petition for relinquishment on Sodium Lease No. LA 0158996 is timely and that payment due (if any) should be prorated to February 1, 1969.

In its appeal to the Director, adopted by reference in this appeal, Southwest Salt Company alleges, among other matters, that in response to a telephone inquiry by their counsel on January 16, 1969, an employee of the Riverside district and land office had declared that a relinquishment of lease LA 0158996 filed before November 1, 1969, would be timely. The appellant further contends that it finds itself in the present predicament principally because of failure of the Riverside district and land office to act promptly on the assignments perfected September 30, 1968, and thereafter to communicate accurate information relative to the rental status of Lease LA 0158996.

Even if completely substantiated without other mitigating factors, the facts on which appellant bases his arguments fall far short of the standard required for the invocation of the doctrine of estoppel. The cases cited by appellant merely serve to emphasize that those who deal with government agents are extremely limited as to the information upon which they can rely, if the advice given conflicts with statutory requirements. As stated by Justice Frankfurter in *Federal Crop Insurance Corp.* v. *Merrill, et al.*, 332 U.S. 380, 384 (1947):

> * * * Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitation upon his authority. * * *

Moreover, the Department has specifically provided by regulation in Title 43 CFR that it will not be bound or estopped by the errors or delays of its employees in the performance of their duties, as follows:

> § 1810.3 Effect of laches; authority to bind government.
>
> (a) The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or agents, or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

(b) The United States is not bound or estopped by the acts of its officers or agents when they enter into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.

(c) Reliance upon information or opinion of any officer, agent or employee or on records maintained by land offices cannot operate to vest any right not authorized by law.

Further, departmental decisions have consistently held that the errors, delays or omissions of employees cannot confer a right or benefit not authorized by law. *Harold E. and Alice L. Trowbridge*, A–30954 (January 17, 1969), and cases cited therein.

With respect to the contention that annual rental for the sodium lease LA 0158996 is not due on or before January 1 of each year, we look to the language of the statute which is clear and unambiguous in its requirement that rental for a sodium lease be paid in advance on a calendar year basis. 30 U.S.C. sec. 262 (1964). The decision below was correct in affirming the land office decision that rental for calendar year 1969 was in default.

The majority of those jurisdictions which have considered the phrase have construed "calendar year" to mean a period beginning on January 1 and ending on December 31 of the same year. 6 WORDS AND PHRASES § 17, and cases collected therein. With specific reference to the term as it is employed in section 24 of the Act, *supra*, we may refer to the maxim *nositur a sociis*. SUTHERLAND STATUTORY CONSTRUCTION (3rd ed.) sec. 4908. By association of the phrases "calendar year" and "or fraction thereof" the legislative intent is made manifest. If we construed the words "calendar year" to mean merely a period of 365 consecutive days from the effective date of a lease, for example, September 1, there could be no "fraction thereof" in the regular term of a lease issued for a given number of full years. This would be to deny meaning to the phrase, which we clearly cannot do. On the other hand if "calendar year" is construed to mean from January 1 to December 31, both days inclusive, we instantly discern a four-month "fraction thereof" in our hypothetical lease beginning on September 1. It is apparent to us that this is the intended meaning.

Therefore, appellant's failure to relinquish prior to January 1 subjected it to liability for additional rental.

With respect to appellant's arguments concerning its petition for relinquishment of Sodium Lease LA 0158996 we think it informative to review the Bureau's decision concerning a similar petition for relinquishment of Lease LA 0159227. In allowing appellant's request that rental be prorated for the period of 1969 prior to the time of filing of the relinquishment, the decision below noted that this was in accord-

ance with the act of November 28, 1943, 30 U.S.C. sec. 188a (1964), which provides that where relinquishment of a lease is filed after accrual but before payment of rental, the rental may be prorated on a monthly basis when it is found that the lessee's failure to file a timely relinquishment prior to the accrual of rental was not due to lack of reasonable diligence. We agree with the decision below that the lessee did not show lack of reasonable diligence in filing the relinquishment of Lease LA 0159227, and therefore is entitled to the benefits of the Act of November 28, 1943, *supra*.

For the reasons stated in that decision, as outlined above, we believe the filing of the petition for relinquishment for Lease LA 0159227 should permit proration on a monthly basis of rental for the period of 1969 prior to the filing of the relinquishment, on the premise that the reliquishment was filed as soon as possible after it was affirmed that the rental had accrued. Accordingly, the rental payment required is $1,281.50, being six-twelfths of the calendar year. In rejecting appellant's contention that the proration should be from February 1, 1969, we find that the statute empowers the Secretary to determine whether a lessee has shown reasonable diligence in filing a petition for relinquishment so as to obtain the benefit of proration, but it does not confer authority to relieve the lessee of liability for rental accrued for those months prior to the filing of the relinquishment.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the Chief, Office of Appeals and Hearings is affirmed as modified.

EDWARD W. STUEBING, *Member.*

WE CONCUR:

ANNE POINDEXTER LEWIS, *Member.*

FRANCIS MAYHUE, *Member.*

DAVID ABEL ET AL.

IBLA 70-25
IBLA 70-26
IBLA 70-28 *Decided March 26, 1971*

Grazing Permits and Licenses: Adjudication—Grazing Permits and Licenses: Range Surveys

Where a grazing allotment includes both private and federal range lands, the Bureau of Land Management may properly determine the grazing capacity

of all of the lands in the allotment and require, as a condition to the issuance of a permit or license to graze the federal range, that the number of livestock using the private lands be limited to the recognized capacity of the lands.

Grazing Permits and Licenses: Range Surveys

A determination of the carrying capacity of a unit of range by the Bureau of Land Management will not be disturbed in the absence of positive evidence of error.

Grazing Permits and Licenses: Generally—Grazing Permits and Licenses: Exchange of Use

Where grazing privileges have been exercised in the past on the basis of an agreement whereby the use of private lands in one pasture has been exchanged for the use of federal lands in another, the agreement may properly be construed either as an exchange of the use of an area of land for the privilege of using another designated area of land for grazing or as an exchange of the use of the first area for the privilege of grazing a specified number of animals on the second.

Grazing Permits and Licenses: Apportionment of Federal Range

Where an apportionment of grazing privileges is made among livestock operators upon the basis of past authorized use, as shown by the records of a state grazing district, and one of the operators denies that he exercised or was allocated the grazing privileges which the records indicate he exercised in a particular year, the case will be remanded for the development of further evidence relating to the allocation of grazing privileges in that year.

BOARD OF LAND APPEALS

David Abel, Nick Janich and John Propp have separately appealed to the Secretary of the Interior from decisions dated January 14, January 6, and January 9, 1969, respectively, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed decisions of a hearing examiner dismissing their respective appeals from decisions of the Billings, Montana, district manager adjusting their grazing privileges with respect to numbers of animals permitted to be grazed and areas and seasons of use. Because the issues are almost identical in all three cases, the appeals are consolidated here.

Appellants are all livestock operators who utilize federal lands which were, at the time these proceedings were commenced, administered through the Buffalo Creek Cooperative State Grazing District, an organization of livestock operators created under the Montana Grass Conservation Act, Sections 46-2301 to 46-2332, Revised Codes

of Montana, 1947.[1] The controversies here arise from reductions in grazing privileges imposed as a result of a range survey conducted by the Bureau of Land Management in 1964 and 1965. The backgrounds of the appeals are as follows:

IBLA 70-25—David Abel

In an application dated December 30, 1966, Abel requested a license or permit authorizing graizng use totaling 4,530 animal-unit months (AUM's) during the 1967 grazing season in the Upper Buffalo Common, Home Ranch, Section 19, Brooks, Holding, Turley Place and Heifer pastures. The pastures embrace an area of about 21,165 acres, of which approximately 6,536 acres, or 23 percent are federal land (see Abel Tr. 48-52; Ex. A-1).[2]

By a decision of March 13, 1967, the Billings district manager approved the application as to 3,613 AUM's, while rejecting it as a 917 AUM's. Upon Abel's appeal from the district manager's decision a hearing was held at Billings, Montana, on April 19, 1968, to determine, as the hearing examiner found:

1. Whether the Government is bound by agreements of February 4, 1964, and April 8, 1966, between Abel and the State Grazing District, which were approved by the Bureau of Land Management; and

[1] The lands administered by the Buffalo Creek Cooperative State Grazing District consist of intermingled private lands, state lands and federal lands (public domain and acquired "LU" or "Land Utilization" lands), and lands owned or directly controlled by the District itself. The conduct of livestock operations in the District has entailed the execution of numerous formal and informal exchange of use agreements among operators, the District and the Bureau of Land Management, resulting in some instances in the creation of complex patterns of land ownership and use.

On January 28, 1963, the Bureau and the State Grazing District entered into an agreement which provided, *inter alia*, that the Bureau would establish and fix, in cooperation with the State District, the grazing capacity of the federal and District land, that it would issue to the District an annual license or term permit for the grazing privileges that may be utilized on the federal land by the District's licensees and certify to the District a list of applicants qualified to use the federal land and the extent of the privileges to which each is entitled, and that the District would use or permit the use of the federal land for grazing purposes in accordance with the terms of the agreement, fixing, subject to approval of the Bureau, the numbers and kinds of livestock to be grazed on the federal land, not in excess of the grazing capacity and the seasons of use. That agreement was terminated by the Bureau, effective September 25, 1968, upon the failure of the District to conform its 1968 allocations to the Bureau's certification after the Bureau had conducted a range survey which resulted in a determination that the capacity of the federal range was substantially less than the previously authorized use. The authority of the Bureau to determine the capacity of the federal range, without the concurrence of the District, and the propriety of the Bureau's actions following that determination were judicially recognized in *Buffalo Creek Cooperative State Grazing District* v. *Tysk*, 290 F. Supp. 227 (D. Mont. 1968).

While it would appear that the termination of the agreement may have some effect on other contractual relations established in the past, it does not appear that the issues raised in the present appeals are directly affected by the Bureau's action.

[2] References to hearing transcripts and exhibits are identified by the names of the appropriate parties, except where the absence of possible ambiguity makes such identification unnecessary.

2. What is the carrying capacity of the Upper Buffalo Common, Home Ranch, Section 19, Brooks and Turley Place pastures.[3]

In a decision dated June 3, 1968, the hearing examiner held the first issue to be immaterial, inasmuch as neither agreement purported to specify the extent of the grazing use which would be authorized by the Bureau of Land Management. From the evidence developed at the hearing, he concluded that the carrying capacity of the appellant's allotments was as disclosed by the range survey and dismissed the appeal.

IBLA 70-26—Nick Janich

By application dated January 6, 1967, Janich requested authority to use 533 AUM's of forage on federal land in the South-K-Henry allotment, in addition to 232 AUM's on private land in the same pasture. The pasture consists of 5½ sections of land, of which 3⅞ sections are federal land (Janich Tr. 6; Ex. A-1).

In a decision dated March 13, 1967, the Billings district manager approved the application for 276 AUM's, rejecting it for the balance.[4] At a hearing held at Billings on April 18, 1967, pursuant to Janich's subsequent appeal from the district manager's decision, the parties agreed that two issues were raised by the appeal:

1. What is the appellant's customary use: and
2. What is the carrying capacity of the South-K-Henry allotment:

In a decision dated August 9, 1968, the hearing examiner found that Janich had entered into an oral agreement with the State District to trade the use of land which he owns in the Central-K-Henry allotment for a specified area of federal land in the South-K-Henry allotment, and the use of a reservoir which he owns in the North-K-Henry allotment for a license to graze 10 cattle for 8 months in the South-K-Henry allotment. He found that Janich also owned 720 acres of land in the South-K-Henry allotment. Prior to the district manager's decision, the hearing examiner determined, Janich was authorized "to graze in the South-K-Henry allotment livestock deemed sufficient to

[3] Abel was granted the full use applied for in the Holding and Heifer pastures (60 AUM's and 250 AUM's, respectively), and there is no question before us relating to those particular areas.

[4] In a "Notice of Allocation of Grazing Privileges and Allotment Boundaries," dated January 17, 1967, the district manager advised Janich that his federal range demand and adjusted grazing privileges in the South-K-Henry allotment were as follows:

Federal range demand	80 AUM's
Active	39 AUM's
Suspended nonuse	41 AUM's

The district manager then advised Janich that his application was approved for 46 cattle from May 1 to October 30 (276 AUM's) and rejected for 43 cattle for the same period (260 AUM's). Those figures were recited again in the decision of March 13, 1967, without further explanation.

harvest the forage produced on the exchange federal and private land and an additional 10 head." He further found that Janich's authorized use during the "customary use" period [5] averaged 778 AUM's, that all of this use was based on self-furnished range, for which reason Janich was not charged the customary grazing fee, and that Janich, therefore, was not and never had been a "regular licensee." [6] The hearing examiner concluded that the district manager had awarded Janich his "customary use" of the range in the South-K-Henry allotment, adjusted to conform with the capacity of the allotment, that no error had been shown in the Bureau's determination of the range capacity, and that Janich had been awarded all of the grazing privileges to which he was entitled.

IBLA 70-28—John Propp

By application dated December 29, 1966, Propp sought grazing privileges for the 1967 grazing season totaling 400 AUM's, 320 of which were to be in the Mill Creek Common allotment, which Propp uses jointly with E. T. Brown, and the balance of which were to be in the Propp Individual allotment.

---

[5] The "priority period", used in determining the "customary use" which serves as the basis for the award of grazing privileges under the Federal Range Code, is defined as:

* * * "the five-year period immediately preceding June 28, 1934, except that if such Federal range was placed within a grazing district after June 28, 1938, or added to an existing grazing district by boundary modification after the latter date, the priority period shall be the five years immediately preceding the date of the order establishing such district or effecting such addition, as the case may be." 43 CFR 4110.0-5(k)(1) (see similar language in 43 CFR 4110.0-5(p)(1)).

The hearing examiner found that all of the federal lands within the boundaries of the Buffalo Creek Cooperative State Grazing District were added to the administrative area of the Billings District of the Bureau of Land Management by Public Land Order 2586 of January 15, 1962, 27 F.R. 580, to be administered, pursuant to regulation 43 CFR 4111.3-2(d), as "lands additionally available." The priority period for determining "customary use" was therefore found to be the years 1957 through 1961.

[6] The Federal Range Code provides that:

"* * * Regular licenses and permits will be issued to qualified applicants to the extent that Federal range is available in the following preference order and amounts:

"(i) To applicants owning or controlling land in class 1 [dependent by use or full-time water], licenses or permits to the extent of the dependency by use of such land; to applicants owning or controlling water in class 1, licenses or permits to the extent of the priority of such water.

"(ii) To applicants owning or controlling land or water in class 2 [dependent by location], licenses or permits for the number of livestock for which range is available and which can be properly grazed in connection with a livestock operation which involves the use of such land or water." 43 CFR 4111.3-1(d)(2).

The Code also provides for the charging of fees for the grazing of all livestock on public lands, except for that authorized under a free-use license, including a minimum charge of $10 on all regular licenses and permits (43 CFR 4115.2-1(k)). Therefore, to the extent that Janich was not a regular licensee his right to use federal lands in the South-K-Henry allotment was derived from an exchange of the use of his land outside the allotment, or from an exchange of water for grazing privileges (as all of it appears to have been), rather than from a recognized privilege of utilizing federal lands *in addition to* his own grazing lands, for which a fee is exacted.

A decision of the Billing district manager dated March 13, 1967, approved Propp's application for 168 AUM's in the Mill Creek Common allotment and 49 AUM's in the Propp Individual allotment, a total of 217 AUM's. Propp appealed from that decision on the ground that the pastures had been used at the same stocking rate for the last 22 years without deteriorating, and a hearing was held at Billings on April 17, 1968, to determine the carrying capacity of the two allotments. In a decision dated May 10, 1968, the hearing examiner accepted the Bureau's determination of the carrying capacities of the lands in question and, finding no dispute with respect to the allocation of the available range between Propp and Brown, dismissed the appeal.

In their current appeals to the Secretary, all appellants challenge the authority of the Bureau of Land Management to regulate the grazing use of private and state lands in carrying out its policies with respect to federal lands. They argue that the landowner had the right to determine the carrying capacity of his own lands, and the State of Montana has the exclusive authority to determine the carrying capacity of state lands, and that the State Grazing District has control of private and state lands within its boundaries. Abel and Propp question the correctness of the Bureau's determination of the grazing capacity of the state and private lands involved in these proceedings. It appears that the dispute with respect to grazing capacity relates only to such lands, and that neither appellant questions the propriety of the Bureau's determination with respect to federal lands. The third appellant, Janich, also disputed the Bureau's findings with respect to range capacity. However, he does not appear now to question the Bureau's determination of grazing capacity so much as its determination of his proportionate share of the available grazing privileges in the South-K-Henry allotment.

Federal lands constitute from 14 to 18 percent of the grazing lands within the Buffalo Creek State Grazing District (see Abel Tr. 45).[7] Appellants point to this disparity in ownership as illustrative of the inequity of the Bureau's attempt to manage the entire range in accordance with its concepts of how its own small part should be used. There is no evidence in the record before us that the Bureau is attempting such broad management of other people's lands as appellants' arguments would imply. Moreover, the percentage of federal lands in the district as a whole has little meaning when we are inquiring into the propriety of range adjudication relating to individual pastures of widely-varing patterns of land ownership. For example, in the seven

[7] *Compare* Abel Tr. 45 (14%) with Propp brief (18%) and *Buffalo Creek Cooperative State Grazing District* v. *Tysk*, *supra*, n. 1 (approximately 17%).

pastures utilized by Abel, the percentage of federal land ranges from approximately 18 percent in the Turley Place pasture to 100 percent in the Heifer pasture, federal lands constituting about 31 percent of those pastures (Abel Tr. 48–52; Ex. A–1). Approximately 70 percent of the land in the South-K-Henry allotment, utilized by Janich, is owned by the United States (see Janich Tr. 6; Ex. A–1), while 71 percent of the land in the Mill Creek Common allotment, utilized by Propp, and all of that in the Propp Individual allotment belong to the federal government (Propp Tr. 10; Exs. A–1, A–2).

Unquestionably, the administration of the federal lands involved in these cases in accordance with the Bureau's view of proper range management necessitates the exercise of some control by the Bureau over the use by grazing operators of their own lands or other nonfederal lands. Therefore, the question raised is what authority the Bureau has to exercise such control over the lands of others.

The problem is a practical one. There is no evidence in the record of any attempt by the Bureau to limit a landowner's use of his own lands where such use would not directly affect the use of federal lands. In each instance here the federal lands comprise all or a part of a tract which is grazed as a single unit. Inasmuch as appellants acknowledge the authority of the Bureau of Land Management to manage those federal lands which have been placed under its jurisdiction, how is this to be affected if cattle in uncontrolled numbers are permitted to graze throughout a pasture comprised in part of federal land?

This problem was considered by the Department in the case of *Leandro Muniz*, Interior Grazing Decision 302, 305 (1942). After noting that the license issued to the appellant in that instance included both federal range and privately owned or controlled lands, the Department stated:

> No doubt all licensees feel that they are entitled to make such use of their private lands as they see fit. This is true in a certain sense, but where such use of the private lands will result in an excessive use of the Federal range, it would appear to constitute a violation of the terms of the license and thus warrant the cancellation of the license if the abuse was substantial.

In numerous other cases the Department has, expressly or impliedly, asserted a right to exercise a degree of dominion over the private lands of an individual in exchange for the granting of grazing privileges on federal lands intermingled with private lands. *See, e.g., Leo Sheep Company*, Interior Grazing Decision 629 (1957); *Nick Chournos*, A–29040 (November 6, 1962); *Alton Morrell and Sons*, 72 I.D. 100, 107 (1965); *cf. J. Leonard Neal*, 66 I.D. 215, 217 (1959), where a grazing operator, charged with trespass in his grazing of federal lands arranged in a checkerboard pattern with private and state-owned lands was

granted his request that a portion of his private land in a separately-fenced pasture be withdrawn from a federal grazing district.

If appellants herein are willing to fence their own lands, and other nonfederal lands which they control, in such a manner as to facilitate control of access to the federal lands from adjacent private lands, we cannot deny their right to graze as many animals as they wish for as many months as they see fit on their own lands. However, if private and federal lands are to continue to be used in the same manner as in the past, it is proper for the Bureau of Land Management to insist that such limitations be imposed upon the total grazing use of an individual pasture as will assure protection against overgrazing of federal lands included in that pasture.

Turning then to the question of grazing capacity, we note appellants contend essentially that the Bureau has arbitrarily accepted the determination of its range experts with respect to the capacity of the lands and has given no weight whatsoever to the testimony of ranchers who know from years of experience how many animals a particular tract of pasture land is capable of supporting during a given season of use. We find no merit in this charge.

It appears from the record that grazing was authorized throughout the Buffalo Creek State District at the rate of 20 animals per section of land during the accepted seasons of use for some years prior to the Bureau's range survey of 1965–1966 (see Abel Tr. 18, 20–21; Janich Tr. 16, 36; Propp Tr. 14–15, 34). The Bureau's survey, in addition to showing that the total authorized use has exceeded the capacity of the lands, indicated that there is substantial variation in the carrying capacities of individual pastures.[8] Without attempting to show that the lands throughout the district have a uniform capacity, appellants contend simply that the prolonged acceptance by the range users of the 20-animal-per-section stocking rate should be persuasive evidence of its correctness.

As both the hearing examiner and the Office of Appeals and Hearings have already pointed out, the Department has repeatedly held that a determination by the Bureau of Land Management of the grazing capacity of a unit of the federal range will not be disturbed in the absence of positive evidence of error. As the Department recognized in *O. J. Cooper et al., Redd Ranches*, A–30974 (April 29, 1969):

> * * * There is inherent in * * * [the Bureau's range studies] an element of human judgment which cannot be eliminated by the most meticulous observance

[8] In the case of Abel's lands, for example, it appears from the Bureau's findings that the available forage on the lands in the individual pastures ranges from about 75 AUM's per section in the Holding pasture (59 AUM's from 502 acres) to 143 AUM's per section in the Home Ranch pasture (590 AUM's from 2,645 acres).

of established procedures for measuring range capacity. However, * * * [t]he fact that there is error in the Bureau's findings can be established only by showing that the Bureau's range survey methods are incapable of yielding accurate information, that there was material departure from prescribed procedures, or that a demonstrably more accurate survey has disclosed a different range capacity. * * * p. 12.

The Bureau's findings in these cases were made after a systematic study of the areas of range here in question, in which accepted standards were employed. If the standards are valid, and if the survey was conducted in accordance with the standards, the conclusion seems inescapable that its determination of the grazing capacity of the lands was sound.

Appellants have not directly questioned the survey method employed by the Bureau. They have neither pointed to any error in the manner in which the survey was conducted nor have they attempted by an independent survey to show how much usable forage is produced annually on the lands in question. Rather, they have inferred from the fact that greater numbers of animals than the Bureau will now authorize have grazed on the lands year after year that the lands must produce more usable forage than the Bureau's survey has disclosed.

We shall not attempt to debate the logic of appellants' premise. We simply find that, where there is conflicting evidence with respect to the grazing capacity of land, a determination of the quantity of forage available which is based upon a systematic study, the results of which are susceptible of verification or refutation, is more persuasive than a determination based upon what has been done in the past, without reference to definitive standards of proper range utilization or forage requirements. Having found, then, that the Bureau has authority to determine the capacity of an entire grazing unit where federal and nonfederal lands are indiscriminately used together, we also find that appellants have failed to show error in the Bureau's determination of the grazing capacity of these particular tracts of land. Accordingly, we conclude that the reductions in grazing authorization previously adverted to have been properly imposed.

We come, finally, to the question of the allocation of grazing privileges among Janich and other users of the South-K-Henry allotment. As we have seen, the hearing examiner found from the evidence that Janich's past authorized use of South-K-Henry lands was based upon (1) his ownership and control of private lands within the allotment,[9] (2) the exchange of the privilege of using lands which he owns

[9] Private lands in the allotment consist of sec. 29 and the N½NE¼ sec. 30 and E½ sec. 32, T. 5 N., R. 27 E., M.P.M. (Janich Tr. 6: Ex. A–1). Federal lands in the allotment consist of secs. 19, 20 and 31, the S½NE¼ and SE¼ sec. 30, and the W½ sec. 32 (Tr. 6–7; Ex. A–1).

in the Central-K-Henry allotment for the privilege of using federal lands in the South-K-Henry allotment and (3) the exchange of the use of water which he owns outside of the allotment for the privilege of grazing an additional 10 head of cattle in the allotment for a period of 8 months per year.

The hearing examiner accepted as proper the district manager's allocation of grazing privileges within the allotment which, in effect, treated it as two separate allotments. The first of these consisted of Janich's private lands and the federal lands for which he exchanged the use of his own lands in the Central-K-Henry allotment.[10] The district manager awarded Janich all of the recognized grazing capacity of those lands without consideration of the relationship of the number of animals now authorized to the number previously allowed to graze thereon and in disregard of the use made of other lands in the South-K-Henry allotment. With respect to the other lands in the allotment, the district manager found that certain numbers of animals had been authorized to graze on the lands during the years 1957 through 1961, and he allocated the available forage on those lands among the three licensed users in direct proportion to what he found to be their licensed use during the priority period.[11] In other words, the district manager

[10] The existence of a formal agreement, to which Janich was a party, effecting an exchange of use of Janich's lands in the Central-K-Henry allotment for public lands in the South-K-Henry allotment was not established at the hearing. However, copies of agreements between Degenhart Bros. and the State Grazing District and between R. G. Robertson and the State District, accepted by the Bureau of Land Management on February 21 and January 3, 1967, respectively, were submitted in evidence at the hearing (Exs. G–7, G–8). Under the terms of those agreements, the respective range users accepted the use of privately owned lands in the Central-K-Henry allotment, consisting of the SE¼NE¼, E½SE¼ and SW¼SE¼ sec. 17 and the E½ sec. 18, T. 5 N., R. 27 E., as the equivalent of grazing privileges which they had established on public lands in the South-K-Henry allotment, consisting of the SE¼ sec. 30, all of sec. 31, and the W½ sec. 32, T. 5 N., R. 27 E. In addition, the agreements recited that the respective range users had additional grazing privileges, including, in the case of Robertson, privileges in secs. 19 and 20 and the S½ NE¼ sec. 30, T. 5 N., R. 27 E., in the South-K-Henry allotment. Inasmuch as the private lands described in the Central-K-Henry allotment belong to Janich, it was reasonably inferred that Janich exchanged the use of those lands for the privilege of using the relinquished public lands in the South-K-Henry allotment (see Tr. 69–70). Evidence was also submitted that Janich entered into a formal agreement on September 1, 1959, to permit the Grazing District to water District-permitted livestock from a reservoir owned by Janich in the NE¼ sec. 1, T. 5 N., R. 26 E., in exchange for 10 animal units of preference within the district (Ex. G–3).

The basic soundness of the Bureau's premise, so far as it relates to the nature of the agreement for the exchange of the use of land in the Central-K-Henry for the use of land in the South-K-Henry, is substantiated by statements which Janich makes in his appeal to the Secretary (see n. 15, *infra*).

[11] Historic use of the lands in secs. 19 and 20 and the S½NE¼ sec. 30, it was found, was divided among three operators—Janich, Shirley Haley and R. G. Robertson. Janich's use of these lands during the priority period, as determined by the district manager, amounted to 80 AUM's per year (the amount of forage to which he was entitled to use in exchange for the use of his reservoir), while Haley received an average of 190 AUM's per year and Robertson received an average of 68. The total available forage on the lands, as determined by the Bureau, amounted to only 163 AUM's, approximately one-half that needed

found that Janich had exercised grazing privileges in the past based, in part, upon the right to use certain lands in the South-K-Henry allotment and, in part, upon the right to graze a specified number of animals on other lands in the allotment. In allocating future grazing privileges, he reasoned that Janich's rights should not be determined by looking solely at the number of animals he had been permitted to graze in the past, but that his privileges based upon areas of use and those based upon numbers of use should be separately computed.

Janich, on the other hand, has contended from the outset that his grazing privileges in the allotment must be determined upon the basis of the actual grazing use made of all of the allotment lands during the years 1957 to 1961, which use constitutes "customary use" within the meaning of the Department's regulation.[12] If a reduction is to be imposed, in Janich's view, his share of the total forage available should remain proportionately the same as his share of the total forage consumed during the priority period. In addition, Janich charges that the Bureau has erred in its computation of past use of South-K-Henry lands, crediting Robertson with 176 AUMs in the allotment in 1957 which were neither allocated to nor used by him.

The total available forage in the South-K-Henry allotment, as calculated by the Bureau, amounts to 400 AUMs, of which the 276 AUM's awarded by the district manager to Janich constitute approximately 69 percent,[13] 92 AUM's (23 percent) going to Haley and 32 AUM's (8 percent) to Robertson. Total authorized grazing use in the South-K-Henry allotment from 1957 through 1961, as determined by the Bureau from records of the State Grazing District, was as follows (see Tr. 6–8, 65–66, 102–103; Exs. G–6, G–9a through G–9d):

to satisfy recognized demand. This forage was divided among the three operators in the same proportions as their shares of the 338 AUM's which they were previously permitted to consume, Haley receiving 92 AUM's (approximately 56 percent of the total), Janich receiving 39 AUM's (24 percent), and 32 AUM's (20 percent) going to Robertson (Tr. 65–66; Ex. G–6).

[12] Regulation 43 CFR 4111.3–2(d)(1) provides that:

"* * * Any land within the exterior boundaries of a grazing district made available for administration by the Bureau of Land Management, * * * after the grazing privileges in the area embracing the land have been adjudicated, will be administered in accordance with customary use so far as such administration may be practicable and consistent with good range management."

[13] The 276 AUM's consist of the 39 AUM's awarded to Janich in the lands which he shares with Haley and Robertson plus those on the lands as to which he was awarded all of the available forage. At the hearing Duane Whitmer, a natural resource specialist employed by the Bureau, stated that the available forage on the other lands amounts to 234 AUMs, of which 171 AUM's represent the forage on the federal lands which Janich is receiving in exchange for his lands in the Central-K-Henry allotment and 87 AUM's represent the amount of forage on his private lands in the South-K-Henry allotment (Tr. 98–99). While some explanation or correction may be needed to reconcile these figures, we are concerned at this time only with determining the soundness of the principles employed by the district manager.

	AUM's 1957	AUM's 1958	AUM's 1959	AUM's 1960	AUM's 1961	Average AUM's	Percent of total
Janich	880	800	800	800	616	779	75
Haley	248	176	176	176	176	190	18
Robertson	176				162	68	7
Total	1,304	976	976	976	954	1037	100

Actual use during that period, according to Janich, was as follows (see Tr. 11–12, 21–25):

	AUM's 1957	AUM's 1958	AUM's 1959	AUM's 1960	AUM's 1961	Average AUM's	Percent of total
Janich	880	800	800	800	616	779	82
Haley		[1] 176	176	176	176	141	15
Robertson					162	32	3
Total	880	976	976	976	954	952	100

[1] In addition to the 176 AUM's which he alleges were improperly credited to Robertson in 1957, Janich excluded from his actual use figures 248 AUM's which were allocated in 1957 to Haley's predecessor, Burcheck, but which apparently were taken in non-use (see Tr. 24, 38–40). Although Janich objected in his brief to the hearing examiner to the crediting of any use to Haley for 1957, it appears that his objection at this time relates only to the 176 AUM's credited to Robertson in 1957.

Acceptance of Janich's theory of proper allocation would result in the award to him of 328 AUM's (82 percent of the 400 AUM's available) instead of the 276 AUM's allotted by the district manager, with 60 AUM's going to Haley and 12 AUM's to Robertson.[14]

[14] In his appeal to the Secretary Janich asserts, *inter alia*, that:

"The trade use which the Appellant had with the State Grazing District of lands in the Central-K-Henry pasture was in effect during the customary use period and the lands exchanged in the trade use were as follows: The Appellant was trading the E½ of Section 18 and that portion of Section 17 lying west of the rims (approximately ½ section, not all of Section 17 as indicated on the government list) and the S½SE¼, NE¼SE¼, SE¼NE¼ of Section 8, Township 5 North, Range 27 East, for the following government lands: the SE¼ of Section 30, all of Section 31, and the W½ of Section 32 in the same township and range. * * *

"The error is that the government did not give the Appellant cr[e]dit for the exclusive use during the customary use period for all Sections 19 and 20 in the South-K-Henry pasture. Sections 19 and 20 were not used in common during the period. * * * Therefore, during the customary use period the Appellant would be entitled to the carrying capacity AUM's on Sections 19 and 20 which were 320 AUM's.

"The second error is found in the statement that: * * * the Appellant was not charged the regular grazing fee since all of this grazing use was based on self furnished range.' This statement is not true because part of the Appellant's use was undertaken pursuant to his permit for 10 head for 8 months or 80 AUM's, for the development of water *outside* the district. This water was *outside* of the grazing district even though it is *inside* of the

The Bureau rejected Janich's theory on grounds that it would give recognition to the existence of grazing rights independent of any proper basis for such rights and that it would, in effect, permit Janich to reclaim the use of his own lands in the Central-K-Henry allotment while continuing to utilize those lands in the South-K-Henry allotment which he has received in exchange for the use of his lands in the Central-K-Henry. The soundness of the Bureau's position and the fallacy in Janich's reasoning are readily demonstrable from the facts of this case.

It should be obvious that, to the extent to which the grazing privileges Janich exercises on federal lands in the South-K-Henry allotment are based upon an exchange for the right of others to use his private lands outside of the allotment, his privileges in the South-K-Henry would terminate upon his reclaiming the use of his private lands. Even now, Janich is attempting to avoid application of this elementary principle.

According to Janich's testimony, a segment of his private land in the Central-K-Henry allotment was taken out of that allotment beginning in 1961. At the same time his grazing authorization in the South-K-Henry allotment was reduced from 100 animal units (800 AUM's) to 77 animal units (616 AUM's), the amount of the reduction presumably reflecting the portion of his South-K-Henry privileges attributable to exchange for the land previously committed to the Central-K-Henry allotment (see Tr. 25–26). Were Janich now to be credited with that part of his past use of South-K-Henry lands which was based upon an exchange for the use of land since taken from the Central-K-Henry allotment, it would follow that he could reclaim the use of all of his Central-K-Henry lands while continuing to exercise all of his "customary use" of South-K-Henry lands. This cannot be. Clearly, past grazing authorizations can be utilized in determining future allocations only to the extent that they were based upon the same qualifications that now exist.

The question before us, in essence, is whether, in allocating grazing use within an allotment where consideration is to be given to historical use, a district manager may, as was done in this instance, resort

allotment. The water is not even located in the same county as the district lands. This water that was outside of the district was the basis for the 10 head for 8 months.

"In addition to this water outside the district the Appellant developed water *inside* the district in the North, Central and South-K-Henry pastures, and on Section 19 for watering Sections 19 and 20. The district allowed Appellant the use of Sections 19 and 20 for this water development *inside* the district, and the 320 AUM's were run there every year during the customary use period. The trade was for *water*. Not land for land as is generally the rule. These 320 AUM's for each year should have been adjudicated to the Appellant because he had the exclusive use of these two sections with the permission of the district for the customary use period." (*Italics* in original.)

It is not easy to tell exactly what Janich is trying to say. Apart from the fact that his statements relating to the basis for his use of secs. 19 and 20 are unsubstantiated by the evidence and seem to be inconsistent with some of his testimony at the hearing (see Tr. 35), Janich seems to have departed from his original simplistic concept which disregarded all factors except actual numbers of animals utilizing the lands during the priority years.

to a formula which recognizes different bases for the historical use of the lands in the allotment or whether he must reduce all prior use, regardless of the basis upon which it originated, to a numerical value and then allocate the available forage proportionately among the qualified users. In other words, the question is whether Janich was authorized to graze a specified number of animals in the South-K-Henry allotment in exchange for the use of his lands in the Central-K-Henry allotment, or whether he was entitled simply to use the capacity of a designated area of land in the South-K-Henry. Assuming that the Bureau has correctly ascertained the bases for Janich's privileges in the South-K-Henry allotment, it could reasonably be found, as it was by the district manager, that his historical use of federal lands in the allotment consisted of the use of a designated area,[15] plus the grazing of a specified number of additional cattle on other allotment lands. It could, with equal rationality, be found that Janich's historical use of the federal range in the South-K-Henry allotment consisted of the *number of animals* which he was permitted to graze in the allotment in exchange for the use of his Central-K-Henry lands plus the additional number which he was authorized to graze in exchange for the use of water. It is conceivable that differing results might be obtained, depending upon which approach were taken.

Upon the established facts of this case, we cannot say that the district manager erred in electing to take the first approach. This is particularly so in the absence of any showing that the results under the second method would be significantly different[16] and, if so, that they

[15] It appears that Janich did, in fact, have exclusive use of sections 19 and 20 during the priority period and that Haley and Robertson exercised their privileges during that time on lands which the Bureau found to have been committed to Janich's exclusive use (see Tr. 22, 35, 46–48). However, we do not find any particular significance in this fact, the hearing examiner having expressly found that because of the complicated pattern of land ownership in the area grazing preference of individual users is not necessarily related to the lands actually grazed in the past. The fact that, by informal agreement, Janich may have permitted Haley and Robertson to utilize lands committed to his use while he exercised exclusive control over lands in which the three were licensed to operate jointly would not alter the extent of the privileges which were exercised.

[16] Using the 1957–61 use figures accepted by the Bureau, but adjusting Janich's recognized use to exclude use apparently based upon the trade of lands no longer offered in exchange (in other words, applying his 1961 use figure through the 5-year period), "customary use" during the priority period would have been:

	AUM's 1957	AUM's 1958	AUM's 1959	AUM's 1960	AUM's 1961	Average AUM's	Percent of total
Janich	616	616	616	616	616	616	70
Haley	248	176	176	176	176	190	22
Robertson	176				162	68	8
Total	1040	792	792	792	954	874	100

It will be seen that the results achieved with the use of these figures would be almost identical with the district manager's determination, Janich received 280 AUM's, Haley 88 AUM's and Robertson 32 AUM's.

would be more equitable. Although Janich has charged the Bureau with failure to recognize other bases for the exercise of his grazing privileges in the South-K-Henry allotment, the existence of such other bases is not established by the evidence. Accordingly, the district manager's findings, to this extent, will not be disturbed.

The question of Robertson's use of the South-K-Henry allotment in 1957 is a different matter. The Bureau's determination of historical use of the lands in the allotment was based upon a summary of State District records, which showed that in 1957 the District furnished Robertson forage for 22 animal units for 8 months in the South-K-Henry allotment (see Tr. 62–65; Ex. G–6). In a statement dated July 30, 1968, which was submitted by Janich with his brief to the hearing examiner, Robertson certified that he did not run any cattle in the South-K-Henry pasture during the year 1957, and that all of his cattle were allocated in the North-K-Henry pasture prior to the year 1961. Neither the hearing examiner nor the Office of Appeals and Hearings commented upon Robertson's statement.

The elimination of the 176 AUM's of use credited to Robertson's use in 1957 would result in a substantial reduction in Robertson's recognized privileges within the South-K-Henry allotment and in modest increases in those of Janich and Haley. In view of the conflicting evidence on this point, further investigation should be undertaken to ascertain whether or not Robertson was, in fact, allocated any use of the South-K-Henry allotment in 1957. In the event that the facts prove to be as alleged by Janich, the recognized grazing privileges of the respective users of the allotment should be adjusted accordingly.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decisions of the Office of Appeals and Hearings relating to Abel and Propp are affirmed, the decision relating to Janich is affirmed, as modified herein, and his case is remanded to the Bureau of Land Management for appropriate action consistent with this decision.

MARTIN RITVO, *Member.*

WE CONCUR:

FRANCIS E. MAYHUE, *Member.*

NEWTON FRISHBERG, *Chairman.*

CRIMINAL JURISDICTION OF UTAH OVER NON-INDIANS HUNTING ON THE UINTAH AND OURAY RESERVATION IN VIOLATION OF STATE LAW

State Laws—Indian Lands: Generally—Indian Tribes: Generally

Utah game laws apply to non-Indians who hunt, even with the tribe's permission, on the Uintah and Ouray Indian Reservation. Thus, non-Indians cannot hunt on the reservation without procuring a state license, even though they may be licensed by the tribe to do so.

M-36813 *March 29, 1971*

TO: COMMISSIONER OF INDIAN AFFAIRS.

SUBJECT: ELK-UTE TRIBE, UINTAH AND OURAY RESERVATION, UTAH.

We have received your request for our advice concerning the Ute Tribe's right to allow nonresidents of Utah to hunt elk on the Uintah and Ouray Reservation. You indicate there were elk on the original Uncompahgre Reservation established prior to Utah's admission to statehood. In addition, the Ute Tribe recently obtained 100 elk from a herd at Yellowstone National Park, paying for their transportation and release on the reservation. We understand that the elk from Yellowstone were allowed to resume their wild state and were not kept in enclosures or attempted to be tamed or domesticated. They are, therefore, to be regarded the same as other wild elk for purposes of this opinion.

The tribe has apparently cooperated with state officials in establishing an elk season for Utah residents in return for Utah's assistance in the cropping of these elk. However, Utah has not been willing to work with the Utes in granting nonresidents of Utah the privilege of taking elk on the reservation. If these nonresidents cannot hunt elk on the reservation, the tribe will be deprived of a substantial source of income. You indicate your belief that the tribe owns the elk on the reservation and has the right to allow nonresidents of Utah to hunt them whether or not Utah grants the nonresident hunters permission.

You cite the act of April 11, 1968, 82 Stat. 78, 25 U.S.C. sec. 1321(b), to support the proposition that the Indians have authority to control, license, or regulate hunting, trapping and fishing on their reservation.

This provision applies only to states which have assumed some measure of jurisdiction over Indian reservations under this act. Since Utah has not assumed any such jurisdiction, 25 U.S.C. sec. 1321(b) is not germane. Moreover, we do not believe this section *gives* tribes authority, exclusive or otherwise, to control non-Indian hunting and fishing on a reservation; it merely *preserves* whatever powers individual tribes may have in states which have been given or have assumed civil or criminal jurisdiction under the act.

While we do not agree with your statement that the elk on the reservation are the property of the Ute Tribe, we concede there is some legal authority to support the proposition of tribal ownership of the fish and wildlife on a reservation. *Mason* v. *Sams*, 5 F. 2d 255 (W.D. Wash. 1925); *Pioneer Packing Co.* v. *Winslow*, 294 P. 557 (Wash. 1930). However, these cases involved one tribe, the Quinaults, and were concerned with the interpretation of a treaty. Whatever the present validity of these two cases as applied to the Quinaults' or other Indians' rights to fish in the State of Washington, we do not consider them to be controlling, or even persuasive, legal authority in the situation considered here.

Even a state does not hold possessory title to the wildlife within its jurisdiction, but rather holds them in trust for the benefit of the people. *Geer* v. *Connecticut*, 161 U.S. 519, 529 (1896); SOLICITOR'S OPINION, 71 I.D. 469, 476 (1964). If the tribe had captured and confined these elk, the argument in favor of tribal ownership would be stronger. However, there can be no individual property in fish and game so long as they remain wild, unconfined, and in a state of nature. 35 Am. Jur. 2d *Fish and Game* sec. 2 (1967). Title to the game in its natural habitat belongs to the first person who lawfully reduces it to possession. *Geer* v. *Connecticut*, *supra;* 4 Am. Jur. 2d *Animals* sec. 5 (1962).

We note in passing that Utah has a statute indicating that all game not held in private ownership legally acquired belongs to the state. 3 Utah Code Ann. sec. 23-1-10 (1969). However, it has been held that statutes like these are concerned only with the state's power of regulation, leaving the landowner's interest what it is. *McKee* v. *Gratz*, 260 U.S. 127, 135 (1922); Solicitor's Opinion, *supra.*

Since the states do not "own" the wild game within their borders, we do not see how an Indian tribe can hold title to the game within its reservation unless one argues that tribal sovereignty is a kind of sovereignty superior to that of states or the nationl government, and we consider this implausible. Therefore, we believe that an Indian tribe does not have title to the fish swimming or wildlife running

free within its reservation, but does have the right to capture such game, after which time possessory title rests in the tribe.

Utah requires all persons to obtain a hunting license before taking any game. 3 Utah Code Ann. sec. 23–1–12 (1969). This provision also applies to Indians who are wards of the Federal Government when outside an Indian reservation. 3 Utah Code Ann. sec. 23–1–8 (1969). Utah also has a statute prohibiting any person from shipping game out of the state without having a valid license or permit attached to it. 3 Utah Code Ann. sec. 23–10–4 (1969). The question thus becomes whether Utah can enforce these statutes against non-Indians hunting elk on the Uintah and Ouray Reservation.

Without question, the tribe has authority to require non-Indians to secure reservation hunting and fishing permits and observe tribal conservation rules while on the reservation. SOLICITOR'S OPINION, 58 I.D. 331, 333, 346 (1943). It is also well settled that state game laws do not apply to Indians on trust lands within the Indian reservation. SOLICITOR'S OPINION, 54 I.D. 517, 520 (1934); *In re Blackbird*, 109 F. 139 (W.D. Wis. 1901); *In re Lincoln*, 129 F. 247 (N.D. Cal. 1904); *United States* v. *Hamilton*, 233 F. 685 (W.D. N.Y. 1915).[1]

However, it must be remembered that Indian country is not regarded as an area of exclusive Federal jurisdiction, but is politically and governmentally a part of the state in which state laws apply to the extent that they do not conflict with Federal Indian law. *Federal Indian Law* (1958) 510, 513–514; *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 650–651 (1930). It is also well settled that offenses committed by a non-Indian against a non-Indian in the Indian country are punishable by the state. *United States* v. *McBratney*, 104 U.S. 621 (1881); *Draper* v. *United States*, 164 U.S. 240 (1896); *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946).

It seems apparent that a tribe's immunity from state hunting and fishing regulations is peculiarly Indian in nature and that a tribe cannot license the immunity to a non-Indian. SOLICITOR'S OPINION, 62 I.D. 186, 194 (1955); Hobbs, *Indian Hunting and Fishing Rights II*, 37 Geo. Wash. L. Rev. 1251, 1267 (1969). The right is one exer-

[1] There is a split of authority on the applicability of state conservation regulations to an Indian on non-Indian land within the reservation. *State* v. *McClure*, 268 P. 2d 629 (Mont. 1954) (no); *State* v. *Johnson*, 249 N.W. 284 (Wis. 1933) (yes). However, today, an attempt to enforce state conservation regulations against Indians in this situation would most likely be considered an interference with reservation self-government. *Williams* v. *Lee*, 358 U.S. 217 (1959).

cised by members in common with other members of the tribe. 62 I.D. 186, 194 (1955); see *Montana Power Co.* v. *Rochester*, 127 F. 2d 189, 192 (9th Cir. 1942).

There is authority which indicates that a non-Indian hunting on the reservation has no immunity from state regulations. *State of Montana ex rel. Nepstad v. Danielson*, 427 P. 2d 689 (Mont. 1967); *Ex parte Crosby*, 149 Pac 989 (Nev. 1915); see *United States* v. *Sturgeon et al.*, 27 Fed. cas. 1357 (no. 16,413) (D. Nev. 1879).[2] In addition, various Attorneys General have taken the position that a state has jurisdiction over non-Indians who violate state game laws while on an Indian reservation. 1950–1952 Opinions of the Attorney General of Nevada p. 20; 1953–1954 Report of the Attorney General of New Mexico p. 511; 1960–1962 Opinions of the Attorney General of Oregon p. 11.

In the *Danielson* case, *supra*, a non-Indian killed two elk on the Crow Reservation in violation of Montana law. The Supreme Court of Montana stated at page 692:

> * * * we conclude that the State of Montana has jurisdiction to enforce its fish and game regulations on Indian reservations contained within its boundaries with respect to persons who are not tribal Indians unless precluded from doing so by an act of Congress or unless such enforcement would interfere with self-government on the reservation.

In conclusion, we believe there is ample authority indicating that non-Indians are subject to state game laws while on an Indian reservation. Of course, Utah may not choose to prosecute nonresident non-Indians who may hunt on the Ute Reservation in violation of the state law. If Utah decides to exercise jurisdiction over these non-Indians, however, we believe the state has both the power and the right to do so.

MITCHELL MELICH,
Solicitor.

---

[2] It is interesting to look at the legislative history of the act of July 12, 1960, 74 Stat. 469, 18 U.S.C. §§ 1164, 1165 (1964); which made it unlawful to destroy boundary markers and to trespass on Indian reservations to hunt or fish. In a letter from the Assistant Secretary of the Interior to the Chairman of the House Committee on the Judiciary dated February 13, 1958, recommending passage of this bill, the Assistant Secretary said: *"While non-Indians are subject to State laws when they go on Indian Reservations,* many of the States do not have criminal trespass laws, and in other States the Indians find it impossible to comply with the requirements of State laws designed to control trespass." (*Italics* added). H.R. Rep. No. 1686, 86th Cong., 2d Sess. 4 (1960). See also 68 IAM 4.6.2E(1)(c), which indicates that non-Indians who have received tribal consent to hunt or fish are also subject to state and federal law.

March 25, 1971

ESTATE OF OSCAR OUGH, SR.*

IBIA 71-2 *Decided March 25, 1971*

Indian Probate: Administrative Procedure Act: Applicability to Indian Probate

The requirement of the Administrative Procedure Act, that all decisions of an Examiner shall include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record, is mandatory and applicable to all decisions of Examiners in Indian Probate proceedings.

Indian Probate: Yakima Tribes: Generally

The amendment to the Yakima Enrollment Act, 84 Stat. 1874 applies to all cases not closed at the time the amendment was enacted, and a case on appeal to the Board of Indian Appeals is considered to be open within the meaning of the amendment.

BOARD OF INDIAN APPEALS

This is an appeal filed by Oscar Ough, Jr., son of the decedent, from an order issued June 4, 1970, by the Examiner of Inheritance denying a petition for rehearing and affirming an earlier order determining the heirs of Oscar Ough, Sr. under the Yakima Enrollment Act, 25 U.S.C. sec. 607 (1964). Appellant filed his appeal with this Board on August 5, 1970, and was within the time requirement prescribed by 25 CFR 15.19.[1]

In his appeal, Oscar Ough, Jr. claims that the Dallas Dam Settlement Funds are not part of the restricted estate subject to the Yakima Enrollment Act, and should therefore be distributed to the children of the deceased, without reference to whether such persons are eligible under the Act to take as heirs. On the basis of the record we are unable to determine if appellant's contention is correct. In the Order Denying the Petition for Rehearing the Examiner stated that "It has been held that such funds were subject to this Act," but no basis was given in the order for reaching this conclusion.

*Not in Chronological Order.

[1] Ben Ough, son of decedent and full brother of Oscar Ough, Jr. has filed an untimely appeal from this order. Title 25 CFR § 15.19 requires that an appeal be filed within 60 days. Ben Ough's appeal exceeded this time limit by more than 30 days. We note, however, that the decision on Oscar Ough, Jr.'s appeal could dispose of the merits of Ben Ough's appeal. Estate of Edward (Edwin) Thomas, IA-836 (May 2, 1966).

424-695—71——1

We find that the record before us is incomplete and that a proper determination cannot be made on the basis of such negligible evidence.

25 CFR 15.15 of the Regulations requires that findings of fact and conclusions of law shall be incorporated in the Examiner's decision. Also, Indian Probate proceedings are subject to the Administrative Procedure Act [2] which provides in 5 U.S.C. sec. 557 (Supp. V, 1970), *formerly* ch. 324, sec. 8, 60 Stat. 242 (1946):

> (c) * * * All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—
>
> (A) findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction, relief, or denial thereof.

Therefore we remand this case to the examiner to make findings of fact and conclusions of law as required by the regulations and the Administrative Procedure Act.

In addition we find that since this case was considered by the Examiner the Yakima Enrollment Act has been amended. The amendment passed in December of 1970 affects the class of heirs eligible to take under the Act (*See* 84 Stat. sec. 1874). The revisions contained within this recent amendment pertain to all cases not closed at the time the amendment was enacted. We consider this case to be open within the meaning of the amendment since the assets of the estate were still undistributed at the time the subject amendment was brought into force,[3] and the appeal procedures within the Department have not been exhausted. In that the Examiner was unable to take this most recent change into consideration in his original decision and in his denial of appellant's petition for a rehearing, we think it proper to remand the case to the Examiner for reconsideration of the right of the appellant to share in the estate under the amended act.

Under the authority delegated to the Board of Indian Appeals by the Secretary of the Interior in 35 F.R. 12081, we reverse the Order Denying the Petition for Rehearing and remand this case to the Examiner for completion of the record and for further hearings, if necessary, to determine whether the parties, including the Yakima tribe, have acquired rights under the amended law.

DAVID J. MCKEE, *Chairman.*

I CONCUR:

DAVID DOANE, *Alternate Member.*

---

[2] Estate of Charles White, 70 I.D. 102 (1963).

[3] In his letter of July 22, 1966, Richard J. Montgomery, Examiner of Inheritance, authorized Floyd H. Phillips, Superintendent of the Yakima Indian Agency to proceed and distribute one-half of the income from the land accruing since decedent's death to the surviving wife because her share was not in question in this case.

M. G. JOHNSON

IBLA 70-14 *Decided April 5, 1971*

Mining Claims: Lands Subject to—Reclamation Lands: Generally—Withdrawals and Reservations: Reclamation Withdrawals

Land in a second form reclamation withdrawal remains open to mineral location.

BOARD OF LAND APPEALS

M. G. Johnson has appealed to the Secretary of the Interior from a decision dated October 2, 1968, of the Office of HEARINGS AND APPEALS, Bureau of Land Management, which affirmed a decision of the Nevada land office declaring null and void *ab initio* the M. J. B. lode mining claims Nos. 1 through 6 because the claims were located on land included in a reclamation withdrawal.

The claims were located in May 1957 on unsurveyed land which, when surveyed, will probably be secs. 15 and 22, T. 20 S., R. 67 E., M.D.M., Nevada. The records of the Bureau of Land Management show that all lands in Nevada within four miles of the Colorado River were withdrawn on January 31, 1903, by the Secretary of the Interior from settlement, entry or other forms of disposition under the public land laws except the homestead laws. The withdrawal was made pursuant to section 3 of the act of June 17, 1902 (32 Stat. 388; 43 U.S.C. sec. 416 (1964)).

The land office held that the claims were within the area withdrawn and that the withdrawal segregated the land it covered from certain forms of entry, including mineral locations.

On appeal, Johnson contended that the claims were outside the withdrawn area and that, in any event, the withdrawn land remained open to mineral location.

The Office of HEARINGS AND APPEALS, by making certain computations on the U.S. Geological Survey quadrangles covering the area in which the mining claims are located and the one to the west, and by enlarging the Bureau of Land Management's Nevada protraction diagram, which includes T. 20 S., R. 67 E., *supra*, concluded that the claims were within the withdrawn area. It also found that Johnson's exhibit, which located the claims on the same Geological Survey quadrangle, placed the claims within the withdrawn area when overlaid on a transparency of the BLM projection enlarged to the same scale.

It then held that Johnson's assertion that there is now and was when the claims were located a distinction between two types of reclamation

withdrawal was without merit. It stated that the development of the reclamation law had wiped out the distinction between withdrawals and that lands withdrawn for reclamation purposes are closed to mineral location unless opened to such disposition by the Secretary under the act of April 23, 1932 (47 Stat. 136), 43 U.S.C. section 154 (1964), which authorizes him to do so. It concluded that the lands were never opened to mineral entry in the absence of such a reopening.

On appeal to the Secretary, Johnson asserts that the lands are not within the withdrawn area. He notes that none of the documents and computations on which the Bureau relied were appended to the decision. As a result, he says, he has not been able to check the accuracy of the calculations and cannot concede that they are correct.

He then reasserts his contention that the land remained open to mineral location even if withdrawn. He points out that the withdrawal left the land open to homestead entry and thus was a second form withdrawal. Both court and Departmental decisions, he continues, hold that lands withdrawn under the second form and open to homestead entry are also open to mineral location, citing *Loney* v. *Scott*, 112 Pac. 172 (Ore. 1910); *Albert M. Crafts*, 36 L.D. 138 (1907); Instructions, 35 L.D. 216 (1906).

We will first consider whether the lands, even if withdrawn remained open to mineral location, for, if they did, it does not matter whether they are situated within or without the limits of the withdrawal.

To begin with, section 3 of the act of June 17, 1902, *supra*, authorizes the Secretary (1) to withdraw from public entry lands required for irrigations works, and (2) to withdraw from public entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from such works. The types of withdrawal become known as withdrawals under the first or second form, respectively. Instructions, 33 L.D. 607, 608 (1905).

As the appellant argued and as the Bureau of Land Management agreed, a second form withdrawal did not at the beginning close the land it covered to mineral location. *Loney* v. *Scott*, *supra; Albert M. Crafts*, *supra*. The Bureau, however, held that later developments so attenuated the difference between the forms of withdrawal that no reclamation withdrawn land remained open to mineral location. It reasoned:

> Any distinction between forms of withdrawal, founded on patent requirements under homestead law, could not be made after the passage of the act of June 25, 1910, 43 U.S.C. 436 (1964), because by reason of section 5 of that act there could no longer be any ordinary homestead entry in a reclamation project. Affirmative authority to control mineral entry lands withdrawn for reclamation purposes was granted to the Secretary of the Interior by the act of April 23, 1932, 43 U.S.C. 154 (1964). It provided that the Secretary may, in his discretion, open lands with-

drawn under the reclamation laws to location, entry and patent under the general mining laws. See Associate Solicitor's Opinion, M–36433 (April 12, 1957). The departmental regulations which implement that act provide for making application for the opening of lands withdrawn pursuant to section 3 of the act of June 17, 1902, *supra*. 43 CFR 3400.4 (formerly 43 CFR 185.36). The subject lands were never reopened to mineral entry pursuant to the land and regulation.

By the act of August 4, 1939, as amended, 43 U.S.C. 387 (1964), the Secretary was authorized to permit the removal of sand, gravel and other minerals, under grant of lease or license, from lands withdrawn for reclamation purposes. Pursuant to that act, a departmental regulation issued in 1955 (Circular 1917, 20 F.R. 5778 (August 10, 1955)), provided for leasing for minerals the lands surrounding Lake Mead withdrawn for reclamation purposes. 43 CFR Subpart 3326 (formerly 43 CFR 199.70). Subsequent to the passage of the act of October 8, 1964, which pertained specifically to the administration of the Lake Mead National Recreation Area and included mineral leasing among the permitted activities therein, the regulation was amended, effective September 29, 1965 (43 CFR 3326.0–3) to reflect the authority granted under the more recent act.

As the Bureau of Land Management decision recognized, the Department and the courts soon after the passage of the Reclamation Act of 1902 held that lands within a second form withdrawal remained open to mineral entry. Instructions, 35 L.D. 216 (1906); *Albert M. Crafts, supra; Loney* v. *Scott, supra.*

The first statute that could have changed this interpretation was section 5 of the act of June 25, 1910, ch. 407, 36 Stat. 835, 836, as amended, 43 U.S.C. section 436 (1964). As originally enacted, section 5 stated: "That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed water charges and the date when the water can be applied and made public announcement of the same." As the Department said a year later *Roberts* v. *Spencer*, 40 L.D. 306, 309 (1911):

> The evident purpose of this legislation was to cure a defect in the reclamation act allowing homestead entries to be made of arid lands within irrigation projects in advance of the supply of water, which could not be successfully cultivated in their desert condition. It was well known that it was impossible for the settler to live on the land and support his family without irrigation, and in many cases great distress resulted in the effort to maintain residence upon such lands. To avoid the evil consequences that would inevitably result from the allowance of entries upon lands within irrigation projects in advance of sufficient progress in the construction of the works to reasonably assure a sufficiency of water for the irrigation of the land, the Department from time to time had been, prior to the passage of said act of June 25, 1910, importuned to withhold such lands from entry of every character as a matter of public policy and in the interest of sound administration until water for the irrigation of the land was available, which could not be entertained, because of the express provisions of the reclamation act allowing entries under the homestead law of lands susceptible of irrigation from the project. See Instructions (33 L.D., 104).

The first act of June 25, 1910 (Chap. 407), was designed to cure these apparent defects in the reclamation act by withholding lands in a reclamation project from entry of every character until public announcement is made of the date when the water can be applied, and the second act of that date (Chap. 432) was intended to relieve entrymen who had made entries prior to the passage of said act and prior to the supply of water by the project from the necessity of maintaining residence upon the land "until water for irrigation is turned into the main irrigation canal from which the land is to be irrigated." *Roberts* v. *Spencer*, *supra*.

On its face section 5 had nothing to do with mineral entry. It has been suggested, however, that since the holding that land in a second form withdrawal remained open to mineral entry was based upon the concept that as long at it was open to homestead entry, it had to remain open to mineral location, when the act of June 25, 1910, closed such land to homestead entry, it in effect also closed them to mineral location. Associate Solicitor's Opinion, M–36433 (April 12, 1957).

We have not found any departmental decision or discussion other than M–36433 (*supra*) which adopts this position, nor have we found one which contradicts it. It is somewhat surprising that if the 1910 act so drastically changed the then existing law as to close all the land in second form withdrawals to mineral location there would be no reflection of the new status in a decision, instruction, or regulation. In its context it could as well be restricted to surface entries as expanded to encompass any possible disposition of the withdrawn land. The language of the act itself is not conclusive.

The difficulty it was meant to resolve was one occasioned by homestead entries, not mineral locations. We note, too, that after the land is open to homestead entry when the conditions of the 1910 act have been met, it is then subject to mineral location. The pertinent regulation 43 C.F.R. 401.24 reads:

> All homestead entries for farm units described in public notices will be subject to the laws of the United States governing mineral land, and all homestead applicants under the public notice must waive the right to the mineral content of the land, if required to do so by the Bureau of Land Management; otherwise, the homestead applications will be rejected or the homestead entry or entries cancelled.

A homestead entry remains subject to cancellation upon discovery of mineral in the land until the entryman has earned equitable title by filing of satisfactory final proof, if the requirements of the homestead laws and regulations have been met. *George R. Pollard, et al.* A–27898 A–28007 (October 18, 1960); Solicitor's Opinion, 65 I.D. 39, 44 (1958); *Union Oil Company of California*, 61 I.D. 106 (1953); *cf. Milton H. Lichtenwalner*, 69 I.D. 71 (1962).

It would be passing strange to permit mineral location of land after it is ready for reclamation development, and indeed after reclamation and cultivation have begun, and yet bar mineral location while the land remains rude and arid. Therefore, we cannot conclude that section 5 of the act of June 25, 1910, *supra*, of itself closed land within a second form withdrawal to mineral location.

Did any subsequent legislation accomplish that result? The next statute cited is the act of April 23, 1932, *supra*. It provides:

> That where public lands of the United States have been withdrawn for possible use for construction purposes under the Federal reclamation laws, and are known or believed to be valuable for minerals, * * * the Secretary of the Interior, when in his opinion the rights of the United States will not be prejudiced thereby, may, in his discretion, open the land to location, entry, and patent under the general mining laws * * *.

We note at once that the statute refers to "lands withdrawn for possible use for construction purposes." That, of course, is the language of a first form withdrawal which refers to "lands required for any irrigation works" as opposed to "lands believed to be susceptible of irrigation from * * * [such] works." Section 3, act of June 17, 1902, *supra*. While the legislative history of the 1932 act does not differentiate between the forms of withdrawal, it is plain that the act was conceived in terms of lands withdrawn for the construction, operation and maintenance of irrigation works without any reference to those withdrawn only because they were susceptible of irrigation from a reclamation project. S. Rep. No. 502, 72d Cong., 1st Sess. (1932). As the Secretary of the Interior said in a letter quoted in the Senate Report, legislation was needed to give the Secretary an alternative to opening land to unrestricted mineral location without reservation under section 3 of the act of June 17, 1902, *supra*, by allowing him to restore such land subject to appropriate reservation, stipulations, and agreements. Here again, the discussion is in terms of what would seem to be first form withdrawals, for in section 3 the restoration provision is part of the first form withdrawal clause.

We cannot find in this act any statement persuasive enough to conclude that it first recognized a change in the availability of second form withdrawal land for mineral location and then made provision for their reopening to such location subject to its terms.[1]

---

[1] We note that the pertinent regulation 43 CFR 3816, 35 F. R. 9744 (formerly 43 CFR 3400.4) enlarging on the act of April 23, 1932, *supra*, speaks in terms of its applicability to "withdrawals made pursuant to section 3." Whether the regulation meant to include all withdrawals under section 3 or only those under section 3 to which the act of April 23, 1932, pertained, a regulation cannot override the terms of a statute. As the regulation is broader in language than the statute, to avoid conflict the regulation is to be read as applying only to withdrawals that have been made "for possible use for construction purposes."

We note that a few years earlier in the Boulder Canyon Project Act of December 21, 1928, 43 U.S.C. sec. 617 *et seq.* (1964), the Congress made perfectly clear its intention to withdraw irrigable lands from mineral entry. Section 9, 43 U.S.C. sec. 617h, reads: "All lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry. * * *"

Here there is no reference to lands needed for irrigation works or for their construction, maintenance or operation. When the Congress intended to cover lands to be irrigated from a project as distinct from those used for irrigation works, it made its intention perfectly clear in very simple language.

The next statute cited is section 10 of the Reclamation Project Act of August 4, 1939 (53 Stat. 1196), 43 U.S.C. sec. 387 (1964). It provides:

> The Secretary, in his discretion, may (a) permit the removal, from lands or interests in lands withdrawn or acquired and being administered under the Federal reclamation laws in connection with the construction or operation and maintenance of any project, of sand, gravel, and other minerals and building materials with or without competitive bidding. * * *

The statute again is quite explicit in its reference to lands withdrawn "in connection with the construction or operation and maintenance of any project." It does not refer to lands to be irrigated by the project, but once more is couched in the language of a first form withdrawal.

Here, too, as noted in discussing the act of April 23, 1932, a Departmental regulation issued some 17 years later with reference to an application of the 1939 act speaks of land withdrawn "for reclamation purposes." 43 CFR 199.70, 20 F.R. 5778, now, as amended, 43 CFR 3566.0–3. The regulation applied only to Lake Mead and to an area surrounding the lake as shown on the map referred to in the regulation, depicting the boundaries.

The act of October 8, 1964 (78 Stat. 1039; 16 U.S.C. sec. 460(n) *et seq.* (1964)), dealt solely with the administration of the Lake Mead Recreational Area and plainly authorizes the Secretary to issue mineral leases for lands within the boundaries of the redefined recreation area. 16 U.S.C. sec. 460(n)–3(b). Since the mining claims were located prior to the enactment of this statute, the rights of the appellants, if based on a valid location, would not be affected by it. Further, the act itself protects valid rights. 16 U.S.C. sec. 460(n)–1.

This review of the sources supporting the view that land in a second form withdrawal is not open to mineral location leaves us unpersuaded of the soundness of that view. We conclude that such land was open

to mineral location after the withdrawal was made and remained so through the date on which appellants made their locations.

Accordingly, it is unnecessary to determine whether the claims are within or without the four-mile limit of the withdrawal. The crucial issue is whether the claims are valid under the mining laws. Effective July 1, 1970, the Board of Land Appeals, Office of Hearings and Appeals, assumed jurisdiction over all appeals before the Director, Bureau of Land Management, in the exercise of the supervisory authority of the Secretary of the Interior (35 F.R. 10012, June 12, 1970).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the Bureau of Land Management appealed from is reversed and the case remanded for further proceedings consistent herewith.

MARTIN RITVO, *Member.*

WE CONCUR:

EDWARD W. STUEBING, *Member.*

ANNE POINDEXTER LEWIS, *Member.*

APPEAL OF PLACER COUNTY, CALIFORNIA

IBCA-777-5-69 *Decided April 8, 1971*

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

Where a contract with a County requires the Government to build a replacement road and bridge in connection with land acquired for the construction of the Auburn Dam and Reservoir and the County complains (i) that in planning for and constructing the replacement road and bridge the Government had failed to adhere to standards proscribed in the contract and (ii) that it had failed to secure the County's approval for access from the replacement road to adjacent Government-owned land acquired for recreational purposes in violation of the contractual provision requiring approval of all accesses granted outside of the project takeline, the appeal is dismissed since the Board found (i) that the contract contained no contract provisions under which the wrongs alleged could be remedied and (ii) that the Disputes clause itself was not sufficient to confer jurisdiction. In reaching this conclusion the Board noted that dismissal of the appeal on jurisdictional grounds was proper, even though neither party had raised any question as to the Board's jurisdiction over the claims asserted.

424-695—71——2

Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Hearings—Rules of Practice: Appeals: Dismissal

Allegations by a County for which a replacement road was being built that the contracting officer had acted in an arbitrary manner and that its future course of action was to some extent dependent upon the result of the Board's review of the County's complaints, warrants Board examination of the complaints in detail even though it concludes on jurisdictional grounds that it has no authority to finally pass upon the claims asserted.

BOARD OF CONTRACT APPEALS

At issue in this appeal [1] is the question of whether the Government violated its contract with the County by failing to adhere to the standards prescribed by the contract for the substitute road and bridge required to be constructed in connection with land acquisition for the Auburn Dam and Reservoir.[2] Also in issue is the question of whether the Government breached its contract by failing to secure the County's approval for planned access roads [3] from the substitute road in question to immediately adjacent land acquired by the Government for recreational purposes.[4]

The instant contract [5] was entered into under date of January 16, 1968, for the relocation of a segment of the Auburn-Foresthill County Road, in connection with the Auburn-Folsom South Unit, American River Division, Central Valley Project, California. Preliminary to the statement of the obligations assumed by the parties, the contract recited (i) that the Government proposed to construct, operate and maintain the Auburn Dam and Reservoir; [6] (ii) that accomplishment of this objective would entail flooding, inundation, destruction and ob-

[1] Three of the five complaints presented by the County in its letter of September 24, 1968, to the Secretary (Exhibit 16), were abandoned at the hearing on this matter because (i) two of such complaints had become moot and (ii) a third complaint had become merged in effect with one of the two remaining complaints (Tr. 5, 6). Except as otherwise indicated, all references to exhibits are to those contained in the Appeal File.

[2] Listed as the second complaint of the County in its letter of September 24, 1968 (note 1, *supra*), and thereafter.

[3] Listed as the first complaint in the County's letter of September 24, 1968 (note 1, *supra*), and thereafter.

[4] A dispute as to a planned access to private property has been resolved to the satisfaction of the parties and is not an issue in this appeal (Exhibit 30; Findings of April 3, 1969, pp. 1, 2).

[5] The contract (Exhibit 32), provides that it was entered into "pursuant to the act of Congress approved June 17, 1902 (32 Stat. 388) and acts amendatory thereof or supplementary thereto, all such acts being commonly known and referred to as the Federal Reclamation laws, and the act of July 14, 1960 (74 Stat. 500) as amended by the act of October 23, 1962 (76 Stat. 1196) and particularly the act of Congress approved September 2, 1965 (79 Stat. 615)."

[6] "* * * the United States, pursuant to the said Act of Congress approved September 2, 1965, proposes the construction, operation and maintenance of Auburn Dam and Reservoir as a feature of the Auburn-Folsom South Unit, American River Division, Central Valley Project, hereinafter referred to as the 'Project,' certain portions of which lie wholly or in part within Placer County, California * * *." (Exhibit 32, pp. 1, 2).

literation and would require the abandonment and conveyance to the Government of such right, title, interest and equity as the County has, or may have, in and to certain interfering portions of the Auburn-Foresthill Road; [7] and (iii) that the parties desired to compromise all claims the County might have as a result of the actions described and to compensate the County for the "taking" by constructing a substitute road facility and a bridge. Under the terms of the contract the Government assumed responsibility for preparing plans and specifications and awarding contracts [8] for the construction of a substitute road and bridge for that involved in the taking.[9] The contract also provides for a joint inspection by the Government and the County of the substitute road and bridge when completed and—if it is mutually agreed that the terms of the plans and specifications have been met—for incorporation of the substitute road and bridge into the County's road system.[10] Following such action the County is required by the contract to abandon and close to public travel those portions of the Auburn-Foresthill Road involved in the "taking" and by quitclaim to transfer to the Government all of the County's right, title and interest therein concurrently with the conveyance to the County by the Government of rights-of-way for, and title to, the substitute road and bridge within the take-line of said project.[11] Among the contract terms is a provision for the resolution of disputes.[12]

---

[7] "* * * a County road designated as FAS 767 which is currently classified as a Federal Air Secondary route and known locally as the Auburn-Foresthill Road * * *" (Exhibit 32, p. 2).

[8] Bids under Specifications No. DC–6685, for relocation of the Auburn–Foresthill County Road, were opened on October 8, 1968 (Exhibit 34). For the Auburn-Foresthill Bridge Substructure under Specifications No. DC–6728 (Exhibit 33), bids were opened on April 17, 1969. At the hearing in April of 1970, the Project Construction Engineer testified that as of that time the substitute roadway itself was approximately 85 to 90% complete and that while the bridge superstructure had not been started, the piers were 20 to 30% complete (Tr. 181).

[9] "1. The United States shall: (a) Survey, design, prepare plans and specifications and award contracts for the construction of the said substitute road and bridge, the approximate alignment and location of which, as proposed by the United States and approved by the County, is approximately as shown on a print of U.S.B.R. drawing No. 859–245–076, dated September 14, 1967, stamped Exhibit 'A' attached hereto and made a part hereof. * * *" (Exhibit 32, p. 3).

[10] Exhibit 32, Clause 3, pp. 6, 7.

[11] Exhibit 32, Clauses 4, 5 and 7, pp. 7–9.

[12] "19 (a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the County. The decision of the Contracting Officer shall be final and conclusive unless within 30 days from the date of receipt of such copy, the County mails or otherwise furnishes to the Contracting Officer, a written appeal addressed to the Secretary of the Interior. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the County shall be afforded an opportunity to be heard and to offer evidence in support of its appeal.

Before proceeding further we wish to take note of the unusual manner in which this appeal was prosecuted in its initial stages. Unaccompanied by any request for a hearing and preceded by neither a finding by the contracting officer nor by a refusal to make a finding, a letter from the Placer County Board of Supervisors dated September 24, 1968, requested the then Secretary of the Interior, Stewart L. Udall, to intervene directly in the matters in dispute.[13] By a letter of October 15, 1968,[14] signed by Kenneth Holum, Assistant Secretary of the Interior, the actions of the Bureau of Reclamation with respect to the five complaints of the County were upheld. The Board of Supervisors' second letter[15] to Secretary Udall produced the same result.[16] The Notice of Appeal[17] specifically refers to the aforementioned letter of September 24, 1968, as constituting the grounds for the present appeal.

On this record a question arises as to whether the action taken at the Secretarial level at the County's behest had the effect of ousting the Board of any jurisdiction it might otherwise have had with respect to the matters in dispute.[18] There is no need for us to pass upon that question since we determine that in any event we are without jurisdiction over the claims asserted.

The differences between the parties as to the merits of the appellant's complaints stem at least in part from the fact that they are

---

Pending final decision of a dispute hereunder the County shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

"(b) This 'Disputes' clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, That nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law" (Exhibit 32, the Contract, pp. 13, 14).

[13] Note 1, *supra*. ("The County and the Director of Region 2 of the Bureau of Reclamation are in dispute with regard to the faithful performance by the United States of the provisions of the contract. This letter constitutes an appeal pursuant to the provisions of Section 19(a), page 13 of the aforementioned contract. The County believes that decisions of the contracting officer have been arbitrary and not in full compliance with certain provisions of the contract").

[14] Exhibit 21.

[15] Exhibit 22; letter of October 29, 1968. This letter did contain a request for a hearing before the Secretary.

[16] The response to the second letter was signed by Robert W. Nelson, Deputy Assistant Secretary of the Interior (Exhibit 23; letter of November 15, 1968).

[17] Exhibit 31; letter of April 30, 1969, p. 2. ("This letter is intended to constitute said written appeal and the County complaints are the same as those in our letter of September 24, 1968 to Secretary Udall, a copy of which is attached hereto and incorporated herein by reference").

[18] *Arundel Corporation* v. *United States*, 96 Ct. Cl., 77, 114 (1942) ("* * * It was the head of the department who had made the ruling of which plaintiff complains and, therefore, the provision for an appeal to him from a ruling of the contracting officer has no application. * * *"); *The Unit Export Company*, ASBCA No. 1408 (August 11, 1953) ("Since it is obvious that the contractor has had the benefit of the appellate procedure provided by the contract, the issue is closed so far as this Board is concerned and the appeal here must be dismissed."); *Cf. Grier-Lowrance Construction Co., Inc.* v. *United States*, 98 Ct. Cl. 434, 462 (1943).

sharply at odds with one another as to the meaning to be ascribed to the following contract provisions:

1. The United States shall:

(a) * * * The design criteria and standards of construction of the roadway to be used by the United States in the preparation of the plans and specifications for the said substitute road are to be comparable to and at least the equal of such standards currently used by the State of California for roads that are to be designed and constructed in a mountainous terrain to accommodate a traffic volume in the range of 1,000 to 5,000 vehicles per day. Said range of traffic volume spans the traffic presently using said Auburn-Foresthill Road, as determined by actual traffic count, and such range of traffic volume has been used by the United States to determine the classification of the road to be replaced. The design of the bridge shall be at least H20–S16.

(e) Acquire permanent easements in, or fee title to all the lands required for the construction of said substitute road and bridge; Provided, However, That the United States as to roadways to be located outside the take-line for the said Project, shall not (1) in acquiring interest therefor authorize any access to such roadways not acceptable to the County, or (2) during the time between the acquisition of such interest and conveyances thereof to the County authorize the use of the roadway by utilities without the approval of the County.

2. The County agrees that the construction of the said substitute road and bridge to the standards provided for herein and the subsequent conveyance to the County of the road rights and interests described in paragraph 4 hereof will provide the County with a road consistent with the standards and classification requirements acceptable for inclusion into the system of maintained Placer County roads, and that any change which would effect an improvement in the capacity over and above that provided for herein, and which would result in additional costs to the United States, shall constitute a betterment and if such betterment is requested by the County and accepted by the United States for incorporation into United States plans for construction, such betterment shall be at the County's sole cost and expense. No construction based on such betterment shall be commenced by the United States until the County has paid to the United States sufficient funds to cover the total amount of the estimated costs for such betterment construction.[19]

Resolution of the questions presented would entail interpreting the quoted contract provisions taking into account the circumstances existing at the time the contract was executed and the contemporaneous construction placed upon the provisions in question by the parties themselves prior to the time the disputes with which we are here concerned arose. In the course of our opinion we shall have occasion to examine these several matters in the light of the evidence of record, even though on jurisdictional grounds we are without

[19] Exhibit 32; the Contract, pp. 3–6.

authority to make any findings dispositive of the issues presented by this appeal.[20]

Design Standards Comparable to State of California

The County has stated the issue involved in this complaint to be whether the roadway and bridge design comply with the contract requirement that the design standards be comparable to, and at least the equal of, such standards currently used by the State of California.[21] In presenting its case at the hearing, the County adduced a considerable amount of testimony to show that the roadway and bridge design employed by the Bureau failed to comply with State standards in current use.

The County witness Pyle [22] testified that the maximum grade allowable under California design standards is 6% except in unusual circumstances; that grades incorporated in the substitute road being built by the Bureau are in excess of the prescribed maximum grade; [23] and that the road in question could not be said to involve unusual circumstances thereby permitting a grade in excess of 6% (Tr. 33, 51). Referring to consideration given at one time to building the road in question as a portion of State Highway 49, Mr. Pyle also testified that a route projected by the State following the same general alignment as the road being built by the Bureau would have had a maximum grade of 6 percent.[24] Upon cross-examination he acknowledged, however, that the 6 percent grade could have been maintained only by lengthening the road several hundred feet and by raising the height of the bridge 46 feet.[25] Mr. Pyle also acknowledged upon cross-exam-

[20] *Mevá Corporation*, 76 I.D. 205, 223 (1969), at n. 66, 69-2 BCA par. 7838, at 36,428. Such action would appear to serve a useful purpose where, as here, a State instrumentality has charged a Bureau of this Department with arbitrary conduct (Exhibit 16), and has indicated that its future course of action may be influenced by the Board's view of the matters in dispute (Tr. 156).

[21] Post-Hearing Brief of the County of Placer, pp. 1, 2.

[22] Supervising Highway Engineer in Charge of Geometric Design, California Division of Highways.

[23] Tr. 17–18, 51. Pyle also testified that the bridge widths were not wide enough to meet State standards (Tr. 17). The specific widths he cited as representing State standards were taken from pages of the State Planning Manual revised on February 9, 1970, however, or more than two years after the contract was executed (Tr. 24).

[24] Tr. 18, 28, 52. The route projected by the State is shown on a map entitled "Project Map, Auburn Dam Relocation, G–2 line bridge." This document was received in evidence as Appellant's Exhibit "J" (Tr. 107–109).

[25] Tr. 25–27. Mr. Pyle initially testified that he would be unable to estimate the additional cost involved in these changes. Later, however, after having had an opportunity to review cost estimates prepared by the State, he stated: "Our preliminary estimates indicate that our projection on the six per cent line would cost 1.6 million dollars more for a 40-foot wide road * * *" (Tr. 111). Government witness Rolin estimated that the change required to maintain a 6% grade in the same vicinity would involve an outlay of 3 million dollars (Tr. 181). The great disparity in these estimates is of considerable importance since Mr. Pyle indicated in his testimony that at some point the State would conclude that the difference was sufficient to constitute an unusual circumstance (i.e., represent an exception to the 6% maximum grade requirement) (Tr. 123–125).

ination that the road in question was a County road; that the standards to which he had testified were from the State Planning Manual and were for State Highways; that the State Highway Division uses the standards of the American Association of State Highway Officials (AASHO) as a guide in reaching a decision; that he had reviewed the plans and specifications for the substitute road in question in the light of State Highway standards rather than AASHO standards; and that he had no specific recollection as to provisions contained in the State's Planning Manual during the latter part of 1967, and the early part of 1968, with respect to the design and construction of County roads.[26]

The Government's questioning of Mr. Pyle with respect to the standards applicable to County roads was a prelude to the Government's offer into evidence of exhibits [27] purporting to show that prior to January 31, 1968, the State Planning Manual did have a section dealing with County roads. These exhibits were admitted in evidence over the objections of County counsel, with the hearing official specifically noting that the contract in question was entered into on January 16, 1968.[28] Shortly after the admission of Government Exhibits 1 and 2,[29] the following colloquy occurred between Government counsel and County witness Pyle:

Q. * * * I'm asking whether the criteria that's contained in Government's Exhibit Number 1 and 2 are being met by the structure that the Government is now—has planned and is now building for the County?

[26] Tr. 30, 35–40.

[27] Government's Exhibit 1 (Standards for Select System of County Roads and City Streets) and Government's Exhibit 2 (Planning Manual Change Letter No. 7–19). See Tr. 40–48.

[28] Tr. 47–48. In the County's Post-Hearing Brief the objection to Government Exhibits 1 and 2 is renewed on the grounds that the statute—upon which the standards for the select system of County roads were dependent—was repealed on December 7, 1967 (Post-Hearing Brief, p. 5). Government counsel asserts, however, that the standards in question existed independent of the repealed statute and for a different purpose (Government Post-Hearing Brief, pp. 17–19). We do not consider that the argument by either counsel is persuasive (e.g., assuming *arguendo* that the provisions of the State Planning Manual pertaining to County roads have no separate existence from the repealed statute that they implemented, how should that fact affect taking such provisions into account in determining the meaning to be ascribed to contract terms susceptible of more than one meaning if negotiations were commenced long before the statute was repealed?) According to Government witness Rolin that was the case here (Tr. 175, 179). *Cf.* the testimony of County witness Pyle with respect to the construction in 1964 of Highway 120 as reported at page 119 of the transcript ("* * * the controls which determined its design were basically—both under the conditions that existed in the late 50's.").

[29] Objection to consideration of these exhibits is also made on the ground that the road in question is a FAS Road and has been for the past 10 years (Post-Hearing Brief, p. 6). It is asserted that this precludes resort to Standards for a Select System of County roads. The requirements of FAS roads were nowhere clearly delineated in the testimony. The record clearly indicates, however, that the grades involved in the substitute road being built will not preclude participation with FAS funds in a second stage improvement. See Trial Brief of the County Placer, Exhibit E, letter of July 2, 1968, from Bureau of Public Roads to Mr. J. A. Legarra, State Highway Engineer.

A. I don't know whether the structure that is now being built meets the standards included in Exhibits 1 and 2. The question I was asked to answer was whether it met State's standards.[30]

Subsequent witnesses for the County testified at some length on AASHO standards. On direct examination County witness Kokila testified that a table in an AASHO publication indicated a maximum grade of 7 percent for a road designed for a speed of 50 miles an hour in mountainous country; that the substitute road is located in mountainous country; that it has been designed for a speed of 50 miles per hour;[31] that the grade on the westerly approach road to the bridge was eight percent; and that there is a provision in the AASHO manual authorizing 2 percent steeper grades for highways of a secondary nature (Tr. 69). Kokila testified, however, that the road in question has been designated as a primary County road.[32] Later in his testimony Kokila noted that another AASHO publication [33] indicated that warning signs could not compensate for safety deficiencies of minimum design; that the same publication advocated the use of truck escape ramps; and that no escape ramps had been designed into the plans and specifications that he had reviewed.[34]

---

[30] Tr. 49. A short time later Pyle stated: "The standards I'm talking about are the standards in the State's Planning Manual for State Highways." Immediately thereafter the following colloquy occurred:

"Q. By that statement then you are not in a position to say whether the plans and specifications that the Bureau of Reclamation is using for the construction of this bridge comes within the AASHO standards?

"A. No." (Tr. 49–50)

Still later upon cross-examination the following exchange took place:

"Q. * * * in arriving at these conclusions, have you any awareness [of] the contract that exists * * * between the United States and the County of Placer?

"A. I read the portion of the contract which provides that the County road be redesigned in effect to State Standards or State Highway with traffic one to five thousand in mountainous range. I'm aware of that much of the contract.

"Q. Are you familiar with the maps and exhibit that is part and parcel of that contract?

