UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior - - - - - - - - - - James G. Watt

Office of Hearings and Appeals - - - James Limb, Director

Office of the Solicitor - - - William H. Coldiron, Solicitor

DECISIONS OF THE UNITED STATES DEPARTMENT OF THE INTERIOR

EDITED BY

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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1982 to December 31, 1982. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable James G. Watt, served as Secretary of the Interior during the period covered by this volume; Mr. Donald P. Hodel served as Under Secretary; Messrs. G. Ray Arnett, Garrey E. Carruthers, Daniel Miller, Pedro A. Sanjuan, Kenneth L. Smith, J. Robinson West served as Assistant Secretaries of the Interior; Mr. William H. Coldiron, served as Solicitor. Messrs. James Limb and John N. Stafford, served as Directors, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "89 I.D."

Secretary of the Interior.

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Anthony C. Pagedas, Calvin J. Gillespie, Peter G. Sarantos, Thomas C. Pagedas, Donald J. Albrecht, & Fred L. Engle, d/b/a Resource Service Center v. *James G. Watt, Secretary of the Interior, Glenna M. Lane, Chief, O&G Sec. Wyo. State Office, BLM,* Civil No. C81-206, D. Wyo. Suit pending.

Geosearch Inc. & M. T. McGregor v. *James G. Watt et al.,* Civil No. C81-208, D. Wyo. Suit pending.

Hoover & Bracken Energies, Inc., 52 IBLA 27, 88 I.D. 7 (1981)

Hoover & Bracken Energies, Inc. v. *DOI, James Watt, Secretary, Doyle G. Frederich, Acting Dir. U.S. Geological Survey & Theodore Krenzke, Dep. Comm'r, BIA,* Civil No. CIV-81-461T, W.D. Okla. Judgment for plaintiff Nov. 18, 1981.

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, Sept. 20, 1965; Per curiam decision, aff'd, Apr. 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); *U.S.* v. *Ollie Mae Shearman et al.—Idaho Desert Land Entries—Indian Hill Group,* 73 I.D. 386 (1966)

Wallace Reed et al. v. *Dept. of the Interior et al.,* Civil No. 1-65-86, D. Idaho. Order denying preliminary injunction, Sept. 3, 1965; dismissed, Nov. 10, 1965; amended complaint filed, Sept. 11, 1967.

U.S. v. *Raymond T. Michener et al.,* Civil No. 1-65-93, D. Idaho. Dismissed without prejudice, June 6, 1966.

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

Civil Nos. 1-65-86 & 1-67-97 consolidated. Judgment adverse to U.S., July 10, 1970; rev'd, 480 F.2d 634 (9th Cir. 1973); *cert. denied,* 414 U.S. 1064 (1973); dismissed with prejudice subject to the terms of the stipulation, Aug. 30, 1976.

*Appeal of Inter*Helo, Inc.,* IBCA-713-5-68 (Dec. 30, 1969), 82 I.D. 591 (1975)

John Billmeyer, etc. v. *U.S.,* Ct. Cl. No. 54-74. Remanded with instructions to admit evidence, May 30, 1975.

Interpretation of Sec. 603 of the Federal Land Policy & Management Act of 1976—Bureau of Land Management (BLM) Wilderness Study, 86 I.D. 89 (1979)

Rocky Mountain Oil & Gas Ass'n v. *Cecil D. Andrus, Secretary of the Interior & Leo Krulitz, Solicitor of the Interior,* Civil No. C78-265, D. Wyo. Judgment for plaintiff, Nov. 17, 1980; appeal filed, Jan. 5, 1981.

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, Mar. 27, 1968.

Island Creek Coal Co., 1 IBSMA 316, 86 I.D. 724 (1979)

Island Creek Coal Co., Rebel Coal Co. v. *Cecil D. Andrus et al.,* Civil No. 80-3137, S.W. W. Va. Suit pending.

C. J. Iverson, 82 I.D. 386 (1975)

C. J. Iverson v. *Kent Frizzell, Acting Secretary of the Interior & Dorothy D. Rupe,* Civil No. 75-106-Blg, D. Mont. Stipulation for dismissal with prejudice, Sept. 10, 1976.

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

M. G. Johnson, 78 I.D. 107 (1971); *U.S.* v. *Menzel G. Johnson,* 16 IBLA 234 (1974)

Menzel G. Johnson v. *Rogers C. B. Morton, Secretary of the Interior, et al.,* Civil No. CN-LV-74-158, RDF, D. Nev. Judgment for defendant, Oct. 18, 1977; aff'd, Sept. 18, 1980. No petition.

June Oil & Gas, Inc., Cook Oil & Gas, Inc., 41 IBLA 394, 86 I.D. 374 (1979)

June Oil & Gas, Inc. & Cook Oil & Gas, Inc. v. *Cecil D. Andrus, Secretary of the Interior, et al.,* Civil No. 79-1334, D. Colo. Judgment for defendant, Jan. 20, 1981; appeal filed Feb. 11, 1981.

Kaiser Steel Corp., Petitioner v. *Office of Surface Mining Reclamation & Enforcement, Respondent,* 1 IBSMA 184 (1979); *Kaiser Steel Corp.,* 2 IBSMA 158, 87 I.D. 324 (1980)

Kaiser Steel Corp. v. *Office of Surface Mining & Enforcement,* Civil No. 80-656-M., D.N.M. Suit pending.

Estate of San Pierre Kilkaken (Sam E. Hill), 1 IBIA 299, 79 I.D. 583 (1972); 4 IBIA 242 (1975); 5 IBIA 12 (1976)

Christine Sam & Nancy Judge v. *Thomas Kleppe, Secretary of the Interior,* Civil No. C-76-14, E. D. Wash. Dismissed with prejudice.

Aquita L. Kluenter et al., A-30483, Nov. 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. Complaint dismissed by plaintiff, June 22, 1959.

Marlin D. Kuykendall v. *Phoenix Area Director & Yavapai-Prescott Tribe,* 8 IBIA 76, 87 I.D. 189 (1980)

Yavapai-Prescott Indian Tribe v. *Cecil D. Andrus, Secretary of the Interior, et al.,* Civil No. CIV-80-464 PCT-CLH, D. Ariz. Suit pending.

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, Mar. 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, Oct. 5, 1964; appeal voluntarily dismissed, Mar. 26, 1965.

Administrative Appeal of Ruth Pinto Lewis v. *Superintendent of the Eastern Navajo Agency,* 4 IBIA 147, 82 I.D. 521 (1975)

Ruth Pinto Lewis, Individually & as the Administratrix of the Estate of Ignacio Pinto v. *Thomas S. Kleppe, Secretary of the Interior, & U.S.,* Civil No. CIV-76-223 M, D.N.M. Judgment for plaintiff, July 21, 1977; no appeal.

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

Kenneth McGahan v. *Stewart L. Udall,* Civil No. A-21-63, D. Alaska. Dismissed on merits, Apr. 24, 1964; stipulated dismissal of appeal with prejudice, Oct. 5, 1964.

Merwin E. Liss et al., 70 I.D. 231 (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, Sept. 20, 1965; per curiam dec., aff'd, Apr. 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, Dec., 10, 1970; no appeal.

Appeal of Carmel J. McIntyre, 4 ANCAB 24, 86 I.D. 663 (1979)

Carmel J. McIntyre v. *Cecil D. Andrus, Secretary of the Interior, Frank Gregg, Dir., BLM, Curtis V. McVee, Alaska State Dir., BLM, Alaska Native Claims Appeal Board, Eklutna, Inc. & Cook Inlet Region, Inc.*, Civil No. A79–391 CIV, D. Alaska. Suit pending.

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

Mrs. Elgin A. McKenna as Executrix of the Estate of Patrick A. McKenna, Deceased v. *Udall*, Civil No. 2001–67. Judgment for defendant, Feb. 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. Or. Judgment for plaintiff, 178 F. Supp. 913 (1959); rev'd, 289 F.2d 908 (9th Cir. 1961).

Estate of Elizabeth C. Jensen McMaster, 5 IBIA 61, 83 I.D. 145 (1976)

Raymond C. McMaster v. *U.S. Dept. of the Interior, Secretary of the Interior & Bureau of Indian Affairs*, Civil No. C76–129T, W.D. Wash. Dismissed, June 29, 1978.

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, Apr. 16, 1962.

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

Marathon Oil Co., 81 I.D. 447 (1974); *Atlantic Richfield Co., Marathon Oil Co.*, 81 I.D. 457 (1974)

Marathon Oil Co. v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. C 74-179, D. Wyo.

Marathon Oil Co. v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. C 74-180, D. Wyo.

Atlantic Richfield Co. & Pasco, Inc. v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. C 74-181, D. Wyo.

Actions consolidated; judgment for plaintiff, 407 F. Supp. 1301 (1975); aff'd, 556 F.2d 982 (10th Cir. 1977).

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, Nov. 16, 1959; motion for *reconsideration denied*, Dec. 2, 1959; no appeal.

Philip T. Garigan v. *Stewart L. Udall*, Civil No. 1577 Tux., D. Ariz. Preliminary injunction against defendant, July 27, 1966; supplemental dec. rendered Sept. 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. Judgment for plaintiff, 511 F.2d 548 (1975).

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

Louise Cuccia & 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 or prosecution, Apr. 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 (Aug. 10, 1966); A-30566 (Aug. 11, 1966); & 73 I.D. 211 (1966)

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

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

Gary Carson Lewis, etc., et al. v. *General Services Administration et al.*, Civil No. 3253, S.D. Cal. Judgment for defendant, Apr. 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, Feb. 20, 1961 (opinion); aff'd, 306 F.2d 799 (1962); *cert. denied,* 371 U.S. 941 (1962).

Morrison-Knudsen Co., Inc., 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 Oct. 6, 1969; judgment for plaintiff, Feb. 17, 1970.

Mountain Enterprises Coal Co., 3 IBSMA 338, 88 I.D. 861 (1981)

Mountain Enterprises Coal Co. v. *Secretary of the Interior,* Civil No. 81-0325-B, W.D. Va. Suit pending.

Glenn Munsey v. *Smitty Baker Coal Co., Ralph Baker, Smitty Baker, & P & P Coal Co.*, 84 I.D. 336 (1977)

Glenn Munsey v. *Cecil D. Andrus,* No. 77-1619, United States Ct. of Appeals, D.C. Cir. Suit pending.

Navajo Tribe of Indians v. *State of Utah,* 80 I.D. 441 (1973)

Navajo Tribe of Indians v. *Rogers C. B. Morton, Secretary of the Interior, Joan B. Thompson, Martin Ritvo & Frederick Fishmen, members of the Board of Land Appeals, Dept. of the Interior,* Civil No. C-308-73, D. Utah. Dismissed with prejudice, Jan. 4, 1979.

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

Richard L. Oelschlaeger v. *Stewart L. Udall,* Civil No. 4181-60. Dismissed, Nov. 15, 1963; case reinstated, Feb. 19, 1964; remanded, Apr. 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. Alaska. Withdrawn Apr. 18, 1963.

Superior Oil Co. v. *Robert L. Bennett,* Civil No. A-17-63, D. Alaska. Dismissed, Apr. 23, 1963.

Native Village of Tyonek v. *Robert L. Bennett,* Civil No. A-15-63, D. Alaska. Dismissed, Oct. 11, 1963.

Mrs. Louise A. Pease v. *Stewart L. Udall,* Civil No. A-20-63, D. Alaska. Dismissed, Oct. 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. Alaska. Dismissed without prejudice, Mar. 2, 1964; no appeal.

Oil Resources, Inc., 28 IBLA 394, 84 I.D. 91 (1977)

Oil Resources, Inc. v. *Cecil D. Andrus, Secretary of the Interior,* Civil No. C-77-0147, D. Utah. Suit pending.

Old Ben Coal Co., 81 I.D. 428; 81 I.D. 436; 81 I.D. 440 (1974)

Old Ben Coal Corp. v. *Interior Board of Mine Operations Appeals et al.,* Nos. 74-1654, 74-1655, 74-1656, United States Court of Appeals for the 7th Cir. Board's decision aff'd, 523 F.2d 25 (7th Cir. 1975).

Old Ben Coal Co., 82 I.D. 355 (1975)

United Mine Workers of America v. *U.S. Interior Board of Mine Operations Appeals,* No. 75-1852, United States Court of Appeals, D.C. Cir. Vacated & remanded with instructions to dismiss as moot, June 10, 1977.

Old Ben Coal Co., 84 I.D. 459 (1977)

United Mine Workers of America v. *Cecil D. Andrus,* No. 77-1840, United States Court of Appeals, D.C. Cir. Suit pending.

Appeal of Ounalashka Corp., 1 ANCAB 104, 83 I.D. 475 (1976)

Ounalashka Corp., for & on behalf of its Shareholders v. *Thomas Kleppe, Secretary of the Interior & his successors & predecessors in office, et al.,* Civil No. A76-241 CIV, D. Alaska. Suit pending.

D. E. Pack, 30 IBLA 166, 84 I.D. 192 (1977); On reconsideration, 38 IBLA 23, 85 I.D. 408 (1978)

John S. Runnells v. *Cecil Andrus, Secretary of the Interior, et al.,* Civil No. C-77-0268, D. Utah. Rev'd & remanded to Bureau of Land Management for issuance of the leases, Feb. 19, 1980; no appeal.

Jack W. Parks v. *L & M Coal Corp.,* 83 I.D. 710 (1976)

Jack W. Parks v. *Thomas S. Kleppe,* No. 76-2052, United States Court of Appeals, D.C. Cir. Voluntary Dismissal, May 4, 1977.

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

Paul Jarvis, Inc. v. *U.S.,* Ct. Cl. No. 40-58. Stipulated judgment for plaintiff, Dec. 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.

Curtis D. Peters, 80 I.D. 595 (1973)

Curtis D. Peters v. *U.S., Rogers C. B. Morton, as Secretary of the Interior,* Civil No. C-75-0201 RFP, N.D. Cal. Judgment for defendant, Dec. 1, 1975; no appeal.

City of Phoenix v. *Alvin B. Reeves et al.,* 81 I.D. 65 (1974)

Alvin B. Reeves, Genevieve C. Rippey, Leroy Reeves & Thelma Reeves, as heirs of A. H. Reeves, Deceased v. *Rogers C. B. Morton, Secretary of the Interior & The City of Phoenix, a municipal corp.,* Civil No. 74-117 PHX-WPC, D. Ariz. Dismissed with prejudice, Aug. 9, 1974; *reconsideration denied,* Sept. 24, 1974; no appeal.

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

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

Earl W. Platt, 43 IBLA 41, 86 I.D. 458 (1979)

Barbara Garcia v. *Cecil Andrus, Secretary of the Interior, Earl W. & Buena Platt,* Civil No. CIV-80-382 PCT, D. Ariz. Suit pending.

Pocahontas Fuel Co., 83 I.D. 690 (1976)

Howard Mullins v. *Cecil D. Andrus,* No. 77-1087, United States Court of Appeals, D.C. Cir. Reversed & remanded, Dec. 31, 1980.

Pocahontas Fuel Co., 84 I.D. 489 (1977)

Pocahontas Fuel Co., Div. of Consolidation Coal Co. v. *Cecil D. Andrus,* No. 77-2239, United States Court of Appeals, 4th Cir. Suit pending.

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, Dec. 7, 1964.

Estate of John S. Ramsey (Wap Tose Note) (Nez Perce Allottee No. 853, Deceased), 81 I.D. 298 (1974)

Clara Ramsey Scott v. *U.S. & Rogers C. B. Morton, Secretary of the Interior, et al.,* Civil No. 3-74-39, D. Idaho. Dismissed with prejudice, Aug. 11, 1975; no appeal.

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

Ray D. Bolander Co. v. *U.S.,* Ct. Cl. 51-66. Judgment for plaintiff, Dec. 13, 1968; subsequent Contract Officer's dec., Dec. 3, 1969; interim dec., Dec. 2, 1969; order to Stay Proceedings until Mar. 31, 1970; dismissed with prejudice, Aug. 3, 1970.

Estate of Crawford J. Reed (Unallotted Crow No. 6412), IBIA 326, 79 I.D. 621 (1972)

George Reed, Sr. v. *Rogers Morton et al.,* Civil No. 1105, D. Mont. Dismissed, June 14, 1973; no appeal.

Reliable Coal Corp., 1 IBMA 97, 79 I.D. 139 (1972)

Reliable Coal Corp. v. *Rogers C. B. Morton, Secretary of the Interior et al.,* No. 72-1477, United States Court of Appeals, 4th Cir. Board's decision aff'd, 478 F. 2d 257 (4th Cir. 1973).

Republic Steel Corp., 82 I.D. 607 (1975)

Republic Steel Corp. v. *Interior Board of Mine Operations Appeals*, No. 76-1041, United States Court of Appeals, D.C. Cir. Rev'd & remanded, Feb. 22, 1978.

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

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

Hugh S. Ritter, Thomas M. Bunn, 72 I.D. 111 (1965), *reconsideration denied* by letter decision dated June 23, 1967, by the Under Secretary.

Thomas M. Bunn v. *Stewart L. Udall*, Civil No. 2615-65. Remanded, June 28, 1966.

Estate of William Cecil Robedeaux, 1 IBIA 106, 78 I.D. 234 (1971); 2 IBIA 33, 80 I.D. 390 (1973)

Oneta Lamb Robedeaux et al. v. *Rogers C. B. Morton*, Civil No. 71-646, D. Okla. Dismissed, Jan. 11, 1973.

Houston Bus Hill v. *Rogers C. B. Morton*, Civil No. 72-376, W. D. Okla. Judgment for plaintiff, Oct. 29, 1973; amended judgment for plaintiff, Nov. 12, 1973; appeal dismissed, June 28, 1974.

Houston Bus Hill & Thurman S. Hurst v. *Rogers C. B. Morton, Secretary of the Interior*, Civil No. 73-528-B, W. D. Okla. Judgment for plaintiff, Apr. 30, 1975; corrected judgment, May 2, 1975; per curiam dec., vacated & remanded, Oct. 2, 1975; judgment for plaintiff, Dec. 1, 1975.

Roberts Brothers Coal Co., 2 IBSMA 284, 87 I.D. 439 (1980)

Roberts Brothers Coal Co. v. *Cecil D. Andrus et al.*, Civil No. 80-016900 (G), W. D. Ky. Suit pending.

Estate of Clark Joseph Robinson, 7 IBIA 74, 85 I.D. 294 (1978)

Rene Robinson, by & through her Guardian Ad Litem, Nancy Clifford v. *Cecil Andrus, Secretary of the Interior, Gretchen Robinson & Trixi Lynn Robinson Harris*, Civil No. CIV-78-5097, D.S.D. Suit pending.

Rosebud Coal Sales Co., 37 IBLA 251, 85 I.D. 396 (1978)

Rosebud Coal Sales Co. v. *Cecil D. Andrus, Secretacy of the Interior, Frank Gregg, Director, Bureau of Land Managment, & Maria B. Bohl, Chief, Land & Mining, Bureau of Land Management, Wyo.*, Civil No. C78-261, D. Wyo. Judgment for plaintiff, Oct. 17, 1979. No appeal.

Richard W. Rowe, Daniel Gaudiane, 82 I.D. 174 (1975)

Richard W. Rowe, Daniel Gaudiane v. *Stanley K. Hathaway, in his official capacity as Secretary of the Interior*, Civil No. 75-1152. Judgment for defendant, July 29, 1976.

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, Nov. 1, 1967.

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

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

Administrative Appeal of Sessions, Inc. (A Cal. Corp.) v. *Vyola Olinger Ortner (Lessor), Lease No. PSL-33, Joseph Patrick Patencio (Lessor), Lease No. PSL-36, Larry Olinger (Lessor), Lease No. PSL-41,* 81 I.D. 651 (1974)

Sessions, Inc. v. *Rogers C. B. Morton, Secretary of the Interior, et al.,* Civil No. CV 74-3589 LTL, C.D. Cal. Dismissed with prejudice, Jan. 26, 1976.

Sessions, Inc. v. *Rogers C. B. Morton, Secretary of the Interior, et al.,* Civil No. CV 74-3591 MML, C.D. Cal. Dismissed with prejudice, Jan. 26, 1976.

Sessions, Inc. v. *Rogers C. B. Morton, Secretary of the Interior, et al.,* Civil No. CV 74-3590 FW, C.D. Cal. Dismissed with prejudice, Jan. 26, 1976.

Steve Shapiro v. *Bishop Coal Co.,* 83 I.D. 59 (1976)

Bishop Coal Co. v. *Thomas S. Kleppe,* No. 76-1368, United States Court of Appeals, 4th Cir. Suit pending.

Shell Oil Co., A-30575 (Oct. 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, Aug. 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.

Charles T. Sink, 82 I.D. 535 (1975)

Charles T. Sink v. *Thomas S. Kleppe, Secretary of the Interior—Mining Enforcement & Safety Administration (MESA),* No. 75-1292, United States Court of Appeals, 4th Cir. Vacated without prejudice to plaintiff's rights, 529 F.2d 601 (4th Cir. 1975).

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, Dec. 2, 1970 (opinion); no appeal.

Southern Pacific Co., Louis G. Wedekind, 77 I.D. 177 (1970); 20 IBLA 365 (1975)

George C. Laden, Louis Wedekind, Mrs. Vern Lear, Mrs. Arda Fritz, & Helen Laden Wagner, heirs of George H. Wedekind, Deceased v. *Rogers C. B. Morton et al.,* Civil No. R-2858, D. Nev. On June 20, 1974, remanded for further agency proceedings as originally ordered in 77 I.D. 177; Dist. Ct. reserves jurisdiction; supplemental complaint filed, Aug. 1, 1975; judgment for defendant, Nov. 29, 1976; appeal filed, Jan. 27, 1977.

Southwest Welding & 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, Jan. 14, 1970; appeal dismissed, Apr. 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, Mar. 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. Alaska. Judgment for plaintiff, 317 F. Supp. 1192 (1970); aff'd *sub nom. Standard Oil Co. of Cal.* v. *Rogers C. B. Morton et al.,* 450 F.2d 493 (9th Cir. 1971); no petition.

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, Jan. 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, Nov. 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).

Appeal of Tanacross, Inc., 4 ANCAB 173, 87 I.D. 123 (1980)

Tanacross, Inc. v. *James G. Watt et al.,* Civil No. A82-005 CIV, D. Alaska. Suit pending.

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); aff'd in part & remanded, 437 F.2d 636 (1970); aff'd in part & remanded, July 19, 1972.

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, Dec. 14, 1961.

Estate of John Thomas, Deceased, Cayuse Allottee No. 223 & 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, Sept. 18, 1958; aff'd, 270 F.2d 319 (1959); *cert. denied,* 364 U.S. 814 (1960); *rehearing denied,* 364 U.S. 906 (1960).

Thoroughfare Coal Co., 3 IBSMA 72, 88 I.D. 406 (1981)

Thoroughfare Coal Co. v. *James G. Watt, Secretary of the Interior,* Civil No. C81-0068, W.D. Ky. Suit pending.

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, Mar. 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, Aug. 2, 1962; aff'd, 350 F.2d 748 (1965); no petition.

Appeal of Toke Cleaners, 81 I.D. 258 (1974)

Thom Properties, Inc., d/b/a Toke Cleaners & Launderers v. *U.S., Department of the Interior, Bureau of Indian Affairs,* Civil No. A3-74-99, D.N.D. Stipulation for dismissal & order dismissing case, June 16, 1975.

Tollage Creek Elkhorn Mining Co., 2 IBSMA 341, 87 I.D. 570 (1980)

Tollage Creek Elkhorn Mining Co. v. *Cecil D. Andrus,* Civil No. 80-230, E.D. Ky. Suit pending.

Estate of Phillip Tooisgah, 4 IBIA 189, 82 I.D. 541 (1975)

Jonathan Morris & Velma Tooisgah v. *Thomas S. Kleppe, Secretary of the Interior,* Civil No. CIV-76-0037-D, W.D. Okla. Dismissed, 418 F. Supp. 913 (1976). No appeal.

TOSCO v. *Secretary of the Interior*

See Union Oil Co., 71 I.D. 169 (1964)

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, 71 I.D. 287 (1964)

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

Union Oil Co. of California et al., 71 I.D. 169 (1964); 72 I.D. 313 (1965); *U.S.* v. *Bohme,* 48 IBLA 267, 87 I.D. 248; 51 IBLA 97, 87 I.D. 535 (1980)

Penelope Chase Brown et al. v. *Stewart Udall,* Civil No. 9202, D. Colo.

Barnette T. Napier et al. v. *Secretary of the Interior,* Civil No. 8691, D. Colo.

The Oil Shale Corp. et al. v. *Secretary of the Interior,* Civil No. 8680, D. Colo.

Joseph B. Umpleby et al. v. *Stewart L. Udall,* Civil No. 8685, D. Colo.

FOR ABOVE CASES: 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., Mar. 12, 1971; judgment for plaintiff, 370 F. Supp. 108 (1973); vacated & remanded, Sept. 22, 1975; petition for rehearing *en banc* denied; *cert. denied,* June 21, 1976; remanded to the Dept. for further proceedings, Jan. 17, 1977.

Equity Oil Co. v. *Stewart L. Udall,* Civil No. 9462, D. Colo.

Gabbs Exploration Co. v. *Stewart L. Udall,* Civil No. 9464, D. Colo.

Harlan H. Hugg et al. v. *Stewart L. Udall,* Civil No. 9252, D. Colo.

John W. Savage v. *Stewart L. Udall,* Civil No. 9458, D. Colo.

The Oil Shale Corp. et al. v. *Stewart L. Udall,* Civil No. 9465, D. Colo.

Union Oil Co. of California, a Corp. v. *Stewart L. Udall,* Civil No. 9461, D. Colo.

FOR ABOVE CASES: Order to Close Files & Stay Proceedings, Mar. 25, 1967.

Union Oil Co. of California, Roman 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 (option); aff'd, 289 F.2d 790 (1961); no petition.

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

The State of Wyoming & 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).

United Mine Workers of America v. *Inland Steel Co.*, 83 I.D. 87 (1976)

United Mine Workers of America v. *Thomas S. Kleppe*, No. 76-1377, United States Court of Appeals, 7th Cir. Board's decision aff'd, 561 F.2d 1258 (7th Cir. 1977).

United Mine Workers of America, Local Union No. 1993 v. *Consolidation Coal Co.*, 84 I.D. 254 (1977)

Local Union No. 1993, United Mine Workers of America v. *Cecil D. Andrus*, No. 77-1582, United States Court of Appeals, D.C. Cir. Suit pending.

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, Nov. 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, Jan. 29, 1962 (opinion); judgment modified, 318 F.2d 861 (9th Cir. 1963); no petition.

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

Esther Barrows, as an individual & 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, Apr. 20, 1970; aff'd, 447 F.2d 80 (9th Cir. 1971).

U.S. v. *J. L. Block*, 80 I.D. 571 (1973)

J. L. Block v. *Rogers Morton, Secretary of the Interior*, Civil No. LV-74-9, BRT, D. Nev. Judgment for defendant, June 6, 1975; rev'd & remanded with instructions to remand to the Secretary of the Interior, Mar. 29, 1977; no petition.

U.S. v. *Lloyd W. Booth*, 76 I.D. 73 (1969)

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

U.S. v. *Alice A. & Carrie H. Boyle*, 76 I.D. 61, 318 (1969), *reconsideration denied*, Jan. 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. Judgment for plaintiff, May 4, 1972; rev'd & remanded, 519 F.2d 551 (9th Cir. 1975); *cert. denied*, 423 U.S. 1033 (1975).

U.S. v. *R. W. Brubaker et al.*, A-30636 (July 24, 1968); 9 IBLA 281, 80 I.D. 261 (1973)

R. W. Brubaker, a/k/a Ronald W. Brubaker, B. A. Brubaker, a/k/a Barbara A. Brubaker, & William J. Mann, a/k/a W. J. Mann v. *Rogers C. B. Morton, Secretary of the Interior*, Civil No. 73-1228 EC, C.D. Cal. Dismissed with prejudice, Aug. 13, 1973; aff'd, 500 F.2d 200 (9th Cir. 1974); no petition.

U.S. v. *Brubaker-Mann, Inc., R. W. Brubaker, a/k/a Ronald W. Brubaker, B. A. Brubaker, a/k/a/ Barbara A. Brubaker & William J. Mann, a/k/a W. J. Mann*, Civil No. 74-742-JWC, C. D. Cal. Stipulated agreement dated Jan. 30, 1975, and accepted by the defendants on Feb. 3, 1975; final judgment entered May 7, 1975.

U.S. v. *Henrietta & Andrew Julius Bunkowski*, 5 IBLA 102, 79 I.D. 43 (1972)

Henrietta & Andrew Julius Bunkowski v. *L. Paul Applegate, District Manager, Bureau of Land Management, Thomas S. Kleppe, Secretary of the Interior, et al.*, Civil No. R-76-182-BRT, D. Nev. Dismissed with prejudice, Nov. 27, 1978.

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

Ford M. Converse v. *Stewart Udall*, Civil No. 65-581, D. Or. 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. Judgment for defendant, Jan. 31, 1972.

Reid Smith v. *Stewart L. Udall, etc.*, Civil No. 1053, D. Ariz. Judgment for defendant, Jan. 31, 1972; aff'd, Feb. 1, 1974; *cert. denied*, Oct. 15, 1974.

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, Dec. 5, 1958 (opinion); aff'd, 271 F.2d 836 (1959); no petition.

U.S. v. *Golden Grigg et al.*, 19 IBLA 379, 82 I.D. 123 (1975)

Golden T. Grigg, LeFawn Grigg, Fred Baines, Otis H. Williams, Kathryn Williams, Lovell Taylor, William A. Anderson, Saragene Smith, Thomas M. Anderson, Bonnie Anderson, Charles L. Taylor, Darlene Baines, Luann & Paul E. Hogg v. *U.S., Rogers C. B. Morton, Secretary of the Interior*, Civil No. 1-75-75, D. Idaho. Judgment for defendant, Nov. 6, 1979; appeal filed, Jan. 3, 1980.

U.S. v. *Richard P. Haskins*, A-30737 (Dec. 19, 1966); 3 IBLA 77 (1971); 59 IBLA 1, 88 I.D. 925 (1981)

Richard P. Haskins for Himself & as Admin. of the Estate of Bartholomew H. Haskins, Deceased v. *Udall*, Civil No. 67-1815-CC, C.D. Cal. Judgment for defendant, Apr. 15, 1968; remanded to Director, Bureau of Land Management for an exercise of discretion, Oct. 3, 1969.

U.S. v. *Richard P. Haskins*, Civil No. 72-246 JWC, C.D. Cal. Judgment for plaintiff, May 18, 1972 (opinion); *rehearing denied*, June 28, 1972; aff'd & remanded for further proceedings, Oct. 25, 1974; no petition. 505 F.2d 246 (9th Cir. 1974)

Richard P. Haskins v. *James Watt*, Civil No. 82-2112 CBM (JRX), C.D. Cal. Suit pending.

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, Oct. 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. *Humboldt Placer Mining Co. & Del De Rosier,* 79 I.D. 709 (1972)

Humboldt Placer Mining Co. & Del De Rosier v. *Secretary of the Interior,* Civil No. S-2755, E.D. Cal. Dismissed with prejudice, June 12, 1974; aff'd, 549 F.2d 622 (9th Cir. 1977); petition for cert. filed, June 25, 1977.

U.S. v. *Ideal Cement Co.,* 5 IBLA 235, 79 I.D. 117 (1972)

Ideal Basic Industries, Inc., formerly known as Ideal Cement Co. v. *Rogers C. B. Morton,* Civil No. J-12-72, D. Alaska. Judgment for defendant, Feb. 25, 1974; motion to vacate judgment denied, May 6, 1974; aff'd, 542 F.2d 1364 (9th Cir. 1976).

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. Or. 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, Jan. 23, 1968; no appeal.

U.S. v. *William A. McCall, Sr., The Dredge Corp., Estate of Olaf H. Nelson, Deceased, Small Tract Applicants Ass'n, Intervenor,* 2 IBLA 64, 78 I.D. 71 (1971)

William A. McCall, Sr., The Dredge Corp. & Olaf H. Nelson v. *John F. Boyles et al.,* Civil No. 74-68(RDF), D. Nev. Judgment for defendant, June 15, 1976; petition for reconsideration denied, Aug. 17, 1977; aff'd, July 10, 1980; rehearing *en banc* denied, Oct. 17, 1980; *cert. denied,* Mar. 23, 1981.

U.S. v. *William A. McCall, Sr., Estate of Olaf Henry Nelson, Deceased,* 7 IBLA 21, 79 I.D. 457 (1972)

William A. McCall, Sr. & the Estate of Olaf Henry Nelson, deceased v. *John S. Boyles, District Manager, Bureau of Land Management, Thomas S. Kleppe, Secretary of the Interior, et al.,* Civil No. LV-76-155 RDF, D. Nev. Judgment for defendant, Nov. 4, 1977; aff'd 628 F.2d 1185 (9th Cir. 1980); *cert. denied,* Mar. 23, 1981.

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. 116, 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, Aug. 13, 1969.

U.S. v. *Charles Maher et al.,* 5 IBLA 209, 79 I.D. 109 (1972)

Charles Maher & L. Franklin Mader v. *Rogers C. B. Morton, Secretary of the Interior,* Civil No. 1-72-153, D. Idaho. Dismissed without prejudice, Apr. 3, 1973.

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, Nov. 16, 1966; rev'd & remanded, 403 F.2d 816 (1968); no petition.

U.S. v. *Frank & Wanita Melluzzo,* 76 I.D. 160 (1969); 32 IBLA 46 (1977)

Frank & Wanita Melluzzo v. *Rogers C. B. Morton,* Civil No. CIV 73-308 PHX CAM, D. Ariz. Judgment for defendant, June 19, 1974; aff'd in part & rev'd & remanded in part, 534 F.2d 860 (9th Cir. 1976); no petition.

Frank & Wanita Melluzzo v. *Cecil Andrus, Secretary of the Interior,* Civil No. CIV-79-282 PHX, CAM, D. Ariz. Judgment for defendant, May 20, 1980.

U.S. v. *Frank & Wanita Melluzzo, et al.,* 76 I.D. 181 (1969); reconsideration, 1 IBLA 37, 77 I.D. 172 (1970)

WJM Mining & Development Co. et al. v. *Rogers C. B. Morton,* Civil No. 70-679, D. Ariz. Judgment for defendant, Dec. 8, 1971; dismissed, Feb. 4, 1974.

U.S. v. *Frank & Wanita Melluzzo,* 38 IBLA 214, 85 I.D. 441 (1978)

Frank & Wanita Melluzzo v. *U.S., James Watt, Secretary of the Interior,* Civil No. 81-607 PHX CAM, D. Ariz. Suit pending.

U.S. v. *Mineral Ventures, Ltd.,* 80 I.D. 792 (1973)

Mineral Ventures, Ltd. v. *The Secretary of the Interior,* Civil No. 74-201, D. Or. Judgment for defendant, July 10, 1975; vacated & remanded, May 3, 1977; modified amended judgment, Sept. 9, 1977.

U.S. v. *G. Patrick Morris et al.,* 82 I.D. 146 (1975)

G. Patrick Morris, Joan E. Roth, Elise L. Neeley, Lyle D. Roth, Vera M. Baltzor (formerly Vera M. Noble), Charlene S. & George R. Baltzor, Juanita M. & Nellie Mae Morris, Milo & Peggy M. Axelsen, & Farm Development Corp. v. *U.S. & Rogers C. B. Morton, Secretary of the Interior,* Civil No. 1-75-74, D. Idaho. Aff'd in part, rev'd in part, Dec. 20, 1976; rev'd, 593 F.2d 851 (9th Cir. 1978). Dismissed with prejudice, June 23, 1980; motion to vacate denied Oct. 9, 1980; appeal filed Dec. 3, 1980.

U.S. v. *New Jersey Zinc Co.,* 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, Jan. 5, 1970.

U.S. v. *Lloyd O'Callaghan, Sr., et al.,* 79 I.D. 689 (1972); *U.S.* v. *Lloyd O'Callaghan, Sr.,* Contest No. R-04845 (July 7, 1975), 29 IBLA 333 (1977)

Lloyd O'Callaghan, Sr., Individually & as Executor of the Estate of Ross O'Callaghan v. *Rogers Morton et al.,* Civil No. 73-129-S, S.D. Cal. Aff'd in part & remanded, May 14, 1974. Judgment for defendant, May 16, 1978, aff'd, May 8, 1980.

U.S. v. *J. R. Osborne et al.,* 77 I.D. 83 (1970); 28 IBLA 13 (1976), *reconsideration denied* by order dated Jan. 4, 1977

J. R. Osborne, individually & on behalf of R. R. Borders et al v. *Roger C. B. Morton et al.,* Civil No. 1564, D. Nev. Judgment for defendant, Mar. 1, 1972; remanded to Dist. Ct. with directions to reassess Secretary's conclusion, Feb. 22, 1974; remanded to the Dept. with orders to re-examine the issues, Dec. 3, 1974.

Bradford Mining Corp., successor of J. R. Osborne, agent for various persons v. *Cecil D. Andrus, Secretary of the Interior,* Civil No. LV-77-218, RDF, D. Nev. Suit pending.

U.S. v. *Pittsburgh Pacific Co.,* 30 IBLA 388, 84 I.D. 282 (1977)

Pittsburgh Pacific Co. v. *U.S., Dept. of the Interior, Cecil Andrus, Joseph W. Goss, Anne Poindexter Lewis, Martin Ritvo, State of South Dakota, Dept. of Environmental Protection & Allen Lockner,* Civil No. CIV77-5055, W.D.S.D. Suit pending.

State of South Dakota v. *Cecil D. Andrus, Secretary of the Interior, et al.,* Civil No. CIV 77-5058, W.D.S.D. Dismissed, Dec. 26, 1978; aff'd, Feb. 12, 1980; cert. denied, Sept. 4, 1980.

U.S. v. *E. V. Pressentin & 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, Mar. 19, 1969; no appeal.

U.S. v. *Ollie Mae Shearman et al.,* 73 I.D. 386 (1966).
See Idaho Desert Land Entries—Indian Hill Group

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. *Rogers C. B. Morton et al.,* Civil No. S-2155, E.D. Cal. Judgment for defendant, Nov. 20, 1974.

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.

U.S. v. *Elmer H. Swanson,* 81 I.D. 14 (1974); 34 IBLA 25 (1978)

Elmer H. Swanson v. *Rogers C. B. Morton, Secretary of the Interior,* Civil No. 4-74-10, D. Idaho. Dismissed without prejudice, Dec. 23, 1975 (opinion).

Elmer H. Swanson & Livingston Silver, Inc. v. *Cecil D. Andrus, Secretary of the Interior,* Civil No. CIV-78-4045, D. Idaho. Suit pending.

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

Alfred N. Verrue v. *U.S. et al.,* Civil No., 6898 Phx., D. Ariz. Rev'd & remanded, Dec. 29, 1970; aff'd, 457 F.2d 1202 (9th Cir. 1971); no petition.

U.S. v. *Vernon O. & Ina C. White,* 72 I.D. 552 (1965)

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

U.S. v. *Frank W. Winegar et al.,* 81 I.D. 370 (1974)

Shell Oil Co. & D. A. Shale, Inc. v. *Rogers C. B. Morton, Secretary of the Interior,* Civil No. 74-F-739, D. Colo. Judgment for plaintiff, Jan. 17, 1977; aff'd, Jan. 25, 1979.

U.S. v. *Elodymae Zwang, U.S.* v. *Darrell Zwang,* 26 IBLA 41, 83 I.D. 280 (1976)

Darrell & Elodymae Zwang v. *Cecil Andrus, Secretary of the Interior,* Civil No. 77-1431 R, D. Cal. Judgment for plaintiff, Aug. 20, 1979.

U.S. v. *Merle I. Zweifel et al.,* 80 I.D. 323 (1973)

Merle I. Zweifel et al. v. *U.S.,* Civil No. C-5276, D. Colo. Dismissed without prejudice, Oct. 31, 1973.

Kenneth Roberts et al. v. *Rogers C. B. Morton & The Interior Board of Land Appeals,* Civil No. C-5308, D. Colo. Dismissed with prejudice, 389 F. Supp. 87 (1975); aff'd, 549 F.2d 158 (10th Cir. 1977).

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

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

Estate of Cecelia Smith Vergote (Borger), Morris A. (K.) Charles & Caroline J. Charles (Brendale), 5 IBIA 96, 83 I.D. 209 (1976)

Confederated Tribes & Bands of the Yakima Indian Nation v. *Thomas Kleppe, Secretary of the Interior & Philip Brendale,* Civil No. C-76-199, E.D. Wash. Suit pending.

Estate of Florence Bluesky Vessell (Unallotted Lac Courte Oreilles Chippewa of Wisconsin), 1 IBIA 312, 79 I.D. 615 (1972)

Constance Jean Hollen Eskra v. *Rogers C. B. Morton et al.,* Civil No. 72-C-428, D. Wis. Dismissed, 380 F. Supp. 205 (1974); rev'd, Sept. 29, 1975; no petition.

Virginia Iron, Coal & Coke Co., 2 IBSMA 165, 87 I.D. 327 (1980)

Virginia Iron, Coal & Coke Co. v. *Cecil D. Andrus, Secretary of the Interior,* Civil No. 80-0245-B, W.D. Va. Suit pending.

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. Amended complaint filed, Mar. 17, 1971; judgment for plaintiff, Feb. 28, 1975.

Estate of Milward Wallace Ward, 82 I.D. 341 (1975)

Alfred Ward, Irene Ward Wise, & Elizabeth Collins v. *Kent Frizzell, Acting Secretary of the Interior, et al.,* Civil No. C75-175, D. Wyo. Dismissed, Jan. 1, 1976.

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, Oct. 26, 1959; satisfaction of judgment entered, Feb. 9, 1960.

Estate of Mary Ursula Rock Wellknown, 1 IBIA 83, 78 I.D. 179 (1971)

William T. Shaw, Jr., et al. v. *Rogers C. B. Morton et al.,* Civil No. 974, D. Mont. Dismissed, July 6, 1973 (opinion); no appeal.

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Herman *v.* Chase (37 L.D. 590); overruled, 43 L.D. 246 (1914).

Herrick, Wallace H. (24 L.D. 23); overruled, 25 L.D. 113 (1897).

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

Hildreth, Henry (45 L.D. 464); vacated, 46 L.D. 17 (1917).

Hindman, Ada I. (42 L.D. 327); vacated in part, 43 L.D. 191 (1914).

Hoglund, Svan (42 L.D. 405); vacated, 43 L.D. 538 (1914).

Holbeck, Halvor F., A-30376 (Dec. 2, 1965); overruled, 79 I.D. 416 (1972).

Holden, Thomas A. (16 L.D. 493); overruled, 29 L.D. 166 (1899).

Holland, G. W. (6 L.D. 20); overruled, 6 L.D. 639; 12 L.D. 433, 436 (1891).

Holland, William C. (M-27696); decided Apr. 26, 1934; overruled in part, 55 I.D. 215, 221 (1935).

Hollensteiner, Walter (38 L.D. 319); overruled, 47 L.D. 260 (1919).

Holman *v.* Central Montana Mines Co. (34 L.D. 568); overruled so far as in conflict, 47 L.D. 590 (1920).

Hon *v.* Martinas (41 L.D. 119); modified, 43 L.D. 196, 197 (1914).

Hooper, Henry (6 L.D. 624); modified, 9 L.D. 86, 284 (1899).

Howard *v.* Northern Pacific R.R. Co. (23 L.D. 6); overruled, 28 L.D. 126 (1899).

Howard, Thomas (3 L.D. 409) (See 39 L.D. 162, 225 (1910)).

Howell, John H. (24 L.D. 35); overruled, 28 L.D. 204 (1899).

Howell, L. C. (39 L.D. 92); in effect overruled (See 39 L.D. 411 (1910)).

Hoy, Assignee of Hess (46 L.D. 421); overruled, 51 L.D. 287 (1925).

Hughes *v.* Greathead (43 L.D. 497); overruled, 49 L.D. 413 (1923) (See 260 U.S. 427).

Hull *v.* Ingle (24 L.D. 214); overruled, 30 L.D. 258 (1900).

Huls, Clara (9 L.D. 401); modified, 21 L.D. 377 (1895).

Humble Oil & Refining Co. (64 I.D. 5); distinguished, 65 I.D. 316 (1958).

Hunter, Charles H. (60 I.D. 395); distinguished, 63 I.D. 65 (1956).

Hurley, Bertha C. (TA-66 (Ir.)), Mar. 21, 1952, unreported; overruled, 62 I.D. 12 (1955).

Hyde, F. A. (27 L.D. 472); vacated, 28 L.D. 284 (1899).

Hyde, F. A. (40 L.D. 284); overruled, 43 L.D. 381 (1914).

Hyde *v.* Warren (14 L.D. 576, 15 L.D. 415) (See 19 L.D. 64 (1894)).

Ingram, John D. (37 L.D. 475) (See 43 L.D. 544 (1914)).

Inman *v.* Northern Pacific R.R. Co. (24 L.D. 318); overruled, 28 L.D. 95 (1899).

Instructions (4 L.D. 297); modified, 24 L.D. 45 (1897).

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

Instructions (51 L.D. 51); overruled so far as in conflict, 54 I.D. 36 (1932).

Interstate Oil Corp. & Frank O. Chittenden (50 L.D. 262); overruled so far as in conflict, 53 I.D. 288 (1930).

Iowa Railroad Land Co. (23 L.D. 79); (24 L.D. 125); vacated, 29 L.D. 79 (1899).

Jacks *v.* Belard (29 L.D. 369); vacated, 30 L.D. 345 (1900).

Johnson *v.* South Dakota (17 L.D. 411); overruled so far as in conflict, 41 L.D. 21, 22, (1912).

Jones, James A. (3 L.D. 176); overruled, 8 L.D. 448 (1889).

Jones *v.* Kennett (6 L.D. 688); overruled, 14 L.D. 429 (1892).

Kackmann, Peter (1 L.D. 86); overruled, 16 L.D. 463, 464 (1893).

Kanawha Oil & Gas Co., Assignee (50 L.D. 639); overruled so far as in conflict, 54 I.D. 371 (1934).

Keating Gold Mining Co., Montana Power Co., Transferee, 52 L.D. 671 (1929); overruled in part, Arizona Public Service Co., 5 IBLA 137, 79 I.D. 67 (1972).

Keller, Herman A., 14 IBLA 188, 81 I.D. 26 (1974); distinguished, Robert E. Belknap, 55 IBLA 200 (1981).

Kemp, Frank A. (47 L.D. 560); overruled so far as in conflict, 60 I.D. 417, 419 (1950).

Kemper *v.* St. Paul & Pacific R.R. Co. (2 C.L.L. 805); overruled, 18 L.D. 101 (1894).

Kilner, Harold E. (A-21845); Feb. 1, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260 (1946).

King *v.* Eastern Oregon Land Co. (23 L.D. 579); modified, 30 L.D. 19 (1900).

Kinney, E. C. (44 L.D. 580); overruled so far as in conflict, 53 I.D. 228 (1930).

Kinsinger *v.* Peck (11 L.D. 202) (See 39 L.D. 162, 225 (1910)).

Kiser *v.* Keech (7 L.D. 25); overruled, 23 L.D. 119 (1896).

Knight, Albert B. (30 L.D. 227); overruled, 31 L.D. 64 (1901).

Knight *v.* Heirs of Knight (39 L.D. 362, 491); 40 L.D. 461; overruled, 43 L.D. 242 (1914).

Kniskern *v.* Hastings & Dakota R.R. Co. (6 C.L.O. 50); overruled, 1 L.D. 362 (1883).

Kolberg, Peter F. (37 L.D. 453); overruled, 43 L.D. 181 (1914).

Krighaum, James T. (12 L.D. 617); overruled, 26 L.D. 448 (1898).

Krushnic, Emil L. (52 L.D. 282, 295); vacated, 53 I.D. 42, 45 (1930) (See 280 U.S. 306).

Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715 (1909).

La Follette, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 I.D. 416, 422 (1947).

Lamb *v.* Ullery (10 L.D. 528); overruled, 32 L.D. 331 (1903).

Largent, Edward B. (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321 (1913).

Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242 (1914).

Lasselle *v.* Missouri, Kansas & Texas Ry. Co. (3 C.L.O. 10); overruled, 14 L.D. 278 (1892).

Las Vegas Grant (13 L.D. 646; 15 L.D. 58); revoked, 27 L.D. 683 (1898).

Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361 (1912).

Laughlin *v.* Martin (18 L.D. 112); modified, 21 L.D. 40 (1895).

Law *v.* State of Utah (29 L.D. 623); overruled, 47 L.D. 359 (1920).

Layne & Bowler Export Corp., IBCA-245 (Jan. 18, 1961), 68 I.D. 33; overruled insofar 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. 389 (1898).

Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 463, 464 (1893).

Liability of Indian Tribes for State Taxes Imposed on Royalty Received from Oil and Gas Leases, 58 I.D. 535 (1943); superseded to extent it is inconsistent with Solicitor's Opinion—Tax Status of the Production of Oil and Gas from Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M-36896, 84 I.D. 905 (1977).

Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299 (1885).

Linderman *v.* Wait (6 L.D. 689); overruled, 13 L.D. 459 (1891).

Linhart *v.* Santa Fe Pacific R.R. Co. (36 L.D. 41); overruled, 41 L.D. 284 (See 43 L.D. 536 (1914)).

Liss, Merwin E. Cumberland & Allegheny Gas Co., 67 I.D. 385 (1960); overruled, 80 I.D. 395 (1973).

Little Pet Lode (4 L.D. 17); overruled, 25 L.D. 550 (1897).

Lock Lode (6 L.D. 105); overruled so far as in conflict, 26 L.D. 123 (1898).

Lockwood, Francis A. (20 L.D. 361); modified, 21 L.D. 200 (1895).

Lonergan *v.* Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199 (1907).

Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157 (1889).

Louisiana, State of (24 L.D. 231); vacated, 26 L.D. 5 (1898).

Louisiana, State of (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291 (1925).

Louisiana, State of (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291 (1925).

Lucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495 (1897).

Luse, Jeanette L. (61 I.D. 103); distinguished by Richfield Oil Corp., 71 I.D. 243 (1964).

Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102 (1906).

Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221 (1914).

Lynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 713 (1891).

Mable Lode (26 L.D. 675); distinguished, 57 I.D. 63 (1939).

Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448 (1898).

Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399 (1907).

Maginnis, John S. (32 L.D. 14); modified, 42 L.D. 472 (1913).

Maher, John M. (34 L.D. 342); modified, 42 L.D. 472 (1913).

Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313 (1913).

Makela, Charles (46 L.D. 509); extended, 49 L.D. 244 (1922).

Makemson *v.* Snider's Heirs (22 L.D. 511); overruled, 32 L.D. 650 (1904).

Malone Land & Water Co. (41 L.D. 138); overruled in part, 43 L.D. 110 (1914).

Maney, John J. (35 L.D. 250); modified, 48 L.D. 153 (1921).

Maple, Frank (37 L.D. 107); overruled, 43 L.D. 181 (1914).

Martin *v.* Patrick (41 L.D. 284); overruled, 43 L.D. 536 (1914).

Martin, Wilbur, Sr., A-25862 (May 31, 1950); overruled to extent inconsistent, U.S. *v.* Flynn, 53 IBLA 208, 88 I.D. 373 (1981).

Mason *v.* Cromwell (24 L.D. 248); vacated, 26 L.D. 368 (1898).

Masten, E. C. (22 L.D. 337); overruled, 25 L.D. 111 (1897).

Mather *v.* Hackley's Heirs (15 L.D. 487); vacated, 19 L.D. 48 (1894).

Maughan, George W. (1 L.D. 25); overruled, 7 L.D. 94 (1888).

Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 87, 88 (1921).

McBride *v.* Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33 (1927).

McCalla *v.* Acker (29 L.D. 203); vacated, 30 L.D. 277 (1900).

McCord, W. E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 I.D. 73 (1937).

McCornick, William S. (41 L.D. 661, 666); vacated, 43 L.D. 429 (1914).

McCraney *v.* Heirs of Hayes (33 L.D. 21); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).

McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285 (1908).

McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616 (1901) (See 35 L.D. 399).

McFadden *v.* Mountain View Mining & Milling Co. (26 L.D. 530); vacated, 27 L.D. 358 (1898).

McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166 (1899).

McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502 (1897).

McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148 (1909).

McHarry *v.* Stewart (9 L.D. 344); criticized and distinguished, 56 L.D. 340 (1938).

McKernan *v.* Bailey (16 L.D. 368); overruled, 17 L.D. 494 (1893).

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) (1913)).

McMicken, Herbert (10 L.D. 97; 11 L.D. 96); distinguished, 58 I.D. 257, 260 (1942).

McNamara *v.* State of California (17 L.D. 296); overruled, 22 L.D. 666 (1896).

McPeek *v.* Sullivan (25 L.D. 281); overruled, 36 L.D. 26 (1907).

Mead, Robert E., 62 I.D. 111 (1955); overruled, Jones-O'Brien, Inc., 1 Sec 13, 85 I.D. 89 (1978).

Mee *v.* Hughart (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. 659, 660 (1923).

Meeboer *v.* Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).

Mercer *v.* Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649 (1907).

Meyer *v.* Brown (15 L.D. 307) (See 39 L.D. 162, 225 (1910)).

Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436 (1891).

Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 I.D. 371 (1934).

Mikesell, Henry D., A-24112 (Mar. 11, 1946); rehearing denied (June 20, 1946); overruled to extent inconsistent, 70 I.D. 149 (1963).

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

Miller, Duncan, A-29760 (Sept. 18, 1963); overruled, 79 I.D. 416 (1972).

Miller, Duncan, A-30742 (Dec. 2, 1966); overruled, 79 I.D. 416 (1972).

Miller, Duncan, A-30722 (Apr. 14, 1967); overruled, 79 I.D. 416 (1972).

Miller, Duncan, 6 IBLA 283 (1972); overruled to extent inconsistent, Jones-O'Brien, Inc., 1 Sec 13, 85 I.D. 89 (1978).

Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181 (1914).

Miller *v.* Sebastian (19 L.D. 288); overruled, 26 L.D. 448 (1898).

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

Milton *v.* Lamb (22 L.D. 339); overruled, 25 L.D. 550 (1897).

Milwaukee, Lake Shore & Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112 (1899).

Miner *v.* Mariott (2 L.D. 709); modified, 28 L.D. 224 (1899).

Minnesota & Ontario Bridge Co. (30 L.D. 77); no longer followed, 50 L.D. 359 (1924).

Mitchell *v.* Brown (3 L.D. 65); overruled, 41 L.D. 396 (1912) (See 43 L.D. 520).

Monitor Lode (18 L.D. 358); overruled, 25 L.D. 495 (1897).

Monster Lode (35 L.D. 493); overruled so far as in conflict, 55 I.D. 348 (1935).

Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 481-2 (1898).

Morgan *v.* Craig (10 C.L.O. 234); overruled, 5 L.D. 303 (1886).

Morgan, Henry S., 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 (1909).

Moritz *v.* Hinz (36 L.D. 450); vacated, 37 L.D. 382 (1909).

Morrison, Charles S. (36 L.D. 126); modified, 36 L.D. 319 (1908).

Morrow *v.* State of Oregon (32 L.D. 54); modified, 33 L.D. 101 (1904).

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 (1908).

Mountain Fuel Supply Co., A-31053 (Dec. 19, 1969); overruled, 79 I.D. 416 (1972).

Mt. Whitney Military Reservation (40 L.D. 315 (1911)) (See 43 L.D. 33).

Muller, Ernest (46 L.D. 243); overruled, 48 L.D. 163 (1921).

Muller, Esberne K. (39 L.D. 72); modified, 39 L.D. 360 (1910).

Mulnix, Philip, Heirs of (33 L.D. 331); overruled, 43 L.D. 532 (1915).

Munsey, Glenn, Earnest Scott and Arnold Scott *v.* Smitty Baker Coal Co., Inc., 1 IBMA 144, 162 (Aug. 8, 1972), 79 I.D. 501, 509; distinguished, 80 I.D. 251 (1973).

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

National Livestock Co. and Zack Cox, I.G.D. 55 (1938); overruled, United States *v.* Maher, Charles, 5 IBLA 209, 79 I.D. 109 (1972).

Naughton, Harold J., 3 IBLA 237, 78 I.D. 300 (1971); Schweite, Helena M., 14 IBLA 305 (Feb. 1, 1974); distinguished, Kristeen J. Burke, Joe N. Melovedoff, Victor Melovedoff, 20 IBLA 162 (May 5, 1975).

Nebraska, State of (18 L.D. 124); overruled, 28 L.D. 358 (1899).

Nebraska, State of *v.* Dorrington (2 C.L.L. 647); overruled, 26 L.D. 123 (1898).

Neilsen *v.* Central Pacific R.R. Co. (26 L.D. 252); modified, 30 L.D. 216 (1900).

Newbanks *v.* Thompson (22 L.D. 490); overruled, 29 L.D. 108 (1899).

Newlon, Robert C. (41 L.D. 421); overruled so far as in conflict, 43 L.D. 364 (1914).

New Mexico, State of (46 L.D. 217); overruled, 48 L.D. 97 (1921).

New Mexico, State of (49 L.D. 314); overruled, 54 I.D. 159 (1933).

Newton, Walter (22 L.D. 322); modified, 25 L.D. 188 (1897).

New York Lode & Mill Site (5 L.D. 513); overruled, 27 L.D. 373 (1898).