"A. No." (Tr. 59, 60)

[31] The record does not disclose whether the road was designed to this speed because of a recognized contract requirement. Department counsel comments: "* * * Although the Bureau proposed and is attempting to build * * * a 50-mile per hour or better road as a benefit and an accommodation to the County as distinguished from any requirement on the Bureau's part or a right in the County, no design for a speed of 50 miles per hour is required of the Government * * *. The speed signs on the road being relocated, as can be seen in the pictorial Exhibits (*supra*) to the Government's Brief, are for less speeds. For comparison purposes the standards [for] a speed less than 50 miles per hour could be used and, if so, it would appear even more strongly that the Bureau was more than meeting the terms of its relocation contract with the County" (Government's Post-Hearing Brief, p. 17).

[32] This testimony was buttressed by the introduction into evidence of (i) a Resolution of the Board of Supervisors of Placer County adopted on May 17, 1954 (Appellant's Exhibit H) and (ii) a two-sheet map showing the County Road System for Placer County and depicting the road to be replaced as a primary County road (Appellant's Exhibit I).

[33] Highway Design and Operational Practices Related to Highway Safety (1967); Appellant's Exhibit L.

[34] Tr. 7476. On cross-examination Kokila indicated that it is not the practice for the State of California to build escape routes into roads it is constructing (Tr. 83).

Upon cross-examination, Kokila testified as follows:

Q. There is one more sentence that I'm not sure whether you read into the record when you were reading from page 195 of the AASHO blue book. Did you read the last sentence of that paragraph below table—Numeral 3–13?

A. Yes, I did.

Q. Would you read that again for me?

A. The last sentence said, "For low [35] volume rural highways grades may be two per cent steeper." [36]

The County's third witness, John Maccoun, Director of Public Works, Placer County,[37] testified to the negotiations preceding the contract's execution and the actions taken by himself or by the Board of Supervisors [38] in connection therewith. After testifying to his familiarity with AASHO standards,[39] Maccoun gave testimony that such standards require carrying full shoulder widths across bridgeways, making medians continuous for separations up to 20 or 30 feet by bridging the under crossings, and providing for escape routes (Tr. 97–99). It is noted, however, that what are referred to as AASHO standards are described in the publication in which they appear as recommendations.[40]

Maccoun testified at some length concerning the negotiations in January of 1968, that culminated in the execution of the contract now in issue. According to his testimony the first couple of days of negotiations were spent trying to resolve questions of engineering stand-

[35] In a colloquy immediately preceding this exchange Kokila gave the following testimony:

"Q. Are you aware of the traffic count average, daily traffic count that's—has been determined to have been using the road, County road involved in this case? * * *

"A. Well, it varies, of course, depending upon the season of the year, but the average daily traffic count is about 1100 at the present time." (Tr. 80–81)

[36] The 1100 per day traffic count places the road in the lower range of the 1000–5000 vehicle per day standard which is included in the contract. It is a rural road at least for the present.

[37] The importance of his role is well illustrated by the testimony elicited from Maccoun by County counsel:

"Q. And you advise the Board on whether certain roadways should be accepted or whether certain contracts should be executed regarding such roadways, is that correct?

"A. That's correct." (Tr. 128)

[38] Upon examination by County counsel, he testified as follows:

"Q. During 1967 and the first part of 1968, did you attend all of the Placer County Board of Supervisors' meetings wherein this particular project, the substitute road, was discussed?

"A. I can't recall ever missing a meeting at that period of time.

"Q. To your knowledge, during that period did the Board at any time at any Board meeting, take any action to approve a grade in excess of the State design standards? Other than the seven per cent grade which you submitted on your L–4 route?

"A. They did not." (Tr. 141, 142)

[39] Tr. 89.

[40] Appellant's Exhibit L, note 33, *supra*, p. 1. From the language employed in Exhibit L with respect to the three areas referred to in the text, it is clear that the "standards" represent desired goals rather than mandatory requirements (See paragraphs 5 and 16 on pages 1 and 3 and the last paragraph on page 19 of the exhibit).

ards for the facility to be constructed. Explaining the manner in which the impasse was finally resolved, Maccoun stated:

* * * finally I was told by the Bureau people that they'd build this better than any State Highway and I said, "Well, then put that in the contract and we won't have to talk about all the detail of the standard," and so we went back and came back to—the next day drafted what I thought we should have. They reviewed it and it was finally incorporated in the contract * * *.[41]

Shortly thereafter the County counsel examined Maccoun as follows:

Q. And then your understanding by that the design criteria to be used would be used by the State in building State Highways?

A. Yes.

Q. And at that time did you know that the State required a minimum—maximum six per cent grade in their design criteria?

A. Yes.[42]

Q. When did you first learn that the Bureau's specifications showed a grade of up to eight per cent?

A. I don't recall, except that I'm sure that as soon as I had my first opportunity to review the plans. There may have been some discussion prior to that,[43] but I can't recall.

Q. When you first learned—in any event, when you first learned the grades were going to exceed six per cent, did you contact any Bureau representative?

A. Yes, I'm sure I did. (Tr. 139)

In the course of his testimony Maccoun provided a good deal of information concerning the route initially recommended by the county.[44] This route designated L–4 was recommended by the Board of Supervisors of Placer County in a letter addressed to the Regional

---

[41] Tr. 137–138. The contract provision referred to is paragraph 1(a), note 19, *supra*. (Tr. 138–139)

[42] Tr. 139. It is clear that by early February of 1968, the County knew that the route selected by the Bureau involved grades of up to 8% for in a letter addressed to the Bureau's Construction Project Engineer under date of February 8, 1968, Maccoun stated:

"The County would design the 7% grade on the South and the 8% grade on the North with two full lanes in each direction and a four-foot shoulder on each side as the requirement because of the climbing and slow down hill movement of trucks and automobiles towing boats and trailers as differentiated from the normal vehicle speed" (Exhibit 9, p. 2).

[43] There in fact had been earlier discussions concerning the use of an 8% grade, as is clear from the following testimony given by Maccoun upon cross-examination with respect to why the Bureau abandoned its plan to follow the L–4 route recommended by the County in late May of 1967:

"Q. Why wasn't [the L–4 route] used?

"A. It went through a subdivision and one of the Board members, anyway, objected to this and so you people found another location.

"Q. * * * were you advised what the use of this other location would involve with respect to grades and other matters as compared to the L–4 location?

"A. I wasn't directly advised although the Board was advised and I may have been in their presence or I heard of it shortly thereafter, that you offered another location—this is the Bureau of Reclamation, wherein you would not disturb any other homes, but you may have to go to a grade of eight percent, but this wasn't known yet" (Tr. 146–147).

[44] Apparently the route was and is viewed by the County as satisfying the State requirement for a 6% grade even though for short stretches the recommended road would have had a grade of 7% (Tr. 129, 141).

Director under date of May 31, 1967.[45] Apparently, as a result of a preliminary survey by the Bureau in the area to be traversed by the L–4 route, property owners in the Sylvan Vista subdivision—who objected to the route going through or adjacent to their property—protested to Board Supervisor Jones who brought their objections to the attention of the full Board (Tr. 152). He also brought the matter to the attention of G. Raymond Rolin, the Bureau's Project Construction Engineer.[46] The objections of the property owners were discussed at the Board of Supervisors Meeting on August 1, 1967, at which Mr. Jones noted that an alternate to the L–4 route was then under study by the Bureau.[47]

For details concerning events which took place from late July until August 15, 1967 (the date the Board of Supervisors adopted the resolution clarifying its position with respect to the L–4 route), we are largely dependent upon the testimony of Mr. Rolin.[48] He testified that on July 31, 1967, Board supervisors Jones, Mahan and another supervisor,[49] met with the Assistant Regional Director and himself in the Regional Office in Sacramento. At that time Rolin presented two alternatives to the L–4 route. One alternate would still have been in the Sylvan Vista area but would have required the removal of fewer houses. The other alternative involved moving the bridge downstream between 2 and 3 thousand feet with the proposed road encroaching on an area called Auburn Heights. The day following the meeting in Sacramento, Board supervisor Jones telephoned Rolin about noon to say that the Board preferred the Auburn Heights area route. By August 5, 1967, it became generally known that the location of the Auburn-Foresthill Road was being changed, however, and interested groups in the North Auburn Heights area began to protest.

Undertaking to describe the situation he found himself in as a result of the turn of events, Rolin states:

> * * * the Board of Supervisors found that the people in Auburn Heights did not want the road in that location, which sort of left me at an impasse because

[45] Exhibit 3 ("The Placer County Board of Supervisors submits herewith its recommendation for the relocation of the Auburn-Foresthill bridge and road to be inundated by the Auburn Dam. * * *" (Tr. 129, 175, 176).

[46] Exhibit 11, Memorandum to Central Files from G. Raymond Rolin, dated May 3, 1968 ("By phone call July 29, 1967, County Supervisor Will Jones notified me that all residents in the Sylvan Vista area were protesting the routing of the road through this developed area, that it was the County's desire to make changes, and asked my views as to what could be done. * * *")

[47] Exhibit A to Trial Brief of the County of Placer.

[48] In the narrative we shall also rely upon information contained in Exhibit 11, note 46, *supra*, particularly with respect to the dates the various events occurred.

[49] Tr. 177. Rolin may have been mistaken as to another supervisor being present. The memorandum prepared by him some two years before (note 46, *supra*), shows Jones and Mahan as the only supervisors present.

I didn't know where to put the road. So I requested a meeting with the Board of Supervisors to talk this matter over, which we did hold such a meeting a few days later at the Foothills Restaurant, and I believe all members of the Board were present plus Mr. Maccoun * * *. However, at that time I pointed out to the Board that if we cannot go through Sylvan Vista and we cannot go through Auburn Heights, the only other location is to go between them. In going between them I pointed out that we have no means of getting a location which would satisfy a six per cent grade unless the bridge was raised considerably.

Now, at that time since we had a location over here that would cost a certain number of dollars, and the location over here that would cost approximately the same, I was not in any position to say that we will increase that cost for the convenience of the County unless the County was willing to absorb the increased costs. The outcome of that meeting—luncheon meeting was that the Board of Supervisors would rather have this intermediate road with an eight per cent grade rather than go to either of the other locations.[50]

The County has attempted to meet the uncontradicted testimony given by Rolin by calling attention to the fact that the meeting at the restaurant occurred long before the contract in issue was signed,[51] and that Rolin did not attend the negotiation sessions at which the final terms of the contract were agreed upon (Tr. 184). In addition, it squarely raises the question of the Board of Supervisors' authority to bind the County in the manner relied upon by the Government, stating:

The only action taken by the Placer County Board of Supervisors during the period in question is shown on the officially certified copies of the Minutes of August 1st and August 8th * * * and Resolution 67-323, dated August 15th * * *. Nowhere did the Board agree to, or even refer to an 8% grade, or any other grade. * * *[52]

[50] The testimony given by County witness Maccoun (note 43, *supra*), is entirely consistent with Rolin's account of the luncheon meeting in the Foothills Restaurant. The County offered no rebuttal testimony. Upon cross-examination the following exchange took place with respect to the Board of Supervisors' meeting of August 8, 1967 (Exhibit B to Trial Brief of County of Placer):

"Q. So at that meeting they indicated then that they did not specifically request the L-4 route?

"A. That's correct. In other words, if I remember right, at that meeting they indicated that they'd be happy to have a road which does not interfere with any houses.

"Q. Number 4?

"A. But the Board of Supervisors at that time knew that the only other route was the one I described to them previously at the luncheon meeting and that the route without hitting any houses would entail an eight per cent grade.

"Q. Had you already done all of the engineering studies on that, you knew the exact grades and the exact routing to be taken?

"A. Yes, * * * the grade is dictated by the grade of the—of the interchange on top there and the—and the grade of a bridge which would have satisfied the relocation in either L-4 or through Auburn Heights.

"Q. Were you present when Mr. Pyle testified regarding a proposed G-2 route?

"A. Yes.

"Q. That route would have connected, I presume, the Interstate 80 interchange with the point?

"A. It would, but it would have taken out some houses." (Tr. 186, 187).

[51] Post-Hearing Brief of the County of Placer, p. 10.

[52] Trial Brief of the County of Placer, p. 7. The authority relied upon is cited on the same page in a passage reading:

"* * * any such discussion did not involve Board action. 'To perform an official act the Board must be regularly convened.' (13 CAL. JUR. 2d, 372). 'Whether or not a board

The significance which would ordinarily attach to the fact that Rolin did not attend the final negotiation sessions for the contract in question is greatly diminished by such circumstances as are present here, namely: (i) the Minutes for the Board of Supervisors' meeting of August 8, 1967, disclose that the Board was aware that not proceeding with the L–4 route would be likely to entail deviations from standards which could have been achieved otherwise; [53] (ii) within a month of the meeting in the restaurant the Bureau forwarded to the Board of Supervisors proposed plans for the roadway in question, reflecting the use of grades of 7 and 8 percent; [54] (iii) the alignment for the roadway shown in Exhibit "A" to the contract as executed reflects the grades of 7 and 8 percent (Tr. 196); and (iv) the record shows that less than a month after the contract was executed the Director of Public Works for Placer County was aware that the roadway the Bureau planned to build involved grades of 7 and 8 percent,[55] but failed to assert in a timely fashion such grades were in violation of the State Standard of a maximum grade of 6 percent for State Highways except in unusual circumstances.

Respecting the Board of Supervisors' failure to formally approve the 7 and 8 percent grades in question, Government counsel asserts that because of its conduct the County is estopped,[56] to assert the lack of formal approval. In the Post-Hearing Brief, Government counsel states:

---

of supervisors has jurisdiction to do an act must be determined by an examination of the record of its proceedings. The best and only evidence of its intention is to be drawn from this record.' (13 CAL. JUR. 2d, 373)."

[53] Trial Brief of the County of Placer, Exhibit B, p. 382 ("A question of the same standards being in effect was brought up by Mr. Barber and the Board concurred. Mr. Kadie pointed out that the standards cannot be accomplished under Federal law and should not be included in the Resolution but could be submitted separately and would be considered by the Bureau of Reclamation as the view of the Board.") In a letter addressed to the Board only four days before the contract was executed, Mr. Kadie stated:

"As you know, the agreement which we have accomplished for the County replacement crossing is based on a location selected by your Board. The road grade for a portion of this replacement is not as desirable as could be obtained by some other route. However, this route does avoid the serious right-of-way problems which are inherent in other routes." (Exhibit 7; letter to Robert P. Mahan, Chairman, Placer County Board of Supervisors.)

[54] Exhibit 6; letter of September 7, 1967, to Mr. William S. Briner, Chairman, Placer County Board of Supervisors from R. J. Pafford, Jr., Regional Director, Bureau of Reclamation ("* * * Location details were discussed with Assistant Regional Director Kadie and Project Construction Engineer Rolin at the meeting of your Board on August 8. Further discussions between Mr. Rolin and your Board occurred on August 15. As a result of these discussions, the alignment shown on the attachment has been selected. * * *") (Tr. 176).

[55] Exhibit 9, note 42, *supra*.

[56] Citing, *inter alia*, *Farrell et al.* v. *Placer County et al.*, 23 Cal. 2d 624 (1944), 153 A.L.R. 323 and *Palo Alto Investment Co.* v. *County of Placer*, 74 Cal. Reptr. 831 (1969).

* * * This equitable theory applies to municipalities as well as individuals and would prevent Placer County from avoiding the effect of its action by any argument that there was no documentation in resolutions of the Board of Supervisors. * * * (pp. 21–22)

Before concluding our consideration of this complaint by the County, it would perhaps be well to note the material change in the County's position which occurred between the time the Board of Supervisors wrote to the Secretary on September 24, 1968,[57] and the time the County filed its Trial Brief at the hearing in April 1970. Concerning this change of position Government counsel states:

* * * This Complaint (deviation from standards for California State highways limiting grades to 6 percent) is not one included in those initially made by the County in its letter of Complaint that forms the basis for this proceeding and is not the subject matter of any Decision of the Contracting Officer in his determination of April 3, 1969 * * *.[58]

Insofar as this opinion is concerned, the principal effect of the County's change in position has been that the Board is entirely without the benefit of any findings by the contracting officer on such crucial questions as (i) requirements of the State of California, respecting 6 percent grades except in unusual circumstances, (ii) the tests applied by the State in determining unusual circumstances, (iii) the extent to which the State's own practice conforms to the standards set forth in its Planning Manual and (iv) the relationship between primary County roads and State highways.

Addressing himself to the major question presented by the County in its letter of September 24, 1968 (Exhibit 16), the contracting officer states:

Public Law 87–874, October 23, 1962,[59] under which the relocation of the County Road is being carried out would not authorize the Bureau, under the facts and circumstances of this case, to finance construction which would change the classification of the road from two lanes to four lanes.[60]

Immediately thereafter he set forth his understanding of the terms, standards and classification [61] as used in the statute and in the result-

[57] After noting its recommendation that the roadway be initially constructed as a 4-lane facility—with a 4-foot center median, four 12-foot travel lanes, and 8-foot shoulders, the letter continues:

"The County contends that this design criteria is appropriate and that this design criteria does not constitute a higher standard than described in the contract under Sec. 1(a), Pages 3 and 4 * * *." (Language referred to quoted in text accompanying note 19, *supra*). Exhibit 16, p. 2.

[58] The Government's Post-Hearing Brief, p. 11.

[59] Exhibit 2. The act amended section 207 of the Flood Control Act of 1960 (74 Stat. 501). The finding is predicated upon the language contained in section 207(c), as amended.

[60] Exhibit 30, Findings of April 3, 1969, p. 2.

[61] Note 60, *supra*. ("Public Law 87–874 provides that the head of the agency concerned is authorized to construct such substitute roads to design standards comparable to those of the State for roads of the same classification as the road being replaced. The same law

ing contract. He also adverted to the use by the State of California of the AASHO standards as a guide, after which he stated:

> In designing the bridge for the relocated road, provision is being made in the piers and in the deck substructures for a future 4-lane road. However, the initial structure will carry only two traffic lanes. This arrangement is as far as the Bureau is authorized to go[62] in construction of the bridge. Any further construction such as adding two additional traffic lanes to the bridge and other portions of the relocated road must be considered a betterment and the cost thereof must be borne by other highway authorities.[63]

As the evidence to which we have referred discloses, the County has made a serious effort to substantiate all of the various contentions advanced in support of its present central thesis that the roadway planned for and being built by the Bureau is not comparable to and at least the equal of California standards for State highways, including roadways of the type described in the contract. Concerning the situation in which the parties find themselves, the County states:

> * * * The hazard caused by this deviation from standards can be corrected only by redesigning the facility in accordance with State Design Criteria, or widening the facility to four (4) lanes.[64] The County will accept either alternative.[65] The County cannot be required to accept the facility until this hazard is corrected.[66]

All of the County's efforts founder, however, upon a course of conduct by the County plainly and consistently at variance with the posi-

---

also provides that 'traffic existing at the time of the taking shall be used in the determination of the classification.' In this instance, the relocation contract provides that construction will be to standards comparable to and at least the equal of such standards currently used by the State of California for roads in mountainous terrain to accommodate a traffic volume in the range of 1,000 to 5,000 vehicles per day. This traffic volume does not authorize a road classification of more than two lanes * * *.")

[62] In letters (B–125045), addressed to the Secretary under dates of April 13, 1970 and September 23, 1970, the Comptroller General found that the Bureau was not authorized to make such arrangements. In the latter letter the Comptroller General states:

"We * * * remain of the opinion that the Department lacks authority under Section 207(c) of the Flood Control Act of 1960, as amended, to participate in the construction costs of the heavier substructure and deck truss and recommend that Federal participation be limited to the cost of constructing a two-lane bridge which will support only two lanes of traffic.")

[63] Note 60, *supra*, pp. 2, 3.

[64] At page 9 of its Post-Hearing Brief the County asserts:

"*All* of the testimony relating to the necessity for four (4) lanes relates *solely* to the need for four (4) lanes due to safety considerations for *present traffic only.*" (Underscoring in original.) This statement is plainly contrary to the following testimony given by County witness Pyle on direct examination:

"Q. * * * if you did not consider traffic that is expected to use the facility after the reservoir is in use, would you still come to the same conclusion?

"A. If I didn't consider traffic that was expected to use the facility after the road was constructed I would not conclude that four lanes was [sic] required." (Tr. 16)

[65] County witness Pyle testified, however, that a four lane highway would still not comply with State standards if, as would be the case here, the alternative would involve an 8% grade (Tr. 20).

[66] Post-Hearing Brief of the County of Placer, p. 10.

tion now asserted. If—as is now contended—the contract standards applicable to the roadway to be built required a grade of not in excess of 6 percent, why was this position not advanced when, prior to contracting, the Bureau advised the County both orally [67] and in writing [68] that the roadway to be built to accommodate the County's request would involve the higher grades. Assuming that the construction the County now urges be placed upon the contract language [69] would otherwise be tenable or even to be preferred, that position cannot be maintained where, as here, an exhibit attached to the contract and expressly made a part thereof shows an alignment for the roadway to be built involving grades of 7 and 8 percent.[70] In these circumstances we attach little weight to County witness Maccoun's testimony that he may not have had sufficient engineering data available for him to determine what grades were involved in the alignment for the roadway shown in Exhibit "A" to the contract (Tr. 130). It does not seem that he could properly discharge his responsibilities to advise the Board of Supervisors as to whether to proceed with the execution of the contract [71] until he had access to sufficient engineering data for an informed judgment. There is nothing in this record to indicate that Maccoun was in any way remiss in the discharge of his responsibilities.

In the Board's view the situation with which we are concerned represents a case of one party knowing or having good reason to know the interpretation placed upon particular contract language by the other party prior to entering into the contract. The law is well-established that in such circumstances the party who has knowledge of the other party's interpretation and who fails to take exception to it is bound by the other party's interpretation.[72] Since the question is the construction to be placed upon the contract language employed, the fact that Maccoun was without authority to contract on behalf of the County or that the Board of Supervisors may have failed to formally approve what they have agreed to informally is not dispositive of the issue presented.[73] We, therefore, find that the contract as

[67] Note 50, *supra*, and accompanying text.
[68] Note 54, *supra*.
[69] Text accompanying note 19, *supra*.
[70] Exhibit 32; the Contract, p. 3, and Exhibit "A" thereto (Tr. 196).
[71] Note 37, *supra*.
[72] *Sun Shipbuilding and Dry Dock Company, et al.* v. *United States*, 183 Ct. Cl. 358, 376 (1968); *Cresswell* v. *United States*, 146 Ct. Cl. 119, 127 (1959). ("If one party to a contract knows the meaning that the other intended to convey by his words, then he is bound by that meaning. The same is true if he had reason to know what the other party intended. * * *"); and *Shadrick Contracting Company, Inc.*, ASBCA No. 14613 (January 6, 1971), 71-1 BCA par. 8647, p. 40,187 ("The law gives legal effect to the words of a contract in accordance with the meaning actually given by one of the parties, if the other party knows of such party's interpretation and does not manifest any disagreement with such party's interpretation before the contract is entered into. * * *")
[73] *Cf. Kraus* v. *United States*, 177 Ct. Cl. 108, 118 (1966) ("* * * Even if the inspector had no authority to supply a binding interpretation of the contract, his actions constitute

entered into contemplated the use of grades 7 and 8 percent along the alignment shown in Exhibit "A" to the contract and that the County has failed to show that the facility being constructed otherwise fails to comply with the standards prescribed in the contract.

Approval Required for Access Roads

The gravamen of this complaint is that in derogation of the express terms of the contract,[74] the Bureau has authorized access to areas located outside the project takeline without securing the County's approval, even where such access is considered hazardous by the County.[75] For its part the Government has consistently maintained that the accesses authorized are within the project takeline and that the contract provision relied upon by the County is therefore inapplicable to the three access roads in question.[76] After noting the County's position as set forth in its letter of September 24, 1968 (Exhibit 16), the contracting officer found:

> The three accesses to the recreation area on the Foresthill Divide are within the project takeline. These accesses are to serve lands acquired by the United States for project purposes. Accesses which are subject to approval by the County under Section 1(e) of the contract of January 16, 1968, are those provided outside of the project takeline to serve ownership remaining after the acquisition of rights-of-way for the replacement road. The subject accesses, therefore, are not appropriate for approval by the County.[77]

Resolution of the question presented on the merits would require a determination of the boundaries of the project takeline. The testimony and exhibits offered by the Government concerning this complaint were designed to show (i) that even prior to authorization of the project in 1965,[78] extensive consideration had been given to provision for recreation in connection with the Auburn Dam and Reservoir undertaking and (ii) that the County was not only aware that this was so but also had obtained an outside study in 1966 to determine the feasibility of the County and others operating proposed recreational installations.

---

highly persuasive evidence of the reasonableness of plaintiff's interpretation.") The rationale upon which our decision is grounded makes it unnecessary for us to determine whether the County is estopped to assert the lack of authority of the Board of Supervisors to bind the County except at a regularly convened meeting (See notes 52 and 56, *supra*, and accompanying text).

[74] See paragraph 1(e), note 19, *supra*.

[75] Post-Hearing Brief of the County of Placer, p. 1 ("The design also incorporates access roads for State of California Parks, located outside the Project Take Line, the designs of which are considered hazardous by the County of Placer. These access designs were approved by the Bureau despite the objection of the County of Placer.")

[76] Government's Post-Hearing Brief, p. 7.

[77] Exhibit 30, Findings, p. 2.

[78] Note 5, *supra*.

With respect to the Government's evidence, we note that Government Exhibit 3 [79] was printed in 1964 (the year before the project was authorized), and that Government Exhibit 4 (Impact Study for the Counties of Placer and El Dorado and the City of Auburn) was apparently transmitted to the County by letter of September 26, 1966 [80] (over 15 months before the contract was executed). Government witnesses Turner and Rolin both testified that recreation was included in the project.[81] Rolin also testified that lands acquired for recreation were within the project takeline.[82] We note, however, that neither witness attended the negotiating conferences at which the contract terms were agreed upon.[83]

County witness Maccoun testified at length as to the genesis of the contract provision requiring County approval of access outside the project takeline. It was his testimony that the provision with which we are now concerned was included in the contract at his request; that the request was made because the County wanted to control all access to the new facility; that the Bureau had advised that they could not relinquish to the County the right to control access within the takeline for the project for dam purposes; that at the time of the final contract negotiations the takeline for the dam facilities was known within a few feet; that the land acquired for such purposes would be retained by the Government; that, insofar as he knew then, the Government had not acquired any land outside of the dam and reservoir takeline; and that it was his understanding any access granted with respect to future acquisitions not included in the takeline for the dam would be subject to County review and approval.[84] Maccoun

[79] House Document No. 171, 88th Congress, 1st Session, U.S. Government Printing Office (1964).

[80] In especially pertinent part the letter states:

"The primary objective of this study was to ascertain the feasibility of local government operation for all or a portion of the recreational facilities proposed in the preliminary recreation plan prepared by the Auburn-Folsom Interagency Task Force (dated June 1966).

"The conclusion reached as a result of this preliminary study indicated that except for marina operations, it appears impractical for the Counties or the City of Auburn to consider operation of the proposed recreational installations."

[81] Tr. pp. 164, 181. Concluding his testimony upon direct examination Turner stated:

"* * * So I would judge from these that the Counties were well aware of the proposals to include recreation on the Foresthill Divide as a part of the Auburn Project" (Tr. 165).

[82] Tr. 182, 183.

[83] The presentation of the Government's case may have been handicapped by the death of one prospective witness and the absence from the County of another (Tr. 143–144). The Counsel who presented the case on behalf of the Government did attend the conference but failed to testify. The lot of an attorney with information to impart concerning a case he is trying is not a happy one, as we have had occasion to note previously. See *American Cement Corporation,* IBCA–496–5–65 and IBCA–578–7–66 (December 2, 1968), 75 I.D. 378, 382, 68–2 BCA par. 7390, at 34,365.

[84] Tr. 131–134. Upon cross-examination Maccoun negated a suggestion from Government Counsel that his primary concern had been accesses to the relocated road from adjacent private property, stating:

also testified that he had first learned of the accesses proposed by the Bureau when he first reviewed the plans some 8 to 10 months after the contract was executed;[85] that he had personally examined the proposed accesses and had found them to be hazardous; and that thereafter, he had requested that the County be relieved of responsibility for the accesses in question.[86]

In most cases, the uncontradicted testimony summarized above would be determinative of the question presented. Here, however, the weight to be attached to Maccoun's testimony is seriously impaired by the fact that he was testifying to events which had occurred over two years prior to the hearing without the apparent benefit of contemporaneous notes of any kind. The record discloses that his memory was dim with respect to at least some aspects of the final negotiation sessions.[87]

It should be noted that there are contradictions between Maccoun's testimony and his letter of February 8, 1968 (Exhibit 9). The assertion that he did not become aware of the accesses planned outside the take-line (as Maccoun had defined it) until 8 to 10 months after the contract was executed,[88] is clearly contrary to the knowledge disclosed by the aforementioned letter.[89] Also it is significant that in the very same

---

"* * * I was concerned with all access to the road, whether it be private or public * * *" (Tr. 149). A short time later responding to an inquiry by Government Counsel as to his recollection concerning discussions to the effect that regulation by the County over accesses to Government property or that were to be for the purpose of the Gvernment was not within the realm of possibility, Maccoun stated:

"Anything outside of the dam project purpose take-line I asked for control of and I thought received within the contract * * *." (Tr. 149, 150)

[85] The following colloquy occurred on direct examination:

"Q. When did you first learn that access had been granted or were planned outside the take-line?

"A. When I * * * first reviewed the plans.

"Q. Was it before or after the contract was executed?

"A. This is about—I would say eight–ten months * * * or longer after the contract was executed." (Tr. 135)

[86] Tr. 135–137.

[87] Compare Maccoun's testimony on direct examination that Mr. King and—he thought—Mr. Kadie or Mr. Horton were the Bureau conferees (Tr. 129) with his acknowledgment on cross-examination that Mr. Robert Smythe and Mr. Gordon Whitaker together with Mr. King may have been the Bureau representatives (Tr. 143, 144).

[88] Note 85, *supra*.

[89] Exhibit 9; letter of February 8, 1968, from Mr. Maccoun, to Mr. Rolin, pp. 2, 3 ("On your preliminary layout plans you have indicated an access on the right at approximately Station 94. We would request that this access be moved up to opposite the access at Station 103+35 * * *. Basically, the reason for this is that the right hand traffic will be going slow in this area, it is on approximately a 7% grade, and the fast moving vehicles which would be the predominate cars using this turn-off would be attempting to pass slow moving vehicles and then to quickly change lanes to make this turn-off and also it is much more desirable to establish the traffic control in the left turn slots in one location and have the two access roads opposite each other, this is especially true in this area with the high gradiance of the roadway. We are cognizant of the fact that the plans for the park areas are not finalized and, therefore, we think that this should be brought to the attention of the Beaches and Parks State Engineers and be resolved.")

letter—written only 23 days after the contract was executed—he clearly indicated that the questions he had raised concerning the proposed accesses should be resolved between the Bureau and the California Division of Beaches and Parks.[90] This is precisely how the Bureau viewed the matter.[91]

Had we jurisdiction over the claims asserted, we would remand the case to the contracting officer for a finding on the question of the extent to which the allegedly hazardous condition with respect to the accesses proposed by the Bureau would have been present if the substitute road had been built on the alignment reflected in the L-4 route. In this connection we note that the County is hardly in a position to complain if the allegedly hazardous conditions are a concomitant[92] of the Bureau having built the substitute road with 7 and 8 percent grades after first having informed the County that accommodating its request to avoid taking any homes in either the Sylvan Vista or the Auburn areas would inevitably result in steeper grades.

Decision

The most basic issue raised by this appeal concerns our authority to provide a remedy for the wrongs alleged. Respecting the jurisdiction of the boards of contract appeals, the most recent authoritative statement is the Supreme Court's decision in *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394 (1966), in which questions involving the basis for and the extent of the jurisdiction of the several boards were examined in considerable detail.

The guidelines established in Utah have been discussed and applied by the Board in a number of cases. In *American Cement Corporation*, IBCA-496-5-65 and IBCA-578-7-66 (September 21, 1966),[93] the Government vigorously contended that the claim by a supply contractor for loss of commercial business (lost profits) was cognizable under either the standard Changes Clause or the Extras Clause. We found otherwise. In *MevA Corporation* (note 20, *supra*), the question presented was whether the claims by a construction contractor were

[90] Note 89, *supra*.

[91] Exhibit 10; letter of April 8, 1968, to the Placer County Board of Supervisors, p. 3 ("* * * The locations of the turnoffs to serve the recreation areas have been coordinated with the Division of Beaches and Parks and they have concurred with our locations.")

[92] The record indicates that there is such a nexus. See, for example, the testimony of County witness Kokila upon direct examination and particularly the following exchange:

"Q. In your opinion is there any objection to the design of these access locations?

"A. Yes, because they approach this road at—on a grade of—where the road is at seven per cent. This is on the easterly portion." (Tr. 64).

[93] 73 I.D. 266, 66-2 BCA par. 5849. The dismissal of the claim for lost profits was affirmed on reconsideration, 74 I.D. 15, 66-2 BCA par. 6065 (1967).

cognizable under the terms of the contract where the increased costs claimed were attributed to the refusal of the Government to permit the substitution of a different subcontractor than the contractor had listed in its bid as required by the terms of a special subcontractor listing clause contained in the invitation and in the resulting contract. We found that they were not.

Unlike the situations present in *American Cement* and *MevA*, *supra*, no question has been raised as to the Board's authority to pass upon the claims asserted. We have previously held, however, that the characterization of a claim as under the contract or for breach of contract is not determinative of our jurisdiction.[94] Very recently another board has held that the jurisdictional question must be faced even though it had not been raised by either party to the dispute.[95]

This case differs from *American Cement* and *MevA*, *supra*, in another material respect. Here neither party has pointed to any contract provision under which relief of the type sought by the County could be provided upon a proper showing.[96] Both the contracting officer's decision (Exhibit 30), and the notice of appeal (Exhibit 31) refer to the contract's Disputes clause.[97] The inclusion of a Disputes clause in a contract does not convert what would otherwise be a claim for breach of contract, however, into a claim under the contract. This is clear from *Utah* in which the Supreme Court specifically rejected the Government's all Disputes clause argument.[98]

---

[94] Note 93, *supra*.

[95] *JCM Corporation*, DOT CAB No. 70–6 (November 13, 1970), 70–2 BCA par. 8586, at 39,887 ("Although neither party has raised any question as to the Board's jurisdiction to hear and decide this appeal, we nevertheless must face this crucial threshold issue.")

[96] The contract contains neither a Changes clause nor any other clause under which the County's complaints could be redressed. *Cf. JCM Corporation*, note 95, *supra*, at 39,887 ("The jurisdiction of boards of contract appeals is limited to claims under specific contract provisions authorizing the relief sought. * * *")

[97] Note 12, *supra*.

[98] See *United States* v. *Utah Construction and Mining Co.*, cited in the text, in which at 403–404, the Supreme Court stated:

"* * * The Government reasserts here its position in the Court of Claims that the disputes clause authorizes and compels administrative action in connection with all disputes arising between the parties in the course of completing the contract. In its view, the disputes clause is not limited to those disputes arising under other provisions of the contract * * * that contemplate equitable adjustment in price and time upon the occurrence of the specified contingencies. * * *

"We must reject the government position, as did all the judges in the Court of Claims. * * * the short of the matter is that when the parties signed this contract in 1953, neither could have understood that the disputes clause extended to breach of contract claims not redressable under other clauses of the contract * * * (footnotes omitted)."

Cf. McGraw Edison Company, IBCA–699–2–68 (October 28, 1968), 75 I.D. 350, 357, 68–2 BCA par. 7335, at 34,113 ("Neither the cases cited by the appellant nor our own research has disclosed any instance where this Board has had occasion to pass upon a Government claim for damages in the absence of a specific contract provision or provisions under which it was considered to be cognizable. * * *")

Conclusion

The appeal is dismissed as beyond the scope of our jurisdiction.

WILLIAM F. MCGRAW, *Chairman.*

WE CONCUR:

DEAN F. RATZMAN, *Alternate Member.*

SHERMAN P. KIMBALL, *Member.*

MAX TANNER, CROSS (X) RANCH, WARREN RASMUSSEN, ROSS WARBURTON, APPELLANTS, CLARENCE A. ELQUIST, INTERVENOR

IBLA 70-16 *Decided April 22, 1971*

Grazing Permits and Licenses: Appeals

An appeal to the director from a decision of a hearing examiner which is received after the period set by the rules of procedure for grazing cases will not be dismissed solely for being late, but the circumstances surrounding the appeal will be examined to determine whether in the exercise of discretion the late appeal should be allowed.

Grazing Permits and Licenses: Apportionment of Federal Range

Where the grazing capacity of the federal range has been greatly increased due to the efforts and expenditures of the licensee with the cooperation of the Bureau of Land Management, and the range is to be divided into separate allotments for that licensee and a group of others, it is proper to allocate the increased capacity to such a licensee apart from the allocation of grazing privileges based on natural forage, especially when the individual licensee suffers a greater reduction of his class 1 demand than do the others.

Grazing Permits and Licenses: Advisory Boards—Grazing Permits and Licenses: Apportionment of Federal Range

Where a proposed line dividing an area into spring/fall and summer use areas and the criterion on which it is based has been discussed many times before an advisory board, the district manager may use that line in allocating grazing privileges despite the fact that it has not been set out in an advisory board recommendation.

Grazing Permits and Licenses: Federal Range Code

The provisions of the Federal Range Code dealing with protests to a decision of the district manager are satisfied if a person is notified of his right to protest from an initial decision; if however, that decision is changed as a result of another's protest, those dissatisfied with the amended decision do

not have a further right to a protest hearing, but must take an appeal as the Range Code provides.

Grazing Permits and Licenses: Apportionment of Federal Range

A permittee or licensee has no right to any particular portion of that Federal Range under the Taylor Grazing Act or the Federal Range Code and, although historical use is a factor to be considered in the determination of grazing privileges, the selection of the particular area in which the range user may exercise his privileges in a matter committed to the discretion of the Department.

BOARD OF LAND APPEALS

Max Tanner, Cross (X) Ranch, Warren Rasmussen and Ross Warburton have appealed to the Secretary of the Interior from a decision of the Chief, Branch of Land Appeals, Office of HEARINGS AND APPEALS, Bureau of Land Management, dated October 8, 1968, which dismissed their appeal from a decision of a hearing examiner affirming the establishment by the District Manager of the Elko Grazing District, Nevada, of the boundary line between the appellants' group allotment and the individual allotment of Clarence A. Elquist on the ground that their appeal was not timely filed. The decision also said that if the appeal were to be decided on the merits, it would uphold the allotments as established by the district manager.

The hearing examiner's decision is dated February 26, 1968. Under the provisions of the Federal Range Code for Grazing Districts effective at that time, the appeal, after several extensions had been granted, ought to have been filed in the Office of the Director on June 28, 1968. 43 CFR 1853.7(b). It was, in fact, mailed in Salt Lake City on June 27, 1968, and received on July 1, 1968.

The Office of HEARINGS AND APPEALS held that the appeal was filed late and under the consistent rulings of the Department an appeal to the Director from a decision of a hearing examiner in a grazing case filed late must be summarily dismissed.

The appellants contend that the regulations do not require the summary dismissal of a late appeal and that the Secretary may exercise his supervisory authority to relieve the appellants of the consequence of a late appeal.

In a recent decision, *Delbert and George Allan*, 2 IBLA 35 (March 4, 1971); 78 I.D. 55, the Department reviewed its rulings on late grazing appeals. It concluded that since the courts have held that the term "subject to summary dismissal" in other than grazing cases does not justify a dismissal of an appeal without the exercise of discretion, it would follow the same rule for grazing appeals. It then held that a grazing appeal mailed within the appeal period and received one day late would not be dismissed solely for that reason, but that the circum-

stances surrounding the appeal would be examined to determine whether in the exercise of discretion the late appeal should be accepted. It concluded that a delay of one day would be excused where there was no prejudice to the other parties and no advantage to the filing party.

Here, too, the appellants, having mailed their brief within the appeal period, have gained no advantage from their tardiness. And again, though the appeal was three days late, two of these days were non-business days, a Saturday and Sunday. Further, there has been no prejudice to the intervenor from the appellants' default. Therefore, we conclude that in the circumstances the late filing will be waived and the appeal will be accepted and disposed of on its merit.[1]

Turning to the merits, we note that the appeal involves the allocation of grazing privileges in the Grande Range Unit of the Elko District, an area in the northeast corner of Nevada bounded by Utah on the east and approaching Idaho to the north. After proceedings before the District Advisory Board, the district manager approved a line dividing the area in question into an individual allotment for Elquist and a group allotment for the appellants. The dispute arises from the positioning of the dividing line.

The facts as summarized by the hearing examiner are:

> The east portion of the Grande Range Unit embraces 76,111 acres, including private lands located primarily along water ways. The Intervenor owns 4,346 acres of private lands in the unit. Appellant Cross X Ranch owns 120 acres of private lands situated within the Appellants' proposed allotment. None of the other Appellants own any private lands in the unit.
>
> On December 9, 1965, the district manager issued a "Notice of Initial Advisory Board Recommendation and Proposed Decision of District Manager on Allotment of Grazing Privileges" (Ex. 10). The notice states in part:
>
> 2. That the present total Class 1 obligation in the Elquist-Grouse Creek allotment is 8688 AUM's for livestock. Of this obligation, the Elquist proportionate share is 5913 AUM's or 68% and the Grouse Creek proportionate share is 2775 is 5913 AUM's for 68% and the Grouse Creek proportionate share is 2775 AUM's AUM's or 32%. There is a wildlife obligation in this allotment of 2000 AUM's.
>
> 3. That based on range survey studies, the estimated grazing capacity of the Elquist-Grouse Creek allotment is 7350 AUM's for livestock and 5000 AUM's for wildlife.
>
> 4. That the estimated present and potential forage production of the Elquist-Grouse Creek allotment is 10,641 AUM's for domestic livestock.
>
> 5. That the Elquist-Grouse Creek allotment be divided into individual and group allotments in accordance with 48 [sic] CFR 4111.3-2(c) as per the attached map which shows the location of these allotments and the operators designated to use them. This division provides for the equitable apportionment of the allotment considering the available forage, the developed potential and the undeveloped potential and is summarized as follows:

[1] The Bureau of Land Management Decision commented that the appeal was also defective because the appellants had failed to file proof of service of their appeal on the adverse parties. The appellants have submitted copies of post office return receipts showing that service was made within the time allowed. 43 CFR 1842.5-2.

April 22, 1971

	Elquist	*Grouse Creek*	*Total*
Available native forage	4835 AUM's	2515 AUM's	7,350 AUM's
Developed potential [2]	1433 AUM's		1,433 AUM's
Undeveloped potential	1139 AUM's	719 AUM's	1,858 AUM's
Total	7407 AUM's	3234 AUM's	10,641 AUM's
Percent of Class I demand	125	117	

The map attached to the notice shows the proposed division line on the east side of the unit extending northerly from the southeast portion thereof to Meadow Creek. The Appellants' allotment is on the east side of the division line.

By letter dated January 7, 1966, counsel for the Appellants indicated that there was no reason to protest the division recommended by the advisory board (Ex. 11).

The Intervenor appeared at an advisory board meeting on January 10, 1966 and protested that the proposed division line set forth in the notice dated December 9, 1965 was unsatisfactory in that it prevented the movement of his cattle through Crooked Canyon. (The division line was on the west side of Crooked Canyon). He proposed to move a portion of the division line from the west side to the east side of Crooked Canyon. To compensate the Appellants for loss of the Crooked Canyon area, the Intervenor proposed to include in the Appellants' allotment the area north of Meadow Creek, known as the Hardesty area, which was in the Intervenor's proposed allotment. Mr. Thomas, representing the Cross X Ranch, and Appellant Warburton indicated that they preferred to use the Crooked Canyon area because the Meadow Creek area was too far from their home ranches. The advisory board recommended that the new division line proposed by the Intervenor be adopted.

The district manager's decision of January 12, 1966 established the division line proposed by the Intervenor, made provisions for providing water for the Appellants' cattle, and referred to a future transfer of the Intervenor's private Meadow Creek lands for Federal lands lying within this allotment.

The appellants raised six objections to the proposed division:

1. The Appellants have been denied an opportunity for a proper hearing before the District Advisory Board.

2. The proposed division line requires the Appellants to use certain portions of the Federal range which were heretofore used by others; that such range is without adequate water; and that the use thereof would require as much as 20 miles of trailing.

3. The proposed division line will require an unreasonable length of fencing, part of the cost of which must be borne by the Appellants.

4. The proposed division line will deny the Appellants their customary and essential summer use, the denial of which will destroy the Appellant's proper balance of grazing use and seriously damage their grazing operations.

5. The proposed division line does not give the Appellants their necessary and equitable share of the available Federal range forage in the Grande unit.

6. The proposed division lines does not provide the Appellants with their necessary and equitable share of the water in the Grande Unit.

[2] "Developed potential" describes the condition of the range at which it is producing the maximum amount of forage for the type of terrain and soil condition involved (Tr. 56). Undeveloped potential describe (he amount by which the carrying capacity of the range can be increased by mechanical or other mean tTr. 57).

At the hearing, the issues were rephrased to three:

1. Does the proposed Appellants' group allotment provide them with a sufficient amount of usable Federal range forage to satisfy their proportionate share of the Federal range demand in the Grande Unit?
2. Is the establishment of the proposed Appellants' group allotment so arbitrary or capricious as to seriously impair their livestock operations?
3. Was any provision of the Grazing Regulations contravened by the advisory board in its consideration of and recommendation on the establishment of the proposed allotments and, if so, was this contravention so substantial that the district manager's decision should be set aside to permit reconsideration by the advisory board?

The hearing examiner first pointed out that the Bureau's determination of the present and potential carrying capacity of the apportioned land had not been challenged and that there was no evidence in the record to refute testimony that the carrying capacities of the Crooked Canyon Area and the Meadow Creek (or Hardesty) area are identical, that is, 381 animal unit months. Further, he said, the record establishes that the proper season of use for the southern portion of the unit is summer, that almost all of the Crooked Canyon and Hardesty areas are designated for spring/fall use, and that the appellants received substantially the same amount of summer forage under the January 12, 1966, decision as they would have under the proposed division of December 9, 1965. He pointed out that the Intervenor's allotment provided him with approximately 85 percent of his qualified demand, while the appellants received 91 percent of theirs, and that the appellants received 677 of the 2212 AUM's classified for summer use, 31 short of their 31 percent proportionate share. He did not find this shortage significant. He then noted that the intervenor was given 1433 AUM's of developed potential, raising his allotment to 106 percent of his qualified demand. He found it proper to give the intervenor the benefit of the increased grazing capacity resulting from reseeding operations he carried out, at substantial cost to himself, with the cooperation of the Bureaus and without any contribution whatever from any of the appellants. He then said that the realization of the undeveloped potential in the intervenor's allotment and the appellants' allotment would give the intervenor in all 125 percent of his qualified demand and give appellants 117 percent of their qualified demand in their area. He concluded that it was not arbitrary or capricious to base the division of the range on a carrying capacity representing only the natural forage and found that the appellants' group allotment provided them with a sufficient amount of federal range forage to satisfy their proportionate share of the federal range demand.

In discussing the appellants' allegation that the proposed allotments would seriously impair their livestock operations, he noted that appellants contended that their allotment did not give them sufficient

forage for their summer use and that it required extensive trailing beyond their area of customary use. He pointed out that there is insufficient summer forage in the unit to satisfy the summer use requirements of both the appellants and the intervenor and again noted that the appellants had been allotted the same amount of summer use as in the December 9, 1965 proposed division, which they had been willing to accept. He concluded that it had not been shown that appellants' livestock operations would be seriously impaired by the failure to allow them all the summer use they desire.

He then disposed of their objections to the change in the area of use by holding that an applicant has no right to the use of any particular portion of the federal range. After stating that the appellants had been using for spring/fall grazing an area now designated for summer use, he found that despite the necessity for some additional transportation, there was no evidence that the appellants could not utilize the Hardesty area and that its use would not seriously impair their livestock operations.

Finally, he held that the manner in which the proceedings before the advisory board had been conducted had not denied appellants an opportunity for a proper hearing.

On appeal the appellants contend that several actions of the district manager were in contravention of the law and regulations.

First they allege that the Bureau of Land Management has "sold" federal range forage to the intervenor instead of disposing of it under the preference provisions of the law and regulation. In essence they urge that it is improper to allocate to the intervenor the federal forage resulting from the improvement of the carrying capacity of the range over that provided by natural forage. They say such capacity should be awarded in accordance with the provisions of the regulation governing class 1 and class 2 applicants.

The provision in the regulation which relates specifically to increases in grazing capacity reads:

> Increases in grazing capacity, when conditions warrant, and after recommendation of the advisory board and approval of the District Manager, will be apportioned in a manner that will assist in the stabilization of livestock operations controlling qualified base property, with emphasis being given to the restoration of reductions that have been imposed to reach the grazing capacity of a particular allotment or range area, and to allocation of increased grazing capacity to operators or interests whose efforts were responsible for such increases. 43 CFR 4111.4–2.

The regulation establishes a separate method of allocating grazing privileges arising from increases in grazing capacity. If it had been intended that such increased capacity merely be placed into the common pot, as appellants would have it, the regulation would have said

just that in so many words or it would have said that the increase would be awarded in the inverse order of the procedure for reductions. 43 CFR 4111.4–3.

We have found no cases dealing with the problem, nor have appellants cited any. We are left, then, with the guidance of the regulation directed specifically to the allocation of grazing privileges for forage resulting from increases in grazing capacity. It offers as guidelines: emphasis to be given "to the restoration of reductions that have been imposed to reach the grazing capacity * * *" and "to allocation of increased grazing capacity to operators or interests whose efforts were responsible for such increases."

Here the district manager has relied upon the latter criterion. We believe he did so properly. The increased capacity resulted from fencing and reseeding operations towards which Elquist contributed about $25,000 (Tr. 99, 122, 252, 289) and the appellants nothing (Tr. 99). The reseeded area lies within the portion of the unit customarily grazed by Elquist and not by the appellants (Tr. 161–165). Further, if the natural forage alone is considered, Elquist has been given only 82 percent of his class 1 demand while the appellants have received 91 percent of theirs (Ex. 2, Tr. 99). In other words, if Elquist had not developed some of the potentials he would have been entitled to a larger share of the natural forage—a share which could only come out of the portion now allocated to the appellants. The appellants, then, are also beneficiaries of the increased grazing capacity which Elquist developed.

In the circumstances, the allocation arrived at will assist in the stabilization of livestock operations controlling base properties by allocating the increased grazing capacity to an operation whose efforts were responsible for the increases. We conclude that the allocation is proper.

The appellants also assert that the range code does not sanction a distinction between carrying capacity based on natural forage and that based on increased available forage resulting from range improvements. As we have just said, it is our view that the regulation governing the disposition of increases in grazing capacity permits such a separation when the criteria it sets are met.

Next the appellants contend that the proper seasons of use for the proposed allotments were not set in accordance with the regulations. The regulation, 43 CFR 4111.3–1(a), provides:

> (a) The District Manager, after recommendation by the advisory board, will rate the grazing capacity of each unit or area in a grazing district and will classify each for proper seasons of use and for the maximum period of time for which any licensee or permittee will be allowed to use the Federal range therein during any one year.

The appellants say that the line dividing the area into summer and spring/fall seasons of use did not appear in any way attached to ad-

visory board actions and was not presented to the advisory board as a "particular delineated area" (Tr. 54, 82). They argue that without such formal action the line has not been properly established in accordance with the regulation.

The record, however, reveals that the problem of seasonal use was discussed by the advisory board many times and that the board understood the district manager's proposed disposition and left to him the precise location of the line. This procedure falls well within the requirement that the advisory board have an opportunity to recommend the seasons in which areas will be open to use before the district manager makes his decision.

The record is quite explicit.

The district manager testified that the line was based upon information gathered during a range survey conducted in 1965 (Tr. 54, 55) and took into consideration such factors as vegetation type, elevations, terrain, and rainfall (Tr. 82, 83). The report on the 1965 survey (Ex. 2, p. 4), in commenting on the problem of season use, says:

> In order to control cattle improvement and prevent improper season of use, a drift fence needs to be constructed along the base of the summer range. Under present conditions, the cattle are following the snow melt up the slopes and grazing the forage as it appears. This in itself is unsound management and is indicated by the increasing number of undesirable plants.

Further, the last page of this report has an analysis of the range capacity by AUM's, part of which sets out the AUM's of summer range for the parties in exactly the ratio adopted by the district manager.

The advisory board's recommendations, which were adopted by the district manager as his decision of October 6, 1965, setting up allotments and reducing livestock grazing use of the parties, referred to the range survey and stated:

> [Y]ou may contact the District Manager to work out specific numbers and times within the proper season of use and within the maximum number of AUM's cited above.

At the board meeting of November 19, 1965, at which protests to the October 6 decision were voiced, the minutes read:

> The board then asked for an explanation of the breakdown of summer and spring/fall ranges and what their present use was of the spring and summer ranges * * *.
>
> The protestants were dismissed and the Board discussed the issues that were presented involving private lands, water, season of use, and access. (Ex. 8, p. 6.)

The minutes of the next meeting held on December 6 and 7, 1965, contain the following:

Don Rhea lead a discussion concerning the proposed allotment of the Grande Unit. Watering facilities, fencing, customary use, and seasons of use were discussed at length. Various aspects of the operations and their requirements were brought up. After these discussions, the board recommended that a proposed line, leaving Clarence Elquist's deeded ground within his own allotment, holding the Grouse Creek users south of Meadow Creek, keeping Mesquite Land Company, Inc. out of the Grande Unit, and dividing the AUM's proportionately by adjusting the line along the western boundary of the Grouse Creek users' proposed allotment, be approved (see map attached) See addendum #3.

The notices of December 9, 1965 (Ex. 10, 11), also referred the addressees to the district manager for a precise determination of season of use (paragraph 9), just as the earlier notice had.

The appellants had no serious objections to these decisions, saying in a letter to the Bureau (Ex. 13),

> If certain details are worked out * * * our associates see no reason to protest the allotment recommended by the Advisory Board * * *. We think that a very fair arrangement has been made and certainly the effort to be fair to all parties is evidenced.

The notices of January 12, 1966 (Ex. 15, 16), which carried out the changes in the east boundary in the allotment line made no reference to seasons of use.

In their appeal, (Ex. 17), dated February 11, 1966, from the notice of January 12, 1966, the appellants objected to the division of the allotment on the grounds that it denied them "their customary and essential summer range"—an objection which indicates they knew where the line separating the seasons of use was.

As we said above, a decision of the district manager, made after so much discussion with the advisory board, is well within the scope of the regulation.

The appellants' next contention is that the advisory board's actions adversely affected their right to present their case. The substance of their complaint is that they should have been given a right to protest the district manager's decision of January 12, 1966, (Ex. 15, 16), instead of being directed to appeal if they were dissatisfied. As the hearing examiner noted, the appellants were given an opportunity to protest the decision of October 6, 1965, and the decision of December 9, 1965, which vacated the former. They had notice that there would be a protest meeting on January 10, 1966, at which they could present whatever objections they had.

The District Manager was not required to set up another protest because the decision of January 12, 1966, from which appellants appeal, modified the decision of December 9, 1965.

The regulation does not provide for a succession of protest hearings; on the contrary it states that the district manager's decision after a protest meeting will be his "final decision for purposes of appeal."

It provides:

April 22, 1971

Protests; reconsideration by advisory boards; service of notice. At the time and place fixed for the protest meeting, any licensee, permittee, or applicant may appear, in person or by attorney or other representative, or may file a written protest with the advisory board, which thereupon will reconsider its previous recommendation in the light of the protest and will make a final recommendation to the District Manager. If such recommendation is favorable to the protestant, and the District Manager approves, he will notify the protestant thereof by ordinary mail, which notice may be the fee billing. If the recommendation is to any extent adverse, and the District Manager approves, a notice giving the reason or reasons therefore will be served on the protestant in person or by certified mail, including a reference to the pertinent sections or provisions of the Federal Range Code for Grazing Districts that serve as controlling factors. Such notice will constitute the District Manager's final decision for purposes of appeal. 43 CFR 4115.2–1(b).

Therefore we conclude that the procedure followed was proper.

The appellants also contend that they have capriciously and arbitrarily been denied their equitable share of the federal range forage. Their objections to the allocation of the "developed potential" have been discussed above. They also protest the treatment of "undeveloped potential" as equal to and interchangeable with usable carrying capacity presently available for qualified demand. The point of this objection is obscure, in view of the fact that they have received 91 percent of their qualified demand while the intervenor has been allocated only 82 percent of his. The intervenor has lost more of his qualified demand than the appellants and the appellants have an equal opportunity to develop the capacity of their allotment.

The appellants assert that the federal range allocated to them is not usable to the extent of their equitable share. They question whether the assumptions that the undeveloped potential will be realized, that water will be available, and that land exchanges will be accomplished are sound. Without discussing their doubts as to future actions by themselves, the Bureau of Land Management or Elquist, it is enough to say that the plan is feasible and that the effect of future events will be examined as they occur.

Finally they object to the substitution of the Hardesty area for the Crooked Canyon area. As the hearing examiner stated, a permittee has no right to the use of any particular area of the federal range, and although historical use is a factor, the determination of areas of use is committed to the discretion of the Department. *Delbert and George Allan, supra; Thomas Ormachea and Michael P. Casey*, 73 I.D. 339 (1966). *Redd Ranches*, A–30560 (July 27, 1966). While the Hardesty area will be less convenient for the appellants, we agree with the hearing examiner that they have not shown that they cannot utilize their

proposed allotment without seriously impairing their livestock operation. The division of the range into summer and spring/fall use areas will in itself require appellants to move their cattle much further than they have had to under the existing arrangement. The difficulty is that the appellants have been using what has been determined to be summer range during the spring and fall and that while they have no great need of spring/fall use they do need summer range (Tr. 118, 138, 149, 216, 217). The appellants have made no showing that their share of the summer range is inequitable. We conclude that the proposed allocation of range use gives the appellants an equitable share of the available forage.

The appellants also present a discussion of some issues which they say are irrelevant and immaterial but which they fear have been injected into the proceedings to their prejudice. Of these only one is pertinent to this decision. It is offered as a quotation from the hearing examiner's decision.

> [T]he Appellants would, in effect, benefit from the results of the intervenor's efforts to improve the range "if they were given a share of the 'undeveloped potential' ".

As we have said earlier, such a result would flow from placing all the available forage in a common pool for allocation and it is our view that neither good range practice nor the regulation requires it.

The other issues need not be discussed.

Accordingly it is concluded that the district manager's allocation of the grazing privileges on the federal range was correct.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the Bureau of Land Management is reversed insofar as it dismissed the appellants' appeal and the decision of the hearing examiner is affirmed.

MARTIN RITVO, *Member.*

WE CONCUR:

FRANCIS E. MAYHUE, *Member.*

JOAN B. THOMPSON, *Member.*

SOULEN LIVESTOCK COMPANY ET AL.

IBLA 70-31 *Decided April 23, 1971*

Administrative Practice—Bureau of Land Management—Grazing Permits and Licenses: Appeals—Grazing Permits and Licenses: Apportionment of Federal Range

The Director of the Bureau of Land Management, upon review of the evidence relied on by a grazing district manager as justification for a proposed real-

location of grazing privileges among licensed users within the district, may properly determine that the reallocation should be held in abeyance pending further study, even though a licensee or permittee who appeals from the district manager's decision setting forth the terms of the proposed reallocation is unable to show that the reallocation is inconsistent with principles of sound range management or that it would create hardships constituting such a serious impairment to the licensee's livestock operation as to give him valid grounds for objecting to the proposal.

BOARD OF LAND APPEALS

Frank Cada, Rudolph Cada, Leslie West, Earl Craig, Milton Branch and Weldon Branch [1] have appealed to the Secretary of the Interior from a decision dated January 31, 1969, whereby the Office of HEARINGS AND APPEALS, Bureau of Land Management, reversed a decision of a hearing examiner dismissing the appeal of Soulen Livestock Company from a decision of the Boise, Idaho, district manager affecting its grazing privileges in the Boise grazing district (Idaho No. 1).

By a notice dated January 28, 1966, Soulen Livestock Company was advised by the district manager of his decision to shift its use of the federal range in the West Crane allotment of the Willow Creek unit to the Little Willow and Lower Crane allotments of the Crane Creek unit. This shift was proposed as the most acceptable of several alternatives for improving what was described as the unsatisfactory condition of the range in the West Crane allotment.

The district manager stated that the Little Willow and Lower Crane allotments are virtually individual allotments now that cattle use formerly made in common is being fenced into separate use areas and that ample "forage is available in these allotments to completely satisfy the recognized qualifications of the Soulen Livestock Company in the Crane Creek and Willow Creek units." He further found that:

* * * Although the recognized federal range qualifications of the Soulen Livestock Company in the West Crane Allotment was only 150 AUM's, as established by the District Manager's Decision dated April 14, 1961, the actual use licensed in this allotment as set out by the above Decision is 1000 sheep, 4/16 to 5/15 and 2000 sheep 11/15 to 12/15, or a total of 600 AUM's. The 150 AUM's recognized federal range privilege is derived by applying a 25% factor for federal range use.

Soulen Livestock Company does own 680 acres of land in this allotment which furnishes 114 AUM's of the above 600. Thus, the correct percentage would be 81% and the actual use made of federal range is 486 AUM's rather than 150 AUM's. The way this comes about is as a result of past licensing practices for this Company. Since 1951, the license for the sheep operation has been written as 25% federal range over their entire area of use in Crane Creek and Willow Creek. As more specific use areas are defined and allotments fenced, it is necessary

[1] Weldon Branch has not previously been identified as a party to these proceedings. Inasmuch as the addition of his name to the list of appellants will have no substantive effect, we do not find it necessary at this time to ascertain the basis for its inclusion or to determine whether or not Weldon Branch has any standing to appeal.

to correct this percentage for each such allotment to prevent serious inequities from developing. Thus when allotments are fenced to confine cattle use, where formerly they roamed at large over a larger area, it becomes necessary to define the amount of sheep use to be made in each allotment, keeping in mind the compensating factor or effect of restricting the cattle use from areas, formerly grazed in common with the sheep. * * *

The district manager also suggested that, in order to consolidate private land holdings into their respective grazing allotments, Rudolph Cada should trade his lands in the Lower Crane allotment for Soulen's lands in the West Crane allotment, any difference in value to be determined by a competent appraiser and paid in cash.

Soulen appealed from the district manager's decision, contending, in essence, that the proposed transfer of grazing privileges (1) was without due compensation, (2) would compound congestion in the Crane Creek unit and would further aggravate shortages of facilities for management development in the unit and would, in fact, cause a reduction in Soulen's grazing privileges, (3) would improve conditions in the West Crane Creek allotment at the expense of worsening conditions in the Crane Creek unit to the same extent and (4) would reduce the stability of the Soulen Livestock Company, requiring it to alter grazing and trailing techniques, procedures and routines in a manner contrary to good animal husbandry practices and contrary to good range management practices. Pursuant to that appeal a hearing was held at Boise, Idaho, on July 13, 1967, at which appellants, represented by counsel, participated as intervenors.

In a decision dated July 30, 1968, the hearing examiner found that the issue raised by the appeal, and agreed to by the parties at the hearing, was whether the district manager was arbitrary and capricious in changing Soulen's licensed sheep use from the West Crane allotment to the Lower Crane and Little Willow allotments. From the testimony given at the hearing he found that Soulen owns about 10,000 sheep, that it has been its practice to begin the grazing of the sheep in the spring in the Lower Crane allotment, allowing them to trail down through the Little Willow allotment, going through the West Crane allotment and on to National Forest lands, and, in the fall, to reverse that pattern. The loss of 150 animal-unit months (AUM's), the hearing examiner found from the testimony of witnesses for Soulen, would not seriously endanger the continuance of the sheep operation, but would have an effect on the amount of profit.

Pointing out that the burden was upon Soulen Livestock Company to show by substantial and competent evidence wherein its rights were impaired and that an applicant has no right to demand that a license or permit confer grazing privileges in any particular part of a grazing district, the hearing examiner found that Soulen had over 30,000 acres of privately owned land in the Little Willow and Lower Crane allot-

ments, interspersed with 17,348 acres of open and 220 acres of fenced federal range land in the Little Willow allotment and 10,636 acres of open and 570 acres of fenced federal range in the Lower Crane allotment—a total of 58,774 acres, in which to graze its 10,000 sheep. The area of grazing assigned to Soulen under the district manager's decision, he stated, is larger than the area in which it was formerly authorized to graze and with proper range management, should not cause any congestion in its sheep grazing operation. The hearing examiner further found that the Government had presented testimony that there is sufficient forage available for Soulen's sheep in the Little Willow and Lower Crane allotments, which was not refuted by Soulen, and that the West Crane allotment was overobligated, the recognized demand having been 1,897 AUM's as against 1,160 AUM's of available forage. It was, in his opinion, clear from the evidence produced at the hearing that the transfer of grazing privileges was in the interest of good range management. He concluded, therefore, that Soulen Livestock Company had failed to sustain its burden of proving that the district manager's decision was arbitrary and capricious, and he granted a motion of the intervenors to dismiss the appeal.

The Office of HEARINGS AND APPEALS, upon consideration of Soulen's appeal from the decision of the hearing examiner, agreed with the hearing examiner that the burden was upon Soulen, as the one alleging that it had been wronged, to show wherein it had been wronged. It agreed with Soulen, however, that, although the proposed transfer of its privileges would not cause it such hardship as to endanger seriously its continuance in the livestock business, it would, to a considerable extent, disrupt and impair its present sheep operations and would result in a substantial loss of income.

Observing that the hearing examiner had correctly stated that an applicant for grazing privileges has no right to demand a license or permit to graze in a particular part of a grazing district, the Office of HEARINGS AND APPEALS stated that the more important issue to be determined in this case is whether the proposed transfer will be in the interest of good range management, and it found the evidence bearing upon this question to be unsatisfactory. Although Soulen may have 58,774 acres of range in the two allotments, it stated, it cannot be determined from the present record what part of that acreage is actually available for grazing. The kind of information that is needed, the Office of HEARINGS AND APPEALS said, can be developed only "by use of the accepted and approved methods and techniques generally employed by the Bureau in making range surveys, which methods were clearly not employed in surveying the allotments involved."

The Office of HEARINGS AND APPEALS further found that there was considerable confusion as to the extent of the grazing privileges that were to be transferred from the West Crane allotment. Noting the hearing examiner's finding that 150 AUM's of federal range use would be shifted from the West Crane to the Little Willow and Lower Crane allotments, that Soulen's authorized use of the West Crane allotment was 600 AUM's, and that, according to the district manager's findings, Soulen's private land within the allotment furnished only 114 AUM's, leaving 486 AUM's, or 81 percent of the total, to be supplied from federal range, it stated that the "percentage of federal range use is certainly susceptible to a more precise determination." If the brief filed by the Idaho State Director in reply to Soulen's appeal to the Director, Bureau of Land Management, is to serve as a guide the Office of HEARINGS AND APPEALS found, Soulen has not generally utilized its fall privileges in the past, so that the only real benefit which will accrue to the West Crane allotment will be the elimination of the pressure of 1,000 sheep for one month in the spring, which, on the basis of 25 percent federal range use, amounts to only 50 AUM's and is scant relief.

The Office of HEARINGS AND APPEALS recognized the need for corrective action in the West Crane allotment. It concluded, however, that the proposed transfer of Soulen's grazing privileges from the West Crane to the Lower Crane and Little Willow allotments, or any other shifting of grazing use between the allotments, should be held in abeyance until such time as more reliable information can be obtained with respect to the actual amount of forage available for livestock on both the private and the federal lands involved, using approved methods for making range surveys. If, on the basis of the information developed, it said, it is determined that the proposed transfer must be consummated in the interest of good range management, the precise amount of grazing privileges which Soulen Livestock Company is entitled to have transferred from the West Crane allotment should be ascertained, and an effort should be made to induce Soulen and Rudolph Cada to work out an amicable agreement for the exchange of title to lands which they own in the respective allotments, or the Bureau should work out suitable exchange-of-use agreements with the two licensees. The Office of HEARINGS AND APPEALS therefore reversed the hearing examiner's dismissal of Soulen's appeal and remanded the case to the district manager for appropriate action.

In challenging the action of the Office of HEARINGS AND APPEALS, appellants assert that (1) Soulen Livestock Company failed to sustain its burden of proving by a preponderance of the evidence that the decision of the district manager imposed a serious hardship on its livestock operation, (2) the Office of HEARINGS AND APPEALS erro-

neously imposed upon the district manager the burden of proving by a preponderance of the evidence that his decision was the product of good range management, and (3) it erred in defining and applying the "law of impairment."

The appeal is a two-pronged attack, aimed, for different reasons, at the Bureau's decision in the instant case, as well as at the language used in certain past departmental decisions. Appellants' criticism of the Department's decisions arises from language used in 1938 in the case of *National Livestock Company and Zack Cox*, I.G.D. 55, 60 (1938), to the effect that:

> * * * [T]he determination of the particular area in which the grazing is to be permitted is a matter committed solely to the discretion of the Department, and no permittee can, as a matter of right, be heard to complain if the lands upon which he is permitted to graze are different from those which he has used in the past. *Such a complaint could only be entertained upon allegation that the determination was so arbitrary or capricious as to render valueless the privately owned land and improvements of the operator adjacent to the grazing district and seriously endanger the possibility of his continuance in the livestock business.* * * * (Italics added.)

Appellants are troubled by the italics language which, they say is patently erroneous. No decision, they assert, can possibly "render valueless" the operator's private land, and the burden of proof imposed by the language is impossible to meet. Appellants further allege that, while the Department has continued to pay lip service to the standard set forth in the *National Livestock Company* case, *supra*, in practice, it has not employed that test.

Appellants have reviewed at some length the development of the law governing the allocation of areas of grazing use. The questionable language of the *National Livestock Company* case, *supra*, they argue, was not essential to the disposition of that case and is dictum. Moreover, they point out that a change in the Federal Range Code adopted soon after that decision established the right of permittees to graze the areas of their historical use, "[s]o far as consistent with proper range practices" * * * (43 CFR 4115.2-1(e)(4)). Notwithstanding this provision, they further allege, the Department continued to assert that the allocation of areas of use was committed to its discretion, and that doctrine has been accepted too many years to be changed now. The standard which has actually been applied, appellants contend, postulates that allocations of area of use will be sustained unless an appellant shows that the area awarded him would create such hardships as to constitute a serious impairment to his livestock operation, citing, *inter alia*, *Thomas Ormachea and Michael P. Casey*, *supra*, at 348.

Appellants point to the fact that in a recent decision *Gordon and*

Ekanger et al., Idaho 1–68–7, 8, 10 and 12 (March 11, 1969),[2] a hearing examiner dismissed an appeal from a district manager's allocation of grazing privileges upon the basis of the *National Livestock* language, notwithstanding his finding that under the district manager's allocation, the appellants failed to receive an equitable portion of the available forage and that the allocation would impose a serious hardship on the appellants' operation. "In what appeared to be [one of] the most obvious cases on record," appellants argue, "the hearing examiner dismissed the appeal," while in the instant case, where the district manager's "decision did not impair the appellants' livestock operation within any meaning attributed to the term by any area of use decision," the Office of HEARINGS AND APPEALS reversed the hearing examiner's dismissal of the appeal.

Appellants contend that the Bureau has given no heed to Soulen's failure to make the showing of hardship customarily required to set aside an allocation of grazing privileges but, rather, has based its action upon what it deemed to be the interest of good range management, ostensibly placing the burden upon the appellant to show that the proposed transfer of grazing privileges is not good range management but, in fact, requiring the district manager to prove that it is. If "it is now to be the law that an area of use may not be changed unless the District Manager sustains the burden of proving that it is good range management to do so," appellants conclude, "then it should be for the department to finally lay all aspects of National Livestock Company at permanent rest."

We do not find it necessary at this time to attempt a reconciliation of the language of the *National Livestock Company* case, *supra*, and the Department's language and actions in other cases or to determine whether, under the proper criteria, Soulen made such a showing as to entitle it to prevail in this matter. Before attempting to come to grips with the question of what is the applicable law in this case, it would seem well to review the major points of the decisions involved in an effort to set the actions of the hearing examiner and the Office of HEARINGS AND APPEALS in better perspective.

As we have seen, the hearing examiner determined from the evidence that Soulen Livestock Company failed to sustain its burden of showing that the district manager's decision was arbitrary and capricious; he concluded that the proposed transfer of grazing privileges was clearly in the interest of good range management. Although the Office of HEARINGS AND APPEALS found that the proposed transfer would "disrupt and impair to a considerable extent" Soulen's present livestock business, it did not find that this fact would warrant rejection of the proposed transfer, and it did not dispute the hearing ex-

[2] Aff'd in part, dismissed in part on other grounds by the Bureau of Land Management, *Gordon and Ekanger*, Idaho 1–68–7, September 22, 1969; now pending on appeal as *Joyce Livestock Co.*, IBLA 70–96, June 2, 1971.

aminer's finding that Soulen had failed to show that the district manager's decision was arbitrary and capricious. It did not, in fact, recognize any right on the part of Soulen to continue to graze in the same areas in which its grazing privileges have been exercised in the past. The Office of HEARINGS AND APPEALS did, however, take exception to the hearing examiner's conclusion that "it is clear from the evidence produced that the transfer of grazing privileges in this case is in the interest of good range management," expressly finding that the proposed transfer "would not be good range management" or that, at the least, "the benefit to the federal range in the subject allotments that will be derived from the proposed transfer of grazing privileges is obscure to us at the present time." It did not, in reaching that conclusion, find that Soulen had shown by its evidence that the transfer would be contrary to principles of sound range management. Rather, it independently raised certain questions relating to the effect of the proposed shift of use and, finding no satisfactory answers to those questions in the evidence submitted by either party, directed that additional information be developed before any transfer of grazing privileges should be put into effect. In other words, the Director of the Bureau of Land Management, acting through the Office of HEARINGS AND APPEALS, substituted his judgment for that of a subordinate as to what steps should immediately be taken to remedy the problem of overgrazing in the West Crane allotment.

The question before us at this time is not what showing a grazing licensee or permittee is required to make in order to cause a range manager's allocation of grazing privileges to be overturned. Rather, it is whether, in the absence of the required showing, the Director of the Bureau of Land Management may nevertheless substitute his own judgment for that of a subordinate to whom he has delegated responsibility for the exercise of discretionary authority vested in the agency. The answer to this, we believe, clearly must be in the affirmative.

It is almost axiomatic that the Director of the Bureau of Land Management or, in an appropriate case, the Secretary of the Interior, has authority at any time, with or without an appeal, to take up and dispose of any matter pending in a district office or to review any decision of a subordinate officer. See, *e.g.*, *Public Service Company of New Mexico*, 71 I.D. 427 (1964); *Barney R. Colson*, 70 I.D. 409 (1963), *aff'd Colson* v. *Hickel*, 428 F. 2d 1046 (5th Cir. 1970); *Oscar C. Collins, Standard Oil Company of California*, 70 I.D. 359 (1963); *Angela Matthews Boos*, A–28712 (September 21, 1962). The authority of the Director, or the Secretary, in acting upon an appeal extends to the making of all findings of fact and conclusions of law just as though he were making the decision in the first instance. *United States* v. *T. C. Middleswart et al.*, 67 I.D. 232 (1960), and authorities cited.

The action of the Office of HEARINGS AND APPEALS in this instance

clearly was within the scope of the authority of the Director. Although the Secretary has similar authority of review and could, in appropriate circumstances, substitute his judgment for that of the Director, such action is not warranted here. As matters now stand, no substantive rights of any range user have been affected. The problem of overgrazing in the West Crane allotment, readily acknowledged by all parties to exist, remains unresolved. Whether or not the transfer proposed by the district manager represents sound range management, we cannot say that the Office of HEARINGS AND APPEALS erred in calling for the development of additional information before the taking of remedial action which could affect the livestock operations of the licensed users of the allotment. Accordingly, its judgment will be sustained.

One additional point merits comment. As we have seen, the Office of HEARINGS AND APPEALS found that the kind of information essential to a proper resolution of the problems presented here could be developed only by the use of standard range survey methods, and it directed that a survey be made, using such methods, prior to any shifting of grazing privileges. The Department has, in the past, held that such a survey was not necessarily a prerequisite to action of the type contemplated here, and it stated in *King Brothers, Inc., et al.*, I.G.D. 114, 118 (1938), that:

> * * * It is recognized that there is much necessary information to be obtained before the licenses in any given grazing district can be adjudicated in a wholly satisfactory manner. * * * But this does not mean that the acting regional grazier shall be powerless to take any action in regard to the areas in which licensees shall graze their livestock until all of the desired information has been obtained. On the contrary, it is necessary that he act in as reasonable a manner as possible and with due regard for the information he has at his disposal, and if he does so, his actions cannot be attacked, especially in the absence of an allegation that the information which is available to him and on the basis of which he has acted is erroneous.

The instructions of the Office of HEARINGS AND APPEALS are not necessarily inconsistent with the pronouncement of the Department in the *King Brothers* case, *supra*. The fact that, in a given instance, a range adjudication might be sustained, even in the absence of some desired information, does not suggest that it would be improper to develop that information before making the adjudication. The instructions given by the Bureau in this case were within the bounds of propriety regardless of whether the district manager's decision could have been sustained upon the evidence of record.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

MARTIN RITVO, *Member.*

WE CONCUR:

FRANCIS E. MAYHUE, *Member.*
ANNE POINDEXTER LEWIS, *Member.*

May 4, 1971

UNITED MINE WORKERS OF AMERICA DISTRICT NO. 31

IBMA 71-2
HOPE 70-120 *Decided: May 4, 1971*

Federal Coal Mine Health and Safety Act of 1969: Hearings: Procedure

Rulings on requests for continuance are matters entirely within the Examiner's discretion and normally are not appropriate for review on interlocutory appeal.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Procedure

Initial determination of the situs of a hearing generally rests in the discretion of the Office of Hearings and Appeals. Requests for transfer of situs are within the discretion of the Examiner. Review of requests for a transfer of situs by the Board of Mine Operations Appeals is appropriate only in cases of mainifest abuse of discretion by the Examiner which would result in irreparable injury and which could not be corrected in the normal course of administrative proceedings.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Compensation

A withdrawal order issued for imminent danger, subsequent to voluntary withdrawal by the operator, is a proper basis of a claim for compensation under section 110(a) of the Act.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Procedure

A provision for public hearing in a compensation proceeding based upon a withdrawal order issued for imminent danger, and in the absence of a statutory mandate therefor, is a proper and reasonable exercise of the Secretary's responsibility to administer the Act.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Compensation

The only questions appropriate for decision under section 110(a) are those relating to compensation due under the order *as issued* and evidence of unwarrantable failure is inadmissible in a compensation case based upon an order issued for imminent danger.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Compensation

Although only the miners are parties to an application for compensation proceeding, the miners may be represented by a person or organization designated by the miners as a representative acting on their behalf.

BOARD OF MINE OPERATIONS APPEALS

This matter is before the Board on separate interlocutory appeals by the United Mine Workers of America, District No. 31 (UMWA), and Clinchfield Coal Company (Clinchfield). The UMWA appeal is

428-593—71——1

from rulings of the Examiner issued on January 25, 1971, which denied its motions for continuance of the hearing and for transfer of the hearing situs. The response by Clinchfield to UMWA's request to file an interlocutory appeal was in the nature of a cross request to take an interloctory appeal on certain legal and jurisdictional questions upon which the Examiner reserved ruling until after hearing, but which, if resolved in its favor, might limit the scope of or eliminate the necessity for any hearing.

By Order of February 1, 1971, we granted permission to take these appeals and stayed further proceedings before the Examiner until further order of the Board. Both parties have filed timely briefs. The Bureau of Mines, represented by the Associate Solicitor, participated as *amicus curiae* in the proceedings before the Examiner and, at the Board's invitation, has filed a memorandum setting forth the views of the Bureau on the issues raised by the appeals.

The UMWA Appeal

For purposes of clarity and before proceeding to the factual and procedural setting in which the Clinchfield appeal arises, we think it best at this point to dispose of the UMWA appeal from the Examiner's rulings denying continuance and transfer of situs.

Continuance. Normally, rulings on requests for continuance are matters entirely within the Examiner's discretion in regulating the course of a hearing and are not appropriate for review on interlocutory appeal. In this case the issue became moot upon issuance of the Board's order staying the proceedings before the Examiner in order to review the jurisdictional and other issues raised by Clinchfield.

Situs of Hearing. The initial determination of the situs for a hearing generally rests in the discretion of the administrative body—in this case the Office of Hearings and Appeals, of which both the Hearings Division and this Board are a part.[1] Here again, rulings on requests for transfer of situs normally are not appropriate for intervention or review on interlocutory appeal except in cases of manifest abuse of discretion which would result in an irreparable injury and which could not be corrected in the normal course of administrative proceedings. Generally, we concur in the Bureau's observation that if a hearing would involve a significantly large number of safety personnel of the Bureau and the parties, it would be preferable when practicable to conduct the hearing in the field so as to permit them to return to their jobs as soon as possible. However, in view of our holding later herein, no ruling on transfer of situs is required.

[1] See General authority of Director, Office of Hearings and Appeals, at 211 DM 13.1; 35 F.R. 12081 (July 28, 1970).

Factual and Procedural Background of the Clinchfield Appeal

On April 2, 1970, an explosion occurred at Clinchfield's Compass No. 2 Mine in Harrison County, West Virginia. Clinchfield immediately withdrew all personnel from the mine. During the succeeding shift a Bureau inspector arrived and issued an Order of Withdrawal pursuant to section 104(a) of the Act (83 Stat. 750),[2] based on his finding that imminent danger existed. At the same time the inspector issued a Notice of Penalty in the amount of $500 * * * "by reason of the violation or violations described" * * * in the withdrawal order. However, no violation or violations were described or charged in the withdrawal order and no notice or notices of violation were issued pursuant to section 104(c) of the Act.[3]

On April 2 and 3, other officials of the Bureau, State mine officials, Clinchfield officials, and UMWA representatives, conducted an underground investigation into the causes of the explosion. An official inquiry, including a public hearing, was held, and completed on April 4.

On April 11, 1970, the withdrawal order was terminated by the inspector after a special inspection of the mine and a finding that the explosion hazards had been eliminated.

On April 30, 1970, the representative of the miners at the Compass No. 2 Mine (UMWA District #31) filed with this Board a claim for compensation to the miners idled by the withdrawal, pursuant to section 110(a) of the Act, 83 Stat. 758.

On June 16, 1971, the matter was assigned to a Hearing Examiner pursuant to Subpart E of Part 301, Title 30, Code of Federal Regulations, and the parties were served notice of such assignment.

It appears that Clinchfield has paid all employees on the shift during which the explosion occurred for the entire shift, and all employees on the succeeding shift for four hours.

On or about July 22, 1970, the Bureau forwarded its Report of Coal Mine Explosion at the Compass No. 2 Mine to the parties.

On October 26, 1970, Clinchfield filed with the Examiner a written Motion to Dismiss for lack of jurisdiction and other reasons. No ruling on this motion has been made.

On November 19, 1970, UMWA filed an Amended Application for Compensation alleging "unwarrantable failure" on the part of Clinchfield, and seeking a full week's compensation for the miners pursuant to the provisions of section 110(a) of the Act dealing with closure for an "unwarrantable failure."

[2] All references to "the Act" herein are to the Federal Coal Mine Health and Safety Act of 1969; 83 Stat. 742; 30 U.S.C. §§ 801–960 (Supp. V, 1970).

[3] Neither Clinchfield nor UMWA sought review of the withdrawal order pursuant to section 105(a) of the Act.

On November 24, 1970, a pre-hearing conference was held before the Examiner largely on the questions of admissibility of evidence of "unwarrantable failure," and whether or not the compensation proceeding properly could be consolidated with the civil penalty proceeding in Docket No. HOPE 71–82–P, arising out of the same withdrawal order. The Examiner requested the parties and the Bureau to submit memoranda of law on these points.

On December 15, 1970, Clinchfield filed its Answer to the Amended Application for Compensation, in which it denied (1) that the Secretary (or the Board) has jurisdiction of the compensation matter under section 110(a) of the Act; (2) that UMWA has standing to maintain the action on behalf of the idled miners; or (3) that it had failed to comply with any safety standard or was guilty of any "unwarrantable failure." On the same day, Clinchfield filed a Motion to Deny consolidation of this proceeding with the penalty proceeding in Docket No. HOPE 71–82–P, in which it again raised questions of jurisdiction.

On December 24, 1970, Clinchfield filed a Memorandum Regarding the Absence of Jurisdiction to Entertain Proof of "Unwarrantable Failure" in a section 110(a) Proceeding and renewed its motion that the proceeding be dismissed.

On January 7, 1971, the Examiner issued a Notice of Hearing, stating that the hearing would not be consolidated with the penalty proceeding in Docket No. HOPE 71–82–P; that, without deciding the admissibility or relevance thereof, UMWA would be permitted to introduce evidence on "unwarrantable failure"; and that Clinchfield's motion to dismiss would * * * "also be carried with the rest of the case for decision after the hearing," * * * which was scheduled for February 3, 1971.

On January 19, 1971, UMWA filed a Motion for Transfer of Hearing Situs to Fairmont, West Virginia, for the stated reason that a vast majority of the witnesses and interested persons involved were located in that vicinity.

On January 22, 1971, a hearing was held before the Examiner on the UMWA motion to transfer the hearing situs. At this conference UMWA made an oral motion for an extension of time. Clinchfield orally opposed the motion for transfer of situs and attempted to again enter its objections on legal and jurisdictional grounds to the holding of any hearing under section 110(a) of the Act.

On January 25, 1971, the Examiner issued a decision denying the UMWA's motions for transfer of situs and for continuance, but made no ruling on Clinchfield's legal objections and challenges to jurisdiction.

On January 28, 1971, UMWA filed its request with this Board for permission to take an interlocutory appeal from the Examiner's rul-

ings denying transfer of situs and continuance. Clinchfield filed a response to this request, opposing transfer of hearing situs and again stating its position that for various legal and jurisdictional reasons no hearing was either necessary or allowable.