Nickel, John R. (9 L.D. 388); overruled, 41 L.D. 129 (1912) (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 (1900).

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 (1915); 117 U.S. 435).

Northern Pacific R.R. Co. *v.* Bowman (7 L.D. 238); modified, 18 L.D. 224 (1894).

Northern Pacific R.R. Co. *v.* Burns (6 L.D. 21); overruled, 20 L.D 191 (1895).

Northern Pacific R.R. Co. *v.* Loomis (21 L.D. 395); overruled, 27 L.D. 464 (1898).

Northern Pacific R.R. Co. *v.* Marshall (17 L.D. 545); overruled, 28 L.D. 174 (1899).

Northern Pacific R.R. Co. *v.* Miller (7 L.D. 100); overruled so far as in conflict, 16 L.D. 229 (1893).

Northern Pacific R.R. Co. *v.* Sherwood (28 L.D. 126); overruled so far as in conflict, 29 L.D. 550 (1900).

Northern Pacific R.R. Co. *v.* Symons (22 L.D. 686); overruled, 28 L.D. 95 (1899).

Northern Pacific R.R. Co. *v.* Urquhart (8 L.D. 365); overruled, 28 L.D. 126 (1899).

Northern Pacific R.R. Co. *v.* Walters (13 L.D. 230); overruled so far as in conflict, 49 L.D. 391 (1922).

Northern Pacific R.R. Co. *v.* Yantis (8 L.D. 58); overruled, 12 L.D. 127 (1891).

Northern Pacific Ry. Co. (48 L.D. 573); overruled so far as in conflict, 51 L.D. 196 (1925) (See 52 L.D. 58 (1927)).

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

Nyman *v.* St. Paul, Minneapolis, & Manitoba Ry. Co. (5 L.D. 396); overruled, 6 L.D. 750 (1888).

O'Donnell, Thomas J. (28 L.D. 214); overruled, 35 L.D. 411 (1907).

Oil and Gas Privilege and License Tax, Ft. Peck Reservation, Under Laws of Montana, M-36318 (Oct. 13, 1955); overruled by Solicitor's Opinion—Tax Status of the Production of Oil and Gas From Lease of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M-36896, 84 I.D. 905 (1977).

Olson *v.* Traver *et al.* (26 L.D. 350, 628); overruled so far as in conflict, 29 L.D. 480; 30 L.D. 382 (1900).

Opinion A.A.G. (35 L.D. 277); vacated, 36 L.D. 342 (1908).

Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333 (1949).

Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I.D. 331 (1943) (See 59 I.D. 346, 350).

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

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

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

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

Opinion of Deputy Assistant Secretary (Dec. 2, 1966), affirming Oct. 27, 1966, opinion by Asst. Sec.; overruled by, Solicitor's Opinion—Tax Status of the Production of Oil and Gas From Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M-36896, 84 I.D. 905 (1977).

Opinion of Deputy Solicitor—M-36562, Aug. 21, 1959 (unpublished)—overruled by Solicitor's Opinion—M-36911, 86 I.D. 151 (1979)—Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska.

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

Opinion of Solicitor, Oct. 31, 1917 (D-40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96 (1942).

Opinion of Solicitor, Feb. 7, 1919 (D-44083); overruled, Nov. 4, 1921, (M-6397) (See 58 I.D. 158, 160 (1942)).

Opinion of Solicitor, Aug. 8, 1933 (M-27499); overruled so far as in conflict, 54 I.D. 402 (1934).

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

Opinion of Solicitor, M-27690, June 15, 1934, Migratory Bird Treaty Act; overruled to extent of conflict, M-36936, 88 I.D. 586 (1981).

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

Opinion of Solicitor—55 I.D. 466 (1936)—State of New Mexico, overruled to extent it applies to 1926 Executive Order to artifically developed water sources on public lands, by Solicitor's Opinion—M-36914, 86 I.D. 553 (1979)—Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation and Bureau of Land Management.

Opinion of Solicitor—M-28198, Jan. 8, 1936, finding, *inter alia,* that Indian title to certain lands within the Fort Yuma Reservation has been extinguished, is well founded and is affirmed by Solicitor's Opinion—M-36886, 84 I.D. 1 (1977)—Title to Certain Lands Within the Boundaries of the Ft. Yuma Indian Reservation as Established by the Executive Order of Jan. 9, 1885—but overruled by Solicitor's Opinion—M-36908, 86 I.D. 3 (1979)—Title to Certain Lands Within the Boundaries of the Fort Yuma (Now Called Quechan) Indian Reservation.

Opinion of Solicitor, May 8, 1940 (57 I.D. 124); overruled in part, 58 I.D. 562, 567 (1943).

Opinion of Solicitor, Aug. 31, 1943 (M-33183); distinguished, 58 I.D. 726, 729 (1944).

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

Opinion of Solicitor, M-34326, 59 I.D. 147 (1945); overruled in part, Solicitor's Opinion, M-36887, 84 I.D. 72 (1977).

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

Opinion of Solicitor, Mar. 28, 1949 (M-35093); overruled in part, 64 I.D. 70 (1957).

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, M-36051 (Dec. 7, 1950); modified, Solicitor's Opinion, M-36863, 79 I.D. 513 (1972).

Opinion of Solicitor, M-36241 (Sept. 22, 1954); overruled as far as inconsistent with,—Criminal Jurisdiction on Seminole Reservations in Fla., M-36907, 85 I.D. 433 (1978).

Opinion of Solicitor, Jan. 19, 1956 (M-36378); overruled to extent inconsistent, 64 I.D. 57 (1957).

Opinion of Solicitor, M-36410, Feb. 11, 1957, Imposition of North Dakota State Fish & Game Laws on Indian Claiming Treaty & Other Rights to Hunt & Fish; overruled to

extent of conflict, M-36936, 88 I.D. 586 (1981).

Opinion of Solicitor, M-36434 (Sept. 12, 1958); overruled to extent inconsistent, Smith, Turner, Jr., Signe D. Smith, 66 IBLA 1, 89 I.D. 386 (1982).

Opinion of Solicitor, June 4, 1957 (M-36443); overruled in part, 65 I.D. 316 (1958).

Opinion of Solicitor, July 9, 1957 (M-36442); withdrawn and superseded, 65 I.D. 386, 388 (1958).

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, Aug. 26, 1959 (M-36575); affirmed in pertinent part by Solicitor's Opinion, M-36921, 87 I.D. 291 (1980)

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

Opinion of Solicitor, M-36735 (Jan. 31, 1968); reversed and withdrawn, Relocation of Flathead Irrigation Project's Kerr Substation and Switchyard, M-36735 (Supp.), 83 I.D. 346 (1976).

Opinion of Solicitor—M-36779 (Nov. 17, 1969), Appeals of Freeport Sulphur Co. & Texas Gulf Sulphur Co., distinguished with respect to applicability of exemptions (4) & (9) of FOIA to present value estimates and overruled with respect to applicability of exemption (5) of FOIA to presale estimates, Solicitor's Opinion—M-36918, 86 I.D. 661 (1979).

Opinion of Solicitor—M-36841 (Nov. 9, 1971), Appeal of Amoco Production Co., distinguished with respect to applicability of exemptions (4) & (9) of FOIA to the present value estimates and overruled with respect to applicability of exemption (5) of FOIA to presale estimates, Solicitor's Opinion—M-36918, 86 I.D. 661 (1979).

Opinion of Solicitor—M-36886, 84 I.D. 1 (1977)—Title to Certain Lands Within Boundaries of Ft. Yuma Indian Reservation as Established by Exec. Order of Jan. 9, 1885 is overruled by Solicitor's Opinion—M-36908, 86 I.D. 3 (1979)—Title to Certain Lands Within the Boundaries of the Ft. Yuma (Now Called Quechan) Indian Reservation.

Opinion of Solicitor, M-36910, 86 I.D. 89 (1979); modified, M-36910 (Supp.), 88 I.D. 909 (1981).

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Oregon Central Military Wagon Road Co. *v.* Hart (17 L.D. 480); overruled, 18 L.D. 543 (1894).

Owens *v.* State of California (22 L.D. 369); overruled, 38 L.D. 253 (1909).

Pace *v.* Carstarphen (50 L.D. 369); distinguished, 61 I.D. 459 (1954).

Pacific Slope Lode (12 L.D. 686); overruled so far as in conflict, 25 L.D. 518 (1897).

Page, Ralph, 8 IBLA 435 (Dec. 22, 1972); explained, Sam Rosetti, 15 IBLA 288, 81 I.D. 251 (1974).

Papina *v.* Alderson (1 B.L.P. 91); modified, 5 L.D. 256 (1886).

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 (1957).

Paul Jones Lode (28 L.D. 120); modified, 31 L.D. 359; overruled, 57 I.D. 63 (1939).

Paul *v.* Wiseman (21 L.D. 12); overruled, 27 L.D. 522 (1898).

Pecos Irrigation and Improvement Co. (15 L.D. 470); overruled, 18 L.D. 168, 268 (1894).

Pennock, Belle L. (42 L.D. 315); vacated, 43 L.D. 66 (1914).

Perry *v.* Central Pacific R.R. Co. (39 L.D. 5); overruled so far as in conflict, 47 L.D. 303, 304 (1920).

Phebus, Clayton (48 L.D. 128); overruled so far as in conflict, 50 L.D. 281; overruled to extent inconsistent, 70 I.D. 159 (1963).

Phelps, W. L. (8 C.L.O. 139); overruled, 2 L.D. 854 (1884).

Phillips, Alonzo (2 L.D. 321); overruled, 15 L.D. 424 (1892).

Phillips *v.* Breazeale's Heirs (19 L.D. 573); overruled, 39 L.D. 93 (1910).

Phillips, Cecil H., A-30851 (Nov. 16, 1967); overruled, 79 I.D. 416 (1972).

Phillips, Vance W., 14 IBLA 79 (Dec. 11, 1973); modified by Vance W. Phillips and Aelisa A. Burnham, 19 IBLA 211 (Mar. 21, 1975).

Pieper, Agnes C. (35 L.D. 459); overruled, 43 L.D. 374 (1914).

Pierce, Lewis W. (18 L.D. 328); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422 (1947).

Pietkiewicz *v.* Richmond (29 L.D. 195); overruled, 37 L.D. 145 (1908).

Pike's Peak Lode (10 L.D. 200); overruled in part, 20 L.D. 204; 48 L.D. 523 (1922).

Pike's Peak Lode (14 L.D. 47); overruled, 20 L.D. 204, 48 L.D. 523 (1922).

Popple, James (12 L.D. 433); overruled, 13 L.D. 588 (1891).

Powell, D. C. (6 L.D. 302); modified, 15 L.D. 477 (1892).

Prange, Christ C. & William C. Braasch (48 L.D. 488); overruled so far as in conflict, 60 I.D. 417, 419 (1950).

Premo, George (9 L.D. 70) (See 39 L.D. 162, 225) (1910).

Prescott, Henrietta P. (46 L.D. 486); overruled, 51 L.D. 287 (1925).

Pringle, Wesley (13 L.D. 519); overruled, 29 L.D. 599 (1900).

Provensal, Victor H. (30 L.D. 616); overruled, 35 L.D. 399 (1907).

Prue, Widow of Emanuel (6 L.D. 436); vacated, 33 L.D. 409 (1905).

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

Puyallup Allotment (20 L.D. 157); modified, 29 L.D. 628 (1900).

Ramsey, George L., Heirs of Edwin C. Philbrick (A-16060), Aug. 6, 1931, unreported; recalled and vacated, 58 I.D. 272, 275, 290 (1942).

Rancho Alisal (1 L.D. 173); overruled, 5 L.D. 320 (1866).

Ranger Fuel Corp., 2 IBMA 163 (July 17, 1973), 80 I.D. 708; set aside by Memorandum Opinion and Order Upon Reconsideration in Ranger Fuel Corp., 2 IBMA 186 (Sept. 5, 1973), 80 I.D. 604.

Rankin, James D. (7 L.D. 411); overruled, 35 L.D. 32 (1906).

Rankin, John M. (20 L.D. 272); reversed, 21 L.D. 404 (1895).

Rebel Lode (12 L.D. 683); overruled, 20 L.D. 204; 48 L.D. 523 (1922).

Reed *v.* Buffington (7 L.D. 154); overruled, 8 L.D. 110 (1889) (See 9 L.D. 360).

Regione *v.* Rosseler (40 L.D. 93); vacated, 40 L.D. 420 (1912).

Reid, Bettie H., Lucille H. Pipkin (61 I.D. 1); overruled, 61 I.D. 355 (1954).

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

Relocation of Flathead Irrigation Project's Kerr Substation and Switchyard, M-36735 (Jan. 31, 1968); is reversed and withdrawn, M-36735 (Supp.), 83 I.D. 346 (1976).

Rialto No. 2 Placer Mining Claim (34 L.D. 44); overruled, 37 L.D. 250 (1908).

Rico Town Site (1 L.D. 556); modified, 5 L.D. 256 (1886).

Rio Verde Canal Co. (26 L.D. 381); vacated, 27 L.D. 421 (1898).

Roberts *v.* Oregon Central Military Road Co. (19 L.D. 591); overruled, 31 L.D. 174 (1901).

Robinson, Stella G. (12 L.D. 443); overruled, 13 L.D. 1 (1891).

Rogers *v.* Atlantic & Pacific R.R. Co. (6 L.D. 565); overruled so far as in conflict, 8 L.D. 165 (1889).

Rogers, Fred B. (47 L.D. 325); vacated, 53 I.D. 649 (1932).

Rogers, Horace B. (10 L.D. 29); overruled, 14 L.D. 321 (1892).

Rogers *v.* Lukens (6 L.D. 111); overruled, 8 L.D. 110 (1889) (See 9 L.D. 360).

Romero *v.* Widow of Knox (48 L.D. 32); overruled so far as in conflict, 49 L.D. 244 (1922).

Roth, Gottlieb (50 L.D. 196); modified, 50 L.D. 197 (1924).

Rough Rider and Other Lode Claims (41 L.D. 242, 255); vacated, 42 L.D. 584 (1913).

St. Clair, Frank (52 L.D. 597); modified, 53 I.D. 194 (1930).

St. Paul, Minneapolis & Manitoba Ry. Co. (8 L.D. 255); modified, 13 L.D. 354 (1891) (See 32 L.D. 21).

St. Paul, Minneapolis & Manitoba Ry. Co. *v.* Fogelberg (29 L.D. 291); vacated, 30 L.D. 191 (1900).

St. Paul, Minneapolis & Manitoba Ry. Co. *v.* Hagen (20 L.D. 249); overruled, 25 L.D. 86 (1897).

St. Pierre, Roger & the Original Chippewa Cree of the Rocky Boy's Reservation *v.* Comm'r of Indian Affairs, 9 IBIA 203, 89 I.D. 132 (1982); overruled by an order: Burnette, Robert (Appellant) *v.* Deputy Ass't Secretary—Indian Affairs (Operations) (Appellee), 10 IBIA 464, 89 I.D. 609 (1982).

Salsberry, Carroll (17 L.D. 170); overruled, 39 L.D. 93 (1910).

Sangre de Cristo and Maxwell Land Grants (46 L.D. 301); modified, 48 L.D. 88 (1921).

Santa Fe Pacific R.R. Co. *v.* Peterson (39 L.D. 442); overruled, 41 L.D. 383 (1912).

Satisfaction Extension Mill Site (14 L.D. 173 (1892)) (See 32 L.D. 128).

Sayles, Henry P. (2. L.D. 88); modified, 6 L.D. 797 (1888) (See 37 L.D. 330).

Schweite, Helena M., 14 IBLA 305 (Feb. 1, 1974); Naughton, Harold J., 3 IBLA 237, 78 I.D. 300 (1971); distinguished, Kristeen J. Burke, Joe N. Melovedoff, Victor Melovedoff, 20 IBLA 162 (May 5, 1975).

Schweitzer *v.* Hilliard (19 L.D. 294); overruled so far as in conflict, 26 L.D. 639 (1898).

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 (1947).

Shale Oil Co., 53 I.D. 213 (1930); overruled so far as in conflict, 55 I.D. 287 (1935).

Shanley *v.* Moran (1 L.D. 162); overruled, 15 L.D. 424 (1892).

Shillander, H. E., A-30279 (Jan. 26, 1965); overruled, 79 I.D. 416 (1972).

Shineberger, Joseph (8 L.D. 231); overruled, 9 L.D. 202 (1889).

Silver Queen Lode (16 L.D. 186); overruled, 57 I.D. 63 (1939).

Simpson, Lawrence W. (35 L.D. 399, 609); modified, 36 L.D. 205 (1907).

Simpson, Robert E., A-4167 (June 22, 1970); overruled to extent inconsistent, United States *v.* Union Carbide Corp., 31 IBLA 72, 84 I.D. 309 (1977).

Sipchen *v.* Ross (1 L.D. 634); modified, 4 L.D. 152 (1885).

Smead *v.* Southern Pacific R.R. Co. (21 L.D. 432); vacated, 29 L.D. 135 (1899).

Smith, M. P., 51 L.D. 251 (1925); overruled, Solicitor's Opinion, Response to Feb. 17, 1976, Request from the General Accounting Office: Interpretation of Mineral Leasing Act of 1920, and Outer Continental Shelf Lands Act Royalty Clause, M-36888 (Oct. 4, 1976), 84 I.D. 54 (1977).

Snook, Noah A. (41 L.D. 428); overruled so far as in conflict, 43 L.D. 364 (1914).

Sorli *v.* Berg (40 L.D. 259); overruled, 42 L.D. 557 (1913).

South Dakota Mining Co. *v.* McDonald, 30 L.D. 357 (1900); distinguished, 28 IBLA 187, 83 I.D. 609 (1976).

Southern Pacific R.R. Co. (15 L.D. 460); reversed, 18 L.D. 275 (1894).

Southern Pacific R.R. Co. (28 L.D. 281); recalled, 32 L.D. 51 (1903).

Southern Pacific R.R. Co. (33 L.D. 89); recalled, 33 L.D. 528 (1905).

Southern Pacific R.R. Co. *v.* Bruns (31 L.D. 272); vacated, 37 L.D. 243 (1908).

South Star Lode (17 L.D. 280); overruled, 20 L.D. 204; 48 L.D. 523 (1922).

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 (1889).

Sprulli, Leila May (50 L.D. 549); overruled, 52 L.D. 339 (1928).

Standard Oil Co. of Calif. (76 I.D. 271 (1969)); no longer followed, 5 IBLA 26, 79 I.D. 23 (1972).

Standard Oil Co. of Calif. *v.* Morton, 450 F.2d 493 (9th Cir. 1971); 79 I.D. 29 (1972).

Standard Shales Products Co. (52 L.D. 552); overruled so far as in conflict, 53 I.D. 42 (1930).

Star Gold Mining Co. (47 L.D. 38); distinguished, U.S. *v.* Alaska Empire Gold Mining Co., 71 I.D. 273 (1964).

State of Alaska, 7 ANCAB 157, 89 I.D. 321 (1982); modified to the extent inconsistent, 67 IBLA 344 (1982).

State of Alaska and Seldovia Native Ass'n., Inc., 2 ANCAB 1, 84 I.D. 349 (1977); modified, Valid Existing Rights under the Alaska Native Claims Settlement Act, Sec. Order No. 3016, 85 I.D. 1 (1978).

State of California (14 L.D. 253); vacated, 23 L.D. 230 (1896); overruled, 31 L.D. 335 (1902).

State of California (15 L.D. 10); overruled, 23 L.D. 423 (1896).

State of California (19 L.D. 585); vacated, 28 L.D. 57 (1899).

State of California (22 L.D. 428); overruled, 32 L.D. 34 (1903).

State of California (32 L.D. 346); vacated, 50 L.D. 628 (1924) (See 37 L.D. 499 and 46 L.D. 396).

State of California (44 L.D. 118, 468); overruled, 48 L.D. 97 (1921).

State of California *v.* Moccettini (19 L.D. 359); overruled, 31 L.D. 335 (1902).

State of California *v.* Pierce (3 C.L.O. 118); modified, 2 L.D. 854 (1884).

State of California *v.* Smith (5 L.D. 543); overruled so far as in conflict, 18 L.D. 343 (1894).

State of Colorado (7 L.D. 490); overruled, 9 L.D. 408 (1889).

State of Florida (17 L.D. 355); reversed, 19 L.D. 76 (1894).

State of Florida (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291 (1925).

State of Louisiana (8 L.D. 126); modified, 9 L.D. 157 (1889).

State of Louisiana (24 L.D. 231); vacated, 26 L.D. 5 (1898).

State of Louisiana (47 L.D. 366; 48 L.D. 201); overruled so far as in conflict, 51 L.D. 291 (1925).

State of Nebraska (18 L.D. 124); overruled, 28 L.D. 358 (1899).

State of Nebraska *v.* Dorrington (2 C.L.L. 467); overruled so far as in conflict, 26 L.D. 123 (1898).

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 (1933).

State of Utah (45 L.D. 551); overruled, 48 L.D. 97 (1921).

State Production Taxes on Tribal Royalties from Leases Other than Oil and Gas, M-36345 (May 4, 1956); overruled, Solicitor's Opinion—Tax Status of the Production of Oil and Gas from Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M-36896, 84 I.D. 905 (1977).

Stevenson, Heirs of *v.* Cunningham (52 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).

Stewart *v.* Rees (21 L.D. 446); overruled so far as in conflict, 29 L.D. 401 (1900).

Stirling, Lillie E. (39 L.D. 346); overruled, 46 L.D. 110 (1917).

Stockley, Thomas J. (44 L.D. 178, 180); vacated, 260 U.S. 532 (See 49 L.D. 460, 461, 492 (1923)).

Strain, A. G. (40 L.D. 108); overruled so far as in conflict, 51 L.D. 51 (1925).

Streit, Arnold (T-476 (Ir.)), Aug. 26, 1952, unreported; overruled, 62 I.D. 12 (1955).

Stricker, Lizzie (15 L.D. 74); overruled so far as in conflict, 18 L.D. 283 (1894).

Stump, Alfred M. (39 L.D. 437); vacated, 42 L.D. 566 (1913).

Sumner *v.* Roberts (23 L.D. 201); overruled so far as in conflict, 41 L.D. 173 (1912).

Superior Oil Co., A-28897 (Sept. 12, 1962); distinguished in dictum, 6 IBLA 318, 79 I.D. 439 (1972).

Sweeney *v.* Northern Pacific R.R. Co. (20 L.D. 394); overruled, 28 L.D. 174 (1899)

Sweet, Eri P. (2 C.L.O. 18); overruled, 41 L.D. 129 (1912) (See 42 L.D. 313).

Sweeten *v.* Stevenson (2 B.L.P. 42); overruled so far as in conflict, 3 L.D. 248 (1884).

Taft *v.* Chapin (14 L.D. 593); overruled, 17 L.D. 414, 417 (1893).

Taggart, William M. (41 L.D. 282); overruled, 47 L.D. 370 (1920).

Talkington's Heirs *v.* Hempfling (2 L.D. 46); overruled, 14 L.D. 200 (1892).

Tate, Sarah J. (10 L.D. 469); overruled, 21 L.D. 209, 211 (1895).

Taylor, Josephine (A-21994), June 27, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260 (1946).

Taylor *v.* Yates (8 L.D. 279); reversed, 10 L.D. 242 (1890).

Teller, John C. (26 L.D. 484); overruled, 36 L.D. 36 (1907) (See 37 L.D. 715).

Thorstenson, Even (45 L.D. 96); overruled, 36 L.D. 36 (1907) (See 37 L.D. 258 (1919)).
Tieck *v.* McNeil (48 L.D. 158); modified, 49 L.D. 260 (1922).
Toles *v.* Northern Pacific Ry. Co. (39 L.D. 371); overruled so far as in conflict, 45 L.D. 92, 93 (1915).
Tonkins, H. H. (41 L.D. 516); overruled, 51 L.D. 27 (1925).
Towl *v.* Kelly, 54 I.D. 455 (1934); overruled, Rosenbaum, Ralph F., 66 IBLA 374, 89 I.D. 415 (1982).
Traganza, Mertie C. (40 L. D. 300); overruled, 42 L.D. 611, 612 (1913).
Traugh *v.* Ernst (2 L.D. 212); overruled, 3 L.D. 98, 248 (1884).
Tripp *v.* Dunphy (28 L.D. 14); modified, 40 L.D. 128 (1911).
Tripp *v.* Stewart (7 C.L.O. 39); modified, 6 L.D. 795 (1888).
Tucker *v.* Florida Ry. & Nav. Co. (19 L.D. 414); overruled, 25 L.D. 233 (1897).
Tupper *v.* Schwarz (2 L.D. 623); overruled, 6 L.D. 624 (1886).
Turner *v.* Cartwright (17 L.D. 414); modified, 21 L.D. 40 (1895).
Turner *v.* Lang (1 C.L.O. 51); modified, 5 L.D. 256 (1886).
Tyler, Charles (26 L.D. 699); overruled, 35 L.D. 411 (1907).

Ulin *v.* Colby (24 L.D. 311); overruled, 35 L.D. 549 (1907).
Union Pacific R.R. Co. (33 L.D. 89); recalled, 33 L.D. 528 (1905).
U.S. *v.* Barngrover (On Rehearing), 57 I.D. 533 (1942); overruled in part by U.S. *v.* Robinson, Theresa B., 21 IBLA 363, 82 I.D. 414 (1975).
U.S. *v.* Bush (13 L.D. 529); overruled, 18 L.D. 441 (1894).
U.S. *v.* Central Pacific Ry. Co. (52 L.D. 81); modified, 52 L.D. 235 (1927).
U.S. *v.* Dana (18 L.D. 161); modified, 28 L.D. 45 (1899).
U.S. *v.* Kosanke Sand Corp., 3 IBLA 189, 78 I.D. 285 (1971); set aside and case remanded, 12 IBLA 282, 80 I.D. 538 (1973).
U.S. *v.* McClarty, Kenneth, 71 I.D. 331 (1964); vacated and case remanded, 76 I.D. 193 (1969).
U.S. *v.* Melluzzo, Frank & Wanita, A-31042, 76 I.D. 181 (1969); reconsideration, 1 IBLA 37, 77 I.D. 172 (1970).
U.S. *v.* Mouat, M. W. (60 I.D. 473); modified, 61 I.D. 289 (1954).
U.S. *v.* O'Leary, Keith V. (63 I.D. 341); distinguished, 64 I.D. 210 & 369 (1957).
Utah, State of (45 L.D. 551); overruled, 48 L.D. 97 (1921).

Veach, Heir of Natter (46 L.D. 496); overruled so far as in conflict, 49 L.D. 461, 464 (1923) (See 49 L.D. 492 for adherence in part).
Vine, James (14 L.D. 527); modified, 14 L.D. 622 (1892).
Virginia-Colorado Development Corp. (53 I.D. 666); overruled so far as in conflict, 55 I.D. 287, 289 (1935).
Vradenburg's Heirs *v.* Orr (25 L.D. 323); overruled, 38 L.D. 253 (1909).

Wagoner *v.* Hanson (50 L.D. 355); overruled, 56 I.D. 325, 328 (1938).
Wahe, John (41 L.D. 127); modified, 41 L.D. 636, 637 (1913).
Walker *v.* Prosser (17 L.D. 85); reversed, 18 L.D. 425 (1894).
Walker *v.* Southern Pacific R.R. Co. (24 L.D. 172); overruled, 28 L.D. 174 (1899).
Wallis, Floyd A. (65 I.D. 369); overruled to the extent that it is inconsistent, 71 I.D. 22 (1963).
Walters, David (15 L.D. 136); revoked, 24 L.D. 58 (1897).
Warren *v.* Northern Pacific R.R. Co. (22 L.D. 568); overruled so far as in conflict, 49 L.D. 391 (1922).
Wasmund *v.* Northern Pacific R.R. Co. (23 L.D. 445); vacated, 29 L.D. 224 (1899).
Wass *v.* Milward (5 L.D. 349); no longer followed (See 44 L.D. 72 and unreported case of Ebersold *v.* Dickson, Sept. 25, 1918, D-36502).
Wasserman, Jacob N., A-30275 (Sept. 22, 1964); overruled, 79 I.D. 416 (1972).
Waterhouse, William W. (9 L.D. 131); overruled, 18 L.D. 586 (1894).
Watson, Thomas E. (4 L.D. 169); recalled, 6 L.D. 71 (1887).
Weathers, Allen E., Frank N. Hartley (A-25128), May 27, 1949, unreported; overruled in part, 62 I.D. 62 (1955).
Weaver, Francis D. (53 I.D. 179); overruled so far as in conflict, 55 I.D. 287, 290 (1935).

Weber, Peter (7 L.D. 476); overruled, 9 L.D. 150 (1889).

Weisenborn, Ernest (42 L.D. 533); overruled, 43 L.D. 395 (1914).

Werden *v.* Schlecht (20 L.D. 523); overruled so far as in conflict, 24 L.D. 45 (1897).

Western Pacific Ry. Co. (40 L.D. 411; 41 L.D. 599); overruled, 43 L.D. 410 (1914).

Western Slope Gas Co., 40 IBLA 280, reconsideration denied, 48 IBLA 259 (1979); overruled in pertinent part, M-36917, 87 I.D. 27 (1980).

Wheaton *v.* Wallace (24 L.D. 100); modified, 34 L.D. 383 (1906).

Wheeler, William D. (30 L.D. 355); distinguished, and to the extent of any possible inconsistency overruled, 56 I.D. 73 (1937).

White, Anderson (Probate 13570-35); overruled, 58 I.D. 149, 157 (1942).

White, Sarah V. (40 L.D. 630); overruled in part, 46 L.D. 55, 56 (1917).

Whitten *v.* Read (49 L.D. 253, 260; 50 L.D. 10); vacated, 53 I.D. 447 (1928).

Wickstrom *v.* Calkins (20 L.D. 459); modified, 21 L.D. 533; overruled, 22 L.D. 392 (1896).

Widow of Emanuel Prue (6 L.D. 436); vacated, 33 L.D. 409 (1905).

Wiley, George P. (36 L.D. 305); modified so far as in conflict, 36 L.D. 417 (1908).

Wilkerson, Jasper N. (41 L.D. 138); overruled, 50 L.D. 614 (1924) (See 42 L.D. 313).

Wilkens, 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 (1898).

Williams, John B., Richard & Gertrude Lamb (61 I.D. 31); overruled so far as in conflict, 61 I.D. 185 (1953).

Willingbeck, Christian P. (3 L.D. 383); modified, 5 L.D. 409.

Willis, Cornelius (47 L.D. 135); overruled, 49 L.D. 461 (1923).

Willis, Eliza (22 L.D. 426); overruled, 26 L.D. 436 (1898).

Wilson *v.* Heirs of Smith (37 L.D. 519); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).

Winchester Land & Cattle Co., 65 I.D. 148 (1958); no longer followed in part, 80 I.D. 698 (1973).

Witbeck *v.* Hardeman (50 L.D. 413); overruled so far as in conflict, 51 L.D. 36 (1925).

Wolf Joint Ventures, 75 I.D. 137 (1968); distinguished, U.S. *v.* Union Carbide Corp., 31 IBLA 72, 84 I.D. 309 (1977).

Wostenberg, William, A-26450 (Sept. 5, 1952); distinguished in dictum, 6 IBLA 318, 79 I.D. 439 (1972).

Wright *v.* Smith (44 L.D. 226); overruled, 49 L.D. 374 (1922).

Young Bear, Victor, Estate of, 8 IBIA 130, 87 I.D. 311 (1980); reversed by Supp., 8 IBIA 254, 88 I.D. 410 (1981).

Zeigler Coal Co., 4 IBMA 139, 82 I.D. 221, 1974-1975 OSHD par. 19,638 (1975); overruled in part, Alabama By-Products Corp. (On Reconsideration), 7 IBMA 85, 83 I.D. 574 (1976).

Zimmerman *v.* Brunson (39 L.D. 310); overrule, 52 L.D. 714 (1929).

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.

U.S. GOVERNMENT PRINTING OFFICE : 1983 O - 406-082

DECISIONS OF THE DEPARTMENT OF THE INTERIOR

DOYON, LIMITED & MTNT, LIMITED

6 ANCAB 270

Decided *January 25, 1982*

Appeal from the Decisions of the Alaska State Office, Bureau of Land Management F-14889-A, F-14906-A, F-14942-A, and F-14945-A.

Partial decision. Reversed in part, affirmed in part.

1. Alaska Native Claims Settlement Act: Navigable Waters—Alaska: Navigable Waters: Generally

Where the Bureau of Land Management has redetermined that water bodies which are the subject of an appeal are navigable, and where the Board finds that the facts in the record upon which the Bureau of Land Management made its redetermination meet the essential elements of navigability, and where the facts in the record are undisputed so that no issue of fact as to navigability remains before the Board, then the Board will find the water bodies to be navigable.

2. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance—Alaska Native Claims Settlement Act: Administrative Procedure: Publication

Redetermination by the Bureau of Land Management of navigability of water bodies while jurisdiction over the subject water bodies is in the Alaska Native Claims Appeal Board is not a "decision" of the BLM, and notice thereof is not required to be published pursuant to 43 CFR 2650.7.

3. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Administrative Procedure: Decisions

Where in a decision to issue conveyance the Bureau of Land Management lists a number of water bodies and declares them to be the only water bodies within the conveyance area which are considered to be navigable, the language indicates, and the Board will find, that the BLM has, within the meaning of 43 CFR 2650.5-1(b), determined the navigability or nonnavigability of every water body within the conveyance area.

4. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance

Where in a decision to issue conveyance the Bureau of Land Management lists certain water bodies and declares them to be the only water bodies within the conveyance area which are considered to be navigable, there is no requirement in ANCSA or its implementing regulations that the BLM list those water bodies, if any, which were determined to be nonnavigable and the beds of which are to be conveyed to the grantee corporation(s) and charged against its entitlement.

5. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance

The Bureau of Land Management is not required to include in a decision to issue

conveyance a written statement of reasons for its navigability determinations, if any.

6. Alaska Native Claims Settlement Act: Definitions: Public Lands: Generally—Submerged Lands

The Bureau of Land Management, under provisions of ANCSA and regulations in 43 CFR, has both the authority and the responsibility to determine which lands, including submerged lands, are "public lands" within the definition of § 3(e) of ANCSA and are therefore available for selection by a Native corporation.

7. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska Native Claims Settlement Act: Navigable Waters

The Bureau of Land Management is not bound to make its navigability determinations in conformity with information provided by the State of Alaska pursuant to 43 CFR 2650.1(b) as to the navigability of water bodies within lands selected under ANCSA, or to accept the State's conclusions as to navigability.

8. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska Native Claims Settlement Act: Navigable Waters

When the State of Alaska's Claim of ownership of submerged lands is based solely upon its own conclusions as the navigability of water bodies within lands selected under ANCSA, and not upon a final adjudication of navigability, the mere assertion of the State's ownership does not constitute a claim of title in the submerged lands which requires the Bureau of Land Management to exclude such lands from the decision to issue conveyance.

APPEARANCES: James Q. Mery, Esq., and Elizabeth S. Ingraham, Esq., for Doyon, Ltd., Larry A. Wiggins, Esq., for MTNT, Ltd.; M. Francis Neville, Esq., Office of the Regional Solicitor, for Bureau of Land Management; Shelley J. Higgins, Esq., for State of Alaska.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeal

Appellants asserted several issues relating to the navigability of numerous water bodies within the conveyance area. Appellants declared that the Bureau of Land Management erred in approving for conveyance, and charging against their acreage entitlement under ANCSA, submerged lands to which the State of Alaska claims title.

The appellants also asserted that no determination of navigability had been made with respect to the subject water bodies, but that if such a determination had been made, it was made in violation of the law and numerous regulation.

The Board finds that the Bureau of Land Management made a navigability determination regarding each of the disputed water bodies. The Board also finds that where in a decision to issue conveyance the BLM lists certain water bodies and declares them to be the only water bodies within the conveyance area which are considered to be navigable, BLM need not list those water bodies, if any, within the conveyance area which were determined to be nonnavigable. Further, the Board holds that a statement of reasons for each navigability determination, if any, need not be included in a decision to issue conveyance.

Regarding conveyance of submerged lands to which the State of Alaska Claims title, the Board concludes that the Bureau of Land Management acted within its authority and responsibility to

determine what lands are "public lands" under § 3(e) of ANCSA and therefore available for selection by a Native corporation when it made a determination of the nonnavigability of various water bodies.

The Board further finds that when the State of Alaska's claim of ownership of the submerged lands is based solely upon the State's own conclusions as to the navigability of the water bodies, the Bureau of Land Management is not bound either to accept the State's conclusions or to recognize the State's claim as an interest leading to a fee title which requires exclusion of land under ANCSA.

In the course of the appeal, the Board ordered the Bureau of Land Management to review its navigability determinations regarding the subject water bodies and to file with the Board the factual bases for such determinations. Upon review, the Bureau of Land Management determined that portions of three rivers earlier found to be nonnavigable were actually navigable.

The Board holds that when the Bureau of Land Management's review of navigability shows a factual basis for redetermining the appealed water bodies to be navigable within established guidelines, the Board will decide that such water bodies are navigable. The Board further holds that redetermination by the BLM of navigability while jurisdiction over the subject water bodies is in the Alaska Native Claims Appeal Board is not a "decision" of the BLM, and notice thereof is not required to be published pursuant to 43 CFR 2650.7.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended,* 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977) (ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

On Nov. 27, 1974, Chamai, Inc., Donlee Corp., Gold Creek, Ltd., and Seseui, Inc., filed village selection applications F–14889–A, F–14906–A, F–14942–A, and F–14945–A, respectively, for lands near the villages of McGrath, Nikolai, Takotna, and Telida. On Nov. 15, 1976, the above-named corporations merged to form MTNT, Ltd. (MTNT).

In response to each of the above-said applications, the Bureau of Land Management (BLM), on Mar. 30, 1979, issued a separate decision to convey land. Each decision approved conveyance to MTNT and to Doyon, Ltd. (Doyon) the surface and subsurface estates, respectively, of certain specified lands. Each decision described the lands approved for conveyance and then listed one or more water bodies specified to be the only water bodies within the

described lands "considered to be navigable."

On May 1, 1979, and May 7, 1979, Doyon and MTNT, respectively, appealed all of the above-specified decisions.

In its Statement of Reasons, Doyon claimed, *inter alia*, that the BLM erred in deciding to convey, and to charge against Doyon's acreage entitlement, the submerged lands underlying numerous water bodies listed on Exhibit "A" to the Statement of Reasons. Doyon declared that the State of Alaska (State) claimed ownership of the submerged lands based on the asserted navigability of the water bodies, and that the lands should be excluded from conveyance pending an adjudication of the State's claim of title. Doyon also asserted that no determination of navigability had been made by the BLM with respect to the subject water bodies, but that if such a determination had been made, it was arbitrary and capricious and was made in violation of the law and regulations:

(1) No good faith investigation was made concerning the navigability of the water bodies in question, nor was data submitted by the State considered;
(2) The determination was made without notice to, and without an opportunity for participation by, the State and Doyon;
(3) There was no delegation by the Secretary of his authority to make navigability determinations in accordance with the applicable law and regulations;
(4) There was no written statement of the reasons for any such determination; and
(5) BLM failed to identify in the DIC's those water bodies, if any, which were determined to be nonnavigable and the beds of which are to be conveyed to Doyon and charged against its entitlement.

Doyon further asserted that the disputed water bodies are navigable as a matter of fact and law.

MTNT, in its Statement of Reasons, made the same claims with respect to the BLM decisions and MTNT's entitlement. Because of the common questions of fact and law presented in the various appeals before the Board, all eight appeals were eventually consolidated into this ANCAB VLS 79-27 (Consolidated) on July 9, 1979.

In its Answer, dated Aug. 13, 1979, BLM denied each of the appellants' allegations of error. With regard to the above allegations numbered 4 and 5, BLM argued that it is not required to identify all the water bodies in each selection area and to include in the decision to issue conveyance a statement of reasons for each determination of navigability.

BLM also declared in its Answer that the appellants had not addressed but rather had made only conclusory statements with regard to "the substantive issue which will ultimately be dispositive of their claim—whether or not the waterbodies are navigable." Answer at 2.

In its reply, dated Aug. 28, 1979, Doyon declared:

> The critical issue in this appeal is that the State of Alaska claims title to, and asserts ownership of, the submerged lands identified on Exhibit A—lands which BLM is attempting to convey to Doyon. * * *
>
> BLM thus misapprehends the substantive issue in this case. It is, quite simply, irrelevant to Doyon whether these water bodies are navigable or non-navigable. [Footnote omitted.] All Doyon is seeking is clear title—an adjudication of the State's

claim of ownership of the very lands BLM purports to convey.

* * * * *

It is BLM which bears the responsibility for adjudicating title to lands to be conveyed to ANCSA corporations. * * * All Doyon is asking is that BLM discharge this responsibility.

Doyon has requested repeatedly, and requests again, that where the State claims ownership of submerged lands, these submerged lands be excluded from conveyance pending an adjudication of the State's title.

Reply of Doyon, Limited at 2-3.

MTNT did not reply to the BLM's Answer.

Pursuant to an order of the Board dated Apr. 15, 1980, the BLM reviewed its navigability determinations at issue in this appeal. On May 6, 1980, the BLM filed with the Board a report detailing the bases for the disputed navigability determinations. Upon review, the BLM determined that the following disputed water bodies, earlier found to be nonnavigable, were actually navigable:

1. South Fork of the Kuskokwim River to the bluffs in T. 31 N., R. 24 E., S.M.;
2. Swift Fork to the mouth of Highpower Creek; and
3. East Fork of the Kuskokwim River to the mouth of Slow Fork.

In response, Doyon requested that the submerged lands underlying the Swift Fork, the South Fork, and the East Fork of the Kuskokwim River be excluded from the conveyance to Doyon. MTNT did not respond.

Decision

In *Appeal of Bristol Bay Native Corp.*, 4 ANCAB 355, 87 I.D. 341 (1980) [VLS 80-2], the Board held that:

> Where the BLM has redetermined that water bodies which are the subject of an appeal pending before the Board are navigable, and where the Board finds that the facts in the record upon which BLM made its redetermination meet the essential elements of navigability enunciated in *Appeal of Doyon, Ltd.*, 4 ANCAB 50, 86 I.D. 692 (1979) [RLS 76-2], and where the facts in the record are undisputed so that no issue of fact as to navigability remains before the Board, then the Board will find the water bodies to be navigable.

87 I.D. at 346.

The Board also held that:

> [F]or purposes of clarification, * * * redetermination by the BLM of navigability of water bodies while jurisdiction over such water bodies is in the Alaska Native Claims Appeal Board is not a 'decision' of the BLM, and notice is not required to be published pursuant to 43 CFR 2650.7.

87 I.D. at 345.

Here, the BLM's navigability review and resulting redetermination of navigability of the above-specified portions of the South, Swift, and East Forks of the Kuskokwim River were performed pursuant to the Board's order dated Apr. 15, 1980, while the Board retained jurisdiction over the issue of navigability and over the submerged lands underlying the subject water bodies.

The Board finds that the record upon which BLM relies for its redetermination of May 6, 1980, presents facts concerning use and susceptibility of use which meet the essential elements of navigability enunciated in *Appeal of Doyon, Ltd.*, 4 ANCAB 50, 86 I.D. 692 (1979) [RLS 76-2]. The Board further finds that the record discloses no dispute to the facts al-

leged in support of a finding of navigability.

[1] Where the BLM has redetermined that water bodies which are the subject of an appeal are navigable, and where the Board finds that the facts in the record upon which the BLM made its redetermination meet the essential elements of navigability, and where the facts in the record are undisputed so that no issue of fact as to navigability remains before the Board, then the Board will find the water bodies to be navigable.

Accordingly, the Board finds the following water bodies to be navigable:

1. South Fork of the Kuskokwim River to the bluffs in T. 31 N., R. 24 W., S.M.; [1]
2. Swift Fork to the mouth of Highpower Creek; and
3. East Fork of the Kuskokwim River to the mouth of Slow Fork.

The BLM is hereby Ordered to exclude these water bodies from conveyance under ANCSA to Doyon.

The Board has authority under 43 CFR 4.1(b)(5) to "consider and decide finally for the Department appeals to the head of the Department." The above finding by the Board that the specified water bodies are navigable is not a decision of the BLM, and notice thereof is not required to be published pursuant to 43 CFR 2650.7. However, the Board's finding does govern the conveyance to be issued to Doyon.

[1] There is no T. 31 N., R. 24 E., S.M. Based on the contents of the BLM's report at page 57, the Board believes BLM intended to refer to T. 31 N., R. 24 W., S.M., and makes its finding accordingly. Any party which believes the Board has misconstrued BLM's intent is requested to so notify the Board within fifteen (15) days of the date of this decision.

[2] Redetermination by the BLM of navigability of water bodies while jurisdiction over the subject water bodies is in the Board is not a "decision" of the BLM, and notice thereof is not required to be published pursuant to 43 CFR 2650.7.

With regard to the remaining water bodies in dispute in this appeal, Doyon and MTNT asserted that no determination of navigability was made, but that if such a determination was made, it was arbitrary and capricious and was made in violation of the law and regulations. Moreover, the appellants asserted error in that (1) there was no written statement of reasons in the decision to issue conveyance for any navigability determinations, and (2) BLM failed to identify in its decision those water bodies, if any, which were determined to be nonnavigable and the beds of which are to be conveyed to the appellants and charged against their acreage entitlements.

In each of the subject decisions to issue conveyance, the BLM described lands approved for conveyance and then listed one or more water bodies specified to be the only water bodies within the described lands "considered to be navigable."

[3] As to appellants' assertion that no determination of navigability was made, the Board holds that where, in a decision to issue conveyance, the BLM lists a number of water bodies and declares them to be the only water bodies within the conveyance area which are considered to be navigable, the language indicates, and the Board will find, that the BLM

has, within the meaning of 43 CFR 2650.5–1(b), determined the navigability or nonnavigability of every water body within the conveyance area.

Accordingly, the Board finds that the BLM has, within the meaning of 43 CFR 2650.5–1(b), determined the navigability status of every water body within the lands approved for conveyance by each of the decisions here on appeal.

[4] As to the assertion that BLM wrongfully failed to identify in each decision those water bodies which were determined to be nonnavigable, the Board holds that where in a decision to issue conveyance the BLM lists certain water bodies and declares them to be the only water bodies within the conveyance area which are considered to be navigable, there is no requirement in ANCSA or its implementing regulations that the BLM list those water bodies, if any, which were determined to be nonnavigable and the beds of which are to be conveyed to the grantee corporation(s) and charged against its entitlement. In listing all the water bodies within the conveyance area which were determined to be navigable, the BLM has implicitly identified those water bodies determined nonnavigable.

[5] As to the assertion that BLM erroneously failed to include in each decision statements of reasons for its navigability determinations, the Board holds that the BLM is not required to include in a decision to issue conveyance a written statement of reasons for its navigability determinations, if any.

Departmental regulations at 43 CFR 2650.5–1(b) provide:

> Surveys shall take into account the navigability or nonnavigability of bodies of water. The beds of all bodies of water determined by the Secretary to be navigable shall be excluded from the gross area of the surveys and shall not be charged to total acreage entitlements under the act. Prior to making his determination as to the navigability of a body of water, the Secretary shall afford the affected regional corporation the opportunity to review the data submitted by the State of Alaska on the question of navigability and to submit its views on the question of navigability. Upon request of a regional corporation or the State of Alaska, the Secretary shall provide in writing the basis upon which his final determination of navigability is made. The beds of all bodies of water not determined to be navigable shall be included in the surveys as public lands, shall be included in the gross area of the surveys, and shall be charged to total acreage entitlements under the Act. The beds of all nonnavigable bodies of water comprising one half or more of a section shall be excluded from the gross area of the surveys and shall not be charged to total acreage entitlement under the act, unless the section containing the body of water is expressly selected or unless all the riparian land surrounding the body of water is selected. No ground survey or monumentation will be required to be done by the Bureau of Land Management of bodies of water.

Appellants asserted that the above-quoted regulation requires that BLM include in a decision to issue conveyance a written statement of reasons for any navigability determinations made in the course of reaching the decision. The above language clearly fails to make such a requirement.

The issue emphasized by Doyon in its reply is the same as that raised by Doyon in *Appeal of*

Doyon, Ltd. and State of Alaska, 5 ANCAB 324, 88 I.D. 636 (1981) [VLS 80-21(C)]. Doyon here asserts, as it did in the cited appeal, that BLM erred in failing to exclude from conveyance the submerged lands of which the State claims ownership and in charging the acreage of such lands against Doyon's entitlement under ANCSA.

Inasmuch as this issue is the same as the sole issue raised by Doyon in *Appeal of Doyon, Ltd. and State of Alaska, supra,* the Board concludes that the discussion and the following findings made in that appeal are appropriate as the basis for decision of the issue in this appeal.

[6] The BLM, under provisions of ANCSA and regulations in 43 CFR, has both the authority and the responsibility to determine which lands, including submerged lands, are "public lands" within the definition of § 3(e) of ANCSA and are therefore available for selection by a Native corporation.

[7] The BLM is not bound to make its navigability determinations in conformity with information provided by the State pursuant to 43 CFR 2650.1(b) as to the navigability of water bodies within lands selected under ANCSA, or to accept the State's conclusions as to navigability.

[8] When the State's claim of ownership of submerged lands is based solely upon its own conclusions as to the navigability of water bodies within lands selected under ANCSA, and not upon a final adjudication of navigability, the mere assertion of the State's ownership does not constitute a claim of title in the submerged lands which requires BLM to exclude such lands from the decision to issue conveyance.

In *Appeal of Doyon, Ltd. and State of Alaska, supra,* the Board found the issue raised by Doyon to be without merit, and accordingly dismissed it.

The parties to this appeal have asserted no factual circumstance and cited no authority which would prevent the decision in *Appeal of Doyon, Ltd. and State of Alaska, supra,* from governing this decision.

Therefore, the Board adopts as its findings in this decision those listed above from *Appeal of Doyon, Ltd. and State of Alaska, supra,* and holds that this portion of this appeal is without merit and is hereby dismissed.

The remaining portions of this appeal yet to be resolved are the issues regarding (1) the factual and legal navigability of the disputed water bodies, (2) the alleged arbitrariness and capriciousness of BLM's navigability determinations, including purported deficiencies and irregularities on the predecision procedure, and (3) unpatented mining claims (raised by Doyon only). These issues, insofar as they have not been addressed herein, will be resolved by separate action of the Board.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

RAY DeVILBISS (WOLVERINE GRAZERS ASSOCIATION)

6 ANCAB 290

Decided *January 27, 1982*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management AA-8489-A.

Partial decision. Appellant, Ray DeVilbiss, has standing to appeal.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

The test for standing to appeal a decision under 43 CFR 4.902 requires, in part, that the appellant claim a property interest within meaning of the regulation. To appeal a § 17(b)(1) public easement decision this portion of the standing requirement is satisfied when the appellant's property interest consists of a § 14(g) valid existing right to which the conveyance of lands under ANCSA is subject.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

An appellant claiming standing to appeal a § 17(b)(1) public easement decision must not only claim to have a property interest, but in order to meet the standing test of 43 CFR 4.902, must further assert that the appealed decision affects that property interest by failing to provide the appellant and the public with access to public lands.

APPEARANCES: Ray DeVilbiss, *pro se;* Russell Winner, Esq., Graham & James, for Cook Inlet Region, Inc.; Elizabeth J. Barry, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; Stephen H. Morrissett, Esq., for Matanuska-Susitna Borough.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeal

The Board rejects the Bureau of Land Management's contention that inclusion of appellant's leasehold interest on Native-selected lands as a valid existing right in the Decision to Issue Conveyance should deny standing under requirements of 43 CFR 4.902 to appeal BLM's public easement decision under § 17(b)(1) of ANCSA.

The Board holds that the Bureau of Land Management's reservation of an easement across the selected lands does not preclude standing of the appellant to show that his property interest is affected by the failure to provide access to appellant and the public along a different route. Although the appellant's property interest is protected under § 14(g), he has a property interest within the requirement for standing under § 4.902, and may appeal the BLM's decision and raise an issue of a § 17(b)(1) public easement.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended,* 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977) (ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

On Sept. 3, 1981, the Bureau of Land Management (BLM) issued a Decision entitled, "Decision of September 30, 1980 Amended in Part," which stated, *inter alia*:

> On October 31, 1980, Chickaloon Moose Creek Native Association, Inc., filed an appeal with the Alaska Native Claims Appeal Board (ANCAB), VLS 80-53, taking issue with the above easement as stated in their 'Statement of Reasons of Interests Affected' presented to ANCAB February 18, 1981. Subsequent proceedings have resulted in ANCAB remanding Secs. 18 and 19, for possible relocation of that portion of EIN 1a D9 lying within those sections.
>
> The decision is hereby amended to change the above easement as follows:
>
> "a. (EIN 1a D9) An easement twenty-five (25) feet in width for an existing access trail: Beginning in Sec. 19, T. 18 N., R. 3 E., Seward Meridian, northeasterly to Wolverine Creek; then easterly paralleling Wolverine Creek to public land. The uses allowed are those listed above for a twenty-five (25) foot wide trail easement."

On Sept. 29, 1981, Appellant, Ray DeVilbiss, appearing *pro se*, and also on behalf of Wolverine Grazers Association, filed a statement, accepted by the Board as a notice of appeal and statement of reasons, asserting the BLM erred in its amended decision.

(1) By relocating public easement EIN 1a D9 incorrectly, "This easement as amended is *still not* the presently used access trail. This trail has not been used for over 20 years because of adverse terrain."

(2) By failing to place public easement EIN 1a D9 as follows: "The present public used access trail begins near Wolverine Lake on the north side of sec. 18 (twn. 18n. Rg. 3E.) and travels southeasterly across sec. 18 and 17 until it reaches Wolverine Creek then the trail runs easterly paralleling Wolverine Creek."

On Nov. 30, 1981, Elizabeth J. Barry, Esq., Office of the Regional Solictor, on behalf of BLM, filed an Answer alleging that (1) appellant lacks standing to bring this appeal because the conveyance is expressly subject to the appellant's grazing lease, and (2) appellant has failed to submit any support for claim that the reserved easement, EIN 1a D9, is improperly located.

On Dec. 9, 1981, appellant filed a reply to the BLM's position on lack of standing to bring this appeal and contends that while access is available to his leasehold lands the major portion of the trail is outside of the leased property and further states that,

> Should the Board affirm the amended decision I would in effect lose the only feasible access to the public lands east of the Native Selected Lands. That *would* affect my livelihood and eliminate any use of these public lands for hunting, sightseeing, or snow-machining for myself or the public.

Decision

The issue before the Board is whether appellant has satisfied the requirements for standing under 43 CFR 4.902. Appellant asserts that the BLM's amended decision of Sept. 3, 1981, which relocates public easement EIN 1a D9, affects his property interest by failing to allow access of the appellant and the public along an existing route from the leasehold land across the Native lands to the unselected public lands to the east. Appellant contends that information available to the BLM shows that EIN 1a D9 should be reserved along a route which

crosses the leasehold lands from the north and joins the reserved easement at Wolverine Creek before proceeding easterly to the unselected public lands.

On Sept. 30, 1980, the BLM issued a Decision to Issue Conveyance (DIC) which approved conveyance of lands selected by Chickaloon Moose Creek Native Ass'n., Inc. (Chickaloon) (Application AA-8489-A) pursuant to §§ 11(a)(1) and 11(a)(2) of ANCSA including the following described sections:

T. 18 N., R. 3 E., S.M.
Sec. 17
Sec. 18, excluding lot 1
Sec. 19

and which, *inter alia,* provided:

[T]he following public easements, referenced by easement identification number (EIN) on the easement maps attached to this document, copies of which will be found in casefile AA-8489-EE, are reserved to the United States. * * *

* * * * *

a. (EIN 1a D9) An easement for an existing access trail, twenty-five (25) feet in width located on the right bank of Wolverine Creek, from Sec. 13, T. 18 N., R. 2 E., Seward Meridian, easterly through the selection. The uses allowed are those listed above for a twenty-five (25) foot wide trail easement.

The issued DIC further provided that the conveyance was subject to appellant's leasehold interest described as, "ADL 36587 located in Secs. 17 and 18, T. 18 N., R. 3 E., Seward Meridian, Alaska."

On Oct. 28, 1980, Mr. DeVilbiss filed an appeal asserting the BLM erred in two particulars, (1) failing to adequately assure protection of his leasehold interest, and (2) failing to correctly place the route of reserved public easement EIN 1a D9. (VLS 80-48.)

On Oct. 31, 1980, Chickaloon filed a separate appeal from the BLM's decision and also raised the issue of reserved easement EIN 1a D9. (VLS 80-53.)

In the case of *Ray DeVilbiss (Wolverine Grazing Ass'n.),* 5 ANCAB 265, 277, 88 I.D. 513, 518 (1981) [VLS 80-48], the Board found that, as to his assertion that the BLM failed to adequately protect his leasehold interest, Mr. DeVilbiss had not raised an appealable issue and dismissed the appeal. The Board held, *inter alia,* that:

[W]hen a lease is identified in a DIC as a § 14(g) interest, and the conveyance is made subject to such interest, then all rights the lessee holds under the terms of the lease, if valid, are protected and there remains no appealable issue which the lessee may appeal as to the effect of the conveyance on the lease.

The Board purposely did not address the question of whether appellant would have standing to appeal BLM's failure to reserve a public easement as proposed across the Native-selected lands because a relocation of the same easement was being reviewed by BLM as the result of proceedings in the above-referenced Appeal of Chickaloon Moose Creek Native Ass'n., Inc., VLS 80-53.