The Board treated Clinchfield's response as a cross request to file an interlocutory appeal, and accepted it as such, since it involves substantial rights of the parties and raises questions of law, the resolution of which will materially advance the final decision.

Issues Presented for Review

I

Whether the Hearing Examiner has jurisdiction to conduct a section 110(a) proceeding when a coal mine has been closed and the miners withdrawn voluntarily by the operator prior to the Bureau's issuance of a withdrawal order under section 104.

II

Whether the Hearing Examiner has jurisdiction to conduct a "public hearing" under section 110(a) when a coal mine is not "closed by an order issued under section 104 * * * for unwarrantable failure" but by an order issued under section 104(a) for imminent danger.

III

Whether the Hearing Examiner has jurisdiction in a section 110(a) proceeding to entertain evidence of unwarrantable failure when a coal mine was closed by an order issued under section 104(a) for imminent danger.

All three of the above issues present questions purely of law which we believe the Examiner should have ruled upon before scheduling an evidentiary hearing at which the introduction of evidence on unwarrantable failure was to be permitted. We fail to see how the taking of evidence would have placed the Examiner in any better position to rule on these threshold questions. Briefs had been submitted by the parties and pre-hearing conferences held. Additionally, a full evidentiary hearing, including evidence on unwarrantable failure, would have required a significantly large number of safety personnel of the parties and the Bureau, and a considerable amount of time and expense to all involved. Under these circumstances we believe the Examiner's decision to withhold ruling until after hearing was prejudicial—particularly to the rights of Clinchfield. Consequently, it is incumbent upon this Board to rule.

Rulings of the Board on the Issues Presented

I

The Hearing Examiner has jurisdiction to conduct a section 110(a) proceeding when a coal mine has been closed and the miners withdrawn voluntarily by the operator prior to the Bureau's issuance of a withdrawal order under section 104.

Section 110(a) provides for compensation when "a coal mine * * * is closed by an order under section 104" and the miners are "idled by such order." Clinchfield argues that since the mine was voluntarily closed prior to issuance of the order, the miners were not idled by such order and that, therefore, section 110(a) is not applicable. We do not agree. We are in agreement with the Bureau that an Order of Withdrawal is more extensive than the mere withdrawal of miners—it also confers jurisdiction on the Bureau to prohibit reentry "until an authorized representative of the Secretary determines that * * * imminent danger no longer exists" (section 104(a)) or "* * * that the violation has been abated" (section 104(b) and (c)(1)). Thus the purpose of a withdrawal order is not only to remove the miners but also to insure that they remain withdrawn until the conditions or dangers have been eliminated. Regardless of the sequence of events or the method by which the miners were originally withdrawn, a mine, or section thereof, is officially closed upon the issuance of an order pursuant to section 104, and the miners are officially idled by such order.[4] We hold the issuance of the withdrawal order in this case was a proper exercise of the Bureau's enforcement power and that the miners were idled by such order.

II

The Hearing Examiner has jurisdiction to conduct a "public hearing" under section 110(a) when a coal mine is not "closed by an order issued under section 104 * * * for unwarrantable failure" but by an order issued under section 104(a) for imminent danger.

Clinchfield argues that a "public hearing" can be held under section 110(a) *only* when a coal mine is closed pursuant to an order issued under section 104(c)(1) of the Act. We read section 110(a) to *require* the Secretary to afford an opportunity for a public hearing on compensation *only* when a 104(c)(1) withdrawal order is involved. We do not construe it as barring the Secretary from holding a public hearing in other proceedings under that section.

[4] We recognize the caveat raised by the Bureau's Memorandum that such may not be applicable in all cases, specifically where an operator closes a mine with the intention of remaining permanently closed. As correctly pointed out by the Bureau such situation raises questions of fact, not pertinent here, which may require resolution on a case by case basis.

Except where a statute specifically requires a particular type of procedure or hearing the method employed by an administrative agency in reaching and rendering a decision is limited only by basic due process requirements. In the absence of specific statutory mandate for a public hearing, e.g., in accordance with section 554 of title 5, U.S.C., the agency is free to make its determination in any fashion provided it does not do violence to due process and insures protection of the basic rights of the parties. The holding of a public hearing where one is not required by statute does not deprive an individual of due process; indeed it may provide a superior forum for protection of rights than would a less formal type of adjudicatory proceeding.

The administrative procedures established by the Secretary in 30 C.F.R. Parts 300 and 301 [5] are a reasonable and proper exercise of his power under section 508 of the Act to insure compliance with section 110 of the Act and to protect the rights of the parties. The Act charges the Secretary with primary enforcement responsibility and provides for judicial review of the Secretary's actions. The method selected by the Secretary to provide for resolution of claims and disputes between miners and operators arising under section 110 is reasonably calculated to bring about a higher degree of uniformity of enforcement of this section than to leave the parties to the ordinary judicial remedies, presumably in the state courts.

In sum, we find no merit in the argument that the Secretary or the Hearing Examiner lacks jurisdiction to conduct a public hearing under section 110(a) of the Act where the order giving rise to the claim was issued pursuant to section 104(a) rather than section 104(c).

III

The Hearing Examiner does not have jurisdiction in a section 110(a) proceeding to entertain evidence of unwarrantable failure when a coal mine was closed by an order issued under section 104(a) for imminent danger.

The UMWA contends that the miners should receive compensation for a period of up to one week for the reason that the miners were withdrawn because of an "unwarrantable failure" of the operator—irrespective of the terms of the Bureau's Order of Withdrawal. Clinchfield contends that since the withdrawal order was issued pursuant to section 104(a) of the Act, evidence on the question of "unwarrantable failure" is inadmissible. We agree with Clinchfield.

In order to place these contentions in proper perspective it is necessary to consider the provisions of the Act under which these claims

[5] 35 F.R. 5225 (March 28, 1970).

arise. This proceeding was instituted under section 110(a) of the Act—"Entitlement of Miners." The pertinent part of this section provides for the payment of compensation to miners by an operator where such miners are idled by an order issued by the Bureau pursuant to section 104 of the Act. An order issued pursuant to section 104 is a prerequisite to any claim for compensation under section 110(a) and the withdrawal order must be alleged by a miner or miners seeking compensation under this section. It appears inherent in the terms of this section that immediately upon the issuance of an Order of Withdrawal a claim for compensation arises. Where such compensation is not paid by an operator the aggrieved miners may apply to this Board for an order requiring an operator to compensate such miners for a certain period of time at a determined rate of pay. Thus, this section provides a method by which miners may enforce the mandatory payment of compensation provided them by the Act where they have been idled by an order of withdrawal.

We do not view a compensation proceeding under section 110(a) as a *review* proceeding within the legal sense or purview of a section 105 review proceeding; nor do we construe this section as providing an alternate review procedure to that provided in section 105. In these proceedings no appeal is being made from a decision of a Departmental officer. Any challenge to or review of an Order of Withdrawal must be accomplished pursuant to section 105 or section 109, where appropriate, and the procedures established by rule thereunder. Therefore, a challenge to the withdrawal order by either the miners or the operator in a section 110(a) proceeding is inappropriate. It follows, then, that we cannot accept the argument of UMWA concerning the form the closure order should have taken since the only questions appropriate for decision under section 110(a) are those relating to compensation due the claimants under the order *as issued*. The Bureau has stated, and it is undisputed by UMWA, that there is nothing in the record of this case to indicate that a section 104(c) Notice of Violation had previously been issued, and we cannot interpret section 104(c) to imply that the basis for a finding of unwarrantable failure can be established retrospectively for the purpose of determining compensation under section 110(a).

As we see it, the intent of section 110(a) is simply to provide administrative enforcement of the statutory provision for compensation to miners idled as a result of a withdrawal order. Since the contention of UMWA is, in effect, a request for review of the pre-existing conditions leading to the order of withdrawal, we hold it is improperly made in this proceeding and that evidence as to "unwarrantable failure" is properly excluded.

Distinction between 104(a) and 104(c) Orders

Since the matter is raised by the pleadings, we think it well to express our views on the distinction between 104(a) and 104(c) orders. An order is issued under section 104(a) *only* in those instances where "imminent danger" is found to exist. "Imminent danger" is the "existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." [6]

An order of withdrawal may also be issued pursuant to section 104(c)(1) for an unwarrantable failure of the operator to comply with any health or safety standard. We agree with the Associate Solicitor that the term "unwarrantable failure" as used in the Act is a "word of art" and has a special meaning restricted by that section. Under section 104(c)(1) a withdrawal order may be issued *only* after the operator has been charged in a Notice of Violation in which an inspector has found four specified conditions to exist: (1) that there is a violation of a mandatory health or safety standard; (2) that the conditions created thereby *do not cause imminent danger;* (3) that the nature of the violation is such that it could significantly and substantially contribute to the cause and effect of a mine safety or health hazard; and (4) that such violation was caused by an *unwarrantable failure* of the operator to comply. When such prerequisites are met, and included in the *notice* to the operator, a section 104(c) Order of Withdrawal may be issued, *but only after* an inspector finds *another* violation caused by the unwarrantable failure of the operator to comply, and such second violation is found during the same inspection or any subsequent inspection within ninety days after issuance of the first notice of violation. We view this section as an intention by the Congress to strengthen enforcement by permitting in certain instances immediate withdrawal irrespective of time given for abatement. However, the proper foundation, as outlined above, must first be laid to support a 104(c) order of closure.

Parties to a Section 110(a) Proceeding

A collateral question has been raised by Clinchfield as to whether or not the UMWA has standing to maintain the action on behalf of the idled miners in this proceeding.

An application for compensation of a miner or miners idled by a withdrawal order may be brought by such miner or miners, or *on*

[6] Sec. 3(j) of the Act.

behalf of such miner or miners, by an authorized representative of miners. The *parties* having a direct interest in the outcome of such proceeding are, of course, only the miner or miners and the operator affected by the withdrawal order. The miner or miners affected may represent themselves, may be represented by an attorney, or, if they so elect, by a person or organization designated by them to act as their representative for the purpose of their application. In the latter case such representative may prosecute an application *on behalf* of the miners—not as a party to the proceeding.

Although the caption in this proceeding may be misleading, we assume that the UMWA appears as an authorized representative on behalf of the miners idled by the withdrawal order and not on its own behalf. If there is a question of whether or not a representative of miners (in this case the UMWA) has properly been authorized by the claimant miners to act in their behalf for the purposes of their claim to compensation, it should, of course, be resolved by the Examiner. Additionally, if the UMWA desires to participate in this proceeding in some capacity other than on behalf of the miners (e.g. as a party to the proceeding), we believe it properly should seek intervention. Our reasons are twofold—first, our interpretation of section 110(a) leads to the conclusion that the miner or miners idled by the order are the proper statutory parties to institute a proceeding for compensation and, secondly, we believe any order of the Examiner (or this Board) directing an operator to make payment of compensation should make clear that payment is to be made to the idled miners. Payments ordered to be made to third persons for disbursement to miners, unless clearly agreeable to both the operator and the miners, could generate further disputes and lead to additional litigation over which this Board (or the Secretary) may have no control. In any case, we think the Examiner (or the Board) should take whatever precautions are needed to protect the operator by assuring that the miners idled by the withdrawal order are paid, or have been paid, the proper amounts due under section 110(a) of the Act.

Order

IT IS ORDERED THAT this proceeding is REMANDED to the Examiner for such further proceedings as necessary and for an Initial Decision not inconsistent with the rulings set forth herein.

C. E. Rogers, Jr., *Chairman.*

I CONCUR:

David Doane, *Member.*

May 10, 1971

UNITED STATES v. RUSSELL G. WELLS

IBLA 70-47 *Decided May 10, 1971*

Homesteads (Ordinary): Residence—Homesteads (Ordinary): Cancellation of Entry

Where the house in which the entryman claims he maintained his residence is situated in a noncontiguous subdivision more than one-quarter of a a mile from the nearest entered land, it is too far removed from the entry to show compliance with the residence requirements of the homestead law, and the entry is properly canceled.

Equitable Adjudication: Substantial Compliance

Equitable adjudication is not available to a homestead entryman in the absence of substantial compliance with the requirements of the homestead laws.

BOARD OF LAND APPEALS

Russell G. Wells has appealed to the Secretary of the Interior from a decision of April 2, 1969, by the Office of Appeals and Hearings, Bureau of Land Management which affirmed a decision of a hearing examiner, dated January 17, 1969, canceling Wells' stockraising homestead entry Cheyenne 056130 and his additional stockraising homestead entry Cheyenne 057297 on the grounds that the house or cabin was not on the entered lands and was not habitable at the time of final proof.

An application filed by Russell G. Wells for an original stockraising homestead entry embracing 319.52 acres described as the E ½ SW ¼ sec. 10; S ½ NE ¼ sec. 3; NW ¼ SW ¼ sec. 2; and NE ¼ SE ¼; and lot 1 sec. 1, all in T. 39 N., R. 67 W., 6th P.M., Wyoming, was allowed on April 13, 1934. An application filed by Wells for an additional stockraising homestead entry covering 320 acres described as the SE ¼ sec. 11 and the SW ¼ sec. 12, all in T. 39 N., R. 67 W., 6th P.M., Wyoming, was allowed on June 7, 1934. Wells remained on the land until 1936, when he left to work in Nebraska. He rendered active service in the United States Navy from 1936 to 1957. Final proof for his entries was submitted in July 1966.

On March 1, 1968, the Bureau of Land Management filed a contest complaint charging that at the time appellant submitted final proof on the entries (a) the cabin in which contestee claims he maintained his residence was not habitable; and (b) the cabin was not and had never been located on the entry lands. The contestee filed a timely answer denying the allegations of the complaint and requesting that the final proof be accepted and that patents issue. A hearing was held on May 21, 1968, on the two issues set forth in the complaint.

The primary question to be resolved in this appeal is whether the cabin in which the contestee claims he maintained his residence was

on the land at the time he submitted final proof. The Government produced one witness at the hearing—a qualified civil engineer and licensed land surveyor. His testimony primarily concerned the location of the cabin in relation to the entered lands. This witness went into great detail concerning the procedures used in his survey. He concluded from his survey that the cabin is situated in the SE ¼ SW ¼ sec. 34 in the township north of the township in which the entered lands are located. Therefore, his survey indicated that the cabin was 1650 feet, or more than one quarter mile, northwest of the south half of the NE ¼ of sec. 3, T. 39 N., R. 67 W., the closest of the several parcels in the subject entries.

The contestee failed to offer credible evidence to rebut the testimony offered by the Government. Rather, the contestee relied upon cross-examination of the Government witness. An attempt was made to discredit the survey and the resulting conclusions by implying that the method of survey used might not have been proper. However, for the reasons hereinafter outlined, there can be no doubt but that the contestee completely failed to discredit the survey and the conclusions reached, either by indirect or direct evidence.

The only evidence in the record which accurately fixes the location of appellant's cabin is the testimony of a qualified, licensed land surveyor. The record clearly shows that the survey was properly conducted. The survey began at a known township boundary marker; during the survey procedure the surveyor found the marker for the common corner of secs. 2 and 3 and secs. 34 and 35. He testified that the topographic calls in the field notes of the original survey substantially agreed with what he had observed during the course of his survey. There was no speculation on the part of the surveyor, for he found on the township boundary line two official survey corner markers which are reliable and acceptable. On the other hand, the appellant failed to offer anything to show that the Government surveyor's method was improper or that an accurate result was not obtained by its use. Mere inferences that there might be error or that the markers may have been moved at some unknown time in the past are purely speculative and conjectural. There can be no doubt that the cabin is not on any of the entered land and is, in fact, more than a quarter of a mile northwest of the nearest entered land.

The decisions below found that the cabin was neither on the entered lands nor on lands contiguous to the entered lands. An entryman is required to have a habitable house *on the entered land* at the time of submitting final proof. 43 U.S.C. secs. 164, 292, 293 (1964); 43 CFR 2511.4–1, *formerly* 43 CFR 2211.2–1. The failure to construct a house on the entered lands is a fatal defect; the entries must

be canceled for failure to comply with the terms of the homestead laws. The United States Supreme Court in *Great Northern Ry. Co.* v. *Hower*, 236 U.S. 702 (1915), noted that even conceding good faith on the part of the entryman whose house was situated one quarter of a mile from the nearest entered land, the entryman's settlement was on a tract of land which was noncontiguous to the tract he undertook to enter, being separated from it by a 40-acre tract. The court held that the house was too far removed from the claimed land to entitle the entryman to the relief sought. The facts and holding of *Great Northern*, *supra*, are controlling in the instant case.

In his brief to the Secretary, appellant attempts to distinguish *Great Northern* from the instant case on the basis that the former involved a contest between private parties and the present case involves a contest between an entryman and the Government. This is not sufficient reason to conclude that the ruling in *Great Northern* is inapplicable here. In *Great Northern*, the court was concerned with the application of the homestead laws where the house was one quarter of a mile from the nearest entry lands. Here we are concerned with the same laws as they apply to a cabin situated more than one quarter mile from the nearest entered lands. Cases cited by appellant are the same cases considered by the Supreme Court in *Great Northern*. The court refused to apply the cases there; the almost identical fact situation prohibits us from applying them in this instance. We conclude that the cabin is too far removed from the entered land to satisfy the statute.

Having determined that the cabin was not located on the entered land and that such is a fatal defect, we need not discuss any other issues presented in this appeal, except appellant's request for equitable adjudication.

Throughout his various appeals, appellant has repeatedly asserted that he is entitled to equitable adjudication. The general statute concerning equitable adjudication is the act of September 20, 1922 (42 Stat. 857), 43 U.S.C. sec. 1161 (1964). Under the regulations adopted pursuant to the statute, 43 CFR 1871.1–1, *formerly* 43 CFR 2011.1–1, equitable adjudication of entries is permitted where there has been substantial compliance with the law. From the evidence, we find no basis for concluding that there has been substantial compliance with the requirements of the homestead law, an indispensable prerequisite to invocation of equitable adjudication. *United States* v. *Lloyd W. Booth*, 76 I.D. 73 (1969).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

FRANCIS E. MAYHUE, *Member.*

WE CONCUR:

FREDERICK FISHMAN, *Member* (concurring specially)

MARTIN RITVO, *Member.*

Frederick Fishman, concurring specially.

I agree with the result reached in this case, although I differ with a broad principle enunciated in the decision.

What concerns me is the flat statement in the decision to the effect that "[t]he failure to construct a house on the entered lands is a defect; the entries must be canceled to comply with the terms of the homestead laws," citing *Great Northern Ry.* v. *Hower*, 236 U.S. 702 (1915).

A casual reading of *Great Northern* would impel such a result. However, it must be recognized that *Great Northern* involves an adverse claimant to the land, the railroad claiming through its grantor, another railroad, under the act of August 5, 1892, Ch. 382, 27 Stat. 390. The authority of the Secretary of the Interior to grant equitable adjudication is limited to situations where it can be granted "* * * without prejudice to the rights of conflicting claimants." 43 U.S.C. sec. 1162 (1964). The same limitation is embodied in the present regulation, 43 CFR 1871.1–1, *formerly* 43 CFR 2011.1–1, which only permits equitable adjucation where there is "no lawful adverse claim."

My point is that *Great Northern* implicitly turns on the issue of an adverse claim by the railroad. Moreover, the existence of such a claim made equitable adjudication by the Department improper, as was the cancellation of the railway's selection because of the exercise of equitable adjudication. In that context, the discussion in the decision as to the need for a habitable house *on the entry* would seem academic. I fully recognize, however, that the *ratio decidendi* of *Great Northern* rested upon that issue.

I reiterate that I have no quarrel with the result reached in the case at bar. The purported "habitable house" was situated not only a ¼ mile from the entry, but also on land patented in 1937. The intervening subdivisions were also privately owned, having been patented in 1921. Moreover, the record amply supports the view that the appellant was casual in seeking to establish the boundaries of his homestead.

The purpose of this concurring opinion is to make crystal clear that I do not subscribe to the doctrine that a habitable house must be on the lands in the entry, failing in which the entry must be canceled. I object to the broad sweep of that doctrine. In appropriate cases where care and good faith have been manifested, in seeking to determine the boundaries of the entry, or where other extenuating circumstances are present, and the habitable house is reasonably close to the entry on an adjoining or cornering subdivision, equitable adjudication may be appropriate. *Cf. Everett J. Wilde*, Fairbanks 012045, approved February 1, 1961, by Assistant Secretary John A. Carver, Jr. and *Signer John Jacobson*, A–21064 (January 10, 1938).

RALPH PAGE

IBLA 70–65 *Decided May 11, 1971*

Mining Claims: Patent—Mining Claims: Withdrawn Land

To be entitled to a patent to mining claims on public land withdrawn from entry subsequent to the original location, an applicant other than the original locator must show not only that the claims were in fact located prior to the date of withdrawal and that the lands claimed are those originally located, but also that he is the successor in interest to and has an unbroken chain of title from the original locator.

Mining Claims: Title—Mining Claims: Withdrawn Land

Where the title asserted by an applicant for a patent to mining claims is based on adverse possession commencing after the lands included in the claims were withdrawn from entry, such title is of independent origin and relates back only to the beginning of the adverse holding and does not transfer to the applicant the title of the former owner. Accordingly, the applicant does not have an unbroken chain of title from the original locator and any rights obtained by his adverse possession are defeated by the prior withdrawal.

BOARD OF LAND APPEALS

Ralph Page has appealed to the Secretary of the Interior from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated May 20, 1969, affirming a decision of the Idaho land office, dated September 9, 1965, which rejected in part the appellant's mineral patent application as to certain lode mining claims situated in sec. 11, T. 20 N., R. 4 W., B.M., Idaho. The four mining claims with which this appeal is concerned are part of the Lime Peak Group described by Mineral Survey No. 3570 and are situated in Adams County, Idaho.

On June 4, 1965, appellant filed his application seeking mineral patent to the above-mentioned claims together with other claims not

considered since they did not include land within section 11. Pursuant to Power Site Classification No. 78, dated June 18, 1924, section 11 had been withdrawn from appropriation under the mining laws. Section 2 of the act of August 11, 1965 (69 Stat. 682), 30 U.S.C. sec. 621 (1964), conditionally opened lands in power site classifications to mining location. Therefore, a mining claim located before August 11, 1955, on land within an existing power site classification is null and void *ab initio* because the land was not then available for mining location. *Armin Speckert*, A–30854 (January 10, 1968). Section 11 was also included in a first form reclamation withdrawal for the Hells Canyon Project, effective February 12, 1952. Mining claims located on land previously withdrawn for reclamation purposes are also null and void *ab initio*. *Grace Kinsela*, 74 I.D. 386 (1967). Both withdrawal orders remain in effect.

In support of this application for mineral patent, the appellant submitted an abstract of title which shows that all four claims were located in the early 1900's. The abstract shows a chain of title to the four claims up to September 22, 1934. The chain of title ends at this point. In 1945, certain parties named Hill and Murphy located four different mining claims which are admitted by appellant to have "jumped" the four claims involved in this appeal. Thereafter, Murphy conveyed his interest in the four claims in question to Hill and, in 1952, Hill conveyed one-half interest to appellant. In 1957, appellant filed a forfeiture notice.

The four claims located by Murphy and Hill were null and void *ab initio*, as the land was not then available for location due to the imposition of the Power Site Classification 1924. Therefore, the transfers between Murphy and Hill and Hill and appellant were ineffectual and conveyed no interest or title. Similarly, appellant gained nothing by Hill's "forfeiture." Appellant alleges that he has occupied and worked the ground since June 26, 1952, the date of his deed from Hill. It is important to note that the Hells Canyon withdrawal was effective more than four months prior to appellant's alleged occupancy.

In April of 1963, appellant filed a complaint in the District Court of the Seventh Judicial District of the State of Idaho seeking to quiet title in the Lime Peak Group. On July 8, 1963, the court entered its decree quieting possessory title to these claims in appellant subject to the paramount title of the United States. The appellant's supporting documentation to his application for patent reflects that the quiet title action was based on his adverse possession of the claims. He emphasizes that he is not seeking title by adverse possession under Revised Statute sec. 2332 (1875), 30 U.S.C. sec. 38 (1964), but argues that the quiet title action was based upon the "lost grant" theory, and

therefore his adverse possession for the statutory period transferred to him the good title held by the original owners.

Under the "lost grant" theory, title by adverse possession is often said to rest upon a presumed grant or conveyance or on the presumption of a lost grant. In emphasizing that his adverse possession of the claims passed the title held by the former owners to him, appellant argues that the "gap in the chain has been bridged by adverse possession under Idaho law" and "the adverse possession confirmed by the court decree operates to transfer the title just as effectively as a deed." Therefore, appellant states, the real issue in this case is whether his adverse possession of the claims, confirmed by the court decree, served to transfer to him the title of the original locators.

The effect of the decree of the Idaho court establishes appellant's right to possession only. He must still make the proof required by law to entitle him to patent. *Perego* v. *Dodge*, 163 U.S. 160 (1896); *Duffield* v. *San Francisco Chemical Co.*, 198 Fed. 942 (D. Idaho, S.D., 1912), *rev'd on other grounds*, 205 Fed. 480 (9th Cir. 1913); *Alice Placer Mine*, 4 L.D. 314 (1886). Under the facts in the instant case, to be entitled to patent the applicant must show that he is the successor in interest to the original claimants having an *unbroken* chain of title from them. *Richard R. Fancher et al.*, A–30840 (November 13, 1967); *John H. Lawrence et al.*, A–30321 (February 3, 1965). Therefore, the crucial issue raised on this appeal is whether the decree of the Idaho court quieting title in appellant gave him an unbroken chain of title from the original locators. We are constrained to answer this question in the negative.

The great weight of authority is that title acquired by adverse possession is a new and independent title by operation of law and is nowise in privity with any former title. *Pearson et al.* v. *Hasty et al.*, 137 P.2d. 545 (Okla. 1943); 3 AM. JUR. 2D *Adverse Possession*, section 240 at 338 (1963); Annot. 147 A.L.R. 232 (1943). Nor is such title based upon the presumption of a grant from the original owner, notwithstanding the cases which frequently refer to title by adverse possession as being "as effectual as a conveyance from the owner," "tantamount to a conveyance," or "as full and complete as could be conferred by the owner of the fee." 2 C.J.S. *Adverse Possession*, section 200 at 804 (1936). Once the title obtained by adverse possession is matured, it relates back only to the beginning of the adverse holding. *Davis et al.* v. *Haines et al.*, 182 N.E. 718 (Ill. 1932); *Lagonda Nat'l Bank of Springfield* v. *Robnett*, 147 N.E. 2d 637 (Ohio 1957); 3 AM. JUR. 2D *Adverse Possession*, section 242 at 342 (1962); 2 C.J.S. *Adverse Possession* section 203 at 805 (1936).

The adverse possessor forms a new stock of descent. He does not take through the former owner, 5 *G. Thompson, Commentaries on the Modern Law of Real Property*, Section 2541 at 510 (1957 replacement). The ordinary decree quieting title does not have the effect of transferring to the plaintiff as against a stranger to the suit the title theretofore held by the defendant. 74 C.J.S. *Quieting Title*, section 105 at 160 (1951). Nor did the decree of the Idaho court in the instant case have such effect.

In any event, the negative effect of the appellant's adverse possession should not be confused with the positive consequence of a conveyance of title by a true owner to an adverse possessor. While his adverse possession vested him with a possessory title, good against other claims, it is not effective as against the United States. His title is not derivative from the former owners, but relates back only to the inception of his adverse possession. Thus, appellant does not have an unbroken chain of title from the original locators and the link in the chain cannot be provided by the quiet title suit brought in state court.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision appealed from is affirmed.

FRANCIS E. MAYHUE, *Member.*

WE CONCUR:

EDWARD W. STUEBING, *Member.*

MARTIN RITVO, *Member.*

RICHARD HUBBARD

IBLA 70-665 *Decided May 11, 1971*

Oil and Gas Leases: Applications: Generally

Where an oil and gas lease offer filed on a drawing entry card in a simultaneous filing procedure contains the name of an additional party in interest, and the required statements of interest, copy or explanation of the agreement between the parties, and evidence of the qualifications of the additional party are not filed within the time prescribed, strict compliance with the Department's regulations may not be waived to favor an applicant who pleads ignorance of the law or inexperience in oil and gas leasing.

Oil and Gas Leases: Applications: Sole Party in Interest

Where an oil and gas lease offer filed on a drawing entry card in a simultaneous filing procedure contains the name of an additional party in interest, and the required statements of interest, copy or explanation of

the agreement between the parties, and evidence of the qualifications of the additional party are not filed within the time prescribed by the Department's regulations, the offer must be rejected.

BOARD OF LAND APPEALS

Richard Hubbard has appealed to the Director, Bureau of Land Management,[1] from a decision of the Bureau's Wyoming land office, dated May 15, 1970, which rejected his noncompetitive oil and gas lease offer, NM 11813, filed pursuant to the Mineral Leasing Act section 17, *as amended*, 30 U.S.C. sec. 226 (1964). The offer to lease was rejected because of a failure to comply with the requirements set forth in 43 CFR 3123.2(c)(3) (now 43 CFR 3102.7, 35 F. R. 9680) that each party in interest in the lease must file evidence of his qualifications to hold such lease interest, and that within 15 days after the filing of the lease offer a statement must be filed, signed by each party in interest, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written.

Appellant's lease offer, as prescribed by 43 CFR 3123.9(c)(1) and (2) (now, *as amended*, 43 CFR 3112.2–1, 35 F. R. 9692), was submitted on a "Simultaneous Oil and Gas Entry Card" (Form 3120–21, December 1968), numbered 206–1111, for inclusion in a drawing of offers simultaneously filed on May 7, 1970. Hubbard's signature and address are entered on the front of the card beneath a statement of the conditions applicable to an offer to lease, which contains among its provisions a stipulation that "applicant is the sole party in interest in this offer and the lease if issued, or if not the sole party in interest, that the names and addresses of all other interested parties are set forth on the reverse hereof." On the reverse of the card, under the heading "Other Parties in Interest," appears the signature of Louis B. Parron, the notation "50 percent," and an address identical to that given for Hubbard. At the bottom of the reverse side is printed the admonition: "NOTICE: Compliance must be made with the provisions of 43 CFR 3123.2." Appellant's offer was the first drawn for Parcel No. 49, and would have been the successful bid if the prescribed evidence of qualifications and statement of interest had been timely filed.

In his appeal, dated May 21, 1970, Hubbard admits to failure to file the required data, but requests reconsideration of the land office deci-

[1] The Secretary of the Interior, in the exercise of his supervisory authority, transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management, to the Board of Land Appeals, effective July 1, 1970. Circular 2273, 35 F.R. 10009, 10012.

sion on the ground that he and Parron were ignorant of the full extent of the applicable law. He states that the parties to the offer have orally agreed that each is to have a 50-percent interest in the lease, and that both have qualified as U.S. citizens over 21 years of age.

Under the circumstances, the land office had no choice but to reject Hubbard's lease offer. The words plainly printed on the reverse of the entry card constituted sufficient notice to appellant that more was required than simply the name, address, and percentage of interest of another party to the lease offer. The regulation cited on the card provides (43 CFR 3123.2(c)(3); now 43 CFR 3102.7, 35 F.R. 9680):

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

The statements contained in the appeal, filed after the expiration of the 15-day period and signed by the offeror only, cannot be accepted as constituting compliance with the clear and unequivocal language quoted above.

Rejection of a lease offer for failure to adhere to the requirements of the cited regulation is mandatory. *Gill Oil Company*, 2 IBLA 18 (March 1, 1971); *Jesse B. Graner et al.*, A–30899 (March 29, 1968); *Timothy G. Lowry*, A–30487 (March 16, 1966). The land office cannot waive strict compliance with the regulations to favor applicants who plead ignorance of the law or inexperience in oil and gas leasing. In the words of the decision in *Jesse B. Graner et al., supra:*

> * * * This Department has no authority to interpret or apply Departmental regulations on a different basis depending upon the experience that an applicant might have in finding oil and gas lease offers. *Stephen J. Hlincik et al.*, A–30652 (January 18, 1967). It is hoped that Departmental personnel would be as helpful as possible to all persons seeking information on filing oil and gas offers, but such personnel, who deal at times with thousands of applications filed at a single time, cannot be expected to anticipate and furnish everything that an applicant might desire if it is not expressly requested. It is not unreasonable to assume that anyone filing a drawing card which expressly states that compliance must be made with "43 CFR 3123.2" would ascertain what this reference required by requesting further clarification from the land office. * * *

We find that the Wyoming land office correctly rejected the drawing entry card lease offer submitted by Richard Hubbard for failure to comply with the regulations cited on the card.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

ANNE POINDEXTER LEWIS, *Member.*

WE CONCUR:

EDWARD W. STUEBING, *Member.*

MARTIN RITVO, *Member.*

UNITED STATES v. ALBERT B. BARTLETT ET AL.

IBLA 71-62 *Decided May 13, 1971*

Mining Claims: Discovery: Marketability

In order to sustain a placer mining claim located for gypsum, it must be shown that the gypsum within the limits of the claim could have been extracted, removed, and marketed at a profit when the lands embracing the claim were withdrawn as part of a military reservation.

Mining Claims: Discovery: Marketability

The requirement that deposits of gypsum be marketable at a profit prior to the withdrawal of the lands embracing the claim has not been satisfied where it is clear that no open market for the product existed, no mining operations had been conducted on the claim, no sales of gypsum had been made, and no effort to establish a market for these specific gypsum deposits had been made by the claimants prior to the date of the withdrawal.

BOARD OF LAND APPEALS

Albert B. Bartlett *et al.* have appealed to the Secretary of the Interior from a hearing examiner's decision dated September 16, 1970, which declared their Jeep No. 3 placer mining claim to be null and void for want of a discovery of a valuable mineral deposit within the limits of the claim.

The facts of record show that the Jeep No. 3 placer mining claim which covers the NW ¼ sec. 35, T. 17 S., R. 67 W., 6th P.M., El Paso County, Colorado, was located on November 1, 1964, by appellants Albert B. Bartlett, Hilary G. Bartlett, Gloy Jett, Wilma Jett, W. A. McKenney, J. C. McKenney, Glenn K. Rogers, and Mary E. Rogers. The claim was located for a gypsum bed which is exposed in the vicinity of the southwest corner of the claim. However, before any mining had been performed on the claim and before any sales of

gypsum had been made, the lands involved were withdrawn from all forms of entry, including mineral entry, by P.L.O. 3731 which expanded the boundaries of the Fort Carson Military Reservation on July 6, 1965.

Contest proceedings were initiated by the Bureau of Land Management's Colorado land office manager in a complaint of June 7, 1967, charging that the Jeep No. 3 was not a valid mining claim because no valuable mineral deposit had been discovered within the limits of the claim. The parties stipulated at a prehearing conference held on April 16, 1969, *inter alia*, that a discovery of a valuable mineral deposit (in this case the mineral being gypsum) must have been made prior to the withdrawal of the lands added to the Fort Carson Military Reservation on July 6, 1965, and such discovery must subsist to the date of hearing. On February 18, 1970, a hearing was held at Canon City, Colorado.

Evidence presented at the hearing established that the gypsum is of extremely widespread occurrence in Colorado, New Mexico, and other states. The deposits on the Jeep No. 3 are thin, interbedded with impurities, shale and mudstone, but the gypsum is of commercial quality.

In his decision, after briefly summarizing the testimony and other evidence presented at the hearing, the examiner focused on the key issue in this case, stating, "[T]he only issue for determination is the legal issue of whether a discovery could have been perfected as of July 6, 1965, without a showing of a market for the gypsum from the claim as of that date." In discussing the requirements for a discovery of a valuable mineral deposit, the examiner pointed to the so-called prudent man test of discovery, first announced by the Department in *Castle* v. *Womble*, 19 L.D. 455, 457 (1894), and reiterated in innumerable subsequent decisions approved by the courts. He also quoted extensively from *United States* v. *Coleman*, 390 U.S. 599, 603 (1968), which emphasized that the element of marketability at a profit, or the so-called "marketability test" is an inherent part of the prudent man test. The examiner concluded that the uncontroverted evidence could only lead to the finding that as of July 6, 1965, and as of the date of the hearing, a market did not exist for the gypsum found on the Jeep No. 3 claim. He held that the *Coleman* case makes it clear that a discovery of a valuable mineral deposit is not perfected until it can be shown that the mineral can be extracted, removed and marketed at a profit.

On appeal to the Secretary, the contestee takes exception to the rulings below, contending (1) the hearing examiner erred in making a finding of fact that a market did not and does not exist for the gypsum found on the Jeep No. 3 claim; (2) the hearing examiner erred in not finding that a market for gypsum from the Jeep No. 3 claim existed as set forth in Exhibits J and K involving other gypsum claims[1]; and (3) the cases applied by the hearing examiner in this matter are not applicable for the reason that they involve claims for materials that have been since designated by Congress as common minerals in 30 U.S.C. sec. 611 (1964); and in those cases the surface of the mining claims involved would be utilized for purposes other than mining.

We have reviewed the entire case record, carefully considering the testimony and evidence adduced at the hearing, and find that the hearing examiner's discussion of the law and his findings are correct. The controlling legal principals applicable to the facts of this case are well-settled precedents. A mining claimant must show a discovery of a valuable mineral deposit on the land for the mining claim to be valid. A discovery exists

> * * * [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *. *Castle* v. *Vomble, supra* at 457; *accord Chrisman* v. *Miller*, 197 U.S. 313, 322 (1905); *United States* v. *Coleman, supra* at 602.

The prudent man rule has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit. The court in *United States* v. *Coleman*, *supra*, stressed that the prudent man rule and the marketability test are not two distinct standards, but are complementary. Present marketability can be demonstrated by a favorable showing of factors such as the accessibility of the deposit, *bona fides* in development, proximity to market, and the existence of a present demand. *United States* v. *William A. McCall, Sr. et al.*, 2 IBLA 64 (March 22, 1971); 78 I.D. 71. It is also well-settled that mining claims must be validated by a discovery of a valuable mineral deposit as determined by an application of the prudent man test before lands are withdrawn. *See, e.g., United States* v.

---

[1] Contestee's exhibits J and K consist, respectively, of (1) Patent No. 1237347 to the Ruby Company for 199.959 acres in Eagle County, Colorado, November 19, 1964; (2) Patent No. 49–69–0054 to Dresser Industries, Inc. for 540.95 acres in Big Horn County, Wyoming, April 10, 1969, and accompanying mineral reports.

G. C. (Tom) Mulkern, A–27746 (January 19, 1959), *aff'd Mulkern* v. *Hammitt*, 326 F.2d 896 (9th Cir. 1964); *United States* v. *United States Silica Corporation et al.*, A–30400 (August 24, 1965), *aff'd Simplot Industries, Inc.* v. *Udall*, Civil No. LV 1024 (D. Nev., June 19, 1969).

In light of the foregoing, it is clear that appellants have failed to show they had discovered a valuable mineral deposit as of the crucial date of July 6, 1965, *i.e.*, that they, in fact, had established a market for the sale and disposal of gypsum from the mining claim as of that date. Although appellants disagree with the hearing examiner's conclusions, they have presented no evidence to substantiate their contentions that he erred in finding that no profitable market for the gypsum existed, and no support for their view can be found in the record.

Appellants admitted at the prehearing conference that no mining had been performed on the claim and that no sales of gypsum had been made. Since no actual mining operations had been conducted on the claim and no commercial transactions were carried out in an attempt to market specific gypsum deposits from the Jeep No. 3 claim, appellants rely on the mere possibility of hypothetical future transactions that might have occurred if they had further developed their claim subsequent to the date of the withdrawal. This is a tenuous position which is grossly inadequate to establish the necessary fact of marketability. While the Department has never held that proof of actual sales is an indispensable element in establishing the marketability of a mineral from a particular claim, it must be shown that the mineral could have been extracted, removed, and marketed at a profit before the critical date of the withdrawal. *See United States* v. *E. A. Barrows et al.*, 76 I.D. 299 (1969), and cases collected therein, *aff'd.*, *Esther Barrows* v. *Walter J. Hickel*, Civil No. 70–215F (D. Cal. April 20, 1970). Appellant's evidence, viewed at its best, shows no more than further development and market research were needed to obtain an outlet for their gypsum.

A brief review of the testimony of Albert B. Bartlett confirms the hearing examiner's conclusion that the gypsum on the Jeep No. 3 claim could not have been extracted, removed, and marketed at a profit as of the date of the withdrawal. Bartlett admitted on cross-examination that a market for the gypsum from the Jeep No. 3 claim did not exist at the time of the hearing, nor did one exist as of July 6, 1965. This, of itself, adequately supports the examiner's ruling. No existing open market for the gypsum was disclosed by the evidence.

Appellants contend that the reason for not further testing the deposit or seeking to develop a market was their advance knowledge that the Army was going to take over the land. While such forbearance may have been prudent under the circumstances, we cannot assume inferentially that quality, quantity and marketability would have been conclusively established had appellants elected to proceed with a normal development program.

We can attribute little significance to appellants' bare reference to Exhibits J and K involving the patents of other gypsum claims in Colorado and Wyoming. Appellants do not explain how the circumstances of these other claims in other areas relate to the development of their own site. There was also no indication whether the development on the cited patented claims was similarly subject to a time limit imposed by an intervening withdrawal. The facts of these other gypsum claims, however, are not before us for consideration. Whether or not patents have properly issued on other gypsum claims, issuance of a patent in this case is not justified if appellants have not shown a valid discovery.

Appellants cannot prove marketability for their gypsum either by reference to other patented claims or by reference to the successful mining operations conducted by the Johns Manville Products Corp. and the Ideal Cement Company, located at Florence, Colorado, some 20 miles south of the claim. Testimony at the hearing established that neither of these users was in the market for outside gypsum as each had its own sources. Such references do not indicate that the Jeep No. 3 claim could have been successfully operated at a profit prior to July 6, 1965. To satisfy the marketability test appellants must have shown the existence of a demand for the material on their specific claim and not simply that the type of material in question is being utilized in the area. *United States* v. *Harold Ladd Pierce*, 75 I.D. 270 (1968); *United States* v. *Everett Foster*, 65 I.D. 1 (1958), *aff'd.*, *Foster* v. *Seaton*, 271 F.2d 836 (D.C. Cir. 1959); *United States* v. *Loyd Ramstad and Edith Ramstad*, A–30351 (September 24, 1965); *United States* v. *J. R. Osborne et al.*, 77 I.D. 83 (1970); *United States* v. *William A. McCall, Sr. et al.*, *supra*. Appellants have not met this burden.

Finally, appellants' contention that the case law applied by the hearing examiner is limited to claims for material known as "common variety" covered by the act of July 23, 1955, 30 U.S.C. sec. 611 (1964), and therefore not applicable to their mining claim, is clearly

erroneous. The "prudent man" test of discovery enunciated in *Castle* v. *Womble*, *supra; Chrisman* v. *Miller*, 197 U.S. 313 (1905); *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 335–336 (1963) has been universally accepted and applied by the Department as a test for discovery on all mining claims. Likewise, the Department, for many years prior and subsequent to the act of July 23, 1955, *supra*, has applied the test of marketability in determining whether or not various materials of widespread occurrence constituted "valuable mineral deposits" within the meaning of the mining laws. *See*, *e.g.*, *Layman et al.* v. *Ellis*, 52 L.D. 714 (1929), and authorities cited; *Big Pine Mining Corporation*, 53 I.D. 410 (1931); *United States* v. *Strauss et al.*, 59 I.D. 129, 137 (1945); *United States* v. *E. A. Barrows et al.*, *supra*. The ruling in *Coleman*, *supra*, approving the marketability test employed by the Department, is not restricted to those mineral deposits considered "common varieties." *Converse* v. *Udall*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969).

Moreover, in its specific treatment of gypsum the Department has held that deposits of gypsum which could not have been marketed at a profit during the times when the lands containing the deposits were subject to location under the mining law are not valuable deposits within the mining law, and claims containing such deposits are properly declared null and void. *United States* v. *G. C. (Tom) Mulkern*, *supra*.

Accordingly, we conclude that the hearing examiner correctly found from the evidence that no discovery of a valuable mineral deposit had been made on the Jeep No. 3 placer mining claim prior to the date of the withdrawal of July 6, 1965.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

EDWARD W. STUEBING, *Member*.

WE CONCUR:

JOAN B. THOMPSON, *Member*.

FRANCIS E. MAYHUE, *Member*.

May 21, 1971

ESTATE OF MARY URSULA ROCK WELLKNOWN

IBIA 70-7 *Decided May 21, 1971*

Indian Probate: Wills: Disapproval of Will

The Secretary is authorized to exercise his discretion in disapproving a devise in the will of a deceased Indian where approval of such devise would sanction a practice permitting the acquisition of Indian lands contrary to the public policy expressed in the statutory restrictions against the alienation of Indian lands held in trust.

Indian Probate: Evidence: Generally—Indian Probate: Wills: Applicability of State Law

Indian probate proceedings involve considerations which go beyond the conventional issues of a state probate proceeding and evidence may be admitted in an Indian probate proceeding which would not be relevant to the probate of a will in a state proceeding.

BOARD OF INDIAN APPEALS

William T. Shaw, Jr. and Richard E. Shaw, devisees under the Last Will and Testament of the decedent, Mary U. Rock Wellknown, dated February 8, 1963, have appealed from the Examiner's Order Approving Will and Decree of Distribution, dated January 8, 1968, and from the Examiner's Decision After Rehearing Affirming Original Decision and Ordering Partial Distribution, dated February 9, 1970. This appeal was originally filed with the Regional Solicitor. The authority of a Regional Solicitor to decide an appeal from an order and decision of an Examiner of Inheritance has been superseded by the Secretary's delegation of such authority to the Board of Indian Appeals and this matter is now before us for the final decision of the Department. 35 F.R. 12081, July 1, 1970.

The will of Mary U. Rock Wellknown devised the SW¼, NE¼, Sec. 19, T. 9 S., R. 37 E., P.M., Montana, containing 40 acres to "Richard E. Shaw, a Whiteman [sic], friend," and the S½, Sec. 24, T. 7 S., R. 34 E., P.M., Montana containing 320 acres to "William T. Shaw, Jr., a Whiteman [sic], a friend." Both of these parcels of land were portions of decedent's allotted lands, Crow Allotment No. 1838. In addition, the will devised to William T. Shaw, Jr. all of the decedent's interest (which constituted a 100 percent interest) in the allotment of Charles F. Wellknown, deceased Crow Allottee No. 2765, described as the NE¼, Sec. 24, T. 7 S., R. 34 E., P.M., Montana, containing 160

acres. The lands devised to the Shaws totaled 520 acres, and represent almost 30 percent of the assets of the estate based upon the inventory and appraisement conducted by the agency realty officer.

The decedent died on January 10, 1965. After a probate hearing, at which the appellants were not present, the Examiner issued an Order Approving Will and Decree of Distribution, both dated January 8, 1968. The Examiner disapproved the paragraphs of the will containing the aforesaid devises to William T. Shaw, Jr. and Richard E. Shaw, and ordered distribution of those lands under the Montana laws of intestacy, there being no residual clause in the will. After notice of the Examiner's order, William T. Shaw, Jr. and Richard E. Shaw filed a petition for rehearing with the Examiner. A rehearing was held after which the Examiner issued his Decision of February 9, 1970, affirming his order of January 8, 1968, and ordering partial distribution.

William T. Shaw, Jr. and Richard E. Shaw appealed the aforesaid order and decision on April 28, 1970. The appellees filed a memorandum, dated July 15, 1970, in support of Examiner's decision. The appellants filed a motion to strike appellees' memorandum contending that it was not timely filed and the appellees wrote the Secretary challenging appellants' motion to strike.

We agree with the appellants that the appellees' memorandum in support of Examiner's decision was not timely filed in accordance with 25 CFR 15.19(c). Under this rule of Indian probate procedure, the appellees had sixty days from the filing of appellants' Notice of Appeal within which to submit written arguments to the Secretary. We believe that the appellees' failure to file within this time is a sufficient basis upon which to grant the appellants' motion to strike.

The Examiner found that there was insufficient evidence in the record to conclude that the decedent had been subjected to fraud, duress, coercion, or undue influence exerted by the Shaws in providing for them in her will. His original order and his decision on rehearing were based rather upon the following proviso contained in 25 U.S.C. section 373 (1964), dealing with the disposition of restricted Indian lands by will:

> * * * *Provided further*, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, * * *.

Exercising the discretion granted the Secretary by the above proviso,[1] the Examiner disapproved the devises to the appellants primarily

[1] The Secretary's authority relating to Indian Probate matters has been delegated to Examiners of Inheritance. 25 CFR 15.1 (35 F.R. 12081, July 1, 1970).

on the basis of evidence of William Shaw's gradual acquisition of Indian lands as a result of devises to him in the wills of four other deceased Indians. This evidence led the Examiner to conclude that approval of the devises to the appellants would contribute to the allowance of a practice whereby a white man could deplete the Indian ownership of land contrary to the congressional legislation designed to prevent such occurrence. We affirm the decision of the Examiner.

Appellants contend that evidence introduced at the rehearing relating to the transactions and relationships between William Shaw and numerous Crow Indians was inadmissible in that such evidence is not relevant or material to the probate of Mary U. Rock Wellknown's will.

An Indian probate proceeding involves considerations, as discussed below, which go beyond the conventional issues of a state probate proceeding and therefore the Secretary in order to exercise appropriately his discretion as to the approval or disapproval of an Indian will, may consider evidence which would not be relevant in a state probate proceeding. We therefore turn to the evidence which warrants the exercise of discretion under 25 U.S.C. sec. 373 (1964) to disapprove the devises to the appellants in the will of Mary U. Rock Wellknown.

The appellant William Shaw has been the postmaster for over 30 years at Lodge Grass, Montana, an incorporated town located within the boundaries of the Crow Indian Reservation. The town has not been excluded from the reservation and is, therefore, in "Indian country." William Shaw became acquainted with the decedent in 1936, but it was not until the death of Mary Wellknown's son, Felix, in 1949 that William Shaw commenced a relationship with Mary Wellknown and her husband, John Wellknown, which involved supplying the Wellknowns with groceries, small amounts of cash, transportation, and other goods and services.

After the death of John Wellknown in 1951, William Shaw, on many occasions and over a period of many years, advanced money to Mary U. Rock Wellknown and her family for her care, furnished her or arranged for her to be furnished food and meals, and provided various other services for her benefit. William Shaw claimed that his basic expenditures toward the welfare of the decedent consisted of $2,635.84 in cash payments of amounts between $1 and $20 paid from the years 1948 through 1964; $1,237.37 in checks dated between 1948 and 1964 payable to the order of the deceased or her family; and payment of grocery bills for the deceased and her family in the sum

of $2,054.36 starting in 1960 until just prior to the decedent's death.[2] William Shaw's testimony was conflicting as to whether these expenditures were considered by him as loans or gifts. He made no effort to collect for his expenditures on behalf of the decedent during her lifetime or to preserve his legal right as a creditor in Mary Wellknown's estate by filing a claim for reimbursement of his expenses.

Richard Shaw is the son of William Shaw. He transported the decedent several times during her lifetime to a medical clinic in Sheridan, to the burial place of her son, Felix, from the business area in Lodge Grass to her home, and to and from other places. On several occasions he delivered to Mary U. Rock Wellknown food and coal purchased by his father. Richard Shaw did not file any claim against the estate as a creditor.

In addition to his occupation as a postmaster, William Shaw engaged in numerous business transactions with Crow Indians relating to personal loans, the sale of their crop shares, and the lease and sale of Indian lands.

William Shaw made personal loans to Crow Indians, often accepting pawned goods as security. Etheline Hill pawned her personal goods with William Shaw to secure small loans at 25 percent interest. William Shaw admitted that he would withhold from mail delivery the per capita checks to an individual Crow Indian if such Indian owed him money.

William Shaw often prepared the contracts or deeds which formalized business transactions involving Crow Indians and, as a notary public, he often notarized such documents. On one occasion he prepared and notarized a document which Etheline Hill believed to be a mortgage on her $6,000 home to secure a $300 loan given to her by William Shaw as agent for a Mr. C. D. Moore. The document was, in fact, a warranty deed conveying Etheline Hill's house to C. D. Moore. Legal action was required in order for Mrs. Hill to clear her title upon repayment of the $300.

William Shaw provided business services to both Crow Indian land owners and non-Indian lessees. He represented all of the twenty to twenty-five small operators around Lodge Grass in their lease arrangements of allotted lands owned by competent Crow Indians, furnishing them advice and services in dealing with the Indian allottees. His non-Indian clients leased about one-half of the total leased land

[2] The appellants introduced into evidence a ledger book which William Shaw claimed was used to record the cash payments as they were made. Appellants also introduced the canceled checks and grocery bill receipts.

in the Lodge Grass area. Mr. Shaw received a total fee of $1,000 in 1969 for the services he rendered his non-Indian clients, the principal service being the obtaining of leases from Crow Indian land owners. He represented both the non-Indian tenants and the Indian land owners in the same transactions and customarily gave the Indians "something" when they would sign leases (Tr. p. 68).

In exchange for loans to Crow Indians, William Shaw entered into transactions with them whereby he purchased their crop shares in the lands they owned and leased for crop raising. In 1956 a bank loaned money to Martin Spotted Horse only on the signature of William Shaw and on condition that Shaw would guarantee the crop as security for the loan. Subsequently, Shaw prepared leases between Martin Spotted Horse and non-Indian tenants of his land whereby Shaw purchased portions of Martin Spotted Horse's crop shares under a crop-share agreement.

In 1963 William Shaw, personally and through his attorney, made efforts to obtain a fee patent for lands held in trust for an enrolled Canadian tribeswoman, Ila Mae Bear All Time, who inherited approximately 3,000 acres from her husband. If it were established that Ila Mae Bear All Time was not a citizen of the United States, she would have been entitled to ownership of the land free of trust. William Shaw intended to purchase this land from her for approximately $40,000 in order to protect the interests of his white tenant clients using this land by insuring that their neighboring competitors would not obtain the land first. The Solicitor affirmed the ruling of the Crow Indian Agency Superintendent denying issuance of the fee patents to Ila Mae Bear All Time who was deemed to be a United States citizen.[3]

William Shaw received an aggregate of 840 acres of allotted Crow Indian land by devise under the wills of deceased Crow Indians in four previous instances. Eighty acres of land were received under the will, dated March 28, 1950, of John F. Wellknown, the deceased husband of Mary U. Rock Wellknown. His will contained the following provision:

> The conveyance of the third devise to William T. Shaw, Jr., is made to him for the reason that he has helped my son, Felix F. Wellknown before his death, and *he expressed the desire that I leave 80 acres of land to him*, and I wish to carry out his wish. (Italics added.)

William Show inherited 520 acres from Clara White Hip by a will made in 1960. His relationship to her was of the same nature as his relationship to Mary Wellknown in that both regarded him as a son.

---

[3] Letter decisions dated February 8, 1965, and April 19, 1965.

He rendered assistance to Clara White Hip in the form of groceries, coal, and other goods and services similar to that provided for Mary Wellknown.

William Shaw inherited 160 acres through the will, made in 1950, of Pup Plays With Himself with whom Shaw also had a relationship similar to his relationship with Mary Wellknown and Clara White Hip. William Shaw also rendered assistance to Mr. Bull Weasel who left him 80 acres in his will made in 1954.

William Shaw's aid to Crow Indians was thus directed to those Indians who were owners of real property. Moreover, in each case, while the recipients of his assistance owned some lands in which they owned only a fractional interest, the devises to William Shaw in these four prior wills were in lands in which the testator owned a full interest.[4] This enabled Shaw to obtain a fee patent to these lands, thus passing the lands out of Indian ownership, and then to sell the lands without restriction. Similarly, in the case of Mary U. Rock Wellknown, her fractional interest in several allotments was devised to several of her heirs, but the devises to Richard E. Shaw and William T. Shaw, Jr. consisted of either her own allotment or a portion of land in which she owned the total interest.

We believe that William Shaw's role as a postmaster and a notary public placed him in a position of public trust.[5] However, we find that his transactions with Crow Indians demonstrated a pattern of dealing with them for the undisclosed purpose of obtaining personal financial gain. This finding leads us to conclude that the devises to the appellants in the will of Mary U. Rock Wellknown were the result of the moneys, goods, and services advanced by William Shaw to the decedent during her lifetime for the purpose of acquiring her land by devise.

---

[4] A non-Indian owner of a fractional interest in land jointly owned by Indians subject to trust would find himself restricted in dealing with the property. He cannot, as a practical matter, manage, use, or lease the land except with the consent and agreement of all his Indian co-owners. His own interest, although free of the trust, is virtually unsaleable unless the trust is lifted as to all of his Indian co-owners upon their request. 25 CFR 121.2. Partition is provided for by statute if requested by the Indian co-owners. 25 U.S.C. § 378 (1964) ; 25 CFR 121.8. Allotted lands devised to a non-Indian where the devise is approved are subject only to a dry and passive trust. The sole remaining power of the United States as trustee is to issue a fee patent to the non-Indian devisee. See *Bailess* v. *Paukune*, 344 U.S. 171 (1952).

[5] The Code of Ethical Conduct for Postal Employees, Ch. 7, *Postal Manual*, Sec. 742.13 (1968) states:

"The postal service has the unique privilege of having daily contact with the majority of the citizens of the Nation, and is in many instances their most direct contact with the Federal Government. Thus, it is an especial opportunity and responsibility for each postal employee to act with honor and dignity worthy of the public trust * * *."

The question is presented as to whether our findings warrant the exercise of the Secretary's discretion to disapprove the devises to William Shaw and his son under the authority of 25 U.S.C. sec. 373 (1964). The resolution of this question requires an examination of the statutory scheme designed for the protection of Indians.

Federal legislation relating to the allotment of restricted lands to Indians has been designed primarily for the protection and benefit of the Indians. See *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365 (1968); *Squire* v. *Capoeman et ux*, 351 U.S. 1 (1956); *United States* v. *Daney et al.*, 370 F.2d 791 (10th Cir. 1966); *Hayes Big Eagle* v. *United States*, 300 F.2d 765 (Ct. Cl. 1962).

The General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified in scattered sections of 25 U.S.C. (1964)), authorized the President to allot Indian reservation lands in severalty. Section 5 of the act provided that the allotted lands would be held in trust for the sole use and benefit of the Indian or, in case of his death, for his heirs. It was provided that conveyances of or contracts concerning the allotted lands made prior to expiration of the trust period would be "absolutely null and void" and there was no provision whereby an Indian could devise his trust allotment by will.

By a series of enactments, Congress has gradually eased some of the restrictions of the General Allotment Act and has given the Indian more control over the utilization and disposition of his lands. These statutes, however, have always provided that transactions relating to Indian lands must be with the approval of the Secretary of the Interior.

The act of May 27, 1902 (32 Stat. 275), 25 U.S.C. sec. 379 (1964), permitted the adult heirs of any deceased Indian owning interest in a restricted allotment to sell and convey the lands inherited from such decedent, subject to the aproval of the Secretary. The act of May 29, 1908 (35 Stat. 444), 25 U.S.C. sec. 404 (1964), provided that the allotted lands of an Indian may be sold upon the petition of the allottee or his heirs, and the act of March 1, 1907 (34 Stat. 1018), 25 U.S.C., sec. 405 (1964), provided for the sale of the allotment of a noncompetent Indian. Both of these latter acts provided that the sale must be on such terms and conditions and under such regulations as the Secretary of the Interior may prescribe.[6]

[6] The Secretary's regulations relating to approval of petitions for the sale of Indian lands provide:

"* * * Sales will be authorized only if, after careful examination of the circumstances in each case, a sale appears to be clearly justified in the light of the long-range best interests of the owner(s). * * * 25 CFR 121.11 (1970)."

The act of June 25, 1910 sec. 5 (36 Stat. 857), 25 U.S.C. sec. 202 (1964) provides that:

> It shall be unlawful for any person to induce any Indian to execute any contract, deed, mortgage, or other instrument purporting to convey any land or any interest therein held by the United States in trust for such Indian, * * *.

A criminal penalty is imposed for violation of this statute.

The general policy to keep Indian trust property in Indian hands is further exemplified by the act of November 24, 1942 (56 Stat. 1021), 25 U.S.C. sec. 373a (1964), which provides that the trust or restricted estate of an Indian who dies intestate without heirs escheats, not to the State or to the United States, but to his tribe.

These statutes exhibit a concern on the part of Congress to protect Indians against alienation of their lands due to improvident *inter vivos* conveyances. This same concern is demonstrated in the statutes relating to the disposition by will of an Indian's lands held in trust.

The act of June 25, 1910, *as amended*, 25 U.S.C. sec. 373 (1964), authorized an Indian allottee to devise by will property held in trust for said allottee; but the act qualified this right of disposition by the following language:

> * * * *Provided, however*, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further*, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, * * *.

The act additionally provided that the approval of an allottee's will by the Secretary and the death of the allottee shall not operate to terminate the trust of the land.

Congress has thus entrusted the Secretary with the role of protecting Indians against alienation of their lands by either improvident *inter vivos* transactions of an allottee or his heirs or by improvident dispositions of allotted Indian lands by the will of the allottee. We therefore believe that Congress intended to give the Secretary flexibility in considering all the circumstances relating to the potential benefit or detriment to Indians as a result of approving or disapproving a given conveyance or devise, and we therefore hold that evidence relating to the transactions and relationships between William Shaw and Crow Indians was properly admissible in this case.

The question remains—is this a proper case for the exercise of the Secretary's discretion to disapprove a will?

The question of the scope of the Secretary's discretion to disapprove

a will under the authority of 25 U.S.C. sec. 373 (1964) was before the Supreme Court in *Tooahnippah* v. *Hickel*, 397 U.S. 598 (1970). The Court there held that the Secretary cannot disapprove a will based upon his subjective opinion that approval of such will would not achieve a just and equitable disposition of the estate as between the beneficiaries under the will and the decedent's heirs at law. The Court recognized, however, that the Secretary was authorized under 25 U.S.C. sec. 373 (1964) to disapprove a will under certain circumstances that might not otherwise be a valid basis for disapproval of a will in a conventional probate proceeding because of the Secretary's special role under the statutes as the trustee of Indian lands, stating at 609:

> * * * The power to make testamentary dispositions arises by statute; here we deal with a special kind of property right under allotments from the government. The right is not absolute; the allottee is the beneficial owner while the government is trustee. 25 U.S.C. § 348. * * *

In his concurring opinion Justice Harlan amplified the view expressed by Chief Justice Burger's majority opinion, summarizing at 619:

> * * * A will that disinherits the natural object of the testator's bounty should be scrutinized closely. If such a will was the result of overreaching by a beneficiary, or fraud; if the will is inconsistent with the decedent's existing legal obligation of support, *or in some other way clearly offends a similar public policy;* * * * the Secretary might properly disapprove it (Italic added).

We believe that it is a proper exercise of discretion for the Secretary to disapprove a devise in the will of an Indian allottee where approval of such devise would be contrary to the public policy designed for the protection of Indians against the improvident alienation of their lands.

We have found that William Shaw provided Mary U. Rock Wellknown with financial and other assistance for the purpose of obtaining a portion of her land through a devise in her will and that William Shaw followed this tactic in the case of four other Indian allottees who owned a full interest in land. We do not believe Congress intended that Indian lands were to be alienated in this manner upon giving Indians the right to transfer their allotments through testamentary disposition.

Approval of the devises to William Shaw and Richard Shaw would sanction a practice whereby individuals may obtain Indian lands for inadequate consideration. Under such practice, the value of the land devised may well be disproportionate to the value of the assistance

which an individual may render to an allottee of Indian lands. This arrangement may not operate to the detriment of the allottee, who receives immediate assistance without any obligation to reimburse the source of assistance during the allottee's lifetime, but the heirs of the allottee are deprived of the land or the full value thereof which they would otherwise receive.

We note that nothing prevented William Shaw from filing a timely claim as a creditor in the estate of Mary U. Rock Wellknown under the contention that his expenses on her behalf were with the expectation of reimbursement. This fact indicates that were we to approve the practice engaged in by William Shaw, an Indian allottee could devise land to one such as William Shaw with the intent to reimburse him for assistance rendered, without knowledge on the part of the Indian allottee that a creditor's claim would also be filed against his estate.

We do not decide here whether the value of the lands received by William Shaw and Richard Shaw exceeds the value of their services rendered to Mary U. Rock Wellknown since our holding is based upon disapproval of the practice per se engaged in by William Shaw. We do emphasize, however, that such a practice is particularly offensive to public policy where, as here, it results in the transfer of Indian lands to a white man who is employed in a federal position of public trust in the Indian community.

We hold that this is an appropriate case wherein the Secretary may exercise his discretion, under authority of 25 U.S.C. sec. 373 (1964), to disapprove a will.

The appellants contend that the Examiner did not have authority to disapprove parts of Mary U. Rock Wellknown's will, but that a will can only be disapproved in its entirety. Appellant's argument is contrary to the general rule:

> A will which is presented for probate may be valid in part and invalid in part; the invalid provisions may be severable from the valid provisions. In a case like this, the invalidity of part of the will does not prevent the probate of, at least, the valid part of the will; and it is error to exclude the whole will from probate because of such partial invalidity. 3 Bowe-Parker: *Page on Wills* § 26.111 (New Revised Treatise 1961).

Since the clauses held invalid by the Examiner are severable, we hold that he was authorized to disapprove them. See *Estate of Milton Holloway*, 66 I.D. 411 (1959).

In their Notice of Appeal, the appellants attached a prior will of the decedent dated February 12, 1953, and a codicil to that will dated

April 21, 1959, each of which indicates a devise to William T. Shaw, Jr. The appellants contend that these documents indicate Mary U. Rock Wellknown's past and continuing intention to devise allotted lands to William Shaw, Jr. Appellants did not offer the prior will and codicil into evidence but claim on appeal that the Examiner should have known or could have found out about these documents, and he is therefore responsible for failing to develop a complete record. We disagree with the appellant's attempt to include such evidence into the record on this basis, but even so, we find that the prior will and codicil are not relevant because the intent of the testator is not at issue in this case.

The Decision and Order of the Hearing Examiner are affirmed. Clauses five and seven of the testatrix's will are disapproved, and we order that the property described in such clauses be distributed under the Montana laws of intestacy in accordance with the Examiner's Decree of Distribution dated January 8, 1968. This decision is final for the Department. 35 F.R. 12081.

C. E. ROGERS, Jr., *Alternate Board Member.*

I CONCUR:

DAVID DOANE, *Alternate Board Member.*

J. D. ARCHER, ELIZABETH B. ARCHER

IBLA 70-93 *Decided May 26, 1971*

Mineral Lands: Prospecting Permits—Act of January 1, 1970

An applicant for a prospecting permit to explore for copper and other hardrock minerals is properly required to agree to certain stipulations as a condition precedent to the issuance of the permit when there is no showing that the requirements are unreasonable, arbitrary, or unduly onerous, and where those stipulations conform to the Department's obligations under the National Environmental Policy Act of 1969.

BOARD OF LAND APPEALS

J. D. Archer and Elizabeth B. Archer have appealed from a decision dated August 26, 1969, by the Office of APPEALS AND HEARINGS, Bureau of Land Management, which affirmed separate decisions both dated June 9, 1969, by the Utah land office.

The land office decisions required the appellants, *inter alia*, to sign a document captioned "General Requirements" [1] as a condition precedent to the issuance of prospecting permits, U 7126 (J. D. Archer) and U 7130 (Elizabeth B. Archer).

The permit applications relate to copper, lead, zinc, molybdenum,

---

[1] The "General Requirements" are as follows:

"No excessive disturbance or removal of soil or vegetation will be permitted. After completion of operations or explorations, soil surfaces will be restored to their natural contour as much as possible.

"No blasting is to be done within 500 feet of wells and springs; 300 feet of dams and reservoirs; and 500 feet of dwellings.

"When blasting along public roads, all shot holes must be a reasonable distance from the shoulder of the road. Any damage to roadways will be reported at once to the District Manager, Fillmore District.

"Water should not be taken from reservoirs, wells, springs or other water developments on Bureau administered public lands without first obtaining permission of the District Manager.

"All existing improvement located on Bureau administered public lands used will be maintained in a serviceable condition. Damaged or destroyed improvements will be replaced or restored to their original condition.

"Fences on BLM administered public lands shall not be let down without special permission from the District Manager. Gates should be left open or closed as found or as directed by attached signs.

"Adequate protective measures shall be provided at any tunnel, shaft, pit, drill hole, blasting site and storage site to protect the life, safety or property of other persons, and to protect livestock and wildlife.

"Permittee shall not remove, injure, deface or alter any object of scenic, historic or scientific interest, including Indian ruins, pictographs and other archeological remains. Where a question exists as to whether or not an object is of scenic, historic or scientific interest, submit the matter in writing to the District Manager for final determination.

"The District Manager shall be informed of the location of any drilled holes in which water was encountered, together with information concerning the depth water bearing strata were encountered and an estimate of quantity and quality of water. In the event flowing artesian water is encountered, the District Manager will be notified immediately.

"During the construction of roads and trails over BLM administered public lands adequate culverts and dips will be placed at drainage crossings. Fills will not be placed in gullies or drainage crossings without adequate culvert drainage. Upon termination of use of roadways, trailways and other cleared areas on BLM administered public lands used and constructed by the party conducting the mineral exploration, earthen water bars (also known as waterbreaks) shall be constructed at various intervals on sloping areas to divert runoff and minimize erosion.

"All areas cleared during the mineral exploration operations shall be seeded or planted as directed by the District Manager. Such areas include roadways, trailways, drilling sites and similar areas. Seeding and planting criteria to be used are as follows:

(a) Method of seeding or planting to be used: Drilling

(b) Species to be used: Agropyron Cristatum (Crested Wheatgrass)

(c) Seeding rate to be used (lbs. viable seed/acre): 7#/acre.

(d) Period seeding or planting permitted: Sept. 15 to Dec. 31.

"Disturbance of authorized livestock use will be held to an absolute minimum.

"To qualify for an extension beyond the 2-year primary period will require at least one adequate test well by core drilling or comparable prospecting satisfactory to the Regional Mining Supervisor.

"For a preference right lease, proof of the discovery of a valuable deposit, by more than one drill hole or other acceptable prospecting methods, must be satisfactory to the Regional Mining Supervisor."

These provisions were formulated by the Utah State office of the Bureau of Land Management. In some particulars, *e.g.* species of grass to be used, seeding rate, and period of seeding, they reflect local conditions.

and associated minerals on lands in T. 11 S., Rs. 3 W, and 4 W., S.L.M., Utah.

The appellants contend in essence that the "General Requirements" are unreasonable. Therefore, they request that they be waived as a condition to the issuance of permits.

The appellants assert that (1) these requirements impose far more stringent controls than the decision by the Bureau of Land Management would indicate (2) section 12 of the basic permit form provides "all of the control necessary to protect the public interest", and (3) the requirements "* * * could conceivably be construed to require the reporting of every blade of grass encountered."

Section 12 [2] of the basic permit imposes a duty upon a permittee to safeguard the environment and other existing values and to restore the surface of the land to its former condition. The requirements, to which the appellant objects, contain specifics directed to the same goals, *e.g.*, no blasting is to be done within 500 feet of wells and springs, or within 300 feet of dams and reservoirs; and sets forth the method, species, seeding rate and period of seeding, for the purpose of revegetating cleared areas. In addition, they specifically interdict the removal, injury, defacing, or alteration of any object of scenic, historic, or scientific interest, including Indian archeological remains.

As indicated earlier, the appellants do not question the Department's authority to impose environmental and related requirements upon a mineral permittee. Their position is simply that the "General Requirements" are unnecessary and unduly onerous.

---

[2] Sec. 12 reads as follows:

"Surface use restrictions. (a) If any of the land is embraced in a reservation or is segregated for any particular purpose, permittee agrees to conduct all operations thereon in conformity with such requirements as may be made by the Bureau of Land Management and/or the agency administering the surface for the protection and use of the land for the purpose for which it was reserved or segregated, so far as may be consistent with the use of the land for the purpose of this permit, which latter use shall be regarded as the dominant use unless otherwise provided herein or separately stipulated.

(b) Permittee shall take such reasonable steps as may be needed to prevent operations from unnecessarily: (1) causing or contributing to soil erosion or damaging any forage and timber growth; (2) polluting the waters of springs, streams, wells, or reservoirs; (3) damaging crops, including forage, timber, or improvements of a surface owner; or (4) damaging range improvements whether owned by the United States or by its grazing permittees or lessees.

(c) Upon any partial or total relinquishment or the cancellation or expiration of this permit, or at any other time prior thereto when required or when deemed necessary by the Government, the permittee shall fill any sump holes, ditches, and other excavations, remove or cover all debris, and, so far as reasonably possible restore the surface to its former condition, including the removal of structures as and if required. The Government may prescribe the steps to be taken and restoration to be made with respect to lands of the United States and improvements thereon."

Those requirements, *inter alia*, put flesh on the skeletal provisions of section 12 of the permit form. They also impose additional stipulations reasonably calculated to protect the land, environment, and public values. Although the appellants make general assertions, they have not shown that any specific provision of the "General Requirements" is unreasonable. Their contention that the "General Requirements" "could conceivably be construed to require the reporting of every blade of grass encountered" is disconsonant with the following provisions:

> No *excessive* disturbance or removal of soil or vegetation will be permitted. (Italics supplied.)
>
> All areas cleared during the mineral exploration operations shall be seeded or planted as directed by the District Manager.

These requirements implicitly recognize that land may be denuded in the exploration process.

We have reviewed carefully the provisions of the "General Requirements" in the light of the appellants' contentions. We find no basis to conclude therefrom that such requirements are unnecessary, unreasonable, arbitrary, or unduly onerous. On the contrary, such requirements are reasonably related to the environmental ethic of this Department and to the obligations of this Department under the National Environmental Policy Act of 1969 (83 Stat. 852), 42 U.S.C. secs. 4331–47 (Supp. V, 1969). The latter essentially states that every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment.

The appellants' contention that the "General Requirements" are not "* * * necessary to protect the public interest" in their view. It is the Department's responsibility to make that determination.

Having found that the "General Requirements" in the light of this appeal are appropriate and reasonably related to the activities authorized under the mineral permits sought, we see no basis to disturb the decision below.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the Bureau of Land Management is affirmed.

FREDERICK FISHMAN, *Member.*

We concur:

JOAN B. THOMPSON, *Member.*

ANNE POINDEXTER LEWIS, *Member*

U.S. GOVERNMENT PRINTING OFFICE: 1971

UNITED STATES
v
WAYNE WINTERS d/b/a PIEDRAS DEL SOL MINING COMPANY

IBLA 70-43 *Decided June 2, 1971*

Mining Claims: Discovery: Generally

The prudent man test of discovery of a valuable mineral deposit does not require present profitable mining operations, but it does require evidence of sufficient mineralization to justify a prudent man in expecting to develop a valuable mine with profits from sales over the expected cost of the operation, and the claimant's unfounded conjecture that the price of gold will increase in the future is not a relevant consideration.

Mining Claims: Discovery: Generally

In a mining claim contest, a showing of mineralization which might justify further exploration for minerals but not development of a mine is not sufficient to satisfy the prudent man test.

Mining Claims: Hearings—Rules of Practice: Evidence—Rules of Practice: Hearings

Evidence tendered on appeal in a mining contest case may not be considered except for the limited purpose of deciding whether a further hearing is warranted, since the record made at the hearing must be the sole basis for decision.

Administrative Procedure Act: Burden of Proof—Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally

Government mineral examiners determining the validity of a mining claim need only examine the claim to verify whether the claimant has made a discovery; they are not required to perform discovery work, to explore or sample beyond the claimant's workings, or to rehabilitate alleged discovery cuts to establish the government's prima facie case.

Administrative Procedure Act: Burden of Proof—Mining Claims: Contests—Mining Claims: Discovery: Generally—Rules of Practice: Evidence

In a government mining contest, where the contestant has made a prima facie showing of lack of discovery, the burden of producing preponderating evidence of the existence of a valuable mineral deposit sufficient to support a discovery is upon the claimant, and he cannot secure a determination that the claim is valid merely by attempting to discredit and impeach the government's witnesses.

Mining Claims: Discovery: Generally—Mining Claims: Hearings—Rules of Practice: Evidence—Rules of Practice: Hearings

New evidence tendered on appeal is not sufficient to justify further evidentiary proceedings, although it might discredit testimony by government

438-307—71——1

mineral examiners that two of their samples of a placer mining claim were taken to bedrock, where there is no tender of proof showing that the alleged greater mineral values at bedrock actually exist and the record does not show evidence of sufficient gold to warrant a prudent man to anticipate development of a valuable mine.

BOARD OF LAND APPEALS

Wayne Winters, d/b/a Piedras Del Sol Mining Company, has appealed to the Secretary of the Interior from a decision by the Office of Appeals and Hearings, Bureau of Land Management, affirming a hearing examiner's decision of August 13, 1968, holding Winters' Oro Escondido placer mining claim null and void for lack of discovery of a valuable mineral deposit.

The mining claim was located October 13, 1962, embracing the SE¼SE¼SE¼ sec. 19, T. 23 S., R. 11 E., G. & S.R. Mer., Arizona, within the Coronado National Forest. Contest proceedings were initiated at the request of the Forest Service. The decisions below concluded that insufficient gold was shown within the claim to warrant a prudent man to further expend time and money with the expectation of developing a valuable mine, *Castle* v. *Womble*, 19 L.D. 455, 457 (1894).

Appellant does not dispute the "prudent man test," which has been approved by the Supreme Court. *Chrisman* v. *Miller*, 197 U.S. 313 (1905); *Cameron* v. *United States*, 252 U.S. 450 (1920); *Best* v. *Humboldt Mining Company*, 371 U.S. 334 (1963); and *United States* v. *Coleman*, 390 U.S. 599 (1968). He contends, however, that the Bureau applied the test too stringently to the facts. He asserts that the Bureau is requiring the claimant to prove that a profitable mine will be developed and that this is not required. Appellant contends generally that the Bureau decisions deny him due process by merely advocating administrative policies rather than being supported by record evidence. He also asserts that the Forest Service failed to establish a prima facie case that there was not a valid discovery, and that he proved by preponderant evidence that a valid discovery was made.

On March 3, 1971, on appellant's motion, oral argument was presented to this Board. It was argued on behalf of appellant that the Government's expert witnesses were incompetent to testify with regard to the conduct of a prudent man in these circumstances; that they were not qualified experts on placer gold mining; that they were biased and neither diligent nor impartial in the taking of samples; and that, consequently, their testimony was inadequate to establish a prima facie case of invalidity. It was also argued that ample evidence of a valid discovery was adduced at the hearing. Counsel for the contestant presented argument in rebuttal.

The main thrust of appellant's case is an effort to discredit the testimony by the Forest Service's witnesses. Appellant contends that the Forest Service mineral examiners gave false testimony concerning their taking of samples to bedrock. He further adverts to the testimony tending to show that the samples were taken, handled and processed in such a manner as to lose much of their gold content. Accordingly, he argues that no weight can be given to any of their testimony and that the Government thus failed to establish a prima facie case. In support of this contention, appellant on appeal submitted an affidavit from Verne C. McCutchan, State of Arizona mine inspector, and two photographs identified as sample nos. 3553 and 3556. He alleges that this affidavit proves the Forest Service witnesses failed to sample to bedrock on those sample cuts, contrary to their testimony at the hearing.

Appellant's argument, supported by the aforementioned affidavit and photographs, raises a real doubt that samples 3553 and 3556 were cut to bedrock, and are, therefore, representative of values which might otherwise have been disclosed. However, it is not the responsibility of the Government mineral examiners to do the discovery work, to explore or sample beyond the claimant's workings, or to undertake to rehabilitate alleged discovery cuts. It is the duty of the claimant to keep such discovery points available for inspection. *United States* v. *Lawrence W. Stevens*, 76 I.D. 56 (1969); *United States* v. *Thomas C. Wells*, A–30805 (January 8, 1968).

Even assuming that the mineral examiners did not sample the two cuts to bedrock, this is insufficient to show their testimony as to the other samples and their overall evaluation of the claim was in error and must be disregarded. To the contrary, such evidence was admissible and, standing unrefuted, must be accorded significant weight.

Where a Government mineral examiner offers his expert opinion that discovery of a valuable mineral deposit has not been made within the boundaries of a contested claim, a prima facie case of invalidity has been made, provided that such opinion is formed on the basis of probative evidence of the character, quality and extent of the mineralization allegedly discovered by the claimant. Mere unfounded surmise or conjecture will not suffice, regardless of the expert qualifications of the witnesses. But an expert's opinion which is premised on his belief or hypothetical assumption of the existence of certain relevant conditions, if evidence is presented that those conditions do exist, is sufficient to establish a prima facie case and to shift the burden of evidence to the contestee. The admissibility of expert testimony in a mining claim contest is determined by the hearing examiner, who exercises a wide latitude of discretion in making these determinations.

Concerning appellant's assertion that the Government mineral examiners were not competent to testify with respect to the prudent man test, we observe that such is not a new or novel assertion. In fact, appellant's attorney presented the same line of argument in *Snyder* v. *Udall*, 267 F. Supp. 110 (1967), to the United States District Court, District of Colorado, and was obviously persuasive. However, the Court of Appeals reversed, specifically rejecting the notion that witnesses with essentially the same qualifications as those in the instant case were not competent to testify with respect to the prudent man test. *Udall* v. *Snyder*, 405 F. 2d 1179 (1968), *aff'd on rehearing en banc* (10th Cir. 1969).

Appellant contends that the Government examiners' calculations and estimates of value of the claim are erroneous. He refers to their estimate of 5,500 cubic yards of channel gravel within the claim. This computation was based not upon measurements from the two sample cuts which affiant states were not to bedrock, but on measurements of samples, numbers 3550, 3555 and 3551, from which estimates of width and thickness of the material above the bedrock, width of the channel gulch, and an average thickness of the gravel were derived. Not only does the affidavit fail to show these measurements and computations to be erroneous, but the record discloses no direct refutation of them. At most, one of appellant's witnesses testified that in order to determine an exact alluvial deposit there should be adequate test holes drilled. This is the type of work which a claimant should do to establish discovery. There is no evidence he made such tests. In the absence of evidence to establish a more accurate estimate of the quantity of gravel, we cannot conclude that error has been demonstrated in the Forest Service's estimation. In fact, in some respects their measurements coincide closely with some estimates given by appellant's witnesses.

Appellant contends that because of failure of the Forest Service mineral examiners to sample to bedrock on sample cuts 3553 and 3556, their calculations of a weighted average of 27.1 cents per cubic yard of gravel is grossly insufficient and in error. While the weighted average of all the samples might thereby have been reduced, the values ascribed to the other individual samples are not affected. Moreover, we note that the weighted average of 27.1 cents per yard is in fact a grossly inflated figure. It was provided by the contestant's witness in response to cross-examination and premised upon the contestee's hypothetical assumption that (1) the weighted average reported by the examiners (17.9 cents per cubic yard) was calculated on the basis of only a 60 percent recovery of the gold from the examiner's samples and (2) that 100 percent of the gold could be recovered. On redirect the mineral examiner estimated that he recovered at least 90 percent of the

gold from the samples. Disregarding the evidence of values found in sample numbers 3553 and 3556, the other samples taken yielded the following values:

#3550	$0.122
#3551	0.459
#3552	0.181
#3554	0.190
#3555	Assay report inconclusive
#3572	0.111
#3573	0.102
#3574	0.106

One of the contestant's expert witnesses testified that to move a yard of gravel in a small area by mechanical means and put it in a hopper of some sort for processing would cost about 40 cents. His opinion was that an operator on this claim would lose money on just the transportation of placer material to the hopper for processing.

Upon reviewing the record and hearing oral argument we find no error in the application of the prudent man test to the facts of this case. The test requires evidence of sufficient mineralization to support a reasonable expectation that a valuable mine might be developed and a profit made from sales over the reasonable cost of a mining operation. *See Adams* v. *United States*, 318 F. 2d 861, 870 (9th Cir. 1963).

The testimony of the Forest Service's witness as to their examination of the workings of the claims, their estimates of the quantity of mineral, the low value of gold shown by assays of samples taken from the workings, costs of mining operations, together with information showing that the area had produced little gold over a long period of time, and their opinions that a prudent man would not expect to develop a profitable mine, adequately established a prima facie case that there was not a valid discovery of a valuable mineral deposit.

The burden of presenting a preponderance of evidence to show a valid discovery developed upon the contestee upon presentation by the Government of a prima facie case. *Foster* v. *Seaton*, 271 F. 2d 836 (D.C. Cir. 1959); *United States* v. *Frank Coston*, A–30835 (February 23, 1968). Had appellant succeeded in totally destroying the credibility of all of the evidence adduced by the contestant he would not thereby have been entitled to a finding that the claim was valid. Absolute impeachment of the Forest Service witnesses would merely have negated the prima facie case and supported a motion for dismissal of the contest. No such impeachment was accomplished in this case. Accord-

ingly, our next concern is whether contestant's prima facie case was overcome by the evidence adduced by contestee.

We agree with the findings in the decision below that appellant failed to show by a preponderance of evidence that there was a valid discovery. Appellant's witnesses offered their opinions that a valuable mine might be developed. However, these statements were not corroborated by specific evidence of positive mineral values or that such minerals could be extracted profitably. For example, appellant testified that there was $5,000 worth of gold in a gravel bar on the claim, which he thought would increase substantially in value by the time he retired from his present employment of editing a newspaper, when he expected to do most of the mining of the claim. His unfounded conjecture that the price of gold may greatly increase in that time is not a relevant consideration here. See *United States* v. *Estate of Alvis F. Denison*, 76 I.D. 233 (1969). Nor did he offer any specific evidence to corroborate his estimate of the present value of the deposit.

The decisions below correctly concluded that although there may be evidence showing mineralization which might warrant further exploration, this is not sufficient under the prudent man test, which requires enough evidence to justify development of a mine.

Appellant argues, in effect, that the word "exploration," when used to describe activity on a mining claim, is not automatically and invariably fatal to the claim's validity. He contends that the testimony of one of his witnesses, which the Bureau interpreted as showing only that further exploration is warranted, actually described the type of work indicated after discovery is made, as pointed out in *Converse* v. *Udall*, 399 F. 2d 616, 620 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969); see *Lange* v. *Robinson*, 148 Fed. 799 (9th Cir. 1906) and *Charlton* v. *Kelly*, 156 Fed. 433 (9th Cir. 1907). The latter two cases are not in point. They involved private contests between conflicting mining claimants. In such cases the burden of proof is less than the burden upon a mining claimant when the contestant is the Government, as *Converse* indicates at pages 619, 620.