The Board remanded this public easement issue and BLM relocated the easement EIN 1a D9 as described in its amended decision of Sept. 3, 1981.

In the present appeal, BLM again asserts that appellant lacks standing to appeal the issue of a § 17(b)(1) public easement when

the DIC is specifically made subject to his leasehold interest. Seemingly, BLM's position is that because the appellant's leasehold interest in lands situated within the selected area is protected as a § 14(g) valid existing right under ANCSA that any possible appeal of a § 17(b)(1) public easement is thereby precluded.

The Board disagrees that such a result follows.

The Board has held that the appropriate test of standing to appeal a decision under ANCSA is not whether a person is an "aggrieved party," but whether a person "claims a property interest in land affected by a determination" from which an appeal to the Alaska Native Claims Appeal Board is allowed. *Appeal of Sam E. McDowell,* 2 ANCAB 350 (1978) [VLS 78-2]; *Appeal of Charles G. and Sara Hornberger,* 4 ANCAB 112 (1980) [VLS 79-37].

The Board has also previously held that since decisions made pursuant to ANCSA affect property interests differently, application of the standing test in 43 CFR 4.902 must take into account the section of the Act relied upon in the decision under appeal. *See Joseph C. Manga et al.,* 5 ANCAB 224, 88 I.D. 460 (1981) [RLS 80-1]; *Patrick J. Bliss,* 6 ANCAB 181, 88 I.D. 1039 (1981) [VLS 80-17].

In the cases of *Joseph C. Manga, supra,* and *Patrick J. Bliss, supra,* as well as in the case of *Patricia and William Nordmark,* 6 ANCAB 157, 88 I.D. 1028 (1981) [VLS 80-45], the property interest claimed by the appellant to satisfy standing requirements under § 4.902 involved either lands located outside the Native selection area or lands which were excluded from selection because of being patented prior to enactment of ANCSA.

As previously noted, appellant's property interest in this appeal consists of a leasehold covering a portion of the Native-selected lands approved for conveyance and which BLM's decision has included as a specific valid existing right to which the conveyed title is subject.

The Board finds that the reasons given in *Joseph C. Manga, supra,* and *Patrick J. Bliss, supra,* in support of the allowance of standing to appeal a § 17(b)(1) public easement are equally applicable when the appellant's property interest is of a temporary nature protected as an encumbrance to a conveyance of lands under ANCSA.

[1] The test for standing to appeal a decision under § 4.902 requires, in part, that the appellant claim a property interest within meaning of the regulation. To appeal a § 17(b)(1) public easement decision this portion of the standing requirement is satisfied when the appellant's property interest consists of a § 14(g) valid existing right to which the conveyance of lands under ANCSA is subject.

Appellant claims that BLM's amended decision to relocate public easement EIN 1a D9 affects his property interest by not allowing access along an existing route through the leasehold land and across Native-selected lands to unselected lands to the east.

The BLM's amended decision of Sept. 3, 1981, relocated EIN 1a D9 so as to enter the western boundary of the Native-selected lands in

Sec. 19, southerly from Wolverine Creek, and after following an existing trail northeasterly to Wolverine Creek, proceeds along the south bank of the creek easterly through the selection area.

Thus, the effect of the BLM's relocation of easement EIN 1a D9 was to move the entire route of the easement from the north to the south side of Wolverine Creek and to establish its entry onto Native-selected lands at an existing trail in Sec. 19.

In this appeal Mr. DeVilbiss continues to assert that BLM has incorrectly relocated the route of public easement EIN 1a D9 and that it should be reserved over the following described lands:

> The present public used access trail begins near Wolverine Lake on the north side of sec. 18 (twn. 18n. Rg. 3E.) and travels southeasterly across sec. 18 and 17 until it reaches Wolverine Creek then the trail runs easterly paralleling Wolverine Creek.

Appellant's leasehold interest is described as ADL 36587 and affects the following described lands:

> Unsurveyed lands which when surveyed will be:
>
> *Township 18 North, Range 3 East, Seward Meridian*
>
> Section 17—That portion of the W½ north of Wolverine Creek
>
> Section 18—That portion north of Wolverine Creek

Appellant claims that BLM's failure to place the easement EIN 1a D9 across the leasehold lands to public lands on the north, affects not only access across his leasehold but also denies any feasible public access to public lands to the east of the Native-selected lands.

The Board, in the case of *Joseph C. Manga, supra,* at 467, held in accordance with a finding made by the court in *Alaska Public Easement Defense Fund* v. *Andrus,* 435 F. Supp. 664 (D. Alaska 1977), that "the purpose of a public easement is to allow travel 'across' lands selected by Native corporations to 'lands not selected.' "

The fact that the reserved easement EIN 1a D9 provides a route across Native-selected lands should not deny an appellant standing under § 4.902 to raise on appeal the issue of whether BLM's decision is in error and that it affects access by appellant and the public along an existing route.

The Board concludes the appellant has shown that the BLM's decision to reserve public easement EIN 1a D9 as located in its amended decision of Sept. 3, 1981, has affected his property interest within the requirement for standing under § 4.902 to bring an appeal of a § 17(b)(1) public easement.

[2] An appellant claiming standing to appeal a § 17(b)(1) public easement decision must not only claim to have a property interest, but in order to meet the standing test of 43 CFR 4.902, must further assert that the appealed decision affects that property interest by failing to provide the appellant and the public with access to public lands.

The Board holds that the Appellant, Ray DeVilbiss (Wolverine

Grazers Ass'n.), claims a property interest affected within the meaning of 43 CFR 4.902, and has standing to appeal BLM's failure to reserve a public easement under § 17(b)(1) of ANCSA.

Appellant has thirty (30) days within which to file any additional brief on the merits of the issue raised in this appeal. Briefs filed thereafter by the respective parties to this appeal will be in accordance with 43 CFR 4.902 *et seq.*

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

WALT HANNI

6 ANCAB 307

Decided *January 28, 1982*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management AA-6670-A through AA-6670-K.

Partial decision on appellant's standing.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

The appropriate test of standing to appeal a decision to this Board is not whether a person is an aggrieved party, but whether a person claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

In response to arguments that the test of whether a person is aggrieved should be applied because it is consistent with judicial requirements for standing, the Board must find itself bound by its own regulations for standing, which require a claim of property interest.

3. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

The mere allegation of ownership and use of State and Federal lands as a member of the public does not constitute a claim of property interest in land as is required for standing under regulations in 43 CFR 4.902.

4. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

A fee simple ownership interest in a fishing lodge is clearly the type of property interest contemplated by standing regulations in 43 CFR 4.902.

5. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing—Alaska Native Claims Settlement Act: Conveyances: Acreage Entitlement—Alaska Native Claims Settlement Act: Definitions: Public Lands: Generally

Where the Bureau of Land Management under regulations in 43 CFR 2650.0-5(g) or 43 CFR 2650.5-1(b) makes administrative determinations of navigability for the purpose of conveying title to submerged lands, and where title to such lands could pass to the State of Alaska or to a Native corporation, but cannot pass to the appellant, the appellant's property interest in other lands is not affected by such navigability determination, and he lacks standing to raise issues of navigability on appeal.

6. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Decisions made pursuant to ANCSA affect property interests differently, with the effect depending, in part, upon the section of the Act on which each decision is based. Therefore, application of the standing requirements in 43 CFR 4.902 must take into account the section of the Act relied upon in the decision under appeal.

7. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing—Alaska Native Claims Settlement Act: Easements: Access

Since the purpose of a § 17(b)(1) easement is to provide public access across Native lands to public lands, such an easement necessarily affects lands other than those to be conveyed. A member of the public who claims a private interest in land outside the conveyance, in asserting standing to appeal a § 17(b)(1) easement decision, may rely on this private holding as a property interest affected within the meaning of regulations in 43 CFR 4.902.

8. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing—Alaska Native Claims Settlement Act: Easements: Access

Where access, by appellent and members of the public, from a public airport to appellant's property and adjacent public lands is dependent upon use of a water body, and upon access to the water body by a public easement, then the appellant's property interest is affected by failure to reserve such a public access easement.

9. Alaska Native Claims Settlement Act: Easements: Access

Where determination of a lake's status as a major waterway is relevant to reservation of public access easements to the lake, and the appellant's assertions regarding public use of the lake, made in connection with an attempt to appeal navigability determinations, are equally relevant to the question of whether the lake is a major waterway, then the appellant may attempt to prove that the lake is a major waterway in order to justify reservation of the public access easement he seeks.

APPEARANCES: Walt Hanni, *pro se;* Kevin Jones, Esq., and M. Francis Neville, Esq., Office of the Regional Solicitor, for Bureau of Land Management; Thomas S. Gingras, Esq., for Bristol Bay Native Corp.; amicus curiae briefs filed by Shelley J. Higgins, Esq., Office of the Attorney General, for State of Alaska; H. Clifton James, Jr., Esq., for National Wildlife Federation and the Alaska Sportsmen's Council, Inc.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeal

The appellant seeks to appeal the Bureau of Land Management's determination that several bodies of water are not navigable, and the BLM's failure to reserve public access easements associated with public use of the water bodies by floatplane.

To have standing to appeal under applicable regulations, a party must claim a property interest in land affected by the decision appealed. The Board finds that the Bureau of Land Management makes navigability determinations for title purposes; since the appellant could not obtain title from BLM to the submerged lands underlying the disputed waters, his property interest in other lands is not affected by the navigability determinations and he lacks standing to raise issues of navigability on appeal.

As to public access easements, the Board finds that the appellant claims a property interest in land

which is affected by lack of easement access, for himself and the public, between his property and public lands and waters. Therefore, as to issues involving access easements, the appellant has standing to appeal.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended,* 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

On Jan. 23, 1980, the Bureau of Land Management (BLM) issued a decision approving land for conveyance to Iliamna Natives, Limited. The decision made the following findings as to the navigability of water bodies within the conveyance area:

> The following inland water bodies, within the described lands, are considered to be navigable:
> Lake Iliamna;
> Newhalen River;
> Tazimina River up to Tazimina Falls in Sec. 25, T. 3 S., R. 32 W., Seward Meridian.

BLM Decision at 13.

The decision reserves two easements which are relevant to this appeal, designated as follows:

> (EIN 24 D3) An easement sixty (60) feet in width, for an existing road along the south and east sides of Slopbucket Lake and the north shore of Iliamna Lake, in Sec. 12, T. 5 S., R. 33 W., Seward Meridian. The uses allowed are those listed above for a sixty (60) foot wide road easement.
>
> * * * * *
>
> (EIN 24 b D3) A one (1) acre site easement, upland of the ordinary high water mark, in Sec. 12, T. 5 S., R. 33 W., Seward Meridian, on the south shore of Slopbucket Lake. The uses allowed are those listed above for a one (1) acre site.

BLM Decision at 11–12.

The uses allowed for the easements are as follows:

> *60 Foot Road*—The uses allowed on a sixty (60) foot wide road easement are: travel by foot, dogsled, animals, snowmobiles, two and three-wheel vehicles, small and large all-terrain vehicles, track vehicles, four-wheel drive vehicles, automobiles, and trucks.
>
> *One Acre Site*—The uses allowed for a site easement are: vehicle parking (e.g., aircraft, boats, ATV's snowmobiles, cars, trucks), temporary camping, and loading or unloading. Temporary camping, loading or unloading shall be limited to 24 hours.

BLM Decision at 10.

Walt Hanni, appearing *pro se,* appealed timely.

Bristol Bay Native Corp., (BBNC) challenged the appellant's standing to appeal. On Apr. 3, 1980, the Board issued an Order to Show Cause why the appeal should not be dismissed for lack of standing. This order specifically stated:

> Authority of the Board to hear disputes arising from implementation of ANCSA is governed by regulations set forth in 43 CFR (Subpart J) 4.900 *et seq.* which describes jurisdictional and procedural requirements which must be met in all appeals made to this Board.
>
> Section 4.902 provides:
>
> "Any party who claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed, or an agency of the Federal Government, may appeal as provided in this subpart. However, a regional corporation shall have

the right of appeal in any case involving land selections."

The essential element of concern in this instance is whether, as an appellant, Walt Hanni is '[a]ny party who claims a property interest in land affected by a determination' in the manner contemplated by the above regulations, and thereby has standing to bring this appeal.

On May 5, 1980, appellant responded to this order.

The Board, on May 29, 1980, issued an Order for Further Information from the appellant to substantiate his claim of a property interest pursuant to 43 CFR 4.902. Appellant responded by letter.

Both BBNC and BLM have filed briefs and moved to dismiss the appeal.

The State of Alaska (State) and the National Wildlife Federation and Sportsmens' Council, Inc. (NWFASC) have filed amicus curiae briefs.

Positions of Parties

The appellant alleges that BLM erred in not finding Slopbucket Lake, Alexey Lake, Alexey Creek, and Hudson Lake to be navigable, thus causing the loss of these waters to public use. The appellant contends that as these water bodies are navigable and title to the beds is in the State, the submerged lands are publicly owned lands to which the public is guaranteed access by § 17 of ANCSA. Accordingly, the appellant also alleges error in that BLM failed to reserve public trail easements along the shores of Slopbucket Lake, with access corridors to the existing road between Slopbucket Lake and the adjacent Iliamna Lake, for which a road easement (EIN 24 D3) is reserved in the Decision to Issue Conveyance (DIC). The appellant asserts a need for overnight public aircraft tie-ups and emergency camping on the shores of Alexey Lake and Hudson Lake. The appellant stresses that public use of the disputed water bodies for floatplane travel is required for access to public lands in the Iliamna area, and that the water bodies have traditionally been used for this purpose by himself and members of the public.

Because this decision deals only with the procedural question of whether the appellant has standing to appeal, the merits of the appeal will not be dealt with at this time.

To have standing to appeal under 43 CFR 4.902, a person must claim a "property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed."

The appellant claims the requisite property interest under several theories. He claims a property interest as a citizen of the State in all navigable water bodies in the conveyance area, because the underlying land belongs to the State. Because navigable water bodies in the conveyance area and the underlying submerged lands are public waters and public lands, the appellant as a member of the public claims as a property interest the right of access to such public lands and waters which is guaranteed by ANCSA.

He owns real property in the Iliamna area, including a partnership interest in a commercial fish-

ing lodge, comprising five acres and buildings, and a limited partnership interest in the Iliamna Reserve partnership, which owns land in U.S. Survey 1750. As a real estate broker, he has marketing agreements with clients on lots in two subdivisions within the Iliamna area. Lot 20 in the Iliaska Subdivision, on which the appellant has a marketing agreement, is the only tract of land in which the appellant claims an interest which is located within the conveyance area. All other interests to which he refers, including the fishing lodge, are outside the conveyance area.

The appellant claims that conveyance would affect his property interests in several ways. Slopbucket Lake is a base where passengers from Iliamna Airport transfer to floatplanes for travel to the fishing lodge and other points which are accessible only in this manner. Slopbucket Lake is used for this purpose when Iliamna Lake is too rough for takeoff and landing, which occurs frequently. If the appellant and members of the public are deprived of access to, and use of, Slopbucket Lake for aircraft takeoff and landing, they will lose access to private property and publicly owned lands in the Iliamna area, which are not accessible by wheeled aircraft or surface transportation.

Alexey Lake, Alexey Creek, and Hudson Lake are used as floatplane landing site for access to the Tazimina River, which was found navigable by BLM, for fishing. Denial of access to Alexey Lake, Alexey Creek, and Hudson Lake would deprive the appellant, and members of the public, of traditional access to the Tazimina River.

Appellant alleges that the indirect result of such loss of access is to lower the market value of appellant's various parcels of property in the Iliamna area.

In support of appellant's position, NWFASC argued in its amicus brief that as a resident of the State appellant has a property interest in lands underlying navigable water bodies, which gives him the necessary standing to bring this appeal.

The State asserts that appellant has demonstrated a direct connection between the land in which he has a property interest, and navigability and easement issues he is appealing. The State contends that the recreational use and market value of the appellant's property are adversely affected by the BLM decision that Slopbucket Lake, Alexey Lake, and Hudson Lake are nonnavigable.

In addition, the State urges that the appellant has a beneficial interest in the use of publicly owned submerged lands and in the reservation of public easements to guarantee access to them. The State argues that the requirement of a property interest for standing is inconsistent with the interest of the public in easement and navigability isues, since only the State or Federal Governments and the grantee Native corporation could claim a property interest in the submerged lands and the public would be deprived of an opportunity in which to appeal administratively from easement and navigability determinations.

The State relies on various authorities. Sec. 17(b)(1) of ANCSA and implementing regulations provide for the reservation of public easements across Native lands and at periodic points along major waterways to guarantee public access and use for recreation, hunting, transportation and other public uses. Departmental regulations provide that members of the public are entitled to participate in the process of identifying needed public easements and major waterways.

The State cites Article VIII, Sec. 14 of the Alaska Constitution, which reads, in pertinent part:

> Access to Navigable waters. Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State.

The State also asserts that as a matter of policy, members of the public should have standing to appeal BLM's failure to reserve public easements, because individuals familiar with an area have the best information regarding easement needs. Further, a person who would have standing as an aggrieved party under the Administrative Procedure Act, 5 U.S.C. § 702 (1976), to appeal a BLM decision in Federal court, should not be denied administrative standing.

BBNC contends that the appellant has not claimed a property interest in land affected by the decision appealed and therefore he does not have standing within the meaning of 43 CFR 4.902.

Citing *Appeal of State of Alaska,* 3 ANCAB 196, 86 I.D. 225 (1979) [VLS 78-42] and *Appeal of Chickaloon Moose Creek Native Ass'n., Inc.,* 4 ANCAB 134 (1980) [VLS 80-1], BBNC argues that a person must have a property interest in land located in the area in dispute to have standing.

Citing *Appeal of Chickaloon-Moose Creek Native Ass'n., Inc., supra,* BBNC contends that even if ownership of land inside or outside the conveyance area is considered a property interest within the meaning of 43 CFR 4.902, the appellant still fails to meet the standing requirements because the claimed effects are not of the type which can confer standing.

BBNC asserts that the appellant is merely claiming an interest in the conveyance area as a member of the Alaskan public, an argument that has been rejected by the Board in *Appeal of Kodiak-Aleutian Chapter, Alaska Conservation Society,* 2 ANCAB 363 (1978) [LS 77-11].

Regarding appellant's claim that an easement should be established along the shoreline of Slopbucket Lake, BBNC argues even if appellant's access claim constituted a property interest, such interests have not been affected by the conveyance decision, because such an easement is already provided, designated EIN 24 D3.

BLM also challenges the appellant's standing. BLM argues, with respect to the navigability issue: The mere assertion of the recreational use of a bank of a river by an appellant does not, by itself, constitute a claim of "property interest" as required by 43 CFR 4.902 for standing. *(Appeal of Sam E. McDowell,* 2 ANCAB 350 (1978)

[VLS 78-2].) The mere assertion by appellant that he "frequently uses" land which might be conveyed to a village corporation, is insufficient by itself to confer standing. (*Appeal of Omar Stratman,* 2 ANCAB 329 (1978) [LS 77-4C]. The mere allegation of ownership and use of State and Federal lands as members of the public, does not constitute a claim of "property interest in land" as required for standing by 43 CFR 4.902. (*Appeal of Kodiak-Aleutian Chapter, Alaska Conservation Society, supra.)*

BLM asserts that, because the appellant's fishing lodge and property do not lie within the conveyance area, appellant fails to show any connection between such land and land interest which are conveyed pursuant to such a decision, and appellant has failed to meet the requirement for standing set forth in 43 CFR 4.902. (*Appeal of Morpac, Inc.,* 3 ANCAB 89 (1978) [VLS 78-53].)

With respect to the easement question, BLM contends that appellant seeks easements to provide access and use of Native-selected land for his private recreational and business purposes and such is prohibited by *Alaska Public Easement Defense Fund* v. *Andrus,* 435 F. Supp. 664 (D.C. Alaska 1977).

BLM also cites *Appeal of Kodiak-Aleutian Chapter, Alaska Conservation Society, supra:*

> The Board finds that the mere allegation of ownership and use of State and Federal lands as members of the public, does not constitute a claim of 'property interest in land' as is required for standing by 43 C.F.R. § 4.902, and, therefore, the Appellant lacks standing to bring an appeal before the Board.

2 ANCAB at 367.

Decision

This appeal raises two categories of issues: the navigability of several water bodies which were found nonnavigable by BLM, and the reservation of public access easements associated with public use of water bodies.

As to navigability, the appellant contends that Slopbucket Lake, Alexey Lake and Creek, and Hudson Lake are navigable, and thus public waters. Regarding public access easements, on the grounds that § 17(b)(1) of ANCSA guarantees public access to public waters, the appellant contends that public trail easements should be reserved from Alexey and Hudson Lakes to the Tazimina River, which was found navigable by BLM, with site easements on the lakes for emergency camping. He seeks a lineal easement along the shore of Slopbucket Lake with access corridors to the public road designated EIN 24 D3 and thence to public facilities (*i.e.,* the Iliamna Airport). He also seeks a site easement for 24-hour aircraft tiedown on the shore of Slopbucket Lake, in addition to the site easement already reserved on the south shore of the lake. (EIN 24 b D3.)

The Board notes initially that Hudson Lake does not appear to be located in the area approved for conveyance by the decision appealed. If this is the case, the decision here appealed does not affect Hudson Lake and the appeal as to Hudson Lake must be dismissed.

Therefore, BLM will be directed by separate order to review its records and advise the Board wheth-

er Hudson Lake is located within the area approved for conveyance in the decision here appealed.

The appellant's standing to appeal has been challenged on the grounds that he does not meet the requirements of regulations in 43 CFR 4.902 which govern standing before this Board, and which provide: "Any party who claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed * * * may appeal as provided in this subpart."

[1, 2] The appropriate test of standing to appeal a decision to this Board is not whether a person is an "aggrieved party," but whether a person claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed. (*Joseph C. Manga,* 5 ANCAB 224, 88 I.D. 460 (1981) [RLS 80-1].) In response to the argument that the test of whether a person is aggrieved should be applied because it is consistent with judicial requirements for standing, the Board must find itself bound by its own regulations. (*McKay* v. *Wahlenmaier,* 226 F.2d 35 (D.C. Cir. 1955).) These regulations require a claim of property interest.

Accordingly, the test for standing focuses first on whether an interest claimed by an appellant is a "property interest" within the meaning of the above regulations, and, second, on whether such a property interest is "affected" by the decision appealed.

In the present appeal, standing to appeal the two categories of issues raised, *i.e.,* navigability and public access easements, will be considered separable because of distinctions between the two types of issues as they relate to property interests claimed by the appellant.

As to both categories, the Board must consider whether the interest claimed by the appellant is a property interest within the meaning of 43 CFR 4.902 and, if so, whether it is affected as required by that regulation.

The appellant has claimed a variety of interests which, it is contended, are property interests within the meaning of 43 CFR 4.902. As a citizen of the State, he claims a property interest in navigable waters because the underlying land belongs to the State. As a member of the public, he claims as a property interest the right of access to public lands and waters. He asserts that he owns real property in fee simple in the Iliamna area, which includes a partnership interest in a fishing lodge property, comprising five acres of land, sleeping cabins, and a main lodge. He claims one property ownership interest within the conveyance area, *i.e.,* a marketing agreement on a lot in Iliaska Subdivision.

[3] The mere allegation of ownership and use of State and Federal lands as members of the public does not constitute a claim of "property interest in land" as is required for standing by 43 CFR 4.902. (*Appeal of Kodiak-Aleutian*

Chapter, Alaska Conservation Society, supra, at 367.)

Accordingly, neither the appellant's claimed interest in navigable waters nor in access to public lands and waters, merely as a member of the public, can be considered a property interest within the meaning of the regulation.

[4] However, a fee simple ownership interest in a fishing lodge, is clearly the type of property interest contemplated by the standing regulations in 43 CFR 4.902. Therefore, the Board must consider whether this interest is affected by the decision appealed.

As to the navigability issues, the Board concludes that the appellant's property interest cannot be affected by the determinations appealed and therefore he lacks standing.

Questions of navigability as it affects title to submerged lands must be decided finally by the courts, rather than in any administrative forum. (*Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U.S. 10 (1935).) However, BLM makes determinations on navigability for several purposes, including that of determining whether lands are public lands. (*State of Montana,* 80 I.D. 312 (1973).) Pursuant to § 13 of ANCSA and implementing regulations, BLM makes navigability findings to determine which lands, including submerged lands, are public lands within the definition of § 3(e) of ANCSA and are therefore available for conveyance to Native corporations. In addition, under 43 CFR 2650.5–1(b), which deals with the computation of acreage entitlement, BLM is required to take into account the navigability of water bodies within areas withdrawn for selection by Native corporations.

BLM's determinations on navigability do affect title, because these determinations are the basis for charging the submerged lands against the Natives' acreage entitlement, if the waters are found nonnavigable, or for recognizing title in the State, if found navigable. Accordingly, while BLM's navigability determinations do not finally adjudicate title to the submerged land, these determinations establish the Department's position on title, and so affect title status.

If the water bodies were found navigable, title to the underlying lands would be in the State. (Submerged Lands Act of 1953, 43 U.S.C. §§ 1301(a), 1311(a), (b) (1976); *Utah* v. *United States,* 403 U.S. 9 (1971); *United States* v. *Utah,* 283 U.S. 64 (1931); *Organized Village of Kake* v. *Egan,* 174 F. Supp. 500 (D.C. Alaska 1959).) If BLM's findings that the waters are not navigable were affirmed, title to the submerged lands would arguably be in the riparian owner, in this case the Native grantee. Under neither outcome could the appellant claim title to the submerged lands, since he claims no riparian property. (R.E. Clark, Waters and Water Rights, §§ 37.3, 41.3 (1967).)

An appellant's property interests cannot be affected by the outcome of BLM's navigability determinations where the appellant cannot claim a private property interest in the disputed water bodies, or in the underlying submerged lands, nor does ownership of these water bodies affect title

to the property interests he claims.

The appellant also claims standing to appeal navigability determinations by asserting, as a property interest, the right to use the surface of the disputed water bodies in the event they are found navigable and accordingly public waters despite conveyance of the adjacent lands. Such rights to beneficial use of the surface of waters following conveyance, pursuant to State law, are not within the jurisdiction of this Board.

The Board recognizes that the Federal District Court for the District of Alaska has stated that, "[T]he State owns or controls the land beneath navigable waters, and the people of the State have the right to use the water itself on non-navigable rivers and streams." (*Alaska Public Easement Defense Fund* v. *Andrus, supra,* at 677.) However, the Court qualified this statement with the following footnote:

> The court notes that the issue of the ownership and control of the water column on waterways flowing through land taken by Natives pursuant to ANCSA is not before the court for decision at this time. Apparently that issue is being litigated elsewhere. Although the court's ruling on easements is dependent to a certain extent upon the understanding set forth in this memorandum that understanding was arrived at without the benefit of briefing on the issue and obviously constitutes merely background information and not rulings on the law.
>
> *Alaska Public Easement Defense Fund* v. *Andrus, supra,* at 677.

In light of this disclaimer, the Board cannot rely on *Alaska Public Easement Defense Fund, supra,* for the ruling that the appellant as a citizen of the State has a property interest in use of the surface of public waters.

[5] Where the Bureau of Land Management under regulations in 43 CFR 2650.0-5(g) or 43 CFR 2650.5-1(b) makes administrative determinations of navigability for the purpose of conveying title to submerged lands, and where title to such lands could pass to the State or to a Native corporation but cannot pass to the appellant, the appellant's property interest in other lands is not affected by such navigability determination, and he lacks standing to raise issues of navigability on appeal.

Accordingly, this appeal is dismissed as to those issues involving the navigability of Slopbucket Lake, Alexey Lake, and Alexey Creek.

As to the issues concerning public access easements, the Board concludes as discussed below that at least one of the appellant's property interests, the fishing lodge, is affected by each of the easement decisions appealed; therefore, as to easement issues, he has standing.

[6] The Board has held, and here reaffirms, that decisions made pursuant to ANCSA affect property interests differently, with the effect depending, in part, upon the section of the Act on which each decision is based. Therefore, application of the standing test in 43 CFR 4.902 must take into account the section of the Act relied upon in the decision under appeal. (*Joseph C. Manga, supra.*)

[7] Where, in seeking public access easements, an appellant relies on § 17(b)(1) of ANCSA for continuing public access to public lands across lands conveyed to Native corporations, the effect of a decision implementing § 17(b)(1) must be on access to public lands as this affects an appellant's property, rather than on any change in land ownership caused by the conveyance.

Although the Board has held that the property claimed to be affected must be located within the conveyance area, the Board has reached a different result in public access easement cases.

Since the purpose of a § 17(b)(1) public easement is to provide access across Native lands to lands not selected, the Board has concluded that a § 17(b)(1) easement necessarily affects lands other than those to be conveyed. Therefore, a member of the public who claims a private interest in land other than the land to be conveyed, in asserting standing to appeal a § 17(b)(1) easement decision, may rely on this private holding as his or her "property interest" affected within the meaning of 43 CFR 4.902.

Thus, in public access easement appeals, the Board finds that the property interest affected, within the meaning of the standing regulation, may be outside the conveyance area, as is the appellant's fishing lodge.

This property interest is affected by BLM's failure to reserve the public access easements which the appellant seeks.

Slopbucket Lake, the appellant asserts, is a floatplane base and fueling point, used when the adjacent Iliamna Lake is too rough for takeoff and landing. He does not assert the right to fish in the lake or otherwise use it for recreational purposes; he seeks to continue to use it as a point of transfer between two modes of travel; (*i.e.,* wheeled aircraft and floatplanes), in the process of traveling to and from his fishing lodge and adjacent public lands. He asserts, and the record reflects, extensive use of Slopbucket Lake by members of the public for this purpose.

[8] Where access, by appellant and members of the public, from a public airport to appellant's property and adjacent public lands is dependent upon use of a water body, and upon access to the water body by a public easement, then the appellant's property interest is affected by failure to reserve such a public access easement in the conveyance here appealed.

The Board has found that as to issues involving the need for site and lineal easements associated with Slopbucket Lake, the appellant may rely on his property interest in a fishing lodge outside the conveyance area, and such property interest is affected by the decision appealed. Therefore, as to issues involving easements to Slopbucket Lake, the appellant has standing.

The appellant also asserts a need for public easements in connection with Alexey Lake. He seeks a public access easement along an existing foot trail from Alexey Lake to the Tazimina River, as well as a site easement for floatplane and boat tie-up and emergency camping on the shore of Alexey Lake. He asserts that

Alexey Lake is traditionally used by himself and members of the public as a point of floatplane access to reach the Tazimina River, which BLM has determined to be navigable.

These circumstances appear to the Board to be analogous to those surrounding Slopbucket Lake, in that the appellant seeks to use Alexey Lake as a point of transfer from floatplanes to another mode of travel (in this case, foot travel) in the course of travel from his property across Native-selected lands to public lands or waters (in this case, the navigable Tazimina River). Accordingly, following the reasoning previously discussed in connection with Slopbucket Lake, the Board finds that the appellant has standing to appeal the lack of public access and site easements which he seeks in the vicinity of Alexey Lake.

The Board notes that § 17(b)(1) of ANCSA and implementing regulations specifically envision the need for access easements to bodies of water which are used for transportation access to public lands.

Sec. 17(b)(1) of ANCSA provides for the reservation of public easements "at periodic points along the courses of major waterways" in order to guarantee "international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, docks, and * * * other public uses" as determined to be important. The major waterways, along which easements are to be reserved, are defined in 43 CFR 2650.0–5(o):

> [A]ny river, stream, or lake which has significant use in its liquid state by watercraft for access to publicly owned lands or between communities. Significant use means more than casual, sporadic or incidental use by watercraft, including floatplanes, but does not include use of the waterbody in its frozen state.

Regulations in 43 CFR 2650.4–7(a) limit reservation of public easements to those "reasonably necessary to guarantee access to publicly owned lands or major waterways * * *." Regulations in 43 CFR 2650.4–7(b)(1) provide:

> Public easements for transportation purposes which are reasonably necessary to guarantee the public's ability to reach publicly owned lands or major waterways may be reserved across lands conveyed to Native corporations. Such purposes may also include transportation to and from communities, airports, docks, marine coastline, groups of private holdings sufficient in number to constitute a public use, and government reservations or installations.

Status as a major waterway is a regulatory matter, properly determined by BLM and appealable to this Board. Since the need for access to major waterways justifies reservation of an easement, under 43 CFR 2650.4–7(b), a determination that a body of water is a major waterway is clearly related to an asserted need for a public easement.

Major waterways are not required to be navigable, although the characteristics of a major waterway as defined in ANCSA and the regulations are not incompatible with those of waters found navigable under traditional tests. In connection with navigability

issues, which the Board found the appellant lacked standing to raise, the appellant made a number of assertions concerning traditional public uses of Slopbucket Lake. The appellant's purpose in making such assertions was clearly to obtain public access easements to the lake, and such assertions are equally relevant to the issue of whether or not the lake is a major waterway.

[9] Where determination of a lake's status as a major waterway is relevant to reservation of public access easements to the lake, and the appellant's assertions regarding public use of the lake, made in connection with an attempt to appeal navigability determinations, are equally relevant to the question of whether the lake is a major waterway, then the appellant may attempt to prove that the lake is a major waterway in order to justify reservation of the public access easement he seeks.

A conference will be set by separate order at which arrangements will be made as necessary for further briefing and a hearing on factual matters.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

GETTY OIL CO.

61 IBLA 226

Decided *January 28, 1982*

Appeal from decision of Wyoming State Office, Bureau of Land Management, denying petition for reinstatement of noncompetitive oil and gas lease. W 49507.

Affirmed.

1. Notice: Generally—Oil and Gas Leases: Reinstatement—Oil and Gas Leases: Rentals—Oil and Gas Leases: Termination

The law imputes knowledge when opportunity and interest, combined with reasonable care, would necessarily impart it; therefore, where the Bureau of Land Management served notice of an oil and gas lease rental increase on an office of a corporate lessee which the lessee claimed was not its address of record for the lease, the lessee cannot assert ignorance of the increase because reasonable care would dictate that the office receiving the notice inform the proper office.

2. Oil and Gas Leases: Reinstatement—Oil and Gas Leases: Termination

A late rental payment may be justifiable if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessee's control which affected his or her actions in paying the rental fee. Where a lessee asserts a lack of knowledge of a rental increase as justification for its failure to pay timely the full amount of the rental, the lease will not be reinstated if the record supports a finding that the lessee had knowledge of the increase approximately 6 weeks prior to the anniversary date of the lease.

APPEARANCES: Donn J. McCall, Esq., Casper, Wyoming, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

INTERIOR BOARD OF LAND APPEALS

Getty Oil Co. (Getty) has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated Apr. 21, 1981, denying appellant's petition for reinstatement of noncompetitive oil and gas lease W 49507, which terminated by operation of law for failure to pay timely the annual rental.

Pursuant to sec. 17 of the Mineral Leasing Act, *as amended,* 30 U.S.C. § 226 (1976), BLM issued W 49507 effective Apr. 1, 1975, to one Don J. Leeman for 326.54 acres of land situated in Converse County, Wyoming. The annual rental charge was initially $163.50 (50 cents per acre). By assignment effective Jan. 1, 1976, Getty acquired 100 percent record title interest in the lease.

On Feb. 9, 1981, approximately 2 months prior to the lease anniversary date, Apr. 1, 1981, BLM received payment from Getty for the annual rental in the amount of $163.50. However, by letter decision, dated Feb. 11, 1981, BLM notified Getty of an increase in the annual rental to $654 ($2 per acre) based on a determination by Geological Survey that the land was within an undefined known geologic structure. Getty received the notice on Feb. 13, 1981. On Apr. 16, 1981, BLM received payment of $654 from Getty's Tulsa, Oklahoma, office. The letter accompanying the payment explained that BLM sent the notice of the increased annual rental to Getty's Denver, Colorado, address rather than the Houston, Texas, address listed on the assignment of the lease to Getty from Leeman. Getty stated that "the Houston, Texas, office was unaware of the notice and tendered the normal rental of $163.50."

In its decision, BLM concluded that the fact that the notice of increased annual rental was sent to appellant's Denver office instead of its Houston office was not a "justifiable reason" for the late payment because the notice was received by the Denver office "approximately six weeks prior to the due date." [1] Getty filed a timely appeal.

Failure to pay the annual rental for an oil and gas lease on or before the anniversary date of the lease results in the automatic termination of the lease by operation of law. 30 U.S.C. § 188(b) (1976). The Secretary of the Interior may reinstate oil and gas leases which have terminated for failure to pay rental timely only where the rental is paid or tendered within 20 days of the due date and upon proof that such failure was either justifiable or not due to a lack of reasonable

[1] In its decision, BLM noted that "[b]eginning with the April 1, 1979, rental due notice, the address on our records was changed to Getty Oil Company, 1515 Arapahoe Street, Suite 700, Denver, CO 80202." On May 8, 1981, appellant inquired as to the basis for the address change. BLM responded by letter dated May 12, 1981:

"We do not have any documentation to provide you with the information as to why Getty Oil Company's billing address was changed on our records between the April 1, 1978 and the April 1, 1979 billing.

"However, we did check our alphabetical listing of leases billed to Getty Oil Company. It lists 280 leases billed to their Denver address, 17 billed to their Tulsa address, and two billed to their Houston address."

diligence. 30 U.S.C. § 188(c) (1976). In the absence of such proof, a petition for reinstatement is properly denied. *See, e.g., Margaret Lee Pirtle,* 54 IBLA 113 (1981); *Alice M. Conte,* 46 IBLA 312 (1980); *J. R. Oil Corp.,* 36 IBLA 81 (1978).

In its statement of reasons for appeal, appellant contends that it exercised reasonable diligence when it submitted its rental payment on Feb. 9, 1981, and that its failure to pay timely the increase in the annual rental was "justifiable." Appellant argues that the fact that BLM mailed the notice of the increased annual rental to the wrong office "directly contributed to the failure of the increased rental payment to be timely received * * * [and that this action was] not subject to and [was] * * * completely outside of the control of Getty Oil." Appellant points out that the notice was sent to the Denver office despite the fact that the address of the Houston office appeared on the assignment to appellant from Leeman and that BLM received a rental payment from the Houston office only 2 days prior thereto.

[1] The initial question for consideration in this case is whether appellant had notice of the increased rental. This Board has held that in situations where an oil and gas lessee could not have known that rental was due, a lease could not terminate for failure to pay the rental timely. *Davis Oil Co.,* 33 IBLA 53, 55 (1977); *Husky Oil Co.,* 5 IBLA 7, 79 I.D. 17 (1972). In this case if appellant did not have notice of the rental increase, timely payment of the old lease rental having been made, its lease would not have terminated, and there would be no reason for reinstatement. On the other hand, if appellant did have notice, the lease would have terminated, and reinstatement could be granted only if appellant established that the failure to pay timely the increased rental was justifiable or not due to a lack of reasonable diligence.

The regulation applicable to BLM communications by mail, 43 CFR 1810.2(b) states:

> Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management.

Appellant contends that notice was not delivered to its last address of record. It asserts that its address of record for lease W 49507 was its corporate office in Houston, Texas, not its office in Denver where the notice was received. Appellant is apparently correct in this contention. In its decision BLM stated that appellant changed its record address in 1979 from Houston to Denver. However, BLM had no documentation to support this statement, nor does the case record reflect any request for a change by appellant.[2] Therefore, we must conclude that when BLM mailed notice to appellant's Denver address it was not mailing the notice to appellant's record address which it was obliged to do by regulation.

[2] We note that the case file contains a copy of "Receipt for Payment" (form 1371-17) for the 1979 rental and a copy of the same form for the 1980 rental. Appellant's Denver address appears on each copy.

The question then becomes whether appellant may assert this lack of service at its record address so as to preclude termination of the lease. Under the circumstances of this case, we think not.

BLM was obligated to notify appellant's Houston office. It did not. However, it did notify appellant's Denver office of the rental increase on Feb. 13, 1980. Appellant's Denver office therefore had actual knowledge of the increased rental. Appellant's Denver office received lease rental billings and notices for other leases administered by the BLM Wyoming State Office. Appellant has made no attempt to explain why its Denver office did not contact its Houston office concerning the lease in question. It seeks instead to focus all blame on BLM for not notifying the Houston office.

It is well settled that the law imputes knowledge when opportunity and interest, combined with reasonable care, would necessarily impart it. *United States* v. *Shelby Iron Co.,* 273 U.S. 571, 580 (1927); *Wollensak* v. *Reiher,* 115 U.S. 96, 99 (1885). The Denver office received notice. We must assume that there are people in the Denver office knowledgeable about rental payments, since most of appellant's leases listed with the Wyoming State Office are administered there. Reasonable care would dictate the notification of the Houston office when the Denver office realized that lease W 49507 was managed through the Houston office. Apparently this was not done; however, the circumstances are such that knowledge of the increase must be imputed to the Houston office. Since appellant's Houston office must be presumed to have had knowledge of the rental increase and there was a failure to pay the proper amount timely, the lease terminated.

[2] We must now consider whether the lease may be reinstated. Clearly appellant did not exercise reasonable diligence because reasonable diligence ordinarily requires mailing the payment sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of mail. 43 CFR 3108.2–1(c)(2). Although appellant submitted the old rental amount approximately 6 weeks in advance of the anniversary date, it failed to transmit the full amount until 2 weeks after the due date. Under such circumstances we must find a lack of due diligence. *See Ralph W. M. Keating,* 55 IBLA 113 (1981).

A failure to make timely payment may be justifiable for purposes of reinstatement if it is demonstrated that the failure was proximately caused by extenuating circumstances outside the lessee's control which occurred at or near the anniversary date of the lease. *Ram Petroleums, Inc.* v. *Andrus,* 658 F.2d 1349 (9th Cir. 1981); *Ralph W. M. Keating, supra.* Appellant's asserted justification for the late payment is its lack of notice. Since we determined above that appellant's Houston office was presumed to have knowledge of the rental in-

crease, we must conclude that there were no extenuating circumstances outside of appellant's control which precluded timely payment of the rental.[3]

Appellant would have us conclude that the Board's decision in *Richard L. Rosenthal,* 45 IBLA 146 (1980), mandates a different result in this case. In *Rosenthal* we held that under the totality of circumstances the appellant was entitled to reinstatement of his lease. Rosenthal had submitted his rental payment to the wrong BLM office (the Colorado State Office rather than the Montana State Office). However, we concluded that "the initial delay attributable to the appellant's error was compounded by the excessive length of time [over 2 weeks] it took employees of the Colarado State Office either to return the payment to appellant or to forward it to the proper office." *Richard L. Rosenthal, supra* at 148. We noted that employees of the Colorado State Office had actual notice of the proper office for receiving payment and of the due date.

This case represents the converse factual situation to *Rosenthal.* In *Rosenthal* the lessee had an obligation to make payment in the proper BLM office. He did not. BLM failed over a period of time to forward payment, however, and we ordered reinstatement. In the present case BLM had an obligation to send notice to appellant's record address. It did not. However, appellant's office that did receive notice failed over a 6-week period of time to notify the proper office. The rationale of *Rosenthal* suports the holding in this case. BLM properly denied appellant's petition for reinstatement.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

BRUCE R. HARRIS
Administrative Judge

WE CONCUR:
BERNARD V. PARRETTE
Chief Administrative Judge
JAMES L. BURSKI
Administrative Judge

[3] As pointed out in the BLM decision, this Board has not accepted either the bulk and/or complexity of a business organization as adequate justification for a late payment. *Mono Power Co.,* 28 IBLA 289 (1976) (complete remodeling of office space); *Serio Exploration Co.,* 26 IBLA 106 (1976) (duty to make payment transferred from company's land manager to accountant); *Columbia Gas Transmission Co.,* 13 IBLA 243 (1973) (restructuring of internal operations).

APPEAL OF ARMSTRONG & ARMSTRONG, INC.

IBCA-1311-10-79

Decided *January 29, 1982*

Contract No. 14-06-D-7404, Specifications No. DC-6985, Bureau of Reclamation.

Granted in part.

1. Contracts: Construction and Operation: Warranties—Contracts: Disputes and Remedies: Burden of Proof—Rules of Practice: Appeals: Burden of Proof

The Government failed to sustain its burden of proving that the malfunctioning of discharge gate valves required for an irrigation system was due to the valves not meeting the requirements of the specifications rather than a result of the Government's failure to provide a filtering device

in the irrigation system to keep out damaging foreign matter. Noted by the Board was the fact that under the maintenance warranty provision on which the Government's claim is based, the contractor is not responsible for repairing defects or failures due to negligence in the operation of the irrigation system by the Government or its agents.

2. Contracts: Construction and Operation: Warranties—Contracts: Contract Disputes Act of 1978: Interest—Contracts: Disputes and Remedies: Buden of Proof

The Board denies a claim for interest on an amount obtained by the Government from an interest-bearing escrow retention account to satisfy its claim of breach of a maintenance warranty (the interest claimed is the amount that would have been earned in the escrow account on the sum taken by the Government from the time taken until the time paid). The denial is predicated upon the absence of any clause in the contract authorizing the payment of the type of interest claimed and the fact that the only statute authorizing the payment of interest on claims against the Government is the Contract Disputes Act of 1978, under which interest is paid on claims from the time they are presented to the contracting officer for decision.

APPEARANCES: William B. Moore, Attorney at Law, Ferguson & Burdell, Seattle, Washington, for Appellant; William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The instant appeal concerns the application of a maintenance warranty provision to 22 hydraulically operated discharge gate valves required for the construction of several pumping plants and a distribution system for the Chief Joseph Irrigation Project in the State of Washington. In the complaint the appellant requests that it be awarded the sum of $25,068.59 [1] said to have been wrongfully seized by the Bureau of Reclamation (hereinafter the Bureau or BOR) from an interest-bearing escrow retention account, together with the interest to the date of payment that would have been earned on the account but for the Bureau's seizure thereof.

Findings of Fact

1. Contract No. 14-06-D-7404 was awarded to the contractor under date of June 8, 1973, in the estimated amount of $4,441,008.65. It called for the construction and completion of the Manson Unit Distribution System, Chelan Division, Washington, Chief Joseph Dam Project in accordance with the terms of specification No. DC-6985. Giving effect to the terms of the contract, all work required thereby was to be completed by Apr. 17, 1975. The contractor was found to be entitled to time extensions totalling 406 calendar days, however, thereby establishing May 27, 1976, as the date by which all of the contract work was to be completed. All work under the contract was accepted as substantially complete

[1] In its notice of appeal dated Oct. 18, 1979, the appellant states that the amount of the claim is just under $50,000. The appellant has made no effort, however, to support a claim in any such amount. The Board notes that the complaint showing the $25,068.59 figure is dated Feb. 12, 1980.

on May 27, 1976. The disputed work involves 22 hydraulically operated discharge gate valves which were furnished and installed under contract schedule items 353 through 358 [2] (Appeal File (hereinafter AF) 1).

2. The contract was prepared on standard forms for construction contracts including the General Provisions set forth in Standard Form 23-A (Oct. 1969 edition, as supplemented). Especially considered in the resolution of this dispute are the following provisions:

GENERAL PROVISIONS

* * * * *

5. TERMINATION FOR DEFAULT—DAMAGES FOR DELAY—TIME EXTENSIONS

(a) * * * Whether or not the Contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damage to the Government resulting from his refusal or failure to complete the work within the specified time.

* * * * *

9. MATERIAL AND WORKMANSHIP

(a) Unless otherwise specifically provided in this contract, all equipment, material, and articles incorporated in the work covered by this contract are to be new and of the most suitable grade for the purposes intended. * * *

* * * * *

10. INSPECTION AND ACCEPTANCE

* * * * *

(b) The Contractor shall, without charge, replace any material or correct any workmanship found by the Government not to conform to the contract requirements, unless in the public interest the Government consents to accept such material or workmanship with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.

* * * * *

(f) Unless otherwise provided in this contract, acceptance by the Government shall be made as promptly as practicable after completion and inspection of all work required by this contract. Acceptance shall be final and conclusive except as regards latent defects, fraud, or such gross mistakes as may amount to fraud, or as regards the Government's rights under any warranty or guarantee.

SPECIFICATIONS

* * * * *

8. DESCRIPTION OF THE WORK

The contractor is required to warrant and be responsible for the repair of all defects, leaks, or failures in the pipe, pipe joints, valves, meters, and fittings.

* * * * *

34. INSPECTION AND TESTS BY GOVERNMENT

In addition to tests specifically outlined in these specifications, the Government reserves the right to inspect and test materials, equipment, and workmanship during the life of the contract in accordance with Clause No. 10 of the General Provisions. * * *

35. BACKCHARGES TO CONTRACTOR

Where these specifications provide for charges to the contractor for costs incurred by the Government for services, materials, or use of equipment, such charges will include the costs of labor and materials, a reasonable allowance for use of plant and equipment, and other expenditures which can be directly assigned to the services or materials furnished, plus 15 percent of such total costs for Government overhead.

* * * * *

[2] The number of discharge valves covered by the contract schedule items cited total 26. Of this total number, however, only 23 are discharge gate valves (AF 1, Specifications paragraph 149). One of the discharge gate valves was apparently considered satisfactory by the Bureau for in the findings from which the instant appeal was taken, the contracting officer states at page 4: "One of the 5-inch gate valves furnished by the contractor which was manufactured by Lunkenhiemer was inspected and did not show any signs of galling or scoring after two seasons of operation. The Government's conclusion was that this valve was apparently furnished with the required hardness differential."

The Bureau replaced the remaining 22 discharge gate valves and charged the contractor therefor (Findings of Fact and Decision dated Dec. 21, 1979, at 5-6).

36. MATERIALS TO BE FURNISHED BY THE CONTRACTOR

* * * * *

b. Inspection of materials.—Materials and equipment furnished by the contractor which will become a part of the completed construction work shall be subject to inspection in accordance with Clauses No. 9 and 10 of the General Provisions at any one or more of the following locations, as determined by the contracting officer: at the place of production or manufacture, at the shipping point, or at the site of the work. * * *

The inspection of materials and equipment at any one of the locations specified above or the waiving of the inspection thereof shall not be construed as being conclusive as to whether the materials and equipment conform to the contrat requirements under Clause No. 10(a) of the General Provisions, nor shall the contractor be relieved thereby of the responsibility for furnishing materials and equipment meeting the requirements of these specifications. Acceptance of all materials and equipment will be made only at the site of the work.

* * * * *

111. MAINTENANCE WARRANTY OF PIPELINES

For a maintenance warranty period of 3 years after acceptance of the work the contractor shall be responsible for the repair of all defects, leaks, or failures occurring in the pipe, pipe joints, fittings, valves, meters, flow tubes, and related piping, manifolds, steel regulating tanks, and station control equipment from any cause whatsoever, except for such leaks, defects, or failures which are, as determined by the contracting officer, due to defects in Government-furnished materials, negligence in the operation of the irrigation system by the Government or its agents, acts of third parties, acts of God, or acts of the common enemy. The contractor will be reimbursed the actual and necessary cost, plus 15 percent of profit and general expense of any work or materials pertaining to repairs or replacements that are determined as not the responsibility of the contractor.

The contractor, upon notice from the Government, shall promptly commence and diligently prosecute the repair of any defects, leaks, or failures that develop during the 3-year maintenance periods. The work of repairing any defects, leaks, or failures includes the necessary excavation, pipe repair, backfill, and replacement of any appurtenances destroyed or disturbed by reason of such work. Repairs as may be required, in the opinion of the contracting officer, shall be made by the contractor in such a manner as to cause the least practicable interference with the use of the pipelines in service. The contractor shall make necessary arrangements to have competent personnel and suitable equipment available so that repairs may be commenced within 48 hours after receipt of notice from the Government.

The obligations of the contractor under this paragraph shall be enforceable against his surety or sureties for the Performance Bond under this contract, during the life of the contract and for 1 year after final acceptance of all work under the contract. Prior to final payment under the contract, the contractor shall furnish a maintenance warranty bond in the penal sum of 5 percent of the total original contract price, to assure performance of the contractor's obligations under this paragraph after the expiration of the obligation under the Performance Bond, for the remainder of the maintenance warranty period.

In lieu of the maintenance warranty bond described above, the contractor may, at his option, and at any time prior to final payment under the contract, provide appropriate evidence that the Performance Bond has been extended and kept in full force and effect for the remainder of the maintenance warranty period: Provided, That the penal sum of the bond may be reduced to 5 percent of the total original contract price.

The maintenance warranty bond or the extended Performance Bond shall contain a clause specifically incorporating the requirements of this paragraph by reference or otherwise. The form of bond and the surety shall be satisfactory to the contracting officer.

If the contractor fails or refuses to make required repairs or replacements with due promptness and diligence as determined by the contracting officer, the Government

shall have the right to make repairs and replacements and, unless it is determined that the cost of such work is chargeable to the Government, the entire costs thereof shall be paid by the contractor and may be collected from the contractor or the contractor's surety or sureties or both.

The cost of furnishing the maintenance warranty bond shall be included in the unit prices bid in the schedule for other items of work.

* * * * *

132. DRAWINGS, DATA, AND CERTIFICATION TO BE FURNISHED BY THE CONTRACTOR

* * * * *

b. * * * [A]pproval by the Government of the contractor's drawings and data shall not be held to relieve the contractor of any obligation to meet all the requirements of these specifications or of the responsibility for the correctness of the contractor's drawings.

* * * * *

CYLINDER-OPERATED DISCHARGE VALVES AND VALVE-OPERATING SYSTEMS

147. GENERAL

The contractor shall furnish and install cylinder-operated discharge valves on the pump discharge of each unit for Pumping Plants No. C, D, E, F, G, and H and a valve-operating system in each plant. The valve-operating system shall be complete with oil pump, air compressor, oil reservoir, accumulator tank, piping, valves, filters, gauges, pipe supports, and all other accessories and controls that may be required to make the system operate satisfactorily.

* * * * *

The valve-operating system and the cylinders on the pump discharge valves shall be suitable for operation using oil as an operating medium. Means shall be provided in the operating systems for venting air from high points in the system and from valve-operating cylinders.

* * * * *

The valve controls shall be arranged to provide the time of opening or closing with the maximum unbalanced pressures on the valves using the initial pressure in the accumulator tank listed. Each valve-operating cylinder shall be of ample size to open or close the valve against the maximum unbalanced operating pressure on the valve listed and with the residual pressure in the accumulator tank after each valve in the plant has completed an opening and closing stroke, without benefit of restored pressure to the accumulator tank by the oil pump.

The piping for the valve-operating systems shall be of such size that the oil velocity will not exceed 15 feet per second in the pressure lines or 10 feet per second in the gravity return lines.

* * * * *

149. DISCHARGE VALVES AND OPERATORS

The contractor shall furnish seven discharge valves and operating cylinders for Pumping Plant No. C, five for Pumping Plant No. D, four for Pumping Plant No. E, four for Pumping Plant No. F, four for Pumping Plant No. G, and two for Pumping Plant No. H complete in accordance with the requirements below. At the contractors [*sic*] option all discharge valves 8 inches and larger may be either of the cone or ball design, and shall be of the same design. All discharge valves smaller than 8 inches shall be of the gate valve design.

* * * * *

c. Gate valves.—* * * The size of each valve and the maximum unbalanced operating pressure under which the valves will be operated are tabulated in Table 1 of Paragraph 147.

The body and seat of each valve shall be subjected to hydrostatic pressure tests applicable to the steam pressure rating of the valve furnished. Each valve shall be suitable for opening or closing against the maximum unbalanced operating pressure on the valve disc. * * * The disc faces shall be stainless steel and machined to fit. The body seat rings shall be made of stainless steel and shall be removable. The stainless steel used in the disc faces and seat rings shall be 12 to 14 percent chrome, annealed and heat treated to produce a differential of not less than 200 points Brinell hardness to minimize galling, seizing, and sliding contact wear between the seating surfaces.

(AF 1, the Contract).

3. By supplemental agreement dated July 30, 1973 (AF 2), the contract was modified to provide that in lieu of the retained percentage requirements of Paragraph 7 of the General Provisions, the contractor should place in escrow specified securities having at all times a principal value equal to or greater than the dollar amount that would otherwise be retained by the Government under General Provision 7 (Standard Form 23 A). The agreement provided that in the event the contractor defaults the contract (default was to be interpreted as, but not limited to, specified causes), the contracting officer would have the right to receive delivery of the securities from the escrow agent after 15 days of written notice by the contracting officer of the default of the contractor and request for delivery by the contracting officer to the escrow agent and that the contracting officer would have the right to sell the securities and to use the proceeds of the sale toward the purpose for which the retained percentage is intended.

The agreement also provided (i) that the right and authority of the contracting officer to demand delivery of the securities from the escrow agent would not be affected or disrupted by the contractor's assertion to the escrow agent that it was not in default; (ii) that the contracting officer's right to determine if there had been a default on the part of the contractor was to be governed by the contract as it related to "Termination for Default"; [3] and (iii) that the contracting officer was authorized to receive from the escrow agent in the same manner and according to the same procedures set forth in the event of a default by the contractor, an amount equal to any overpayment that might exist at the time of completion of the construction contract.