We agree that a mere reference in testimony to a need for further "exploration" is not, of itself, determinative of an absence of discovery, but must be considered in the proper context and in the light of the other evidence adduced. Here the contestee's witnesses indicated that test holes should be drilled throughout a channel area in order to adequately measure the quantity of material. This was not done by the appellant. It is further argued that it must be assumed that the claim will contain greater values of gold than shown by the Forest Service witnesses, because there are greater values of placer gold to be found at bedrock. As stated by the Court of Appeals for the Ninth

Circuit in *Henault Mining Company* v. *Tysk*, 419 F. 2d 766, 770 (1969), *cert. denied*, 398 U.S. 950 (1970), "A reasonable prediction that valuable minerals exist in depth will not suffice as a 'discovery' where the existence of those minerals has not been physically established."

Even assuming the accuracy of the new matter tendered on appeal, appellant has failed to show the existence of gold within the claim in quantities sufficient to satisfy the prudent man test. If, as appellant contends, there were greater values of gold at bedrock missed by the Forest Service witnesses in their sampling, he could easily have offered evidence of his own sampling to bedrock and assay reports showing the alleged greater values. This he has totally failed to do. The one sample alluded to at the hearing by appellant's witnesses was not described clearly, nor was the assay information sufficient to support the value claimed. There was nothing to show that its alleged high value was representative of values to be found throughout the claim. Therefore, it alone does not establish the existence of a valuable mineral deposit. See *United States* v. *August Herman*, 72 I.D. 307 (1965).

In the absence of more substantial proof, and especially in the absence of proof tending to show the existence of gold within the claim in sufficient quantities to justify a prudent man to expend further time and money with the expectation of developing a valuable mine, nothing would be gained by further evidentiary proceedings in this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

EDWARD W. STUEBING, *Member.*

WE CONCUR:

NEWTON FRISHBERG, *Chairman.*

FRANCIS E. MAYHUE, *Member.*

RELIABLE COAL CORPORATION

IBMA 71-3 *Decided June 10, 1971*

Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders

Where the Bureau finds that a violation charged in a notice issued under section 104(b) or (i) of the Act is totally abated, an application to review such notice under section 105(a) is subject to dismissal.

BOARD OF MINE OPERATIONS APPEALS

In these proceedings, Reliable Coal Corporation (Reliable) seeks review of two Notices of Violation issued pursuant to section 104 (b) and (i) of the Federal Coal Mine Health and Safety Act of 1969.[1] The matter is before the Board on appeal by Reliable[2] from separate orders by the Chief Hearing Examiner[3] which: (a) granted motions of the Bureau of Mines (Bureau) to dismiss each of the proceedings; (b) denied Reliable's Motion for Proceeding to be Held in Abeyance in HOPE 71-50; and (c) dismissed Reliable's applications for review. For purposes of this appeal, we have consolidated the proceedings. The parties filed timely briefs and oral argument was heard by the Board on April 13, 1971.

Statement of Facts

Docket No. HOPE 71-50

On September 16, 1970, an inspector of the Bureau served Notice of Violation No. 1 at Reliable's Masontown Mine, charging a violation of the mandatory health standard set forth in section 202(b)(1) of the act in that the cumulative concentration of respirable dust in mine section 001 exceeded 3.0 milligrams per cubic meter of air. The Notice ordered that the condition be totally abated by October 16, 1970. Under date of October 7, 1970, the inspector issued a Notice of Penalty advising Reliable that by virtue of the violation cited in Notice No. 1 it was subject to a penalty not to exceed $10,000. On October 2, 1970, Reliable filed an Application for Review of Notice No. 1, pursuant to section 105(a) of the act, which, *inter alia*, denied the existence of the violation cited in the notice for the alleged reason that the Bureau's computations derived from dust samples were incorrect. On October 12, 1970, a notice of total abatement was issued by the inspector on the basis of a special inspection of the mine.

Docket No. HOPE 71-66

On October 7, 1970, an inspector of the Bureau served Notice of Violation No. 3 at Reliable's Kanes Creek Mine, charging a violation of the mandatory safety standard set forth in section 306(d) of the act in that four temporary splices were found in the trailing cable of a continuous miner and three temporary splices in the trailing cable of a shuttle car. The notice ordered that the condition be totally

[1] Sections of the act cited herein as 104, 105, 106, 109, 202 and 306 are to 83 Stat. 742, and are respectively, sections 814, 815, 816, 819, 842 and 866 of 30 U.S.C. (Supp. V, 1970).

[2] Although filing separate notices of appeal in each case, Reliable filed but a single brief in support. Likewise, the Bureau filed but a single brief in opposition.

[3] The order in each case is captioned by the Examiner: "Application for Review Dismissed."

abated by October 12, 1970. Coincident with the issuance of Notice No. 3, the inspector also issued a Notice of Penalty advising Reliable that by virtue of the violation cited in Notice No. 3, it was subject to a penalty not to exceed $10,000. On October 13, 1970, following a special inspection of the mine, the inspector issued a notice of total abatement. On November 5, 1970, Reliable filed an Application for Review of Notice No. 3 under section 105(a) of the act, alleging that the statutory requirement was unreasonable.

In response to the filing of each Application for Review, the Bureau moved to dismiss the proceeding on the basis that the conditions which gave rise to the issuance of each of the notices had been timely and totally abated. The Bureau's motions to dismiss were opposed by Reliable. Reliable also moved that the proceeding in HOPE 71–50 be held in abeyance pending the outcome of such proceedings as might be instituted by the Bureau under section 109 of the act with respect to the Notice of Penalty issued in connection therewith. On February 5 and 9, 1971, the Examiner separately ordered the applications for review dismissed. On February 5, 1971, Reliable received a Proposed Order of Assessment from the Bureau's Assessment Officer proposing a civil penalty in the amount of $100 for the violation cited in HOPE 71–50.[4]

Issue Presented for Review

Whether in a section 105(a) proceeding an application to review a notice issued pursuant to section 104 (b) or (i) of the Act is subject to dismissal where the violation charged in such notice has been totally abated.[5]

Ruling of the Board

We hold that where the Bureau finds a violation charged in a notice issued under section 104 (b) or (i) of the act to be totally abated, an application to review such notice under section 105(a) is subject to dismissal.

The Bureau's Motions to Dismiss and its contentions here are based upon our opinion in *Freeman*, issued on October 5, 1970.[6] In the proceedings below, the Chief Examiner concluded that he was constrained by *Freeman* to grant the Bureau's Motions to Dismiss, holding that a notice of violation was not reviewable where the violation had been abated.

Reliable also seeks to find in *Freeman* authority for its contentions that its applications for review should not be dismissed. In addition

[4] Issued pursuant to 30 CFR, Part 100 (36 F.R. 779–780), effective January 16, 1971.
[5] As used herein, the term "abated" or "abatement" means that the Bureau has unequivocally found the violation charged in the notice to be totally abated.
[6] *Freeman Coal Mining Corporation*, 77 I.D. 149 (1970).

to its reliance on our rulings in *Freeman*, Reliable asserts a statutory right of review under section 105(a), and further argues that if the Examiner's orders of dismissal are permitted to stand a precedent will be established whereby: (a) a possibility of vacating or withdrawing invalid notices prior to proceedings for the assessment of penalties would be eliminated; (b) an operator would be required to "trudge up the procedural hill" in more than one set of proceedings in order to exhaust its administrative remedy; and (c) an operator's rights of judicial review would be curtailed or delayed.

We do not believe that Reliable has construed properly the meaning of our rulings in *Freeman;* nor do we believe Reliable's arguments on its other points of contention are sound. We deal first with the *Freeman* rulings.

I. *Meaning of Rulings in Freeman*

We should first point out that at the time of the *Freeman* appeal there was considerable uncertainty concerning assessment procedures created by the *Ratliff* injunction.[7] That injunction has since been dissolved and new procedures for the assessment of civil penalties have been established by the Secretary (footnote 4 *supra*) and made applicable to each notice of violation and withdrawal order issued on or after March 30, 1970. The new rules provide that formal adjudication procedures are instituted in the Office of Hearings and Appeals only after the informal procedures therein set forth have been exhausted. As a consequence of the new assessment procedures, the Board, by Order of February 1, 1971, stayed all penalty proceedings then pending in the Office of Hearings and Appeals in order to permit all parties equal access to the new informal procedures, or if they so elected, to protest and file a request for formal adjudication.

The appeal in *Freeman* was interlocutory and involved eight violations, only one of which had been totally abated. Although we were there concerned with a somewhat different factual and procedural problem than here obtains, our rulings under the first and fourth issues in *Freeman* are relevant to the arguments in this case.

"*Seeking of a penalty.*" Under the first issue in *Freeman* case, *supra*, at page 156, we held that "where the Bureau finds a violation charged under section 104(b) to be totally abated *and does not seek the assessment of a penalty based on the violation charged in the notice*, there is no issue appropriate for review by this board. * * *" (Italics added).

Reliable contends that inasmuch as it had received a Proposed Order of Assessment from the Bureau's Assessment Officer, based on the violation charged in Docket No. HOPE 71-50, the Bureau clearly is

[7] *Ratliff* v. *Hickel*, Civil Action No. 70-C-50-A (W.D. Va., filed April 23 and 30, 1970).

seeking the assessment of a penalty in that case and that, in any case, exposure to such assessment removes it from our holding under the first issue in *Freeman*. We do not think so. The clause "* * * and does not seek the assessment of a penalty * * *." in our first holding in *Freeman*, *supra*, was included because it was a fact unique to that case. The Bureau was not seeking the assessment of penalties for any of the eight violations there involved. As a result of the doubt cast by *Ratliff* on all penalty proceedings pending at the time of the *Freeman* appeal, we thought it best, in remanding to the Examiner, to preserve the rights and position of the parties there involved with respect to that question. Therefore, the element of "seeking of a penalty" was not a controlling factor in our ruling on this issue. Under present procedures, and as a general proposition, we see no reason why the institution of assessment proceedings is required for the holding of review proceedings under section 105(a) of the act. We think it sufficient if the Bureau has unequivocally found that a violation has occurred, and if there exists an issue as to the reasonableness of time allowed to abate. Section 109(a)(1) directs that an operator who violates a mandatory standard or any other provision of the Act, except provisions of Title IV, *shall* be assessed a civil penalty. In *Freeman*, it appeared that there was nothing left to be decided in the proceedings before the Examiner as to the violation which had been abated, and we therefore held that the Bureau's motion to dismiss the application as to that violation should have been granted. We remain of that view.

"*Fact of Violation.*" With respect to the fourth issue in *Freeman*, we held, at page 164, that the scope of review of notices issued pursuant to section 104(b) must relate to determination of a reasonable time for abatement. Also, at page 164 therein, we stated that—

> We accept, at least for purposes of the issues presently before us, the proposition that *any time for abatement is an unreasonable time if no violation exists.* Hence, the truth of the Bureau's allegations of violation, and the legal sufficiency of the facts claimed to constitute a violation, may be challenged by an applicant seeking review of a section 104(b) notice. These same issues are, of course, fully reviewable in any proceeding in which the Bureau seeks the assessment of a penalty based on a section 104(b) violation. We note that the Act itself nowhere expressly precludes review of the fact of violation *as an element of the reasonableness of time for abatement* in a section 104(b) notice. (Italics added)

Reliable contends that the above statement has the effect of a ruling that an applicant, although the violation has been abated, has the option of having the "fact of violation" determined either in a section 109 or a section 105(a) proceeding. Again, we cannot agree.

Holding, as we have, that the scope of review of notices *must relate* to determination of a reasonable time for abatement, the above statement in *Freeman* simply recognized that, in a proper case, one of

the possible bases for a contention by an operator that the time allowed for abatement is unreasonable is that the violation did not occur. A proper case for review under section 105(a) would be one where the violation is unabated. If, however, the violation has been timely abated, there no longer exists an issue appropriate for review under section 105(a). In such case, the "fact of violation" would be determined in penalty proceedings. Thus, where the violation has been abated, an applicant does not have an option of having the "fact of violation" decided either in a section 105 or a section 109 proceeding. This issue will be decided in one or the other proceedings, but not at the option of the applicant. Section 109(a)(3) *requires* the Secretary to determine that a violation occurred before assessing a penalty; whereas section 105(a)(1) contains no such specific requirement, but, in contrast, limits review of a notice to the time fixed for abatement.

II. *Statutory Right of Review under Section 105*

Our examination of the legislative history of the Act convinces us that there must be present the question of whether the abatement time specified in the notice is reasonable in order for a notice to be reviewable under section 105(a). We call attention particularly to the Statement of the Managers on the Part of the House, appearing at page 69 of the Legislative History,[8] dealing with sections 104 and 105 as follows:

Section 104

4. * * * The conference agreement adopts the House amendment with some modifications. Under this provision, if, based on samples taken, analyzed, and recorded as provided in section 202(a) or, based upon an inspection, the respirable dust standard is exceeded, the inspector, during an inspection, or some other delegate of the Secretary, without an inspection, must issue a notice of violation and fix a reasonable time to abate the violation. The conference agreement does not place a time limit here but parallels the procedures followed in the case of notices for other health or safety violations under section 104(b). Also, it does provide, in section 105(a), *for review solely of the reasonableness of the time fixed in this notice and other notices issued under section 104* of violations of the health and safety standards on application by the operator or the representative of the miners. The Secretary or the court cannot stay the application of such notice *while the time fixed is being reviewed.* (Italics added)

Section 105

1. The Senate bill and the House amendment each contained provisions under which all withdrawal orders issued under the act may be reviewed by the Secretary, except orders issued under section 104(h) which provides separate procedures for review. *The conference substitute adopts these provisions with technical changes and with the modification referred to above under which an operator who is issued a notice pursuant to section 104(b) or (i) or the represent-*

[8] Conference Report, Statement of the Managers on the Part of the House, H.R. Rep. No. 761, 91st Congress.

ative of the miners at the mine may obtain a review of the notice if he believes that the period of time fixed for the abatement of the violation is unreasonable. * * * (Italics added)

In light of the foregoing, we find no merit in Reliable's contention that the inter-relationship of the statutory provisions of sections 104, 105(a)(1) and 109(a)(3), supports its view that an operator has a statutory right of review of the "fact of violation" in a section 105(a) proceeding. As we interpret these provisions of the act, and as we held in *Freeman*, the Act does not *preclude* a determination of this issue in a section 105(a) proceeding where it is raised as an element of the reasonableness of time allowed for abatement. Indeed, in such case, a decision under section 105(a) on the issue of reasonableness of time must inherently incorporate a determination that the violation did or did not occur—and such determination, if final, would be *res judicata* within the Department. Thus, the "fact of violation" would not be litigable in more than one administrative proceeding. But where a violation has been abated, we can only conclude that the Congress intended that any challenge to the "fact of the violation" be made in a section 109 proceeding. In sum, we agree with the Bureau that an applicant does not have a statutory right of Secretarial review of the naked "fact of violation" in a section 105(a) proceeding.

III. *Consolidation of Section 105(a) and Section 109 Proceedings*

Reliable has requested in the alternative that we reverse the Examiner's ruling, in Docket No. HOPE 71–50, which denied its motion that proceedings in that case be held in abeyance until penalty proceedings are instituted, so that a consolidated hearing may be held pursuant to subsection (a)(3) of section 109 of the act. The pertinent provision of subsection (a)(3) is: "* * * Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title." * * * This is not an appropriate case for consolidation of hearings. We are in full agreement with the Examiner and the Bureau that the holding in abeyance of the instant 105(a) proceeding would serve no purpose. As we see it, only in situations where there are pending before the Hearings Division both the issue of reasonableness of time allowed to abate and the issue of penalty assessment, arising out of the same violation or violations, would it be appropriate to consolidate hearings on these issues. In such event, a motion to consolidate, or to schedule hearings on these issues on the same date, for administrative ease or convenience of the parties, may be appropriate.[9] However, where the violation has been abated, either

[9] "(a) The contractor shall promptly, and before such conditions are disturbed, notify party; whereas the parties to a section 109 proceeding are the Bureau and the party against whom the penalty is sought.

within the time specified in the original notice, or as extended by subsequent notice, the reasonableness of time allowed for abatement is no longer an issue. At such point, the bare issue of the "fact of violation" is relevant only in a proceeding for assessment of penalty—where the Bureau clearly has the burden of proving that a violation did occur.

In ruling as we do, it is important to note that we concur fully in the Bureau's statement that dismissal of the applications herein in no way constitutes a finding of the existence of a violation, and that Reliable will be able to litigate this issue to the fullest extent in *any* future proceeding involving either the notices herein, or a different notice, in which a history of previous violations is relevant. In no case, therefore, do we see any advantage to an operator by staying a 105(a) proceeding where the only issue to be held in abeyance is whether the violation charged in the notice did or did not occur; nor do we see how Reliable can be prejudiced by dismissal. On the contrary, we think dimissal of such a proceeding is entirely proper and in keeping with section 105(c) of the act which directs that all review actions of the Secretary "* * * shall be taken as promptly as practicable, consistent with adequate consideration of the issues involved."

IV. *Administrative Review of Notices—Expedited Hearings—Invalid Notices*

In holding that an applicant's right of review under section 105(a) of notices issued pursuant to section 104(b) or (i) is limited to situations where the violation charged in the notice is unabated, we realize that any meaningful administrative review would have to take place within the time allowed by the Bureau for abatement. This is particularly significant since section 105(d) provides that no temporary relief shall be granted in case of a notice issued under section 104(b) or (i) of the act. In these cases, therefore, the Office of Hearings and Appeals is prepared, upon request, to provide an expedited hearing and speedy ruling, where need be, to forestall the issuance of an order of withdrawal if it is determined that no valid basis exists for issuance of such order. We go further and say that the Office of Hearings and Appeals stands ready to provide expeditious review in any case where irreparable injury may result and time is of the essence to any applicant seeking to exhaust his administrative remedy.

We appreciate Reliable's concern that, even though it may elect to protest the Assessment Officer's proposal and request formal adjudication under section 109, there may be considerable delay, due to the large backlog of cases, before the Bureau institutes such proceedings, and that such delay, in itself, may be prejudical to its rights to a fair hearing on the issue of the fact of violation. As we understand it, the

Bureau is now hastening these cases, particularly where an operator is challenging the fact of violation and requests an early hearing. If there is undue or unreasonable delay in prosecution of such cases, we recognize that such delay may be prejudicial and do violence to basic due process requirements for prompt and expeditious resolution of such proceedings, in which event remedial orders of an Examiner or this Board may be appropriate.

Furthermore, if there are cases where it clearly appears that a notice has been mistakenly issued or may be found, without the necessity of a hearing, to be fatally defective or invalid on its face, such notice should, of course, be withdrawn, canceled, or vacated at the earliest practicable point in the administrative process, notwithstanding the fact that an application for its review may also be subject to dismissal because the condition to which it relates has been abated. If such cases of patent invalidity are not rectified at the Bureau level, it is always within the power of an Examiner (or the Board) to issue rulings and orders to bring about a prompt, just, and practical disposition of the matter. Neither of the notices appealed herein appears to fall within this category.

For all of the above reasons, we do not believe that our decision here will adversely affect the rights of any party including those of the representative of miners, to administrative review of notices under section 105 of the act. On the contrary, we believe that it will result in a more orderly and expeditious procedure for all concerned in the administrative review of notices as well as in proceedings for the assessment of civil penalties.

V. *Rights of Judicial Review*

In reaching our decision on the issue before us, we have not been unmindful of the rights of judicial review provided in sections 106 and 109 of the act. By the terms of section 109, a U.S. District Court may determine *de novo* all relevant issues except issues of fact which were or could have been litigated before a court of appeals under section 106 of the act. If an applicant is barred from review of the "fact of violation" under section 105(a), this issue obviously could not be reviewed under section 106 before a court of appeals. Therefore, it would be fully litigable under section 109, along with all other relavant issues, in any appropriate U.S. District Court, and, upon request of the respondent, submitted to a jury. The decision of such district court would, of course, be reviewable by a court of appeals. On the other hand, direct review of Departmental decisions by a court of appeals under section 106 is not *de novo* and, pursuant to that section, the findings of the Secretary (Board) if supported by substantial

record evidence would be conclusive. Consequently, we do not believe our decision herein affects adversely any rights of judicial review. If anything, it would appear that a trial *de novo* in a district court on the "fact of violation" would afford a greater scope of judicial review of any agency decision of that issue. We think this result is in conformity and harmony with both the language and legislative intent of sections 104, 105, 106 and 109 of the act.

Conclusion

Wherefore, pursuant to the authority delegated to the Board of Mine Operations Appeals by the Secretary of Interior (211 DM 13.6; 35 F.R. 12081), the decisions and orders of the Chief Hearing Examiner dismissing the applications of Reliable are hereby affirmed.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

APPEAL OF JOHN M. KELTCH, INC.

IBCA-830-3-70 *Decided June 22, 1971*

Contracts: Construction and Operation: Changed Conditions

A claim for a first category changed condition is denied where a quick condition actually encountered in excavating for concrete drains did not differ materially from what the contractor could reasonably have expected to encounter from site examination and the contract indications of subsurface conditions.

Contracts: Construction and Operation: Changed Conditions

Even though appellant pleaded both a first and a second category changed condition, the Board decides the claim as a first category changed condition only since the contract contains accurate and sufficient indications of the subsurface conditions to be encountered citing as support therefor recent Court of Claims decisions.

BOARD OF CONTRACT APPEALS

This appeal presents a claim for equitable adjustment in the amount of $51,798.17 under the Differing Site Conditions [1] Clause of a Bureau

[1] "4. DIFFERING SITE CONDITIONS

"(a) 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 materially so differ and cause an increase or decrease in

of Reclamation contract for the placement of certain tile drains on the Columbia Basin Project in the State of Washington.

The contract called for the placement underground of three mainlines of 18-inch tile drain, with their subsidiary laterals, draining into an open drain. Appellant was low bidder, and commenced construction on May 26, 1969, at the outlet of the D266 mainline.[2] The description of the progress of construction and the site conditions encountered during construction as related here is drawn primarily from the testimony of John M. Keltch, appellant's President, given at a hearing held October 21, 22, and 23, 1970.

Appellant started excavation with his trencher at the outlet of the D266 line. Excavation proceeded smoothly to station 5+00 where the bottom of the trench became soft requiring overexcavation by backhoe and the addition of extra gravel [3] to station 6+03. Excavation by trencher again proceeded smoothly to station 19+00 where the bottom became exceptionally soft. Here about 150 feet of pipe was laid on grade in the evening, but in the morning some sections were a foot high and others a foot low. The Government authorized extra gravel. The cost of repair of the pipe is included in the claim.

At station 24+50, according to Mr. Keltch, water suddenly exploded up from the bottom of the trench to 3 or 4 feet above the pipe invert. The water was described as boiling up from below. The contractor managed, however, to get through this area by overexcavating and using large quantities of gravel with the Government paying for a yard of excavation for each yard of gravel used. In this manner the contractor proceeded to station 28+00.

At station 28+00 the contractor "just couldn't move." At this point a 7-foot caisson used for installing manholes disappeared during a lunch break, and was found later four feet below the invert of the pipe. Somewhere between 50 to 75 cubic yards of gravel were used trying to stabilize a stretch of 25 feet, but without success. Appellant shut the job down and dug a large deep ditch parallel to an earlier surface water drainage ditch in a vain attempt to reduce the water.

Appellant estimated that it would take 2 to 5 cubic yards of gravel per lineal foot of trench, using the backhoe, to stabilize the bottom of

---

the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

"(b) No claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in (a) above; provided, however, the time prescribed therefor may be extended by the Government.

"(c) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract."

[2] The three mainlines are identified as D266, D265 and D264.

[3] Additional graded filter gravel for this purpose was paid for by the Government at the unit price of $4.50 per cubic yard bid by appellant.

the trench. On his own initiatice Keltch called in John W. Stang Corporation, a firm specializing in dewatering equipment, for advice. Mr. O. D. Garrett, an employee of John W. Stang Corporation, water jetted three test holes at stations 33+00, 38+00 and 43+00, using 21 feet of 1½-inch pipe plus 40 inches of well point (30-inch screen) to a depth of 22 feet where he observed a change in the washings from a silty water bearing sand to a light sand and gravel. At station 38+00, after disconnecting the jetting hose, water ran freely from the top of the pipe which was about six inches above the ground surface. The water was clear and the flow was estimated at 10 gallons per minute. A 1½-inch pump brought the flow to 37 gallons per minute.[4] The test well at station 33+00 ran 20 gallons per minute and the well at 43+00 ran 25 to 30 gallons per minute when pumped.[5]

On the basis of these test-well results, on his own initiative, Mr. Keltch ordered a well-point dewatering system. A well point was installed every eight feet to a depth of 25 to 27 feet at 10 feet off the centerline of the trench. At first 125 well points were installed covering 1,000 linear feet, and were connected to an 8-inch header pipe with two 8-inch vacuum pumps. After a week of pumping, with the water 42 inches below the surface he put in 65 extra well points and added 500 more lineal feet with 85 well points. This system discharged 4,200 to 4,500 gallons per minute in a 1,000-foot section.

After pumping appellant adjusted his trencher so that more gravel could be used, and then excavated by trencher to the end of the line without difficulty. It was observed by Mr. Keltch that the most troublesome places were on high ground, that the water problem seemed to follow the ground contour. Ponded areas could be excavated by trencher with no trouble but high spots were very troublesome. It is agreed by both appellant and the Government that the problem was not caused by surface water.

The D265 line gave no problems. But on the D264 line, at station 2+50, there was "no bottom at all."[6] The Government instructed appellant to proceed according to specifications. Accordingly, using the backhoe, appellant excavated and laid about 10 feet of pipe using 50 to 60 cubic yards of gravel. Appellant then installed well points for 500 feet, skipped about 500 feet of high ground, and well pointed another 2,000 feet. The omitted 500 feet eventually had to be well pointed as well. In addition to the D266 and D264 mainlines, appellant also used well points to dewater the S-lateral on the D266 line.

Appellant conducted a pre-bid site examination. There were erosion ditches in the D264 and D266 mainline areas, water was observed

[4] This paragraph is based primarily on Mr. Garrett's testimony.
[5] Testimony of Mr. Keltch.
[6] Tr. 28.

seeping out of the ground in low areas giving rise to a good-sized stream. Areas of ponding were visible up to station 43+00, but never over 6-inches deep. The pre-bid examination was conducted around April 19–20, 1969, and after the irrigation season had commenced. These visible conditions were taken into consideration by appellant in preparing its bids.[7] The pre-bid observation of a sizable stream of running water derived from ground water, testified to by Mr. Keltch, and confirmed by Government witnesses, is itself direct evidence of the presence of hydrostatic pressure (which should more aptly be called hydrodynamic pressure).

Government testimony generally confirmed appellant's observations with respect to the actual site conditions. The Government undertook, however, to establish the cause or causes of the conditions observed. We think first, that the Government has adequately demonstrated that there was no artesian system in the geological sense of a body of water held under pressure by a confining impermeable stratum.[8] The record shows that the word "artesian" was used by appellant simply as a description of the fact that water rose above the surface of the ground in the test well points. Appellant's claim is based on a "quick condition in the trench bottom," [9] regardless of cause.

In this case, however, the cause of the observed phenomena is relevant to a determination of the question of the adequacy of the contract indications as to subsurface conditions. To phrase the question in another way, even though the contract nowhere expressly stated that the contractor would encounter "quick" conditions, was there enough information given so that the quick effect was reasonably foreseeable.[10]

The testimony of a Government witness has established to the satisfaction of the Board that the phenomena admittedly observed by Mr. Keltch resulted primarily from the high water table, acting in conjunction with the kind of material found in the trench. All of the ponding and free flowing water observed on the surface resulted from the high water table caused by irrigation.[11] There was no surface supply to the areas of the D264 and D266 drains, but there was a recharging subterranean passage of water as evidenced by the surface flow.[12]

---

[7] Tr. 158.

[8] Tr. 158.

[9] Tr. 277, 289. A quick condition is one where a mixture of soil and water has predominantly fluid qualities.

[10] It is an underlying assumption in all changed condition cases considered on their merits that the field condition was not in fact known or anticipated by the contractor. Evidence to the contrary would defeat the claim. See e.g. *Morrison-Knudsen Co.* v. *United States*, 170 Ct. Cl. 712, 720 ; 345 F. 2d 535, 539–540 (1965).

[11] Tr. 101, Government Exhibits 4A–4F, Tr. 107, 122.

[12] Tr. 139.

The "artesianing" effect noticed by both Mr. Garrett and Mr. Keltch was, according to uncontradicted Government testimony, simply a function of the downhill gradient of the recharging water table.[13] If there was no recharge and flow the "artesian" pressure effect would not have occurred.[14]

And, more importantly, Government witnesses adequately explained the observed bubbling up of sand and water in the bottom of the trench. According to the testimony of Government witnesses the condition at the bottom of the trench was a result of the head of water in the cut. The deeper the trench, with a water table at or near the surface, the greater was the pressure in the bottom.[15] Appellant's testimony support this explanation, as the principal difficulties with quick conditions were experienced in the high spots, where the depth of trench was greatest. When the water table was reduced almost 3½ feet by the well-point system, excavation proceeded without difficulty. In ponded areas, and on the D265 line where no difficulties occurred, the trench was not as deep with less associated water pressure.[16] These conditions would also occur in a flat and static water table.[17] On this record substantial evidence supports the conclusion that the quick condition which occurred at various spots on the D264 and D266 lines resulted from the depth of cut and associated high water table acting together in conjunction with the soil type.[18]

We now turn our attention to the contract, to describe and interpret the indications of subsurface conditions contained therein. This we do as an issue of law for decision by the Board, not as an issue of fact to be proved by a preponderance of expert testimony, or to be decided on the basis of appellant's failure to meet a burden of proof.[19]

Paragraph 36 of the Specifications[20] calls attention to water conditions. Most significant in this paragraph is the alert sounded as to

[13] Tr. 149–151, 159.
[14] Tr. 162.
[15] Tr. 171–172, 143.
[16] Tr. 228, 232, 120.
[17] Tr. 143.
[18] Tr. 201, 202, 106, 124, 241.
[19] *Foster Construction C.A. and Williams Bros. Co.* v. *United States*, Ct. Cl. No. 417–66 (decided December 11, 1970), 435 F. 2d 873.
[20] "*Water Conditions and Handling Water*

"a. General.—Some ground water, surface drainage, and irrigation water may be encountered during construction of the drains, and it is anticipated that flow of water will increase in the existing drainage facilities and tributaries proximate to the drains after about April 1 due to irrigation operations.

"Water table elevations and the dates on which water elevations were measured are indicated on the drawings. During the construction operations, the water table elevations may vary widely from those indicated on the drawings.

"The Government does not represent that the above information shows or describes completely the conditions which may be encountered in performing the work and the contractor must assume all responsibility for any deductions or conclusions which he may derive from such information.

"b. Handling water.—Where the excavation to be performed under these specifications

increased flows due to irrigation after April 1, and that during construction water-table levels may vary widely from those indicated on the drawings. Paragraph 36 certainly does not minimize water problems.

A second alert is sounded in Specification paragraph 41b(1).[21] It holds out the possibility of unstable trench bottoms, and prescribes a method for coping with the problem. The prescribed method was in fact used successfully, even if with difficulty, on the D264 mainline up to station 28+00 when it was unilaterally abandoned by appellant in favor of a well-point dewatering system.

Several contract drawings are relevant. These drawings are plan and profile drawings containing logs of the Government test borings along the trench alignments. Drawing 222–116–36493 portrays the D264 mainline. At station 2+50, the lower end of the drain where appellant found "no bottom at all," the depth of the drain pipe invert is shown as about 12 feet. The closest boring at Station PA 0+00 on the centerline of D264B lateral shows the soil at the trench bottom elevation (approximately 832.5 feet above sea level) to be "Fine sandy loam; dark brown; wet 8.0′–8.5′ saturated 8.5′–12.0′; severe caving 8.5′–12.00′; easy boring; no cementation; loose; nonsticky, nonplastic." [22] The November 7, 1968 ground-water surface is shown to be about at the invert of the D264B lateral where it connects with the D264 mainline at mainline station 0+84 not far from its outlet.

---

crosses or otherwise encounters ponds or pools of water or where excavation is performed in material below the ground water surface or in running water, the contractor shall provide for controlled drawdown of water during the progress of the work so that no damage will result to either public or private interests. The contractor's method of excavation and handling of excavated materials and method for control of drawdown of the water surfaces, including ground water surfaces, shall prevent drainout of bank storage at a rate that will cause significant sloughing of the banks, and shall prevent excavated or loosened material from washing downstream into the downstream waterways by any amount that in the opinion of the contracting officer, impairs the usefulness of the waterway.

* * * * * * *

"The contractor shall construct and maintain all necessary cofferdams, bulkheads, channels, flumes, or other temporary diversion and protective works; shall furnish all materials required therefor; and shall furnish, install, maintain, and operate all pumping and other equipment necessary to maintain the excavations in good order during construction. After having served their purpose, all cofferdams or other protective works shall be removed.

"c. Costs.—The costs of all work required by this paragraph shall be included in the prices bid in the schedule for excavation."

[21] The pertinent part of paragraph 41b(1) is as follows:

* * * * * * *

"Where in the opinion of the contracting officer, the character of the material in the bottom of a drain pipe trench is such as might cause unequal settlement, the unstable material shall be removed to such depth as may be directed and the additional excavation backfilled with graded gravel filter material."

[22] Drawing Sheet 222–116–36494.

Next, on the D264 mainline, at station PA 9+80, the soil at the pipe invert (about 11 feet below ground surface) is characterized as "Loaming Fine Sand: very dark grayish brown; saturated; fluid, severe caving; easy boring; no cementation; nonsticky; nonplastic." The water table surface is shown at about 1½-feet below ground surface as of November 7, 1968. At station PA 13+76, 24 feet to the left of the mainline, the soil at the invert depth of the pipe (10 feet below ground surface) is described as "Silt loam: Dark olive brown; saturated 10.0′–12.0′; easy boring; severe caving; loose, slightly sticky; nonplastic." The water table is shown essentially at ground surface during the summer months of 1968. The test boring at station PA 26+46, at 16 feet left of the D264 mainline shows the soil at the invert level of the pipe (about nine feet below ground level) to be a "Sandy loam: Light olive brown; saturated; severe caving; easy boring; loose; nonsticky; nonplastic." The water-table level during the summer months of 1968 is shown to be about three feet below ground surface. Finally, at the upper end of the D264 mainline the test hole at station PA 32+00 shows at the drain pipe invert (about nine feet below ground surface) the soil to be "Loamy Sand: very dark grayish brown; saturated; severe caving; easy boring no cementation; nonsticky; nonplastic; sand loam lenses 7.5′–11.0′." The water table surface as of November 7, 1968, stood about seven feet below ground surface. The D264 mainline profile shows drain pipe rise of about 23.5 feet over a distance of 3,325 feet.

The plan and profile for the D266 mainline includes five test boring logs.[23] The first, at station PA 5+60, at 10 feet left of the mainline, shown at the pipe invert depth of 10 feet below ground surface soil characterized as "Loam: olive brown; saturated 10.0′–12.0′; easy boring; severe caving; firm; nonplastic; slightly sticky." The water-table level as of the summer of 1968, stood about three feet below ground surface. Second, at station PA 9+74, 12 feet right of the mainline, at invert depth of about 7.5 feet, the soil is described as, "Fine Sandy Loam: Light olive brown; saturated 7.0′–14.0′; easy boring; severe caving; very friable; nonsticky, nonplastic." The water-table surface is shown for the summer months of 1968, at about 1½ feet below ground surface. Third, at station PA 17+00, on centerline, the log shows at invert depth of 11 feet, "Very Fine Sandy Loam: Brown, saturated; no caving; easy boring; no cementation; slightly sticky; nonplastic." The water-table level as of November 15, 1968, is shown at about three feet below ground level. Fourth, the log at station PA 25+06, on centerline, shows from top to bottom, "Loamy Sand: Dark brown; wet 0.0′–1.0′; saturated 7.0′–14.0′; slightly caving 0.0′–

[23] Drawing No. 222–116–36503.

3.0′; severe caving 3.0′–12.0′; easy boring; no cementation, very friable; nonsticky; nonplastic; sand lenses 7.0′–11.0′." The pipe invert is at 10 feet and the water table is shown at the ground surface on November 14, 1968. Fifth, at station PA 44+75, 50 feet left of certerline, the log shows at invert depth of about 8.5 feet, "Loamy Sand: Light yellowish brown; saturated 8.0′–10.0′; easy boring; severe caving; loose; nonsticky; nonplastic." The water-table level during the summer months is 2 to 2.5 feet below ground surface. The profile for the D266 mainline shows a rise of 47.35 feet over a distance of 4,500 feet.

Drawing No. 222–116–36510 contains one log pertaining to the D266–S lateral at station PA 8+00, on centerline. From top to bottom the test hole showed, "Fine Sandy Loam: Brown; moist 0.0′–2.0′; dry 2.0′–5.0′; moist 5.0′–6.0′; wet 6.0′–8.0′; saturated 8.0′–12.0′; slight caving; easy boring; no cementation; friable; nonsticky; nonplastic; sand lenses 3.0′–5.0′ and 6.5′–10.0′." No water surface was found after drilling on November 8, 1968. The pipe invert was at a depth of about nine feet. The profile shows a rise of 12 feet in a distance of 800 feet. At about station 4+50 the invert of the pipe is almost 16 feet below ground surface.

A comparison of contract indications of subsurface conditions with those actually encountered at those places where appellant experienced its difficulties on the D266 mainline (stations 5+00, 19+00, 24+50 and 28+00) shows a high degree of correlation between the two. Thus, at station 5+00 where the bottom became soft, the contract shows the pipe invert to be at about 10 feet, located in a loam with severe caving and easy boring characteristics, with an associated 7-foot water column. At station 19+00 where the bottom became exceptionally soft there is an invert depth shown of 10 feet, and extrapolated from the soil log at station 17+00, the soil at that depth would be either a saturated very fine sandy loam, or saturated gravelly sand with severe caving, under an 8-foot water column.

At station 24+50 where the water exploded up, the contract shows a 10-foot invert depth and the nearest test boring at 25+06 indicates a loamy sand with severe caving between 3.0′–12.0′. The water table is at the surface indicating a 10–foot column of water over the invert level. At station 28+00, where the appellant "just couldn't move," the contract shows a pipe-invert depth of at least 12 feet. The nearest log is again at station 25+06 and shows soil conditions as noted above.

On the D264 mainline, at station 2+50 there was "no bottom at all." At this point the contract shows an invert depth of about 12 feet. The ground-water elevation at station 9+80 is close to the surface, although at about station 0+84 it is at the pipe-invert level. Both water level readings are in November 1968, and do not necessarily reflect summer irrigation season levels, which we think would be higher.

Also, on the D264 line, between stations 7+50 and 12+50 (where appellant at first skipped using well points, but eventually had to dewater), the invert lies between 8 and 13 feet below ground surface. The November 1968 water level at station 9+80 was only a few feet below the surface. The soil at invert depth shows severe caving.

On the D266–S lateral, the invert of the pipe varies between 7 and 15 feet below ground surface. No water table is shown in November 1968, although the soil at invert depth is saturated and shows slight caving.

In conclusion, the contract indications are generally of water logged unstable soils at invert depths under a water column many feet in height which would be at its maximum during the period of contract performance. We conclude that the contract indications are such as to give ample forewarning of the kind of difficulties actually encountered in the field, and that the contract indications described and predicted with unusual precision the conditions actually encountered on excavation. In terms of Clause 4, Differing Site Conditions, we find no material difference between the subsurface conditions at the site and those indicated in the contract.

Even though appellant pleaded his case as either a first category changed condition, or as a second category changed condition, we have considered it as limited to a first category changed condition situation because of the large amount of data as to subsurface conditions included in the contract. This we believe to be the proper legal approach following the decision of the Court of Claims in *Foster Construction C.A. and Williams Bros. Co.* v. *United States*.[24] According to that case all that is necessary to place a claim into the first category is that there be enough of an indication on the face of the contract documents for a bidder reasonably to conclude that he would not meet the type of subsurface conditions actually met during performance.[25]

As subsequently elaborated in *Pacific Alaska Contractors, Inc.* v. *United States*,[26] the test for a successful claim is that there must be reasonably plain or positive indications that subsurface conditions would be otherwise than actually found, or stated otherwise, that there

[24] Note 19, *supra*.

[25] *Cf. Charles T. Parker Construction Co. and Pacific Concrete Co.* v. *United States*, Ct. Cl. No. 168–66 (November 13, 1970). "Under 'Category Two,' in contrast, the Government has elected not to presurvey and represent the subsurface conditions * * *." (Slip Opinion, p. 12).

[26] Ct. Cl. No. 294–67 (January 22, 1971), 436 F. 2d 461.

were indications which induced reasonable reliance by the successful bidder that subsurface conditions would be more favorable than those encountered. In the present case, we conclude that the contract indicates substantially and accurately the subsurface condition actually encountered. There was adequate information in the contract from which appellant could have reasonably foreseen the situation encountered.

Furthermore, the pre-bid site examination observation of substantial flowing water along the drain alignments substantiated the contract indications of a most difficult combination of soil and water conditions. Appellant's evidence does not show that the subsurface data placed in the contract by the Government were erroneous.[27]

Appellant also argues that the Government failed to disclose to bidders pertinent information in its possession, with the consequence of misleading the bidders as to subsurface conditions. We find no merit in this contention. Apparently the Government had a project-wide water table map, reflecting an underground reservoir.[28] But the testimony shows that the "reservoir" alluded to is merely the fact that the soil below the water-table surface is saturated. It seems to us that such a map would reveal no more about the construction area than already revealed in the contract and apparent on pre-bid visual inspection of the site. There is also testimony that the drawings and specifications disclosed all that the Government knew about water in the area.[29]

Lastly, the appellant asserts prejudice because the Government failed to disclose to bidders that it foresaw a water and soil problem of the severity encountered.[30] The accusation here is that the Government did not make known conclusions which its personnel may have drawn from the data presented in the contract. Apart from the ambiguity of the testimony as to the pre-bid existence of such conclusions, it is clear that no factual data was withheld, only conclusions drawn from the same data as were presented to bidders. We do not think that *Helene Curtis Industries, Inc.* v. *United States*,[31] involving a prejudicial failure to disclose facts, requires the Government to disclose its opinions.

---

[27] *D. J. McQuestion and Sons* v. *United States*, Ct. Cl. No. 335–67 (March 19, 1971).
[28] Tr. 236–237.
[29] Tr. 175.
[30] Tr. 175–176.
[31] 160 Ct. Cl. 437 (1963).

Conclusion

The appeal is denied.

ROBERT L. FONNER, *Member.*

WE CONCUR

WILLIAM F. MCGRAW, *Chairman.*

RUSSELL C. LYNCH, *Member.*

C. ARDEN GINGERY, MICHIKO SHIOTA (GINGERY)

IBLA 70-6 *Decided June 23, 1971*

Act of August 11, 1916—Desert Land Entry: Generally—Reclamation Lands: Acquisition and Disposal

Where an irrigation district acting pursuant to the Smith Act of August 11, 1916, has enforced its lien against public land in an unpatented desert land entry and has sold the land at a tax sale, the rights of the entryman and his successors are terminated and the rights of the purchaser are determined by the Smith Act.

Desert Land Entry: Generally—Reclamation Lands: Inclusion and Exclusion of within Irrigation District—Withdrawals and Reservations: Reclamation Withdrawals

Land within a desert land entry included in an irrigation district does not become subject to a later reclamation withdrawal so long as the entry subsists.

Act of August 11, 1916—Desert Land Entry: Generally—Reclamation Lands: Generally—Words and Phrases

"Irrigation Works" and *"Water of the district available for such land."* For the purpose of determining whether entered but unpatented land can be disposed of pursuant to section 6 of the Smith Act of August 11, 1916, the "irrigation works" referred to in that section are not those necessary on an individual entry to carry out irrigation but refer to facilities that serve the irrigation district in general, and "water of the district available for such land" means only that the entryman has a legally enforceable claim to available water even though access to it is barred by a Departmental regulation.

Desert Land Entry: Relief Acts

One who has acquired his interest in a desert land entry by purchase in 1949 cannot purchase the entry under the provisions of the act of March 4, 1929, which authorizes purchases only by an assignee under an assignment made prior to March 4, 1929.

Desert Land Entry: Suspensions

Since the suspension of desert land entries under the policy announced in *Maggie L. Havens*, A-5580 (October 11, 1923), was subject to termination whenever the Secretary found good reason to do so, the Secretary is authorized, when he determines that there is no public purpose to be served by continuing the suspension of entries suspended for almost 50 years, to terminate the suspension without notice or hearing and to restore the entries to the condition they were in on the date of the suspension.

Act of October 17, 1940

One who acquires an interest in a desert land entry by purchase long after he entered military service cannot derive benefits from the Soldiers' and Sailors' Civil Relief Act of 1940 which are restricted to those who acquire their interest before entering military service and who file a notice of such entrance with the land office within six months of such entrance.

Desert Land Entry: Suspensions

Where part of a desert land entry suspended under the policy announced in *Maggie L. Havens*, A-5580 (October 11, 1923), has been held by the United States under lease for use by the Department of the Navy for purposes which make it impossible for the entryman to reclaim the entry, the termination of the *Havens* suspension while the land remains under lease should not work to the detriment of the entryman and the entry is to remain suspended until it is determined that the United States' occupation has ceased or is no longer an obstacle to reclamation.

BOARD OF LAND APPEALS

C. Arden Gingery has appealed to the Secretary of the Interior from a decision dated February 27, 1968, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of the Riverside district and land office rejecting his application for an extension of time in which to submit final proof on desert land entry LA 038253; for relief under the provisions of section 504 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App sec 564 (1964); or for purchase of the land in the entry in its entirety under the act of March 4, 1929, *as amended*, 43 U.S.C. sec. 339 (1964), or in part under the act of June 23, 1910, 43 U.S.C. sec. 441 (1964), or section 6 of the Smith Act of August 11, 1916, 43 U.S.C. sec. 628 (1964).

Michiko Shiota Gingery [1] has appealed from the decision to the extent it affirmed the rejection by the land office of her application to purchase part of the entry under section 6 of the Smith Act of August 11, 1916.

The record shows that the desert land entry was allowed to Christopher C. Gingery, the father of appellant Gingery, on June 10, 1907. The entry, as adjusted, covers the S½SW¼ sec. 17, SE¼SE¼ sec. 18, E½NE¼ and NE¼SE¼ sec. 19, and lots 3 and 4 sec. 20, T. 15 S., R. 12 E., S.B.M., California. By dint of several extensions and suspensions the entry remained viable for over 16 years and then on October 11, 1923, it was suspended under the departmental decision in *Maggie L. Havens*, A–5580 (October 11, 1923). The *Havens* case suspended the Havens entry and all others similarly situated until water for the irrigation of the lands covered by an entry became available or until it should be found advisable to revoke the suspension for any good reason arising in the future. *See Hazel, Assignee of Patterson*, 53 I.D. 644 (1932).

The record also indicates that on October 19, 1920, the lands in the entry, along with others, were included in a first form reclamation withdrawal pursuant to section 3 of the act of July 17, 1902, 43 U.S.C. sec. 416 (1964). On February 16, 1921, the Secretary of the Interior approved an application filed on May 6, 1920, by the Imperial Irrigation District to place the lands under the Smith Act of August 11, 1916, *supra*. This act permits an irrigation district organized and operated under State law to impose a lien on unentered and entered but unpatented public land within the district boundaries for a proportionate share of charges payable for construction, maintenance, and operation of irrigation works, and authorizes the enforcement of the lien against unpatented entries by sale of the land in the same manner as assessments are enforced against privately owned lands.

By letter dated April 16, 1964, the irrigation district informed the land office that part of the lands in the entry, the SE¼SE¼ sec. 18 and a portion of the S½SW¼ sec. 17, is within the West Mesa unit, that the remainder of the entry is in the Imperial unit, and that water

[1] The land office concluded that this appellant was married to a man named Gingery and addressed its decision to her to "Michiko Shiota Gingery." Although the mail receipt for the decision is signed "Michiko S. Gingery," the appeals to the Director and to the Secretary are in the guise "Michiko Shiota (Gingery)." The Director described this appellant as the wife of C. Arden Gingery. The appellants neither admitted nor denied the assertion in their appeals to the Secretary.

is available from the district to the portion of the entry in the Imperial unit.

A certificate, dated February 16, 1966, by the proper official of the irrigation district states in effect that all of the entry lying within the Imperial unit was sold to the district in 1936 for failure to pay assessments; that in 1939, the period for redemption having expired, collector's deeds were issued to it in exchange for the certificates of sale; and that on April 2, 1952, the district deeded all its right, title, and interest to C. Arden Gingery.

Gingery has also submitted a copy of a deed from his mother, who acquired the entire interest in the entry on the death of her husband in 1931. The deed, which conveys the entire entry to Gingery, is dated November 30, 1949. It was recorded on December 26, 1961. The appellant's mother died on March 11, 1950, leaving Gingery and two other children as heirs. Gingery has also filed a duplicate original of a document dated February 7, 1966, quitclaiming to him the interest of his brother and sister in the entry and the land it covers.

It also appears that the land in the entry has been used by the Department of the Navy as a target range since 1944. In 1952 Gingery signed a lease with the Navy under which the Navy paid him for past use and agreed to pay him an annual rental of $72.50, renewable annually through June 30, 1958. Thereafter Gingery granted new leases to the Navy which continued the Navy's usage through June 30, 1967, at rentals increasing from $261 per year to $1,914 per year.[2]

Mrs. Gingery filed an application on February 20, 1966, for the purchase of 99.40 acres described as SE¼SW¼, SW¼SW¼ sec. 17, lots 3 and 4 sec. 20, T. 15 S., R. 12 E., S.B.M., as the subrogee of Gingery under the tax sale. She alleged that Gingery had failed to pay the proper manager's fees, commissions, and purchase price as required by 43 U.S.C. sec. 628.[3]

On November 13, 1964, the land office informed Gingery by mail that, by letter dated April 16, 1964, the irrigation district had informed it that water was available and that, as a result, the land office was considering lifting the *Havens* suspension.

[2] The record does not show whether the premises were leased after June 30, 1967.

[3] Mrs. S. Gingery's application actually describes 130.15 acres. Apparently she intended to describe only that part of the S½SW¼ sec. 17 which is within the Imperial Irrigation District. This portion covers 40 acres, which with 19.40 acres in lot 3 and 30.75 in lot 4, sec. 20, totals 90.15 acres. Gingery's acknowledgment of payment to him of the price for which the lands were sold at the sale compounds the error by referring to the SE¼SW¼ and the SW¼SW¼ sec. 20.

A little over a year later, the Secretary, on December 2, 1965, issued a notice to all entrymen whose entries were suspended under the *Havens* case stating that the blanket suspension was revoked. It then said that water had been available for entries within the service area of the Imperial Irrigation District or the Coachella Valley County Water District since March 4, 1952, at the latest, when the All American Canal was officially declared completed, and that the life of these entries had begun to run as of that date. The entrymen were allowed 90 days to submit final proof that reclamation had been accomplished within that period. If, however, an entryman could show that he had actually reclaimed the land, he would receive a patent. If he were in the process of actually and diligently reclaiming the entry, he would be allowed 90 days or the life of his entry as of March 4, 1952, whichever was greater, to file final proof. The entrymen were required to give notice within 90 days if they elected to take the greater period. Other entries would have what life was left to them as of the date of the *Havens* suspension.

The notice also announced that the Department's regulation governing grants of right-of-way across public lands was amended by adding to it a provision prohibiting the allowance of a right-of-way within Imperial and Riverside counties for the construction of canals and ditches to effect the agricultural reclamation of desert lands unless the appellant could show that the water to be carried would be from some source other than the Colorado River.

On February 14, 1966, Gingery filed a notice electing to take advantage of the longer period for filing final proof.

He then filed the several applications which were disposed of in the earlier decisions.

As we have seen, Gingery offers several sources for his interest in the entry. It may be well to examine this point at the outset in the hope that the elimination of some of his alternate claims may simplify the issues he raises. One of Gingery's sources of title is a quitclaim deed from the Imperial Irrigation District for 210.15 acres, *i.e.*, a part of the S½SW¼ sec. 17, E½NE¼, NE¼SE¼ sec. 19, and lots 3 and 4 sec. 20. The lien enforcement proceedings carried out by the irrigation district in accordance with the applicable State law and the Smith Act effectively transferred the rights of the original entryman and his wife or his heirs to the irrigation district and terminated their rights to the

portion of the entry within the district. *Clytie McPherson et al.*, A–26440 (October 25, 1954).

Gingery's rights, then, to this portion are only those of a purchaser or by a tax deed from the irrigation district. These rights, in turn, depend upon whether the land is or is not subject to the provisions of the Reclamation Act of June 17, 1902, *as amended*, 43 U.S.C. sec. 371 *et seq.* (1964). If it is, as section 2 of the Smith Act, 43 U.S.C. sec. 626 (1964) provides, his rights are those of an assignee of a homestead entryman (43 U.S.C. sec. 441 (1964)), and he may receive a patent upon submitting satisfactory proof of the reclamation, the irrigation, and the making of the payments required by the Reclamation Act. If it is not, his rights are controlled by section 6 of the Smith Act, *supra*, which authorizes the patenting of lands sold by the irrigation district upon payment of $1.25 per acre, or such other price as may be fixed by law, and other fees and a "satisfactory showing that the irrigation works have been constructed and that water of the district is available for such land."

As the land office pointed out, the entry, having been allowed prior to the reclamation withdrawal, did not then and does not become subject to the reclamation withdrawal so long as the entry subsists. *George B. Willoughby*, 60 I.D. 363 (1949); *Clytie McPherson et al.*, *supra*. Consequently, section 6 of the Smith Act governs Gingery's rights.

The land office then held that the applications for purchase under section 6 of the Smith Act could not be allowed because no "irrigation works" had been constructed on the land in the entry. It found that "irrigation works" in the statute refers to works to be constructed on the entry as well as those to be constructed by the irrigation district to serve all the lands in the district. It also concluded that water was not available to the land because water can be conducted to the entry only over public lands which lie between the facilities of the irrigation district and the entry, and Department regulations preclude the approval of a right-of-way for the irrigation of the entry.

The appellants point out that the effect of the land office decision would be to limit severely the ability of the irrigation district to dispose of public land which it has acquired for nonpayment of water assessments and, consequently, its ability to realize income from its assessments.

There are two aspects to this issue: one, whether the land is eligible for sale; and, two, what its status is if it is not.

Turning first to the question of what "irrigation works" are, we find little help in either the statute or regulations. The term is used three times without definition in section 3 of the Smith Act, 43 U.S.C. secs. 623, 625 (1964), as well as in section 6, 43 U.S.C. sec. 628 (1964). In section 2, 43 U.S.C. sec. 622 (1964), however, there are listed all the components of an irrigation project whose cost is to be apportioned among the lands in the district. These, we note, are "[t]he cost of acquiring, purchasing, or maintaining canals, ditches, reservoirs, reservoir sites, water, water right, rights-of-way, or other property incurred in connection with any irrigation project." While there is no connection made between these items and the term "irrigation works," they do constitute a rather complete category of what would be "irrigation works."

Similarly, the regulation expanding on the statutory requirement that an irrigation district submit a map explaining the plan of irrigation in a district where the irrigation works have not been constructed requires that the map show "reservoirs, canals, ditches, power plants, transmission lines, or other aids to reclamation which are included in the system." 43 CFR 2783.1-4(d), *formerly* 43 CFR 2253.1-4(d). Here again the reference is to facilities that serve the irrigation district in general and not to structures on an individual entry.

Finally, we observe that section 3 of the Smith Act, 43 U.S.C. sec. 625 (1964), authorizes the Secretary after a certain period has elapsed to release from the lien authorized by the statute "any unentered land or lands upon which final certificate has not issued, for which irrigation works have not been constructed and water of such district made available for the land." Since it is highly unlikely that any "irrigation works" would be placed on unentered land, the section would offer no protection to an irrigation district if the lien could be released so long as there were no irrigation works on the land itself. Thus the "irrigation works" must be those, as section 3 says, constructed *for* unentered land or lands upon which final certificate has not issued, not those on the land itself.

We conclude, then, that the "irrigation works" referred to in section 6 are not those necessary on an individual entry to carry out irrigation, and the absence of water distributing facilities on an entry is not a reason to deny an applicant the opportunity to purchase an entry under section 6.

The land office also held that Gingery had failed to meet the other requirement that section 6 imposes upon an applicant for purchase, that is, that he demonstrate the availability of water. Although it was admitted that water was available for the land from the irrigation district, the land office noted that water could not be conducted to the entry because the Department had issued a regulation precluding the approval of a right-of-way over intervening public lands. 43 CFR 2871.08, *formerly* 43 CFR 2234.3–1(d)(1).

As we have noted, the Department has held that water was available to entries such as the appellants' no later than March 4, 1952. In fact, it was on the basis of the availability of water within the service area boundaries that the Department found that the *Havens* suspension had expired and that the statutory term of the entries had again begun to run. The only change that has occurred since then is that the Department has decided that it will not grant a right-of-way across publicly owned lands if the right-of-way is to be used to transport water originating in the Colorado River for use in irrigation. Does the policy of denying an entryman access to water justify a determination that water is not available to the entry? The policy was adopted to prevent or make more difficult the use of Colorado River water for irrigation. That policy will be as easily enforced by the Department's own action denying a right-of-way whether title to the land in the entry is in the Gingerys or the United States.

The question, then, is whether within the meaning of the Smith Act the water becomes not "available" when the United States decides that it will cut off access from the land to the water or whether an applicant must demonstrate only that he has an enforceable claim to water even though access to it is barred.

All the statute requires is that the "water of the district be available for such land." There is no dispute that he has a right to water. It is our conclusion that the water remains "available" despite the difficulty that the applicant may encounter in utilizing it.

Accordingly, Gingery has met the above statutory requirements and is to be permitted to purchase under section 6 of the Smith Act the land to which he still retains his right, assuming he meets the other qualifications of the act. Similarly, Mrs. Gingery, whether she is an assignee or subrogee, has established her right to purchase the acreage, which

she claims in lieu of Gingery, in the entry that is within the same area of the Imperial Irrigation District.[4]

There remains for disposition the approximately 80 acres in sections 17 and 18 situated outside the service area. Once again we note that the appellant submitted a deed dated November 30, 1949, signed by his mother conveying the entire entry to him. While the deed was ineffective as to the portion of the entry which had passed to the irrigation district by tax sale, it did transfer to Gingery his mother's interest in the other 80 acres. Since it precedes any interest he would have gained through inheritance upon his mother's death, it must be considered as the source of his interest in the entry. Treating the sale as an assignment, as the regulation provides, 43 CFR 2521.3(c)(2), *formerly* 43 CFR 2226.1–2(c)(2), and assuming that Gingery is qualified to be an assignee, 43 CFR 2521.3(b), *formerly* 43 CFR 2226.1–2(b)(c), we may now consider his claim to this land.

First, Gingery's assertion that he may derive benefits from the Soldiers' and Sailors' Civil Relief Act is unfounded. The provisions pertaining particularly to desert land entries, found in section 504, 50 U.S.C. App. sec. 564 (1964), offer relief only to an entryman who acquired his interest before he entered military service and who filed notice of his entrance into military service with the land office within six months after his entrance. Gingery acquired the interest in the entry by purchase from his mother long after he entered the military service and he never filed the requisite notice. Thus he is not one whom the act benefits.

Furthermore, the obligation to reclaim the portion of the entry outside the Imperial Irrigation District did not begin to run again until the *Havens* suspension was terminated by the notice of December 2, 1965. On that date the appellant had been separated from the service for over 3 years. His military service, then, did not interfere with his opportunity to reclaim the entry.

Next he asks that he be permitted to purchase this portion of the entry pursuant to the act of March 4, 1929, *as amended*, 43 U.S.C. sec. 339 (1964). That act, however, permits an assignee to purchase only if he is a "duly qualified assignee under an assignment made prior to March 4, 1929." Since Gingery purchased the entry from his mother in 1949, he is not an assignee who may take advantage of the act.

[4] Gingery's application to purchase part of the entry under section 6 of the Smith Act describes lands totalling 160 acres including Lot 4 sec. 20 and that part of the SW¼SW¼ sec. 17 lying within the Imperial Unit. Mrs. Gingery's application also lists Lot 4 sec. 20 and the SW¼SW¼ sec. 17. To the extent the applications are in conflict, Mrs. Gingery, as the subrogee of Gingery, will prevail.

What then is the status of this portion of the entry? Under the notice of December 2, 1965, the suspension under which it had lain for over 40 years was lifted and, in the absence of any reason to the contrary, the life of the entry began to run. The term of the entry would then have expired on April 6, 1968.

Gingery raises many objections to the manner in which the suspension was terminated. Without discussing them in detail, it is enough to point out that the entrymen had no right to the original suspension, that it was an act of Secretarial discretion, and that the notice announcing it said that the suspension would be ended anytime for good reason. The Secretary has determined that no useful purpose is to be served by continuing into the indefinite future entries now some 50 years or more old. There is no requirement for the Secretary to hold a hearing and to take other formal procedures before acting. Upon the temination of the suspension, the entry reverted to its status as of the day of the suspension.

The only unusual aspect of the entry is that it has been under lease by the Department of the Navy for use in connection with several naval programs. While the appellant has received substantial compensation for the naval occupation of the entry, it is also true that the Navy's use was exclusive and that Gingery could not have reclaimed his entry while the Navy was in possession. The land office held that Gingery had disabled himself from reclaiming his entry by leasing the entry. The Office of Appeals and Hearings, on appeal, concluded that the lease was a prohibited assignment. In our view neither of these conclusions is correct. The strictures against the assignment of an entry discussed in *Idaho Desert Land Entries—Indian Hill Group*, 72 I.D. 156 (1965), and *United States* v. *Ollie Mae Shearman et al.*, 73 I.D. 386 (1966),[5] cited in the decision appealed from, were designed to prevent unqualified persons from gaining effective control of an entry or to make it illegal for any person to hold more than one entry. They have no pertinency to use of an entry by the United States for purposes of national defense.

The land office view, in turn, ignores the fact that the United States could have taken its leasehold by eminent domain, if it had so desired. That the appellant cooperated with the Government by making

[5] *Rev'd sub nom. Reed* v. *Department of the Interior*, Civ. No. 1–67–97 (D. Idaho, July 10, 1970), *appeal docketed*, No. 71–1187, 9th Cir., February 9, 1971.

legal proceedings unnecessary is not to work to his detriment and he is not to be deemed to have incapacitated himself by assenting when resisting would have been meaningless.

While the United States occupies the entry, it is impossible to determine with certainty whether the entryman would be able to reclaim this portion of it by developing his own sources of water. The final disposition of this land can best be made either when the United States has ceased to use it or when its use is no obstacle to Gingery's development of it. Until such time, the only way to avoid the Government's use from being detrimental to the entryman is to place this part of the entry in suspension. Accordingly, that portion of the entry that was not conveyed to Gingery by the irrigation district is suspended as of December 2, 1965, and is to remain suspended until December 31, 1971. At that time, the land office will examine the status of the tract. If the conditions which we have stated as justifying a suspension are unchanged, then the land office will continue the suspension for a year. If, in the land office's opinion, the suspension is no longer justified, it will notify the entryman that the suspension has been terminated and that the life of the entry has again begun to run.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the Bureau of Land Management is affirmed insofar as it denied (1) Gingery's application for relief under section 504 of the Soldiers' and Sailors' Civil Relief Act (2) his application to purchase part of the entry pursuant to the act of March 4, 1929, and (3) his request for equitable adjudication; it is reversed insofar as (1) it denied the appellants' separate applications to purchase part of the entry under section 6 of the Smith Act, and (2) it held that the life of that part of the entry now within the Imperial Unit was to expire on April 6, 1958; and the case is remanded for further proceedings consistent herewith.

MARTIN RITVO, *Member.*

WE CONCUR:

JOAN B. THOMPSON, *Member.*

FRANCIS E. MAYHUE, *Member.*

U.S. GOVERNMENT PRINTING OFFICE: 1971

April 19, 1971

JURISDICTION OF INDIAN TRIBES TO PROHIBIT AERIAL CROP SPRAYING WITHIN THE CONFINES OF A RESERVATION*

Indians: Civil Rights

A tribal ordinance which prohibits all aerial crop spraying within the confines of the Fort Hall Indian Reservation because of a history of damage occasioned by such spray falling upon neighboring lands in the reservation not intended for such spraying is not violative of the due process requirement of Title II, sec. 202, subsection (8), of the Civil Rights of April 11, 1968, 82 Stat. 77; 25 U.S.C. sec. 1302 (Supp. V., 1965–1969), even though the ordinance prohibits the continuation of a recognized and useful occupation, and may impair the performance of a contract previously made.

Indian Tribes: Sovereign Powers

A tribal council acting in a legislative capacity is not required to provide interested persons with an opportunity to present their position prior to enactment of an ordinance.

M–36826 *April 19, 1971*

Furchner & Anderson
Attention: Mr. James L. Martsch
Attorneys at Law
178 West Judicial Street
Blackfoot, Idaho 83221

Dear Mr. Martsch:

This will constitute our decision on the joint appeal that you have filed on behalf of the Russett Potato Company, Blackfoot Flying Service, and Messrs. Gary Cordon, Blaine Van Orden, J. Blaine Shoemaker, and John Yamagata from a decision dated August 27, 1970, by the Acting Associate Commissioner of Indian Affairs. The decision appealed from refused to recommend rescission by the Secretary of the Interior of Ordinance S6–70, as enacted by the Fort Hall Business Council and approved by the Superintendent of the Fort Hall Indian Agency on June 29, 1970.[1] The ordinance prohibits aerial

*Not in Chronological Order.

[1] Article IV, Section 1 of the Constitution and Bylaws for the Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho provides *inter alia* that the business council shall exercise the power:

(1) To safeguard and promote the peace, safety, morals and general welfare of the Fort Hall Reservation by regulating the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinances directly affecting nonmembers of the reservation shall be subject to review by the Secretary of the Interior.

441–339—71——1

crop spraying within the confines of the Fort Hall Reservation in Idaho. A copy of the ordinance is enclosed. No appeal has been taken from that part of the Acting Associate Commissioner's decision which states that the criminal penalities imposed by the ordinance would not be applicable to non-Indians, since Indian tribes generally do not possess criminal jurisdiction over non-Indians. See *Solicitor's Opinion*, 77 I.D. 113 (1970), a copy of which was enclosed with the decision appealed from.

We note that some of the appellants are non-Indians engaged in farming acreages of allotted or tribal lands within the Fort Hall Reservation pursuant to lease agreements made with either individual members of the Shoshone-Bannock Tribes or the Fort Hall Business Council. The other appellants are also non-Indians who assert that the ordinance operates to their detriment, but do not specify the manner in which it allegedly does so.

The appellants assert that the due process provision of Amendment XIV of the Constitution of the United States requires that state legislation be reasonable, and that the due process provision of Amendment XIV governs ordinances adopted by organized Indian tribes. There has been no judicial interpretation which holds that the due process requirements of the XIV Amendment apply to Indian tribes. However, Title II of the act of April 11, 1968, 25 U.S.C. sec. 1302(8) (Supp. V., 1965–1969), provides that no tribe in exercising powers of self-government shall deprive any person within its jurisdiction of liberty or property without due process of law.

First, it is my opinion that there is no merit to the appellants' assertion that they have been denied procedural due process because the ordinance was enacted by the tribes without the appellants or other interested parties such as they being offered an opportunity "to present their respective positions to the tribal council" prior to the ordinance's enactment. As the Supreme Court has stated:

> Appellants contend that the legislative action was taken without investigation and hence must be considered to be arbitrary and beyond the legislative power. There is no principle of constitutional law which nullifies action taken by a legislature, otherwise competent, in the absence of a special investigation. The result of particular legislative inquiries through commissions or otherwise may be most helpful in portraying the exigencies to which the legislative action has been addressed and in fortifying conclusions as to reasonableness. *Nebbia* v. *New York* [291 U.S. 502, 516 *et seq.* (1934)]. But the legislature, acting within its sphere, is presumed to know the needs of the people of the State. Whether or not special inquiries should be made is a matter for the legislative discretion. * * * *Townsend* v. *Yeomens*, 301 U.S. 441, 451 (1937).

The appellants also contend that the ordinance prohibiting all aerial spraying and crop dusting on the reservation is invalid as an unreasonable and arbitrary act of the tribal business council. The appellants concede in their appeal that aerial spraying is a proper subject for regulation and that the tribal business council has authority to regulate such activity on the reservation in a reasonable manner. The appellants further acknowledge that there have been "problems" in the past and there may be "problems" in the future arising by reason of aerial spraying within the confines of the reservation. Although the appellants state that they know of no sickness or death caused on the reservation by reason of aerial spraying, as recited in a whereas clause of the ordinance, they do not deny that such an occurrence is possible. The appellants offer no suggestion in lieu of the ordinance forbidding all aerial spraying which they deem practicable to prevent pollution of the area with insecticides and to prevent trespassing by spraying, other than to suggest that the State of Idaho does have procedures to regulate aerial spraying within the state. Sections 22–2209, Vol. 5 *Idaho Code* (Republished 1968).

However, since appellants concede that the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation may regulate aerial spraying of their reservation, it is obvious they are not contending that state law exclusively governs such spraying on the reservation. The sole question in this regard, therefore, is whether appellants have established that Ordinance S6–70 is violative of the due process guaranteed by 25 U.S.C. sec. 1302(8) (Supp. V., 1965–1969).

Numerous jurisdictions have found aerial spraying and crop dusting to be ultrahazardous because of the inherent risk of such activity. *Oscar H. Loe et al.* v. *Jack Lenhardt et al.*, 227 Oregon 242, 362 P.2d 312 (1961); *Gotreaux* v. *Gary et al.*, 232 Louisiana 373, 94 So.2d 293 (1957); and cases cited in 6 *Stanford Law Review* 69 *et seq.* The law review article notes that the ability to control the drift of sprays or dust to a given area is limited by such uncertainties and uncontrollable factors as the size of the drops or particles (only the average size can be predetermined, and the smaller the size the greater the drift), the air disturbances created by the airplane, and such natural atmospheric forces as wind and convection caused by heat from the sun radiating from the land surface. The damage done to neighboring property has been a source of restrictive legislation in 24 states. Compiled in footnote one. *Oscar H. Loe et al.* v. *Jack Lenhardt et al.*,

supra, at page 317. Thus Arkansas has declared to be a public nuisance any chemical so distributed which has been determined by the state plant board to be dangerous to persons, plants or animals. Sections 77–201 to 77–211 *Arkansas Statutes Annotated 1947*. The use of aircraft to distribute certain chemicals is outlawed in certain portions of Texas. See *Texas Herbicide Regulation No. 1*. California has blocked out large areas of the state where all applications of certain chemicals are prohibited from March 15 to October 15 of each year because of the danger of the chemicals falling on neighboring fields where crops susceptible to such chemicals are growing. Sec. 2450(c) (1) *California Admin. Codes*, Title 3. Different states have approached the problems caused by aerial spraying in various ways, such as requiring pilots to be specially trained in crop spraying techniques, issuing permits to limit the activity, requiring specified equipment (such as the diameter of the nozzles and spray pressure), limiting activities to certain flying conditions, establishing financial responsibility requirements and strict liability, setting up and operating laboratories to test chemicals, establishing investigative and enforcement bodies, and prohibiting certain activities at certain times and places. See the *Stanford Law Review* article, *supra*.

Appellants apparently recognize the hazards involved in aerial spraying but contend that as it is a recognized and useful occupation it may only be regulated and not prohibited. The Supreme Court of the United States has specifically rejected such a theory. In *Ferguson, Attorney General of Kansas et al.* v. *Skrupa, d/b/a Credit Advisors*, 372 U.S. 726 (1963), the Court held it was not for the courts to pass on the wisdom of state legislation which prohibited certain "debt adjusting" business.

> * * * We refuse to sit as a "superlegislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." Nor are we able or willing to draw lines by calling a law "prohibitory" or "regulatory." 372 U.S. 731–732 (Footnotes omitted).

Since the action of the Fort Hall Business Committee is not violative of due process as being prohibitory rather than regulatory, the only thing I have to add in this respect is that I find no reason to differ with the policy decision made by the tribes.

The residents of the Fort Hall Reservation are rightfully concerned by the damage which has admittedly resulted from aerial spraying within the reservation. Their insistance that they and their lands be

protected from unwanted spraying is reasonable, and whatever restrictions may be provided by the *Idaho Code* governing aerial spraying such restrictions have proved inadequate to stop indiscriminate spreading of chemicals on the reservation. Considering the limited financial resources of the tribes, and the small acreage involved in relation to the area embraced within the state, it is clear that the procedures, expense, personnel and technology involved in administering a comprehensive aerial spraying and crop-dusting program on the reservation cannot feasibly be undertaken by the tribes.

I also find no merit to the appellants' contention that the ordinance is invalid since it allegedly impairs the performance of certain existing contracts. The answer to this assertion is that ordinances such as the one in issue are enacted within the scope of police power, and ordinances enacted within police powers are valid notwithstanding they may incidentially prevent the performance of a contract previously made. See *St. Louis Poster Advertising Company* v. *City of St. Louis et al.*, 249 U.S. 269, 274 (1919).

Nor do I find merit in appellants' argument that the ordinance is unreasonable in that it "frustrates" farming the leased lands on the reservation. The body of the ordinance expressly provides that nothing therein will restrict the application of approved chemicals to plants and soil by conventional means, including any mechanism except aircraft. Thus, the ordinance does not prohibit the use of chemicals for farming reservation land, but merely precludes the one method of distribution which has proved to be uncontrollable in that the chemical is placed where it causes damage. The ordinance may make it more costly, more time consuming, or more difficult to spray the reservation lands, but the ordinance is careful to provide means for necessary crop spraying so as to eradicate and control weeds, plant and soil diseases, and insects that may threaten the productivity of the lands. As shown by *Ferguson* v. *Skrupa*, *supra*, a law enacted under the police power is not invalid merely because some people may suffer economic loss by reason of its enforcement.

For the foregoing reasons, I find Ordinance S6–70 of the Fort Hall Business Council is not invalid and should not be set aside. Accordingly, the decision appealed from is affirmed.

Sincerely yours,

HARRISON LOESCH,
Assistant Secretary of the Interior.

ESTATE OF WILLIAM CECIL ROBEDEAUX

IBIA 71-5 *Decided July 20, 1971*

Indian Probate: Appeal: Matters Considered on Appeal

The Board of Indian Appeals will not scour the record in Indian probate proceedings to find alleged irregularities which are not specified with at least some particularity in the appeal.

Indian Probate: Wills: Undue Influence

In Indian probate proceedings, proof of undue influence in the execution of a will must be so substantial that the judges of fact, having a proper understanding of what undue influence is, may perceive by whom and in what manner it has been exercised, and what effect it has upon the will.

Indian Probate: Wills: Undue Influence

To invalidate an Indian will because of undue influence, it must be shown: (1) that the decedent was susceptible to being dominated by another; (2) that the person allegedly influencing the decedent in the execution of the will was capable of controlling his mind and actions; (3) that such person, at the time of the testamentary act, did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires.

Indian Probate: Attorneys at Law: Fees

In general, the jurisdiction of the Secretary to determine and award attorney fees in Indian probate proceedings will be asserted in two situations: where the fees are for representation of Indians in such probate proceedings, and where the fees are for services rendered in behalf of the decedent during his lifetime, in which latter event the claim is of the same genre as those of other general creditors.

Indian Probate: State Law: Pretermitted Heir

Absent an act of Congress, the Secretary, in determining the rights of pretermitted heirs in Indian probate matters, will not follow any state statutes dealing with the subject.

Indian Probate: State Law: Applicability to Indian Probate, Testate

Compliance with state laws setting forth requirements for the execution of wills is not required in the execution of Indian wills disposing of trust or restricted property.

Indian Probate: Wills: Failure To Make Request of Witness

An Indian will is not rendered invalid by the failure of the testator to specifically request the attesting witness to sign the will, since there is no such requirement either in the statutes authorizing the disposition by Indians of their trust or restricted property by will or in the regulations.

Indian Probate: Wills: Publication

There is no requirement in the Indian probate regulations or the applicable statutes that the testator, at the time of the execution of his will, "publish" the same by openly declaring it to be his last will and testament.

Indian Probate: Wills: Testamentary Capacity

The burden of proof as to testamentary incapacity in Indian probate proceedings is on those contesting the will, and an Indian is not deemed to be incompetent to make a will by virtue of his being unable to manage his own property or business affairs or by appointment of a guardian for him.

BOARD OF INDIAN APPEAL

Oneta Ruth Lamb Robedeaux, Lena V. Robedeaux, and their attorney, John H. Kennedy, and Houston Bus Hill and Thurman S. Hurst, attorneys, have appealed to the Secretary of the Interior from the order by Hearing Examiner Kent R. Blaine dated January 21, 1970, approving will and decreeing distribution, and from various orders of his successor, Hearing Examiner John F. Curran, all dated August 24, 1970, in which petitions for rehearing filed by said appellants were denied. Hearing Examiner Blaine determined that the appellant, Lena V. Robedeaux, was not the daughter of the decedent, William Cecil Robedeaux, and was thus not entitled to share in his estate as an heir at law. His decision also contained findings that the decedent's last will and testament, leaving all of his property in equal undivided shares to his two children, Willis Edward Robedeaux and Ramona Esther Auld, except the sum of one dollar which was left to his second wife, Oneta Ruth Lamb Robedeaux, met all of the requirements of the Department for a valid instrument; that the decedent had sufficient testamentary capacity; and that the will was not invalidated by the exertion of undue influence on the testator by his son, Willis. By the same order the examiner denied: (1) the claims of Houston Bus Hill and Thurman S. Hurst for attorney's fees totalling $8,250 ($6,750 for alleged legal services rendered in behalf of the decedent in two 1966 divorce actions between the decedent and Oneta Robedeaux, and $1,500 for services rendered in connection with a 1957 guardianship proceeding wherein Willis Robedeaux was named his father's guardian); and (2) the claim of John H. Kennedy in the sum of $6,105.63 for legal services in behalf of Oneta Robedeaux in connection with the same divorce litigation. The claim of Houston Bus Hill for legal services performed in these probate proceedings, allegedly in behalf of Willis Robedeaux and Ramona Esther Auld was not yet filed and not being in issue, was not mentioned.

The children and beneficiaries under the decedent's will, Willis Edward Robedeaux and Ramona Esther Auld, have made no appearance in this appeal proceeding.

FACTUAL AND PROCEDURAL BACKGROUND

The decedent died on December 16, 1968, at the age of 64 years, a resident of Oklahoma at the time of his death. He left trust or restricted property located in the State of Oklahoma under the jurisdiction of the Pawnee Agency of the Bureau of Indian Affairs. He also left the sum of twenty-three thousand three hundred thirty-four dollars and eighteen cents ($23,334.18) which was deposited in his Individual Indian Money Account under the control of the Bureau of Indian Affairs.

The last will and testament of Mr. Robedeaux was executed on March 2, 1967, and witnessed by two employees of the Bureau of Indian Affairs, William R. Scott and Henry Sheridan. The decedent's entire estate was left in equal shares to his son, Willis, and his daughter, Ramona. Mr. Robedeaux effectively disinherited his wife, Oneta, a white woman, by leaving her the sum of one dollar ($1). Appellant, Lena V. Robedeaux, claiming to be a daughter, is not mentioned in the will. Willis and Ramona are legitimate children of the decedent born out of his union with his first wife, Jessie Mae Butler. This marriage ended in divorce in 1955.

The decedent and the appellant Oneta Lamb Robedeaux, a white woman, were married on August 10, 1955. From the record we gather that no children were born of this marriage. Decedent and appellant apparently began living apart some time in 1958. On July 1, 1957, Willis E. Robedeaux was appointed guardian for his father and on April 14, 1966, Mr. Robedeaux, represented by Houston Bus Hill and Thurman S. Hurst, commenced a divorce action in Pawnee County, Oklahoma, Case No. D 2492. On May 16, 1966, Oneta Robedeaux, represented by John H. Kennedy, commenced a second divorce in Oklahoma City, Oklahoma, apparently on the theory that the decedent was disqualified from bringing the action himself because he was mentally incompetent. The jurisdictional question went to the Supreme Court of the State of Oklahoma, which held that the court in Pawnee County had jurisdiction. At the time of the decedent's death a divorce decree had not been entered, and it is unclear whether either party was pressing the matter to a final conclusion at that time.

In 1957 Willis Robedeaux was appointed his father's guardian by

the County Court, Oklahoma County, upon his petition which alleged, *inter alia*, that his father was "mentally incompetent to manage his property." On April 19, 1966, Willis Robedeaux filed a motion for discharge from his duties as guardian for the alleged reason that the Bureau of Indian Affairs had actively resumed its supervision over his father's trust property and income therefrom, and that his services as guardian were no longer needed. The record does not reflect that the court ever acted on this motion. It does appear, however, that Willis Robedeaux did not thereafter exercise any responsibilities as his father's guardian.

Examiner Blaine, in his Order Approving Will and Decreeing Distribution, found that the decedent's heirs at law, as determined in accordance with Oklahoma law, were Oneta Robedeaux, Willis Edward Robedeaux, and Ramona Esther Auld. Had the decedent died intestate, each would have received a one-third share in his estate. The Examiner also allowed Oneta's claim in the sum of $4,200, for monthly support payments of two hundred dollars allowed by the District Court in the divorce proceedings by order of April 17, 1966.

Following the filing of petitions for rehearing by each of the appellants herein, Examiner John F. Curran [1] entered denials of each such petition in separate instruments dated August 24, 1970. His rationale in connection with each of these rulings will be taken up in more detail in subsequent discussion of the various issues raised herein.

Following denial of their petitions for a rehearing, each of the appellants filed independent appeals and the matter is properly before this Board for final decision pursuant to delegation of such authority from the Secretary of Interior. 35 F.R. 12081 (July 28, 1970). [2]

As grounds for her appeal, Oneta Robedeaux assigns the following fifteen errors which were originally set forth in her petition for rehearing:

1. Said instrument which purported to be the last will of William Cecil Robedeaux was not signed by the decedent in the presence of each or either of the attesting witnesses thereto.

2. The subscription to said instrument was not acknowledged by said decedent to each or either of the attesting witnesses thereto.

[1] Shortly after issuing his Order Approving Will and Decreeing Distribution on January 21, 1970, Hearing Examiner Blaine left the Department to accept employment with another Federal Agency. Mr. Curran was assigned to succeed him.

[2] The authority of Regional Solicitors to decide appeals from orders and decisions of hearing examiners in Indian probate matters has been superseded by this delegation.

3. The said decedent did not, at the time of the alleged acknowledgment thereof, declare said instrument to be his last will.

4. The said witnesses to said instrument did not sign their names thereto at the request of the decedent nor in his presence.

5. The said decedent, at the time of the alleged execution of said instrument, was not of sound mind or memory, or in any respect capable of making a disposition of his property because he was suffering from chronic alcoholism; that the decedent had been declared incompetent by the Probate Court of Oklahoma County and was incompetent at the time of the execution of the purported will; that he frequently suffered from severe delirious tremens (sic); that he did not know the extent of his property, and had been judicially declared incompetent to manage same; that there was no change in his condition which would justify the disposition of his assets to the detriment of the petitioner, his lawful wife.

6. Said instrument was obtained and the alleged execution thereof procurred (sic) by undue influence practised upon the decedent by Willis Edward Robedeaux, his son, who refused to give the decedent monies or to buy liquor for him if he did not do exactly as Willis Edward Robedeaux directed.

7. That he did not know the persons, including this petitioner, who were the natural objects of his bounty in that he did not make a just provision for the petitioner, nor by (sic) his daughter, Lena V. Robedeaux, by his sister (Effie Roy, who was a witness); that the decedent clearly lacked testamentary capacity.

8. Irregularity in the proceedings of the trial examiner and the prevailing party by which this appellant was prevented from having a fair trial.

9. The conduct of Willis Edward Robedeaux by his threatening manner and physical gestures toward the appellant, her witnesses, and her attorney in the course of the trial.

10. That the decision is not sustained by sufficient evidence, and is contrary to law.

11. Error of law occurring at the trial, and excepted to by the appellant.

12. Refusal of the Hearing Examiner to accept polygraph examinations by any reputable examiner of the Hearing Examiner's choice of Willis Edward Robedeaux, Juanita Robedeaux (Mrs. Willis Robedeaux), Lena Robedeaux, Effie Roy, Lewis (sic) LeForce, and the petitioner, the principal witnesses who testified at the trial of this case. The polygraph tests were offered to be paid for by Oneta Robedeaux and Lena V. Robedeaux, and would have helped the hearing examiner reach a just decision in this case, and should have been received. The offer is renewed by this instrument.

13. Newly discovered evidence, material for the petitioner which she could not, with reasonable diligence, have discovered and produced at the trial which goes to the competency of the decedent.

14. The Hearing Examiner erred in denying her attorney reasonable attorney fees because it was through the acts of Willis Edward Robedeaux that she was denied all the monies after the decedent became incompetent and when she attempted to secure sufficient monies for her living; that because of the acts of the guardian, the decedent filed suit in Pawnee County, Oklahoma, which required the petitioner to defend said action. Minimum bar fees should be allowed her attorney. Decedent was not even a resident of Pawnee County, but was living with Effie Roy, his sister, in Noble County when said action was filed.

15. That petitioner was the lawful wife of the decedent for more than 14 years, and no cause exists why she should be deprived of her just share as a widow; and that the Hearing Examiner should have given her ⅓ of the estate of the decedent, and declared the will void and invalid.

The appeal of Lena V. Robedeaux is almost identical to that of Oneta Robedeaux with respect to the various allegations of invalid execution of the will, lack of testamentary capacity, undue influence, unspecified irregularities in the conduct of the hearing, newly discovered evidence and unspecified errors of the hearing examiner. In addition, Lena V. Robedeaux alleges that she is the daughter of the decedent, that during his lifetime decedent did not support or educate her even though she had brain damage, that she is not mentioned by name in the decedent's last will, and that the will does not indicate that this omission was intentional.

EXECUTION OF THE WILL

The various allegations of technical irregularities in the execution of the will which appear in the appeals of both contestants, Oneta Ruth Lamb Robedeaux and Lena V. Robedeaux, fail to contain citations of specific statutory or case authority. These allegations appear to be based on requirements typically found in state laws. It is well established, however, that compliance with the requirements of state laws in the execution of Indian wills is not required. *Blanset* v. *Cardin, as Guardian of Daylight, a Minor, et al.* 256 U.S. 319 (1921); *Estate of Annie Devereaux Howard*, IA–884 (December 17, 1959). Because state laws are inapplicable in determining the validity of wills of Indians disposing of their trust or restricted property, and since there is no requirement in 25 U.S.C. sec. 373 (1964) [3] that the Secretary of the Interior prescribe regulations which precisely describe the form and manner of execution of such wills,[4] we must look primarily to the probate regulations for guidance. The pertinent regulation, 25 CFR 15.28(a), simply provides that an Indian of the age of 21 years and of testamentary capacity, who has any right, title, or interest in trust or restricted property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses. In the case before us, standard-form affidavits of the decedent and the two attesting witnesses accompany the will. The decedent's affidavit indicates that the will was prepared by Elmer W. Jeannotte and that the

[3] This section authorizes the disposition by Indians by will of their trust or restricted property.

[4] See *Homovich* v. *Chapman*, 191 F. 2d 761 (D.C. Cir., 1951).

decedent requested the two attesting witnesses, William R. Scott and Henry Sheridan to act as witnesses thereto. It also states that the two attesting witnesses heard the decedent publish and declare the same to be his last will and testament, that the decedent and the witnesses signed the will in the presence of each other, and that the will was read and explained to the decedent, or read by him, before he signed it. Such an affidavit in and of itself constitutes prima facia evidence that the will was attested to by the witnesses in the presence of the testator and that the testator likewise signed the will in their presence. *Estate of Joe (Joseph) Sherwood*, IA–P–20 (November 19, 1960).

The two contestants, Lena Robedeaux and Oneta Robedeaux, presented no evidence whatever to establish their allegation that the will was not signed by the decedent in the presence of each or either of the attesting witnesses. Indeed, the record clearly shows the contrary. Thus, the two attesting witnesses, William R. Scott and Henry Sheridan, both testified that they were present when the decedent signed the will. Henry Sheridan testified that both he and Scott were present when the testator signed the will and that he and Scott attested the same in the presence of each other. Scott, however, was not certain that Sheridan was present when he affixed his signature. Even so, because of the wording of the regulation, the prevailing rule does not require the two attesting witnesses to be present at the same time. *Estate of Joe (Joseph) Sherwood, supra.* Both attesting witnesses did sign the instrument. There is no requirement in the regulations or elsewhere that they sign in the presence of the testator, or that the testator acknowledge his subscription to his will to either or both of the attesting witnesses, or that he "publish" said instrument by declaring it to be his last will. It is a rule of general application that, in the absence of a statute requiring it, publication is unnecessary. 94 C.J.S. *Wills* sec. 187 (1956). Nor is there any requirement, as the contestants contend, that the attesting witnesses sign their names in response to an overt request of the testator. In *Estate of Annie Devereaux Howard, supra*, this question was put in proper perspective:

> That portion of regulations applicable to the present situation provides that an Indian of the age of 21 years and of testamentary capacity may dispose of his trust or restricted property by a will executed in writing and "attested by two disinterested adult witnesses." There is nothing contained in the regulations requirng that the testatrix shall request the attesting witnesses to sign as such.

We are satisfied from our review of the entire record that the execution of the will in question was regular in all respects and was fully in accordance with the applicable regulations.

TESTAMENTARY CAPACITY

The contention of the contestants, Oneta Robedeaux and Lena V. Robedeaux, that the decedent lacked testamentary capacity rests chiefly on his chronic alcoholism and his having been the subject of guardianship proceedings. Aside from the implications one might draw from the guardianship proceedings, the evidence of the decedent's lack of testamentary capacity consists of the opinions of the two contestants, both of whom are parties claiming an interest in the estate, and the opinion of decedent's sister, Effie Roy. Thus, Oneta Robedeaux, Lena Robedeaux, and Effie Roy, each testified that the decedent was not "competent" to make a will.[5] On cross-examination, however, Oneta testified that when the decedent was not drunk he was "normal", that he knew who his children were, who she was, who his former wife was, and that he had money at the Indian Agency. She also testified that the decedent, when he was sober, was rational and normal and knew what he was doing.

Lena Robedeaux also qualified her opinion by testifying that the decedent would have been competent to make a will if he was sober at the time, and that she did not know whether or not he was drunk or sober on March 2, 1967, when the will in question was executed.

Dr. P. R. Reimer, who treated the decedent at various times in 1968, confirmed that the decedent was an alcoholic and that he had various diseases including diabetes, heart trouble, hypertension, kidney trouble, and arteriosclerosis. He indicated, however, that while these ailments could affect one's ability to function mentally and conduct business, they would not necessarily have that effect, and in the decedent's case they did not have that effect "as far as he could tell." He felt the decedent was competent to make a will. Although his opinion is based on dealings with the decedent after the will was executed, we may consider the same in determining testamentary capacity at the time of execution of the will. *Moore et al.* v. *Glover*, 196 Okla. 177, 163 P. 2d 1003 (1945).

Willis Robedeaux testified that on March 2, 1967, the date of the execution of the will, his father was sober, was aware of the extent of his property, and knew who the members of his family were.

Both attesting witnesses testified that the decedent, at the time he

[5] The extreme generality of Effie Roy's testimony is characteristic of that of Lena Robedeaux and Oneta Robedeaux on this point. The following exchange, appearing at page 5 of the transcript of her testimony, is typical: Q. "Alright, from the time he was placed under guardianship in 1957 until he died, was he ever competent to draw a will in your opinion?" A. "I will say no, I don't think he was."

executed his last will, was sober and had sufficient mental capacity to make a will. One of these witnesses, William R. Scott, a social worker at the Pawnee Agency, testified that the guardianship was necessitated by the decedent's inability to manage his money and property rather than mental incompetency. This is corroborated by Willis Robedeaux, who testified that he was appointed guardian for his father's estate in 1957 by the County Court of Oklahoma County because the decedent was a spend-thrift and because a go-between between the decedent and the Bureau of Indian Affairs was needed.

In addition to the testimony of Willis Robedeaux, Dr. Reimer, and the two attesting witnesses, the examiner's finding of sufficient testamentary capacity is supported by the testimony of two of the testator's friends, Byron Neal and J. W. Ridley. They testified the testator was able to carry on conversations in a normal, rational manner, and that he was competent tomake a will.

In view of our holding herein that the will in question was duly executed, the burden of proof as to testamentary incapacity is on the two contestants. *In the Matter of the Estate of Samuel Hugh Wadsworth*, 273 P. 2d 997 (Okla. 1954); 94 C.J.S. *Wills* sec. 31 (1956). From our reading of the record, we believe it apparent that the testator knew each of his children and was otherwise aware of the natural objects of his bounty. It is not unusual that he chose to disinherit his second wife, Oneta Robedeaux, in view of their troubled marital status and the fact that divorce proceedings were pending at the date the will was signed and at the time of his death. Whether the disposition of property under a will is natural is determined by examining the relationship existing at the time of its execution between decedent, and his heirs and devisees. *Estate of Edward Leon Petsemoie*, IA-T-10 (April 29, 1968). Here, the evidence clearly establishes that the marital relationship between the decedent and Oneta Robedeaux had significantly deteriorated and it was perfectly natural and consistent for him to disinherit her. The failure of the decedent to mention Lena Robedeaux in his will is also entirely consistent with the relationship which existed between them during his lifetime. While the record indicates that the decedent, from time to time, purchased gifts for Lena, this is explainable by the fact that she was the daughter of his sister. It does not necessarily evidence any indication of intent on the decedent's part to manifest paternal feelings and instincts toward her.

There is no evidence in the record that the decedent's alcoholism caused any damage to his brain so as to substantially affect his memory or ability to reason or that he was under the influence of alcohol

or otherwise incapacitated at the time he made his will in March of 1967. Accordingly, we find the evidence that the decedent was a chronic alcoholic, even combined with his other illnesses, is insufficient to rebut the testimony of the attesting witnesses and other witnesses concerning his testamentary capacity. *Estate of William Bigheart, Jr.*, IA–T–21 (August 8, 1969).

The fact that the decedent was unable to manage his own business affairs does not preclude a finding that he possessed testamentary capacity at the time of the execution of his will. *Estate of Taf-poie (Tof-poie)*, IA–1413 (May 9, 1966); *Estate of Anna Charley Kaseca White*, IA–T–13 (June 18, 1968). While an adjudication of a testator's mental incompetency to manage his property is to be considered in the determination of his testamentary capacity, such evidence is not conclusive proof thereof. *Estate of Wook-kah-nah*, IA–855 (October 21, 1958), 65 I.D. 436. A person is not deemed to be incompetent to make a will by virtue of that fact that a guardian has been appointed. *Moore* v. *Glover*, *supra*; *In re Nitey's Estate*, 175 Okla. 389, 53 P. 2d 215 (1935). A person may require a guardian to supervise his estate and yet be competent to make a valid will disposing of it upon his death. *In re Bottger's Estate*, 14 Wash. 2d 676, 129 P. 2d 518 (1942).

We subscribe to the generally accepted definition of testamentary capacity appearing *In re Nitey's Estate*, *supra*, i.e., a state of mental capacity to understand in a general way the nature of the business then ensuing, to be able to bear in mind in a general way the nature and situation of the property, to remember the objects of one's bounty, and to plan or understand the scheme of distribution. *See also In re Bottger's Estate*, *supra*. We are satisfied that the testator demonstrated a sufficient capacity to meet these requirements. Accordingly, the determination made by the examiner on this point will not be disturbed on appeal.

UNDUE INFLUENCE

The contestants also allege that the will was obtained, and the execution thereof procured, by undue influence practiced upon the decedent by his son, Willis Robedeaux. The theory advanced is that Willis refused to give his father money to purchase liquor unless he did exactly as directed. We find this allegation to be without merit. Indeed, we find little correlation between this allegation, of undue influence arising out of psychological pressure resulting from withholding alcohol, and the proof presented by contestants. Their evidence, viewed

in its most favorable light, consists of a showing that Willis Robedeaux was his father's guardian for a period of time, that he drove his father to the agency to make the will, that the decedent stayed with Willis a majority of the time during the six year period preceding his death, that due to ill health and alcoholism the decedent was susceptible to undue influence, and that Willis drove his father to the hospital and other places where the decedent had to go. While the opportunity may have existed for Willis to exercise undue influence over his father, there is no proof that he actually coerced or influenced the decedent's execution of a favorable will. The fact that decedent did not have a driver's license accounts for his being chauffeured by Willis on various occasions. Willis also denied that he discussed the provisions of the will with his father, although he did admit encouraging his father to make a will.

The position of the contestants is also eroded by the testimony of Effie Roy that the decedent, during the last six or seven years of his life, lived with her a substantial part of the time.

Where, as here, it has been established that a will was duly executed, the contestants have the burden of proving undue influence. *In re Estate of Wadsworth, supra.* To invalidate a will because of undue influence upon a testator, it must be shown: (1) that he was susceptible to being dominated by another; (2) that the person allegedly influencing him in the execution of the will was capable of controlling his mind and actions; (3) that such person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires. *Estate of Louis B. Fronkier*, IA–T–24 (Feb. 24, 1970). If any one of these elements of proof is missing, an allegation of undue influence cannot be established merely by showing that an opportunity existed for it to be exerted. *Estate of Joe (Joseph) Sherwood*, IA–P–10 (May 9, 1968). Nor can active participation in procuring the execution of a will be inferred from the fact that the person charged with undue influence accompanied the testator to an attorney's office where the will was executed, in the absence of evidence showing that the testator went there at such person's instigation and that the testator was not acting in accord with his own desires. *In re Lingenfelter's Estate, DeArmond* v. *Tucker et al.* 38 Cal. 2d 571, 241 P. 2d 990 (1952). We find no evidence in the record indicating, or tending to indicate, that Willis Robedeaux withheld alcohol from his father for the purpose of coercing his father, contrary to his father's own desire, into making a will with favorable provisions for himself and his sister,

Ramona Esther Auld. Nor do we find evidence which tends to establish that the decedent was a person susceptible to the domination of his son or any other person. There is absolutely no showing that Willis actually exerted influence on the decedent with respect to specific provisions of the will, or that there was pressure of any kind operating directly or indirectly upon the decedent at the time of the testamentary act. *Estate of Charlotte Davis Kanine*, 72 I.D. 58 (1965). Furthermore, since the decedent's will provides for the disposition of his estate to his two children, the natural objects of his bounty, we find this to be a perfectly natural distribution. Generally speaking, no influence upon a testator is sufficient to invalidate a will unless it was directly connected with the execution of the instrument by the testator, and was present and operating directly upon his mind so as to control his disposition of his property under the will. 57 Am. Jur. *Wills* sec. 352 (1948). There is no showing that Willis Robedeaux or any other person brought pressure to bear upon the decedent in proximity to the time and place of performance of the testamentary act.

Proof of undue influence in the execution of a will must also be so substantial that the judges of fact, having a proper understanding of what undue influence is, may perceive by whom and in what manner it has been exercised, and what effect it has upon the will. 57 Am. Jur. *Wills* sec. 435 (1948). While most of the authorities support the view that a presumption of undue influence arises upon a showing that the person who actively prepared or procured the execution of a will obtains a substantial benefit to which he has no natural claim, this presumption does not arise here. Willis Robedeaux, as a son, does have a natural claim to his father's estate, and he only encouraged his father to make a will and did not actually procure the execution of the same. He did not promote a distribution favorable to himself. 57 Am. Jur. *Wills* sec. 390 (1948).

Based upon our review of the evidence adduced at the hearings and our interpretation of the applicable law, we concur with the determination of the examiner and find that the subject will is the product of decedent's free and voluntary testamentary act.

PATERNITY

Lena Robedeaux claims that she is the daughter of the decedent by his sister Effie Roy and that she was unintentionally omitted from the will. Effie Roy testified that decedent was Lena's father, that she gave birth to Lena in 1923 when she was 15 or 16 years old, and

that she put the name of a friend, Roy Hurst, on Lena's birth certificate because he had befriended her. She also claims that on the occasion of Lena's conception her brother attacked her. She did not tell her father what had occurred but explained the matter away by saying that she had had a fight with her brother in the barn.[6]

In 1960, in a motor court in Oklahoma City, the decedent allegedly acknowledged to Effie Roy that he was Lena's father. Those present were, in addition to the testator and Effie Roy, Lena and one Louis LeForce. Effie Roy admitted that her brother was "drunk" at the time, but she felt he understood what he was saying. Lena Robedeaux and Louis LeForce corroborated Effie Roy's testimony concerning the conversation in Oklahoma City in 1960. In addition, LeForce testified that the decedent told him in 1943 that Lena was his daughter. LeForce was "dating" Lena at the time.

Oneta Robedeaux testified that the decedent told her in 1955 [7] that he was Lena's father and that they discussed the matter "lots of times" after that.

In his ruling denying the petition for rehearing of Lena V. Robedeaux, the Hearing Examiner took judicial notice of the order approving will and decreeing distribution dated May 10, 1968, in the *Estate of Carl Bruce Clifton*, deceased Otoe Unallottee, noting that:

> In that case the mother of this petitioner testified on March 21, 1968, that Carl Bruce Clifton was the father of the petitioner. The petitioner made a sworn statement at that hearing that the testimony of her mother was true. This record plainly establishes that the decedent in the case at bar is not the father of the petitioner.

Unfortunately the record in this case is barren of the records and transcript of hearing in the *Estate of Carl Bruce Clifton*. Nor is there any testimony in the record before us from Effie Roy or other witnesses relative to Effie Roy's testimony in that case. The Examiner's ruling appears to have been primarily based upon the contradictions in Effie Roy's testimony concerning the paternity of her daughter. Although not challenged by any of the appellants herein, we are concerned with the propriety of an examiner's taking official notice of facts and testimony from other unrelated files without giving interested parties an opportunity to contest such information.

As we held in *Estate of Lucille Mathilda Callous Leg Ireland*, 1 IBIA 67, 78 I.D. 66 (1971), Indian probate adjudications fall within

[6] The records of the Pawnee Field Office of the Bureau of Indian Affairs reflect that Roy Hurst is Lena's father. These records also show that Lena is "illegitimate."

[7] Shortly after they were married.

the provisions of the Administrative Procedure Act. In hearings governed by the Administrative Procedure Act where a decision of an agency is based on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary, 5 U.S.C. sec. 556(e) (Supp. V, 1970); 2 Davis, *Administrative Law Treatise*, sec. 15.01 (1958). It is also generally recognized, however, that while an administrative agency may take notice of facts known to it, such facts must be made to appear in the record in order to support a decision. *United States* v. *Baltimore and O.S.W.R.R. et al.*, 226 U.S. 14 (1912); 2 Am. Jur. 2d *Administrative Law*, sec. 386 (1962).

Although we recognize that there is some conflict in the authorities as to the propriety of an administrative tribunal basing its decision upon facts gathered from other files in its possession without introducing those files into evidence,[8] we conclude that it was improper for the examiner to use information gleaned from the record in the *Estate of Carl Bruce Clifton* without giving the interested parties herein due notice thereof and an opportunity to contest or rebut the same. Such action, however, does not constitute prejudicial error for two reasons. First, there is other independent evidence in this record sufficient to sustain the finding that the decedent was not Lena's father. Second, in view of our other findings herein, the ultimate result would have been the same had the examiner ruled in Lena's favor on the paternity issue. Furthermore, since the point was not raised in the notice of appeal, it is deemed waived.

Where the examiner has had the opportunity to observe the witnesses and evaluate their testimony on the controverted factual question of paternity, it has been, and still is, the policy of this Department not to disturb his conclusions thereon. *Estates of Josie Carroll Mustache and John Mustache, Sr.*, IA–1262 (April 4, 1966).

Furthermore, having examined this record carefully, we are inclined to view the testimony of Lena Robedeaux and the other witnesses in her behalf with considerable reservation. Here, the decedent and Lena never maintained the usual father-daughter relationship. Nor did the decedent educate or appreciably support Lena during his lifetime. His actions throughout were not particularly compatible with an acknowledgment on his part that Lena was his daughter. No evidence was produced showing that the decedent ever acknowl-

[8] See 2 Am. Jur. 2d *Administrative Law* § 387 (1962).

edged paternity in writing. *Estates of Josie Carroll Mustache and John Mustache, Sr., supra.* We are also influenced by the fact that Effie Roy at the time of Lena's conception failed to name her brother as the father, even to her own father, although this is possibly explainable by the fact that she was only 15 to 16 years of age at the time. Of even stronger persuasion is the fact that another individual, Roy Hurst, was named as Lena's father not only in Lena's birth certificate (which was prepared at that time) but also in the records of the Bureau of Indian Affairs which were prepared some years thereafter. Finally, we have given some consideration to Lena's admission that she went by the name "Lena Hurst" until 1966.

Although we agree with the Hearing Examiner that the record does not establish paternity on the part of the decedent, even if we were to assume, *arguendo*, that paternity was established in this record the result in the final analysis, would be the same. The appellant, Lena Robedeaux, urges that she is entitled under Oklahoma law to share in the estate as an unintentionally omitted child. The applicable statute cited by appellant, 84 OSA, section 132 provides:

> Provisions for children unintentionally omitted. When any testator omits to provide in his Will for any of his children, or for the issue of any deceased child unless it appears that such omission was intentional, such child or the issue of such child, must have the same share in the estate of the testator, as if he had died intestate, and succeeds thereto as provided in the preceding section.

We are, of course, not obliged to follow any state statute in determining the rights of pretermitted heirs. *Charles Clement Richard*, IA–1260 (July 15, 1963). In any event, it appears to us that Lena's omission was intentional and that this will is entirely consistent with decedent's actions, as well as the relationships which he established, during his lifetime. The facts of this case parallel those in *Estate of George Chahsenah*, IA–T–4 (June 20, 1967), a decision in which the Regional Solicitor reversed Examiner Blaine. The Regional Solicitor was reversed by the District Court in *Atewooftakewa et al.* v. *Udall*, 277 F. Supp. 464, 467–68 (D.C.W.D. Okla. 1967),[9] wherein the court stated:

> The import of the Regional Solicitor's views is that an inequity will result should the decedent's estate be permitted to devolve upon a niece, who had provided the decedent with a home, and to her children, and thereby is denied to a

[9] The decision of the District court in this case was subsequently reversed by the 10th Circuit as reported, *Dorita High Horse* v. *Tate*, 407 F.2d 394 (10th Cir. 1969). The Court of Appeals in turn was reversed by the Supreme Court *sub nom. Tooahnippah (Groombi), Administratrix et al.* v. *Hickel*, 397 U.S. 598 (1970) which in effect affirmed both Examiner Blaine and the District Court.

putative daughter whose relationship with the decedent was only of the most casual nature. I find difficulty in following his reasoning to that conclusion. Moreover, there is danger in that course in that it provides no recognizable standard, thereby permitting the Secretary to go as near or as far in the grant of his sanction as his sympathies may lead him, in whatever direction, and conceivably could result in all manner of discretionary abuses.

* * * * * * *

This decedent's will was not an unnatural one in light of the circumstances. Someone has lost sight of the fact here that Congress has conferred the right to make a will upon the Indian and not upon the Secretary. The Secretary can no more use his approval powers to substitute his will for that of the Indian than he can dictate its terms. If the will making right is to be meaningful the Indian must be given a free hand to decide upon those persons who shall be the objects of his bounty without unreasonable Secretarial interference. I find that the denial of approval of the last will and testament of George Chahsenah lacks a rational basis and it is unreasonable and arbitrary denial of a right conferred upon him by Congress.

We are satisfied that the omission of Lena from the decedent's will was intended and that she would not be entitled to share in the decedent's estate even if the Oklahoma statute were applicable.

Accordingly, we find no error in this respect in the examiner's denial of the petition for rehearing of Lena V. Robedeaux entered August 24, 1970, herein.

MISCELLANEOUS ALLEGATIONS OF ERROR

The two contestants, Lena Robedeaux and Oneta Robedeaux, have alleged, in grossly vague terms, "irregularities in the proceedings of the trial examiner," "error of law occurring at the trial," and other error arising out of the refusal of the Examiner to order polygraph examinations of Willis Robedeaux and his wife, the contestants, Effie Roy, and Louis LeForce. With regard to the general allegations of error, we will not scour the record to find irregularities which are not specified with at least some particularity in the appeal. This Board is no different from other administrative review boards, and for that matter, from appellate courts, in its lack of clairvoyant powers. We have absolutely no way of knowing what the appellants, or their attorney, have in mind in regard to these allegations.

In connection with the refusal of the Examiner to direct polygraph examinations, there are numerous reasons why this allegation is without merit. To begin with, the Examiner has no authority to order any of the parties or witnesses to take lie detector tests. Assuming

some of the parties mentioned by the appellants were willing to take such tests, the proper procedure would have been for appellants' attorney to have had the tests taken prior to the hearing and offer the same in evidence at the hearing. At this point, the Examiner would have discretion to accept or reject the evidence, provided a proper foundation for the receipt of such evidence had been established. Even if the Examiner had accepted such evidence, however, we would be strongly inclined to find the receipt thereof to be improper and prejudicial. The results of polygraph or lie detector tests are not ordinarily admissible. *Aetna Insurance Co. et al.* v. *Barnett Bros., Inc.*, 289 F. 2d 30 (8th Cir. 1961); 32 C.J.S. *Evidence* sec. 588(4) (1964). This is true regardless of whether submission to such tests is by voluntary agreement, by direction of the tribunal, or by coercion. 32 C.J.S. *Evidence* sec. 588(4) (1964). Such tests simply have not gained sufficient standing, scientific recognition, or degree of dependability. *Henderson* v. *State*, 94 Okla. Crim. 45, 230 P. 2d 495 (1951). *See also* Annot., 23 A.L.R. 2d 1306 (1952).

The two contestants, in raising the question of their right to submit newly discovered evidence bearing on the "competency of the decedent," attached to each of their appeals an affidavit of one Estanislado Farias, which contains material relating not only to decedent's competency, but also to the paternity question. While we do not condone the practice of placing evidence in the record as attachments to an appeal, we have examined the affidavit of Mr. Farias and conclude that had his testimony been received in evidence, it would be only cumulative and would have no bearing on the ultimate decision reached in this case.

Accordingly, we find no irregularities in the record which occurred during the conduct of the hearing or otherwise such as would have the effect of depriving the appellants of administrative due process or an otherwise fair hearing.

ATTORNEY FEES

Claim of John H. Kennedy

Mr. Kennedy has submitted his claim herein for attorney fees in the sum of $6,105.63 for services rendered in behalf of Oneta Robedeaux in the divorce proceedings described hereinabove.

As a general proposition, the jurisdiction of the Secretary to determine and award attorney fees in Indian probate proceedings will be asserted in two situations. First, where the fees are for representa-

tion of Indians in such probate proceedings, and second, where the fees are for services rendered in behalf of the decedent during his lifetime, in which event the claim is of the same genre as those of other general creditors including judgment creditors. Mr. Kennedy's claim does not fall within either of these categories. In the normal course of business, his fees would be the responsibility of his client, Oneta Robedeaux, absent a determination by the Oklahoma court to the contrary.

In the absence of a judgment against the decedent for fees issued by the divorce court, similar to the support money award made by that court, no fees can be allowed to Mr. Kennedy. Oneta Robedeaux takes nothing from this estate under the Examiner's decision herein affirmed and neither does his other client, Lena Robedeaux. All proceedings herein were under the provisions of 25 CFR 15.26, which remained in effect until April 15, 1971, when the procedure was revised with the publication of 43 CFR sec. 4.281 in 36 F.R. 7198. Under 25 CFR 15.26 the fees for the attorney representing Oneta and Lena Robedeaux were collectable only from such interest as they might take from the estate. Here they took nothing, and no fee can be allowed against the interests of the other beneficiaries.

Claims of Houston Bus Hill and Thurman S. Hurst—Divorce and Guardianship Proceedings

Houston Bus Hill and Thurman S. Hurst have filed claims herein in the total sum of $8,250 for their representation of the decedent in the two divorce actions filed in 1966 and the guardianship proceeding.

In his order of January 21, 1970, Examiner Blaine, denied this claim. Examiner Curran, in denying the petition for rehearing of Mr. Hill and Mr. Hurst by instrument dated August 24, 1970, stated:

> This claim is for the legal services rendered in collateral actions before separate tribunals. The claim is not for legal services rendered in this probate proceedings, and the Hearing Examiner has no jurisdiction to adjudicate and determine the amount of fees where there was no contract for a fixed fee. This claim is an unliquidated claim and the Hearing Examiner is without jurisdiction to adjudicate an unliquidated claim not related entirely and directly to the restricted estate. *See Estate of Thomas Umtuch*, IA–1157, April 7, 1960; *Bennett* v. *Vordelon*, La. App. 146 So. 176.

We disagree with some of the conclusions reached by the Examiner. First, his jurisdiction in adjudicating claims for attorney fees is not limited to claims for services rendered in Indian probate proceedings.

Claims for all types of legal services rendered a decedent during his lifetime could have been recognized as general creditors' claims pursuant to 25 CFR 15.23, provided all the requisites of that section were met. We see no generic difference between claims for services of a legal nature and claims for goods provided or other categories of services. Where there is no written or oral contract, the reasonable value of such services should be ascertained by *quantum meruit*. We disagree with the examiner that the claim in question is "unliquidated", in the sense that such term is used to bar allowance of claims sounding in tort not reduced to judgment. Both liability and damages are jury questions in a tort action, whereas the value of the services of an attorney is within the peculiar field of the Examiner. He may rely upon his own special knowledge to form an independent judgment of the value of legal services rendered with or without the testimony of witnesses. *Campbell, et al.* v. *Green*, 112 F. 2d 143 (5th Cir. 1940).

However, it would appear very doubtful that attorney fees in a guardianship proceeding initiated and conducted entirely under authority of the laws of the State of Oklahoma could be considered a general debt of the deceased incompetent. Under the authority of *Campbell, supra*, the evaluation of fees in that proceeding would appear to be within the discretion of the judge of the County Court of Oklahoma County, Oklahoma, the Court having jurisdiction of the appointment of the guardian for whom the attorney acted.

Since the record and briefs are devoid of any reference to this rule, it is incumbent upon the attorney to establish his claim to fees for services to the guardian as distinguished from services to the decedent in the divorce matter. When the record is complete, the claims may be indistinguishable in view of the recitals in Mr. Hill's appeal indicating that the guardianship was a continuing status during the times the divorce actions were filed and carried through the Supreme Court of Oklahoma and back to the lower court.

Here, if the claim is for valuable services rendered to the decedent during his lifetime, it is as fit a subject for payment as the expense of the decedent's burial expense, doctor's bills, and grocery bills. We conclude that the liability for and reasonable value of such fees are within the Examiner's jurisdiction for determination, but only after the Examiner has first determined that the allowance of such fees was beyond the exclusive jurisdiction of the County Court of Oklahoma County, Oklahoma, in the guardianship proceeding.

Mr. Hill and Mr. Hurst contend that the Hearing Examiner re-

fused to permit the introduction of evidence relating to their attorney fees. Attached as part of their appeal is an affidavit from former Hearing Examiner Kent Blaine wherein Mr. Blaine affirms that prior to the hearing he advised Mr. Hill that, due to other issues and anticipated extensive evidence, "there would be no evidence taken at this hearing on these two creditors' claims for legal services." The Examiner also indicated his intention that at some future time Mr. Hill's entitlement to attorney fees for services as a general creditor would be resolved informally "by conference or a special formal hearing on these matters." Thus, former Examiner Blaine supports Mr. Hill's contention that he was not permitted to introduce evidence at the hearing relating to his entitlement to attorney fees in this probate proceeding. Off-the-record agreements and understandings as to procedures, or those that affect any rights of any party, are difficult of proof and the subject of controversy in cases. In the event this matter should again come before this board, the rule will be that no consideration will be given to any matter alleged which is not a part of the official record as specified in 43 CFR 4.236, 36 F.R. 7196.

In view of the understanding between Mr. Hill and Examiner Blaine that there would be further proceedings to determine attorney fees in this case, and in view of the questions raised herein, we see no alternative but to remand this case to the hearing examiner for such purposes.

In remanding this case for further proceedings, the issues are strictly confined to the entitlement of Mr. Hill and Mr. Hurst to attorney fees for services rendered before decedent's death which are chargeable to this estate, and the amount thereof, if any.

Claim of Houston Bus Hill—Probate Proceedings—Fees

In addition to the claims which Houston Bus Hill made against the estate for attorney fees for services rendered to the decedent and to his guardianship estate, he is now asserting an additional and separate claim in the amount of $2,500 for services rendered to the principal beneficiaries under the will, Willis Robedeaux and his sister, Ramona Robedeaux Auld. It is not clear whether Mr. Hill was in fact authorized or employed to represent these beneficiaries at all. The transcripts of the hearings held January 16, 1969, and May 8, 1969, do not include an entry of appearance by Mr. Hill on behalf of the beneficiaries as clients (Mr. Kennedy had duly filed a power

of attorney from the widow). Mr. Hill had filed no power of attorney from his clients as required by 25 CFR 15.7, nor had he filed the certificate required by 5 U.S.C. sec. 500 (Supp. V, 1970) or even qualified himself under 43 CFR 1.3. Examiner Curran, in his order of August 24, 1970, relied in part upon these omissions as a basis for the denial of the application for allowance of fees in the probate. In the order of February 19, 1971 denying Mr. Hill's petition for rehearing, he said, "A claim for attorney fees after a final order has been entered comes too late." The following facts are noted:

At the time Examiner Blaine issued the order of January 21, 1970, wherein he approved the will, approved the claim for support money arising out of the order of the divorce court, settled for heirship rights of Leona Robedeaux, and denied the attorney fee claims of both Mr. Hill and Mr. Kennedy, he had only those issues before him and all were finally disposed of therein. Having decided all of the issues, his jurisdiction over the probate terminated subject only to his authority to grant a petition for rehearing or to enter an order nunc pro tunc to correct technical errors. Examiner Blaine thereupon resigned his position on January 6, 1970.

On March 7, 1970, Mr. Hill filed his application for attorney fees and attempted thereby to reopen the proceedings and to interject an entirely new issue into the probate without satisfying the requirements of 25 CFR 15.18.

A series of petitions for rehearing were separately filed by all the opposing parties except Willis Robedeaux and his sister, Ramona Robedeaux Auld. Examiner Curran, the successor Examiner, entered orders denying these petitions on August 24, 1970. On the same day he entered a separate initial order denying Mr. Hill's March 20, 1970, application for attorney fees.

Mr. Hill filed a petition for rehearing on his probate attorney fee issue on October 22, 1970, and the notices of appeal vesting this Board with jurisdiction as to all matters except the attorney fee issue were filed in this office October 29, 1970. A separate appeal on the attorney fee issue could not be filed at the time since Examiner Curran had not ruled and did not rule on such separate issue until February 19, 1971. The appeal on the separate fee issue reached the offices of the Board March 25, 1971. Mr. Hill's position on this appeal appears to be somewhat adverse to the interests of Willis Robedeaux and Ramona Robedeaux Auld since they were not represented by Mr. Hill before this Board, and since Mr. Hill's appeal concerns itself solely with his claim for fees rendered in their behalf.

The appeal of Houston Bus Hill for attorney fees in the amount of $2,500 for services rendered is dismissed for lack of jurisdiction.

ORDER

Pursuant to the authority vested in this Board by virtue of its delegation from the Secretary, 35 F.R. 12081, the orders of the Examiner dated August 24, 1970, denying the petitions for rehearing of Oneta Robedeaux, Lena Robedeaux, and John H. Kennedy, respectively, are affirmed, and the appeals of these appellants are dismissed. The order of the Examiner dated August 24, 1970, denying the application of Houston Bus Hill for attorney fees in connection with his representation of Willis Robedeaux and Ramona Esther Robedeaux in these probate proceedings is affiirmed and his appeal is dismissed. The order of the Examiner dated August 24, 1970, denying the petition for rehearing of Houston Bus Hill and Thurman S. Hurst in connection with their claims for services rendered in the divorce and guardianship proceedings is set aside, and these proceedings are remanded for further hearing in accordance with our instructions herein and for the preparation by the Examiner of a further decision in this matter.

In view of the delay caused by this remand and the potentially adverse economic effect on the beneficiaries named in the will occasioned thereby, we see no reason why partial distribution of the assets of decedent's estate is not in order, provided sufficient funds are withheld to cover the claims of Houston Bus Hill and Thurman S. Hurst should such claims be sustained on this remand. Accordingly, the Examiner is instructed, after first withholding sufficient funds for payment of the claims of Houston Bus Hill and Thurman S. Hurst in the divorce and guardianship proceedings to enter an order of partial distribution, providing for (1) payment of the devise of $1 to Oneta Robedeaux (2) payment of her claim for monthly support payments in the sum of $4,200, and (3) distribution of the remaining assets in the decedent's estate, to the extent possible, with due consideration as to the type and extent of such assets, to Willis Edward Robedeaux and Ramona Esther Robedeaux Auld. in the manner provided in decedent's will.

DAVID J. MCKEE, *Chairman,*
Board of Indian Appeals.

I CONCUR:

MICHAEL LASHER,
Alternate Board Member.

SUSPENSION OF OPERATIONS ON OIL AND GAS LEASES

Outer Continental Shelf Lands Act: Generally

Under his conservation authority the Secretary (or his delegate) may suspend operations on an OCS oil and gas lease while legislation is pending where such operations might lead to results inconsistent with the purpose of the legislation.

Under his conservation authority the Secretary (or his delegate) may suspend operations on an OCS oil and gas lease to permit the preparation of an environmental impact statement on exploratory drilling which will assist him in the determination of any special stipulations to be imposed on drilling permits.

When the regional oil and gas supervisor of the Geological Survey directs the suspension of operations on an OCS lease in the interest of conservation, the lease will be extended for a period equal to the period of suspension.

M-36831 *July 21, 1971*

To: Secretary

Subject: Appeals of Union Oil Company of California, Mobile Oil Corporation, Gulf Oil Corporation, and Texaco Inc.; Humble Oil and Refining Company and Atlantic Richfield Company; and Standard Oil Company of California, from Orders Suspending Operations on Oil and Gas Leases in the Santa Barbara Channel.

You have asked us to review the appeals by these seven oil companies from the suspension of operations imposed on April 21, 1971, on forty-seven of their oil and gas leases in the Santa Barbara Channel. All leases were issued under section 8 of the Outer Continental Shelf Lands Act (43 U.S.C. sec. 1337), hereafter called the OCS Act. The suspension orders were issued by the regional oil and gas supervisor of the Geological Survey under 30 CFR 250.12(d)(1) which provides that "* * * in the interest of conservation the supervisor may direct * * * the suspension of operations * * *." Another regulation (43 CFR 3305a.4) provides: "In the event that under the provision of 30 CFR 250.12(c) or (d)(1), the regional oil and gas supervisor of the Geological Survey directs the suspension of either operations or production, or both, with respect to any lease, the term of the lease will be extended by a period equivalent to the period of suspension."

Legislation to cancel thirty-five of these leases has been submitted to the Congress by the Department. Operations on these leases were suspended from April 21, 1971, to January 2, 1973, to give the Congress an opportunity to pass the termination bill. On the other twelve leases

(and on two others not involved in these appeals) operation were suspended for ninety days from April 21, 1971, to permit the Department to complete the preparation of an environmental impact statement on exploratory drilling on the Santa Barbara Channel. The appellants have challenged the authority of the Department in these circumstances to issue a suspension of operations on these leases in the interest of conservation and to grant an equivalent period of extension.

Four principal legal questions are raised in these appeals:

1. Does the regional oil and gas supervisor, as a representative of the Secretary, have authority to suspend operations on an OCS lease in the interest of conservation?

2. Were the suspensions of operations on the leases involved in these appeals made in the interest of conservation?

3. If the regional oil and gas supervisor has authority to suspend operations on a lease in the interest of conservation, does the Secretary have authority to extend the lease for a period equal to the period of suspension?

4. Does the National Environmental Policy Act affect the Secretary's and lessee's rights in the Santa Barbara situation?

The particular provisions of the OCS Act under which these questions arise have not been tested in the courts nor have they been significantly construed in administrative decisions of the Department. Consequently, guidance must come primarily from the legislative history of the OCS Act.

Although the appeal is only from the orders of suspension issued by the regional oil and gas supervisor on April 21, 1971, the appellants also allege that their leases were in effect suspended for periods prior to the April 21 orders and request the Secretary to grant extensions and rental relief for those periods of de facto suspension.

I

Section 5(a)(1) of the OCS Act (43 U.S.C. sec. 1334(a)(1)) authorizes the Secretary to issue rules and regulations to carry out the provisions of the Act and states that "the rules and regulations prescribed by the Secretary * * * may provide * * *, in the interest of conservation, for * * * suspension of operations or production * * *." Pursuant to this statutory authority the Secretary has issued a regulation (30 CFR 250.12(d)(1)), which authorizes the supervisor to direct a suspension of operations or production, or both,

in the interest of conservation. It is under this regulatory provision that the suspensions in this case were issued.

This regulation was issued in 1969 after the issuance of the leases which are the subject of these appeals.[1] Section 5(a)(1) provides that the Secretary—

> may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this Act. * * *

Consequently, the revised regulation, as a regulation providing for the conservation of the natural resources of the outer Continental Shelf, became, upon promulgation, applicable to all existing leases, including the leases involved in these appeals.

The answer to the first question is thus that the Secretary and, by delegation, the regional oil and gas supervisor, have authority to suspend operations in the interest of conservation on the forty-seven OCS leases involved in these appeals.

II

Although the statute authorizes the Secretary to issue regulations for the suspension of operations in the interest of conservation of natural resources, the term "conservation" is not defined in the statute, nor is there any explicit definition of the term in the legislative history of the Act. However, conservation is defined in the dictionary as: "1. A conserving, preserving, guarding, or protecting; a keeping in a safe or entire state; preservation. 2. Official care or keeping and supervision, as of a river or forest * * * ." Webster, *New International Dictionary* (2d ed. 1943). Even if the term "conservation" should be limited to its use in the mining industry, a similarly broad definition would be applicable: "conservation: conserving, preserving, guarding, or protecting; keeping in a safe or entire state; using in an effective manner or holding for necessary uses, as mineral resources." U.S. Department of the Interior, Bureau of Mines, *A Dictionary of Mining, Mineral, and Related Terms* (1968).

The legislative history of the OCS Act clearly indicates that "conservation" was used in the broadest sense and not merely in the sense of attaining maximum production or of protecting only the mineral

[1] In 1968 the comparable regulations were 30 CFR 250.12(b), 30 CFR 250.20, and 43 CFR 3383.5.

resource itself. When S. 1901 was introduced, the term "conservation" appeared alone, but the Senate Committee on Interior and Insular Affairs reported S. 1901 with the addition of "prevention of waste." S. Rep. No. 411, 83d Congress, 1st Sess. 17, 24 (1953). The present text of section 5(a)(1) was recommended by Secretary of the Interior McKay in his letter of June 8, 1953, to Senator Cordon of the Senate Interior Committee. S. Rep. No. 411, 83d Cong., 1st Sess. 26, 27, 29 (1953). In that letter, at page 27, Secretary McKay referred to the expansion of the authority under section 5 to cover "prevention of waste."

Mr. Duncan, Chief of the Conservation Division, Geological Survey, testified in support of the Department's position before the Senate Committee on May 21, 1953. Mr. Duncan discussed conservation in general and gave examples of the conservation regulations of the Department, one of which was the regulation of "pollution and surface damage." Thus it was clear to the Senate Committee considering the bill that the Department deemed conservation to be a term denoting the protection of other interests as well as the attainment of maximum production. Nothing was written by the Committee or said in Congressional debate to indicate that the meaning of conservation of natural resources was to be limited or that the term was to be interpreted in any way other than that used by the Department.

Secretary McKay, in his letter of June 8, 1953, *supra*, stated, at page 28, that broad authority in the field of conservation was needed by the Department so that it would be free to modify its regulations "as circumstances peculiar to operations and actual experience in administering a leasing program in the submerged lands made appropriate." The Department's conservation authority was to be broad and not to be restricted in its actions in the new areas of the outer Continental Shelf. Secretary McKay's recommendation was adopted. The eventual terms of section 5(a)(1) were largely evolved from the recommendations of the Department.[2]

We hold that the Secretary's authority to issue regulations for the suspension of operations in the interest of conservation is broad and

[2] Under any circumstances the determination of the meaning of a term in a statute by the officer charged with the administration of that statute is given great weight; "An administrative official charged with the duty of administering a specific statute has a duty to determine as an initial and administrative matter the meaning of terms in that statute." * * * *California Company* v. *Udall*, 296 F. 2d 384, 388 (D.C. Cir. 1961). The role played by the Department in proposing statutory language to the Committee gives increased importance to the Secretary's interpretation of section 5(a)(1).

embraces all aspects of the protection of the natural resources of the Shelf, and that this was the construction intended by the Congress. The Secretary's authority is sufficient to permit suspension of operations in the interest of conservation in the two situations with which these appeals are concerned.

(1) Operations were suspended on fourteen leases to permit the completion of an environmental impact statement on exploratory drilling. Until the statement is completed, the Department will not know what particular terms and conditions will have to be imposed on exploratory drilling permits to protect natural resources of the Shelf. There is no intention, we understand, to prevent exploratory drilling, but merely an intention to surround it with the safeguards necessary to protect other resources. This is a clear example of conservation.

(2) Operations were suspended on the thirty-five other leases to give the Congress time to consider legislation to establish a National Energy Reserve in which oil and gas and other resources would be protected for the future. This legislation is a conservation measure. Operations on these leases while the legislation is pending might have effects that would frustate the purpose of the legislation. The following were the possible effects specified by the Geological Survey: (a) exploratory drilling may inadvertently lead to a situation where the only sound conservation practice would be continued extraction;[3] (b) a plugged well is usually quite safe, but it is not as safe as if no drilling at all had been conducted, and consequently there may be a loss of fluids or damage to the environment after the drilling and plugging of a well; (c) whenever there is drilling for oil and gas, a blowout or loss of well control is always possible. The Geological Survey said that, although none of these events is likely, all three are possible. In the proper exercise of conservation authority, these possibilities must be recognized and dealt with. Any one of these results would be completely inconsistent with the determination to place the oil and gas deposits in the proposed National Energy Reserve. Consequently, the only way in which the Secretary or his delegate may be certain of protecting the natural resources while the legislation is pending is by suspending all operations on the leases which he recommends be terminated. The legislation, if enacted, will provide just compensation for all that is taken. If the legislation fails of enactment, the leases will,

[3] For example, on the Dos Cuadras structure it has proved impossible to stop the developmental process once begun. As a result of drilling an oil leak developed. The only way in which to control that leak has proved to be continued extraction. The Department does not expect that, with its improved controls, a similar situation would occur again, but the possibility remains.

under the suspension order, be extended for a period equal to the period of suspension. Therefore, we hold that the suspension of operations in these circumstances is a proper exercise of the Secretary's conservation authority.

III

The appellants have questioned the authority of the Secretary to grant extensions equal to periods of suspension, although, they claim that it would be inequitable if the Secretary could not do so. Section 5(a)(1) authorizes the Secretary to suspend operations in the interest of conservation. Section 8(b)(2) provides that an "oil and gas lease * * * shall * * * be for a period of five years * * *." Congress specifically granted the lessee five years in which to bring his lease into production. Although the OCS Act does not explicitly provide that there will be a period of extension added to a lease equal to the period of suspension of operations or production, the statute implicitly grants an extension equal to a period of suspension of operations. During any period of suspension of operations order by the Supervisor, the lessee is effectively deprived by the Supervisor's act of the ability to do anything to obtain production on his lease. Consequently, unless an extension equal to a period of suspension were added to a lease term, a lessee would not have the full five years granted to him by the statute.

The Secretary is given no authority to reduce the term of a lease. Unlike the Mineral Leasing Act of 1920, as amended (30 U.S.C. secs. 181–263), the OCS Act does not describe in much detail the provisions of an oil and gas lease. Instead the Secretary is given in section 8(b)(4) broad discretion in the terms and provisions which he may include in a lease. Section 8(b) sets out only one unqualified limitation on the Secretary's discretion; the lease must be for a period of five years and so long thereafter as there may be production in paying quantities. As to all other matters the Secretary is given some discretion. If there were no extension accompanying a period of suspension, the Secretary could effectively defeat this specific command of the Congress by suspending operations and thus depriving a lessee of part of the five years given him by statute. For this reason sections 5(a)(1) and 8(b)(2), when read together, by implication grant a lessee an extension when the Secretary or his delegate has directed a suspension of operations.

The legislative history supports only this construction of the statute. Section 5(a)(1) in its first sentence gives the Secretary broad discre-

tion to issue regulations to carry out the purposes of the Act and in its concluding sentence, "without limiting the generality of the foregoing provisions", authorizes him to issue regulations to achieve specific objectives. S. 1901, the bill which became the OCS Act, originally included only the broad grant of authority. H.R. 5134, the House version, however, incorporated nine sections of the Mineral Leasing Act. One of these sections was section 39 of the Mineral Leasing Act, *supra*, which gives the Secretary specific statutory authority to suspend operations and production on oil and gas leases in the interest of conservation and likewise requires the extension of the term of leases which have been suspended. There is no doubt that the House version of the bill as originally presented would have required the Secretary to extend leases on the Outer Continental Shelf which had been suspended in the interest of conservation.

During the month of June 1953 the Department was asked to submit comments and suggestions for amendments to S. 1901 and H.R. 5134. In his report of June 8, 1953, *supra*, Secretary McKay recommended the enactment of S. 1901 with amendments to give the Secretary broad leasing authority rather than authority restricted to detailed provisions. The Congress adopted his recommendation and gave the Secretary the broad authority set forth in S. 1901 rather than the authority proposed in H.R. 5134 which was limited to specific provisions of the Mineral Leasing Act.

However, in asking for broad authority over leasing, Secretary McKay did not propose to deprive the Secretary of the Interior of any authority which would have come from the specific provisions of the Mineral Leasing Act, but to give him all that authority and more. At page 28, Secretary McKay said:

> Section 5 of S. 1901 should be amended to expressly authorize the Secretary of the Interior to deal by regulations with such matters as unitization, pooling, subsurface storage of oil and gas, suspension of operations and production, waiver or reduction of rentals or royalties, compensatory royalty agreements, the assignment and surrender of leases, and the sale of royalty oil and gas. This authorization should, we believe, be provided in general terms rather than more specifically as in effect provided for in section 5(e) of the Committee Print by adoption of portions of the Mineral Leasing Act of 1920, as amended (secs. 17, 17(b), 30(a), 30(b), 36, 39; 30 U.S.C. 1946 ed., secs. 187a, 187b, 226, 226e, 192, 209). If the authority to promulgate regulations on these subjects is cast in general terms, the Department would be free to incorporate the provisions of the Mineral Leasing Act on the same subjects, but would also be free to modify them as circumstances peculiar to operations and actual experience in administering a leasing program in the submerged lands made appropriate.

The Committee acted upon this recommendation and used the same terms in the final version of section 5. Thereafter the Congress adopted the broad provision recommended by the Department. In so doing, Congress impliedly authorized extensions of the primary term of a lease upon the ordering of a suspension in the interests of conservation.

The Department has always interpreted the Act to give it such authority to extend leases.

The original OCS regulations issued by the Department provided that, where there was a suspension in the interest of conservation, "the term of the lease will be extended by a period equal to the period of suspension." 43 CFR 201.90(a) (19 F.R. 793 (1954)). Two years later in *Solicitor's Opinion M-36364*, 63 I.D. 337 (1956), the Solicitor, after carefully examining the bases on which a lease under the OCS Act might be extended, stated, at 63 I.D. 338:

> As I read section 5 of the act, the Secretary's authority to extend leases granted therein exists only when such extension is indicated as the outgrowth of a suspension of operations or other action taken in the interest of conservation and even there the authority must be implied for it is nowhere expressly conferred. That section * * * contains express authorization to do certain acts and the implied authority to extend the terms of leases but is limited by the requirement that everything that is authorized must be "in the interest of conservation."

This was the original interpretation of the OCS Act, and has remained the interpretation since that time. However, the appellants have questioned the authority of the Secretary to grant an extension equal to a period of suspension because of a misreading of *Solicitor's Opinion M-36392*, 63 I.D. 406 (1956), which was issued three months after *M-36364*. At 63 I.D. 407 the Solicitor stated "I am unable to find any authority for extending section 8 leases in the Outer Continental Shelf Lands Act. Further, it is my considered opinion that legal authority must be found before any such lease can be validly extended." Standing by itself, this remark would appear to be a conclusive determination that there could be no extension in such cases as those under appeal. However, a reading of the whole opinion clearly leads to an opposite conclusion. In the case before the Solicitor in *M-36392* there had been no suspension in the interest of conservation and the request under consideration was for an extension for another purpose. Moreover, in *M-36392* the Solicitor referred favorably to *M-36364*, and the two opinions should be read together.

We conclude that there is statutory authority for 43 CFR 3305a.4 which provides that a lease will be extended by a period of time equal to the period of any suspension of operations directed by the

regional oil and gas supervisor under 30 CFR 250.12(d)(1) in the interest of conservation.

IV

Although the National Environmental Policy Act of 1969 (42 U.S.C. secs. 4321–4347) does not require the preparation of an environmental impact statement before the issuance of exploratory drilling permits for leases which were issued prior to its enactment, procedures under section 102(2)(C) of the statute may be used by the Secretary where he finds them helpful in determining what special terms and conditions should be imposed on any drilling permit approved.

Consequently the preparation of a 102(2)(C) statement in connection with exploratory drilling was not an action required by law itself, but a step taken by the Secretary voluntarily to execute properly duties imposed on him by the OCS Act. This he has authority to do.

V

The appellants have argued in their appeals that, although the Department issued no formal order suspending operations prior to April 21, 1971, it did in effect suspend operations for long periods of time between the blowout on the Dos Cuadras structure on January 28, 1969, and the issuance of the order. Therefore, they ask that the Secretary now recognize those periods of informal suspension and grant extensions equal to the periods of actual suspension.

Each of these appeals, by its very terms, is only an appeal from the orders of the Acting Regional Supervisor dated April 21, 1971. That order was a unilateral act of the Supervisor suspending operations on certain leases, and the only issues which may be raised on appeal from it are those issues relating to the propriety or legality of that order.

The issues which appellants raise with respect to alleged de facto suspensions in the past do not pertain to either the legality or propriety of that order. They instead relate to: (1) previous alleged delays of the Department, described in a most general fashion, in processing applications filed by the appellants; and (2) certain other orders and statements made prior to April 21, 1971. All these, according to appellants, constitute "de facto suspensions." If appellants wish to raise these issues at the Secretarial level, they have chosen the wrong means. If they wish to contest any specific order other than those of April 21, 1971, they should do so in an appeal from that other order. On the other hand, if appellants wish to urge that the

Department issue a suspension order retroactively, thereby acknowledging certain facts to have been a "de facto suspension", they should first apply to the regional oil and gas supervisor alleging with particularity those facts which constitute a "de facto suspension." If the supervisor's action on such a request is unsatisfactory to the appellants, then and only then will an appeal to the Secretary in which these issues are raised be proper.

Appellants are thus premature in attempting to raise the issue of a "de facto suspension" at either the Directorial or Secretarial level without first raising the issue with the regional oil and gas supervisor. Until appellants do so, the Secretary should not consider any questions concerning a "de facto suspension" or whether such a thing as a "de facto suspension" is even possible.

CONCLUSION

In summary, the suspension orders issued by the regional oil and gas supervisor were issued in accordance with the regulations and come within the provisions of the Outer Continental Shelf Lands Act. The scope of the Secretary's conservation authority under that statute embraces suspensions of operations to enable Congress to consider proposed legislation to terminate leases and to enable the Department to determine what specific terms should be included in exploratory drilling permits. Any lease on which operations are suspended will be extended for a period equal to the period of suspension.

MITCHELL MELICH,
Solicitor.

APPEAL OF F. H. ANTRIM CONSTRUCTION CO., INC.

IBCA-882-12-70 *Decided July 28, 1971*

Contracts: Disputes and Remedies: Jurisdiction

Claims of a construction contractor for additional compensation because of increased costs of performance resulting from alleged interference of the project inspector and alleged delay by the Government in vacating certain buildings are based on breaches of contract, which are outside the jurisdiction of the Board to determine administratively.

Contracts: Formation and Validity: Authority to Make—Contracts: Construction and Operation: Changes and Extras

Absent a showing that a project inspector has been given greater authority than included in an express delegation, actions clearly outside the delegation will not be recognized as binding on the Government.

The Government has filed a motion to dismiss this timely appeal on the basis that the stated claims totaling $186,236.37 are clearly claims for alleged Government-caused delays which are beyond the jurisdiction of the Board.

The contract, awarded on September 25, 1967, in the lump-sum amount of $2,187,000,[1] was for the construction of the Santa Rosa School facilities at Santa Rosa, Arizona. Prepared on standard forms for construction contracts, the contract incorporated the General Provisions of Form 23–A (June 1964 Edition), including the Changes clause [2] and the Disputes clause.[3] No Suspension of Work or other pay-for-delay clause is included in the contract.

Appellant's two claims are for equitable adjustment under the Changes clause. The first claim alleges that the interference of the project inspector with the work of the flooring subcontractor deprived the contractor of his basic right to control and direct the work, thus creating a 150-day delay which constituted a change. The requested compensation for the increased cost due to the alleged change is $165,796.77. The second claim alleges that the Government's failure to vacate certain buildings in accordance with the terms of the contract constituted a delay not contemplated by the parties and amounts to a compensable change. The resultant cost is claimed to be $20,439.60.

Appellant's complaint asserts that the claims arise from changes which are within the scope of the Changes clause. The Government in its motion to dismiss states that the claims are founded on delay which, if proved, amount to breaches of contract which are outside the jurisdiction of the Board.

Respecting the first claim, appellant cites *Richey Construction Co.*,[4] for the proposition that improper interference with a contractor's performance of a contract by a representative of the contracting officer is a constructive change. Appellant appears to have ignored the distinction between its claim and the *Richey Construction Co.* case. In *Richey* the action of the supervisory engineer in taking control and direction of the contractor's work was attributable to the Government because the supervisory engineer was the authorized representative of the contracting officer. In the instant appeal the limited authority of

[1] Decreased by Change Orders to $2,176,979.18.
[2] Clause 3.
[3] Clause 6.
[4] IBCA–456–9–64 (February 18, 1966), 73 I.D. 63, 66–1 BCA par. 5386.

the project inspector was carefully outlined in the contracting officer's letter dated October 10, 1967, to the appellant. [5]

It is well settled in the area of Government contracts that the Government is not bound by the actions of unauthorized Government employees. [6] The basic theory underlying the rule is that Government officers and agents possess only the authority expressly delegated to them. [7] The doctrine of apparent authority is not applicable to those who may purport to act on behalf of the Government. In *Chester Barrett d/b/a The American Tank Co.*,[8] the Board has occasion to consider the application of this rule to Government inspectors, stating:

> The appellant's reliance upon the argument that the Government inspector was the authorized representative of the contracting officer appears to be based upon a misunderstanding of the role of a Government inspector. * * * Absent proof that an inspector has been given authority to modify the terms of a contract, an instruction received from him having that apparent effect will not be recognized as binding upon the Government.

Absent a showing that he had the authority to act, the actions of the project inspector would not constitute a change cognizable under the Changes clause, even if we assume—as we do for the purpose of the motion to dismiss—that he acted in the manner described by the appellant.

Appellant has failed to allege or to establish that it is relying on any doctrine other than general agency principles in asserting that the Government is liable for the actions of the project inspector. In light of the special agency rules which govern the relationship of the Government and its agents, we regard the first claim as not one of constructive change, but rather a claim for breach of contract over which the Board has no jurisdiction. [9]

Appellant's second claim involves delay in turning over buildings to the contractor. Appellant urges the Board to find a constructive change which "arose through respondent's failure to vacate certain buildings in accordance with the terms of the contract." [10] The particular provision of the contract cited by the appellant is paragraph 2.b of Subdivision B of the General Conditions. [11]

---

[5] Findings of Fact, Exhibit No. 8.

[6] *Utah Power and Light Co.* v. *United States*, 243 U.S. 389 (1917).

[7] *Federal Crop Insurance Corp.* v. *Merrill*, d/b/a Merrill Bros., 332 U.S. 380 (1947).

[8] IBCA–429–3–64 (April 7, 1966), 66–1 BCA par. 5503 at 25,776.

[9] *Commonwealth Electric Co.*, IBCA–347 (March 12, 1964), 71 I.D. 106, 1964 BCA par. 4136 and authorities cited therein.

[10] Appellant's Memorandum In Opposition to Motion, par. 8, p. 2.

[11] Appellant's Memorandum In Opposition to Motion, par. 9, p. 3. Paragraph 2.b reads as follows:

"* * * The Contractor's work schedule shall reflect phasing of all institutional building construction at the new Santa Rosa School site completed and ready for occupancy prior

Paragraph 2.b, however, does not provide for a contract adjustment in the event that the Government delayed its move. The Court of Claims has recently held in *Edward R. Marden Corporation* v. *United States*,[12] that "to the extent complete relief is not made available under a specific contract provision, a controversy is not subject to administrative determination via the Disputes clause * * *."

Our past decisions are contrary to the appellant's contentions.[13] The Board finds the claims asserted are for "pure delay" and hence outside the jurisdiction of the Board.[14]

The appellant has also requested a hearing. Since the Board is without authority to remedy the wrongs alleged, no useful purpose would be served by holding a hearing.[15]

---

to commencement of buildings Nos. I–6 and I–7 remodeling work at the Gu Achi Site. Before beginning the work on building No. I–6, the Contractor shall allow 10 calendar days for the transfer of stores, equipment, and provisions from building No. I–6 to the new facility No. I–2, and the relinquishment of the building after all Government property has been removed." * * *

[12] No. 154–70 (May 14, 1971).

[13] *Ideker Construction Co.*, IBCA–124 (October 3, 1957), 64 I.D. 388, 57–2 BCA par. 1441; *Hoak Construction Co.*, IBCA–353 (January 27, 1965), 65–1 BCA par. 4665. *Cf. Blackhawk* cited by the appellant in support of its position. We note, however, that that case involved a claim for a time extension rather than a claim for additional compensation. We also note that the time extension granted could have been provided under the clause entitled "Termination For Default—Damages For Delay—Time Extensions" of Standard Form 23–A.

[14] *James Knox d/b/a JāK Enterprises*, IBCA–684–11–67 (February 13, 1968), 68–1 BCA par. 6854; see *Allison & Haney, Inc.*, IBCA–642–5–67 (February 7, 1968), 68–1 BCA par. 6842, in which, at 31,631, the Board stated:

"* * * It thus appears that we are not presently concerned with increased costs incurred by the appellant in the performance of the changed work. Rather, appellant is seeking reimbursement for its standby costs. This is what is termed a 'pure delay' situation. The Government is charged with the violation of the contractual obligation not to hinder the contractor in the performance of his contract.

"The Changes clause was not designed as a mechanism for the adjustment of breach of contract claims. * * *"

[15] *North Star Aviation Corp.*, IBCA–741–10–68 (May 19, 1969), 69–1 BCA par. 7673.

CONCLUSION

Accordingly, the motion is granted and the appeal is dismissed. For this reason, appellant's request for a hearing is denied.

RUSSELL C. LYNCH, *Member.*

WE CONCUR:

WILLIAM F. MCGRAW, *Chairman.*

SHERMAN P. KIMBALL, *Member.*

USE OF STATE CONVICTS IN BLM FIRE-SUPPRESSION WORK

Executive Orders and Proclamations—Fire Suppression—Cooperative Agreements—Labor: Generally—Act of February 23, 1887—Statutory Construction: Legislative History

The prohibition against contracts involving the employment of convict labor as contained in Executive Order No. 325a does not apply to those cooperative agreements entered into by the Bureau of Land Management and the several States which provide for emergency manpower assistance for the suppression of fires, even though, the States may rely in part upon trained convict crews for such emergency manpower reserves.

M-36832 *August 13, 1971*

To: DIRECTOR, BUREAU OF LAND MANAGEMENT
THROUGH: ASSISTANT SECRETARY, PUBLIC LAND MANAGEMENT

Subject: USE OF STATE CONVICTS IN BLM FIRE-SUPPRESSION WORK

This refers to the effect of Executive Order No. 325a, May 18, 1905, prohibiting the employment of convict labor, upon existing and future agreements between the Bureau of Land Management and the several States in providing manpower for emergency fire fighting.

While it is clearly within the authority of the Secretary to enter into reciprocal agreements with the States for the furnishing of fire protection services on the property under his administration, 42 U.S.C. sec. 1856 (1964), 16 U.S.C. sec. 594 (1964), etc., a question arises under Executive Order No. 325a whether the Secretary and the Bureau of Land Management are prohibited from entering into cooperative agreements with the various States for the purpose of providing emergency manpower assistance for the suppression of fires where the States may rely in part upon trained convict labor for such emergency manpower reserves.

Executive Order No. 325a provides:

Whereas by an Act of Congress which received executive approval on February 23, 1887, all officers or agents of the United States were as a matter of public policy forbidden, under appropriate penalties, to hire or contract out the labor of any criminals who might thereafter be confined in any prison, jail, or other place of incarceration for the violation of any laws of the Government of the United States of America;

> IT IS HEREBY ORDERED, That all contracts which shall hereafter be entered into by officers or agents of the United States involving the employment of labor in the States composing the Union, or the Territories of the United States contiguous thereto, shall, unless otherwise provided by law, contain a stipulation forbidding, in the performance of such contracts the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories or Municipalities having criminal jurisdiction.

Although it has been held that this order prohibits the employment of convict labor for non-emergency services as in the case of automobile or typewriter repair, etc., 32 Comp. Gen. 32, there is no authority indicating that the order contemplates the prohibition of the use of convict labor in the event of public emergencies where an alternative labor force is unavailable.

A review of the policy underlying Executive Order No. 325a is useful in determining whether the President intended that Federal agencies could make no use of convict labor in coping with public emergencies of the scope and gravity of forest fires. The order was promulgated subsequent to the passage of the Act of February 23, 1887, ch. 213, secs. 1, 2, 24 Stat. 411, *as amended* 18 U.S.C. sec. 436 (1964), and apparently adopts the policy justifications of that Act. The 1887 Act prohibits officers and agents of the United States from hiring or contracting out the labor of convicts incarcerated for violations of Federal law while the Executive Order prohibits federal contracts which involve the employment of persons incarcerated for State or local violations. Although the 1887 Act is inapplicable to the BLM-State situation, the public policy behind that Act is persuasive in determining the scope of 325a since that policy is referred to in the prefatory clause of the order. A perusal of the legislative history of the 1887 Act reveals that the intent of Congress in prohibiting the hiring and contracting out of Federal convicts was to make certain that cheap convict labor would not be thrown into the labor market in competition with American labor. S. Rep. No. 1691, 49th Cong., 2d Sess., Jan. 19, 1887; 17 Cong. Rec. 2227 (1886) (remarks of Congressman James); *cf.* S. Rep. No. 1969, 49th Cong., 2d Sess., Feb. 26, 1887; 17 Cong. Rec. 6995 (1886) (remarks of Congressman Tarsney). S. Rep. No. 1691, *supra*, states in relevant part:

> This bill is designed to relieve the law-abiding laborers and producers of this country from the burden of competition with the production now thrown upon the market by combination between private capital, assisted by the State, and cheap labor, made so by its involuntary servitude for crime.

It would seem then that in issuing Executive Order No. 325a, the President's primary intent was to protect American labor.

While the order makes no exception upon its face for the use of convict labor in public emergencies where the available labor supply

is insufficient to protect the interests of the United States, it seems that in light of the underlying public policy and in light of exceptions made in similar Congressional enactments, that such an exception is implicit in the prohibition. Where Congress has had occasion to consider the matter of the use of convict labor and convict made goods, exceptions have invariably been made where such use would not be inconsistent with the protection of American labor or where the best interests of the United States demand such an exception. In the case of the employment of Federal convicts, an exception to the 1887 Act was provided by Congress in the Act of June 25, 1948 (62 Stat. 852), 18 U.S.C. sec. 4125 (1964) which authorizes the Attorney General to make the services of Federal prisoners available to the heads of the several departments for work on public lands.

Similarly, the Act of June 25, 1948 (62 Stat. 851), 18 U.S.C. sec. 4122 (1964) allows prisoner made goods to be sold to departments or agencies of the United States while prohibiting such sale "to the public in competition with private enterprise" *Id.* The 1948 Act, 62 Stat. 785, 18 U.S.C. sec. 1761 (1964) also prohibits the interstate transportation of prisoner made goods except for government use. Also, Congress has provided an exception to the prohibition against the purchase of prison-made goods where such goods are used in emergency cargo ship construction. Act of February 6, 1941 (55 Stat. 6), 46 U.S.C. sec. 1119b (1964). The use of convict labor for the protection of public lands in cases of public emergency where an alternative manpower reserve is unavailable is directly analogous to these exceptions provided by Congress and is in harmony with the public policy and purposes of Executive Order No. 325a.

Furthermore, another Federal agency has reviewed the effect of Executive Order No. 325a in relation to the use of convict labor by a State in providing manpower assistance for fire fighting and has concluded that the order is inapplicable. The Department of Agriculture, National Forest Service maintains:

> Executive Order 325a (FSM 6301.16) requires that contractors of the United States agree not to use services of persons undergoing sentences of imprisonment at hard labor. An exception is made when forest fire protection is the major objective on the basis that this is a public emergency and any available labor may be used by a State. Forest Service Handbook § 1581.13.

In accordance with the foregoing legal analysis and without reference to additional possible distinctions within the Executive Order as between "contracts" and "Cooperative agreements" and between those prisoners "undergoing sentences of imprisonment at hard labor" and those prisoners whose sentences do not provide for hard labor, it is the

opinion of this office that the prohibitions contained in 325a do not extend to the formation of State-Federal cooperative agreements for the purpose of providing emergency manpower assistance for the suppression of fires, even though the State may rely in part upon trained convict labor for such emergency manpower reserves. Accordingly, those cooperative agreements between BLM and the several States need not contain a proviso prohibiting the employment of convict labor where the scope of such agreements merely provides for mutual manpower cooperation for the suppression of fires. However, any Federal-State agreements which provide for non-emergency fire prevention activities such as clearing, maintenance, or reforestation are prohibited by the order and must contain such a proviso.

MITCHELL MELICH,
Solicitor.

STATE DIRECTOR FOR UTAH
v.
EDGAR DUNHAM

3 IBLA 155 *Decided August 31, 1971*

Grazing Permits and Licenses: Trespass—Trespass: Generally

A grazing trespass will not be deemed clearly willful where two separate, almost simultaneous violations of short duration have occurred followed by an admittedly willful violation involving only one cow for one day.

Administrative Procedure Act: Generally—Rules of Practice: Evidence

The Board of Land Appeals has authority to reverse the fact findings of a hearing examiner even when not clearly erroneous. However, where the resolution of a case depends primarily upon his findings of credibility, which in turn are based upon his reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they will not be disturbed by the Board.

INTERIOR BOARD OF LAND APPEALS

The Bureau of Land Management State Director for Utah has appealed to the Secretary of the Interior from a decision dated June 9, 1969, in which the hearing examiner directed the District Manager to refuse to issue the appellee a license or permit authorizing grazing of livestock upon the Federal Range until such time as damages in the amount of $11.12 are paid.

The facts of the controversy are ably set forth in the decision, which is attached.

The appellee has been charged by the Bureau with grazing trespass on six different days during the period commencing March 19, 1968, and terminating May 30, 1968. The examiner found that trespasses had occurred on all the different dates, but treated the first five trespasses as not willful, and assessed damages therefor at $2 per animal unit month. As to the treaspass which occurred on May 30, 1968, the examiner found that only one of the six cattle asserted by the Bureau to be in trespass was in fact trespassing on that date; he assessed damages for that trespass at $4 per animal unit month as a willful trespass.

The appellant asserts that the hearing examiner erred in not holding the first five trespasses as willful, and that six head of cattle were in willful trespass on May 30, 1968.

In addition, the appellant's stance is that the hearing examiner "chooses to believe the Respondent's [appellee's] testimony that he placed his cattle in authorized areas and they merely drifted to the unauthorized areas. . . . [and appellee's testimony] as to number of trespassing livestock rather than the BLM employee who testified." Appellant requests, in essence, that we find that all asserted trespasses occurred to the extent asserted by the State Director; that all such trespasses be deemed to be willful; and that appellee's base property qualifications be reduced 25 percent [1] for a period of two years.

Thus, the case largely turns upon the credibility of those testifying at the hearing and the weight of the hearing examiner's findings thereon, which obviously takes into account the demeanor of the witnesses.

It is clear that the agency, rather than the examiner, is the primary fact finder. *United States* v. *T. C. Middleswart et al.*, 67 I.D. 232 (1960). His findings may be reversed by the agency even when not clearly erroneous. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 492 (1951).[2] *Cf. Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955); Administrative Procedure Act, sec. 8, 5 U.S.C. sec. 557 (1970).

It is axiomatic that there are no prescribed rules or methods of evaluating the credibility of oral testimony. In the brief time that the witness testifies, it is difficult for the trier of the facts to ascertain

[1] The State Director, through the Regional Solicitor, had earlier requested a 30 percent reduction in base property qualification for two years.

[2] However, in *Universal Camera* the court also stated at 496: "We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case." * * *

whether the witness is telling the truth. More important in this regard than knowledge of the substantive law and the law of evidence is the natural and acquired shrewdness and experience by which an observant man forms an opinion as to whether a witness is or is not telling the truth. The most acute observer would never be able to catalogue the nuances of voice, the passing shades of expression, or the unconscious gestures which he had learned to associate with falsehood; and if he did, his observations would probably be of little use to others. Every man must learn matters of this sort for himself, and though no sort of knowledge is as important to a hearing officer, no rules can be laid down for its acquisition. No process is gone through the correctness of which can be independently tested. The judge or hearing officer has nothing to trust but his own nature and acquired sagacity. *Stephen, The Indian Evidence Act with an Introduction to the Principles of Judicial Evidence*, 41–43.

Creamer v. *Bivert*, 113 S.W. 1118, 1120–21 (Mo. 1908), illuminates this concept as follows:

> * * * [O]ne witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify. * * *

The impact of demeanor evidence is similarly enunciated in *Broadcast Music, Inc., et al.* v. *Havana Madrid Restaurant Corp.*, 175 F. 2d 77, 80 (2d Cir. 1949) as follows:

> * * * For the demeanor of an orally-testifying witness is "always assumed to be in evidence." It is "wordless language." The liar's story may seem uncontradicted to one who merely reads it, yet it may be "contradicted" in the trial court by his manner, his intonations, his grimaces, his gestures, and the like—all matters which "cold print does not preserve" and which constitutes "lost evidence" so far as an upper court is concerned. For such a court, it has been said, even if it were called a "rehearing court," is not a "reseeing court," only [sic] were we to have "talking movies" of trials could it be otherwise. A "stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." It resembles a pressed flower. The witness' demeanor, not apparent in the record, may alone have "impeached" him. * * * [Footnotes omitted.]

In *National Labor Relations Board* v. *James Thompson & Co. Inc.*, 208 F.2d 743, 745–46 (2d Cir. 1953), where the National Labor Relations Board reversed a credibility finding of an examiner, and the court in turn reinstated the reversed finding, Judge Learned Hand stated:

> This issue seems to us to be one on which the examiner's finding should have prevailed under the doctrine of Universal Camera Corp. v. National Labor Rela-

tions Board, 340 U.S. 474 * * *. As was inevitable, the Supreme Court did not try to lay down in general terms how far the Board should accept the findings of its examiner. Plainly it did not mean them to have the finality of the findings of a master in chancery, or of a judge; but it necessarily left at large how much less reluctance the Board need feel in disregarding them than an appellate court must feel in doing the same to the findings of a district judge. The difficulty is inherent in any review of the findings of a judicial officer who chooses between discordant versions of witnesses whom he has seen, because the review does not bring up that part of the evidence that may have determined his choice. Over and over again we have refused to upset findings of an examiner that the Board has affirmed, not because we felt satisfied that we should have come out the same way had we seen the witnesses; but because we felt bound to allow for the possible cogency of the evidence that words do not preserve. We do not see any rational escape from accepting a finding unless we can say that the corroboration of this lost evidence could not have been enough to satisfy any doubts raised by the words; and it must be owned that few findings will not survive such a test.

So tested, it seems to us that the examiner's finding should stand * * *.

In *United States Steel Co.* (Joliet Coke Works) v. *National Labor Relations Board*, 196 F. 2d 459, 467 (7th Cir. 1952), the court, in adopting the findings of the examiner despite the contrary findings of the agency, used the following standard:

* * * [W]e may not disregard the superior advantages of the examiner who heard and saw the witnesses for determining their credibility, and so for ascertaining the truth.

Witnesses are on occasion affected by bias, partisanship, overzealousness, and other constraints. We do not intend to suggest any failing in the witnesses in the hearing below. We simply must accord proper weight to the fact findings of a hearing examiner [3] where they depend primarily on the credibility of the witnesses and are supported by substantial evidence. As indicated above, the appellant has chosen to make such findings the gravamen of his appeal.

In that frame of reference, examining the fact findings of the examiner, we see no compelling reason to reverse them. Admittedly,

[3] That the examiner generally accepted the appellee's testimony does not vitiate his findings of fact. This view is buttressed by *NLRB* v. *Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949) in which the Supreme Court stated:

"*First:* We are constrained to reject the court's conclusion that an objective finder of fact could not resolve all factual conflicts arising in a legal proceeding in favor of one litigant. The ordinary lawsuit, civil or criminal, normally depends for its resolution on which version of the facts in dispute is accepted by the trier of fact. Where the number of facts in dispute increases, the arithmetical chance of their uniform resolution diminishes—but it does not disappear. Yet it is not mere arithmetical chance which controls our present inquiry, for the facts disputed in litigation are not random unknowns in isolated equations—they are facets of related human behavior, and the chiseling of one facet helps to mark the borders of the next. Thus, in the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next. Accordingly, total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact."

the appellee's testimony was not free from contradiction. However, the cold words of a record are no substitute for the exercise of the examiner's evaluation of the veracity of the witnesses. We find that the examiner's conclusions are supported by substantial evidence.

Similarly, we are not disposed to interfere with the examiner's finding that all the trespasses, save the one that occurred on May 30, 1968, were not willful. Although the appellant asserts that the trespasses were of a repeated nature, we believe the examiner properly found that, apart from the trespass of May 30, two separate, almost simultaneous violations of short duration appear to have occurred. In these circumstances, we believe that respondent has not repeatedly trespassed upon the Federal Range. *Cf. Eugene Miller*, 67 I.D. 116 (1960); *Clarence S. Miller*, 67 I.D. 145, 147 (1960).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

FREDERICK FISHMAN, *Member.*

WE CONCUR:

ANNE POINDEXTER LEWIS, *Member.*

FRANCIS MAYHUE, *Member.*

Statement of the Case

The Utah State Director, Bureau of Land Management, issued a notice on December 26, 1968, citing Respondent Edgar Dunham to appear before a Hearing Examiner of the Bureau of Land Management on February 7, 1969, at Kanab, Utah, to show cause why his "license or base property qualifications should not be reduced or revoked or renewal thereof denied and satisfaction of damages made" because of respondent's allegedly "willful, grossly negligent, or repeated, violations of the terms or conditions of [his] license, of provisions of the Taylor Grazing Act of June 28, 1934, as amended (43 U.S.C. 315 *et seq.*) and the Grazing Regulations (43 CFR 4110 etc.)." The notice was issued pursuant to 43 CFR 9239.3-2(e).

The notice charged that respondent had violated the provisions of the act and the regulations by allowing 14 cattle to graze the Federal range from March 19, 1968, through March 23, 1968; 7 cattle from March 22, 1968, through March 23, 1968, 5 cattle from March 28, 1968, through April 1, 1968; 7 cattle from April 2, 1968, through April 9, 1968; and 6 cattle on May 30, 1968, without an appropriate license or permit.

By agreement of the parties, a hearing was held at Kanab, Utah, on February 6, 1969, rather than as specified in the notice. The State Director was represented at the hearing by Mr. Harvey C. Sweitzer, Office of the Solicitor, United States Department of the Interior, Salt Lake City, Utah. Respondent appeared on his own behalf.

The Alleged Trespass

The Respondent was issued a license to graze 13 cattle and an exchange-of-use authorization for an additional 6 cattle in the Cottonwood Management area "in accordance with operational plan to be attached to license." The Cottonwood Management plan attached to the license provided for grazing these livestock in Pasture 5 from November 1, 1967, to March 31, 1968; in Pasture 1 from April 1 to April 20, 1968; in Pasture 2 from April 21 to May 10, 1968; and in Pasture 3 from May 11 to May 31, 1968. These pastures were outlined on a map which was also attached to the license.

The Respondent was also authorized to graze an additional 13 cattle from November 1, 1967, to May 31, 1968, in the Upper Paria Management Area in an allotment designated at 16G2.

Bureau employees visited the Management areas and adjacent Federal range during the grazing season. They counted the following livestock, identified by brand earmarkings as Respondent's, in areas where they were not authorized:

Date	Number of cattle
Mar. 19, 1968	14
Mar. 22, 1968	7
Mar. 28, 1968	5
Apr. 2, 1968	7
Apr. 9, 1968	7
May 30, 1968	25

Although 25 cattle were counted on May 30, 1968, only 6 were alleged to be in trespass. Respondent was driving the cattle to his summer grazing area on the national forest, in accordance with his usual practice. His Forest Service license began on April 1, 1968, at the termination of his Federal range license. The State Director, therefore, charged a trespass by only 6 cattle, the difference between 19 cattle licensed in the Cottonwood Management area and the number counted.

On March 21, 1968, a notice of trespass, covering the 14 cattle discovered by the March 19 count, was personally served on the Respondent allowing him three days to remove the trespassing cattle and requesting settlement of trespass damages within 5 days. A notice,

covering the 5 head of trespassing cattle discovered on March 28, was received by the Respondent on April 1, 1968. The notice requested removal of the trespassing cattle within 2 days and settlement of trespass damages. A notice, covering the 7 head of cattle discovered on April 2, was received by Respondent on April 16, 1968. This notice requested removal of the livestock within 2 days and settlement of trespass damages.

On June 25, 1968, the State Director sent a letter by certified mail, which Respondent refused to accept, requesting settlement of the trespass damages by payment of $22.88, which was computed on the basis of $4 per animal unit month. This computation of damages was made pursuant to sec. 9239.3–2(c) (2) (43 CFR 9239.3–2(c) (2) which provides, in part:

> * * * Where the trespass grazing is not deemed to be clearly willful the forage value shall be computed at the rate of $2 per animal unit month, or at the commercial rate if such rate is the higher; if the district manager deems the trespass grazing to be clearly willful, grossly negligent, or repeated he shall compute the forage value at $4 per animal unit month, or at twice the commercial rate if such amount is the higher.

Respondent admitted that some of his livestock had trespassed upon the Federal range (Tr. 40–49), but denied that the trespasses were willful (Tr. 49). The issues, therefore, are whether the trespasses are as extensive as charged, and whether they are willful.

The Nature of the Trespasses

The Respondent's testimony concerning the extent of his trespasses conflicts with the evidence presented by the State Director only with respect to the alleged trespass of May 30, 1968 (Tr. 40–49). The livestock count was made on that day by three Bureau employees. Only the Area Manager testified regarding it. He stated that he counted 25 head which were "identified by brands and earmarks, and were at the time being driven by the Respondent." (Tr. 17)

The Respondent testified that "there was actually 28 head there, and there was actually, by count, 20 of mine there in the bunch" (Tr. 47). The other 8, according to the Respondent, belonged to other licensees. No evidence was offered to rebut the Respondent's testimony or to confirm the testimony of the Area Manager. The Respondent's admission of the other alleged trespasses lends credence to his testimony concerning the May 30 incident. I am inclined to believe, and so find, that only 20 of the May 20, 1968, livestock belonged to the Respondent and that the Bureau employees observed Respondent driving cattle, identified some by Respondent's brand, and concluded that all were his. The livestock were apparently being driven from the Cottonwood Management

Area where the Respondent had authorization for 19 cattle. Only one animal was, therefore, in trespass on May 30, 1968.

The trespasses, as charged in the violation notice and either admitted or established by the evidence, are:

	AUMs
14 cattle, Mar. 19, 1968 to Mar. 23, 1968	2.33
7 cattle, Mar. 22, 1968 to Mar. 23, 1968	.47
5 cattle, Mar. 28, 1968 to Apr. 1, 1968	.83
7 cattle, Apr. 2, 1968 to Apr. 9, 1968	1.87
1 cattle, May 30, 1968	.03
Total	5.53

The remaining issue is whether the trespass was "clearly willful, grossly negligent, or repeated," requiring the assessment of damages at $4 per animal unit month as required by the grazing regulations.

The Court, in *Goodman* v. *Benson*, 286 F. 2d 896, 900 (7th Cir., 1961), stated that a violation is willful:

> * * * if a person 1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements * * *.

The Respondent testified that he put his cattle "where they were supposed to have been, on those areas, but they wouldn't stay" (Tr. 41), because they reverted to their established grazing habits (Tr. 40, 46). He stated that Henrieville Valley (allotment 16G2) in the Upper Paria Management Area is unfenced (Tr. 40) and that where a fence did exist (presumably in the Cottonwood Management Area) "the gate was broke" (Tr. 45). He also testified that after receiving a trespass notice he "moved them cattle * * * where they belonged" (Tr. 44).

No evidence was presented directly contradicting the Respondent's testimony. The Area Manager did testify that Pasture No. 5 "for the most part is fenced either by fence or by natural barrier" (Tr. 31). No testimony was presented as to the condition of the fence or the natural barrier or their effectiveness as a barrier to the movement of livestock.

The evidence does not prove that Respondent intentionally did a prohibited act or acted in careless disregard of statutory requirements, except for the trespass of May 30, 1968. Then, he admittedly had on the Federal range one cow in excess of his authorized use. He is presumed to know the amount of his authorization. His excess grazing was intentional and, therefore, willful.

The State Director also charged that the trespasses were subject to the $4 damage rate because they were repeated. The violations occurred in two general areas. Those of March 19, March 22, and May 30 were in or adjacent to the Cottonwood Management Area. The March 28,

April 2 and April 9 trespass was in the Upper Paria Management Area. Rough terrain separates the two areas. It is, therefore, concluded that the trespass counted on March 28, April 2 and 9 was by livestock in the Upper Paria Management Area, and that counted on March 19 and 22 was by livestock authorized in the Cottonwood Management Area.

Omitting the trespass of May 30, which has been held to be willful, two separate, almost simultaneous violations of short duration appear to have occurred. Under these circumstances, it cannot be said that Respondent has repeatedly trespassed upon the Federal range. The forage value is, therefore, to be computed at $2 per animal unit month for the trespasses other than that of May 30, which is to be assessed at $4 per animal unit month. The total damages amount to $11.12.

Reduction of Privileges

Section 43 CFR 9239.3–2(e)(2) provides, in part:

> * * * If the alleged violation is established to the satisfaction of the examiner, or upon the failure, without proper excuse satisfactory to the examiner, of the person named in the notice or his representative to appear at the hearing, the examiner will render a written decision assessing the amount of damages, including the value of any forage consumed, as determined in accordance with paragraph (c)(2) of this section, and directing the district manager to suspend, reduce, or revoke the license, permit, or base property qualifications or to deny renewal, if the facts so warrant.

The State Director has recommended a 30 percent reduction in Respondent's base property qualifications for a period of two years. This seems unduly severe. In view of the limited nature of the trespasses and the finding that the only willful violation was for one day by one cow, no reduction of Respondent's license or base property qualifications is warranted.

Order

The District Manager is directed to refuse to issue Respondent a license or permit authorizing grazing of livestock upon the Federal range until such time as damages in the amount of $11.12 are paid.