Included with the supplemental agreement as Appendix I is a document entitled "Escrow Agreement" which was entered into under date of Aug. 6, 1973. The agreement provides for the delivery by the contractor of specified securities to the Colorado Springs National Bank and is shown to have been approved by the contracting officer. In especially pertinent part the agreement provides:

> 4. Within fifteen (15) days after you are served with a written request from the Contracting Officer for the delivery of securities or other property of the Contractor held by you and written notice by the said Contracting Officer that the Contractor has been determined, in accordance with the provisions of Paragraph 3 of the Supplemental Agreement to the Contractor's relevant construction contract with the Government, to be in default in the performance of such construction contract, you shall deliver to said Contracting Officer all securities or other property of the Contractor then in your possession and subject to this Escrow Agreement. If you deliver the properties of the Contractor to said Contracting Officer, you shall in no way be liable for so doing even though it may later be determined that such request and notice were improper and unlawful.

(AF 2).

[3] The only clause pertaining to default contained in the contract appears to be Clause No. 5, Termination For Default—Damages for Delay—Time Extensions of the General Provisions.

4. An existing problem with the discharge valves was reported to the contractor by a letter under date of July 27, 1976 (AF 12), in which the Bureau stated (i) that some of the discharge valves had failed to close against extreme hydraulic unbalance ever since testing commenced early in the spring; (ii) that the valves experiencing problems were all the discharge valves at pumping plants D and F plus the discharge valve for unit 3 at pumping plant E;[4] (iii) that the problem had been discussed with the supplier's representatives who had advised that the cause was probably stiff valve packing which would probably free up allowing satisfactory operation; and (iv) that substantial use of the valves since then had resulted in no change in their operation.[5] The letter concluded by advising the contractor that it should submit its maintenance warranty bond as required by Paragraph 111 of the specifications covering a 3-year period commencing on May 27, 1976, the date on which all work under the contract was accepted as substantially complete.[6]

By letter dated Nov. 19, 1976, the BOR confirmed discussions of Nov. 3, 1976, among representatives of the Bureau, the contractor, and the contractor's suppliers, concerning repair of the subject valves.[7] At the meeting it was stated (i) that the contractor's valve supplier would ask the manufacturers of the valves in question to review the problem and recommend a solution; (ii) that the contractor would submit the recommendation to the Bureau prior to proceeding with repair of the valves; and (iii) that all necessary repairs would have to be completed prior to the 1977 irrigation season which would commence about Mar. 31.

In a followup letter to the contractor under date of Jan. 18, 1977, concerning the repair of the hydraulically operated valves, the BOR stated (i) that it had received no indication that progress was being made in resolving the problem; (ii) that it was imperative

[4] The problems encountered apparently involved 10 discharge gate valves (five at pumping plant D; four at pumping plant F; and one at unit 3 of pumping plant E) (AF 1, Para. 147 of Specifications, Table 1).

[5] The chief, Division of Construction, stated:

"The upstream manifold to the discharge valve for unit 4 at pumping plant D was dissembled to allow for inspection. Although the valve could not be opened, it appeared that there was scoring on either the gate leaf or seat. Unless the system has to be shut down for another reason, we will not be able to confirm this until fall. By copy of this letter the Project Construction Engineer is advised to notify you when system conditions will allow for further inspection of the valve to determine the cause of the malfunction so that you may proceed with the necessary repair work." (AF 12, BOR letter dated July 27, 1976).

[6] The Maintenance Warranty Bond subsequently furnished noted that paragraph 111 of the specifications (incorporated into the bond by reference)

"required the Principal (1) upon receipt by the Principal of a notice from the government so to do, to promptly commence and diligently prosecute in strict and complete compliance with the terms of said Paragraph the repair of any defects, leaks, or failures that, within the three year period immediately succeeding the Government's final acceptance dated May 27, 1976 of all of Principal's work under said contract, may develop in the pipelines constructed under said contract; and (2) prior to final payment under the contract, to furnish to the Government's contracting officer a bond in form and with Surety thereon satisfactory to the contracting officer to secure the Principal's obligation to perform said repair of such defects, leaks, (or) failure as may develop during the second and third years of said three year period, commencing May 27, 1976." (AF 13).

[7] The letter from the acting project construction engineer states:

"[A]n inspection prior to the meeting indicated that there is considerable galling and scouring of machined surfaces of the discs and seats in approximately 75% of the valves inspected. This condition is unsatisfactory and makes the valves unacceptable as meeting requirements of the specifications. Specifications Paragraph 149c states, in part, 'The gate valves shall be suitable for cold-water service, and for controlling the discharge of centrifugal pumps.—The size of each valve and the maximum balanced operating pressure under which the valves will be operated are tabulated in Table 1 of Paragraph 147.—Each valve shall be suitable for opening or closing against the maximum unbalanced operating pressure on the valve disc.'" (AF 14, BOR letter dated Nov. 19, 1976).

that the valves be operable prior to the start of the 1977 irrigation season near the end of March; and (iii) that unless it received word prior to Feb. 1, 1977, that the contractor was proceeding with the repairs, the Government would initiate them [8] and back-charge the contractor for the costs involved plus a Government overhead allowance of 15 percent (AF 12, 14, and 15).

5. In a comprehensive five-page letter to Hallgren Co., Inc. (hereinafter Hallgren),[9] dated Dec. 2, 1976, Greaves Co., Inc. (hereinafter Greaves), undertook to address questions raised by the Bureau, the contractor [10] or Hallgren, and to provide a summary of its inspection of the site on Nov. 29, 1976. From the text of the letter it appears that as early as Aug. 10, 1976, Greaves had advised Hallgren that it had no responsibility for the 23 gate valves furnished to Hallgren because there was no longer any warranty in effect.[11]

The conclusions reached by Greaves and its consultant as a result of their Nov. 29, 1976, site visit included the following: (i) Foreign objects in the piping caused scoring on some of the valves, such as (a) bits and pieces of concrete, (b) welding slag, (c) sand, silt, and/or rocks, (d) pieces of metal such as bolts, nuts, washers, wires, etc., (e) basalt particles, and (f) definite evidence that larger particles passed through, probably at start-up; (ii) the system intake of water from a trench in the lake bottom at a point some 300 yards from the shore involves water coming into the pump station bay which is picked up by vertical line shaft turbine pumps that cause turbulence with the result that any solids (silt and sand) flowing into the suction bay are stirred up by this pump turbulence which is passed through the pumps into the system; (iii) that as a result of the conditions outlined in item (ii), *supra*, fines such as silt and sand and basalt particles will continuously be present in the water pumped through the system, scoring the valves on a continuing basis and from the visual evidence being the cause of some of the scoring, especially during opening and closing; (iv) any reasonable conclusion is that this will be a continuing process; and (v) the inspection made by Greaves and its consultant satisfied them that the valves inspected were scored due

[8] The Bureau's claims were asserted under the Maintenance Warranty Bond (requirements of which were described in Paragraph 111 of the Specifications) and the latent defects provision of Clause 10(f) of the General Provisions (AF 15, BOR letter dated Jan. 18, 1977).

[9] A copy of the Greaves letter of Dec. 2, 1976, accompanied the contractor's letter to the Bureau dated Jan. 21, 1977. Also furnished with that letter was a copy of Hallgren's letter to the contractor of Jan. 5, 1977, and a copy of Greaves' letter to Hallgren dated Dec. 8, 1976. The latter letter simply transmitted to Hallgren a copy of a letter from Zidell Explorations, Inc., to Greaves under date of Dec. 7, 1976 (AF 16).

[10] In its letter to counsel for the contractor dated Jan. 5, 1977, Hallgren categorically rejected the suggestion that Hallgren had any obligation to take care of what the contractor had labelled "faulty valves." In the same letter Hallgren states: "[T]he responsibility for devising a solution to the problem complained of would appear to rest upon the USBR as a part of its design function, and the cost of implementing any such solution should presumably entitle Armstrong to additional compensation under its contract" (AF 16, letter dated Jan. 5, 1977, at 2).

[11] By a letter dated Jan. 5, 1977, Hallgren had advised the contractor that it had supplied the required valves some 18 months before which fulfilled all requirements imposed on Hallgren (AF 16, letter dated Jan. 5, 1977, at 1).

to entrapment of foreign material.[12]

In its letter Greaves raises the following questions: 1. Why has there never been any reference to or evidence of strainers or filters? 2. On its first visit to the site when it complained to the Bureau and contractor personnel about poor storage and handling and lack of protection, why did no one seem to care? 3. Why do the Bureau and the contractor both seem to feel that Greaves and Hallgren have an obligation to perform adjustments and service labor indefinitely?

After asserting that it had sold a commodity and not any services, Greaves offers the following comments:

> 4. As we see it after all the trips, letters and research, you bear no responsibility for the valve scoring [13] *nor does Armstrong and Armstrong.*
>
> The only exception would be laxity, on their part at start-up. The continuing scoring certainly cannot be their problem until the USBR makes provision for the removal of foreign material and takes steps for normal maintenance. I cannot see where Armstrong should be held accountable for service conditions over which they have no control. Why is this so hard to see? [Underscoring in original.]

The Jan. 21, 1977, submission by the contractor also included a copy of a letter from Zidell Exploration, Inc., to Greaves under date of Dec. 7, 1976. In especially pertinent part the letter states:

> Valves sold to you were factory new Crane that meet all your requirements. These valves are backed with a one year warranty (see attached). [14] These valves are no longer a warranted item, since they were delivered over two years ago.
>
> * * * [T]here is no doubt that this system was misdesigned since there is no filtering device in this system to eliminate damaging foreign matter. Therefore, there would be no warranty based on the improper usage of material even if it was within the one year period. [15]

(AF 16).

6. In its letter to the contractor of May 9, 1977, the Bureau rejected the view of the valve suppliers that foreign material pumped from the reservoir was the principal cause of the breakdown of the sealing services of the valves. The letter refers to an underwater inspection of the Lake Chelan pumping plant and intake channel which had been performed on Feb. 25, 1977, by the Pacific Northwest regional diving team as a result of which the team had concluded that a small amount of fine silt could be pumped through the system following initial start-up or during times when the lake is roiled due to high winds. It was noted, however, that normally the waters of Lake Chelan are very clear and are not expected to

[12] Hallgren states: "[W]ith reference to comment on unsatisfactory valve closure, Greaves appears to identify the contributing factors as inadequate operation, maintenance, and lubrication, as well as the aggravating presence of foreign material. Obviously none of these problems involve Hallgren responsibility" (AF 16, letter to contractor dated Jan. 5, 1977, at 2).

[13] Near the conclusion of the letter Greaves states: "5. You seem to us to be dealt with by Armstrong as if you were a mechanical Subcontractor rather than a Vendor with a purchase order for goods. Which is the case?" (AF 16, letter to Hallgren dated Dec. 2, 1976, at 5).

[14] In especially pertinent part the Warranty provision states:

"All goods are warranted to be free from defects in workmanship, which may cause failure under normal usage and service when the goods are properly installed and used for the intended purpose. If the goods are found defective within one year from the date of the delivery of the goods to the Buyer and the Seller is immediately notified in writing, Seller will repair the goods and, at Seller's option will repair or replace the defective goods without charge if the defective goods are returned to Seller's plant. This warranty applies only to the original buyer of the goods; there are no warranties for goods that have been repaired, altered or modified or subject to misuse, negligence or accident after purchase." (AF 16).

[15] In its letter to the Bureau of Jan. 21, 1977, the contractor refers to the several letters it has enclosed, after which it states: "Please note that they attribute such problems as do exist to design defects for which the Bureau would be responsible" (AF 16).

transport much silt into the system.

The Bureau also asserted (i) that following 2 years of operation the Lake Chelan tanks had been inspected on Jan. 19, 1977; (ii) that such inspection had revealed no evidence of foreign materials of the type described in the referenced letters; (iii) that inspection of tank A and tank B (the next two tanks downstream from the Chelan tank) had shown only a thin film of fine silt covering the bottom of each tank with a very small amount (perhaps one shovelful) of sand and fine gravel; (iv) that any sand, gravel, or foreign material being pumped through the system would tend to settle out in each succeeding tank because the tank outlets were 6 inches above the bottom of the tanks, while the inlets are flush with the tank bottom; and (v) that while pumps from plants C, D, E, F, H, Ha, and Ca were disassembled during Jan. and Feb. 1977, to modify bearing seals, inspection of the impellers and inside flow passages of these pumps by Bureau personnel had revealed no evidence of unusual polishing, abrasion, or scars that would result from foreign objects or materials in the water.

The letter states that one 3-inch Powell valve and one 5-inch Crane valve were removed from the system and sent to the Bailey Manufacturing Co., Inc., of Wenatchee, Washington, for hardness tests of valve seats and disc material and that the certified test results [16] were as follows:

1. 3-inch Powell valve
   Seat Brinell hardness 279/286
   Disc Brinell hardness 253

2. 5-inch Crane valve
   Seat Brinell hardness 311/319
   Disc Brinell hardness 353

Concerning the above-quoted test results the letter states that the materials used in the discs and seats of these valves do not meet the specifications requirement of not less than 200 points Brinell hardness differential between the sealing surfaces.[17] After asserting that the contractor had not furnished the hydraulic-operated gate valves in accordance with the specifications requirements, the Bureau directed the contractor to furnish and install valves in accordance with Paragraph 149 of the specifications, that is, stainless steel discs and seats with a 200 point Brinell hardness differential. The letter also noted that at that time Bureau project personnel were replacing the 3-inch Powell and the 5-inch Crane valves in the discharge lines of pumping units F–1 and B–1, respectively.[18]

[16] The Government has acknowledged that these tests were not certified and could not have been certified since Bailey's machine had not been certified for accuracy and was not certified by an independent testing laboratory until Feb. 2 of 1979. *See* copy of BOR memorandum dated June 6, 1979, which accompanied a letter to the Board from appellant's counsel dated June 2, 1980, and which appellant's counsel requested be made a part of the record as exhibit 30 by letter to the Board of June 12, 1980.

[17] Thereafter the letter states: "[V]isual examination disclosed galling of the discs and seats of both valves. Extreme galling was evident on the disc of the 5-inch Crane valve. We feel that the galling of the valve discs and seats was the result of insufficient differential in hardness of the materials used for these components" (AF 20, BOR letter dated May 9, 1977, at 2).

[18] As to the nature of the replacement, the letter states: "[T]he replacement valves will have stellite seats

Continued

As to the unsatisfactory operation of some of the discharge valve operators, the Bureau comments (i) that its reports indicate the valve operators on some of the valves do not work satisfactorily even after the packing glands were completely loosened and lubricated; (ii) that the unsatisfactory operation of the valve operators may be related to the galling which had occurred on the valve seats and discs; and (iii) that the contractor would be advised of the disposition of the operation of the hydraulic operators following the 1977 irrigation season (AF 20).

7. The response of the contractor to BOR's May 9, 1977, letter was to forward a copy of a letter dated Oct. 6, 1977, from the attorney representing Hallgren's supplier, the Greaves Co., which had been furnished to the contractor's attorney by Hallgren's lawyer.[19]

Addressing the question of whether the breakdown of the sealing surfaces of the valves was due to galling or scoring, the Greaves' letter states (i) that in the May 9 letter the Bureau had maintained that galling had occurred;[20] (ii) that Greaves was convinced and satisfied that the breakdown is due only to scoring; (iii) that galling may be the result of many factors, one of which is insufficient differential in the hardness of materials used in manufacturing valve seats and discs; (iv) that the scoring is the result of foreign objects in the system;[21] and (v) that hardness differential will not protect against scoring.

The following points are quoted from the summary in Greaves' letter:

1. The Greaves inspection of valves establishes that the damage was caused by scoring. The Bureau gave no weight to this opinion notwithstanding the fact that metallurgical tests permit galling to be identified with certainty. [22]

2. The Bureau failed to conduct an investigation of the bottom of Lake Chelan. Lake Chelan is clear but more than fine silt rests on the bottom, and in moments of extreme turbulence, such as at start-up, sand and rock are circulated and enter the system. Damage undoubtedly also occurred at these times. Further, construction debris lies in the water in and about the pumps. (In such installation, elementary precautions require filtering and cleanup procedures.)

3. The Bureau's conclusion that only a shovelful of sand and pebbles had passed through the system over a two-year period was based upon an examination of the tank bottom. The Bureau failed to recognize [23] that as water enters the inlet

and stainless steel discs which are commercially available stock items. These valves will be inspected after the irrigation season to determine if these seat and disc materials will perform satisfactorily under actual field operating conditions. If it is found that these materials have performed satisfactorily, then you would be allowed to furnish and install these materials in lieu of the stainless steel discs and seats required by the specifications." (AF 20, BOR letter dated May 9, 1977, at 2, 3).

[19] The contractor's letter states that its counsel had directed that Greaves' letter of Oct. 6, 1977, be forwarded to the BOR "as an explanation of Hallgren's denial of liability under the warranty claim" (AF 21, letter dated Oct. 20, 1977).

[20] Noted by Greaves were the earlier statements by the Bureau indicating that the malfunctioning was due to both scoring and galling (AF 21, letter dated Oct. 6, 1977, at 1).

[21] Returning to the question of foreign objects in the system in the summary of its position, Greaves states:

"[T]he Bureau's analysis fails to take into account the following:

"a. The polishing action of silt moving through the system in the two-year period of operation.

"b. 'Unusual polishing' would require more than visual examination. The useful life of gate valves is very long, and damage which reduced this expectancy by many years would not be detectable to the eye." (AF 21, letter dated Oct. 6, 1977, at 4).

[22] Earlier in the letter Greaves had stated: "The existence of scoring or galling can be determined by metallurgical examination and tests. Galling will show as unpatterned tearing. Scoring does not tear. If metal is removed by scoring, it will show as a pattern" (AF 21, letter dated Oct. 6, 1977, at 1, 2).

[23] In its summary the letter emphasizes the failure of the Bureau to give effect to the nature of the valves offered, stating:

"5. Greaves did not furnish nor propose to refurnish, gate valves to the required Brinell specification for the

Continued

valve at the very bottom of the tank, a sweeping motion is created causing sediment to move through the tank. [24]

(AF 21)

8. Responding to the questions raised in the letter of Oct. 6, 1977, from Greaves' attorney (Finding 7), the BOR again quoted from the Bailey test results to show that the materials used in the discs and seats of the valves in question did not meet the specifications requirements of not less than 200 point Brinell hardness differential between the sealing surfaces. Concerning the effect to be given to the fact that the valve data had been submitted, and approved,[25] the BOR letter of Nov. 16, 1977 (AF 22), states (i) that since the contractor had not taken exception to obtaining the 200 point Brinell hardness differential requirement of the specifications, it had been assumed that the requirement would be met; (ii) that the valves tested had been found to have a maximum demonstrated Brinell hardness differential of 43 points between the seats and discs; and (iii) that the Bureau's approval of design intent did not relieve the contractor from design or performance requirements of the specifications.

The contractor was also advised that the experiment involving procuring and installing a 3-inch Powell and a 5-inch Crane discharge valve (which contained stellite seats and stainless steel discs) had been successful in that under actual operating field conditions these materials had performed satisfactorily. Therefore, it had been found that these materials would be an acceptable alternative in lieu of replacing the 20 hydraulic-operated gate valves listed in the letter with stainless steel discs and seats at a 200 point Brinell hardness differential as required by the specifications. After noting that the replacement of the valves should begin immediately to ensure completion prior to commencement of the 1978 irrigation season, the letter stated that if the contractor had not advised or shown evidence of its intent to perform the work within 14 calendar days from the date of

same reason the Bureau is not replacing these valves with valves which meet these specifications; that is, such valves are not commercially available items * * * Greaves submitted its offer from the only gate valves which were 'commercially available.' The proposal was submitted on the basis of catalog data, and was accepted by the Bureau (*see* letter attached). The gate valves furnished were as described in the catalog." (AF 21, letter dated Oct. 6, 1977, at 4).

[24] Concluding the summary of Greaves' position, the letter states:

"6. The gate valves supplied for the project constituted an acceptable alternative to the Bureau and met the requirements of Paragraph 149c of the Specifications requiring in part:

"The gate valves shall be suitable for cold-water service, and for controlling the discharge of centrifugal pump. * * * The size of each valve and the maximum unbalanced operating pressure under which the valves will be operated are tabulated in Table 1 of Paragraph 147. * * * Each valve shall be suitable for opening or closing against the maximum unbalanced operating pressure on the valve disc.

"Each manufacturer has confirmed the ability of all gate valves furnished to the project by Greaves to meet these operating requirements." (AF 21, letter dated Oct. 6, 1977, at 5).

[25] Adverting to the circumstances in which its approval had been given, the BOR letter states:

"2. We approved Powell valve data with P-140 trim which contained the following comment:

"'Powell stainless steel, used for valve trim, is a high chromium alloy material produced for valve seating faces and stems or spindles. This stainless steel is carefully heat treated for maximum wear requirements. BY ALTERNATING THE HEAT TREATMENT A VARIATION IN THE HARDNESS OF STAINLESS STEEL SEAT AND DISC FACES IS OBTAINED. This greatly minimizes the seizing and galling action between the seats and discs.'

"We also approved the submittal data for the Crane valves. These data also indicated that a wide range of heat treated disk and seat hardness was readily available." (AF 22, letter dated Nov. 16, 1977, at 2).

receipt of the letter, then the Government would take over and complete the work and deduct the cost of replacing the valves plus a markup of 15 percent for Government overhead from the escrow account.

Subsequently, the Bureau placed a purchase order with the Western Supply Co. of Oklahoma (AF 23), calling for the furnishing of 20 gate valves (13 5-inch, 2 4-inch, and 5 3-inch) as required by solicitation No. DF-00066[26] pertaining to gate valves for the Manson Unit Distribution System, Chelan Division, Chief Joseph Dam Project (AF 22 and 23).

9. In a letter to the BOR dated Mar. 21, 1979, counsel for the contractor protested what it described as a seizure of $19,001.51 from the contractor's retention account consisting of $1,826.51 on or about Nov. 28, 1977, and $17,175 on or about Apr. 26, 1978. These sums represented the expenses claimed by the Bureau of procuring valves replacing those that the BOR contends did not meet contract requirements and installing them at the project site.[27] Concerning these actions by the Bureau, counsel asserted (i) that the project was accepted on May 27, 1975;[28] (ii) that although the most recent seizure of funds was made on Apr. 28, 1978, the replacement valves were only delivered to the site on Mar. 2, 1979; and (iii) that the funds were seized without a hearing a year before they were disbursed and with knowledge that the contractor[29] and its supplier contested the Bureau's entitlement to them.

According to counsel, the contractor's most fundamental point was that the Bureau had replaced the questioned valves with different valves than those originally specified.[30] After quoting the language of the option contained in the reprocurement invitation (n.26, *supra*), counsel asserts that the successful offeror on the procurement, Western Supply Co., of Oklahoma, had acknowledged that the valves the Bureau pur-

[26] The solicitation included the following provision: "2.1.1—VALVE REQUIREMENTS

* * * * * *

"b. * * * [T]he stainless steel used in the disc faces and seat rings shall be 12 to 14 percent chrome, annealed and heat treated to produce differential of not less than 200 points Brinell hardness to minimize galling, seizing, and sliding contact wear between the seating surfaces. Prior to shipment, the contractor shall provide certification of the disc and seat material hardness to the Contracting Officer, Bureau of Reclamation, P.O. Box 25007, Denver Federal Center, Denver, Colorado 80225, Attention Code 1340.

"c. The contractor may, at his option, provide valves with CR-13 discs and stellite seats equivalent to Crane Xv or Powell 3003NFE trim in lieu of valves with stainless steel discs and seats as specified above." (AF 23, section 2.1 GATE VALVES).

[27] The Bureau's letter of Aug. 6, 1979 (AF 27), shows the costs involved to be in the amount of $25,068.59, computed as follows:

Actual costs for furnishing 22 valves	$15,579.26
Actual costs for installing 22 valves	5,900.99
Subtotal	21,480.25
15% governmental overhead	3,222.04
Subtotal	24,702.29
Repair hydraulic oil system	366.30
Total reprocurement and repair costs	25,068.59

[28] AF 24; letter dated Mar. 21, 1979 at 1. The project was accepted as substantially complete on May 27, 1976 (Exh. 30 at 1; n. 16, *supra*).

[29] The letter also states: "[A]rmstrong in litigation with its supplier vigorously asserted the position taken by the Bureau" (AF 24, letter dated Mar. 21, 1979, at 2). This position was maintained by the contractor until the judgment was rendered against it in a Miller Act suit on Sept. 18, 1978 (AF 24; Satisfaction of Judgment dated Dec. 27, 1978).

[30] Concerning the optional valve provided for in the reprocurement solicitation, the Bureau states: "[T]his stellite material was allowed because it is an alternative method in preventing galling of the valve seat and disk and it is less expensive than the heat treating process that would be necessary under the original specifications in order to meet the Brinell hardness differential requirement. Thus, by allowing a valve with the seat overlayed with stellite, the Government reduced the contractor's cost of reprocurement" (AF 28; BOR letter dated Aug. 29, 1979, at 1).

chased were the valves provided under the option and not those required by the original specifications. Contractor's counsel offers the following comment: "Had Armstrong totally defaulted * * * and had thus subjected itself to the full panoply of government remedial measures (which of course Armstrong did not), the government would have been required to obtain replacement supplies 'the same or similar'[31] to those called for in the contract * * * as soon as practicable * * *" (AF 24).

10. Brinell hardness tests[32] were conducted by Dr. Donald T. Klodt on one 3-inch and one 5-inch discharge gate valve.[33] Concerning these tests Dr. Klodt states: (i) that he is a consulting metallurgist; (ii) that Brinell hardness tests were conducted on four valve parts under contract with the Water and Power Resources Service (BOR); (iii) that the results of those tests appear in his reports dated May 15, 1979 (AF 25), June 1, 1979 (Exh. E), and June 28, 1979 (Exh. F);[34] (iv) that the tests were conducted at Mangone Testing Laboratories; (v) that the equipment used to conduct the tests was certified at the time the tests were made; and (vi) that he is qualified to perform Brinell hardness tests.[35]

Based upon the test results reported by Dr. Klodt, Mr. Harry K. Uyeda (a Government engineer)[36] stated:

> 12. The tests show the following brinell hardness differential between the seal ring and the leaf:
>
> -Evaluation of 5-inch valve, manufactured by Crane greatest difference, 375-255=120 BHN; least difference; 352-270=82 BHN
>
> -Evaluation on 3-inch valve, manufactured by Powell greatest difference; 401-261=140 BHN; least difference; 363-285=78 BHN.[37]

Discussion

The parties have advanced various contentions in support of their respective positions. The resolution of this appeal will turn, however, on the question of whether the Government is successful in showing that it is entitled to retain the $25,068.59 obtained from an interest-bearing escrow account under the authority of a maintenance warrantly provision[38] Contained in the contract on which its claim is based.

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[31] Cited in support are FPR 1-8.602-6(a) and *Land-Air, Inc.*, ASBCA No. 15091 (Sept. 24, 1971), 71-2 BCA par. 9086. The regulation cited applies to default terminations of fixed price supply contracts. The decision in *Land-Air* involved construing the word "similar" in the default clause there in issue. The words "same or similar" do not appear in the default clause with which we are here concerned (n. 3, *supra*).

[32] In the Miller Act suit the District Court is reported to have stated: "There is no credible evidence that any of the items supplied by Hallgren failed to meet the requirements of Specification DC-6985 in any respect, including that of Brinell hardness differential" (AF 24; letter dated Mar. 21, 1979, at 2).

[33] Affidavit of Harry K. Uyeda dated June 5, 1980. This affidavit and that of Dr. Klodt were submitted in response to the Order Settling Record as attachments to the Government's Brief dated June 12, 1980.

[34] Exhibits E and F accompanied the Government's Brief (n. 33, *supra*).

[35] Affidavit of Donald T. Klodt dated June 5, 1980 (n. 33, *supra*).

[36] Mr. Uyeda was responsible for disassembly of and obtaining Brinell hardness tests of the seat ring and leaf (wedge) of one 3 inch and one 5 inch gate valve (n. 33, *supra*). These valve parts were delivered to Dr. Klodt for the Brinell hardness tests on which he subsequently reported (text accompanying n. 34, *supra*).

[37] Affidavit of Harry K. Uyeda at 2, 3 (n. 33, *supra*).

[38] The appellant has not shown that the Government's rights under the maintenance warranty provision are governed by the language contained in other contract provisions (*e.g.*, inspection or default clauses) or in regulations dealing with such provisions (see n. 31, *supra*, and accompanying text).

On July 27, 1976 (within the 3-year warranty period), the contractor was notified that some of the discharge gate valves furnished had failed to close against extreme hydraulic unbalance ever since testing commenced early in the spring. Following a conference in early Nov. of 1976, involving representatives of the BOR, the contractor, and its valve suppliers, the Bureau wrote the contractor a letter in which it called attention to the specification requirement that "[e]ach valve shall be suitable for opening or closing against the maximum unbalanced operating pressure on the valve disc" (Finding 4).