DENT D. DALBY,
Hearing Examiner.

ESTATE OF GEORGE GREEN

1 IBIA 147 *Decided September 2, 1971*

Indian Probate: Children, Adopted: Right to Inherit: Child from Kin of Adoptive Parents

Under Oklahoma Uniform Adoption Act, a child adopted under prior law may inherit from relatives of adoptive parent where the person from whom inheritance is claimed dies after the date of enactment of Uniform Adoption Act.

Indian Probate: Inheriting: Generally

In general, rights of inheritance are determined by the law in effect on the date of death of the person from whom inheritance is claimed.

INTERIOR BOARD OF INDIAN APPEALS

George Green, the decedent herein, died December 25, 1964, unmarried and without issue. He was the son of Albert Green who predeceased him in 1921. His brother, John Green, died in 1916 leaving two children, Albert Levi Green, Jr., the appellant herein, and Alice Green Masquat. A sister of the decedent, Rachel Green, died in 1941 leaving two children, George L. Kent and Eugenia Kent Brand, the present appellees.

The decedent's father, Albert Green, adopted Albert Levi Green, Jr., on November 11, 1918. Albert Levi Green, Jr., claims one-third of the estate as an adoptive brother of the decedent, whereas the Examiner held him to inherit a one-fourth share as a blood nephew.

During his lifetime, George Green had executed three wills. The last will, dated February 2, 1963, was disapproved by the Examiner, whose decision was affirmed by the Regional Solicitor in *Estate of George Green*, IA–T–11 (June 7, 1968). The disapproval of that will brought earlier wills into consideration, *i.e.*, the will of May 1, 1951, in which Olynthia Pipestem was a beneficiary, and the will of December 14, 1937, in which Albert Green III, a son of the appellant, was a beneficiary.

Following the decision in *Estate of George Green*, *supra*, the parties entered into an agreement, approved by the Examiner, under which the beneficiaries under the remaining two purported wills agreed that those wills would be disapproved in return for certain stipulated cash amounts. Under this agreement, the remainder of the estate was to be

distributed to the "heirs at law" of the decedent. The only memorandum of this agreement appearing in the record is a "statement of facts" issued by Examiner Blaine on December 5, 1969. In this "statement of facts," however, the Examiner not only outlined the facts of the case and the terms of the settlement (including the provision that the remainder would be distributed to the "heirs at law"), but went on to make the following statement:

> Albert Levi Green, Jr., was legally adopted by this decedent's father, Albert Green, and, thus, would also be a brother-by-adoption of this decedent. However, *in the opinion of the [Examiner], Albert Levi Green, Jr., is not entitled to inherit as a "brother by adoption" under the laws of Oklahoma, thus each of these four nieces and nephews would inherit ¼ of this estate as heirs at law.* [Italics supplied.]

The Examiner's ruling upon the heirship question, in the context of this document explaining the settlement, introduced an ambiguity into the record as to the scope of the settlement agreement itself: Did the parties agree to the distribution of the estate to the "heirs at law" *as determined by the Examiner*, or was the question of heirship to be left open for further litigation?

This question cannot be answered by consideration of no more than the "statement of facts" itself. If the parties had intended to leave open the question of heirship, there would be no need to recite, as part of a memorandum of that settlement, an actual finding of heirship. Such finding would normally be a part of the Examiner's decision in the case after any necessary arguments or briefing by the parties. On the other hand, if the agreement included a stipulation as to the shares to be taken by the heirs at law, the Examiner could have so stated in his description of the agreement. Also, in this situation, it would be incorrect to state that the parties had agreed that the remainder of the estate should be distributed to the "heirs at law," because the actual agreement would have been to a specified division—namely, one-fourth to each of the blood nieces and nephews.

The appellees contend that the appellant is "estopped" from claiming heirship as an adopted brother of the decedent because of the agreement. This argument is apparently based on the theory that the agreement included the parties' consent to the heirship findings of the Examiner. The appellees also contend that, in any event, the Examiner's finding was correct under Oklahoma law and should not be disturbed. For reasons discussed below, we disagree with both of these contentions.

On January 20, 1970, Examiner Blaine issued an order captioned as follows: "Order Disapproving Wills and Determining Heirs at Law." In this order, the Examiner did in fact determine the heirship question based on a detailed discussion of the merits of the issue under

Oklahoma law. In light of Examiner Blaine's ruling on the merits of the heirship issue, it appears that the agreement of the parties was understood by the Examiner as having left this issue open to further consideration. Since the Examiner was directly involved in the case at the time of the parties' settlement discussions and agreement, his understanding of that agreement is accorded substantial weight by the Board. Furthermore, the parties, both on petition for rehearing and in this appeal, have placed primary emphasis on the merits of the heirship issue.

In this situation, we hold that the appellant is not barred by virtue of the agreement from pressing his claim as to the extent of his proper share of the estate as an "heir at law" of the decedent.

Section 60.16(1) of the Uniform Adoption Act (10 O.S. 1961, secs. 60.1 *et seq.*), which became effective in Oklahoma in 1957, provides as follows:

> After the final decree of adoption is entered, the relation of child and parent shall thereafter exist between such adopted child and the adoptive parents adopting such child *and the kindred of the adoptive parents.* From the date of the final decree of adoption, the child shall be entitled to inherit real and personal property from and through the adoptive parents in accordance with the statutes of descent and distribution, and the adoptive parents shall be entitled to inherit real and personal property from and through the child in accordance with said statutes. [Italics supplied.]

The italics language in the above quotation makes it particularly clear that, if this statute applies to the instant case, the appellant would inherit as a brother of the decedent. Under the statute in effect prior to 1957, he would not.

In his order denying appellant's petition for rehearing, the Examiner ruled that under the holding of *Conville* v. *Bakke*, 400 P. 2d 179 (Okla. 1965), appellant could not take as the decedent's adopted brother because the adoptive parent died before the present Oklahoma adoption statute was enacted. We believe that this holding misconstrues the *Conville* case and the trend of the law of Oklahoma generally as it relates to adoption.

In the *Conville* case, *supra* the question before the Court was the intent of the testator in specifying that a portion of his estate should be awarded to the "heirs" of a named person, which heirs were to be determined at the time of the death of that person. Specifically, the question presented was whether the testator would be presumed to have acted with the knowledge that the laws of adoption or descent and distribution were subject to change, and with the intent that such amended laws might be followed in the distribution of his estate. It was held that, absent evidence tending to "show [that the] testator

intended to exclude" adopted children from participating as his heirs, no such intention would be presumed. *Conville* v. *Bakke*, *supra*, at 191.

The court then went on to discuss the extent to which the Uniform Adoption Act expanded the rights of persons adopted under previous (repealed) statutes, stating:

> Had the Legislature intended the Act to operate prospectively only and keep the old law in effect as to persons adopted prior to August 27, 1957, this could have been accomplished by inclusion of an exception limiting the rights of those adopted under the repealed statutes. * * * [*Id.* at 193.]

In the same paragraph, the court "decline[d] to ascribe" an intention to create two systems of inheritance for adopted children, depending on the date of adoption,

> * * * to an act of the Legislature which plainly evidenced acceptance of the modern, liberal considerations of public policy toward the status of adopted children. * * * A construction must be adopted which permits uniform operation of the statute. * * *

Acceptance of the appellees' position in the present case would indeed create "two systems of inheritance" for adopted children, a result which would be in direct opposition to the policy expressed by the court in *Conville*.

The Examiner's order also cites Annot., 18 A.L.R. 2d 960, 962 (1951), and the authorities contained therein, as supporting the proposition that the statute "in force on the date of the death of the *adoptive parent* * * * is controlling" for purposes of inheritance (Italics supplied). We believe, however, that the authorities cited in this annotation actually establish the rule that the controlling date, for purposes of inheritance, is the date of death "of the person *from whom inheritance is claimed.*" *Brooks Bank & Trust Co.* v. *Rorabacher*, 118 Conn. 202, 207, 171 A. 655, 657 (1934) (Italics supplied). As was explained in *Gatchell* v. *Curtis*, 134 Me. 302, 306–07, 186 A. 669, 671 (1936) (dictum):

> * * * A decree of adoption entered in accordance with power conferred by statute fixes the status of the child; it divests the natural parents of control and establishes the rights and obligations of the foster parents. It does not settle for all time the child's right to inherit property. That remains as in the case of all persons subject to legislative regulation, until it becomes vested by the death of him whose estate may be subject to administration. * * *

The only Oklahoma cases we find which would indicate any restriction on the full family status of adopted children under the Uniform Adoption Act involve the interpretation of the meaning of words such as "issue of [the] body" in a will. *See, e.g.*, *Moore* v. *McAlester*, 428 P. 2d 266 (Okla. 1967). Other Oklahoma cases indicating limited inheritance rights for adopted children are inapplicable, since they

relate either to testamentary intent or to previous (now repealed) statutes of descent and distribution. *E.g.*, *Hein* v. *Hein*, 431 P. 2d 316 (Okla. 1967); *Noble* v. *Noble*, 205 Okla. 91, 235 P. 2d 670 (1951); *In re Ware's Estate*, 348 P. 2d 176 (Okla. 1958). Recognizing that the issue presented in this appeal has not been squarely confronted by the Supreme Court of Oklahoma, we also note the recommendations contained in Note, *Symposium on Domestic Relations: Adoption*, 14 Okla. L. Rev. 353, 358 (1961), that if the present problem should arise, the Court should "grant the adopted child a right of inheritance to the estate of his adoptive parent's relative regardless of when he was adopted."

Under the authority delegated to the Board of Indian Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is REVERSED, and REMANDED to the Examiner for such further action as may be necessary to implement this decision. The decision is final for the Department.

DAVID J. MCKEE, *Chairman*,
Board of Indian Appeals.

I CONCUR:

JAMES M. DAY, *Ex Officio Member.*

UNITED STATES
v.
KOSANKE SAND CORPORATION

3 IBLA 189 *Decided September 3, 1971*

Mining Claims: Discovery: Generally—Mining Claims: Hearings

A decision holding that certain placer mining claims located for silica sands are null and void for lack of a discovery of valuable deposit of mineral will be reversed where a preponderance of the evidence adduced at the contest hearing shows that the sands are of glass quality, that a market for such sands exists in close proximity and that it is reasonable to anticipate that such sands can be beneficiated at a cost which will make them competitive with present suppliers of the existing market.

INTERIOR BOARD OF LAND APPEALS

Kosanke Sand Corporation has appealed from the September 16, 1970, decision of the hearing examiner rejecting the patent applica-

tion for the following mining claims and holding them to be null and void:

Earache L, 2, III, 4, Earach 5, Jeff, Pete, and Ray placer mining claims; and KO–KO 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 lode mining claims, located in sec. 8, T. 1 N., R. 1 E., M.D.M., Contra Costa County, California.

It would appear that the contestee is not appealing that portion of the hearing examiner's decision which limited the number of claims which remain to be considered in the contest after certain stipulations were entered into, eliminating some claims contained in the complaint. The hearing examiner found at page 2 of his decision that:

The KO–KO 1 thru 20 are lode claims and the Earache 1 thru 5, Pete, Jeff and Ray are placer claims. At the opening of the hearing the parties stipulated that there were no lode minerals on any of the lode claims and Earache 1, the S½ of Earache 2, the Earache 4, and the Ray placer claims were void by reason of abandonment. Later in the proceeding (Tr. 371) the parties stipulated that the S½ of the Jeff placer claim was nonmineral in character. Because of the stipulations these claims are declared null and void.

It therefore appears that the appeal is taken from that portion of the hearing examiner's decision which relates to the placer claims located in sec. 8, T. 1 N., R. 1 E., M.D.M., which are:

N½ of Earache No. 2	N½NW¼NE¼
Earache No. III	NE¼NW¼
Earach No. 5	NW¼NW¼
Pete	SW¼NW¼
N½ of Jeff	N½SE¼NW¼

The hearing examiner found that with reference to this group, located in 1963 for silica sand used in glass making and for other special purposes, the contestee failed to meet its obligation to affirmatively establish that the sand at issue can be processed to meet the requirements of the glass industry at a price competitive with existing sources of supply, and that, therefore, the contestee failed to rebut the Government's prima facie case that there has been no discovery of a valuable mineral deposit on the claims. We do not agree.

As noted by the hearing examiner, the parties were in agreement that silica sand used in the manufacture of glass is not a common variety, that there is a market for glass sand in the San Francisco Bay area where the claims are situated, and that the claims are accessible. He further noted that if the sand could be beneficiated to glass grade material at a price competitive with other sources, "there is every reason to believe that the contestee could capture a portion of the market." He correctly observed that if the sand could not compete economically, it would not be prudent to extract, remove, process and sell it. Therefore, he stated, the issue of whether there has been a dis-

covery of a valuable mineral deposit is dependent on the question of whether the contestee's process can improve the quality of the sand on an economical and competitive basis with the existing sources of supply.

The essential facts are these. The claims are situated 40 miles east of San Francisco on a massive sandstone deposit known as the Domengine Formation. They are accessible by road. The mantle of overburden is thin and the configuration of the deposit is such as to readily afford surface development. The claims have not been developed and there have been no sales of the sands by the contestee. Other areas on the Domengine Formation near and adjacent to the subject claims have produced silica sand which was used for glass manufacture as well as for foundry sand. However, in recent years there has been no production from this area, except for use for the same purposes for which a common variety of sand could be employed.

Foundry sand was mined by the Silver Sands Company on the Earache 1 claim as recently as 1962 or 1963. That company discontinued operations when its right to do so was successfully contested by the appellant. The Roberts Sand Company produced from "Pit No. 4" on Earache 3 and Earache 4. Other silica sand operations on the Domengine Formation were apparently discontinued by various producers at intervals between 1946 and 1962, as the deposits being mined were exhausted or of because the competition from producers from the Ione deposits in Amador County, who began their production in the early 1950's. Claims along the east boundary of the subject claims were worked underground for silica sand from the same formation, and drifts were driven to the boundary of the contested claims. This operation apparently was discontinued because the claims were worked out. Sand from this mine was used for 20 to 25 years for the manufacture of glass by Glass Containers Corporation, which has one plant only five or six miles away and another within the market area.

The Government's expert witness estimated the available glass sand market in the Bay area to be around 600,000 tons annually, although this figure may not be sufficently encompassing, as the witness indicated that he had no knowledge of the amounts used locally by several large corporate consumers. Virtually the entire market for glass sand in the Bay area is being supplied by two plants in Amador County which are producing from the Ione Formation—the Owens-Illinois Company, which produces 1800 to 2000 tons per day, and the International Pipe and Ceramic Company, producing 700 tons per day. However, one of the Government's witnesses testified that foundry sand is being shipped from Overton, Nevada, to the Bay area and to Los Angeles, and that some foundry sand is being shipped in from

Illinois. The contested claims are 42 miles from San Francisco, whereas the Ione deposits are approximately 126 miles from the city.

Glass manufacturers in the Bay area are combining the silica sand from Ione with feldspathic sands from Monterey County and with sodium carbonate and limestone. Because of the higher alumina content of the silica sand from the Domengine Formation, the contestant contends that it could not be blended with feldspathic sand, which also contains alumina in large amounts. It was said that users of Domengine sand would have to purchase additional sodium carbonate, which would increase the cost of the mix, or batch. However, no evidence was given as to the amount of such increase per ton, if this was to be attempted.

In addition to the alumina, the iron (ferric oxide) content of the sands on the contested claims is alleged by the contestant to be so high as to preclude these sands from economic competition in the market. Contestant's witness testified that manufacturers of glass demand a very low ferric oxide content in the silica sand because they can then utilize a cheaper limestone, which also contains iron. An excess of iron produces discoloraton in the glass.

Testimony varied as to the acceptable maxima of iron and alumina for glass making, as did the reports and bulletins entered as exhibits. On review, we conclude that ferric oxide can run as high as .10%, and the alumina can reach 8.0% to 8.5% in inferior grades of container glass.[1] After beneficiation, sands marketed by the Ione plants run from .02% to .025% ferric oxide and to .5% alumina. The sands on the Kosanke claims were extensively sampled by the contestant and by the contestee. One Government sample consisted of individual samples taken at 10 foot intervals over 300 feet and analyzed for ferric oxide. The 30 individual samples thus obtained ranged from .15 percent to 2.30 percent ferric oxide. The mathematical average of all 30 of these samples was 1.023 percent Fe_2O_3. After a wash by an independent metallurgical laboratory, which employed agitation, but not attrition, the iron content dropped to .33% ferric oxide, indicating that a substantial portion of the iron associated with the sand could be removed by washing. The average aluminum oxide content of this consolidated sample was 7.12%. Sample splits from six other Government channel samples were combined for a composite sample and sent to the metallurgical laboratory where analysis showed that the composite contained 1.31% ferric oxide and 5.93% aluminum oxide.

[1] However, Exhibit G, a report prepared by a BLM mining engineer, stated that for sixth quality green container glass and window glass and for seventh quality green glass the Bay area glass manufacturers specified .3 percent Fe_2O_3.

Steven Kosanke, president of the contestee corporation, appeared for it without benefit of counsel. In the presentation of his case it developed that George Omo first examined and sampled the deposit in 1962. He then contacted Kosanke, who staked the claims, established the discovery points and formed the corporation. Kosanke then took channel samples at each of the discovery points from which he made a proportional composite sample, which he shipped to Omo at El Paso, Texas. Omo had it analyzed by El Paso Testing Laboratories, which reported the content to be 95.90 percent silica, 1.25 percent alumina and .47 percent ferric oxide, plus small amounts of titanium oxide and calcium oxide. Omo then personally performed a size, weight and screen analysis on a proportional representative portion of the sample sent to El Paso. He also instructed El Paso Laboratories to perform a simple acid test. They used a water and hydrochloric acid solution and agitated the samples for 5 minutes, 15 minutes and 30 minutes. Their report states that there was a considerable increase of iron in the acid after 15 minutes and a much lesser increase in the interval from 15 to 30 minutes. An analysis of the sand after washing four times with water revealed only minute traces of iron, in the 1 to 5 parts per million range, indicating that the acid had removed the iron quite effectively. The silica content after the test was 97.6 percent.

Omo asserted repeatedly that the iron presented no problem; that not only could it be removed by a simple acid bath, but also by attrition, agitation and commercial machines that are presently in use in glass sand plants. Omo owns ten percent of the stock of Kosanke Sand Corporation.

Thomas I. Sharps, presently senior geologist in the mining division of Vitro Mineral Corporation, first learned of the deposit from Kosanke, who then was also employed there. He testified that his company is interested in expanding into the non-metallics field and that silica sands were included in its scope of interest. For this reason he examined the claims. He testified that the sand could be very easily and inexpensively exploited because of the configuration of the claims and the thin covering of overburden. He stated that if title to the property coud be acquired, a prudent individual would "most definitely" be justified in the further expenditures of money to develop the claims. He stated his belief that these sands could capture part of the market. He estimated roughly that there are at least 25 million tons of commercial sand on the claims. He further stated that he anticipated that upon his return to his company's home offices he would recommend to the company that it take further interest in

the development of these claims. On cross-examination, Sharps conceded that further exploration and development were required. He stated that by this he meant conducting a pilot plant study and market analysis. When asked if such work would not be considered exploration, he acknowledged that it would, stating that exploration does not cut off, that it has to phase from one stage into the other, from exploration into development and exploitation. On re-direct examination he stated that he felt that the work that he had observed and read of pertaining to this property had gone past what is normally considered the raw initial exploration phase.

Kosanke explained in considerable detail the process proposed for the beneficiation of the sand. He has designed a mill suited to the topography and the bedded deposits to be mined initially, and selected the sites of haul roads, settling ponds, and fill areas. The geology of the claims has been well mapped and delineated. A detailed report of the property, describing the sands, the mining, milling, flotation, quality control and marketing operations proposed, complete with detailed cost data and flotation test results, was prepared by Kosanke as a prospectus for presentation to mining companies.

Kosanke testified that he developed the flow sheet for milling and flotation at the Metallurgy Department at the University of Texas, where there is a one ton capacity pilot mill. He stated that after making his original test of the beneficiation of the sand by attrition and in the silicon flotation cell, he did in fact run considerable amounts of material into the pilot mill in an effort to duplicate what would take place in a normal producing cycle in the flotation mill he had synthesized. A chemical analysis based upon this experimentation showed 99.8 percent silicon, 0.12 percent alumina and .023 percent ferric oxide. The projected cost per ton for the Kosanke process was set at $3.07, based upon a mining cost of 93 cents, milling cost of $1.85, with an additional 29 cents attributed to quality control and sales.

The contestant's witness, George Scarfe, responded to Kosanke's plan for beneficiating the sand with skepticism. Acknowledging that it is difficult to argue with a flow sheet until it is actually in operation, he stated that sometimes such plans do not work out as expected, that problems develop, some of which can be met and some of which cannot. He stated that processing sand in a laboratory is vastly different from duplicating the process on the large scale in an actual commercial mining and milling operation. In his opinion, a prudent man would be justified in the development of this property with a reasonable expectation of creating a valuable mine only after the validity of the process had been proved by running thousands of tons of the material through a pilot plan, which has not been done in this instance.

Scarfe also testified at length regarding the sand specifications required by Bay area glass manufacturers, indicating that only the high quality silica sands supplied from the Ione deposits could meet these requirements. However, in this connection, the following exchange took place on cross-examination:

Q. BY MR. KOSANKE: How many companies have you asked in your diligent search about their iron requirements, Mr. Scarfe?
A. You are talking about consumers only?
Q. Consumers only.
A. One.

Contestant's exhibit 19, a Colorado School of Mines bulletin dated March 1968 entitled "The Economics of a Small Milling Operation," lists in Table No. 5 a summary of the predesign operating cost for a typical 500 ton per day flotation concentration mill. Amortized over an eight year period, the estimated cost is $3.88 per ton. For the same plant amortized over 20 years, the estimated cost is $3.25 per ton. However, the author of the bulletin acknowledges that these are merely rough estimates and that costs can vary widely. The mill design hypothesized in the bulletin is substantially different from that proposed by Kosanke Sand Corporation.

The hearing examiner failed to note that the projected Kosanke mill cost is not merely an estimate by Mr. Kosanke, but rather is based on firm bids from suppliers which were put in evidence. His projected milling cost was $1.85 per ton. He estimated his total cost for mining, milling, quality control and sales at $3.07 per ton. But even if his cost were higher, even if actual costs approximated those projected by the Government, there is no evidence to show that this would make competition with the Ione sands impossible. The method of beneficiating the Ione sands was not accurately described and no evidence was provided as to the cost. It was therefore impossible to compare the cost of the Ione operation with the projected cost of the Kosanke operation. However, there was testimony that the flotation process utilized to beneficiate the Ione sand is a "neutral circuit" (without acid), whereas the flotation process proposed by Kosanke involves an acid wash, which is more costly.

The contestee introduced as exhibit G an approved 90-page report of a mineral examination dated July 29, 1963, prepared on behalf of the Bureau of Land Management in connection with a different matter, and devoted solely to the N½N½ sec. 8. The mining engineer who prepared this report stated as follows:

It is the conclusion of the examining engineer that the N½N½ sec. 8, T. 1 N., R. 1 E., M.D.M., is mineral in character because it contains large reserves of an uncommon variety of high silica sand that is suitable for the manufacture of glass and for use in the foundry industry. The sand is suited to this market

because of its physical and chemical properties, and production from adjacent lands has established this fact. The subject lands are accessible, and there is a large market for the material within a radius of 40 miles.

One of the contestant's witnesses testified that he is familiar with where the samples listed in the report were taken and that none were taken on the claims in issue. In fact, he said that several samples were taken from the Domengine Formation twenty miles from the claims. The decision notes that this witness' testimony suggests that the report was on the Domengine Formation in general rather than the land occupied by the claims in issue here. We find this in no way persuasive. The conclusion quoted above deals precisely with a specific 120 acres of the 160 acres here at issue. The contention that it deals with the Domengine Formation generally is belied by the very title of the report and the language of the conclusion, and the suggestion that the conclusion was based upon samples taken more than 20 miles distant is an insupportable tax on our credulity. Moreover, the engineer who prepared the report makes the matter quite clear on page 57 thereof, stating:

> The samples were taken from the sandstone beds exposed in the old mine workings in Sec. 5 because there were no fresh exposures of sand in Sec. 8, although this formation does outcrop the subject lands, and Sample No. 6 was taken approximately 50 feet north of the section line between Secs. 5 and 8. The bed was well exposed in Sec. 8, and these sand beds are fairly consistent in its [*sic*] physical and chemical properties over a large area. And, for this reason, the samples taken from Sec. 5 should be indicative of the quality of the sand on the adjacent subject lands.

The weight to be accorded testimony and exhibit evidence is a matter peculiarly, but not exclusively, within the province of the hearing examiner. However, since the decision appealed from is premised upon the examiner's determination that the evidence adduced by contestee was insufficient to rebut the Government's prima facie case, we are obliged to ascertain whether the evidence presented by both sides was accorded proper weight.

The examiner apparently attached considerable significance to two letters by Russell E. Manley of Manley Bros., a concern which leased the claims from the Kosanke Sand Corporation, the salient portions of which were reproduced in his decision. In the first of these letters Manley declared that the quality of the sand could produce a first quality glass and foundry sand, that the reserves were excellent and that the economic and market potential justified the development of the claims. In the second letter, written after relinquishing the lease upon payment to the contestee of $13,000, Manley asserted that the statements made in the first letter were erroneous and that he no longer believed them to be true. Mr. Manley was not called as a witness, and

his statements were not subject to examination. We therefore have no means of knowing on what his judgment of the claims was based, i.e., the nature and extent of his testing, if any, his research into the production methods and systems, if any, the cost analysis performed by him, if any, and so forth. It is undeniable that the second Manley letter negates the first, but beyond this they are of small evidentiary worth.

The weight which the hearing examiner accorded the testimony of Steve Kosanke is expressed in the following quotation from the decision at page 8:

> Mr. Kosanke prepared the flotation plan and expressed the opinion that it will work. He then eliminated the possibility that his opinion could be accorded any real weight by testifying that he was not an expert in the field of flotation or chemistry.

Kosanke did testify that he was not expert in these fields. However, he also testified that he had worked as a contract miner for some seven years, that he subsequently obtained a Bachelor of Science degree in geology from the University of Texas at El Paso, that he had started a gold mine in Nevada, that he had worked as a consultant in silica flotation for Arrowhead Silica, that he had worked as a consultant in the field of geology and metallurgy, principally in the hire of F. W. Millard and Son, that he had performed flotation on silicates for one of the heads of the Department of Metallurgy at the University of Texas at El Paso, and that he had visited the Ottawa Silica Corporation in Illinois and made suggestions regarding their flotation processes which were subsequently adopted by the company. He testified that he had designed plants similar to the one which he proposes, and several of them have been in partial production. He has also been employed as a field engineer servicing mining equipment, and as an exploration geologist in uranium. We cannot know whether Kosanke's denial that he is an expert was attributable to undue modesty or to ignorance of the legal requirements for expert qualification. However, in view of his stated experience and background, we are of the opinion that his testimony should not have been so lightly regarded.

The examiner's decision also notes that Thomas Sharps, witness for the contestee, stated that he has had no previous experience in mining silica sands, that he is not a metallurgist and not qualified to make a determination of whether the Kosanke process will work satisfactorily. Mr. Sharps is a graduate geologist who has completed some graduate work at the Colorado School of Mines. He has done advanced studies in oceanography and sedimentation, he is a registered professional engineer by written examination in the State of Colorado, and a certified professional geologist. He has worked in the Colorado School of Mines Research Foundation for four years and is the author of several mineral industrial publications. He also conducted an unsuccessful

silica sand search for Coors Brewery, during which he sampled and rejected several deposits in Colorado.

George Omo, a witness for the contestee, is a graduate mining engineer with a number of years of mining consulting and responsible corporate employment in the mineral field. With reference to his testimony that a prudent man would be justified in developing the claims for silica sand, the hearing examiner observed that he has had no experience in mining silica sands.

The deficiencies in the background and experience of the contestee's witnesses, upon which the hearing examiner remarked, are equally attributable to George Scarfe, the principal witness for the contestant, who also acknowledged that he is not a flotation expert or a metallurgist, that he never performed any beneficiation of glass sand, and that he has never been employed in the manufacture or fabrication of glass Nevertheless, the examiner relied heavily on Scarfe's testimony.

It is apparent that the sands of the Domengine Formation are suitable for both glass manufacture and foundry work, because they have been successfully extracted, marketed and used for these purposes in the past. It is equally apparent that the sands from the Ione deposits are of better quality than are those on the Kosanke claims. The evidence establishes that the Kosanke sand can be beneficiated to achieve a quality that equals the product marketed from Ione, but at somewhat greater expense. The major markets are 40 to 80 miles closer to the Kosanke claims, but the hearing failed to develop the extent of the economic advantage that appellant would derive from this fact.

The evidence is clear that if the appellant can offer an acceptable grade of sand at a price competitive with the Ione sand, it can capture a portion of the market. The price of Ione sand is $4.75 f.o.b. the plant. Current shipping costs from Ione to the Bay area buyers is not found in the record, but certainly some economic advantage must lie with the Kosanke claims by virtue of their being closer to the market. This aspect was not considered in the decision below. Contestee also elicited testimony that barge haulage, which affords extremely cheap freight to consumers with waterfront facilities, is only three or four miles from the property, and that railroad facilities are also available nearby.

As noted by the hearing examiner, there is no disagreement that a substantial market for glass sand exists locally. In fact the claims lie virtually in the heart of a large market area with a number of glass manufacturers in close proximity. Contestee's Exhibit C, a letter from Glass Containers Corporation, which is self-explanatory, is set forth below:

January 26, 1970

Dear Mr. Kosanke:

Subject: *Sand Consumption*

In answer to your inquiry of January 22, 1970, we have listed our approximate

requirements for silica sand tonnage. We feel that this tonnage could be supplied by such an operation as you have proposed as this deposit has been mined before for glass sand.

Our present needs amount to approximately 4,000 tons of silica sand per month at our Antioch plant. Our plant at Hayward consumes a like amount and both plants are presently being supplied by Ione and Del Monte sands. Due to the shipping differential, your company could probably expect to capture this market provided you can maintain the quality required and be price competitive. Our present price is in the $4.50–$5.00/ton range. Other markets do exist in the immediate area and a prudent individual could expect to capture an additional tonnage equal to that used by Glass Containers. You mentioned staking your claims in 1963 and I can assure you that the market for silica sand of high purity existed prior to that time.

We appreciate your interest in our company and do expect to discuss this matter in detail sometime prior to construction of your plant.

Sincerely yours,

/s/ C. H. Meyers,
Plant Manager,
Glass Containers Corporation.

The milling and flotation process described by Kosanke is similar in many respects to that in other plants operated for the beneficiation of glass sands in California and elsewhere, and is not a bizarre or novel concept. The record discloses no basis for assuming that it will not perform as intended. The unit cost of construction and operation is a critical aspect, but the figures supplied by the contestee were not disproven. Clearly, if the sand could be produced for the cost related by the contestee, the profitability of the operation would be virtually assured. The weakness of the contestant's case lies in its failure to offer any probative evidence that these costs are not accurately represented, or to demonstrate at what point a higher cost might dissuade a prudent man from reasonably anticipating that he could successfully compete in the existing market. The skepticism expressed by Mr. Scarfe must be accorded some weight, but its value is severely limited by his failure to show on the basis of specific itemized costs that his opinion is more nearly correct than the contestee's.

The preponderance of the evidence strongly indicates that the sand can be beneficiated economically to meet the minimum standards for inferior grades of glass. Whether it can be upgraded to compete economically with Ione sands for use in first quality optical products and the better grades of polished plate is more doubtful, but such a possibility has not been precluded. The evidence adduced by the contestant in making its *prima facie* case was successfully rebutted by the detailed showing of the contestee that he has good and sufficient reason to believe that the sands can be produced and sold at a profit in the present market in competition with existing suppliers.

Appellant submits that the following language from *Solicitor's Opinion*, 69 I.D. 145, 146 (1962), is applicable in this instance:

> * * * When a nonmetallic mineral is not of extremely wide occurrence and when a general demand for that mineral exists, it may be enough, instead of showing an actually existing market for the products of that particular mine, to show that a general market for the substance exists of a type which a reasonably prudent man would be justified in regarding as one in which he could dispose of those products.

Appellant is not required to prove *certainty* of profit or *certainty* of future sales or actual sales. *United States* v. *Clear Gravel Enterprises, Inc.*, 2 IBLA 285 (1971); *United States* v. *Harold Ladd Pierce*, 75 I.D. 270, 283 (1968), and cases therein cited.

In concluding that a discovery of a valuable mineral deposit has been effected on the claims in question, thereby removing a major obstacle to the issuance of a patent, we recognize that the claimant may not be able to finance the mill and flotation plant he has described or it may, after all, prove impossible to beneficiate and market the silica sand at a price competitive with the present suppliers of the market. But we are persuaded that a prudent man would be justified in the further expenditure of his labor and means in the reasonable anticipation that a valuable mine can be developed, and that is the sole issue for our determination.

In reaching this conclusion we have been obliged to compare our action with *United States* v. *Maurice Duval et al.*, 1 IBLA 103 (1970), a case involving very similar circumstances in which this Board reached an opposite conclusion. The essential distinction between the two lies in the fact that the land occupied by the *Duval* claims was withdrawn from mineral location on July 18, 1961, and it was therefore incumbent upon the claimants to demonstrate a valid discovery as of that date by showing that the silica sands were marketable at a profit prior to the date of withdrawal. *United States* v. *United States Silica Corp.*, A-30400 (August 24, 1965), *aff'd. sub nom. Simplot Industries, Inc.* v. *Udall*, Civil No. LV 1024 (D. Nev. June 19, 1969). In the instant case no withdrawal is involved.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed with reference to the KO-KO Nos. 1-20 lode mining claims, the Earache 1, the S½ of Earache 2, the Earache 4, the Ray and the S½ of the Jeff placer mining claims; the decision is reversed insofar as it pertains to the remaining claims and portions of claims, and the case is remanded to the Bureau of Land Management for further action consistent herewith.

EDWARD W. STUEBING, *Member.*

WE CONCUR:

FREDERICK FISHMAN, *Member.*

NEWTON FRISHBERG, *Chairman.*

Frederick Fishman, concurring.

I agree with the reasoning and conclusion in the main decision. I do feel, however, that certain facets of the case warrant further discussion.

The overturning of the fact findings of the examiner accords with the authority of the Board in making all findings of fact and conclusions of law based upon the record necessary to decide the case just as though the Secretary were making the decision in the first instance. *See United States* v. *T. C. Middleswart et al.*, 67 I.D. 232, 234–35 (1960), which quotes from a leading treatise as follows:

> 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 they did before adoption of the APA. 2 Davis, Administrative Law Treatise (1958), sec. 10.04.

It is settled law that a hearing examiner's findings are not as unassailable as a master's and may be reversed by the agency even when not clearly erroneous. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 492 (1951). *See Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955). Section 8 of the Administrative Procedure Act, 5 U.S.C. sec. 557(b) (1970) supports this rule by stating:

> * * * On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. * * *

Since the agency may reverse a hearing examiner's findings of fact even when not clearly erroneous, it is obvious that it has that authority where clear error appears. In my opinion, the fact findings below were afforded due consideration in the main decision.

The facts of record lend themselves to an independent judgment by this Board. Our conclusions, which override those of the examiner, rest upon such facts. We have not second-guessed the examiner as to the veracity and demeanor of the witnesses. *Cf. Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951); *National Labor Relations Board* v. *James Thompson & Co.*, 208 F. 2d 743 (2d Cir. 1953).

Although, at first blush, my views in this case may seem inconsistent with *State Diretcor for Utah* v. *Edgar Dunham*, 3 IBLA 155, 78 I.D. 272 (1971), *Dunham* is clearly distinguishable in that the hearing examiner's findings therein rested largely, if not primarily, upon his determination of the veracity of the witnesses.

I fully recognize that the main decision in this case appears to be disconsonant with the consideration given to mining claim contests in applying the "prudent man" concept. That concept, enunciated in *Castle* v. *Womble*, 19 L.D. 455, 457 (1894), and approved in *Chrisman* v. *Miller*, 197 U.S. 313, 322 (1905), is stated as follows:

> Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, *with a reasonable prospect of success*, in developing a valuable mine, the requirements of the statute have been met. [Italics supplied.]

The Department in *United States* v. *Theodore R. Jenkins*, 75 I.D. 312, 318 (1968), construed the prudent man rule as follows:

> * * * The test is not whether there is an operating profitable mine, or whether a prudent man at some time in the future under more favorable circumstances might expect to develop a profitable mine, but whether under the circumstances *known at the time* a profitable mine might be expected to be developed. This expectation must be based upon present considerations as to the value of the deposit as determined by the extent of saleable mineral within it, and the market price for the mineral, and by comparing the expected costs of the mining operation. [Footnote omitted.]

In *United States* v. *Estate of Alvis F. Denison*, 76 I.D. 233, 240 (1969), the Department construed *Jenkins* as follows:

> As the *Jenkins* case, *supra*, further indicates the expectation of future remunerative market prices must be based upon rational considerations, including normal market ups and downs, and not upon conjectures and speculation as to possible sharp increases in market prices due to unpredictable changes in world political and economic conditions, or to a Government subsidy, or to the unforeseen lowering of costs because of dramatic technological breakthrough. Thus, the expectation of future profitability under the prudent man test must be based upon present economic circumstances known then and not upon mere speculation as to possible substantial changes in the market place.

In essence, a mining claimant, to sustain the validity of his claim in a mining contest (after the Government has made a prima facie case of invalidity), must show by a preponderance of the evidence that there is a *reasonable prospect* that he can mine, remove, and market the mineral at a profit. *See United States* v. *Robert E. Anderson, Jr. et al.*, 74 I.D. 292 (1967); *United States* v. *Michael Batesel, Muriel Batesel et al.*, Nevada Contest Nos. 062008, 062009–1 and 2, and 062012 (August 6, 1969).

Other than for *Anderson* and *Batesel*, so far as I am aware, there heve been few, if any, Departmental or Bureau of Land Management decisions in recent times which have recognized as valid those mining claims from which there have been no *actual* sales of minerals which are not inherently valuable.

The Department has recognized that a reasonable prospect of success "does not mean a sure thing." *United States* v. *C. B. Myers et al.*, 74 I.D. 388, 390 (1967). *Converse* v. *Udall*, 399 F. 2d 616, 623 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969), confirms this conclusion by

approving the standard that "the nucleus of value which sustains a discovery must be such that with actual mining operations under proper management *a profitable venture may reasonably be expected to result.*" [Italics supplied.]

In *United States et al.* v. *Coleman et al.*, 390 U.S. 599, 603 (1968), the Supreme Court explicitly recognized the marketability standard as simply a refinement of the prudent man rule, stating:

> Finally, we think that the Court of Appeals' objection to the marketability test on the ground that it involves the imposition of a different and more onerous standard on claims for minerals of widespread occurrence than for rarer minerals which have generally been dealt with under the prudent-man test is unwarranted. As we have pointed out above, the prudent-man test and the marketability test are not distinct standards, but are complementary in that the latter is a refinement of the former. While it is true that the marketability test is usually the critical factor in cases involving nonmetallic minerals of widespread occurrence, this is accounted for by the perfectly natural reason that precious metals which are in small supply and for which there is a great demand, sell at a price so high as to leave little room for doubt that they can be extracted and marketed at a profit.

It is noteworthy that the Government stated in the brief [1] filed by the Secretary in the rehearing held in *Coleman, et al.* v. *United States* before the Court of Appeals for the Ninth Circuit:

> The *Coleman* opinion states several times that the Department has imposed an "absolute requirement of proof of present marketability at a profit" (or words to that effect) as the standard of discovery for minerals of widespread occurrence. If the court means that the Department has required a showing that an actual profitable marketing operation was in existence on the critical date, the court has misread the Department's decisions. All that the Department has required has been a showing of facts from which *the conclusion could reasonably be drawn that a profitable mining operation could have been conducted on the pertinent date, not that such an operation was actually being conducted.* [Italics supplied.]

The application of the marketability test to minerals not inherently valuable is not a novel doctrine. In *United States* v. *C. E. Strauss et al.*, 59 I.D. 129, 138 (1945), the Department stated:

> * * * [W]hether particular deposits of these and other mineral substances of wide occurrence are *valuable* mineral deposits within the contemplation of the mining laws and whether the lands containing them are therefore subject to location and purchase under the mining laws are questions of fact, *held to depend upon the marketability of the deposit.* The rule long laid down by both the courts and the Department requires that to justify his possession the mineral locator or applicant must show that by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed, and disposed of at a profit. [Italics in original.] *Ickes* v. *Underwood et al.*, 78 App. D.C.

---

[1] Supplemental and Replacement Brief and Appendix for the United States, Appellee, and Brief and Appendix for Stewart L. Udall, Secretary of the Interior, Appellee and Counterclaim Defendant at 58, *Coleman* v. *United States*, 363 F. 2d 190 (9th Cir. 1966).

396, 141 F. (2d) 546 (1944); *opinion of Acting Solicitor*, 54 I.D. 294 (1933); *Layman* v. *Ellis*, 52 L.D. 714 (1929). In *Big Pine Mining Corp.*, 53 I.D. 410, 412 (1931), the syllabus said:

"Lands containing limestone or other minerals, which *under the conditions shown in the particular case cannot probably be successfully mined and marketed*, are not valuable because of their mineral content, nor subject to location under the mining law." [Last italics supplied.]

There is a constant thread in these decisions—the "reasonable prospect of success" of *Castle* v. *Womble* is the progenitor of the concept that to sustain the validity of a mining claim, it must be established that the mineral can "probably be successfully mined and marketed," although in some cases it is suggested that in the absence of actual sales of the mineral, a presumption of non-marketability arises. *See United States* v. *Alfred N. Verrue*, 75 I.D. 300, 307 (1968), *rev'd*, *Verrue* v. *Secretary of the Interior*, Civil No. 6898 (D. Ariz., filed December 29, 1970), *appeal pending*.

In the decision below, the examiner postulated the issue of discovery on "whether the Kosanke process can improve the quality of the sand on an economical and competitive basis with the existing sources of supply." The letter of January 26, 1970, to the contestee from Glass Containers Corporation suggests the feasibility of contestee's plans by stating, "We feel that this tonnage could be supplied by such an operation as you have proposed as this deposit has been mined before for glass sand."

Admittedly, the letter is something less than a ringing endorsement of the contestee's plan of operations—it is, however, something more than a mere expression of interest. But the point is that there is insufficient countervailing evidence in the record. It seems to me that the contestee has successfully borne the risk of non-persuasion, *i.e.*, he has established by a preponderance of the evidence that there is a reasonable prospect that he can mine, remove, and market the mineral at a profit. His showing does not rest upon the premise that "unforeseeable developments might some day make the deposit commercially feasible . . . ." *Foster* v. *Seaton*, 271 F. 2d 836, 838 (D.C. Cir. 1959).

HAROLD J. NAUGHTON

3 IBLA 237 *Decided September 13, 1971*

Alaska: Indian and Native Affairs—Alaska: Land Grants and Selections—Indian Allotments on Public Domain: Lands Subject to—Indian Allotments on Public Domain: Settlement—Withdrawals and Reservations: Effect of

No rights are acquired under the Alaska Native Allotment Act, 48 U.S.C. secs. 357, 357a, 357b (1958) by a native who purportedly commenced his occupa-

tion of the land at a time when the land was withdrawn from all forms of appropriation and where after the withdrawal was revoked, the land was opened only for the filing of State selection applications.

Alaska: Grazing—Indian Allotments on Public Domain: Lands Subject to—Indian Allotments on Public Domain: Settlement

Settlement on land in Alaska which is subject to a grazing lease issued under the Alaska Grazing Act of March 4, 1927, 48 U.S.C. secs. 471, 471a–471o (1958) does not create any rights, by virtue of such settlement, under the Alaska Native Allotment Act, 48 U.S.C. secs. 357, 357a, 357b (1958), since such land is segregated from adverse appropriation at least until the Department takes action to cancel the grazing lease.

Alaska: Grazing—Alaska: Statehood Act—Alaska: Land Grants and Selections

Although the existence of a grazing lease, issued under the Act of March 4, 1927, 48 U.S.C. secs. 471, 471a–471o (1958) is effective to bar settlement of the land covered thereby, it does not preclude the filing of a State selection application for the land, which, when filed, segregates the land from all appropriations based upon application or settlement or location.

INTERIOR BOARD OF LAND APPEALS

Harold J. Naughton has appealed to the Secretary of the Interior from a decision dated December 29, 1969, by which the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Bureau's Alaska State Office dated May 15, 1969, rejecting his native allotment application, AA–2805, filed pursuant to the Native Allotment Act of May 17, 1906, *as amended*, 48 U.S.C. secs. 357, 357a, 357b (1958).

The basis for the decision appealed from was that a portion of the land sought by the appellant (hereinafter called the north part) had been withdrawn at the time of settlement, and after the withdrawal was revoked, the land was opened only to State selection; and as to the remainder of the land (hereinafter called the south part) the rejection was sustained on the basis that the land was in a grazing lease, issued under the act of March 4, 1927, 48 U.S.C. secs. 471, 471a–471o (1958) and was not available for settlement until so ordered by the Bureau of Land Management.

Appellant's contentions on appeal are essentially as follows:

1. He claims occupancy of the land from 1950, which predates the selection of the area by the State of Alaska.

2. Selection of the land by the State violates the protection afforded rights of natives under the Constitution of the State of Alaska.

3. The Alaska Grazing Act of March 4, 1927, 48 U.S.C. secs. 471, 471a–471o (1958) guarantees the use of land by natives.

4. The State of Alaska conceded that its selections are subject to native rights.

Appellant filed his native allotment application on June 23, 1968, for approximately 160 contiguous acres of land on the shore of Kalsin Bay, Kodiak Island, Alaska, together with a petition for deletion of the land applied for from a grazing lease. According to a map attached to the application, the land applied for covers parts of sections 23–26, T. 29 S., R. 20 W., Seward Mer.[1]

Even taking appellant's claim of occupancy at its face value, it does not appear, as shown below, that it vested him with any rights to the land.

The records show that on June 14, 1941 by Executive Order No. 8789, 3 CFR 952 (Cum. Supp. 1938–1943) the north portion was withdrawn from all forms of appropriation. On April 30, 1956, by Public Land Order No. 1297 (21 F.R. 2981) the withdrawal was revoked as to such land, *inter alia*, but the order provided that the lands would not be open to appropriation until so ordered by the authorized officer of the Bureau of Land Management. On June 24, 1968 (Order No. AA–2717, 33 F.R. 9309), the lands were opened only to the filing of State selection applications. Withdrawn lands are not subject to the initiation of rights by settlement under the Indian allotment laws. *See Donald E. Miller*, 2 IBLA 309 (1971); *Theodore A. Velanis*, A–30953 (March 7, 1969). Since the lands have not been opened to settlement, no rights could accrue to the settler until such restoration takes place. *See Sol. Op.*, M–36078 (May 16, 1951). Therefore, at no time during the asserted occupancy did the appellant gain any rights by virtue of his occupancy of the land.

The south part of the lands sought was withdrawn on February 10, 1940, by Executive Order No. 8344, 3 CFR 618 (Cum. Supp. 1938–1943) and they remained withdrawn from settlement until December 26, 1961, when they were opened to entry generally pursuant to Public Land Order No. 2417, 26 F.R. 5926 (June 26, 1961). The withdrawal precluded the initiation of a settlement right during that period. In addition, all the lands applied for have been in a grazing lease, A–7916, issued in 1932 for a term of 20 years, renewed in 1952 for an additional 20 years, and renewed on April 8, 1971, to expire December 31, 1997. All of the lands are included in State selection application, A–062768, filed (as to these lands) on February 15, 1967.

The impact of the grazing lease and State selection application warrant discussion. As indicated earlier, the grazing lease is extant and has been since 1932. In discussing the effect of such a grazing lease, issued under the act of March 4, 1927, the Associate Solicitor for Public Lands stated in M–36454 (July 23, 1957) in part as follows:

[1] On July 23, 1971, appellant filed an amended legal description. The difference in the two descriptions is of no consequence to the decisions rendered below or to this decision.

It is clear that under the Act, the potential grazing use of public land in Alaska was made subordinate to its use for other more beneficial purposes and to development of its resources. But once a grazing lease had issued, it was the Act's purpose to protect the stockman in his use of the land to the extent indicated by the regulations and by the terms of his lease. To provide such protection, and particularly in view of the provisions of Sections 4 and 11 of the Act, *the issuance of a grazing lease,* except as to mining location, *must be considered as an appropriation, segregating the leased lands from the remainder of the public domain so as to prevent unfettered entry thereon,* at least until adverse action excluding the land from the lease had been taken. [Italics supplied.]

See William R. C. Croley, A–30673 (May 11, 1967) and 43 CFR 4131.3–1. That regulation essentially reiterates the principle enunciated in the Associate Solicitor's opinion. It follows, therefore, that the appellant's use of both the north and south portions was unauthorized and did not give rise to any rights. As indicated above, the south portion would have become available for settlement by Public Land Order No. 2417 of June 26, 1961, but for the existence of the grazing lease. However, on February 15, 1967, the State of Alaska amended its selection application to include both the north and south portions. Although the State's application was not operative as to the north portion because it was not open to such application until the order of June 24, 1968, became effective, the State's application did segregate the south portion from all appropriations based upon application or settlement or location, by the force of 43 CFR 2222.9–5 (1968), now 43 CFR 2627.4(b).[2] *Cf. Udall* v. *Kalerak,* 396 F. 2d 746 (9th Cir. 1968), *cert. denied,* 393 U.S. 1118 (1969).

In the light of our earlier holdings, we need not decide whether the appellant's showing of settlement constitutes satisfactory evidence to meet the statutory and regulatory criteria.[3]

---

[2] The pertinent part of 43 CFR 2222.9–5(b) (now 43 CFR 2627.4(b)), provides:
"Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the appropriate land office * * *."

[3] Appellant's claim of occupancy since 1950 is burdened with inconsistencies. Although he submitted two affidavits of other parties reciting that the appellant had used the area for hunting and fishing "during the year 1950" and "during the years 1959 through 1963", these affidavits have little probative effect to establish the duration and intensity of the use.

The form (Form 2212–3 (June 1964)) on which appellant filed his application contains a number of questions.

Question No. 8a is: "From what date have you occupied the land applied for?" Appellant left the space following this question blank.

Question No. 9 is: "Is evidence of continuous use and occupancy of the land for a period of 5 years attached in *triplicate?*" Appellant checked the block, following the question, marked "No".

It is noteworthy that under the Act of May 27, 1906 and 43 CFR 2212.9–4 (1968), now 43 CFR 2561.2, an applicant for a native allotment must make satisfactory proof of substantially continuous use and occupancy of the land for a period of five years by him.

It is our view that the selection of the land by the State of Alaska is not violative of the State's Constitution since the appellant has no *rights* to the land. Nor do we find that the Alaska Grazing Act gives any guarantee of approval of his allotment application, contrary to appellant's suggestion.

Appellant also urged that a State selection is subject to a native claim of occupancy. In certain factual situations, this is obviously so. *See State of Alaska* v. *Udall*, 420 F. 2d 938 (1969), *cert. denied*, 397 U.S. 1076 (1970). We need not decide whether the State's selection application is precluded from approval on the issue of whether the selected lands in the case at bar are not "vacant unappropriated and unreserved" within the ambit of the Alaska Statehood Act, sec. 6(b), 72 Stat. 339 (1958), 48 U.S.C. note prec. sec. 21. Our finding that the filing of the State selection application as to the south portion was effective to segregate the land from other appropriations and the non-opening of the north portion to any appropriation other than State selection applications is dispositive of the case. *See Annie K. Miller*, Fairbanks 031861 (July 17, 1964).

In view of the foregoing it is unnecessary at this time to pass upon appellant's petition for cancellation of the grazing lease to the extent that it conflicts with his application.[4]

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

FREDERICK FISHMAN, *Member.*

WE CONCUR:

MARTIN RITVO, *Member.*

FRANCIS MAYHUE, *Member.*

[4] The petition referred to is the one envisaged by the following regulation:

"§ 4131.3–1 Settlement, location, and acquisition.

"Lands leased under the act are not subject to settlement, location, and acquisition under the nonmineral public land laws applicable to Alaska unless and until the authorized officer of the Bureau of Land Management determines that the grazing lease should be cancelled or reduced in order to permit, in the public interest and without undue interference with the grazing operations, the appropriate development and utilization of the lands (see § 4131.2–7(e)) and that the lands are suitable for and otherwise subject to the intended settlement, location, entry or acquisition. An application on the appropriate form or a notice on a form approved by the Director if applicable to the class of entry contemplated, will be accepted and treated as a petition for determination. Upon such determination and after not less than 30 days' notice thereof to the lessee the grazing lease may be cancelled or reduced to permit the settlement, location, entry or other acquisition of the lands so eliminated from the lease, and the petitioner will be accorded a preference right to settle upon or enter the lands in accordance with the determination.

ALFRED E. KOENIG

4 IBLA 18 *Decided October 26, 1971*

Public Lands: Special Use Permits—Rights-of-Way: Generally

A special land use permit will not be granted where other provisions of any existing law authorize the desired use; therefore, it is proper to reject an application for a special land use permit to accommodate an excess road to a mining claim where the road is authorized by existing law.

Mining Claims: Generally—Rights-of-Way: Generally

The United States mining laws give to the owner of mining claims as a necessary incident a nonexclusive right of access across the public lands to their claims for purposes of maintaining the claims and as a means of removing the minerals. Therefore, an owner of a mining claim may construct and maintain across the public lands a nonexclusive road for such purposes.

INTERIOR BOARD OF LAND APPEALS

Alfred E. Koenig has appealed from a decision dated November 25, 1970, in which the district manager, Glenwood Springs District, Bureau of Land Management, rejected his application C–9239 for a special land use permit to accommodate an access road right-of-way across public domain lands for a distance of approximately 1,082 feet.

The district manager refused to encumber the land with the special land use permit on the basis that the land is included in a state indemnity selection application by the State of Colorado, on which favorable action was contemplated by the Bureau.

The appellant contends that the road has been built and is necessary for access to his mine workings. He further asserts that the road affords the only access to his mining claim. The existence of the road is confirmed by a letter of January 15, 1971, from the acting district manager to the appellant. The need for the road is unrebutted in the record.

The threshold question is whether the appellant needs any authorization from the Bureau of Land Management to construct and maintain such an access road on the public lands. For the reasons indicated below, if the road is not exclusive of the general public, no such authorization is required.

In *Solicitor's Opinion*, M–36584, 66 I.D. 361, 363–365 (1959),[1] the question is resolved as follows:

> The genesis and history of the mining laws make it clear that Congress intended to give the miner free access to minerals in the public lands and to leave him free to mine and remove them without charge. Congress in the 1860's failed to go along with an executive recommendation for disposing of the minerals by lease in order to raise revenue. It has consistently since then left the miner free and untrammeled so far as his mineral rights are concerned. * * * Further, Congress, in effect, confirmed the miner's rights previously exercised under sufference as much as it granted mining rights. * * *
>
> Congress knew, when it enacted the mining laws, that miners necessarily would have to use public lands outside of the boundaries of their claims for the running of tunnels and for roads. In effect, it provided only for a procedure where possession could be maintained and patent to the land could be obtained. Otherwise the clear intent was that the miner should have the right to appropriate the minerals and convey them to market. Lindley in his 3d edition on *Mines*, volume 2, sections 629 and 631, points out that roadways are necessary as an adjunct to working a claim and as a means toward removing the minerals.
>
> The Department has recognized that roads were necessary and complementary to mining activities. It early adopted the policy of recognizing work done in the construction of roads to carry ore from mining claims as legitimate development work accreditable to the claims as assessment and patent work. *Emily Lode*, 6 L.D. 220 (1887). In *Douglas and Other Lodes*, 34 L.D. 556 (1906), it held that such roadways were not applicable. But in *Tacoma and Roche Harbor Lime Co.*, 43 L.D. 128 (1914), after discussing a number of pertinent court and departmental decisions, the Department adopted the rule as stated in Lindley on Mines and allowed credit toward patent expenditures to a trail subject only to proof of the applicability of the trial work to specific locations. The principle was applied to an aerial tramway in *United States* v. *El Portal Mining Co.*, 55 I.D. 348 (1935), citing the *Tacoma* case, *supra*. These cases obviously recognize the right of a mining claimant to construct roads across public lands for necessary use in mining operations even to the point of crediting expenditures made in that connection toward meeting the requirements of the statute. And, as already indicated, it has preserved that right in express terms in at least two general laws providing for Federal use of public lands.
>
> We may reasonably apply here a principle that the courts have frequently applied in cases measuring the powers of the United States to legislate in relation to matters within the exclusive jurisdiction of a State, and the reverse. Executive action along the line proposed could be used to completely destroy the rights granted by Congress under the mining laws. It is true that where a tramway right-of-way is granted under 1895 act, *supra*, [43 U.S.C. § 956 (1970)] the Department, for more than 20 years, has charged an annual rental. But that charge is made under the discretionary power granted by Congress to the Secretary under the act. Such rights when granted in the past have vested an exclusive right of user in the mining claimant. A road constructed by a mining

[1] Cited with approval in *United States* v. *9,947.71 Acres of Land, etc.*, 220 F. Supp. 328, 332 (D.C. Nev. 1963).

claimant for purposes connected with his claim, without the benefit of such a grant is not exclusive and there is no specific law giving the Secretary discretionary authority to grant that right-of-way "under general regulations" as under the 1895 act.

In view of the foregoing, it is clear that no authorization is needed for such a nonexclusive road.[2] The record indicates that appellant desires merely a nonexclusive road. Accordingly, appellant's continued use of the access road is authorized by law. In that posture, this decision is dispositive of the case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision below is affirmed as modified.

FREDERICK FISHMAN, *Member.*

WE CONCUR:

NEWTON FRISHBERG, *Chairman.*

FRANCIS E. MAYHUE, *Member.*

ROGER L. MOREHART

4 IBLA 1 *Decided October 26, 1971*

School Lands: Indemnity Selections—State Selections—Exchanges of Land: Forest Exchanges

Where a State has received title to a school indemnity selection, the base land for which the idemnity is taken remains in federal ownership and where, after the State has received such indemnity land, it issues an instrument of conveyance for the base land to private party A, who conveys it to B, who conveys it to the United States as base for a forest lieu selection, which is satisfied, and thereafter the United States issues an indemnity clear list to the State for the school land in place to validate the State's purported conveyance to A, the title to the school land in place inures to the United States under the doctrine of after-acquired title.

[2] We note that the State Board of Land Commissioners, by letter of May 14, 1970, stated that "we have no objection to the granting of a right-of-way for a public road over this lot. * * *" The Boulder County Engineering Department, by letter of May 18, 1970, asked that the district manager "reconsider the granting of any access strips or lands that might be used for improper land development purposes without first requiring adherence to local planning requirements." In view of our holding, there is no discretion in the Department concerning this matter.

Conveyances: Generally—Conveyances: Interest Conveyed

A federal grant of land to a State for the purpose of validating the State's purported conveyance of such land to a third party does not vitiate federal ownership of the land where the United States has received a deed to the land from the assignee of the State's grantee. Under California law, where a person purports to convey the fee simple to certain land and subsequently acquires title to the land so conveyed, the after-acquired estate inures to the benefit of the original grantee or his successors in interest.

Public Lands: Generally

Lands conveyed to the United States under the Act of June 4, 1897, 30 Stat. 11, 36, as a basis for a forest lieu selection which is consummated, are public lands of the United States.

Public Sales: Generally—Public Sales: Applications

Where a public sale application is rejected on the basis that the land has been conveyed out of federal ownership, and it is found that the land is public land, the application will be remanded for further appropriate consideration.

INTERIOR BOARD OF LAND APPEALS

Roger L. Morehart has appealed from the decision of the Riverside land office dated, May 10, 1971, which rejected his public sale application.

The decision was based on the following:

On October 10, 1916, the State of California selected lots 1 and 2 of Sec. 16, T. 11 N., R. 29 W., SBM in State Indemnity Selection San Francisco 09838. The selection was approved December 17, 1920 by Clear List No. 86 without a reservation of any minerals to the United States. Accordingly, the land sought in your petition-application is no longer under the Jurisdiction [*sic*] of the Bureau of Land Management and the petition-application is rejected.

A letter in response to our inquiry from the Title Officer of the California State Lands Division recites in part as follows:

The records of this office show that the State of California was indemnified for its entitlement in the subject Section 16 as follows:

Acres	*Clear List*	*Approval Date*
160.00	25 SF	3/24/1873
280.00	28 SF	11/12/1873
23.67	48 SF	11/16/1882
139.19	54 SF	11/7/1891
602.86		
−320.00	State's entitlement	
282.86	Overcertification	

The overcertification of indemnity acquired by Clear Lists approved *AFTER MARCH 1, 1877*, totalling 162.86 acres, was satisfied by issuance of State patent to the United States on December 7, 1909.

The overcertification of indemnity acquired by Clear Lists approved *PRIOR TO MARCH 1, 1877*, totalling 120 acres, was satisfied by cash payment. Controller's Warrant No. 5606 was transmitted to the General Land Office, Washington, D.C. with the State Surveyor General's letter of December 29, 1913.

The above-mentioned patent and cash payment reduced the State's acqusition [*sic*] of indemnity to 320 acres of land elsewhere within the State. This was the State's actual entitlement.

More specifically, the State was indemnified by Clear List No. 25, San Francisco Land District, approved March 24, 1873, for the SE ¼ [1] of the unsurveyed Section 16. After approval of the United States plat of survey on May 8, 1885, the State apparently overlooked the fact that it had previously relinquished its right to any portion of the SE ¼ and processed the application of George Black to purchase Lots 1 and 2, issuing a patent therefor on March 2, 1903.

When the State selected Lots 1 and 2 of Section 16, T. 11 N., R. 29 W., S.B.M. and received title thereto by Clear List No. 86, San Francisco Land District, approved December 17, 1920, our interest had apparently been conveyed to our patentee, George Black. According to information provided this office by Mr. Morehart's attorney, Mr. Black had conveyed Lots 1 and 2 to C. W. Armstrong who in turn exchanged his interest with the United States for land in Section 34, T. 5 N., R. 96 W., Sixth Principal Meridian, Colorado.[2]

The file relating to Clear List No. 86 of December 17, 1920, which purportedly vested title to lots 1 and 2 (the lands in issue) in the State of California states in part as follows:

> [T]he selections were made in accordance with and pursuant to a basis of adjustment agreed upon and adopted by officials of the state and of the Land Department of the United States on June 16, 1911 and letters G of this office dated May 3, 1912 and August 13, 1913, for the benefit of the transferees of the State and to compensate the United States for lands certified to the State in excess of the quantity to which it was entitled on account of the sections or portions thereof selected in the foregoing list.

Thus it is apparent that the purported conveyance was to protect the title given by the State of California to its grantees.

As shown above, the State in 1873 had already received indemnity for the lands in issue. It thereby abandoned its claim to the school land in place. See *Riggio* v. *McNeely*, 135 La. 391, 65 So. 552 (1914).

---

[1] Lots 1 and 2 lie in the SE¼ sec. 16, for which a school indemnity selection would lie if the base land did not vest in the State. 43 U.S.C. §§ 851, 852 (1970).

[2] This is confirmed by the official records of the Bureau of Land Management. Armstrong made lieu selection No. 8142, for which patent No. 108615 issued on February 10, 1910, under serial Glenwood 0631. Armstrong had conveyed the lands in issue to the United States in 1903.

In essence the case involves the following facts: The State of California received a *quid pro quo* for the base lands in 1873. In 1903 it inadvertently conveyed such base lands to Black, who conveyed them to Armstrong, who in turn conveyed them to the United States. In 1920 the United States issued a clear list to the State of California for such lands, *inter alia*, to make good the grant to Black. This raises the question of to whose benefit the after-acquired title of the State of California inures.

In *Barberi* v. *Rothchild et al.*, 7 Cal. 2d 537, 61 P. 2d 760, 761 (1936), the court stated:

> * * * In Clark v. Baker, 14 Cal. 612, 627–631, 76 Am. Dec. 449, this court reviewed the early cases adopting the common-law rule that after-acquired title did not inure to the benefit of the mortgagee and therein expressly rejected that rule because of the provisions of sections 33 and 36 of Conveyance Act. (Stats. 1850, p. 249.) Section 33 of that act provided that: "If any person shall convey any real estate, by conveyance purporting to convey the same in fee simple absolute," and shall subsequently acquire the full legal estate, that shall inure to the benefit of the original grantee. Section 36 defined a conveyance as embracing "every instrument in writing by which any real estate or interest in real estate is created, aliened, mortgaged, or assigned, except wills * * *."
>
> * * * Since the adoption of the Civil Code, section 1106 has read: "Subsequently acquired title passes by operation of law. Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title, or claim of title thereto, the same passes by operation of law to the grantee, or his successors." Section 1215 has defined "conveyance" to embrace every instrument in writing "by which any estate or interest in real property is created, aliened, mortgaged, or encumbered, or by which the title to any real property may be affected, except wills." The difference in the language used in the Conveyance Act and that used in section 1106 of the Civil Code is that the former relates to the one who "shall convey any real estate" and the latter to one who "purports by proper instrument to grant." Though both statutes add the words "in fee simple," it was said in the Clark Case that this did not affect the plain purpose of the statute which was "to provide that the subsequently-acquired estate shall be as completely covered by the instrument, whether conveyance or mortgage, as if originally possessed by the grantor or mortgagor." (p. 761)

See *Crane* v. *Salmon*, 41 Cal. 63 (1871). *Cf. Watkins* v. *Lynch*, 71 Cal. 21, 11 P. 808 (1886); *People* v. *Jackson*, 62 Cal. 548 (1881).

Thus it is clear that under California law after-acquired title by a purported grantor inures to the benefit of his purported grantee.[3] *Cf.*

---

[3] The rationale for the rule is supported by *Jermiah Van Rensselaer* v. *Kearney et al.*, 18 U.S. (11 How.) 631, 643–644 (1850) as follows:

"The principle deductible from these authorities seems to be, that whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the

Daniell v. *Sherrill*, 48 So. 2d 736 (Fla. 1950); Annot., 23 A.L.R.2d 1423 (1952); *Lobean* v. *Trustees of Internal Improvement Fund*, 118 So. 2d 226 (Fla. 1960); *Charles O. Martin* v. *United States*, 270 F. 2d 65 (4th Cir. 1959); Annots., 58 A.L.R. 345 (1929) and 144 A.L.R. 544 (1943); *Elizabeth M. Jones* (*On Rehearing*), 52 L.D. 411 (1928).

Accordingly, the patent given by the State of California to Black inures to the benefit of his ultimate assignee, i.e., the United States. The lands are, therefore, federally owned.[4] The records show that they are not within any reservation. Since the lands were conveyed to the United States as base for a forest lieu selection, which was consummated, they are public lands. *Cf. Foster Cline et al.*, Colorado 014505 (August 7, 1957). The records further indicate that the lands constitute an isolated tract and are therefore subject to sale under 43 U.S.C. sec. 1171 (1970).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision below is reversed and the case is remanded to the Bureau of Land Management for further appropriate consideration.

FREDERICK FISHMAN, *Member.*

WE CONCUR:

FRANCIS E. MAYHUE, *Member.*

NEWTON FRISHBERG, *Chairman.*

---

deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies."

"The reason is, that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it."

"The doctrine is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of every one. And although it debars the truth in the particular case, and therefore is not unfrequently characterized as odious, and not to be favored, still it should be remembered that it debars it only in the case where its utterance would convict the party of a previous falsehood; would be the denial of a previous affirmation upon the faith of which persons had dealt, and pledged their credit or expended their money."

"It is a doctrine, therefore, when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when in conscience and honesty he should not be allowed to speak."

[4] It is noteworthy that the Bureau of Land Management apparently considered the land to be federally owned. Despite the 1920 clear list which did not reserve minerals to the United States, oil and gas lease Sacramento 042442 (later designated LA 088806) was issued for the lands effective June 1, 1952. Similarly, oil and gas lease LA 0134579 was issued for the lands as of November 1, 1955.

MASONIC HOMES OF CALIFORNIA

4 IBLA 23 *Decided October 27, 1971*

Statutory Construction: Legislative History—Act of July 6, 1960—Conveyances: Generally—Lieu Selections

An application for a quitclaim deed under sec. 6 of the Act of April 28, 1930, 43 U.S.C. sec. 872, based upon a conveyance to the United States of land as a basis for lieu selection, which conveyance was made pursuant to the Act of June 4, 1897, 30 Stat. 11, 36, is properly rejected because the Act of July 6, 1960, 74 Stat. 334, precludes the Department from utilizing the 1930 act for that purpose.

INTERIOR BOARD OF LAND APPEALS

Masonic Homes of California has appealed from the decision of the Director of the Bureau of Land Management, dated April 24, 1970, which affirmed the decision of the Sacramento land office rejecting the application of Masonic Homes for the issuance of a quitclaim deed to the SW¼ SE¼ sec. 36, T. 7 S., R. 22 E., M.D.M., California, under sec. 6 of the Act of April 28, 1930 (46 Stat. 257); 43 U.S.C. 872 (1964).

The appellant is the successor in interest of one Hiram M. Hamilton, who deeded the land to the United States in 1901 as a basis for a lieu selection, as was then permitted by the Forest Exchange Act of June 4, 1897 (30 Stat. 11, 36).

Hamilton filed three separate selections of tracts in lieu of the land in issue, none of which was accepted by the Government. By Departmental decision A–21005, dated December 8, 1937, Hamilton's right of reselection was denied on the ground that he had withdrawn his original selection application, and that selection rights were thereafter precluded by the Act of March 3, 1905 (33 Stat. 1264). The 1905 Act preserved selection rights "if for any reason not the fault of the party making the same any pending selection is held invalid * * *." The Department in A–21005 took the position that a relinquishment was not tantamount to an invalid selection.

The statutory background concerning forest lieu selections and quitclaims therefor is set forth in S. Rept. 1639, 86th Cong. 2d Sess., in connection with H.R. 9142, which culminated in the Act of July 6, 1960, 74 Stat. 334. That report states in part as follows:

The 1897 Act [30 Stat. 11, 36] provided that—

in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler

or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent * * *.

This act was amended by the acts of June 6, 1900 (30 Stat. 588, 641 [sic], correct citation (31 Stat. 588, 614), and March 3, 1901 (31 Stat. 1010, 1037), to limit the permissible lieu selections to—

vacant surveyed nonmineral public lands which are subject to homestead entry

and was repealed by the act of March 3, 1905 (33 Stat. 1264). The last-named act saved, however—

the validity of contracts entered into by the Secretary of the Interior prior to the passage of this Act.

and provided, further, that—

selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issued therefor the same as though this Act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid another selection for a like quantity of land may be made in lieu thereof.

None of these acts contained any provision for reconveyance of the relinquished lands and the 1905 act, as is evident, treated the conveyor's rights as contractual rather than proprietary in nature. It was not until the Act of September 22, 1922 (42 Stat. 1017), became law that there was authority for the Secretary of the Interior to make a reconveyance and this was limited to applications for reconveyance made before September 22, 1927. The 1930 act, which covers a large variety of situations, reopened the possibility of reconveyances. There is nothing in the history of the bill that became this act to indicate any awareness of its effect upon or applicability to the old forest lieu selections problem.

In view of the earlier legislation, the 1922 and 1930 acts must, at least so far as reconveyances are concerned, be regarded as acts of grace on the part of Congress which vested no permanent or irrevocable right to a reconveyance in their beneficiaries. Enactment of H.R. 9142 will thus, in effect, restore the legal situation to what it was before these acts became law except as to lands which have been returned to private ownership in the meantime.

The Act of July 6, 1960 (74 Stat. 334) provided, in pertinent part, that upon demand made within one year from the date of enactment, payment of $1.25 per acre, with interest, would be made for lands held by the Federal Government (which it had received under the Act of June 4, 1897, 30 Stat. 11, 36 as the basis for lieu selections), provided that the person who relinquished such lands, or his successor in interest, had not theretofore received his lieu selection, a reconveyance of his lands, or authority to cut and remove timber. Section 3 of the 1960 act provides:

The Act of September 22, 1922 (42 Stat. 1017; 16 U.S.C. 483) is hereby repealed. No reconveyance of lands to which section 1 of this Act applies shall hereafter be made under section 6 of the Act of April 28, 1930 (46 Stat. 257; 43 U.S.C. 872).

The appellant contends that, despite the above-quoted statutory language, the Department has both the power and the duty to issue the requested quitclaim deed. The appellant argues: (1) that the act of 1960 by its terms does not apply to the pending matter; (2) that the power to issue quitclaim deeds exists independently of the 1922 act, the 1930 act, and the 1960 act; and (3) the Director's decision would place the United States in the position of taking private land without compensation.

The legislative history of the Act of July 6, 1960, clearly demonstrates that the act was intended to cover the case at bar and that Congress intended to strip the Department of authority to execute a quitclaim deed in these circumstances. S. Rept. 1639 states in applicable portion:

PURPOSE

The principal purposes of H.R. 9142 are (1) to provide compensation for land conveyed or relinquished to the United States during the years 1897–1905 under the act of June 4, 1897 (30 Stat. 11, 36), in cases in which the lieu lands or other rights which the owners were entitled to receive under this 1897 act and supplementary legislation have not already been given them; (2) *to make inapplicable to the owners, their heirs and assigns a later provision of law directing the Secretary of the Interior, upon request, to return the original lands;* and (3) thus to correct defects in the law under which such parties are now laying claim to valuable lands within the national forests and parks and taking them out of Federal ownership. [Italics supplied.]

With respect to appellant's contention that the denial of his application would place the United States in the position of taking private land without compensation, that report shows that Congress considered that problem as follows:

* * * It seems proper, therefore, that provision be made, as proposed in H.R. 9142, for payment to those who are precluded from exercising their original lieu selection rights, since it was never intended that the conveyed or relinquished lands should be a donation to the Government. The price to be paid ($1.25 per acre) was the going price of public lands generally at the time the base lands were relinquished. The interest payment proposed in the bill, as amended, commends itself to the committee as being reasonable and fair both to the original owner and to the Government.

The committee also recognizes that it has been held in some judicial decisions that until there had been an acceptance of the base lands by the Secretary of the Interior no rights accrued under the 1897 act. (For examples see *Roughton* v. *Knight*, 219 U.S. 537, 547 (1911); *Daniels* v. *Wagner*, 205 Fed. 235 (C.C.A. 9th, Cir. 1913).) Understandable as this position was, as of the time and in the light of the circumstances in which it was taken, the committee does not understand or

believe that after a lapse of 60 years during which the Forest Service, the National Park Service, and other Government agencies have administered these lands and Congress has appropriated funds for their management, improvement, and protection, there can any longer be doubt that they have been, in law as in fact, fully accepted by the Government and that the former owners' claims to continued ownership are without merit or equity. [1] The committee notes that the Department of Justice has examined the bill and reports that it—

> is not aware of any basis on which claims could be justified for compensation under the fifth amendment of the Constitution.

The committee agrees with this view and notes, further, that a continuation of the present system may well result in unjust enrichment of speculators whose contentions in this respect are worthless in terms of any usual standards or [sic] law or equity.

Our view that the 1960 act was intended to remove from the Department authority to issue quitclaim deeds in connection with forest lieu matters is further buttressed by *Udall* v. *Battle Mountain Co.*, *supra*, as follows:

> Legislative history shows clearly what Congress had in mind in 1960. It was concerned over the fact that public lands of the United States were being reconveyed under the 1930 Act (the successor of the 1922 Act) in "what the public press, conservation interests and others regard as being virtually a 'give-away' of public resources approaching a scandal." S. Rep. No. 1639, 86th Cong., 2d Sess. (1960). The 1960 Act repealed the provision permitting reconveyance. Instead, claimants were to be compensated at $1.25 an acre. (The 1964 Act [2] provides compensation on a different basis as an alternative to selection of lands and includes all who had recorded under the 1955 Act.) Further the legislative history shows that the extent of recordation under the 1955 Act was carefully analyzed in order that the cost of such compensation might be anticipated.

In support of its contention that the Act of 1960 does not apply to the pending matter, the appellant notes that the Act of 1960 does not apply to cases in which the person who relinquished the land (or his

---

[1] *Cf. Work* v. *Read*, 10 F.2d 637 (D.C. Cir. 1925), which holds that relinquishment of forest lands to the United States, and acceptance thereof by the United States, creates a contractual relation. *Also cf. Udall* v. *Battle Mountain Co.*, 385 F.2d 90, 94, 96 (9th Cir. 1967), *cert. denied*, 390 U.S. 957 (1968), which states: "Since the relinquishment to the United States contemplated a completed exchange of lands an equity in the nature of a right to rescission remained with the owner of the relinquished land until the exchange had been completed and it was not until then that the United States might be regarded as vested with unconditional ownership."

[2] The Act of August 31, 1964, 78 Stat. 751, 43 U.S.C. § 274 (1964), note, provided in part for redemption of forest lieu selection rights, which had been properly recorded under the Act of August 5, 1955, 69 Stat. 534, 43 U.S.C. § 274 (1964), note. Under the 1964 Act, holders of such scrip rights were eligible to receive $275 per acre, 43 CFR 2612.1(e)(3) (1971).

A number of claimants did receive such compensation for forest lieu selection rights.

successor) had previously received a reconveyance of his lands. The appellant further notes that prior to 1960, the Government had not only rejected Hamilton's proposed lieu selections, but "returned his deed and other papers," an action which the appellant views as "tantamount to a reconveyance." In this situation, it is argued, section 3 of the 1960 act does not apply to deprive the Department of the power to issue the quitclaim deed requested.

If the appellant's contention that the return of the papers is equivalent to a reconveyance were correct, then there would be no need for a quitclaim deed. It is, however, generally recognized that the return of a deed to a grantor does not revest him with title. *Mead* v. *Pinyard*, 154 U.S. 620 (1876); *Kuntz* v. *Partridge*, 65 N.W. 2d 681, 52 A.L.R. 2d 1 (N.D. 1954); *Houts* v. *Montes*, 204 Okla. 215, 228 P. 2d 651 (1951); *Valley State Bank* v. *Dean*, 97 Colo. 151, 47 P. 2d 924 (1935); 23 Am. Jur. 2d, Deeds § 310.

Under Article IV, Section 3, Clause 2 of the Constitution, Congress is granted the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ." In *Gibson* v. *Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1871), the Supreme Court stated:

> * * * That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. * * *

Whether the Act of 1960, *supra*, is a proper exercise of this power is not within the scope of our consideration.

We note, however, that our decision in this matter rests solely on our findings that the Act of 1960 withdraws, or otherwise negates, the authority of the Department to grant the relief requested. We reach this conclusion reluctantly in view of the issues implicit in this case. *Cf. Sol. Op.*, 53 I.D. 427 (1931).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

FREDERICK FISHMAN, *Member.*

WE CONCUR:

NEWTON FRISHBERG, *Chairman.*

FRANCIS E. MAYHUE, *Member.*

October 28, 1971

QUANTEX CORPORATION ET AL.

4 IBLA 31 *Decided October 28, 1971*

Oil and Gas Leases: Generally—Secretary of the Interior

The Secretary of the Interior, in the exercise of his discretionary authority respecting issuance of oil and gas leases, may require acceptance of special stipulations as a condition precedent to issuance of such a lease, where such stipulations are designed to protect the soil and surface resources and do not unreasonably interfere with the lessee's rights of enjoyment.

Environmental Policy Act of 1969—Oil and Gas Leases: Generally

It is proper to require one making an oil and gas lease offer to consent to stipulation deemed necessary to protect the land and surface resources from undue damage by exploratory operations, as a condition precedent to issuance of the lease, pursuant to the mandate of the Congress expressed in the National Environmental Policy Act of 1969.

Oil and Gas Leases: Consent of Agency

An applicant for a noncompetitive public land oil and gas lease of lands being administered by the Forest Service is properly required to file a written consent to stipulations requested by that agency as a condition precedent to issuance of the lease, or face rejection of his offer, where the stipulations are not unreasonable and will not seriously deter operations for development of the leased oil and gas deposits.

Oil and Gas Leases: Generally

An applicant for a noncompetitive oil and gas lease on lands included within the oil shale areas of Colorado, Utah and Wyoming, as defined in the Secretary's Order of June 1, 1971, is properly required to accept, in writing, the special stipulations required by that order or face rejection of his offer.

INTERIOR BOARD OF LAND APPEALS

Quantex Corporation, and others [1] have appealed individually from decisions in which the Utah land office, Bureau of Land Management, required each of them to agree to special stipulations as a condition precedent to issuance of noncompetitive oil and gas leases under sec. 17, Mineral Leasing Act of 1920, 30 U.S.C. sec. 226 (1970), in response to their respective lease offers. The stipulations would require the

[1] See Appendix for a listing of IBLA docket numbers, BLM serial numbers, appellants, and stipulations required for each offer.

lessee to notify, in writing, the district manager, Bureau of Land Management, or the forest supervisor, Forest Service, of any proposed operations on the leasehold within their respective areas of jurisdiction which might damage the surface resources, cause water pollution, scar the public lands or induce erosion. In addition, the lessee would be precluded from use or occupancy of the surface of lands included in proposed or actual recreational development areas, watershed areas, or within specified distances from certain roads and waters, as specifically described in the stipulation, although exploitation of the oil and gas resources underlying such lands may be accomplished by directional drilling from outside the restricted areas, and the lessee would be limited as to his use of lands within the "oil shale areas" established by Executive Order No. 5327 of April 15, 1930.

The appellants contend essentially that the required stipulations will create unnecessary restrictions against exploration for oil and gas under the federal leases.

We look first at the requirement that notice be given to the BLM district manager. The Secretary of the Interior has discretionary authority to issue oil and gas leases pursuant to the Mineral Leasing Act of 1920 under such rules and regulations as he deems necessary. 30 U.S.C. sec. 189 (1970). Furthermore, he is vested with plenary authority over administration of the public lands, including institution of measures designed to protect these lands and their resources. 43 U.S.C. sec. 1457 (1970). He exercises these general powers over the public lands as guardian of the people. *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 419 (1931). Moreover, he is obligated to support and implement the policy expressed by the Congress in the National Environmental Policy Act of 1969. 42 U.S.C. sec. 4331 (1970).

The responsibility in the Department of the Interior for management of public land resources, with direction to develop a program to provide for protection of the resources and for a quality environment, has been delegated to the Bureau of Land Management. The requirements set forth in the environmental protection stipulation are authorized by 43 CFR 3109.2–1 (1971). The requirement that notice be given to the district manager is neither an abuse of the Secretary's authority nor an impediment of any consequence to exploratory operations of the lessee as alleged by appellants. The stipulation is not unreasonable, nor unduly restrictive. Moreover, it comports with the

mandate of the Congress in the National Environmental Policy Act of 1969. Each appellant is properly required to consent to the stipulation requested by the district manager, BLM, as a condition precedent to issuance of an oil and gas lease on public lands or face rejection of his lease offer.

Now looking at the requirement that a notice be given to the national forest supervisor, we find that the Secretary of Agriculture has jurisdiction over public lands withdrawn for national forest purposes, and is under broad mandates from the Congress to promote conservation and best use of the national forest lands, including management of watersheds, regulation of streamflow and reduction of soil erosion. 16 U.S.C. sec. 472 (1970). Although the Secretary of the Interior has exclusive jurisdiction over oil and gas leasing of national forest lands, he may consider the recommendations of the Secretary of Agriculture prior to issuance of any such oil and gas lease. 43 CFR 3109.4–2 (1971).

The stipulation that notice be given to the national forest supervisor has been the subject of many appeals before this Department in the past. See, e.g., *Duncan Miller*, A–30722 (April 14, 1967); *J. D. Archer*, A–30750 (May 31, 1967). In every case arising from a request for this type of stipulation, the Department has held that it sees no serious problem insofar as operations of the lessee are concerned and that it has no reason to question the propriety of the stipulation. We adhere to the position that this Department will not issue an oil and gas lease under sec. 17 of the Mineral Leasing Act, *supra*, on national forest lands unless the stipulation, so long as we consider it to be not unreasonable, is agreed to by the offeror. 43 CFR 3109.4–2 (1971); *Duncan Miller*, A–29760 (September 18, 1963); *H. E. Shillander*, A–30279 (January 26, 1965). If appellant has serious questions about the meaning of the stipulation or wants it modified, he should seek to obtain modification or clarification from the Forest Service. *Duncan Miller*, A–30742 (December 2, 1966).

Similarly, the propriety of the stipulation whereby the lessee must agree not to occupy the surface of specified areas set apart for recreational development, watershed protection or for aesthetic values are beyond question by this Department, unless they so seriously deter operations as to prevent development of the oil and gas resources. Even

then, the importance of oil and gas development would have to be weighed against the importance of the environmental protective factors in order to determine whether a lease should be issued at all. While adherence to these stipulations, in the cases before us, may impede the lessee's proposed exploratory operation, the overriding importance to the public interest of the other land values, e.g., recreation, watershed protection, aesthetic beauty, outweigh the possible inconvenience to the lessee. The appellants where applicable are properly required, therefore, to consent to the stipulation relating to directional drilling as a condition precedent to issuance of an oil and gas lease on public lands withdrawn for national forest purposes or face rejection of the lease offer.

Finally we look at the "oil shale lands" stipulation. This stipulation is required pursuant to Secretary's Order of June 1, 1971, set forth at 615 Departmental Manual 2.1. This stipulation is mandatory and must be accepted as a condition precedent to issuance of any oil and gas lease in the "oil shale areas of Colorado, Utah and Wyoming," as they are defined in Executive Order No. 5327 *supra*. See *William S. Burness*, 1 IBLA 180 (December 24, 1970). Where applicable, the appellant must accept the required stipuation or face rejection of his lease offer.

None of the appellants has made any substantive showing in support of his objection to the required stipulations nor has adduced cogent arguments that the stipulations will, in fact, prevent the orderly development of the oil and gas resources in the lands involved.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decisions appealed from are affirmed. Each appellant is allowed 30 days from the date of this decision within which to submit executed copies of the required stipulations to the Utah land office, Bureau of Land Management, failing in which his offers herein discussed will be rejected without further notice.

NEWTON FRISHBERG, *Chairman.*

WE CONCUR:

EDWARD W. STUEBING, *Member.*

MARTIN RITVO, *Member.*

APPENDIX

Docket number	*Appellant*	*BLM serial*	*Stipulations**
IBLA 72–5	Quantex Corp	U–14493	BLM, DD
		14494	BLM
		14795	BLM
		14796	BLM, FS
		14797	FS
		14798	BLM
		15092	BLM, OS
		15093	BLM, OS
		15094	BLM, OS
		15095	BLM, OS
		15096	BLM, OS
		15097	BLM, OS
		15098	BLM, OS
		15099	BLM, OS
IBLA 72–6	Milan S. Papulak, Kay Papulak	14764	FS, DD
		14777	FS, DD
		14778	FS, DD
		14779	FS, DD
		14785	BLM, FS
		14786	FS
		14787	FS, DD
		14788	BLM
		14789	BLM
		14791	FS
		14800	BLM, FS, DD
IBLA 72–7	Geocon, Inc.,	14892	FS
	Cameo Minerals, Inc.	14893	FS, DD
		15100	FS, DD
IBLA 72–12	Malcolm F. Justice, Jr.	14695	FS, DD
IBLA 72–13	John Oakason	14965	FS, OS

See footnote at end of table.

Docket number	*Appellant*	*BLM serial*	*Stipulations**
IBLA 72-27	John Oakason,	U-13976	FS, OS
	Jean Oakason	15110	FS
		15111	FS
		15112	FS, DD, OS
		15113	FS, DD, OS
		15114	FS
		15132	FS, DD
		15133	FS, DD
		15134	FS
		15135	FS
		15136	FS, DD
		15137	FS
		15138	FS, DD
		15139	FS
		15140	FS, DD
		15141	FS, DD
		15145	BLM
		15146	FS, DD
IBLA 72-31	James A. Krumhansl	14696	BLM
		15115	FS
		15116	FS
		15117	BLM, DD
		15118	FS, DD, OS
		15127	FS, DD
IBLA 72-35	John Oakason	14849	BLM, FS
		15212	BLM
		15221	BLM
		15232	FS
		15236	FS, DD
		15237	FS, DD
		15238	FS, DD
		15239	FS, DD
		15260	FS
IBLA 72-36	Malcolm F. Justice, Jr.	14128	FS, DD
IBLA 72-38	E. E. House	15446	BLM, OS

See footnote at end of table.

Docket number	Appellant	BLM serial	Stipulations*
IBLA 72-47	Frances Kunkel	U-15311	BLM, OS
		15312	BLM, OS
		15313	BLM, OS
		15314	BLM, OS
		15315	BLM, OS
		15316	BLM, OS
		15317	BLM, OS
		15318	FS, DD
		15319	BLM
		15320	FS, DD
		15321	BLM
		15322	BLM
		15323	BLM
		15324	BLM
		15325	BLM
		15326	FS
IBLA 72-52	John Oakason	14591	FS, DD
		15261	FS, DD
		15447	BLM, OS
		15448	BLM, OS
		15480	BLM
		15481	BLM
		15482	BLM
		15508	BLM
		15509	BLM
		15510	BLM
		15537	BLM
		15554	BLM, DD
		15568	BLM, FS, DD
		15571	BLM
		15580	BLM, DD
		15581	BLM
IBLA 72-54	James A. Krumhansl	14592	FS
		14593	FS
		14594	FS

See footnote at end of table.

Docket number	*Appellant*	*BLM serial*	*Stipulations**
IBLA 72-58	R. H. C. Cotter, J. L. Felter.	U-15283	FS, DD
		15284	FS, DD
		15337	FS
IBLA 72-60	Jean Oakason	15327	BLM
		15328	BLM
		15330	BLM, OS
		15331	BLM, OS
		15332	BLM, OS
		15333	BLM, OS
		15477	BLM
IBLA 72-64	Crest Resources, Inc.	15584	BLM
IBLA 72-67	James A. Krumhansl	14555	FS, DD
IBLA 72-68	Frances Kunkel	15511	BLM, OS
		15513	BLM, OS
		15514	BLM
		15517	BLM
		15518	BLM, DD
		15520	BLM
		15521	BLM
		15523	BLM
		15524	BLM
		15525	BLM
		15563	BLM
IBLA 72-70	Bernard W. Cline	15573	BLM
		15574	BLM
IBLA 72-71	AA Minerals Corp.	14168	FS, OS
		14169	FS
		14170	FS, OS
		14171	FS, OS
		14172	FS
		14173	FS
IBLA 72-89	John Oakason	15983	BLM

*BLM: Notice to district manager.
FS: Notice to forest supervisor.
DD: Directional drilling requirement.
OS: Oil shale lands involved.

ESTATE OF SAMUEL PICKNOLL (PICKERNELL)

1 IBIA 168 *Decided November 1, 1971*

Indian Probate: Reopening: Waiver of Time Limitation

A petition to reopen filed more than three years after the entry of the order determining heirs and some ten years after the petitioner learned of his relationship to the decedent without explanation for the delay, will be denied for the reason that the petitioner has been dilatory in submitting his petition.

Indian Probate: Reopening: Waiver of Time Limitation

The Board of Indian Appeals will not exercise Secretarial discretion duly delegated to it to waive the three-year time limitation for reopening where there is no showing of fraud, accident or mistake so compelling in nature as to require reopening and the petitioner has not shown a capability of establishing his claim by a preponderance of the evidence even if the matter were reopened.

INTERIOR BOARD OF INDIAN APPEALS

This matter is before the Board upon the petition of Kenneth D. Pickernell for the reopening of the *Estate of Samuel Picknoll (Pickernell)*.[1] The petition for reopening was filed in the office of the Examiner of Inheritance, Portland, Oregon, on April 7, 1971.[2] Since more than three years had elapsed following the entry of the Order Determining Heirs, the Examiner of Inheritance properly forwarded the petition to the Board of Indian Appeals.

The petitioner was born on March 9, 1942, in Eureka, California, and he alleges that the decedent, Samuel Pickernell, was his father. In support of his petition, Mr. Pickernell attached a photocopy of a birth certificate naming Samuel Pickernell as his father and Hazel Charlot Bagley as his mother.

In his petition, which was filed nearly eight years after he reached 21 years of age, petitioner alleges that neither he nor anyone representing him was notified of the hearing which was held on April 18, 1951, at Hoquian, Washington, to determine the heirs of his alleged father; that at the time of the probate of his father's estate he was a minor and uneducated and would not have understood the purport of

[1] The final order closing the estate, viz., Order Determining Heirs, was entered on October 23, 1952.

[2] From the record before us it appears that at the time of the filing of his petition, the petitioner was incarcerated in the Washington State Penitentiary, Walla Walla, Washington. On June 10, 1971, a document entitled "Limited Power of Attorney" was received in the office of the Examiner of Inheritance in Portland, Oregon, together with a letter from one Robert J. Riddell. The letter explains that the petitioner might be moved to another location within the jurisdiction of the institution and that since he is unable to adequately understand the "legal aspects" of his case, he appointed Mr. Riddell as "next friend." We gather that Mr. Riddell is not a member of the bar.

452-132—72

the notice even had he received one; that during his lifetime, and until he reached the age of eighteen, he was not aware of his father's name; that shortly after his birth, his parents separated and his mother left California with one Melvin Peterson, taking him and part of the Pickernell family to Idaho; that he went by the name Peterson until he was eighteen years of age, at which time his mother told him that his real name was Pickernell so that he might register with Selective Service; that in his youth, he did not live with his mother at all times but spent periods of time with relatives.

The petitioner does not explain why he permitted eight years to pass before filing his petition for reopening. Nor is his petition supported by affidavits from persons who would be in a position to give testimony in his behalf should his reopening petition be granted.[3] Furthermore, he makes no allegations or showing that any previous efforts have been made to procure reopening.

At the 1951 hearing, petitioner's mother testified that seven children were born of her union with decedent, but the petitioner was not one of the seven she named. We quote *verbatim* pertinent portions of her testimony:

Q. Were you acquainted with the decedent?

A. I was his wife. We got married about 1930, according to state law, in South Bend. We started divorce proceedings but I don't know how it came out. We separated and then went back together again. We separated for good in 1939.

* * * * * * *

Q. Did he have children from you?

A. Yes.

Q. What are their names, living and dead, and did any of the dead ones have children?

A. Tessie Marie Pickernell, age 20, living, Nampa, Idaho, William Clarence Pickernell, age 19, living, Taholah, Wash., % Frank Pickernell, Taholah, Wash., Winifred Pickernell, age 16, living, Nampa, Idaho, Emma Jean Pickernell, age 15, living, Nampa, Idaho, Edward Alexander Pickernell, age 13, living, legally adopted by Daisy Wiley, 308 W. King St., Aberdeen, Washington, Nathan Pickernell, age 12, living, % Mrs. Mattie Howeattle, Taholah, Wash., Florence Violet (now Myrtle Lee Sigo), % Florence Sigo, Shelton, Wash., legally adopted about 1941, in Port Orchard. That is all.

The decedent's brother, Frank Pickernell, also testified at the 1951 hearing. His testimony corroborated that of petitioner's mother.

Since the petition for reopening was filed more than 3 years after the issuance of the examiner's Order Determining Heirs, and since the applicable regulation, 25 CFR 15.18, permits an examiner to reopen petitions filed within the three-year period "but not thereafter," we

[3] For example, in *Estate of Alvin Hudson*, IA–P–17 (May 29, 1969), reopening was allowed where the petition was promptly filed and supported by affidavits from petitioner's mother and first cousin.

must determine if this is a proper case for the exercise of Secretarial discretion to waive the three-year limitation and permit reopening.[4] The question as to whether a proper basis for reopening exists has arisen with particular frequency with respect to minors who were not given the opportunity to be heard during the original probate proceedings. *Estate of Betty May Black Garcia*, IA–P–3 (July 21, 1967); *Estate of Jesse Swan*, IA–1268 (April 28, 1966); *Estate of Alvin Hudson, supra; Estate of George Minkey*, 1 IBIA 1 (1970), aff'd on reconsideration, 1 IBIA 56 (1970).

Generally speaking, requests for reopening filed beyond the three-year period will be denied unless it appears that the original decision was procured by or resulted from fraud, mistake or accident. *Estate of Betty May Black Garcia, supra; Estate of George Squawlie (Squally)*, IA–1231 (April 5, 1966). Over the years the Department of the Interior has adopted a strict policy of refusing to entertain appeals not timely filed. *Estate of Ralyen or Rabyea Voorhees*, 1 IBIA 62 (1971). This same policy will be applied to petitions for reopening filed beyond the three-year limitation provided in the regulations, *Estate of George Minkey, supra*, and the power of the Secretary to waive and make exceptions to his regulations in Indian probate matters will be exercised only in cases where the most compelling reasons are present. *Estate of Charles Ellis*, IA–1242 (April 15, 1966); *Estate of George Minkey, supra*. Reopening will be permitted only where it appears that the petitioner has not been dilatory in seeking his remedy. *Estate of Alvin Hudson, supra; Estate of George Squawlie (Squally), supra; Estate of George Minkey, supra*.

In summary, then, as prerequisites to the exercise of Secretarial discretion to grant petitions for reopening filed beyond the three-year limitation, it must appear from the record, including the petition and any supporting affidavits or documentation, that:

(1) the petitioner has been diligent in asserting his claim;

(2) the original probate determination resulted from fraud, accident or mistake of such a compelling nature that a manifest injustice will occur unless reopening is granted; and

---

[4] The Department's regulations setting forth procedural rules for Indian probate proceedings, including hearings, reopenings, and appeals in such matters, were formerly codified in Subchapter C, Part 15, Title 25 of the Code of Federal Regulations. The regulations contained therein were the subject of recent modification and renumbering. Such amendments became effective as of April 15, 1971, the date of their publication in the Federal Register (36 F.R. 7185 *et seq.*), and will appear in Title 43, Code of Federal Regulations. However, since the petition herein was filed on April 7, 1971, it precedes the new regulations and will be governed by the old procedural rules contained in Subchapter C, Part 15, 25 CFR. Accordingly, the power of this Board to determine the matter is derived from discretionary power retained by the Secretary to waive or make exceptions to his regulations, 25 CFR § 1.2, as delegated to the Board of Indian Appeals in 211 DM 13.7; 35 F.R. 12081. See *Estate of Eliza Shield Him*, 1 IBIA 80 (1971).

(3) there exists the strong possibility that the petitioner, upon reopening, will be able to carry his burden of proof and establish his claim by a preponderance of the evidence.

In *Hudson*, *supra*, reopening was allowed where the petitioner alleged he did not learn of his relationship to the decedent until he was 24 years of age, at which time he promptly initiated proceedings to establish his claim. In *Squawlie*, *supra*, Secretarial discretion was exercised to permit reopening where, within fourteen months after expiration of the three-year period, petitioners sought to reopen on the basis of newly discovered evidence showing that they were related to the decedent. Such newly discovered evidence consisted of earlier probate determinations of the Department reflecting that the petitioners were related to the decedent in the sixth degree. As in *Hudson*, *supra*, a specific finding was made that there was no indication that petitioners were "dilatory or neglectful in their submission of their petition, or that they could have been more diligent in their pursuit of their rights."

By contrast, the petitioner here alleges that he first learned of his father's identity from his mother when he was 18 years of age, yet he fails to explain why he waited over ten years to seek reopening.

The public interest requires that Indian probate proceedings be concluded within some reasonable time in order that the property rights of legitimate heirs or devisees be stabilized. *Estate of Abel Gravelle*, IA–75 (April 11, 1952). To hold that the property rights of heirs in the allotted lands be forever open to challenges such as that made by the petitioner here would, in our opinion, not only constitute an abuse, but would seriously erode the property rights of those whose heirship in the lands has already been determined. See *Estate of Jesse Swan*, *supra*. The grounds for reopening must be truly compelling. On the record before us we are unable to find such grounds. There is no showing of fraud, accident, or mistake such as would warrant reopening. Petitioner alleges he was born on March 9, 1942, yet his mother testified that she and decedent "separated for good in 1939." Furthermore, not only has the petitioner failed to diligently prosecute his claim, but the record developed at the 1951 hearing constitutes strong and substantial evidence of the correctness of the original decision herein as well as the invalidity of petitioner's contentions. Thus, the person best qualified to resolve petitioner's paternity by virtue of having both a unique and exclusive knowledge thereof, his mother, has already testified adversely to him. In these circumstances, we are unable to find that a manifest injustice has occurred since it is unlikely that petitioner would prevail if reopening were permitted. The original probate determination will not be disturbed.

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7; 35 F.R. 12081, the Petition for Reopening filed herein on April 7, 1971, is denied, and the Order Determining Heirs entered herein on October 23, 1952, by D. H. Bruce, Examiner of Inheritance, is affirmed. This decision is final for the Department.

DAVID J. MCKEE, *Chairman.*

I CONCUR:

MICHAEL A. LASHER, *Alternate Board Member.*

ESTATE OF CHARLES DANIELS

1 IBIA 177 *Decided November 19, 1971*

Indian Probate: Escheat

After a final order of escheat has been entered in Indian probate proceedings, one petitioning for reconsideration thereof has the burden of proof to establish his claim by a preponderance of the evidence.

INTERIOR BOARD OF INDIAN APPEALS

This matter is before the Board for reconsideration of an order of escheat entered March 20, 1967, by the Associate Solicitor in the exercise of authority vested in the Secretary of the Interior which was delegated to the Solicitor by the Secretary.[1] The delegations of authority from the Secretary to the Solicitor, relating to the disposition of restricted or trust estates of Indians who have died intestate and without heirs, were superseded by the Secretary's delegation of authority to the Board of Indian Appeals. 35 F.R. 12081 (July 28, 1970).

FACTUAL AND PROCEDURAL BACKGROUND

The decedent, Charles Daniels, died intestate on December 27, 1941, at the age of 84 years (approximately). At the time of his death he was possessed of trust or restricted interests in five public domain allotments totaling some 560 acres located in the State of California. Several hearings were held during the years between 1946 and 1963, the result of which was the failure of all parties so claiming to establish any relationship to the decedent.

[1] 210 DM 2.2a(3)(c), 24 F.R. 1348 (February 21, 1959), redelegated to the Associate Solicitor by Solicitor's regulation 23, 31 F.R. 4631.

On March 20, 1967, an order of escheat was entered by the Associate Solicitor, Indian Affairs, finding, *inter alia*, that decedent's estate consisted of cash and trust or restricted allotments on the public domain exceeding $17,000 in value; that none of the tracts of land involved lie within or adjacent to an Indian community; and that the evidence adduced at the hearings failed to establish any heirs of decedent. It was ordered that the assets of decedent's estate escheat to the United States to become part of the public domain.[2] Thereafter, on January 13, 1969, the petitioners, Grace McKibbon and Dorothy Tardiff, petitioned the hearing examiner to vacate the order of escheat. On January 22, 1969, Hearing Examiner Alexander H. Wilson entered an order dismissing their petition for the reason that he no longer had probate jurisdiction of the matter. Petitioners appealed Examiner Wilson's order dismissing their petition by letter to the Regional Solicitor dated March 20, 1969. Following the creation of the Office of Hearings and Appeals in the Department of the Interior, and the Board of Indian Appeals thereunder, the Acting Regional Solicitor, transferred this matter to the Director, Office of Hearings and Appeals on July 6, 1970, pursuant to 111 DM 13.

The Board of Indian Appeals has jurisdiction to determine this matter under 35 F.R. 12081. On February 17, 1971, by Procedural Order and Delegation of Authority, the matter was referred to Examiner Wilson to take and receive testimony and other evidence tendered by the petitioners in support of their allegations.

On July 21, 1971, a special hearing was held at Weaverville, California, at which the testimony of the two petitioners and other witnesses was received. On August 20, 1971, Examiner Wilson issued Findings and Recommendations in which he held that petitioners had failed to satisfactorily establish their alleged relationship to the decedent, and recommended that the escheat order of March 20, 1967, be affirmed. On September 1, 1971, the petitioners filed objections to the Findings and Recommendations of the examiner.

---

[2] Since the lands involved here are on the public domain, and are not within or adjacent to an Indian community, under the controlling statute, 25 U.S.C. § 373b (1970), such lands become part of the public domain upon escheat and are not subject to the proviso of section 373b permitting such lands to be held in trust for such Indians as might be designated by the Secretary of the Interior or by Congress. In view of our subsequent holding herein as to burden of proof we note that trust or restricted estates which do not lie on the public domain, regardless of value will escheat to the tribe owning the land at the time of the allotment, or its successor. 25 U.S.C. § 373a (1970). If such tribe is no longer in existence, the land is held in trust for the benefit of such Indians as the Secretary may designate. Pursuant to the proviso to section 373b, lands on the public domain which are within or adjacent to an Indian community and exceed $2,000 in value are held in trust for such Indians as Congress may designate, and those valued less than $2,000 are held in trust for such "needy" Indians as may be designated by the Secretary. Thus, in most instances where there is a failure of heirs, the lands will either escheat to a tribe, or be held in trust for the benefit of designated Indians.

Petitioner Grace McKibbon claims to be related to Charles Daniels [3] through her father, Jim Nalton, the son of Ann Nalton,[4] who is alleged to be the sister of both Bob Tewis [5] and Pottis, the alleged father of Charles Daniels.

Dorothy Tardiff claims to be the "second cousin" of Grace McKibbon based on the allegation that her grandmother, Anne Nalton, was the sister of Jim Nalton (Grace McKibbon's father) and the daughter of Ann Nalton.[6] Technically speaking, if petitioners' theory is correct, McKibbon is related to the decedent as first cousin once removed in the fifth degree of relationship and Tardiff is related to the decedent as first cousin twice removed in the sixth degree of relationship.

We must initially discuss the presumptions, general law, and rules relating to burden of proof, which should govern this matter.

LEGAL PRINCIPLES INVOLVED

It is a well-settled general rule that escheats are not favored by the law. 27 Am. Jur. 2d, *Escheat*, § 11 (1966). There is also a presumption, at least in actions initiated by states under specific statutes authorizing escheat proceedings, that a person dying intestate has left heirs or next of kin who will succeed to his estate upon his death. 27 Am. Jur. 2d, *Escheat*, § 34 (1966). While the presumption is rebuttable, proof in rebuttal must be of a high degree, 30A C.J.S. *Escheat*, § 16 (1965).

Escheat proceedings in state courts are generally provided for and regulated by statutes which prescribe the manner and procedures therefor. 30A C.J.S. *Escheat*, § 8 (1965). The common-law procedure for enforcing an escheat has been generally superseded by statutory provisions which provide an exclusive method of procedure. Such statutes usually provide for the bringing of an information by the state, whereupon the court issues and causes to be published an order requiring all persons interested to appear and show cause why title should not vest in the state. 27 Am. Jur. 2d *Escheat*, § 29 (1966).[7] Consequently, it is not unusual that under such detailed statutes the bur-

[3] Sometimes referred to in the record as "Charley" Daniels.

[4] Sometimes spelled "A-n-n-e" in the record. For clarity herein, we will refer to the alleged sister of Bob Tewis and Pottis as "Ann" and to Ann's daughter as "Anne."

[5] The estate of Bob Tewis (who is sometimes referred to in the record as "Buckskin Bob") was the subject of Indian probate proceedings in 1923 and 1924. This file has a strong bearing on this case and is part of the record herein.

[6] Thus, the key element in the primary theory advanced the petitioners herein is that Charles Daniels' father was Pottis, and that Pottis had a brother, Bob Tewis, and a sister, Ann. Ann is the common ancestor through whom both petitioners claim. McKibbon claims that Ann was the mother of her father, Jim Nalton. Tardiff claims that Ann was her great-grandmother, i.e., the mother of Anne Nalton (Jim Nalton's sister) who was the mother of Sally George (Tardiff's mother).

[7] By contrast, in Indian probate cases neither the controlling statute involved, 25 U.S.C. § 373b (1970), nor the applicable regulations, 25 CFR, Part 15, provide procedures for escheat cases. Nor does the Departmental Manual so provide.

den of proof should rest on the state initiating the action. 27 Am. Jur. 2d *Escheat*, § 34 (1966).

We are concerned, however, with the feasibility of applying such rule to Indian probate proceedings where, as here, such proceedings follow the issuance of an order of escheat and the filing of petitions for reconsideration filed by persons claiming to be heirs. To our knowledge, only one case, *Estate of Jackson Searle*, IA–S–2 (December 9, 1968), has dealt with the subject of escheats in Indian probate proceedings in a substantial way. In his opinion therein, the Regional Solicitor in effect applied the rule applicable in state courts to our proceedings holding that:

> * * * Where the case concerns the possibility of escheat, the presumption is even stronger, and the courts hold that the burden of proof shifts to the state to prove the failure of heirs * * *.

In disagreeing with the holding in the Searle case, we are of the opinion that because of vast differences between Indian probate matters and escheat actions brought by states the burden of proof should not be on the government in our proceedings to establish that the decedent died without heirs. To begin with the Department is not a party in Indian probate proceedings.[8] Furthermore, the primary purpose of the hearings conducted by examiners employed by the Department is to ascertain the heirs of the decedents, 25 CFR 15.1, and to afford all interested parties the opportunity to establish their claims as either creditors or heirs. Experience has shown that these proceedings characteristically involve claimants whose ability to establish heirship have been blunted by time and the effects of their disadvantage. Consequently, the purpose and approach of the Department in carrying out the scheme of Congress has been, and is, to help them establish their claims, not to defeat such claims or to assert an adverse claim of title. As an example, we need only point to the numerous hearings held in the instant case over the last 30 years. While the relationship of the government to Indian claimants in these cases is not

[8] In our proceedings, the nature of the property over which the Department has jurisdiction is trust or restricted property of which the Secretary is the trustee for the benefit of individual Indians. Thus, the General Allotment Act of February 8, 1887 (24 Stat. 388, as amended by Act of February 28, 1891, 26 Stat. 794, as amended by Act of June 25, 1910, 36 Stat. 855), 25 U.S.C. § 331 (1970), *et seq.*, provides *inter alia*, for the allotment to individual Indians of specific tracts of land. Title to these lands is held by the United States in trust for the allottee, or his heirs, during the trust period or any extension thereof. Although the allottee and his heirs were given possessory rights to the land, their interest is not a fee simple. Rather, the land is held in trust by the United States for the allottee's benefit. 25 U.S.C. § 348 (1970). So long as the legal title to the land is held in trust, there are drastic restrictions on the alienability of these allotment interests. For example, it is only by securing the prior approval of the Secretary of the Interior that allottees can sell, mortgage, or give away their restricted allotments, or make a valid will disposing of same. *Tooahnippah (Goombi) v. Hickel*, 397 U.S. 598 (1970).

exactly that of guardian and ward, *Department of the Interior, Federal Indian Law (1958)*, page 557 *et seq.*, it is protective in the sense that the thrust of the proceeding is to ascertain heirs. Escheat orders are not the product of special proceedings. They result only where the Department has determined in ordinary probate proceedings that there are no heirs.

Because of the unique relationship existing between the federal government and Indians, the trust or restricted character of the lands normally involved in Indian probate proceedings, the nature of the proceedings, and the non-adversary role of the government therein, the difficult, if not sometimes impossible, burden of proving a negative fact, i.e., the nonexistence of heirs, should not fall upon the government.[9] We take the view that in Indian probate hearings, there being no statute or regulation to the contrary, the "preponderance of the evidence" rule applicable to administrative tribunals as well in judicial proceedings should operate. That is, one claiming to be an heir of the decedent must establish his claim by a simple preponderance of the evidence. 2 Am. Jur. 2d *Administrative Law*, §§ 392, 393 (1962).

Furthermore, since our proceedings are governed by the provisions of the Administrative Procedure Act, *Estate of Charles White*, Nez Perce Allotter No. 66, 70 I.D. 102 (1963); *Estate of Lucille Mathilda Callous Leg Ireland*, 1 IBIA 67; 78 I.D. 66 (1971); *Estate of William Cecil Robedeaux*, 1 IBIA 106; 78 I.D. 234 (1971), section 7(c) thereof is applicable here. It provides that "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof." This language has been construed to mean that the party initiating the proceeding has the general burden of establishing a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. 2 Davis, *Administrative Law Treatise*, § 14.14 (1958); *Department of Justice, Attorney General's Manual on the Administrative Procedure Act*, p. 75, footnote 3 (1947).

Accordingly, to the extent of its inconsistency with this decision, *Estate of Jackson Searle*, *supra*, will not be followed. Let us now examine the facts of this case in light of the above principles.[10]

---

[9] In a similar if not analogous situation, where a deceased veteran left no heirs and the assets of his estate consisted of unexpended Veteran's Administration pension payments, it has been held that the federal government had no burden of proving, as a condition precedent to its right thereto, that the decedent left no distributees. In re *Regan's Estate*, 185 N.Y.S. 2d 350, 18 Misc. 2d 463 (1959).

[10] The record herein consists not only of the transcript of hearing held on July 21, 1971, but also of transcripts of hearings previously held in 1950, 1951, 1952, 1956, 1961, and 1963, and the record of a related probate proceeding, *Estate of Bob Tewis* (Red-437), Probate No. S2056-24.

FACTUAL AND LEGAL ANALYSIS

The determinative issues herein are primarily factual, and turn largely upon the credibility of the testimony offered by the petitioner, Grace McKibbon.

At the hearing on July 21, 1971, McKibbon testified that she is a full-blood Wintun, born in 1900; that her parents were Sarah and Jim Nalton; that her grandparents on her father's side were George Nalton and Ann Nalton; that Ann Nalton was the sister of both Bob Tewis and Pottis; that Pottis had two sons, Charles Daniels and another son who died without issue prior to Charles Daniels; that Bob Tewis was therefore Charles Daniels' uncle, and her grandmother, Ann, was Charles Daniels' aunt; that her grandmother, Ann, had three children: Jim Nalton (her father), another son, Martin, and a daughter, Anne; that Anne married William George; that four children were born of this marriage one of which was a daughter, Sally George; that Sally George, had three children one of which was Dorothy Tardiff. McKibbon was unable to name the parents of Pottis, Bob Tewis, and Ann Nalton, thus leaving unresolved the question as to whether they were full-blood or half-blood brothers and sister.

McKibbon claims that her father told her that Pottis, Bob Tewis and Ann, were brothers and sisters but that he did not know the names of the parents of Pottis, Bob Tewis or Ann. She also testified that the decedent referred to her as "niece."

The significant portions of Dorothy Tardiff's brief testimony is that her mother's name was Sally George; that her mother married Thomas Burns; that her maternal grandfather and grandmother were Anne Nalton and Bill George; that she first met Charles Daniels when she was 12 or 13; that he referred to her as "cousin" and once told her, "I am your relative, cousin"; and that she has a sister, Ruth Morton, who is still living.[11]

The petitioners presented two witnesses at the July 21, 1971, hearing in support of their allegations, J. B. Thomas and Wilma Olsen. Thomas, an eighty year old non-Indian, testified that he had "heard," from a source he was unable to recall, that Charles Daniels was related to the Thomas Burns family, and that Bob Tewis, Charles Daniels and Jim Nalton were all related.[12]

Thomas also testified, however, that although he was acquainted with McKibbon, he had never heard that she was related to Charles

[11] Unlike McKibbon, Tardiff did not testify at the hearings previously held herein. McKibbon, on the other hand, gave testimony in 1951, 1956, 1961, and 1963.

[12] This is in direct contradiction to Thomas' testimony in 1950 that only Bob Tewis, Ellen Hosendolly and Walter Loomis were related to Charles Daniels. As noted by the hearing examiner, Loomis, at the 1963 hearing, disclaimed any relationship to the decedent.

Daniels or Jim Nalton. He emphasized that the only relative Charles Daniels ever mentioned to him was Bob Tewis.

Wilma Olsen, approximately 71 years of age, testified that she is acquainted with both McKibbon and Tardiff; that the first time Charles Daniels visited her home, he came with Jim Nalton and introduced him to her mother and her folks as his cousin. Although she also testified that it was "common knowledge" that Charles Daniels and Jim Nalton were related, she did not specify the degree, or nature (blood or marriage) of the relationship.

Barbara Ferris, an assistant realty officer at the Hoopa area field office, testified that Sally George (Dorothy Tardiff's mother) was present at a hearing held on October 15, 1924, in the Bob Tewis estate matter, and that Sally George did not claim any interest in the Tewis estate.[13]

The theory advanced by the two petitioners is based almost entirely on McKibbon's testimony. It does not bear up under scrutiny. To begin with, McKibbon's conclusions that she and Tardiff are related to the decedent through her grandmother, Ann, is not based on any firsthand personal knowledge. Only when pressed by the examiner did she furnish the explanation that her father told her that Pottis, Tewis, and Ann were brothers and sister. There is no corroboration of this vital point from other witnesses, or by photographs, family documents, court records, church records, or other Indian probate files. McKibbon's testimony boils down to little more than a naked assertion on her part that "this was the way it was." Yet, at the 1951 hearing, after McKibbon had testified that her father's mother was the sister of Tewis and decedent's father, this exchange occurred:

Q. Is it not true that the old Indians called their cousins their brothers and sisters?

A. Yes.

[13] This is confirmed by our review of the Tewis file. Sally George's testimony at the 1923 hearing therein is significant:

"Q. Do you know an Indian named Bob Tewis?

A. No, I did not know him.

Q. Did you ever hear of him?

A. I think I have, but I do not know him.

Q. *Was Bob Tewis related to you?*

A. *Not that I know of.*

Q. Are you a daughter of Ann(e) George?

A. Yes.

Q. When did Ann(e) George die?

A. About 10 years ago.

Q. Who was her father?

A. George Nalton. He is an old man, he is over hundred years old. He is feebleminded. He lives near Knob, Calif.

Q. *Who was the mother of Ann(e) George?*

A. *I do not know her. She died years ago.*" (Emphasis supplied.)

Four other witnesses testified at this hearing. Two testified Tewis had no sisters. Of the two remaining witnesses, Charles Daniels testified that Tewis had 3 sisters, Little Ellen, Big Ellen and Broomhead; Jim Tye testified Tewis had 2 sisters, Little Ellen and Big Ellen.

Q. Is it possible that Charles Daniels father and Buckskin Bob [Tewis] and Jim Nalton's mother were just cousins, instead of brothers and sisters?
A. I don't know. I couldn't tell you that.[14]

It is also remarkable that at the 1951 hearing, McKibbon could not name "Ann" as her father's mother. When specifically asked the question, she replied: "I don't know, but she was Mrs. George Nalton." "Ann" first cropped up in McKibbon's testimony at the 1961 hearing. The source of McKibbon's acquisition of this most crucial information remains a mystery.

Furthermore, the petitioners' claims are not borne out by the conduct of their antecedent relatives. They not only failed to assert any relationship to Bob Tewis in the Tewis probate proceedings, but also, according to Caroline E. Smith, the nurse who attended Charles Daniels for several months in 1933 and again at the time of his death, they never visited the decedent during his illnesses. Mrs. Smith further testified that she asked the decedent if he had any blood kindred and that he replied that he "didn't have any."

There is also evidence in the record that the decedent practiced the convention of addressing nonrelatives as "cousin." Thus, the fact that he so addressed the two petitioners is not of particular import.[15]

In evaluating the evidence and testimony presented by the two appellants, we have considered all the evidence previously introduced in these lengthy probate proceedings, and the numerous and conflicting theories of relationships propounded by other claimants therein. There is substantial evidence in the record from impartial witnesses that the decedent left no relatives. The Bob Tewis file, which the hearing examiner found to be "the best evidence available" in determining the relations of Charles Daniels, is of singular importance. It was determined therein that Tewis died during the month of January 1923, at the approximate age of 100 years, intestate, unmarried at time of death, without issue, father or mother, or brothers or sisters, leaving surviving as his only heir and next of kin his nephew, Charles Daniels, son of a prior deceased brother, "Puik-Dow-Hanny."[16] The entire Tewis estate passed to Charles Daniels under the laws of California. As noted heretofore, none of the petitioners' ancestors, through whom their relationship to both Tewis and Charles Daniels must be traced,

[14] At the 1971 hearing, McKibbon was most emphatic that the relationship was "brothers and sisters" and not "cousins." However, in 1950 she testified they were "half" brothers and sister.

[15] We have no reason to disagree with the sage comment of the hearing examiner on this point: "Anyone familiar with Indians, particularly the older ones, is well aware of the existing custom of them addressing each other as cousin, sister, brother, etc., when in fact no relationship actually exists."

[16] Presumably the same person as "Puik-dow-con-ne" and "Pu-yuk-dow-con-ne."

claimed to be heirs in the Tewis proceedings. Indeed, McKibbon admitted being present at the hearing herself but could not offer a satisfactory explanation why neither she nor her relatives made a claim.

We agree with John H. Anderson, the Examiner of Inheritance in the Bob Tewis matter, that if Bob Tewis was an uncle of Ann George, the mother of Sally George, Ann George must have been a daughter of a brother or sister of Bob Tewis, which, as Anderson stated "is not borne out by the testimony" taken by him. Anderson pointed out that Indians "usually refer to a cousin as a brother or sister, and that is probably the cause of the mixup in this particular case." [17]

We also agree with Examiner Wilson that the petitioners' testimony that Pottis was the father of Charles Daniels is not supported by the Tewis probate file. Of considerable importance in this connection is the enrollment application executed by Charles Daniels in 1930 in which he identifies his father as "Pu yuk-dow-con-ne," and his father's father as "Pot-us."

In view of the foregoing and the testimony of a significant number of disinterested witnesses that Charles Daniels had no relatives, we find that the petitioners have not satisfactorily substantiated their claim of relationship to the decedent.

Finally, we call attention to the fact that the Indian probate regulations contain no provision for further proceedings where the Secretary has determined that an Indian estate shall escheat. Since the inherent power of the Secretary to reopen and review final administrative determinations of the Department will be exercised only where some new factor, such as newly discovered evidence, fraud or mistake of a truly compelling nature is brought to his attention,[18] the question arises whether such a factor is present in this case. We conclude that there is not. The evidence presented by Grace McKibbon in the hearings on July 21, 1971 (which is relied on by both petitioners) is essentially the same as that previously presented by her in the 1951, 1956, 1961, and 1963 hearings which preceded the Order of Escheat. We find that no newly discovered evidence, or evidence of fraud, accident or other cause of a compelling nature has been presented such as would warrant the exercise of Secretarial discretion to reopen this proceeding. *Estate of Meshach (Mace) Tipton*, IA-41 (January 19, 1951).

Furthermore, with respect to Grace McKibbon, the bar of 25 CFR § 15.18 is clearly applicable. It limits reopenings to an individual who "had no actual notice of the original proceedings and who was not

[17] These statements are contained in a letter from Anderson to Violet E. Lehmann, Deputy County Clerk, Hyampom, California, dated March 11, 1924.

[18] *Estate of Samuel Picknoll (Pickernell)*, 1 IBIA 168, 78 I.D. 325 (1971).

on the reservation or otherwise in the vicinity at any time while the public notices of the hearing were posted * * *." *See Estate of Philomene (Jessie P.) Carpenter et al.*, IA–1444 (April 21, 1966).

CONCLUSION AND ORDER

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7; 35 F.R. 12081, the petition of Grace McKibbon and Dorothy Tardiff is denied and the Order of Escheat dated March 20, 1967, is affirmed. The Bureau of Indian Affairs is directed to take appropriate action forthwith to cause the transfer of the assets of the decedent's estate from its jurisdiction, the trust and restricted interests in the allotments described in said Order of Escheat to become part of the public domain under the administration of the Bureau of Land Management, Department of the Interior. This decision is final for the Department.

MICHAEL A. LASHER,
Alternate Board Member.

I CONCUR:

DAVID J. MCKEE, *Chairman.*

APPEAL OF WEST COAST DREDGING, INC.

IBCA–906–6–71 *Decided November 26, 1971*

Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Changed Conditions—Contracts: Construction and Operation: Third Persons—Contracts: Disputes and Remedies: Burden of Proof

A dredging contractor's claim based upon the non-availability of a spoil area and asserted under the Changes and Differing Site Conditions clauses is denied where the Board finds the contract does not indicate the specific terms upon which the spoil area will be made available and the contractor has failed to even allege with particularity the assurances purportedly received from representatives of both the Government and the private landowner prior to bidding with respect to the spoil area in question.

INTERIOR BOARD OF CONTRACT APPEALS

The contractor has timely appealed the denial of its claim in the amount of $42,575.76 under the Changes and Differing Site Conditions clauses.

Prepared on standard form for construction contracts including the General Provisions set forth in Standard Form 23A (June 1964 Edition), except as amended,[1] the contract was awarded to the contractor on September 18, 1970, in the estimated amount of $152,640 representing the lowest bid [2] received in response to the invitation. The contract called for the removal of sediment from the Delta-Mendota Canal Intake Channel, Central Valley Project, California, with reimbursement on a unit price or lump-sum basis for work performed. A preconstruction conference was held on October 1, 1970.[3] The notice to proceed was received by the Contractor on October 9, 1970. The contract work was completed within the time allowed as extended.

The gravamen of the complaint is that a spoil area [4] the contractor had contemplated using for the deposit of spoils taken from the Canal Intake Channel was not made available in accordance with the contractor's understanding of (i) the terms of the invitation [5] and (ii) the conversations held with representatives of both the Government [6] and

---

[1] Revised clauses are substituted for Clause No. 3, "Changes" and Clause No. 4, "Changed Conditions" of the 1964 Edition of Form 23A. (Appeal File, Exhibit No. 3.) Unless otherwise indicated, all references to exhibits are to those contained in the appeal file.

[2] The next low bid was submitted by Shellmaker, Inc., San Francisco, California, in the amount of $201,130. The Engineer's Estimate for the job was $150,560. See Government Statement of Facts and Supporting Brief; Exhibit No. 5, Government memorandum dated September 10, 1970.

[3] A memorandum of the conference written the same day states: "Mobilization is expected to be complete by October 8, 1970, and dredging operations are expected to begin as soon as spoil areas are developed. Arrangements with other property owners for spoil areas are still pending. If any arrangements are made, the contractor will furnish the Government with a copy of the agreement." Government Brief, note 2; *supra*; Exhibit No. 7.

[4] The initial claim letter of December 17, 1970 (Exhibit "A" to Exhibit No. 1), indicates that the claim encompasses the nonavailability of various spoil areas on private property. The costs claimed for by the letter dated January 19, 1971 (Exhibit "B" to Exhibit No. 1), are all tied to the nonavailability of spoil area No. 4, however, and this is the only spoil area referred to in the Notice of Appeal and in the Complaint.

[5] "When we received the specifications in the mails, the availability of these private holdings for spoiling was confirmed in Special Provisions, Section 31(b), Para. 1." Claim letter of December 17, 1970, note 4, *supra*.

[6] In the initial claim letter (note 4, *supra*), the contractor states:

"Persuant [sic] to Section 29 of the Special Provisions of the contract, we twice met with the [sic] surveyed the area of dredging and spoiling with personnel from the Bureau. Each time, we were verbally told that lands under private ownership would be available for spoiling. Each visit, we commented that this was quite important, since the areas to spoil, owned by the Bureau, were more difficult to develop and use, and, might prove insufficient. * * * Our bid proposal was based on the determination from both the verbal conversations and the written specs, that these lands were available for the contractor's spoils."

the owner [7] of the land on which spoil area No. 4—the spoils area in question—was located.

Neither party having requested an oral hearing, the case will be decided on the basis of the written record.

Central to the resolution of the dispute is the proper interpretation to be placed upon the following contract provision:

> 31. *General* * * *
>
> b. Spoil areas.—The spoil from station L–17+32 to station L–72+37 shall be deposited in spoil area Nos. 1, 2, and 3, or the contractor may, at his option, deposit the material in spoil area No. 4. Spoil area No. 4 is off Government right-of-way and arrangements must be made by the contractor with the landowner. *The landowner has been contacted and has indicated that he would like to have the spoil from the canal to raise the grade of his adjacent land* * * *.[8] (Italics added.)

After quoting the language italicized above, the notice of appeal states:

> The contractor, relying upon this language, discussed the matter with the landowner of spoil area No. 4 and was led to believe that the landowner had expressly agreed to use of spoil area No. 4 for this purpose.[9]

Although the claim letter [10] only refers to conversations with Bureau personnel antedating the submission of the contractor's bid, both the

---

[7] The Notice of Appeal refers to the last sentence quoted in note 6, *supra*, and then continues:

"By this, the contractor meant to convey the idea that actual contact had been made by the contractor with the landowner of spoil area No. 4 or a representative of the landowner of spoil area No. 4 before the bid had been made and the contractor had been informed and advised that the landowner of spoil area No. 4 had indicated he would like to have the spoil from the canal to raise the grade of his adjacent land, but at no time was there any indication prior to the bid by the landowner that the landowner intended to charge for the use of the spoil area or to make any claim for the use of spoil area No. 4."

[8] Exhibit No. 3, the contract, Sediment Removal.

[9] Notice of Appeal, p. 2. Immediately thereafter the contractor quotes the following from Paragraph 34 of the contract:

"If spoil area No. 4 is used, the contractor shall be responsible for and shall make the necessary arrangements with the landowner concerning the construction and maintenance of dikes for the spoil and for return of the tailwater to the Delta-Mendota Canal."

Concerning the above quote, the appellant states:

"This language, together with the attitude of the landowner, led the contractor to believe that all that remained to be done was to agree upon the manner in which the spoil area would be used by the contractor with the contractor submitting to the landowner a plan acceptable to the landowner for these purposes."

[10] Note 4, *supra*.

notice of appeal [11] and the complaint [12] refer to contacts or communications, or both, with the landowner concerned, or with his representative, prior to bid in an apparent effort to show that the appellant had made an adequate site inspection [13] within the meaning of Paragraph 29 [14] of the contract.

For its part the Government asserts (i) that the language of the contract relied upon by the appellant clearly makes the use of spoil area No. 4 subject to arrangements being made with the landowner concerned; [15] (ii) that the contract terms do not limit in any way the scope of the arrangements to be made; [16] that prior to the award of contract no Government representative advised the contractor as to the terms upon which spoil area No. 4 would be made available by the land owner concerned; [17] and that, according to their sworn statements neither the owner of the land on which spoil area No. 4 was located nor his son-in-law (who was farming the property at the

---

[11] Note 7, *supra.*

[12] "3. That on or before the date when the appellant, WEST COAST DREDGING, INC., did submit its bid, contact was made and communications were had with the owner of the land designated in said specifications as Spoil Area No. 4. As a result of this investigation and contact and communications, both oral and in writing, appellant, WEST COAST DREDGING, INC., believed, and on such information and belief, prepared its bid including as part of its estimated cost the use of Spoil Area No. 4."

[13] Addressing himself to this question in paragraph 4 of the findings, the contracting officer states:

"* * * Paragraph 29 of the specifications urges the bidders to visit the work site to acquaint themselves with existing conditions. Had this been done by the contractor prior to submitting his bid, he would have been aware of the arrangements necessary to provide for the use of spoil area No. 4. * * *" (Exhibit No. 1.)

[14] "29. *Investigation of Site.* Bidders are urged to visit the site of the work and by their own investigations satisfy themselves as to the existing conditions affecting the work to be done under these specifications. If the bidder chooses not to visit the site he will nevertheless be charged with knowledge of conditions which a reasonable inspection would have disclosed. Bidders and the contractor shall assume all responsibility for deductions and conclusions as to the difficulties in performing the work. * * *" (Exhibit No. 3, Local Conditions.)

[15] Government's Statement of Facts and Supporting Brief, p. 9.

[16] "One of the existing conditions at the work site was that spoil area No. 4 was privately owned. The contract required that arrangements be made with the landowner prior to the use of spoil area No. 4. The contract did not specify what arrangements must be made with the landowner only that arrangements *must* be made." (Government Brief, note 15, *supra*, p. 7.)

[17] Government Brief, note 15, *supra*, Exhibit No. 1.

time in question) had any conversations with the contractor prior to award of contract.[18]

In his sworn statement Mr. Alan D. Benefiel—Bureau engineer in charge of the field administration of the contract at the work site—acknowledges (i) that prior to the preparation of the specifications for the contract he conferred with Mr. Floyd Crites, president of the appellant corporation on one occasion and (ii) that during this conference he advised Mr. Crites that the Government intended to approach Mr. Furtado, the owner of the land on which spoil area No. 4 was located, with respect to the use of his land as a spoil area. Concerning other representations made to the contractor prior to award, Mr. Benefiel states:

> During this conversation I did not indicate to Mr. Crites the terms for the use of Mr. Furtado's land as I did not know whether Mr. Furtado would allow the use of his land as a spoil area or the terms of the use of the land. I further stated to Mr. Crites that as of that date I had not talked to Mr. Furtado about the use of his land and that the successful low bidder would have to make arrangements with him for the use of his land.[19]

Decision

In the Board's view the language relied upon by the appellant from Paragraphs 31b [20] and 34 [21] does not support the claim. Both paragraphs clearly inform prospective bidders that arrangements for the

---

[18] Affidavits from Manuel Furtado (the landowner) and Manuel Costa (the son-in-law) accompanied the Government's Brief, note 15, *supra*, as Exhibits Nos. 3 and 4, respectively. Mr. Furtado categorically states that prior to award of contract he did not talk to any contractor about the use of his land as a spoil area. Respecting his participation in talks of this nature, Mr. Costa states:

"* * * prior to the award of bid to West Coast Dredging, Inc., I talked to representatives from two different dredging companies regarding the use of part of our land as spoil area No. 4. I explained to the representatives that they could use the land if they would pay all expenses of their operation and in addition, to either agree to level the land after they had used it or to agree to pay for the leveling of the land after their use. To my knowledge these representatives were not from West Coast Dredging, Inc., and I didn't talk to a representative from West Coast Dredging, Inc., until after the award of the bid."

[19] Note 17, *supra*. Immediately thereafter and concluding his affidavit Mr. Benefiel states:

"That to the best of my knowledge, neither I nor anyone else from my office had a discussion with anyone from West Coast Dredging, Inc., regarding the use of spoil area No. 4 prior to the bid opening other than the above discussed conversation."

[20] See text accompanying note 8, *supra*.

[21] Note 9, *supra*.

use of spoil area No. 4 are to be made with the private landowner; nor do we regard as any way incompatible therewith [22] the provision of Paragraph 31b in which the bidders were advised that the landowner concerned had indicated that he would like to have the spoil from the canal to raise the grade of his adjacent land. The provision itself leaves open the question as to who must bear the expenses involved or the proportion, if any, in which they will be shared. The preceding sentence in the same subparagraph specifically states, however, that "arrangements must be made by the contractor with the landowner."

But the appellant has not been content to rest its case simply upon the construction to be placed upon the language of the aforementioned paragraphs. The question posed is rather whether the language employed therein supports the appellant's construction of the terms used when read in the light of conversations the appellant had with representatives of both the Government and the private landowner during the course of the appellant's site investigation. Even when so viewed, however, the appellant fails to make the required showing.[23] Although these conversations are apparently regarded as crucial to establishing the case for recovery, the appellant has failed to even allege with specificity what transpired. We note, for example, that nowhere in the record does the appellant undertake to say what the Government representative or the landowner concerned (or his agent) said in the conversations relied upon to establish Government liability. Instead, we are advised of the conclusions the appellant formed [24]

---

[22] We therefore have not considered the application of cases involving obvious inconsistencies in specifications. E.g., *J. A. Jones Construction Co.* v. *United States*, 184 Ct. Cl. 1, 13 (1968) ("* * * Where the discrepancy occurs in the specifications themselves, the discrepancy exists from the very start. It is the existence and type of the discrepancy, not necessarily the contractor's actual knowledge of it, that imposes a burden of inquiry on the contractor in the face of a provision like Article III. * * *"). We note, however, that General Provisions No. 2 of the contract contains language pertaining to the resolution of specification discrepancies virtually identical to Article III of the contract involved in the *Jones* case.

[23] Hence, we do not reach the question of the authority of a Government agent to modify the terms of an invitation by representations made prior to bid opening. See, however, *R & R Construction Company*, IBCA–413 and IBCA–458–9–64, 72 I.D. 385 (1965), 65–2 BCA par. 5109. For the same reason, there is no need to consider the application of the parol evidence rule to the facts presented. *Cf. Inter-Helo Inc.*, IBCA–713–5–68 (December 30, 1969), 69–2 BCA par. 8034, affirmed upon reconsideration, 70–1 BCA par. 8264.

[24] See notes 6, 7, and 12, *supra*.

from the alleged conversations. The evidence marshalled by the Government indicates, however, (i) that the alleged conversations with the private landowner (or his agent),[25] never took place[26] and (ii) that no Government representative gave the appellant any assurances as to the terms upon which spoil area No. 4 would be made available to the contractor receiving the award.[27]

In an apparent effort to bridge the gaps in the evidence, the appellant asserts that it has additional evidence to substantiate its position.[28] If this is indeed the case, it is surprising that no such evidence was submitted in response to the Board's settling of the record notice.[29] In any event, it is clearly incumbent upon the parties to present to the Board whatever evidence they have relevant to the issues in dispute if they wish such evidence to be considered by the Board[30] in reaching its decision.

Based upon the record before us we conclude that the appellant has failed to show that it is entitled to relief under the terms of the contract. It has not shown that the conditions encountered in performing the work called for by the contract differed materially from the con-

---

[25] The notice of appeal says that prior to bidding the contractor contacted the landowner or a representative of the landowner. See note 7, *supra*.

[26] Compare the appellant's version of the conversations with the private landowner or his agent, prior to submission of the appellant's bid (notes 7 and 12, *supra*), with sworn statements obtained from the landowner and his son-in-law (note 18, *supra*).

[27] See note 19, *supra*, and accompanying text.

[28] See paragraph 14 of the complaint in which the appellant states:

"Appellant was ready, willing, and able, and is ready, willing, and able, to submit additional records, documents, information, schedules, and testimony to support the claim of the appellant and for the purposes of making proof of additional claims as a result of lost time amounting to Forty-two Thousand, Five Hundred Seventy-five Dollars and Seventy-six Cents ($42,575.76). * * *" See also note 12, *supra*.

[29] In our letter of August 5, 1971, counsel for the parties were advised that the record could be supplemented by additional documents or exhibits submitted to the Board prior to September 6, 1971, and that the same would be added to the record if determined to be relevant and material.

[30] *South Portland Engineering Company*, IBCA–771–4–69 (January 29, 1970), 70–1 BCA par. 8092.

ditions indicated in the contract when reasonably construed; [31] nor in the circumstances of this case do we need to give separate [32] consideration to the fact that the claim is also asserted under the Changes clause.

The most that can be said for the appellant's position is that conceivably it submitted its bid in the mistaken belief that spoil area No. 4 would be available to it without incurring any expenses other than those involved in hauling the sediment removed from the intake channel to that area and dumping it. If so, any relief available must be sought in another forum.[33] Since we have found no liability to exist on the part of the Government with respect to the claim asserted, we have not reached the question of the appellant's obligation to mitigate damages.[34]

Conclusion

The appeal is denied.

WILLIAM F. MCGRAW, *Chairman.*

I CONCUR:

SHERMAN P. KIMBALL, *Member.*

---

[31] The claim would not appear to be covered by the Differing Site Conditions clause in any event. See *John McShain, Inc.* v. *United States*, 179 Ct. Cl. 632 (1967), where, in denying the changed conditions claim there asserted the Court invoked the rule that to fall within the purview of the Changed Conditions clause the condition must exist at the time the contract was entered into and not be one occurring thereafter. See also *James H. Clack* v. *United States*, 184 Ct. Cl. 40, 46–47 (1968) ("* * * the 'Changed Conditions' provision of the contract was intended to authorize an adjustment of the contract price only with respect to physical conditions that were unknown to, and could not reasonably be anticipated by, the parties at the time they entered into the contract. * * *").

[32] In this case, as in *Pacific Alaska Contractors, Inc.* v. *United States*, 193 Ct. Cl. 850 (1971), the claim under the Changes Clause is inseparable from and grounded upon the claim of changed condition.

In *Pacific Alaska Contractors, Inc.* v. *United States, supra,* the Court stated at pages 866–67:

"* * * All the contractor's arguments, under the Changes as well as the Changed Conditions clauses, rest upon the basic assertion that subsurface conditions actually encountered differed from those indicated in the contract documents and anticipated by the plaintiff. Since we have determined that there were no such changed conditions, there is no independent claim under the Changes article left to consider." (Citation omitted.)

[33] See *Orndorff Construction Company, Inc.*, IBCA–372, 74 I.D. 305, 357 (1967), 67–2 BCA par. 6665, at 30,927. To the extent the claim is predicated upon a breach by the private landowner of a prebid commitment to the appellant involving the use of spoil area No. 4, we are without jurisdiction in the matter. *Bateson-Cheves Construction Co.*, IBCA–670–9–67 (August 12, 1968), 68–2 BCA par. 7167, at 33,260, footnote 21, affirmed upon reconsideration, 68–2 BCA par. 7289 (October 8, 1968).

[34] See Government's Brief, note 15, *supra*, p. 11.

ESTATE OF ANDY WILLIAMS

1 IBIA 195 *Decided November 30, 1971*

Indian Probate: Reopening: Waiver of Time Limitation

A petition to reopen filed more than thirty years after entry of the order determining heirs and at least seven years after the petitioner acquired the belief that she was related to the decedent without explanation for the delay will be denied for the reason that the petitioner has been dilatory in submitting her petition.

INTERIOR BOARD OF INDIAN APPEALS

This matter is before the Board upon the petition of Messie Mix for the reopening of the Estate of Andy Williams, Probate No. 42945–40.[1] The Petition for Reopening [2] was originally filed with the Sacramento Area Office, Bureau of Indian Affairs, and was forwarded to the Hearing Examiner, Alexander H. Wilson, with the recommendation that the Estate of Andy Williams be reopened. In forwarding the petition to this Board, the Hearing Examiner has included transcripts of testimony taken in the related cases of Ella Short Pada,[3] Probate No. 49694–38, Conom Pada, aka Connan Pedee,[4] Probate No. F–110–64, *circa* 1964, and Stella Anita Williams,[5] Probate No. F–23–71, *circa* 1970. Since more than three years has elapsed following the entry of the Order Determining Heirs, the Examiner's jurisdiction was exhausted and he properly forwarded the petition to this Board for its determination whether the discretion retained by the Secretary to waive regulations should be exercised herein.[6]

---

[1] The final order closing this estate, viz., Order Determining Heirs, was entered July 29, 1940.

[2] The petition itself is an undated, one-paragraph document, notarized on July 12, 1971, stating: "I, Messie Mix, petition the estate of Andy Williams, Probate No. 42945–40 be reopened on the basis I did not inherit in the estate as a surviving daughter nor did I receive a notice of the estate hearing to enable me to attend such a hearing and offer my testimony about my father and mother."

[3] The petitioner's mother.

[4] The second husband of petitioner's mother, Ella Short Pada. The Summary of Report on Heirs in the Ella Short Pada probate file shows Conom Pada to be the petitioner's father.

[5] A daughter of the decedent, Andy Williams, by his second wife, Mamie Jim Stonecoal Williams.

[6] Pursuant to 25 CFR 1.2 "the Secretary retains the power to waive or make exceptions to his regulations * * * in all cases where permitted by law and * * * such waiver or

The decedent having died intestate, his estate was distributed under the California law of descent and distribution in equal shares to three children, Evelyn Williams O'Neill, Theodore John Williams, and Stella Anita Williams. The estate originally consisted of four allotments in California having a total appraised value of $2,371.67. Three of the allotments have since been disposed of and the only remaining asset of the estate is the fourth allotment which is presently valued at $2,200.

The factual question raised by the petitioner is whether the decedent, Andy Williams, or Conom Pada, was the petitioner's father. No point would be served by a lengthy recital of the evidence contained in the various probate files which constitute the record in this proceeding. Suffice it to say that at the hearing held herein in 1940, substantial evidence was introduced to the effect that Andy Williams had six children; that he left only the three above-named children living at the time of his death and that the other three children died in infancy. The petitioner, Messie Pada, has testified on both sides of the question relating to her paternity. Thus, at the hearing in her mother's estate in 1938 the petitioner, who was 22 years old at the time, testified that her father was Conom Pada,[7] and that her mother had no children by Andy Williams. However, at an Indian probate hearing in 1964 in the Estate of Conom Pada, the petitioner testified that her father was Andy Williams. She has not indicated, why she changed her testimony or from what source the most recent theory of her paternity stemmed, if there was such a source. We can only conclude that this is a change of mind on her part not produced by "newly discovered" evidence.

We held in *Estate of Samuel Picknoll (Pickernell)*, 1 IBIA 168, 78 I.D. 325 (1971), that as prerequisites to the exercise of Secretarial discretion to grant petitions for reopening filed beyond the three-year limitation, it must appear from the record, including the petition and its supporting affidavits or other documentation, that: (1) the petitioner has been diligent in asserting his claim; (2) the original probate determination resulted from fraud, accident, or mistake of such a com-

---

exception is in the best interest of the Indians." *See, Estate of George Minkey*, 1 IBIA 1 (1970), aff'd on reconsideration, 1 IBIA 56 (1970) and *Estate of Eliza Shield Him*, 1 IBIA 80 (1971). The three-year limitation itself appears in 43 CFR § 4.242(a), 36 F.R. 7197 (April 15, 1971).

[7] Veline Pada, a daughter of Conom Pada and Ella Short Pada whose parentage is not in doubt, also testified therein that petitioner's father was Conom Pada.

pelling nature that a manifest injustice will occur unless reopening is granted; and (3) there exists a strong possibility that the petitioner, upon reopening will be able to carry his burden of proof and establish his claim by a preponderance of the evidence.

We doubt that petitioner would be able to sustain her burden of proof if the matter were reopened. The original determination in the Andy Williams' probate matter in 1940 was supported by substantial evidence in the record at that time. The record as it now stands also contains substantial support for the original decision. The petitioner has made no allegation of or showing of fraud, accident, or mistake. Nor is the petition itself supported by affidavits or documentation which indicate that a manifest injustice has occurred or which demonstrate a likelihood that she would prevail if this case were reopened.[8]

Finally, it appears that the petitioner has been dilatory in pursuing her claim. There is no explanation why she permitted more than 30 years to pass before filing her petition. Even after testifying at the 1964 hearing that she was the daughter of the decedent, she waited an additional seven years before seeking reopening. In such circumstances, the original probate determination will not be disturbed. *Estate of Samuel Picknoll (Pickernell), supra; Estate of Abel Gravelle*, IA–75 (April 11, 1952).

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7; 35 F.R. 12081, the petition of Messie Mix for reopening is denied and the Order Determining Heirs entered herein on July 29, 1940, by Oscar L. Chapman, Assistant Secretary, is affirmed. This decision is final for the Department.

MICHAEL A. LASHER, *Alternate Member.*

I CONCUR:

DAVID J. MCKEE, *Chairman.*

---

[8] The petition is not supported by affidavits from persons who would be in a position to give testimony of probative value on petitioner's behalf or by birth certificates, letters, church records, or similar memorabilia. The file does contain a letter from Mrs. Frances Pada Martinez, whose relationship to the petitioner is not shown. Mrs. Martinez alleges that her (Mrs. Martinez') mother and the decedent were both present when the petitioner was born at Alturas, California, on June 2, 1916, and that her mother told her that the petitioner was one year and four months when Ella Short married Conom Pada. Mrs. Martinez also states that the petitioner's birth certificate shows her name to be "Missie (sic) William Pada."

THE EIGHTEEN-YEAR-OLD VOTE AMENDMENT AS APPLIED TO INDIAN TRIBES*

Indian Tribes: Sovereign Powers—Indians: Civil Rights—Indian Reorganization Act—United States—Voting

The Twenty-Sixth Amendment to the Constitution, providing, *inter alia*, that "the United States" shall not deny or abridge the right of eighteen-year-olds to vote, applies to Indian tribes' elections called by the Secretary pursuant to the Indian Reorganization Act or other act, but, because of the fundamental right of a tribe to govern itself, the amendment does not apply to Indian tribes in purely tribal elections.

M-36840 *November 9, 1971*

To: COMMISSIONER OF INDIAN AFFAIRS.

SUBJECT: THE EIGHTEEN-YEAR-OLD VOTE AMENDMENT AS APPLIED TO INDIAN TRIBES.

By memorandum of August 16, 1971, you requested an opinion as to the applicability of the Twenty-Sixth Amendment to the United States Constitution to Indian tribes. A response requires consideration of: (1) the tribes' fundamental right to govern themselves; and (2) criteria for determining actions of "the United States" under the amendment.

The Twenty-Sixth Amendment reads:

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

I

Two important aspects of tribal sovereignty are: (1) the power of a tribe to govern itself;[1] and (2) the inapplicability to Indian tribes of the United States Constitution and general acts of Congress, unless Congress manifests an intent to include them.[2] *First:* A tribe's power

*Not in Chronological Order.

[1] *See, e.g., Colliflower* v. *Garland*, 342 F.2d 369 (9th Cir. 1965); *Native American Church of North America* v. *Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959); *Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); Solicitor's Opinion, 55 I.D. 14, 30–32 (1934).

[2] *Elk* v. *Wilkins*, 112 U.S. 94, 100 (1884); *McCandless* v. *United States ex rel. Diabo*, 25 F.2d 71 (3d Cir. 1928), *aff'g sub nom. United States ex rel. Diabo* v. *McCandless*, 18 F.2d 282 (E.D. Pa. 1927); *United States* v. *5,677.94 Acres of Land*, 162 F. Supp. 108, 110–111 (D. Mont. 1958); *Seneca Nation of Indians* v. *Brucker*, 162 F. Supp. 580, 581–582 (D.D.C. 1958), *aff'd*, 262 F.2d 27 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 909 (1959); and *Nicodemus* v. *Washington Water Power Co.*, 264 F.2d 614, 617 (9th Cir. 1959). *But see F.P.C.* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960).

to govern itself must include "* * * the right to define the powers and duties of its officials, the manner of their appointment or election * * *." Solicitor's Opinion, 55 I.D. 14, 30 (1934). *Second:* On its face, the Twenty-Sixth Amendment does not purport to limit the power of Indian tribes to determine for tribal elections [3] the age qualifications of voters, and there is nothing in the legislative history of the amendment that would indicate that Congress intended that the amendment should apply to tribal elections.[4]

In other words, even if a tribe's constitution includes a clause such as the following, for example, from that of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, that the tribes:

> * * * secure to ourselves and our posterity the power to exercise certain rights of self-government not inconsistent with Federal, State, and local laws, * * *

it is clear that the Twenty-Sixth Amendment was not intended to constitute, and does not constitute, such an "inconsistent" law; the Twenty-Sixth Amendment is not inconsistent because it was not intended to speak, and does not speak, to the basic right of tribal self-government possessed by all recognized tribes.

II

Actions of "the United States" under the amendment would include not only acts of Congress, but also judicial action and administrative action. *See, e.g.*, for definitions of "state action" under the Fourteenth Amendment, *Shelley* v. *Kraemer*, 334 U.S. 1, 14 *et seq.* (1948), and cases therein cited; *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 343 (1938); *Virginia* v. *Rives*, 100 U.S. 313, 318 (1880).

The provisions in the Indian Reorganization Act that limit the right

---

[3] Tribal elections refer to those that are authorized under tribal constitutions or other organic documents. For tribes organized under the Indian Reorganization Act, June 18, 1934 (48 Stat. 984, 25 U.S.C. §§ 461 *et seq.*) or other act, this would include elections of officials and referenda concerned with domestic and internal business, but not referenda adopting or amending a constitution. For tribes organized traditionally (those not organized under the Indian Reorganization Act or other act) this would include all elections of officials and all referenda, concerning not only domestic and internal business, but also the adoption of tribal constitutions and amendments thereto.

[4] *See, for an analogous example, Groundhog* v. *Keeler*, 442 F.2d 674 (10th Cir. 1971), in which the court observes that the Indian Civil Rights Act, April 11, 1968, 82 Stat. 77, 25 U.S.C. §§ 1301, 1302, "* * * is much narrower than the language of the Fourteenth Amendment, and it omits entirely the suffrage provisions of the Fifteenth Amendment." The court thus assumes, as we do, that an amendment restricting only "the United States" does not, without more (such as a congressional act), restrict also tribal rights of self-government.

November 9, 1971

to vote in Secretarial elections [5] to those persons 21 years of age or older constitute acts of "the United States" which "den[y] or abridg[e]" the right to vote of those Indians between 18 and 21. Such provisions, and any others that would operate with similar effect, are therefore unconstitutional as applied in such elections to otherwise qualified Indians of at least 18 years of age. The right to vote should therefore be extended to 18-year-olds in elections called to adopt new Indian Reorganization Act constitutions or amendments to existing constitutions, even though that particular existing constitution may impose a 21-year-old voting requirement, and to all other Secretarial elections.

In other words, the Twenty-Sixth Amendment is self-executing,[6] which means that all laws and regulations contrary to it are changed without other action on the part of the Congress or federal agencies. Thus, for example, the definition of adult Indian in 25 CFR § 52.1(e) must be read: "Adult Indian means any Indian who has attained the age of 18 years." And 25 U.S.C. sec. 479 is, in effect, changed to read:

> * * * "The words adult Indians" wherever used in said sections shall be construed to refer to Indians who have attained the age of twenty-one years, except that in reference to voting in Secretarial elections, it shall be construed to refer to Indians who have attained the age of eighteen years.

Regarding Secretarial elections concerned with issuing charters of incorporation, 25 U.S.C. sec. 477 provides:

> The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of adult Indians living on the reservation.

May 18-year-olds sign such petitions, and thus be counted among the "adult Indians" for the purpose of this statute? We think that the petition is a sufficiently integral part of the Secretarial election process that the 18-year-old vote requirement of the Twenty-Sixth Amendment must apply. *See, e.g., Smith* v. *Allwright, supra.*

MITCHELL MELICH,
Solicitor.

---

[5] Secretarial elections refer to those that are authorized pursuant to statute and conducted by the Secretary under his regulations. The primary examples are those authorized by the Indian Reorganization Act, which provides that any Indian tribe residing on a reservation may adopt or amend its constitution and bylaws, which shall become effective when ratified by a majority vote of adult members of the tribe (25 U.S.C. § 476). Adult members are defined as those who have attained the age of twenty-one years (25 U.S.C. § 479). Secretarial elections would thus also include elections such as Osage elections, pursuant to the Act of June 28, 1906, 34 Stat. 539, as amended, and 25 CFR Part 73.

[6] *United States* v. *Amsden*, 6 F. 819, 822 (D. Ind. 1881) (regarding the self-executing nature of the Fifteenth Amendment).

MINING IN NATIONAL PARK SERVICE AREAS*

Mining Claims: Lands Subject to—Mining Claims: Withdrawn Land—National Park Service Areas: Generally—National Park Service Areas: Land: Use

Areas of the National Park System are withdrawn from location, entry and patent under the Mining Laws of the United States unless the language creating the area specifically makes lands within the area subject to the mining laws.

M–36838 *November 16, 1971*

To: Field Solicitor, San Francisco, California.

Subject: Withdrawal of National Park Areas from Mineral Location by Code of Federal Regulations.

In your memorandum of September 2, 1971, you requested our comments on whether National Park Service areas were withdrawn from mineral entry and location by 36 C.F.R. sec. 5.14 and 43 C.F.R. sec. 3811.2–2. Specifically, you are concerned that Federal lands within the Lake Mead and Bighorn Canyon National Recreation Areas might be subject to mineral location under the general mining law of 1872, R.S. 2319, as amended, 30 U.S.C. sec. 22 (1970). The issue is further complicated because legislation creating some National Park Service areas [e.g., Whiskeytown, 79 Stat. 1295, 16 U.S.C. sec. 460q (1970)] explicitly bars mining locations, while the legislation creating Lake Mead and Bighorn Canyon makes no mention of the matter in the establishment acts.

The opinion of the Field Solicitor, Billings, Montana, June 22, 1967, concludes that 36 C.F.R. sec. 5.14 (1971), has the effect of prohibiting mining activities within the Bighorn Canyon National Recreation Area. While we agree that the Secretary has authority to withdraw public lands from entry under the mining laws, there is some question whether the term "park areas" in 36 C.F.R. sec. 5.14 includes the recently created recreation areas. Furthermore, we have doubts over whether an area of the public domain may be withdrawn from the application of the mining laws by Departmental regulations of a general application as distinguished from a public land order describing the specific lands withdrawn or act of Congress. Executive Order No. 10355, dated May 26, 1952 (17 F.R. 483) provides:

Section 1. (a) Subject to the provisions of subsections (b), (c), and (d) of this section, I hereby delegate to the Secretary of the Interior the authority

*Not in Chronological Order.

vested in the President by section 1 of the act of June 25, 1910, ch. 421, 36 Stat. 847 (43 U.S.C. 141), *and the authority otherwise vested in him to withdraw or reserve lands of the public domain* and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made.

(b) All orders issued by the Secretary of the Interior under the authority of this order *shall be designated as public land orders* and shall be submitted to the Division of the Federal Register, General Services Administration, for filing and for publication in the Federal Register. (Italics added.)

Under the provision of section 1(b) of the Executive Order it would appear that the withdrawal of an area from the mining laws by executive action requires a public land order identifying the lands to which it applies, rather than a general regulation. However, it is not necessary to belabor this point in that we are of the opinion that authority exists for the premise that Federal lands within these two recreation areas are not open to entry and location under the mining laws.

By far the largest portion of land within the National Park System consists of areas withdrawn from the public domain. In most cases when a National Park Service area is created, the withdrawal language is contained in the individual act of Congress creating the area or the proclamation establishing a national monument under the Antiquities Act of June 8, 1906, 34 Stat. 225, 16 U.S.C. sec. 431 (1970). An example of the withdrawal language is found in the act creating the Whiskeytown-Shasta-Trinity National Recreation area which provides that the public lands within the described boundaries "are hereby withdrawn from location, entry and patent under the United States mining laws." *See* section 6 of the Act of November 8, 1965, 79 Stat. 1298, 16 U.S.C. 460q–5 (1970).

The fact, however, that some statutes establishing areas of the National Park System do not contain such language should not be read to infer a Congressional intent that the area is open to mineral entry. In our judgment, just the opposite intent should be inferred. An examination of the various statutes on this subject reveals that, whenever Congress has desired to make lands within an area of the National Park System open to mineral entry, the establishing act specifically so states. *See:* Mount Rainier, Act of May 27, 1908, 35 Stat. 365, 16 U.S.C. 94 (1964), superseding the Act of 1899; Crater Lake, section 4 of the Act of August 21, 1916, 39 Stat. 522, 16 U.S.C. 127 (1964), superseding the Act of 1902; Olympic, section 2 of the Act of June 29, 1938, 52 Stat. 1242, 16 U.S.C. 252 (1964); and Mount McKinley, section 4 of the Act of February 26, 1917, 39 Stat. 938, 16 U.S.C. 350 (1964). In addition, mining in four national monuments has been allowed only

through specific acts of Congress—Glacier Bay, Act of June 22, 1936, 49 Stat. 1817; Coronado, Act of August 18, 1941, 55 Stat. 631, 16 U.S.C. 450y (1970); Death Valley, Act of June 13, 1933, 48 Stat. 139, 16 U.S.C. 447 (1970), and Organ Pipe Cactus, Act of October 27, 1941, 55 Stat. 745, 16 U.S.C. 450z (1970). These acts indicate that when Congress intends mining to be allowed in National Park System areas, the legislation will specifically so authorize. The legislation establishing Bighorn Canyon and Lake Mead does not open these areas to mineral entry and location.

Secondly, it can be inferred that when an area is reserved for public use as a National Park System area, it has been withdrawn from entry under the mining laws. A clear example of this can be seen in the act creating the Lake Mead Recreation Area. The creating act, 16 U.S.C. 460n (1964), makes no mention that the land is withdrawn from entry under the mining laws, yet the legislative history and the Departmental report make it eminently clear that the area was created to afford protection after the termination of the reclamation withdrawal and that mining would not be authorized. *2 U.S. Code, Cong. and Adm. News*, 88th Cong. pp. 3918–3923 (1964).

Consistent with this interpretation Public Land Order 5048, 36 F.R. 8149, which revoked prior reclamation withdrawals for the area, provided that the area shall "remain closed to location, settlement, and entry under the public land laws, including the mining laws * * *."

With respect to the Bighorn Canyon National Recreation Area, that act also indicates a congressional intent that this area be closed to entry and location under the mining laws. Specifically, section 3(a), Act of October 15, 1966, 80 Stat. 914, 16 U.S.C. 460t–2 (1970), provides:

> The Secretary shall coordinate administration of the recreation area * * * (3) for management, utilization, and disposal of *renewable natural resources* in a manner that promotes, or is compatible with, and does not significantly impair, public recreation and conservation of scenic, scientific, historic, or other values contributing to public enjoyment. (Emphasis added.)

Because this section provides the basic congressional directive by which the Secretary shall administer this area, and the location of mineral entries would jeopardize, if not preclude, management of the renewable resources (i.e., timber, grass and other renewable resources would be depleted by mining activities), an intent may be inferred from this section that Congress closed the recreation area to mineral entry and location. In addition, the fact that the Secretary has been given authority to dispose of renewable natural resources indicates a congressional intent that he is not authorized to dispose of the nonrenewable mineral resources.

Withdrawal by inference is also supported by the decision in *Rawson* v. *United States*, 225 F. 2d 855, 858 (9th Cir. 1955), where the court found that under the public land laws mineral entries may

be made only on lands forming part of the public domain, "* * * that is, public lands of the United States subject to entry, sale, or other disposal pursuant to general law." * * * The court notes that there are exceptions to this general rule where Congress has *expressly* reserved the mineral rights even though the land is to be used for other purposes. *Cf. Thompson* v. *United States*, 308 F. 2d 628 (9th Cir. 1962).

In discussing the application of the language of the Mining Act of 1872, the Supreme Court in *Oklahoma* v. *Texas*, 258 U.S. 574 (1922), opined that it applied only to "public lands," that is, lands open to entry, location, selection, sale or other disposal under the general public land laws. The Court illustrated the absurdity of inferring that all public lands are open to mining entry by pointing to the fact that such an interpretation would allow mining about the grounds of the Capitol in Washington or within the National Cemetery at Arlington or the lands in national parks such as Yosemite or Yellowstone. A recent opinion of the Solicitor, citing the cases discussed above, reached the same decision with regard to the application of the Wilderness Act. Solicitor's Opinion, 74 I.D. 97 (1967).

In conclusion, we are of the opinion that the acts establishing Lake Mead and Bighorn Canyon National Recreation Areas withdrew the lands from entry under the public land laws, and accordingly, the mining laws are inapplicable. To view these acts otherwise would allow a use of National Park System lands totally inconsistent with the stated objectives of Congress in setting aside and protecting these areas for recreational use by the public.

BERNARD R. MEYER,
Associate Solicitor.

ESTATE OF LUCY HOPE DEEPWATER

1 IBIA 201 Decided *December 16, 1971*

Indian Probate: Rehearing: Pleading, Timely Filing

Where a petition for rehearing was not filed in the appropriate office of the Department of the Interior until the 61st day after entry of the original order, the hearing examiner lacked authority to extend the time for filing thereof and had no jurisdiction to determine the substantive issues raised in the petition on their merits.

INTERIOR BOARD OF INDIAN APPEALS

This matter is before the Board of Indian Appeals on appeal by Daniel B. Evening, Sr., from an order of Hearing Examiner Alexander H. Wilson denying his petition for rehearing.

The hearing herein was held on October 22, 1970. On February 3, 1971, the examiner issued an order approving the decedent's last will and directing distribution of the trust property comprising the decedent's estate to the beneficiaries named in the will after payment of certain allowable claims against the estate. On April 6, 1971, Mr. Evening filed his petition for rehearing at the Fort Hall Agency. On May 7, 1971, the examiner entered an order denying the petition for rehearing on substantive grounds. In doing so, however, he specifically waived the 60-day limitation provided in the applicable regulation in effect at that time, 25 CFR § 15.17(a).[1] Thus, the Order Denying Petition for Rehearing states:

> The petition, although bearing the date of April 5, 1971, was not actually filed with the Fort Hall agency until April 6, 1971, thus exceeding by one day the 60 days permitted by 25 CFR § 15.17 (now 43 CFR 4.241) for filing for rehearing. *The nominal and insignificant delay of one day in filing the petition is considered inconsequential and insufficient reason for summarily dismissing the petition.* (Emphasis supplied.)

On June 28, 1971, the appellant filed his Notice of Appeal, alleging in general terms that the decedent's will was the product of duress and undue influence, and that the decedent lacked testamentary capacity. The Notice of Appeal was supported by copies of two affidavits which had previously been filed in support of appellant's Petition for Rehearing.[2]

In the examiner's Notice to Heirs attached to and accompanying the Order Approving Will and Decree of Distribution herein dated February 3, 1971, a copy of which was mailed to the appellant, the

[1] So far as pertinent hereto the regulation provides that "any person aggrieved by the decision of the examiner of inheritance may, within 60 days after the date on which notice of the decision is mailed to the interested parties (or within such additional period as the Secretary, for good cause, may allow in any case), file with the superintendent a written petition for rehearing. Such a petition must be under oath and must state specifically and concisely the grounds upon which it is based. If the petition is based on newly discovered evidence, it must state a justifiable reason for the failure to discover and present the evidence at the hearing, and the petition must be accompanied by the sworn statement of at least one disinterested person having knowledge of the facts." * * *

[2] Approximately 2 months after filing his appeal, appellant submitted by mail an unsworn statement in letter form from the decedent's attending physician to the effect that she suffered from a "marked degree of senility" and was "in no condition * * * to intelligently review or make a will." We note here our disapproval of the practice of documenting appeals in stages. Furthermore, the doctor's opinion as expressed in the letter is too general in nature to be of significant probative value even had it been in proper form and timely submitted. In this connection it should be noted that in *Estate of William Cecil Robedeaux*, 1 IBIA 106, 124; 78 I.D. 234, 243 (1971) we expressed our approval of this generally accepted definition of testamentary capacity: "* * * a state of mental capacity to understand in a general way the nature of the business then ensuing, to be able to bear in mind in a general way the nature and situation of the property, to remember the objects of one's bounty, and to plan or understand the scheme of distribution." Other considerations aside, a medical opinion such as the one before us stating conclusions only and having no factual reference to the legal touchstones governing the issue in dispute is of little evidentiary value.

parties involved, including appellant, were specifically advised as follows:

> This decision becomes final 60 days from the date of this notice. Any person aggrieved by the decision of the examiner may, within the 60 days, but not thereafter, file with the superintendent a written petition for rehearing.
>
> If the petition is based upon newly discovered evidence, it must state the justifiable reason for the failure to discover and present the evidence at the hearing, and the petition must be accompanied by the sworn statement of at least one disinterested person having knowledge of the fact.

The primary issue involved here is whether the examiner's waiver of the 60-day limitation of 25 CFR § 15.17(a) is within his power to effect.[3]

Generally speaking, where statutory provisions or administrative regulations provide that an application for a rehearing must be filed within a specified period after the service or entry of an administrative body's order or decision, such application must be filed within the specified period and the power of the administrative body is limited by the rule or regulation setting forth such limitation. 73 C.J.S., *Public Administrative Bodies and Procedure*, § 156b. (1951).

We construe the qualifying language of section 15.17(a), i.e., "* * * or within such additional period as the Secretary, for good cause, may allow in any case" * * * to be merely an expression of the power reserved by the Secretary in 25 CFR § 1.2 which provides that "the Secretary retains the power to waive or make exceptions to his regulations * * * in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians." It follows that section 15.17(a), insofar as it permits extension of the 60-day period of limitation, creates a discretionary power to be exercised by the Secretary only, except as he has delegated it. The Secretary has not delegated to hearing examiners the power to extend time limitations. He has, however, specifically delegated to the Board of Indian Appeals his authority to decide appeals from orders and decisions of hearing examiners, including his authority in relation to "extension of time or waiver of time limitations with respect to rehearings, reopenings, or appeals in proceedings for the determination of heirs or the approval of wills of deceased Indians * * *" 35 F.R. 12081.

In past decisions this Department has consistently held that petitions for rehearing which are not filed within the 60-day period are properly denied, *Estate of Henry Amauty*, IA–879 (July 17, 1959);

[3] If he has no such power the necessity for determining if the Examiner correctly denied the petition for rehearing on the specific substantive grounds stated in his denial of the Petition for Rehearing arises only if we should otherwise determine that this is a proper situation for the exercise of the Secretary's discretion to waive the regulations.

Estate of Agatha Quiltairre (*Qualtier*), IA–114 (January 11, 1954), and that an examiner does not have authority to grant an extension of the time for filing a petition for rehearing. *Estate of Jack Fighter*, 71 I.D. 203 (1964); *Estate of Jeanette Halfmoon*, IA–120 (May 5, 1954).

Over the years the Department of the Interior has adopted a strict policy of refusing to entertain appeals not timely filed. *Estate of Ralyen or Rabyea Voorhees*, 1 IBIA 62 (1971). This same policy has been applied to petitions for reopening filed beyond the three-year limitation provided in the regulations, *Estate of George Minkey*, 1 IBIA 1 (1970); *Estate of Samuel Picknoll* (*Pickernell*), 1 IBIA 169; 78 I.D. 325 (1971), and we see no reason why such a policy should not apply to petitions for rehearing as well.[4] In *Estate of Ralyen or Rabyea Voorhees*, *supra* at 63 where we dismissed the petition for rehearing filed 67 days after the issuance of the order determining heirs, the policy was applied although not expressly stated. We did note, however, that "The language of sec. 15.19 governing appeals is substantially identical to that governing petitions for rehearing in sec. 15.17" and that "* * * the reasons for the rule in sec. 15.17 are the same as in sec. 15.19 and shall apply equally. * * *"

In the instant case, the petition for rehearing was not filed in the appropriate office of the Department until the 61st day. It is thus untimely and should have been denied by the examiner for that reason since he had no jurisdiction to make any other determination. *Estate of Henry Amauty*, *supra*.

Nor do we see any reason, on the facts of this case, for this Board to exercise the discretion of the Secretary duly delegated to it to waive the time limitation provided in 25 CFR 15.17(a). Such power will be exercised only in cases where the most compelling reasons are present. *Estate of Samuel Picknoll* (*Pickernell*), *supra; Estate of Charles Ellis*, IA–1242 (April 15, 1966). Here, the appellant has not met the requirements of the regulation by virtue of his failure to propound any "justifiable reason" for not discovering and presenting at the hearing the evidence which he includes as attachments to his Petition for Rehearing and his Notice of Appeal.[5] On the basis of the record before us

[4] Admittedly, the effects of strict enforcement of limitations is sometimes harsh. However, the efficacy of such rules is based thereon. If, for example, the time could be extended one day at the discretion of the hearing examiner, why not for another day? The logic and justification for extending from the 61st day to the 62d comes more readily than for extension from the 60th to the 61st, and so on. Nothing would be gained by construing limitations to be guidelines, rather than bars, and by granting examiners discretion to extend limitation periods. At some point a cut-off date for filing has to be established and uniformly enforced so that cases come to a conclusion and property rights become stabilized.

[5] In his Petition for Rehearing appellant alleges that he was unable to remain at the hearing and present evidence because of an emergency involving the "physical well being" of his family. The hearing examiner, however, in denying the petition noted that "The petitioner, contrary to his allegation, was present during the entire proceedings, with the exception of a relatively short period of time prior to the conclusion of the hearing."

we are unable to ascertain any truly compelling reason justifying an exception to the regulations. We have carefully reviewed the record and find that there is ample support therein for the examiner's decision to approve the will and direct distribution of the decedent's estate according to its terms. Moreover, the evidence submitted by the appellant in support of his appeal is both vague and conclusionary in nature and has neither the quality or content which we find persuasive.

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7; 35 F.R. 12081, the appeal of Daniel B. Evening, Sr., is denied and, for the reasons stated in the body of this opinion, the Order Denying Petition for Rehearing entered herein by Hearing Examiner Alexander H. Wilson on May 7, 1971, is affirmed. This decision is final for the Department.

MICHAEL A. LASHER, JR.,
Alternate Board Member.

I CONCUR:

DAVID J. MCKEE, *Chairman.*

RIJAN OIL COMPANY, INC.

4 IBLA 153 Decided *December 17, 1971*

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

The proviso added to section 31(b) of the Mineral Leasing Act by section 1 of the Act of May 12, 1970, 84 Stat. 206, 30 U.S.C. sec. 188(b) (1970), to except an oil and gas lease from automatic termination in certain circumstances where timely annual rental payment is deficient, is curative in effect; therefore, where a rental payment was nominally deficient as prescribed by the Act and defined by Departmental regulations and the deficiency was paid prior to the Act, the lease is not terminated unless a new lease had been issued prior to May 12, 1970.

INTERIOR BOARD OF LAND APPEALS

This appeal by the Rijan Oil Company, Inc. is from a decision of the New Mexico land office dated November 19, 1969,[1] which declared that appellant's oil and gas lease NM 623 terminated by operation of law because the annual lease rental for the fourth year had not been paid in full.

[1] The appeal was addressed to the Director, Bureau of Land Management. Jurisdiction over appeals pending before the Director was transferred by the Secretary of the Interior to this Board effective July 1, 1970. Cir. 2273, 35 F.R. 10009, 10012.

The lease issued effective November 1, 1966, for 148.17 acres, with an annual rental of $74.50 at the prescribed annual rental rate of 50 cents per acre or fraction thereof. On September 24, 1969, prior to the anniversary date, appellant submitted a check for $74.09. The land office decision was based upon the 41-cent deficiency in the rental payment, and upon its conclusion that under section 31(b) of the Mineral Leasing Act, as amended by section 1(7) of the Act of July 29, 1954, 68 Stat. 585, a lease automatically terminates where payment of the rental in full is not timely made and there is no authority whereby a lease could be reinstated.

The appellant paid the 41 cents with its notice of appeal. It asserts that the deficiency was due to inadvertence and miscalculation and suggests that under the doctrine of *de minimis non curat lex* the lease should not be terminated.

At the time the land office decision was rendered, there was Departmental precedent for holding that an oil and gas lease terminates under the Act of July 29, 1954, even where a timely rental payment was only slightly deficient. *Duncan Miller*, A–30067 (March 12, 1964). Since that time, however, a relief act, the Act of May 12, 1970, 84 Stat. 206, 30 U.S.C. sec. 188 (b) and (c) (1970), has been passed to prevent in certain circumstances the automatic termination of a lease where a timely rental payment was deficient, and to provide under certain conditions for reinstatement of oil and gas leases terminated for failure to pay rental timely. The only issue which we need consider then is the effect of this Act upon appellant's lease.

We believe, as will be discussed, that appellant's lease is saved under section 1 of the Act of May 12, 1970, unless a new lease for the land had been issued prior to May 12, 1970. That section added the following proviso to the Act of July 29, 1954:

> *Provided*, That if the rental payment due under a lease is paid on or before the anniversary date but either (1) the amount of the payment has been or is hereafter deficient and the deficiency is nominal, as determined by the Secretary by regulation, or (2) the payment was calculated in accordance with the acreage figure stated in the lease, or in any decision affecting the lease, or made in accordance with a bill or decision which has been rendered by him and such figure, bill, or decision is found to be in error resulting in a deficiency, such lease shall not automatically terminate unless (1) a new lease had been issued prior to the date of this Act or (2) the lessee fails to pay the deficiency within the period prescribed in a notice of deficiency sent to him by the Secretary. (30 U.S.C. § 188(b) (1970)).

This case comes within the proviso's first exception pertaining to a nominal deficiency in the payment. The 41-cent deficiency in the rental was clearly nominal. As defined in recently published regulations, 43 CFR 3108.2–1 (36 F.R. 21035, 21036, November 3, 1971), a

"deficiency will be considered nominal if it is not more than $10 or five percentum (5 percent) of the total payment due, whichever is more."

Although the payment was deficient and the land office decision was rendered prior to the passage of the Act of May 12, 1970, it is apparent that Congress intended this proviso to apply to leases where rental payments were deficient prior to the effective date of the Act. This is evident from the language in the proviso that the "amount of the payment has been or is hereafter deficient," and further language expressed in the past tense. The Act then states that "such lease shall not automatically terminate unless (1) a new lease had been issued prior to the date of this Act." By conditioning the exception to the automatic termination upon whether a new lease had issued prior to the effective date of the Act, it is obvious that Congress clearly intended to nullify the effect of the automatic termination provision retroactively in these circumstances. The issuance of a "new lease prior to the date of this Act [May 12, 1970]" could only have been effective if an old lease had been terminated and the land in the terminated lease made available in accordance with the procedure prescribed in the regulations in effect at that time, 43 CFR 3123.9 (1969) (now renumbered 43 CFR 3112.1 (1971)).

In addition to the express language of the proviso, the legislative history of S. 1193, 91st Congress, which became the Act of May 12, 1970, shows that Congress intended that leases which would have been considered terminated under the existing law could be revived by this proviso. In recommending the inclusion of the provision which denies relief in cases where a new lease had been issued prior to the enactment of the Act, the Acting Secretary of the Interior, in a letter of February 11, 1970, to the Chairman of the House Committee on Interior and Insular Affairs, commented:

> Upon a further review of the language of section 1 of S. 1193, it appears that a problem could exist with respect to the interest of a subsequent lessee of land which had been previously automatically terminated under present law. Section 1 of S. 1193 provides that a lease shall not automatically terminate where the rental paid under a lease is either (1) nominally deficient or (2) paid in accordance with figures stated in the lease or in a bill rendered. The probable effect of this language in S. 1193 would be to reinstate a lease terminated under present law if the specified conditions were met. However, in some instances a new lease has been entered into based upon a prior termination on the existence of facts which are now set forth in (1) or (2) of section 1. The interest of a subsequent lessee should be protected against the possible revival of a prior lessee's interest if his termination resulted from what (1) and (2) of section 1 now make exceptions to automatic termination.

The Committee, reporting on the amendment recommended by the Department, described its effect in these words:

> * * * Also in connection with this section [§ 1], the committee adopted an amendment, suggested by the Department by its letter of February 11, 1970, which prevents revival of a lease where a subsequent lease was issued prior to enactment of S. 1193. (H.R. Rep. No. 91-1005, 91st Cong., 2d Sess. 5 (1970)).

In view of this clear manifestation of Congressional intent that section 1 of the Act of May 12, 1970, has a curative effect, appellant's lease will not be considered as having terminated providing, of course, that no lease issued for the land prior to the date of the Act.[2]

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is set aside, and the case is remanded to the Bureau of Land Management for appropriate action.

JOAN B. THOMPSON, *Member.*

WE CONCUR:

MARTIN RITVO, *Member.*

NEWTON FRISHBERG, *Chairman.*

[2] Since the appellant had paid the deficiency prior to the enactment of this relief provision, there is no need for the notice of deficiency contemplated by the statute.

ZEIGLER COAL COMPANY

1 IBMA 71 Decided *December 20, 1971*

Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders

The termination by the Bureau of an order issued under section 104 of the Act is not a proper basis for dismissal of an application for review of such order.

Reliable Coal Corp., 1 IBMA 50, 78 I.D. 199 (1971), distinguished.

INTERIOR BOARD OF MINE OPERATIONS APPEALS

J. Halbert Woods and J. Roy Browning, on behalf of Zeigler Coal Company (Zeigler); Robert W. Long, Associate Solicitor, J. Philip Smith, Acting Assistant Solicitor, and Stanley M. Schwartz, Trial Attorney, on behalf of the Bureau of Mines (Bureau); Charles L. Widman, on behalf of the United Mine Workers of America

(UMWA); Guy Farmer on behalf of the Bituminous Coal Operators' Association (BCOA); Wesley C. Marsh, on behalf of The Pittston Company (Pittston); John C. Kinder, on behalf of Youghiogheny and Ohio Coal Company (Youghiogheny).

Zeigler Coal Company seeks review under section 105 of the Act[1] of an Order of Withdrawal issued pursuant to section 104(a) of the Act. The matter is before the Board upon the Board's initiative, in accordance with 43 CFR 4.594, 36 F.R. 17342, for review of the Hearing Examiner's Decision on Reconsideration. The decision under review was issued on August 14, 1971, and affirmed an order of the Examiner, issued on July 27, 1971, dismissing Zeigler's Application for Review of the above-referenced Order of Withdrawal. The Board, in ordering review, requested the parties to file briefs and invited briefs from persons having an interest in the subject matter. Briefs were filed by Zeigler, the Bureau, UMWA, BCOA, Pittston, and Youghiogheny. All parties, except Youghiogheny, appeared at oral argument before the Board on November 30, 1971.

STATEMENT OF FACTS

On May 7, 1971, an inspector of the Bureau issued an Order of Withdrawal, pursuant to section 104(a) of the Act,[2] to the operator of the Moffat (now Zeigler) Coal Company's Murdock Mine. The order cited the existence of conditions which the inspector believed constituted imminent danger.[3] Two hours after issuing the order, the inspector terminated the Order of Withdrawal, in accordance with section 104(g) of the Act, after finding that the condition or practice set forth in the order was totally abated so that imminent danger no longer existed.

Zeigler filed an Application for Review of the Order of Withdrawal on May 19, 1971, claiming that the conditions or practices described in the order did not constitute imminent danger. Prior to the hearing on the Application for Review, the Bureau filed a Motion to Dismiss the Application on the ground that the volations cited in the Order

[1] All references herein to "the Act" are to the Federal Coal Mine Health and Safety Act of 1969, P.L. 91–173, 83 Stat. 742, 30 U.S.C. secs. 801–960 (1970).

[2] Section 104(a) reads, in part: "If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists."

[3] Section 3(j) of the Act defines imminent danger as: "[T]he existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

of Withdrawal had been fully abated, thereby rendering moot the Application for Review. The Examiner granted the Bureau's motion and ordered the Application for Review dismissed.

Zeigler filed a petition for reconsideration with the Examiner contending that his Order of Dismissal denied Zeigler an opportunity for the hearing provided for in section 105(a)(1) of the Act. The Examiner affirmed his Order of Dismissal, relying upon this Board's opinion in *Reliable Coal Corp.*, 1 IBMA 50, 78 I.D. 199 (1971). Although the Examiner recognized that *Reliable* pertained to a notice of violation issued under section 104(b) of the Act, whereas the case before him involved an order of withdrawal issued under section 104 (a) of the Act, he concluded that the arguments and facts in this case were very similar to the argument and facts supporting the holding in *Reliable*. Based upon the finding that Zeigler's Application for Review was deprived of practical significance after the condition giving rise to the order was fully abated and the finding that the question of whether a violation existed could be fully litigated in any future proceeding under the Act, the Examiner concluded that dismissal of the Application for Review was proper.

ISSUE PRESENTED FOR REVIEW

Whether an application for review of an order of withdrawal issued under section 104 of the Act should be dismissed where the Bureau has terminated such order.

Zeigler, Pittston, Youghiogheny, and BCOA take the position that an operator has an absolute right to obtain review of an order of withdrawal issued by the Bureau, unqualified by the fact that such order is terminated. The Bureau agrees that an order of withdrawal issued under section 104(c) of the Act should be subject to review after termination of such order, but maintains that it is not proper to consider an application for the review of an order issued under sections 104 (a), (b), or (i) where such order has been terminated. The UMWA argues that any order issued under section 104, whether terminated or not, should be subject to review, if at all, only in a proceeding brought under section 109 of the Act for the assessment of a civil penalty.

RULING OF THE BOARD

We hold that the termination by the Bureau of an order issued under section 104 of the Act is not a proper basis for dismissal of an application for review of such order.

Section 105 of the Act describes the rights of the operator and

the representative of miners with respect to the review of an order of withdrawal:

Section 105.(a)(1) An operator issued an order pursuant to the provisions of section 104 of this title, or any representative of miners in any mine affected by such order or by any modification or termination of such order, may apply to the Secretary for review of the order within thirty days of receipt thereof or within thirty days of its modification or termination. * * * Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing, at the request of the operator or the representative of miners in such mine, to enable the operator and the representative of miners in such mine to present information relating to the issuance and continuance of such order or the modification or termination thereof * * *.

* * * * * * *

Section 105(b) Upon receiving the report of such investigation, the Secretary shall make findings of fact, and he shall issue a written decision, incorporating therein an order vacating, affirming, modifying, or terminating the order, or the modification or termination of such order, or the notice, complained of and incorporate his findings therein.

We find no language in section 105 (or any other section of the Act) which states explicitly or implies that the Secretary may not review an order of withdrawal where such order has been terminated by the Bureau; nor do we find anything in the legislative history of the Act to indicate such an intent by Congress. The Bureau's Motion to Dismiss, and the Examiner's ruling thereon, were not based upon their construction of the Act but upon what we think is a mistaken view of our holding in *Reliable* and what we think is a mistaken view of the doctrine of mootness.

We held in *Reliable* that where the Bureau finds a violation charged in a notice issued under section 104(b) or (i) of the Act to be totally abated, an application for review of such notice under section 105(a) is subject to dismissal. There are crucial distinctions between *Reliable* and the case before us. Nowhere in *Reliable* did we state that our holding was applicable to a case involving an order of withdrawal. Our discussion in *Reliable* of our opinion in *Freeman Coal Mining Corp.*, 1 IBMA 1, 77 I.D. 149 (1970) and of the legislative history of the Act related *solely* to the provisions for review of a notice of violation. We emphasized the language in section 105 which limits the review of a notice of violation to the sole issue of the reasonableness of the time fixed for abatement.[4] This limitation does not apply to

[4] Section 105.(a)(1) states in part: "* * * An operator issued a notice pursuant to section 104(b) or (i) of this title, or any representative of miners in any mine affected by such notice, may, *if he believes that the period of time fixed in such notice for the abatement of the violation is unreasonable,* apply to the Secretary for review of the notice within thirty days of the receipt thereof. . . ." (Italics added).

the review of an order of withdrawal. In addition, the determinations relating to the issuance of an order of withdrawal and the consequences to the operator of the issuance of such order involve considerations, discussed below, which necessitate a distinction between the review of a notice of violation and the review of an order of withdrawal. We find, therefore, that our holding in *Reliable* does not dictate the result we must reach in this case.

The Bureau maintains that a section 105 proceeding to review an order issued under section 104(a) of the Act could not afford any practical relief to an operator where the order has already been terminated. The Bureau argues that an administrative agency should not decide a case where no legal or practical remedy can be afforded to the litigant and thus urges that the doctrine of mootness warrants dismissal of this case. We disagree.

In the case of an order issued under section 104(a), the determination of whether conditions found by an inspector constitute imminent danger is clearly a subjective one.[5] Where such latitude in discretion exists, the need for review of a given order of withdrawal is necessary to insure against arbitrary judgments by the enforcement arm of the Department of the Interior. Additionally, there are consequences flowing from the issuance of an order of withdrawal, such as loss of production and the operator's liability for compensation to miners under section 110 of the Act, which require that the operator be given an opportunity to obtain a decision on review as to whether an inspector's findings underlying his issuance of an order of withdrawal were correct. Such a decision would help establish guidelines as to the proper basis for the issuance of an order of withdrawal and would help to protect all operators from the adverse effects of improperly issued orders.

The fact that an order being reviewed has been terminated by the Bureau is not relevant to the above considerations. We believe that this type of review was contemplated by Congress and is in accordance with case law which recognizes that the doctrine of mootness is not properly applicable to proceedings involving orders, such as those issued under section 104, which are of short duration and capable of repetition. *See Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911); *Friend* v. *United States*, 388 F.2d 579 (D.C. Cir. 1967); *Meyers* v. *Jay Street Connecting R.R.*, 288 F.2d 356 (2d Cir. 1961).

The Examiner concluded that the dismissal of Zeigler's Application for Review would not prejudice Zeigler's rights under the Act because

[5] Although the issue is not presented in this case, another question which could arise in a proceeding under section 105 to review an order issued under section 104(a), is whether the inspector correctly determined the area throughout which the imminent danger allegedly existed.

he found that the question of whether a violation existed could be fully litigated "*in any future*" proceeding under the Act. We need not not decide whether this finding is correct because even if Zeigler could obtain, under another provision of the Act, all the rights of review granted by section 105, the opportunity to litigate certain issues under more than one provision of the Act cannot be the basis for depriving Zeigler of its statutory right to litigate under a specific provision of the Act. That such was the intent of Congress is substantiated by the provision in section 109(a)(3) of the Act which provides for a consolidation of proceedings under section 109 with proceedings under section 105.

We believe that our reasoning as to the review of an order of withdrawal issued under section 104(a) of the Act, where abatement of the conditions underlying the order has occurred, also applies to orders of withdrawal issued under sections 104(b), 104(i) or 104(c). The issuance of a 104(c)(1) order of withdrawal makes the operator vulnerable to an order of withdrawal issued under section 104(c)(2). Therefore, the operator may obtain relief by having an order issued under 104(c)(1) reviewed in a proceeding under section 105 of the Act, for if such order is vacated the operator will obtain relief from the possible issuance of an order under 104(c)(2). With respect to orders issued under sections 104 (b) or (i), we think that the several findings which the inspector must make in issuing such orders [6] involve subjective judgments by the inspector which should be subject to review, even after termination of such an order, for the same reasons expressed in reference to orders issued under section 104(a) of the Act.

Therefore, we conclude that any order issued under section 104 may be reviewed under section 105, even after such order has been terminated.

In view of the foregoing, IT IS ORDERED that the Examiner's Decision on Reconsideration IS REVERSED: the Order of Dismissal IS VACATED; and the case IS REMANDED to the Examiner for hearing on the merits.

C. E. ROGERS, JR.,
Chairman.

DAVID DOANE, *Member.*

[6] Sec. 104(b) states in part: "* * * If, upon the expiration of the period of time as originally fixed [in a notice of violation] or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated."

ERNEST SMITH
RUTH SMITH

4 IBLA 192 Decided *December 27, 1971*

Mining Claims: Generally—Mining Claims: Lands Subject to

Absent a statutory direction to the contrary, lands acquired by purchase do not thereby acquire a public land status and are therefore not subject to the operation of the United States mining laws.

The Act of August 10, 1939, 53 Stat. 1347, adding certain lands to the Kaniksu National Forest, constitutes such a statutory direction.

Statutory Construction: Generally—Statutory Construction: Administrative Construction

It is an elementary rule of statutory construction that effect must be given, if possible, to every word, clause and sentence of a statute.

Where contemporaneous and practical interpretation of a statute had stood unchallenged for some 26 years, it will be regarded as of great importance in arriving at the proper construction of a statute.

Where a statute recites that "[l]ands * * * purchased under * * *this Act shall be open to mineral locations * * * ", the statute contains no purchase authority, but another section of the statute refers to laws under which such purchases have been made, the phrase quoted will be construed as meaning "[l]ands * * * purchased under * * * the laws set forth in this Act. * * *"

Administrative Practice—Administrative Procedure Act: Hearings—Mining Claims: Lands Subject To—Rules of Practice: Hearings

Mining claims located on lands purchased by the United States under the Act of April 8, 1935, 49 Stat. 115, and added to the Kaniksu National Forest by the Act of August 10, 1939, 53 Stat. 1347, may not be declared null and void *ab initio*, but the mining claimants must be afforded notice and an opportunity for hearing before the claims are subject to cancellation.

INTERIOR BOARD OF LAND APPEALS

Ernest Smith and Ruth Smith have appealed to the Board of Land Appeals from a decision dated July 7, 1971, in which the Oregon state office, Bureau of Land Management, declared the Holt No. 1 and Holt No. 2 placer mining claims null and void *ab initio*, and rejected application OR 6177 (Washington) for mineral patent. The decision stated that the subject lands had been patented to the Northern Pacific Railway on September 4, 1902, were subsequently reacquired by the United States through purchase by the Farm Security Administration on May 2, 1936, under the provisions of the Act of April 8, 1935, 49 Stat. 115, and were added to the Kaniksu National Forest by the Act of August 10, 1939, 53 Stat. 1347. The decision held that reacquisition of the lands by the United States did not, per se, make them open to

mining location; it required some specific statutory direction which was not given by the Kaniksu Act, or by any other statute.

The appellants contend that the wording of section 2 of the Kaniksu Act does not support the interpretation given by the state office decision.

In his report on H.R. 2752, 76 Cong., 1st Sess. (1939) (which culminated in the Act of August 10, 1939), the Secretary of Agriculture indicated the bill proposed to give "a national forest status to all lands of the United States" and to extend the provisions of the Forest Exchange Act of March 20, 1922, 42 Stat. 465, 16 U.S.C. sec. 485 (1970), to all other lands within a described area of approximately 459,400 acres lying between the Colville and the Pend Oreille Valleys in the northeastern part of the State of Washington. The Secretary stated that "addition of the lands to the national forest will in no way interfere with legitimate mining activities." *Id.* p. 2. He recommended that the bill be given favorable consideration so that national forest status can be given to the described lands.

Absent a statutory direction to the contrary, lands acquired by purchase and made a part of a national forest do not thereby acquire a public domain status. *See Rawson* v. *United States*, 225 F.2d 855 (9th Cir. 1955), *cert. denied*, 350 U.S. 934 (1955), 40 Op. Atty. Gen. 389 (1945). It is clear, therefore, that unless the 1939 Act contains such a direction, the lands in issue would not be subject to mining location under the United States mining laws. *Thompson* v. *United States*, 308 F.2d 628, 631 (9th Cir. 1962); *Bobby Lee Moore et al.*, 72 I.D. 505, 508–510 (1965).

The 1939 Act provides in applicable portion as follows:

[Sec. 1] That all lands of the United States situated within the area hereinafter described, including those acquired, or in course of acquisition, under the provisions of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 195), the Emergency Relief Appropriation Act, approved April 8, 1935 (49 Stat. 115), or the Bankhead-Jones Farm Tenant Act, approved July 22, 1937 (50 Stat. 522), are hereby added to and made parts of the Kaniksu National Forest, Washington, and shall hereafter be subject to the rules and regulations applicable to national-forest lands, but claims, entries, filings, or appropriations under the public-lands laws, or special provisions included in conveyances of title to the United States, valid and subsisting at the date of this Act and thereafter legally maintained, shall not be affected by this Act.

* * * * * * *

Sec. 2. Any of the lands described in the first section of this Act which are privately owned may be accepted in exchange by the Secretary of the Interior under the provisions of the Act entitled, "An Act to consolidate national-forest lands", approved March 20, 1922, as amended (U.S.C., title 16, secs. 485, 486).

All of such lands so accepted in exchange shall thereupon be added to and made a part of the Kaniksu National Forest in the State of Washington and shall thereafter be administered under the laws and regulations relating to the national forests. Lands received in exchange or purchased under the provisions of this Act shall be open to mineral locations, mineral development, and patent, in accordance with the mining laws of the United States.

The fact that section 1 of the 1939 Act provides that these acquired lands "are hereby added to and made parts of the Kaniksu National Forest * * * and shall hereafter be subject to the rules and regulations applicable to national-forest lands * * *" distinguishes these acquired lands from those acquired under the Weeks Act, *as amended*, 16 U.S.C. secs. 480, 500, 513–519, and 521 (1970). Section 10 of the Weeks Act, March 1, 1911 (36 Stat. 962, 16 U.S.C. sec. 519 (1970)), after providing for sale of certain agricultural lands at their true value, further states:

* * * And no right, title, interest, or claim in or to any lands acquired * * * or the products, resources, or use thereof after such lands shall have been so acquired, shall be initiated or perfected, except as in this section provided.

Section 11 of the Weeks Act, 16 U.S.C. sec. 521 (1970), directs that the land acquired under its authority "be permanently reserved, held, and administered as national-forest lands" under the Act of March 3, 1891, *as amended*, 16 U.S.C. sec. 471 (1970). *Cf.* 40 Op. Atty. Gen. 389 (1945).

Turning to section 2 of the 1939 Act, we note a dichotomy—the lands in section 1 are made subject to the "rules and regulations applicable to national-forest lands," in contradistinction to lands acquired in exchange under the Forest Exchange Act of March 20, 1922, *as amended*, 16 U.S.C. secs. 485, 486 (1970), which are to "be administered under the *laws* and regulations relating to the national forests." [Emphasis supplied.]

However, section 2 of the 1939 Act further provides that

* * * Lands received in exchange or *purchased* under the provisions of this Act shall be open to mineral locations, * * * [Emphasis supplied.]

But the 1939 Act makes no provision for purchase of lands. What meaning is therefore to be given to the word "purchased"?

"It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." 1 KENT COMM. 462 (13th ed. 1884). This rule is particularly appropriate where, as here, the language in question was added to the bill by the Senate Committee on Public Lands and Surveys. S. Rept. 959, 76th Cong., 1st Sess. (1939). Although the matter is not entirely free from doubt, it would appear logical to read "Lands * * * purchased under

the provisions of this Act" as meaning "Lands * * * purchased under the provisions of the laws set forth in this Act." We believe this conclusion comports with the concept of "whole statute" interpretation. SUTHERLAND, STATUTORY CONSTRUCTION, § 4703 (3d ed. 1943).

We do not regard the provision of section 1, saving valid and subsisting public land claims, entries, filings, or appropriations as militating against our conclusion. That provision preserves desert land entries, homestead entries, scrip locations, etc., on the public lands added to the national forest.

Our view of the case at bar is further buttressed by the opinion of the Solicitor of the Department of Agriculture, No. 5016, of July 8, 1944, which reaches the same result. Moreover, where contemporaneous and practical interpretation has stood unchallenged for a considerable length of time, it will be regarded as of great importance in arriving at the proper construction of a statute. *United States* v. *State Bank of North Carolina*, 31 U.S. (6 Pet.) 12 (1832). *Cf.* SUTHERLAND, STATUTORY CONSTRUCTION, § 5104 (3d ed. 1943).

It follows, therefore, that mining claims on the purchased lands within the area described in the Kaniksu Act may not be declared null and void *ab initio* for the reasons stated in the Oregon state office decision. Such mining claims, located after acquisition of the lands by the United States and after the date of the Kaniksu Act, must be afforded due process, including proper notice and an opportunity for hearing before being subject to cancellation. *Cf. Mrs. Marion E. Beresford*, A–30015 (April 6, 1964).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decison appealed from is vacated and the case is remanded to the Bureau of Land Management for further appropriate action not inconsistent herewith.

FREDERICK FISHMAN, *Member.*

WE CONCUR:

EDWARD W. STUEBING, *Member.*

NEWTON FRISHBERG, *Chairman.*

APPEAL OF S. S. MULLEN CONSTRUCTION, INC.

IBCA-860-7-70 Decided *December 28, 1971*

Contracts: Construction and Operation: Changed Conditions—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes and Remedies: Substantial Evidence—Rules of Practice: Appeals: Burden of Proof

A claim for a changed condition will be denied when the contractor fails to present adequate evidence as to what the field conditions were, and fails to prove that the field conditions differed materially from conditions shown in the contract documents.

Contracts: Construction and Operation: Changed Conditions—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes and Remedies: Substantial Evidence—Rules of Practice: Appeals: Burden of Proof

A changed condition claim will be denied where the contractor fails to show significant error in the data contained in the contract documents.

Contracts: Construction and Operation: Changed Conditions

A claim for a changed condition will be denied when the evidence shows that the overwet condition of borrow material intended for use as compacted earthdam fill was most likely the result of the use of too much water in wetting the borrow material prior to excavation.

Contracts: Construction and Operation: Changed Conditions

A claim for a changed condition based upon overwet borrow material will be denied when the contract expressly recognizes the possibility of overwetting the material and states that the contractor must cover the contingent risk of overwet material in his unit bid prices.

INTERIOR BOARD OF CONTRACT APPEALS

This appeal arises out of a contract for the construction of the Joes Valley Dam, part of the Emery County Project, Utah, of the Bureau of Reclamation. Appellant was the successful bidder on the contract with an estimated value of $3,562,260 which was awarded on May 10, 1963. The specific claim at issue, valued at $500,000, arises from the difficulties experienced by appellant in the course of construction because the borrow material for the impervious core of the earth fill dam was generally wetter than optimum for compaction in the dam.

The contract called for Zone 1 embankment, *i.e.*, the impervious core, to be constructed of compacted fill which was to be secured from the "Lowry borrow area," a site some 6,000 feet upstream from the dam.

The contract describes Zone 1 material as consisting of a mixture of clay, silt, sand, and gravel from a uniform cutting from the full height of the designated face of the borrow pit excavation, and free of cobbles or rock fragments greater than five inches in maximum dimension. There is no dispute over these characteristics of the borrow. The dispute germinates in the requirement of specification paragraph 57c., which specified moisture pre-conditioning of the fill 30 days in advance of excavation operations.[1]

There is little doubt but that the borrow material for Zone 1 embankment was generally overwet for optimum compaction. Appellant's case is that this condition resulted from the borrow pit area being predominently a lean clay soil, with greater water holding properties, rather than a more predominately sandy soil shown in the contract specifications, and on which the pre-excavation irrigation was based. In short, appellant urges a first category changed condition under the Changed Conditions clause.[2]

[1] Because of its importance in the case paragraph 57c. is quoted here in full:

"57c. Moisture and drainage.—The moisture content of the Zones 1 and 2 embankment materials prior to and during compaction shall be in accordance with applicable paragraphs for placing the embankment. As far as practicable, the earthfill, Zone 1 material shall be conditioned in the borrow pits before excavation. If required, moisture shall be introduced into the borrow pits for the earthfill, Zone 1 material by irrigation, at least 30 days in advance of excavation operations. When moisture is introduced into the borrow pits for earthfill material prior to excavation, care shall be exercised to moisten the material uniformly, avoiding both excessive runoff and accumulation of water in depressions. If at any location in the borrow pits for earthfill material, before or during excavation operations, there is excessive moisture, as determined by the contracting officer, steps shall be taken to reduce the moisture by selective excavation to secure the drier materials; by excavating and placing in temporary stockpiles material containing excess moisture; by excavating drainage ditches; by allowing adequate additional time for curing or drying; or by any other approved means.

"Borrow pits in the Seely borrow area will not require preconditioning by irrigation. Moisture as required shall be added to the materials on the embankment or at the option of the contractor may be added at the separation plant.

"The contractor shall be entitled to no additional allowance above the unit prices bid in the schedule on account of the requirement for stockpiling and rehandling excavated materials which have been deposited temporarily in stockpiles; delays or increased costs due to stockpiling; poor trafficability on the borrow area, the haul roads, or the embankment; reduced efficiency of the equipment the contractor elects to use; or on account of any other operations or difficulties caused by overly wet materials.

"To avoid the formation of pools in borrow pits during the excavation operations and in borrow pits above elevation 6910 after the excavation operations are completed, drainage ditches from borrow pits to the nearest outlets shall be excavated by the contractor where, in the opinion of the contracting officer, such drainage ditches are necessary.

"No direct payment will be made for irrigation or unwatering of borrow areas, for addition of moisture at separation plant, for any other operations necessary to condition the material properly, and the entire cost of such irrigation, addition of moisture, excavation of drainage ditches, or other operations, shall be included in the unit prices per cubic yard bid in the schedule for excavation in borrow areas."

[2] "4. CHANGED CONDITIONS

"The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (a) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (b) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily

The Government defends along several lines: One, the claim is defeated by lack of notice under the Changed Conditions clause; two, the contract places the risk of overwet materials on the contractor; three, the facts do not show a changed condition; and four, the overwet condition was the fault of appellant's subcontractor for borrow pit irrigation. The record in this case compels the Board to reach the same conclusions.

Lack of Notice

The first written notice to the Bureau that appellant considered conditions in the Lowry borrow area to be something different than represented by the contract consists of a brief letter dated November 1, 1965,[3] which stated that the soil characteristics differed substantially from pre-bid information. The Government responded immediately, asking a meeting at the site of work and pointing out that stoplogs had been installed in the diversion tunnel on November 3, 1965, and that inundation of some of the borrow area was imminent.[4] Appellant did not respond to the Government's request.

The evidence further shows that all Zone 1 embankment, which included 900,000 cubic yard of fill from the Lowry area,[5] was completed on October 18, 1965.[6] All dam embankment was completed on October 27, 1965.[7] Thus, no written notice was given until almost two weeks had elapsed from final excavation in the disputed borrow area, and the soil incorporated into the dam structure. Although the Government at this point could have itself investigated the remaining soil *in situ* in Lowry, it had no way of investigating the soil which had been excavated, transported to the dam, and compacted, in order to ascertain if the field conditions in fact differed from the contract indications. It is the *in situ* characteristics of the soil used in the dam which is in issue in this case, and not the characteristics of soil not excavated and not used in embankment.

In addition, there is no evidence that the Bureau had actual notice that the soil characteristics were not as shown in the contract. Bureau

---

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 Contractor's cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; or unless the Contracting Officer grants a further period of time before the date of final payment under the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions."

[3] Appeal file, Exhibit 16.
[4] Appeal file, Exhibit 17.
[5] Tr. 97.
[6] Tr. 45.
[7] Tr. 91.

employees knew that the soil was overwet as early as April 1965, and indeed, had alerted appellant to this condition.[8] It is nowwhere alleged or shown that the Bureau's knowledge of the fact that the soil was overwet necessarily imparted any knowledge that the soil characteristics were different than shown. The overwet material had previously been irrigated by appellant's subcontractor and it was just as meaningful to ascribe the overwet condition to such irrigation.

Appellant's conduct may also have avoided a timely investigation. Appellant's Vice President, Mr. Bisordi, made a pre-bid examination and looked into three or four open test pits.[9] Appellant took a soil sample in June 1964, which was analyzed by Woodward, Clyde, and Sherard, soil engineers in Denver, for moisture content and compaction characteristics.[10] Some pre-wetted borrow was excavated in the fall of 1964, and apparently was satisfactory for compaction.[11] When the Government's Chief Inspector, Mr. Harold Deming, suggested to Mr. Bisordi, at the end of May 1965, that appellant try some experimental irrigation in an attempt to meet the problem of overwet materials, Mr. Bisordi responded that the irrigation subcontractor knew what it was doing.[12]

In August 1965, because of its concern with the overwet condition,[13] appellant secured the services of Mr. George G. Yamane, a qualified soils engineer, whose report to appellant dated August 17, first referred to "lean clay." Mr. Yamane investigated and reported only on the overwet condition resulting from irrigation. Apparently the question of different soil characteristics was not even put to him.

The above evidence indicates that appellant itself did not consider the soil in the Lowry borrow area to be significantly different from that shown in the contract until it made this claim for the overwet material. If such is the case, it is *a priori* impossible to charge the Bureau with any actual knowledge of a changed condition prior to November 1, 1965.

Accordingly, we believe that the evidence in this case shows that the Government did not receive notice of a changed condition until receipt of the letter of November 1, 1965, from appellant despite appellant's knowledge since May 1965, of the overwet condition. This letter arrived too late for the Government to make any meaningful *in situ* examination of the borrow material used in construction of the dam. Al-

[8] Tr. 440–441.
[9] Tr. 57.
[10] Government Exhibit 8, Item 16. This sample is classified as "sandy clay."
[11] Tr. 11, 31, 437–438.
[12] Tr. 440.
[13] Tr. 82–83.

though a finding of prejudice to the Government could be made on this record,[14] we refrain from doing so since we prefer to decide the case on the merits of the changed condition issue.

The Changed Condition

There is no dispute but that the Lowry borrow material was generally wet of optimum. The question is why. Appellant ascribes the overwet condition to a predominately "lean clay" soil.[15] The evidence in support of that position was presented by Mr. George G. Yamane, a soils engineer with the firm of Shannon and Wilson of Seattle, Washington. Mr. Yamane visited the work site for four days, commencing on August 10, 1965, at the invitation of Mr. Bisordi. The purpose of the visit was to investigate the wet borrow material conditions.[16]

During his visit seventeen test holes were dug with a backhoe in order for Mr. Yamane to see the material and to estimate its moisture content in relationship to optimum.[17] He examined the material visually and hand threaded it to determine if the moisture content was above the plastic limit.[18] In addition, he classified the soils by feel into a three part classification, silty sand, lean clay, and fat clay, by trying to dry it up in his hand, feeling how tough the soil was, and how hard it was and how long it took to work it down to its plastic limit.[19] He concluded that the moisture content was 2–5 percent over optimum.[20]

Appellant's Exhibits O and P were introduced to graphically depict the results of Mr. Yamane's test pit examinations. These exhibits show 17 test pit profiles. Thirteen of the pits are labeled as clay, either fat or lean, or both, four pits are predominately labeled silty sand or "dry soil." From these pits, Mr. Yamane estimated that 85 percent of the Lowry borrow area that was wetted was clay, and 15 percent silty sand.[21]

Another basis for Mr. Yamane's conclusion that Lowry material was predominately clay was the fact that Bureau moisture tests taken on the embankment material between June 26, 1965, and July 25, 1965, showed the average water content of embankment material to be 14.7 percent.[22] To Mr. Yamane, an optimum moisture of embankment

---

[14] *Klefstad Engineering Co., Inc., et al.*, VACAB No. 522 (June 30, 1966), 66–1 BCA par. 5678. *Korshoj Construction Co.*, IBCA–321 (January 31, 1966), 73 I.D. 33, 66–1 BCA par. 5339.

[15] Appellant's Post-hearing Brief, p. 2.

[16] Tr. 253.

[17] Tr. 255.

[18] Tr. 256, 321. If the soil was above its plastic limit, it was overwet for optimum compaction (Tr. 259).

[19] Tr. 258, 261.

[20] Tr. 264.

[21] Tr. 282–283.

[22] Tr. 273, 302. Appellant's Exhibit U.

material of 14.7 percent indicated more clay material than shown by the average optimum moisture of 13.2 percent which can be derived from contract data.[23]

The third leg of Mr. Yamane's conclusion was based upon a comparison of engineering laboratory tests made by the Bureau on eleven samples from six test pits.[24] The laboratory data was not part of the contract specification data, but the logs of the test pit profiles based on field classification procedures were.[25] According to Mr. Yamane, samples from test pits 111, 112, 116, showed significant differences from the logs; test pits 114 and 115 showed some discrepancies, but not of significance, test pit 110, showed no difference. The significant differences were a higher proportion of fines in the laboratory samples and a laboratory classification of those samples as clays.[26]

On cross-examination Mr. Yamane made several admissions and statements which detract from the probative value of his classifications of the soils in his test pits, and his estimate of soil type based upon the optimum moisture of embankment material of 14.7 percent. His testimony on cross-examination also tended to confirm the validity of Bureau field soil classification procedures.

In response to a question as to why he relied on his own field tests, and discredited the Bureau's field classifications by referring to laboratory tests as better, Mr. Yamane responded that he used a hand test for plastic limit because his primary purpose was to see how wet the material was, and he

> * * * went through the test pits real quickly and gave a brief classification of the *sample* * * *[27]

Further, his classification was devised to meet his purpose and that purpose was quite different from the Bureau's purpose.[28] For construction purposes he would be more detailed.[29]

His estimate of 85 percent lean clay in the wetted soils ignored sand lenses, shown to exist on his own Exhibits O and P.[30]

With respect to his conclusion that the Lowry area had more clay than shown in the logs because of the 14.7 percent optimum moisture content of embankment material, Mr. Yamane admitted that if the average optimum moisture content of embankment material was shown to be 13.5 percent, he would change his view about the clay.[31]

[23] Tr. 302–303.
[24] Appellant's Exhibits S and T.
[25] Specification Drawings 304–D–28, and 304–D–29.
[26] Tr. 285–301, 303, 306, 372, 373.
[27] Tr. 321, emphasis supplied.
[28] Tr. 325–326.
[29] Tr. 327.
[30] Tr. 337–338, 374.
[31] Tr. 320–332.

By Exhibit 22, and the testimony of its expert witness, Dr. Jack Hilf, the Government showed that the average optimum moisture content of embankment material, based on 417 tests, was 13.5 percent.[32]

Mr. Yamane agreed that in his own work in the Seattle area in investigation of foundation material, he used visual and field methods of classification, "there is nothing that can beat the field." [33] He agreed that the Unified Soil Classification System is a good standard,[34] and that it is not necessary to refine classifications based upon visual and manual methods by laboratory analysis.[35] He agreed further that the data on appellant's Exhibits S and T was for dam construction and not for classification, although classification data was there.[36]

The Government's highly qualified soils expert,[37] Dr. Jack Hilf, testified that, as to compaction characteristics, the Government data in the contract [38] corresponded closely with actual results of embankment tests. There was no significant difference.[39] Exhibits S and T reflect data for compaction characteristics, and only incidentally classify borrow material, and then only on the basis of the sample, and not for the entire pit.[40] One would not as a matter of practice change a field classification because of a differing laboratory result; however, a gross difference would lead one to go back to the pit for another look.[41] Further, only a little difference in sand content can change a sandy clay to a clayey sand.[42]

On cross-examination, Dr. Hilf stated that the Bureau had no opinion on the predominate soil type in the Lowry area,[43] and that for Zone 1 material did not look for material with a lot of clay fines, but for material that would be impervious and readily available.[44] On the relationship between the field classification and the date shown on Appellant's Exhibits S and T (the Bureau laboratory data), Dr. Hilf maintained that the field classifications were not incorrect, that neither laboratory nor field report were in error but simply reflected differences due to sample selection and the different procedures applied to classify.[45] The laboratory sample is a mere microcosm of what is seen and

[32] Tr. 484–485.
[33] Tr. 351.
[34] Tr. 353.
[35] Tr. 353, 356, 357.
[36] Tr. 361.
[37] Government Exhibit 20. Dr. Hilf is Chief Design Engineer of the Bureau of Reclamation, with a doctorate in soil mechanics. He has been a specialist in soils engineering since 1943.
[38] Drawing 308–D–52.
[39] Tr. 486.
[40] Tr. 488.
[41] Tr. 488.
[42] Tr. 489–490.
[43] Tr. 418.
[44] Tr. 519.
[45] Tr. 520–525.

described in the field.[46] In field classification whether a soil is fine grain or coarse grain is determined visually,[47] and, responding to the question as to whether or not the field people were off as to the quantity of fines, Dr. Hilf pointed out that by definition the fines are too small to be seen by the unaided eye, so the estimate of fines is done by subtraction of the estimated percentage of particles visible to the naked eye from the total amount of material.[48]

On this record, appellant's lean clay theory has no substance; the evidence for it evaporates upon analysis. First, Mr. Yamane's soil classification is at most a simple convenience, and not intended to classify the soils. Mr. Yamane himself would not use it if his purpose was soil classification. Second, Mr. Yamane's seventeen test pits can in no way reflect the predominate situation in Lowry, since 650,000 cubic yards had already been removed and compacted into embankment.[49] No one can say what that soil was *in situ*. Third, there is no support for the lean clay theory in the optimum moisture content tests of embankment material. To the extent Mr. Yamane's support of the lean clay theory rests on such tests, it is discredited.

There remains the differences between the six laboratory samples called significantly different from their corresponding field log descriptions. Although we are of the opinion that Dr. Hilf adequately explained the differences and put them into perspective as not comparable to the field data, we will, nonetheless, make a detailed comparison of those six samples with the corresponding data in the contract.

The laboratory data are from six test pits. As to three of these test pits, Nos. 110, 114 and 115, there is admittedly no significant difference between the laboratory data and the field descriptions. This eliminates five of the eleven samples from consideration.[50] We need consider, then, only test pits 111, 112 and 116. As to only these three test pits has any evidence of error been presented. With respect to the other eighteen test pits shown in the contract, and as to Specification Drawing 304–D–52, "*In place moisture and density in Lowry borrow area*, error is ascribed by implication only on the basis of the lean clay theory which we have found to be evidentiarily inadequate.

Laboratory data for test pit 111, from 1.2–4.6 feet indicates 60 percent fines, 34 percent sand, and 6 percent gravel, with a maximum par-

[46] Tr. 522.
[47] Tr. 530.
[48] Tr. 531.
[49] Tr. 342–343. When Mr. Yamane visited the site, appellant still needed 350,000 cubic yards out of 1,000,000 for Zone 1 embankment.
[50] One could view these eliminated samples as confirmatory of the correctness of the field data, just as one is urged to view the remaining six as showing error in the field data.

ticle size in the sample of 1½ inches. The field log profile for test pit 111, 1.2–4.6 feet, describe the soil as silty sand, estimated 15–20 percent silty fines, sand predominately fine to very fine, occasional thin lenses and small pockets of fine gravel. The laboratory sample shows 40–45 percent more fines, but is only 10 percent over the dividing line between clays and sands.

In test pit 111 from 5.3–12.3 feet, the laboratory data shows 51 percent fines, 33 percent sand, 16 percent gravel, with a maximum size particle in the sample of 1½ inches. The field log describes the same level as silty sand, approximately 15–20 percent silty fines, fine to medium, and with occasional angular sandstone fragments to 10 inches. The laboratory sample has 30–35 percent more fines, but is only 1 percent over the dividing line between sands and clays. We cannot tell to what extent the laboratory sample was skewed to the fine side by exclusion of rock fragments over 1½ inches.

Laboratory data for test pit 112, between 1.5–9.0 feet shows 60 percent fines, 38 percent sand, 2 percent gravel, with a maximum particle size of 1½ inches. The field log describes the material as clayey sand, approximately 20–25 percent clayey fines of medium plasticity and medium toughness, sand is predominately fine to medium. The laboratory sample is 10 percent on the fine side of the clay-sand dividing line, and shows 30–35 percent more fines than indicated in the field classification.

Another sample from test pit 112 overlaps the one given above. The second laboratory sample covers 1.5–18.2 feet, and shows 51 percent fines, 37 percent sand, 9 percent gravel, and 3 percent cobbles. The field log for level 9–18.2 feet estimates 15–25 percent silty fines, sand fine to very fine quartz, occasional pockets and lenses of angular sandstone to 3 inches in size. The overall lab sample reduces the fines by 9 percent, and the sample exceeds the sand class in fines by only 1 percent. Interestingly, the field classification data appears to parallel very closely the relative proportions of fines between the two layers as reflected in laboratory data, even though the percentages differ.

The laboratory data for test pit 116 consists of two samples, both covering 1.0–14.0 feet. The first sample, on appellant's Exhibit T, shows 78 percent fines, and 22 percent sand, with a maximum particle size in the sample of 2.38 millimeters (No. 8 sieve). The second sample, from appellant's Exhibit S shows 78 percent fines, 20 percent sand, and 2 percent gravel. The field log for test pit 116 describes the soil between 1–14 feet as silty sand, estimated 15 percent fines with low to medium plasticity and medium dry strength, sand fine medium, with irregular pockets and thin lenses of fine clean gravel. The difference in fines between laboratory sample and field log is high at 63 percent.

Of these six laboratory samples, two are borderline between sands and clays. Two exceed sands in fines by only 10 percent. Two samples from one test pit (116) show a large difference. Taking all samples as a group we do not find the differences materially significant. Only one laboratory sample out of the eleven taken shows a marked discrepancy which could possibly exceed the differences normally expected from different procedures and sampling techniques. We point out, too, that the comparison which we have made are not between contract data and field conditions, as such, but between contract data and laboratory data. Such a comparison is only marginally relevant to proof of a changed condition.

Thus, on this record, we are compelled to conclude that the claim of a changed condition fails because of a failure to prove what the actual field conditions were.[51] The only evidence of any merit at all is Mr. Yamane's identification of the soils in his test pits made during his four day visit, and, for the reasons already given, his identifications are inadequate for the purpose of classifying the soils. It is noted again that no question has been raised, except by broad sweeping allegation, about the accuracy of the preponderant bulk of the contract indications, and no error with respect to the contract indications has been proved.[52]

Although we have focused on the contract soil profiles, contract specification paragraph 57c [53] is also a contract indication relevant to the changed condition issue.[54] In our opinion paragraph 57c offers no additional promise to the contractor that if he irrigates the borrow area good results will automatically flow. The paragraph expressly refers to the contingency of the borrow material being overwet and calls attention to the possible need to excavate selectively, to stockpile, or to allow additional time for curing and drying. The Government here clearly sees the possibility of overwet materials, warns the contractor of it, and advises him, in no uncertain terms, to cover the risk in his unit prices. The situation thus differs drastically from *Ray D. Bolander*[55] where a contract provision for compaction was held to imply that compaction could be accomplished in the normal course of construction. We find nothing in the contract or its implications that could have induced in appellant a reasonable reliance that subsurface conditions would be more favorable than those actually encountered.[56]

[51] *Clark F. Cass and Walt Alloway,* IBCA–813–11–69 (February 16, 1971), 71–1 BCA par. 8712.
[52] *D. J. McQuestion and Sons* v. *United States,* Ct. Cl. No. 335–67 (March 19, 1971), *cert. denied,* 40 LW 3155.
[53] See footnote 1 above, p. 373.
[54] *Foster Construction C.A. et al.* v. *United States,* 193 Ct. Cl. 587 (1970).
[55] *Ray D. Bolander, Inc.* v. *United States,* 186 Ct. Cl. 398 (1968).
[56] *Pacific Alaska Contractors, Inc.* v. *United States,* 193 Ct. Cl. 850 (1971).

Irrigation Operations

A large amount of evidence was submitted on the issue of the irrigation of the Lowry borrow area in order to pre-wet the material. Appellant's position is that the overwet condition was a function of the soil and that the amount of water applied was not causative. The Government, on the other hand, maintains as a defense that the irrigation subcontractor, Industrial Pipelines Intermountain, Inc., simply applied too much water. We think that the weight of evidence of record supports the Government's contention and accordingly negates any inference that a changed condition existed from the mere fact that the Lowry borrow material was wetter than optimum.

Appellant's evidence was seemingly aimed at proving two propositions; first, that the irrigation subcontractor, Industrial Pipelines, Intermountain, Inc. (hereinafter IPI) utilized reasonable expertise in calculating the amount of water to be applied to achieve optimum moisture; and second, that the amount of moisture in a soil after irrigation was beyond control except as to depth of water penetration. The first point does not need to be labored. It is apparent from the record that Kirk Bowman, the IPI official who calculated the amount of water to be applied, made several errors which increased the amount of water.[57] Apart from patent arithmetic errors, Mr. Bowman also made unwarranted changes in soil classification for certain samples shown on Specification Drawing 304–D–52, basing his changes solely on the dry weight of the sample.[58] His errors led him to conclude that there were an average moisture deficiency of 7.5 percent requiring an addition of 32.4 gallons of water per cubic yard of borrow.[59] Approximately 31 gallons per cubic yard were in fact applied.[60]

Mr. Yamane, appellant's own expert, testified that 6.5 percent was a more proper figure utilizing for this purpose Bowman's field carry capacity figures.[61] Dr. Hilf testified that a simple calculation made from the data on Specification Drawing 304–D–52 would result in a 4.9 percent added moisture requirement (equal to 14.6 gallons per cubic yard).[62] Dr. Hilf, who also calculated the amount of water using Mr. Bowman's procedure, but without Bowman's classification changes, and arithmetic errors, arrived at a figure of 5.48 percent added moisture.[63]

---

[57] See Appellant's Exhibit E; Appeal File Exhibit 27, a letter from Kirk Bowman to S.S. Mullen, Inc., dated September 23, 1968.
[58] See Appeal File Exhibit 27.
[59] Exhibit E.
[60] Appeal File Exhibit 27.
[61] Tr. 273. Appellant's Exhibit R.
[62] Government Exhibit 21, Tr. 469–471.
[63] Government Exhibit 23, Tr. 496–497.

Government Exhibit 24 shows that the differences, in terms of water applied, range from 20.8 million gallons (including an allowance for inefficiency of 1/0.7) for the 4.9 percent figure, to 32 million gallons "actually" used (Mr. Bowman's letter of September 23, 1968, says 31 million gallons). Mr. Yamane's difference is 6.5/7.5 or about 13.5 percent less than actually used. Even though Mr. Yamane's calculation was based on Mr. Bowman's field carrying capacities, his amount of water is still significantly less than that actually used.

The record also shows that IPI made no field tests for soil moisture either before or during its irrigation operation.[64] It seems IPI simply set up its sprinklers, ran them for 96 hours, and then moved out.[65] It suggests a lack of prudence on the part of appellant to have allowed its subcontractor to so proceed after having been alerted by the Bureau that the irrigation by IPI was resulting in overwet material. Further, IPI used a hot climate efficiency factor in calculating the water requirement,[66] but then made no adjustment for the fact that it irrigated during the fall of 1964 when the weather was cool,[67] and during summer months of 1965 when there was considerable rain and cool weather.[68]

Appellant's second position, as mentioned, is that control of moisture content of a soil cannot be achieved, only the depth of penetration can be controlled.[69] The basis of this position is that the soil will retain water at its field carrying capacity, and excess water will drain downward under force of gravity.[70] Although there will be further movement of water in the soil subsequent to gravity drainage, these movements are long term and not of practical significance for a construction irrigation operation.[71]

Mr. Earl A. Sibly, a Senior Vice President of Shannon and Wilson in Seattle, Washington, described the basis for the conclusions. Water moves through soils in both a saturated and unsaturated state. Unsaturated flow is a function of the forces of cohesion of water to water and adhesion of water to other surfaces. With an increased volume of water tensions are reduced until gravity moves the water. Saturated flow is the equivalent of free water and occurs when all voids are filled with water.[72] Cohesion and adhesion forces are greater in soils with

[64] Tr. 432, 186.
[65] Appellant's Exhibits A, B, and C.
[66] Tr. 238.
[67] Tr. 437–438.
[68] Tr. 439.
[69] Appellant's Post-hearing Brief, pp. 9–10.
[70] Tr. 108–125.
[71] Tr. 390–391.
[72] Tr. 379–381.

small voids such as clays, and the movement of water is slower.[73] An irrigated condition is not a saturated condition. Very little soil in irrigation would be saturated and then principally near the surface.[74] Field carrying capacity is reached when essential downward movement has ceased from a practical point of view.[75] One can conclude from this testimony that field carrying capacity is some point of moisture content just short of saturation, or free downward flow under force of gravity, and just about at the maximum holding capacity of the soil through adhesion and cohesion.

The Government established that field carrying capacity is seldom used in engineering, and that it is primarily an agricultural concept,[76] and that there is no standard test to determine the water holding capacity of soils.[77] In fact, according to Government evidence, such a test is impossible.[78] Water is constantly moving in the soil because of capillary phenomena. It is arbitrary to say that field carrying capacity is reached after gravity drainage ceases because the gravity-capillarity relationship is a continuous function.[79]

Dr. Hilf contended that a measure of moisture control can be achieved, but that one must monitor the subsoil and water content and amount of water retention.[80] In the Board's opinion the evidence shows that it is not prudent to rely on a vague unmeasurable concept such as field carry capacity as a guide for achieving a favorable soil moisture content for engineering purposes. Prudence would indicate that the contractor monitor the results of irrigation, and adjust his irrigation operations accordingly. In this case no such effort was made.

Conclusion

The appeal is denied.

ROBERT L. FONNER, *Member.*

WE CONCUR:

WILLIAM F. MCGRAW, *Chairman.*

RUSSELL C. LYNCH, *Member.*

---

[73] Tr. 382.
[74] Tr. 383.
[75] Tr. 384.
[76] Tr. 392, 475.
[77] Tr. 394, 478.
[78] Government Exhibits 14 and 25.
[79] Tr. 482.
[80] Tr. 506.

December 30, 1971

UNITED STATES

v.

ISBELL CONSTRUCTION COMPANY

4 IBLA 205 Decided *December 30, 1971*

Mineral Lands: Mineral Reservation—Patents of Public Lands: Generally—Patents of Public Lands: Reservations

A reservation of all minerals to the United States in a patent of public lands to the State of Arizona pursuant to 43 U.S.C. sec. 315(g) (1970) reserves valuable deposits of sand and gravel found thereon. No exception to this rule applies where those materials comprise all or substantially all of the land in question because the statute makes provision for the owner of the surface estate to receive payment for damages caused to the land and improvements thereon by mining operations.

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

To satisfy the requirements for discovery on placer claims located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit as of that date. Where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the claim, and that no sand and gravel had been or was being marketed from the claim on July 23, 1955, the fact that the material on the claim is sufficient, both as to quantity and quality, as is the abundant supply of similar material in the area, is inadequate to show that material from the particular claim could have been profitably removed and marketed as of July 23, 1955, and the claim is properly declared null and void.

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

To satisfy the requirements of discovery on placer mining claims located for sand and gravel prior to July 23, 1955, it must be shown that the deposits could have been extracted, removed, and marketed at a profit as of that date and not as of some prospective date; where claimant fails to make that showing, the claims are properly declared null and void.

INTERIOR BOARD OF LAND APPEALS

Isbell Construction Company has appealed to the Secretary of the Interior from a decision dated February 18, 1970, by the Office of Appeals and Hearings, Bureau of Land Management, which affirmed, with modifications, the decision of a hearing examiner rejecting mineral patent applications AR-032473 and AR-032474 and holding that the two placer mining claims involved are null and void.

The contest was initiated by a complaint issued on December 30, 1964, alleging separately and collectively that:

1. The Agua Fria No. One and the Agua Fria No. Two placer mining claims were not properly located since title to the sand and gravel passed to the State of Arizona in 1945 with the surface patent.

2. No discovery of a valuable mineral deposit has been made within the limits of Agua Fria No. One or the Agua Fria No. Two placer mining claims.

The history of the claims herein at issue can be summarized as follows: On May 19, 1955, Notices of Location of Agua Fria No. One and No. Two placer mining claims were posted. Subsequently, with respect to Agua Fria No. One, an amended location notice dated February 23, 1956, was filed with the Phoenix land office, and application was made for patent on April 15, 1963. With respect to Agua Fria No. Two, the location notice was twice amended, on February 23, 1956, and again on April 29, 1963. An application for patent was filed in the interim on April 15, 1963. Both claims fall within the tracts of land patented on October 10, 1945, by the United States of America to the State of Arizona (Patent Number 1120177). By the terms of the patent "all minerals" in the lands so granted were reserved to the United States. Isbell desires to extract and market sand and gravel from both claims. It asserts that said sand and gravel fall within the mineral reservation of the above patent, and, therefore, the claims involved are patentable to it under the mining laws of the United States.

The record reflects at several points that all, or substantially all, of the surface of the Agua Fria No. One and No. Two claims is composed of sand and gravel with little, if any, silt overburden. The record further reflects that witnesses, both for the government and for Isbell testified that the sand and gravel deposits composing the claims extend below the surface, to a known depth of at least twenty feet, and reportedly "very deep"—as much as 500 to 600 feet. The particular deposits herein involved, have prospective use as general building and highway construction materials. The lands surrounding the claims are of similar geological character and sand and gravel therefrom are presently extracted and marketed for similar uses. Thus, this case presents a situation in which no meaningful distinction can be drawn between the mineral composition of the surface and the subsurface of claims sought to be patented.

The question raised in the first charge of the contest complaint is whether the common variety of sand and gravel found on the land passed to and vested in the State of Arizona in 1945, or whether it was

reserved to the United States under the terms of the general mineral reservation recited in the patent, and thereby remained subject to location until enactment of the Multiple Surface Resources Act of July 23, 1955, 30 U.S.C. sec. 611 (1964). The hearing examiner avoided the need to decide this issue by holding that the claims were invalid under the second charge of no discovery. On appeal to the Director, Bureau of Land Management, the issue was taken up and decided in favor of the state's ownership of the sand and gravel. That decision then held further that due to the absence of a market in 1955 there had been no discovery of a valuable mineral deposit, so that the claims were invalid in any event.

Appellant alleges error in the Director's decision in that a determination was made with respect to the first charge of the complaint, even though the hearing examiner made no ruling with reference to that charge. We disagree. 5 U.S.C. sec. 557 (1970). The Administrative Procedure Act, provides that an agency shall have "* * * all the powers which it would have in making the initial decision." The words "all the powers" include determinations of law as well as fact and the agency is clearly free to substitute its judgment for that of the examiner on any or all questions. K. Davis, Administrative Law Treatise § 10.04 (1958). The Director of the Bureau of Land Management was not limited in his consideration of an appeal to the particular question raised by that appeal. *Barney R. Colson*, 70 I.D. 409 (1963).

Appellant contends that the decision of *United States* v. *Schaub*, 163 F. Supp. 875 (D. Alas. 1958), is controlling of this case. We do not so view the matter. Schaub and others located a claim for low-grade sand and gravel of common variety in the Tongass National Forest, Alaska, in 1951. The court merely held that sand and gravel might be considered mineral within the purview of the mining law, that the material in question constituted a valid discovery, and that, under the mining laws in effect when the entry was made, the claim was valid. The case involved no divided ownership of the surface and mineral estates and, therefore, it contributes very little to our consideration of the first charge. As to the second charge, the issue in *Schaub* was whether the material was a locatable mineral rather than whether it had sufficient value to constitute a valid discovery as in the case at hand.

Appellant further asserts that the testimony of contestant's witnesses as to conditions on the claims cannot find support in the record. It alleges that the two mining engineers called as witnesses for the government were not physically present on the claims. Our review of the record establishes to our satisfaction that the determination of the

hearing examiner, upheld by the decision below, was correct in finding that the witnesses did in fact observe the geological character of the claims from positions on the claims, utilizing automobile speedometers, compasses, U.S.G.S. topographic maps, terrain features, and aerial photographs as aids to ascertain their position. Contrary to appellant's assertion, there is absolutely no record evidence of "denial under oath" of either of the engineers that they in fact were on the claims at the times of their respective inspections, and witness Clemmer stated categorically that he knows that he was on the claims (Tr. 101).

Authority for the imposition of the reservation is found in the statute, which provides, in pertinent part, that:

> When an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent thereto shall contain a reservation of all minerals to the United States; * * *
>
> * * * * * * * *
>
> * * * Where mineral reservations are made by the grantor in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon. . . . (43 U.S.C. § 315(g)) (1970)

The reservation of minerals to the United States was expressed in the patent as follows:

> Reserving, also, to the United States, all mineral in the lands so granted, together with the right to prospect for, mine, and remove the same, as authorized by subsection 8 [of the Act of June 28, 1934 (48 Stat. 1269)] as amended as aforesaid.

The issues thus presented by the first charge are: (1) whether common sand and gravel are "minerals" reserved to the United States, and (2) if so, whether such deposits which comprise all or substantially all of the land conveyed and are indistinguishable from the soil itself are within the ambit of the reservation.

In ascertaining whether sand and gravel are "minerals" reserved to the United States, we must observe that a diversity of opinion has emanated from the several jurisdictions which have considered somewhat similar questions. *See* Annotations, 95 A.L.R. 2d 843. It has been held that building sand and gravel is not a "mineral" within the terms of a mineral lease. *Praeletorian Diamond Oil Ass'n.* v. *Garvey*, 15 S.W.2d 698 (Tex. Civ. App. 1929); *Shell Petroleum Corporation* v. *Liberty Gravel and Sand Co.*, 128 S.W.2d 471, 475 (Tex. Civ. App. 1939). In other cases from the same jurisdiction the court

held that sand and gravel are not "minerals" within the ordinary and natural meaning unless they are exceptional in character or have a peculiar value. *Watkins* v. *Certain-Teed Products Corp.*, 231 S.W.2d 981, 985 (Tex. Civ. App. 1950). *Atwood* v. *Rodman*, 335 S.W.2d 206 (Tex. Civ. App. 1962). An earlier Alabama case construing a reservation in a deed, held that the word "minerals" means all substances in the earth's crust, sought for and removed for the substance itself, and is not limited to metallic substances but includes salt, coal, clay, stone, etc. *McCombs* v. *Stephenson*, 44 So. 867 (Sup. Ct. Ala. 1907). In Washington it was held that the word "minerals" as used in grants and reservations of mineral rights is not a definite term and is susceptible of limitations or extensions according to the language employed, the surrounding circumstances, and the intention of the grantor, if it can be ascertained. *Puget Mill Co.* v. *Duecy*, 96 P. 2d 571 (Sup. Ct. Wash. 1939). A recent Minnesota decision holding that sand and gravel were not reserved to grantors by a deed "also accepting mineral reservations", stated that the rule that ambiguities in deed must be resolved in favor of the grantee is modified by the rule that in construing reservations and exceptions in deeds, the proper method is to determine the intention of the parties from the entire deed and surrounding facts and circumstances. *Resler* v. *Rogers*, 139 N.W.2d 379 (Sup. Ct. Minn. 1965). In Michigan a conveyance of state-owned land which was subject to a reservation of all "mineral", coal, oil and gas was held to have reserved the sand and gravel to the state. *Matthews* v. *Department of Conservation of the State of Mich.*, 96 N.W.2d 160 (Sup. Ct. Mich. 1959). A Pennsylvania court held that, according to the circumstances, sand may or may not be a mineral, within the meaning of a certain state statute which accorded double damages for the unlawful removal of "minerals." *Handler* v. *Lehigh Valley Railroad Company*, 58 Atl. 488 (Sup. Ct. Penn. 1904). A Louisiana court found that "sand" and "gravel" have been classed "natural resources" as distinguished from "minerals." *Holloway Gravel Company* v. *McKowen*, 9 So. 2d 228 (Sup. Ct. La. 1942). Sand and gravel were described as "nonmetallic minerals" in *Foster* v. *Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959).

The enactment of the Multiple Surface Resources Act, *supra*, did not alter the status of reserved minerals. *Cf. State Land Dept.* v. *Tucson Rock and Sand Co.*, 481 P.2d 867 (Sup. Ct. Ariz. 1971). Solicitor's Opinion, M–36417 of February 15, 1957, contains the following statements:

> The removal of sand, gravel and certain other low-grade mineralized substances from the operation of the mining laws by Public Law 167, 84th Cong.

(69 Stat. 367, 30 U.S.C. sec. 601, *et seq.*) has no relation to the question of whether a reservation of "coal and other minerals" under section 9 of the Stock-raising Homestead Act (43 U.S.C. sec. 299) includes them.

* * * * * * *

* * * If these mineral materials in a given case meet the standard definition for "valuable minerals" as applied to low-grade deposits they must be deemed valuable and being minerals they are "valuable minerals" even though they are no longer such within the meaning of the mining law. *See Solicitor's Opinion*, M-36384 (October 19, 1956). * * *

Inasmuch as valuable deposits of sand and gravel were, for many years, regarded as minerals subject to location under the General Mining Law of 1872, 30 U.S.C. 22, *et seq.* (1970) and since the enactment of the Multiple Surface Resources Act did not affect the mineral character of these materials, we conclude that valuable deposits of common sand and gravel are minerals, and as such would ordinarily be reserved to the United States under a reservation of "minerals."

Having so decided, we face the question of whether the circumstances of this case warrant a finding that this particular deposit was not reserved to the United States, but passed to the patentee. Usually the task of interpretation is solely for the courts, as controversies between surface owners and mineral claimants pass beyond the jurisdiction of the land department. *Berg* v. *Taylor*, 51 L.D. 45 (1925). But in this instance our jurisdiction has been invoked by the necessity of acting upon appellant's application for patent of the mineral estate.

The extraction of valuable mineral substances does not deny to the surface patentee the enjoyment of his estate *so long as mining activities do not devour the surface.* 1 American Law of Mining, § 3.26 (Rocky Mountain Mineral Law Foundation). The reservation of minerals to the United States should be construed by considering the purpose of the grant for reservation in terms of the use intended. By applying such a construction, the reservation of minerals should be considered to sever from the surface all mineral substances *which can be taken from the soil and have a separate value.* The majority rule appears to be that it makes no difference whether the particular substance was known to be valuable at the time of severance, or becomes known to be of value as the result of future development of the arts and sciences. Such an approach would exclude nothing that is presently or prospectively valuable as extracted substances. *Id.* However, a minority rule has also developed which emphasizes that the interpretation to be given the term "minerals" is dependent upon popular understanding of what substances are known as minerals at the time of execution of the instrument. *New Mexico & Arizona Land Company*

v. *Elkins*, 137 F. Supp. 767 (D.N.M. 1956). *See also*, C. Lindley, A Treatise on the American Law Relating to Mines and Mineral Lands, § 93 (3d ed. 1914).

An English court of appeal has held that sand and gravel were not reserved as "minerals" or "mineral substances" in the vernacular of the mining world, the commercial world, or landowners, and as sand and gravel constituted the ordinary soil of the district, it would negate the substance of the transaction to hold that all sand and gravel which were generally a part of the soil and subsoil of the farm and obtained from the surface were reserved to the grantor. *Waring* v. *Foden*, 1 Ch. 276, 86 A.L.R. 969 (1932).

In *Hartwell* v. *Camman*, 64 Am. Dec. 448, 451 (1854), the New Jersey Court of Chancery, in construing the terms of a conveyance granting "all mines, minerals, opened or to be opened," stated:

> By the use of the terms "mines" and "minerals," it is clear that the grantor did not intend to include everything embraced in the mineral kingdom, as distinguished from what belongs to the animal and vegetable kingdom. If he did, he parted with the soil itself. . . .

In Mississippi, the court held that the intention of the party controlled the effect of a reservation of "all minerals both liquid and solid" to the grantor, and ruled that in view of the fact that gravel was under all of the land conveyed and that oil had been discovered in the area five years prior to the making of the deed, the reservation did not include sand and gravel. *Witherspoon* v. *Campbell*, 69 So. 2d 384 (Sup. Ct. Miss. 1954).

The judicial opinion most in point is *Farrell* v. *Sayre*, 270 P.2d 190 (Sup. Ct. Colo. 1954), rehearing denied in which Sayre conveyed the surface of the land involved to another, ". . . excepting and reserving all mineral and mineral rights and rights to enter upon the surface of the land and extract the same . . ." Some of the area involved is placer ground but the entire surface of the land so conveyed is nothing but sand and gravel. In reversing the trial court, the Supreme Court of Colorado, sitting en banc, said that to uphold Sayre's contention that he had reserved the sand and gravel would be tantamount to saying that originally Sayre retained all that he granted; that the deed served no useful purpose; and that the grantee received nothing. The court found that at the time of making the deed Sayre, as grantor, had no intention of reserving to himself that which he had granted, namely the sand and gravel on the surface of the land, and held that the grantor had retained no rights thereto by virtue of

the mineral reservation. *See Psencik* v. *Wessels*, 205 S.W.2d 658 (Tex. Civ. App. 1947), *error ref.*

In a somewhat analogous case, the United States, in the exercise of eminent domain, provided in its declaration of taking that all gas, oil and "other minerals" in and under said land were reserved to the owners of the subsurface estate. The successor in interest to the reserved minerals later asserted a right to remove gravel which was found exposed on the surface of the land. The court held that under the maxim of construction *ejusdem generis*, gravel was not included within the intent of the reservation and, further, that a reservation of the subsurface estate did not include gravel which was exposed at the surface and lying near the surface of the land. *Bumpus* v. *United States*, 325 F.2d 264 (10th Cir. 1963).

The question has been previously considered by the Bureau of Land Management's now defunct Office of Appeals and Hearings, which held that where the land which was patented to the State of Arizona, with a reservation of minerals to the United States, consisted almost entirely of sand and gravel those substances had passed to the state and were not reserved, so that the State Highway Department's application for a material site should be rejected. *Arizona State Dept. of Highways*, Arizona 030560, etc. (November 8, 1961). The appeal by the Highway Department to the Secretary was dismissed on the ground that, as the Bureau decision recognized the State's ownership of the material sought, the state agency had no standing to appeal from a decision which was not adverse to the interest of the state. *Arizona State Highway Department*, A–29325 (October 21, 1963).

The Supreme Court of Oregon in construing a mineral reservation, said:

> If we were to hold in this case that the right to extract sand and gravel was reserved to the grantor, we would have to assume that those who purchase land subject to a mineral reservation do so in contemplation of the possible destruction of their interest in the event that gravel lies under the surface of the land conveyed. We do not believe that parties to land transactions in this state normally have this understanding of the effect of a mineral reservation. We hold that the right to the sand and gravel in the land conveyed to defendant passed by the deed and that plaintiff has no right to recover for their removal. *Whittle* v. *Wolff*, 437 P.2d 114 (Sup. Ct. Oreg. 1968).

The case of *Smith* v. *Moore*, 474 P.2d 794 (Sup. Ct. Colo. 1970) involved a conveyance with a reservation of minerals together with "the right to ingress and egress upon said land for the purpose of mining said coal, oil and gas and other minerals together with enough of the surface of the same as may be necessary and reasonable for the proper and convenient working of such minerals. . . ." Coal had been mined from the property continuously by underground methods for

many years prior to the conveyance. After the conveyance the grantor determined that underground mining was no longer feasible and that the coal should be extracted by a stripping operation at the surface. The surface owner objected. The owner of the mineral estate contended that the reservation included the right to destroy the surface to the extent necessary and reasonable for the proper mining of the underlying minerals. The court found that the circumstances did not warrant the conclusion that the parties to the conveyance bargained in contemplation that strip mining would be necessary and that extensive destruction of the surface might be authorized without compensation, saying:

> If we were to * * * find that the plaintiff has the right to destroy any portion of the surface necessary for proper working of the coal without compensation to the defendants, we would in effect be holding that the grantor retained everything he granted by his deed, and that the grantee received nothing.

While *Smith* v. *Moore*, *supra*, deals with the surface mining of coal rather than sand and gravel, it enunciates a theme that is common to all of these decisions; *i.e.*, the concern by the several courts that the grantor, if he prevailed, would have retained dominion over that which he purportedly conveyed and the grantee would be deprived of the very substance of his bargain without compensation.

It is this aspect of the matter which distinguishes all of the foregoing cases from the case at hand. Here the statute under which the conveyance was made, and which provides the authority for the reservation, states:

> * * * Where mineral reservations are made by the grantor in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, *upon payment to the owner of the surface for damages caused to the land and improvements thereon.* . . . 43 U.S.C. 315g(d). (Italics added).

Here the Congress has foreseen the possibility of damage to the surface by reason of the reservation of minerals and has made provision for the owner of the surface to be compensated. This obviates the need for special concern where the mineral in question comprises substantially all of the surface. *See* discussion and cases collected in 1 *Amer. Law of Mining* § 3.51.

It is noteworthy that Congress also provided a similar indemnity to surface owners of land patented with a mineral reservation pursuant to a stock raising or other homestead entry for surface damages occasioned by open pit or strip mining. 30 U.S.C. sec. 54 (1970).

It being our opinion that valuable deposits of sand and gravel are reserved to the United States, and finding that there is no reason to impose an exception to that rule for the protection of the surface owner, it is our further opinion that the sand and gravel deposits here in question did not pass to the State of Arizona but were reserved to the United States, conditioned only upon a finding that the said deposits are valuable. Accordingly, the decision appealed from is reversed as to its holding with reference to the first charge of the complaint.

This brings us to the second charge which alleges that no discovery of a valuable mineral deposit has been made within the claims. Both claims were located in May 1955. The evidence is conclusive of the fact that the sand and gravel in question are common varieties, principally suitable for construction purposes. *See United States* v. *Lloyd Ramstad*, A-30351 (September 24, 1965); *United States* v. *Mount Pinos Development Corp.*, 75 I.D. 320 (1968).

Since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955, 30 U.S.C. § 611 (1970), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit, had been met by that date. *Palmer* v. *Dredge Corp.*, 398 F.2d 791 (9th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969); *United States* v. *Barrows*, 404 F.2d 749 (9th Cir. 1968), *cert. denied*, 394 U.S. 974 (1969); *United States* v. *William A. McCall, Sr.*, 2 IBLA 64, 78 I.D. 71 (1971); *United States* v. *Clear Gravel Enterprises, Inc.*, 2 IBLA 285 (1971).

In summary, the evidence, described in considerable detail in the two decisions below, is that no sand or gravel has been extracted from the claims and sold at any time. Appellant did utilize 20,000 tons of the material in construction of its own properties in the winter of 1956–57, 6,300 tons in 1963, and 4,200 tons in 1964. These were used in constructing appellant's own office, warehouse, dock facilities, airstrip, and other improvements.

The evidence presented by both sides makes copious reference to the activities on the private land adjacent to the contested claims, now held by Arizona Sand and Rock Company. The company's predecessor, Phoenix Concrete and Construction Company built a sand and gravel plant on the property in 1959. This was the first sand, rock and concrete plant in the area. Arizona Sand and Rock Company took over the property in 1959. In 1959 Sun City, Arizona, was built, creating a market. Beginning in 1959 Arizona Sand and Rock Company produced from its own properties adjacent to the claim for its ready mixed plant,

and gained a dominate market position. Lloyd A. Foster, an officer of Arizona Sand and Rock Company testified, "The latter part of '59, I think, is when they started there or had completed their planning on the Sun City development and actually work started getting pretty heavy in there in the early part of '60."

Reporting on the subject claims in 1963, a Bureau of Land Management mining engineer wrote, "It can be assumed that a market has existed in the vicinity since 1959, but with reserves held by Arizona Sand and Gravel (Rock) it would be difficult for a competitor to obtain any of the existing market." This view is reinforced by testimony to the effect that Arizona Sand and Rock is capable of serving a larger market and that it has sufficient material on the adjacent land to satisfy the existing markets for the next 10 to 20 years. This, coupled with the fact that the appellant has made no effort to capture a portion of the market that since has come into being, is indicative of the impracticality of a commercial development of the deposit. However, this decision does not rest upon our analysis of the present or potential marketability of the material, since our determination of the status of the claims must be based upon their validity as of July 23, 1955.

The testimony of Thurman Byars, Vice President of the appellant corporation and one of the original locators of the contestant claims, points up the fact that the claims were located with a view toward taking advantage of a trend which indicated that a future market would develop rather than to enter a market in existence at the time:

> Q. At the time these claims were located, what was the reason that they were located in this particular spot?
>
> A. The reason that they were primarily located was for the quality of the materials, and in what we considered an area that could probably be developed later as a good market for those materials. (Tr. 143)
>
> * * * * * * *
>
> Q. At the time the claims were located in 1955 by Isbell, what market for those materials existed in that area?
>
> A. We looked primarily to the—I am going to call it for want of better words, fringes of how the community were [*sic*] expanding to the northwest, and as been stated before, hauls often determine marketability. We felt the area in which the community was moving to the northwest offered the greatest market for this particular product. (Tr. 144)
>
> On cross examination, he testified as follows:
>
> Q. And I believe you made the statement that you felt that these two claims under discussion here today could be developed to handle future market as it came into being?
>
> A. Yes. (Tr. 164)

This evidence that the claims were located on May 19, 1955, in anticipation that they were in an area "that could probably be developed later

as a good market" takes on critical significance in light of the fact that the claims had to be valid on July 23, 1955, to subsist beyond that date. There is no evidence that a profitable market for the materials on these claims came into being in that two-month interval. To satisfy the requirement of discovery on placer mining claims located for sand and gravel prior to July 23, 1955, it must be shown that the deposit could have been extracted, removed, and marketed at a profit as of that date and not as of some prospective date; where the claimant fails to make that showing, the claims are properly declared null and void. *United States* v. *Clear Gravel Enterprises, Inc., supra.* What is required under the "marketability test" for "valuable mineral deposits" is that there be, at the time discovery is alleged, a market for the discovered material which is sufficiently profitable to attract the efforts of persons of ordinary prudence, and locations based on speculation that there may at some future date be a market for the discovered material cannot be sustained. *Barrows* v. *Hickel*, 447 F.2d 80 (9th Cir. 1971).

The appellant's removal of sand and gravel from its claims for construction of its own facilities may be regarded as sales, and it may even be assumed that such use was profitable. However, this cannot serve to validate the claims for two reasons. First, the initial use of the sand and gravel came approximately a year and a half after the critical date. Second, the isolated use for the limited construction of its own facilities cannot be equated with or substituted for an existing market. Moreover, it raises the question of why, if a market demand existed in 1955–57, the appellant made no sales after it had opened the pits on its claims and brought in the necessary equipment to extract and remove the material for its own use, particularly since there was no competing production from the adjacent land at that time.

We are obligated to conclude that no market existed on July 23, 1955, sufficient to enable appellant to show that by reason of bona fides in development, proximity to market, the existence of a present demand, and other factors, the deposit was of such value that it could have been mined, removed and disposed of at a profit. *Foster* v. *Seaton, supra; Layman* v. *Ellis*, 52 L.D. 714 (1929).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed as hereby modified.

EDWARD W. STUEBING, *Member.*

WE CONCUR:

MARTIN RITVO, *Member.*

JOAN B. THOMPSON, *Member.*

MARY I. ARATA

4 IBLA 201 Decided *December 30, 1971*

Words and Phrases

The term "signed and fully executed" as used in 43 CFR 3112.2–1(a) (1971) does not interdict the use of a rubber stamp to affix a signature to a drawing entry card, provided that it is the applicant's intention that the stamp be his signature.

Oil and Gas Leases: Applications: Generally—Regulations: Applicability—Regulations: Interpretation

Regulations should be so clear that there is no basis for an oil and gas lease applicant's noncompliance with them before they are interpreted so as to deprive him of a statutory preference right to a lease.

INTERIOR BOARD OF LAND APPEALS

Mrs. Mary I. Arata has appealed to the Secretary of the Interior from a decision by the Chief, Branch of Mineral Appeals, Bureau of Land Management,[1] dated May 22, 1969, which affirmed a Utah land office decision of January 13, 1969. Appellant's drawing entry card (No. 118–3132) was drawn December 27, 1968, for Parcel No. U 83. Her offer was rejected because her signature on the drawing card was affixed by a rubber stamp.

The regulation, 43 CFR 3123.9(c) (1970), now 43 CFR 3112.2–1(a) (1971), requires the following:

> Offers to lease * * * must be submitted on a form approved by the Director, "Simultaneous Oil and Gas Entry Card" signed and fully executed[2] by the applicant or his duly authorized agent in his behalf. * * *

The Bureau decision interpreted this regulation as having the same meaning as 43 CFR 3123.1(d) (1970), now 43 CFR 3111.1–1(a) (1971), which requires that "each offer must be * * * signed *in ink* by the offeror * * *." (Italics supplied). The Bureau decision cites no legal authority to support its conclusion.

The Bureau decision also questioned the appellant's statement that she personally stamped the card and that the stamp had never left her possession, since the drawing card originally had a different name (that of Mrs. Arata's husband) stamped on one portion of the card.

Appellant's veracity is not at issue in this matter. Even if it were, she has filed affidavits stating that she stamped the card with the intention of it being her signature, and there is nothing in the record

[1] This decision henceforth will be referred to as the Bureau decision.

[2] The term "executed" in the context of the regulation does not affect the consideration of this case. *See* 80 C.J.S. *Signatures* § 1.

to refute her affidavit. The sole question is the interpretation of "signed and fully executed" as provided in 43 CFR 3112.2–1(a) (1971).

In considering whether regulations should be interpreted to the detriment of persons who would have a statutory preference to a lease, the test to be applied is whether the regulations are so clear that there is no basis for the appellant's noncompliance. If there is doubt as to their meaning and intent such doubt should be resolved favorably to the applicants. *A. M. Shaffer et al., Betty B. Shaffer*, 73 I.D. 293 (1966); *Madge* v. *Rodda, Lockheed Propulsion Co.*, 70 I.D. 481 (1963); *William S. Kilroy et al.*, 70 I.D. 520 (1963); *Jack V. Walker et al.*, A–29402, etc. (July 22, 1963).

There is an abundance of legal authority discussing and interpreting the terms "sign" and "signature." Many state and federal cases hold that the terms included any memorandum, mark, or sign, written or placed on any instrument or writing with intent to execute or authenticate such instrument. It may be written by hand, printed, stamped, typewritten, or engraved. It is immaterial with what kind of instrument a signature is made. *Joseph Denunzio Fruit Co.* v. *Crane*, 79 F. Supp. 117 (S.D. Cal. 1948), *vacated on other grounds*, 89 F. Supp. 962 (S.D. Cal. 950), *rev'd*, 188 F.2d 569 (9th Cir. 1951), *cert. denied*, 342 U.S. 820 (1951) (contract); *Plemens* v. *Didde-Glaser, Inc.*, 244 Md. 556, 224 A.2d 464 (1966) (Uniform Commercial Code); *Blackburn* v. *City of Paducah*, 441 S.W.2d 395 (Ky. 1969) (resignation of city official); *Weiner* v. *Mullaney*, 59 Cal. App. 2d 620, 140 P.2d 704 (1943) (trust); *Bishop* v. *Norell*, 88 Ariz. 148, 353 P. 2d 1022 (1960) (Statute of Frauds). The law is well settled that a printed name upon an instrument with the intention that it should be the signature of the person is valid and has the same effect as though the name were written in the person's own handwriting. *Roberts* v. *Johnson*, 212 F.2d 672 (10th Cir. 1954).

Thus, it appears that a rubber stamp has been an acceptable form of signature and the words "signed and fully executed" would not be disconsonant with an applicant's belief that a rubber stamp would be acceptable, provided it was the applicant's intention that the stamp be his signature. This conclusion is further fortified by the Department's own rules of construction which provide that "signature" and "subscription" include a mark when the person making the same intended it as such. 43 CFR 1810.1(g) (1971).

It perhaps would be better policy to require that the signature on the drawing card be "handwritten in ink" by the offeror. However, the regulations do not so state, and we cannot add those words by implication. If the Department had intended for the card to be so signed,

it should have clearly stated.[3] As was stated in *A. M. Shaffer et al., Betty B. Shaffer*, *supra*, at 301, "* * * If it is felt that the practice followed by the appellants is objectionable, the regulations should be amended to make the offerors' obligations clear." Therefore, because of the ambiguity of the regulations, an interpretation favorable to the applicant is required.

In view of the disposition of this case, the appellant's request for a hearing would serve no useful purpose and is therefore denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the Bureau of Land Management is reversed and the case is remanded for further proceedings consistent herewith.

FREDERICK FISHMAN, *Member.*

We concur:

EDWARD W. STUEBING, *Member.*

NEWTON FRISHBERG, *Chairman.*

[3] To make the requirement even more explicit, the regulation, in addition to spelling out that the signature be handwritten, could have provided that signatures which were printed, stamped, typewritten, engraved, photographed, or cut from one instrument and attached to another, would not be acceptable. *See* 80 C.J.S. *Signatures* § 7.

INDEX-DIGEST

(Note—See front of this volume for tables)

BUREAU OF LAND MANAGEMENT

COLOR OR CLAIM OF TITLE

GENERALLY

CONTRACTS

(*see also* Labor, Rules of Practice)

CONSTRUCTION AND OPERATION

Changed Conditions

GRAZING PERMITS AND LICENSES—Continued

ADJUDICATION

ADVISORY BOARDS

APPEALS

INDIANS—Continued

454-062—72——6

OIL AND GAS LEASES—Continued

OUTER CONTINENTAL SHELF LANDS ACT

(*See also* Oil and Gas Leases)

○