While the valve suppliers have attributed deficiencies in the performance of the valves at least in part to inadequate operation, maintenance, and lubrication by the Bureau, it is clear that they considered the principal cause of the valve failures to have been the presence of foreign material in the system for which the Bureau was said to be responsible. Thus, in a letter dated Dec. 7, 1976, Zidell Explorations, Inc., makes the charge that the system was misdesigned since it includes no filtering device to eliminate damaging foreign matter after which it states that there would be no warranty based on the improper usage of material even if the deficiency had developed within the 1-year period covered by its warranty (Finding 5).

In its letter of May 9, 1977, the Bureau contested the view of the valve suppliers that foreign material pumped from the reservoir was the cause of the breakdown of the sealing surfaces of the valves. After referring to the hardness tests of valve seats and discs material conducted by Bailey Manufacturing Co., Inc., of Wenatchee, Washington, which had shown that the materials used in the two valves tested failed to meet the requirement of the specifications of not less than 200 points Brinell hardness differential between the sealing surfaces and also to the fact that visual examination of the valves had disclosed galling of the discs and seats of both valves, the letter states: "We feel that the galling of the valve discs and seats was the result of insufficient differential in hardness of the materials used for these components" (Finding 6).

In the course of a point-by-point rebuttal to the Bureau's letter of May 9, 1977, the Greaves Co., Inc. (a valve supplier), states (i) that galling (found to be present by the BOR) may be due to many factors, one of which is insufficient differential in the hardness of materials used in manufacturing valve seats and discs; (ii) that the breakdown in the sealing surfaces was due only to scoring; (iii) that scoring is the result of foreign objects in the system; (iv) that hardness differential will not protect against scoring; and (v) that the existence of galling or scoring can be determined by metallurgical examination and tests with galling showing an unpatterned tearing and scoring (which does not tear) showing the removal of metal in a pattern (Finding 7).

The parties are in agreement that there was a breakdown in the sealing surfaces of discharge

gate valves[39] furnished under this contract. They are apart, however, on the question of whether the valve failures experienced have been shown to be the result of not meeting the Brinell hardness differential requirements of the specifications

In support of its position the Government calls attention to the results of tests conducted by Bailey Manufacturing Co., Inc., [40] on two valves and the results of tests performed on two additional valves by Dr. Donald T. Klodt in May and June of 1979.[41] All of these tests showed the valves involved in the tests did not meet the requirements of the specifications for a Brinell hardness differential between the disc faces and seat rings of not less than 200 (n. 26, *supra*).

Positions taken by a valve supplier include the arguments (i) that the BOR waived the requirement in question by accepting proposals based on submitted catalog data and (ii) that the Brinell hardness differential requirement was impracticable because valves satisfying such a requirement were not commercially available. Neither of these arguments are considered to have merit. As to item (i) the contract specifically provides that approval by the Government of the contractor's data shall not be held to relieve the contractor of any obligation to meet all the requirements of the specifications (Finding 2). With respect to time (ii), no one has shown any representation by the Government that the valves meeting the Brinell hardness differential requirement were commercially available; nor has any one contended that valves meeting such a requirement were beyond the state of the art.[42]

The Board finds that the tests conducted by the Bailey Manufacturing Co., Inc., were not certified (n. 16, *supra*) and that consequently they are of little probative value on the question of whether the two valves involved in those tests met the Brinell hardness differential requirements of the specifications.[43] The Board finds,

[39] In its opening brief, at pages 4 and 5, appellant raises a quesiton as to the propriety of rejecting all 22 discharge gate valves based upon an inspection of only two of them. As none of the clauses included in the contract provide for inspection by sample, resolution of the question presented would require a determination as to whether the two valves inspected and found deficient were a representative sample. In the view we take of the appeal, it is unnecessary to address this question. *See*, however, *Carb Manufacturing Co.*, ASBCA, No. 5251 (Oct. 29, 1965), 65-2 BCA par. 5176; *Gramercy Machine Corp.*, ASBCA No. 17900 (Apr. 19, 1974), 74-1 BCA par. 10,611.

[40] As shown in a letter to the BOR dated Mar. 14, 1977 (Exh. C), the tests results reported by the Bailey Manufacturing Co., Inc., showed the 3-inch Powell valve tested had a Brinell hardness differential between the seat ring and the disc in the range of 26 to 33 with the 5-inch Crane valve tested having a Brinell hardness differential between the seat ring and the disc in the range of 34 to 42 (Government's Opening Brief at 5, 6).

[41] Concerning these latter tests the appellant states:

"[C]ontractor has no basis to either admit or deny the conclusions of those tests although it is obvious that the tests were not performed at a time to be of any assistance in resolving the claims of the suppliers against the general contractor in the Miller Act litigation. By the time the Bureau made proper tests, the valves had already been removed and replaced." (Appellant's Opening Brief at 6).

[42] There is no evidence of record showing the appellant secured a 3-year maintenance warranty from its valve suppliers to correspond to that which it had given the Government (Finding 2). It is clear that a valve supplier which supplied 10 of the valves in question had given only the standard 1-year warranty (n. 14, *supra* and accompanying text).

[43] The highest Brinell hardness differential reported by Bailey Manufacturing Co., Inc., as a result of its tests are 33 for the 3-inch Powell valve and 42 for the 5-inch Crane valve (n. 40, *supra*). The highest Brinell hardness differential found by Dr. Klodt for the 3-inch Powell and the 5-inch Crane valves tested by him were 140 and 120, respectively (text accompanying n. 36, *supra*). These marked differnces in testing results relate to the same

Continued

however, that the two valves tested by Dr. Klodt clearly did not meet the Brinell hardness differential requirements of the specifications.

The Government has made no effort to show that the failure of the valves tested to meet the Brinell hardness differential requirements of the specifications was the cause of the valves involved in this appeal not being "suitable for opening or closing against the maximum unbalanced operating pressure on the valve disc" (Finding 4). Nowhere has it undertaken to contest the flat assertions by Greaves in its letter of Oct. 6, 1977, (i) that scoring is the result of foreign objects in the system; (ii) that hardness differential will not protect against scoring; and (iii) that the existence of galling or scoring can be determined by metallurgical examination and tests (Finding 7).

The presence of galling and absence of scoring in the valves tested would appear to be central to establishing the Government's case that the malfunctioning of the valves was due to their failure to satisfy the Brinell hardness differential requirement of the specifications. Brinell hardness tests on two valves were conducted by Dr. Klodt in May or June of 1979, or long after the Bureau had been furnished a copy of Greaves' letter of Oct. 6, 1977, referred to above. Although Dr. Klodt is a qualified metallurgist, he made no findings with respect to the presence or absence of galling or scoring[44] on the valves tested, presumably because he was not asked to do so.

In response to positions advanced by the Bureau, Greaves asserts (i) that the breakdown of the sealing surfaces of the valves was due only to scoring; (ii) that in moments of extreme turbulence, such as start-up, sand and rock are circulated and enter the system; (iii) that for an installation of the type involved, elementary precautions require filtering and cleanup procedures;[45] and (iv) that the Bureau had failed to recognize that as water enters the inlet valve at the very bottom of the tank, a sweeping motion is created causing sediment to move through the tank (Finding 7).

[1] In an apparent effort to bolster its case, the Government cites the case of *Paul E. McCollum, Sr.*, IBCA-1080-10-75 (Feb. 24, 1976), 83 I.D. 43, 76-1 BCA par. 11,746, for the proposition that the Government is entitled to strict compliance with its specifications (Government's Opening Brief at 11). Neither the *McCollum* case nor the cases cited therein, however, involve a claim asserted by the Government under a warranty provision of a contract, as is the case here. More germane to the question presented is our decision in *R. H. Fulton, Contractor,*

size valves manufactured by the same manufacturers at presumably about the same time.

[44] In his decision of Dec. 21, 1979, the contracting officer refers to an inspection of valves conducted on Nov. 3, 1976, after which he states: "[T]he inspection indicated that there was considerable galling of machined surfaces on the disks and seats in approximately 75 percent of the valves inspected" (Findings of Fact, par. 6). Referring to a meeting between the parties on Nov. 3, 1976, the acting project engineer states: "[A]n inspection prior to the meeting indicated that there is considerable galling and *scoring* of machined surfaces of the discs and seats in approximately 75 percent of the valves inspected." (Emphasis supplied; n. 7, *supra* and accompanying text.)

[45] In an earlier letter Greaves had inquired as to why there had never been any reference to or evidence of strainers or filters. At about the same time Zidell Explorations, Inc., stated: "[T]here is no doubt that this system was misdesigned since there is no filtering device in this system to eliminate damaging foreign matter" (Finding 5).

IBCA-769-3-69 (Feb. 2, 1971), 71-1 BCA par. 8674. There the Board stated that it was fully in accord with the rule enunciated in *Klefstad Engineering Co., Inc.*, VACAB Nos. 704, 706 (Sept. 16, 1968), 68-2 BCA par. 7241 in which at page 33,678, the Veterans Administration Board of Contract Appeals had stated:

> To establish the validity of its demands under this guaranty the Government must as a minimum prove by a preponderance of evidence that the unsatisfactory conditions developed within the period of guaranty coverage and that the most probable cause was the contractor's use of inferior, defective, or noncomplying materials or workmanship. [Citations omitted.]

Also for consideration is the fact that the maintenance warranty provision under which the Government's claim for breach of warranty is made provides that the contractor shall not be responsible for negligence in the operation of the irrigation system by the Government or its agents.

In this case the contractor's valve suppliers have charged that the Bureau failed to provide either filters or strainers for the irrigation system and that the principal cause of the malfunctioning of the valves here in issue was the damage done to the valves by the foreign material pumped from the reservoir. While the Bureau has denied these charges, it has not denied the absence from the system of filters or strainers; nor has it offered any explanation for the failure to provide for filters or strainers in the design of the system.

Moreover, when the Bureau had a qualified metallugist test two of the discharge valves to determine whether they met the Brinell hardness differential requirements of the specifications, it failed to secure an opinion from him as to whether and, if so, to what extent galling or scoring were present. According to Greaves, the malfunctioning of the valves was due entirely to scoring caused by foreign material entering the system. Since Greaves' contention that scoring could not have resulted from the failure of the valves to meet the Brinell hardness differential requirements of the specifications is undisputed, the Board is unable to conclude on the basis of the evidence of record that the failure of the valves to operate properly was the result of their failure to meet the requirements of the specifications in the respect noted.

The Board finds that the Government has failed to show by a preponderance of the evidence that the malfunctioning of the valves covered by the maintenance warranty was the result of such valves not meeting the Brinell hardness differential requirement of the specifications and not the result of "negligence in the operation of the irrigation system by the Government or its agents" (Finding 2).

[2] Remaining for consideration is the question of whether the appellant is entitled to interest on the amount obtained by the Government from an interest-bearing escrow retention account from the time the sums were taken by the Government until the time they were repaid. Appellant asserts

that money to cover the cost of reprocuring the discharge gate valves was taken from the contractor's interest-bearing retention account without a prior hearing, although the Bureau knew that its allegations were disputed (Appellant's Opening Brief at 6, 7). A review of the record discloses, however, that while the valve suppliers disputed the Bureau's allegations (nn. 15 & 19, *supra*), the contractor did not do so until after a judgment was rendered against it in a Miller Act suit on Sept. 18, 1978. In that suit, the contractor had "vigorously asserted the position taken by the Bureau" (n. 29, *supra*).

More importantly, the appellant has failed to show that there is any clause in the contract providing for payment of the type of interest claimed here; nor is there any statutory authority for the payment of such interest. Absent any contractual or statutory basis, the Board is without authority to award the contractor interest on the sums taken by the Government from its interest-bearing escrow retention account in satisfaction of its claim for breach of a maintenance warranty.

Decision

1. The appeal is granted in the amount of $25,068.59, together with interest thereon computed in accordance with the Contract Disputes Act of 1978 (41 U.S.C. §§ 605, 611 (Supp. II 1978)) from July 31, 1979, until payment thereof.

2. The appeal is otherwise denied.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:
RUSSELL C. LYNCH
Administrative Judge

UNITED STATES *v.* ACTING AREA DIRECTOR, ABERDEEN AREA OFFICE, & CELINA YOUNG BEAR MOSSETTE AND UNITED STATES *v.* ACTING AREA DIRECTOR, ABERDEEN AREA OFFICE, BUREAU OF INDIAN AFFAIRS, & GERALDINE VAN DYKE*

9 IBIA 151

Decided *January 8, 1982*

Appeals by the United States from two decisions of the Acting Area Director, Aberdeen Area Office, Bureau of Indian Affairs, refusing to set off claims owed to the United States from money accruing to Individual Indian Money accounts.

Affirmed.

1. Indians: Fiscal and Financial Affairs—Indians: Indian Money Accounts

Under 25 U.S.C. § 410 (1976) and 25 CFR 104.9, the approval of the Secretary of the Interior is required before funds in an Individual Indian Money account derived from trust property may be applied against a debt owed by the individual Indian.

2. Claims by the United States—Indians: Fiscal and Financial Affairs—Indians: Indian Money Accounts

Nothing in the Federal Claims Collection Act of 1966, 31 U.S.C. §§ 951-953 (1976), and its implementing regulations in 4 CFR Chapter II repeals or overrides the authority of the Secretary ot the Interior to approve or disapprove the use of funds in an Individual Indian Money account for the payment of debts of the Indian owner.

3. Bureau of Indian Affairs: Administrative Appeals: Acts of Agents of the United States—Claims by the United States—Indians: Fiscal and Financial Affairs—Indians: Indian Money Accounts

A decision not to honor a setoff request against an Individual Indian Money account for a debt owed to another agency of the Federal Government is not arbitrary, capricious, or an abuse of discretion when it is based on an examination of the funds potentially available for setoff, the basic necessities of the individual involved, and the interest of the United States in collecting judgment claims.

APPEARANCES: Gary Annear, Esq., Assistant United States Attorney for the District of North Dakota, for appellant United States of America; Wallace G. Dunker, Esq., Field Solicitor, Department of the Interior, Aberdeen, South Dakota, for appellee Acting Area Director, Aberdeen Area Office, Bureau of Indian Affairs; John O. Holm, Esq., for appellee Celina Young Bear Mossette; and James B. Fitzsimmons, Esq., for appellee Geraldine Van Dyke. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

The United States through the Assistant United States Attorney for the District of North Dakota, has appealed from two decisions of the Acting Area Director, Aberdeen Area Office, Bureau of Indian Affairs (BIA), denying set-

*Not in chronological order.

offs for judgment claims received by the United States against Clifford and Celina Young Bear Mossette and Purley W. and Geraldine Van Dyke from the Individual Indian Money (IIM) accounts of the two women. The United States sought setoffs against the IIM accounts under the Federal Claims Collection Act of 1966, Act of July 19, 1966, 80 Stat. 308, 31 U.S.C. §§ 951–953 (1976), and regulations found in 4 CFR Part 102. The Acting Area Director denied the requests under the authority of 25 U.S.C. § 410 (1976) and 25 CFR 104.9. Because these cases involve the same issue, they are hereby consolidated for purposes of decision.

Background

On Oct. 16, 1979, the United States District Court for the District of North Dakota, Southwestern Division, entered judgment for the United States against Clifford Mossette and Celina Young Bear Mossette in the amount of $24,914. *United States of America* v. *Mossett,* Civ. No. A78–1031 (D.N.D. Oct. 16, 1979). The sale of certain secured property netted $5,150 which was applied against the judgment amount. A balance of $19,764 remained outstanding on the judgment. On Jan. 18, 1980, the United States requested a setoff against the IIM account of Celina Young Bear Mossette, an enrolled member of the Three Affiliated Tribes, from the Superintendent of the Fort Berthold Agency, BIA. After receiving from Mrs. Mossette an objection to the setoff request and information regarding her income and living expenses, the Acting Superintendent declined to honor the setoff request on June 19, 1980. The United States (appellant) appealed this decision to the Acting Aberdeen Area Director who affirmed the Acting Superintendent's decision on July 30, 1980. Appellant then appealed to the Commissioner of Indian Affairs. That appeal was referred to the Board of Indian Appeals pursuant to 25 CFR 2.19 on Nov. 4, 1980.

Similarly, on Dec. 6, 1979, the same United States District Court entered judgment for the United States against Purley W. Van Dyke and Geraldine Van Dyke in the amount of $33,653.99. *United States of America* v. *Van Dyke,* Civ. No. A78–1045 (D.N.D. Dec. 6, 1979). The sum of $1,625.78, received in a foreclosure sale, was applied against the judgment, leaving a balance of $32,028.21. Appellant requested a setoff against the IIM account of Geraldine Van Dyke, also an enrolled member of the Three Affiliated Tribes, from the Fort Berthold Agency Superintendent on Apr. 17, 1980. The Superintendent initially approved the setoff on Aug. 8, 1980, because he did not receive notification that Mrs. Van Dyke had timely objected to the request. Mrs. Van Dyke's objection to this decision was treated as an appeal to the Aberdeen Area Director. Subsequently, a letter from Mrs. Van Dyke objecting to any setoff was found in the agency's files and the case was returned to the Superintendent for appropriate action.[1] On Oct. 16, 1980, the

[1] Appellant objects to this procedure on the grounds that there is no regulatory provision for returning a case to the Superintendent once he has made a decision. Although not couched in legal terminology, the Area Direc-

Superintendent issued a second decision denying the setoff request. Appellant appealed to the Acting Area Director who, on May 5, 1981, affirmed the Superintendent's decision. The appeal filed with the Commissioner of Indian Affairs was referred to the Board of Indian Appeals under 25 CFR 2.19 on July 20, 1981.

Discussion and Conclusions

These cases present an apparent conflict between two Federal policies, each expressed in statute and regulations. One policy deals with the collection of debts owed to the Federal Government; the other concerns the special responsibility of the Federal Government to individual Indians. The question presented in both of these cases is whether the Department of the Interior has authority to determine that the funds in the IIM accounts of the individual appellees should not be subjected to a setoff against judgment claims in favor of the United States. Consistent with the Federal Government's role as trustee for and guardian of the individual appellees and with the statutory and regulatory provisions effectuating this policy, the Board holds that the Acting Area Director had the authority to find that these funds should not be so applied and affirms his decisions.

[1] The Department of the Interior owes a fiduciary duty to those Indians, including the individual appellees here, for whom it holds property in trust. In particular, 25 U.S.C. § 410 (1976), a statute passed in 1906, provides that:

> No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, * * * except with the approval and consent of the Secretary of the Interior.[2]

Such funds, when placed in an IIM account, are available to the Indian owner and, under 25 CFR 104.9, "may be applied by the Secretary or his authorized representative against delinquent claims of indebtedness to the United States or any of its agencies."[3] Thus, both the statute and the regulation require the approval of the Secretary before funds derived from trust property [4] may

tor, in effect, vacated the Superintendent's initial decision and remanded the case to him for appropriate action on the basis of newly discovered evidence. Such a procedure is within the Area Director's supervisory authority.

[2] *Cf.* 25 U.S.C. § 354 (1976): "*No lands* acquired under the provisions of [secs. § 331–334 of this title, allotment of reservation lands] *shall,* in any event, *become liable to the satisfaction of any debt* contracted prior to the issuing of the final patent in fee therefor." (Italic added.) This absolute prohibition against the use of allotted lands to secure personal debts evidences the congressional intent to protect trust land and its proceeds. This trust concept is further implemented, although less restrictively, in sec. 410.

[3] The section further provides that funds derived "from the sale of capital assets which by agreement approved prior to such sale by the Secretary or his authorized representative are to be expended for specific purposes, and funds obligated under contractual arrangements approved in advance by the Secretary or his authorized representative or subject to deductions specifically authorized or directed by acts of Congress, shall be disbursed only in accordance with the agreements (including any subsequently approved modifications thereof) or acts of Congress."

Such funds would, therefore, not be available to be applied against a debt owed to the United States unless that use was the subject of the approved arrangement or act of Congress. For a similar conclusion, *see Associate Solicitor's Opinion,* M–36782 (Sept. 10, 1969).

[4] Appellant has not alleged and there is no evidence in the record that the IIM accounts of the individual appellees contain funds other than those derived from trust property.

be applied against a debt owed by an individual Indian.[5]

[2] Nothing in the Federal Claims Collection Act, *supra*, and its implementing regulations in 4 CFR Chapter II repeals or overrides the Secretary's trust responsibilities. The Federal Claims Collection Act and regulations establish general procedures to facilitate the collection of debts owed to the United States by authorizing an agency either to retain funds in its possession owed to the debtor or to request retention of such funds held by another agency. All agencies are enjoined by 4 CFR 102.3 to cooperate in the collection of debts owed to the Federal Government, and the Department of the Interior fully accepts this responsibility. *See* 344 DM 1.3(B)(3) and 2.2. This general statute, however, does not evidence any Congressional intent to alter the trust relationship between the Federal Government and the Indians or to remove the Secretary's authority to approve the use of IIM funds.[6] In the absence of a clear expression of such intent, the trust responsibility remains intact and the Secretary retains authority to approve or disapprove the use of funds in an IIM account for the payment of debts of the Indian owner.

[3] Needless to say, in exercising this authority the Secretary should be cognizant of these dual and perhaps conflicting obligations. Any disapproval of a request for setoff against IIM funds should be well-considered and not arbitrary.[7] In each of the present cases, the Superintendent or Acting Superintendent carefully reviewed the judgment claims and the financial circumstances of the individual appellees. In the case of Celina Young Bear Mossette, the Acting Superintendent's decision of June 19, 1980, affirmed by the Acting Aberdeen Area Director, recites:

> Pursuant to 25 CFR 104.9 an indepth review has been made of your obligations or reasons why such disbursement should not be made, of your long range best interests and of the interest of the United States. My decision is that such application [for setoff] should be denied for the reason that such money is essential for your necessities including food, clothing, and shelter. I have reviewed your Individual Indian Money account and found that in the last sixteen months a total of $422.53 has been deposited into your IIM account.[8] In view of the large size of the judgment rendered, which includes interest, and the amount of money being deposited into your account, and in taking into consideration your other income [approximately $6,000 per year], it is felt that this money is needed by you and your family.
>
> I should point out, however, that should the amount of your income change to any large degree, the United States Attorney will be notified and he may file another request for setoff.

Similarly, in the case of Geraldine Van Dyke, the Superintendent's Oct. 16, 1980, decision, also affirmed by the Acting Aberdeen Area Director, states:

[5] *Cf.* 25 CFR 11.26 and 11.26C which require the approval of the Secretary before IIM funds may be applied against a civil damage judgment rendered by a Court of Indian Offenses.

[6] *Cf. Joint Tribal Council of Passamaquoddy Tribe* v. *Morton*, 388 F. Supp. 649, 663 n.15 (N.D. Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975): "It is clear, however, that termination of the Federal Government's [trust] responsibility for an Indian tribe requires 'plain and unambiguous' action evidencing a clear and unequivocal intention of Congress to terminate its [trust] relationship with the tribe."

[7] *See Associate Solicitor's Opinion*, M-36782 (Sept. 10, 1969).

[8] Appellee's trust income of approximately $26.40 per month would pay off her debt, excluding future interest, in a little over 62 years.

[P]ursuant to 25 CFR 104.9, a review has been made of your objections or reasons why such disbursement should not be made, of your long range best interest, and of the interest of the United States.

My decision is that the application by the United States is denied because the money derived from your trust properties is essential for your necessities including food, clothing, and shelter.[9]

In both cases, the decision not to approve the setoff request was thus based on an examination of the funds potentially available for setoff, the basic necessities of the individuals involved, and the interest of the United States in collecting quite substantial judgment amounts.[10]

These decisions are not arbitrary, capricious, or an abuse of discretion. They are well-reasoned exercises of the Secretary's authority to approve and disapprove disbursements from IIM accounts and to decide that the small amount of trust money involved is better applied to pay for appellees' necessities of life than for the particular debts owed to the Federal Government.

This holding in no way infringes upon any rights of the creditor agency and the Department of Justice to decide whether to continue, suspend, or terminate collection activities or to seek setoffs at a later time should the financial circumstances of either individual appellee change substantially.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

This decision is final for the Department.

JERRY MUSKRAT
Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

WM. PHILIP HORTON
Chief Administrative Judge

[9] Although the Superintendent's decision does not state how much money was being deposited into Geraldine Van Dyke's IIM account, undisputed letters from Mrs. Van Dyke show fixed expenses of approximately $2,600 per year and an income of less than $2,500, and state that there is only "a few hundred dollars" in her IIM account.

[10] These factors considered by the Superintendent should be compared with those listed in 4 CFR 104.3(a) and (c) for determining whether to terminate activity directed toward collecting a debt owed to the Federal Government. The Board recognizes that the decision whether to terminate collection activity is to be made by the creditor agency or, under appropriate circumstances, the General Accounting Office or Department of Justice, and is limited to claims of under $20,000, exclusive of interest. The regulations, however, provide some standards against which these decisions not to honor setoff requests can be measured to determine whether or not those decisions were arbitrary or capricious.

APPEAL OF PORTER MECHANICAL CONTRACTORS, INC.

IBCA-1357-5-80 & 1366-6-80

Decided *February 1, 1982*

Contract No. 68-03-6093, Environmental Protection Agency.

Denied.

1. Contracts: Disputes and Remedies: Burden of Proof

A construction contractor's claim for substantial increases in equitable adjustments allowed by the contracting officer for directed changes is denied where the Board finds that appellant has failed to sustain

the burden of proving a causal connection between the costs claimed and the alleged Government actions, and failed to provide reliable cost data to show the Government computations were inadequate compensation for the changed work.

APPEARANCES: Randy S. Goldenhersh, Attorney at Law, Smith, Currie & Hancock, Atlanta, Georgia, for Appellant; Richard V. Anderson, Government Counsel, Environmental Protection Agency, Cincinnati, Ohio, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

Appellant was awarded a fixed price contract in the amount of $62,896 on Aug. 20, 1979, providing for the construction of a sanitary sewage system on Sabine Island, Florida. The contract required performance to be completed within 90 days after receipt of the notice to proceed, which was acknowledged by appellant on Aug. 29, 1979. The contract was substantially completed on Apr. 28, 1980. These appeals involve claims for alleged changes in the contract resulting in extra work and 159 days of delay. Appellant claims extra costs of $117,652.51 and $786,000 for loss of other contracts and business attributed to the accumulative effect of the changes and delays alleged to amount to a breach of contract. Appellant had presented a number of separate claims to the contracting officer which were the subject of two separate final decisions. Appellant's disagreement with those decisions resulted in the taking of these appeals. A hearing of the appeals was held on Jan. 27 through Jan. 30, 1981, in Pensacola, Florida. Appellant's posthearing brief summarized all of the claims in seven (7) contested Government actions as follows:

Claim 1—Relocation of Manhole 2.

The Government directed that manhole (hereinafter MH) 2 be moved 5 feet to the West. It is undisputed that this resulted in the line between MH-2 and MH-1 having to be removed and replaced. The amount of work involved is in dispute. Also, at issue is whether or not the line between MH-2 and MH-5 had already been laid at the time of the relocation of MH-2. Appellant contends that this line was in place and also had to be removed and relocated. The Government contends that this line was not in.

Claim 2—The Addition of Two "Wyes."

Appellant contends that the Government directed it to tie in three additional buildings to the sewer system. The Government contends that it requested simply the addition of two pipeline wyes. Appellant contends that as a result of this directive, it was required to provide materials to do all the work involved to completely hook up three additional buildings. Appellant contends that as a result, it incurred substantial costs for materials.

Claim 3—The Directive to Tie In the Pumphouse.

It is undisputed that Appellant was directed to tie in the pumphouse. Appellant contends that the tie-in was not in its contract. Additionally, the cost of making the tie-in is in dispute.

Claim 4—The Credit for Deletion of Manhole 8 and Associated Piping.

Appellant contends that the Government insisted upon an excessive credit for deleting this work. The Government demanded credit for overhead and profit to which it was not entitled.

Claim 5—The Relocation of Manhole 10 and Manhole 11.

Appellant claims that an inadequate equitable adjustment was given for this work. The adjustment failed to accurately reflect the excessive amount of handling of

pipe and exploratory work which resulted from the relocation.

Claim 6—The Benchmark Problem.

This involves the most major aspect of the claim. Appellant performed a substantial portion of its work with reference to a benchmark elevation of 6.74. The Government then contended that the proper benchmark was 5.96. As a result, Appellant was forced to remove and replace hundreds of feet of pipe and several manholes already installed. Appellant contends that the benchmark elevation when established from the other elevations on its contract drawings was 6.74, that it took reasonable steps to confirm this, and that its work was properly installed. The Government conceded responsibility for failure to indicate that a benchmark of 5.96 was desired. It contended, however, that deficiencies in the Appellant's work should absolve the Government of at least partial responsibility.

Claim 7—Porter's Work was Delayed.

Appellant contends that its work was delayed by the changes mentioned above and, in particular, the benchmark elevation problem. That problem caused it to redo half of its work and forced it to work inefficiently throughout the winter. Additionally, the Government failed to issue directives or issued confusing and meaningless directives due to its continuous failure to recognize that it created changes to Appellant's work. As a further result, the Government failed to pay Appellant in a timely manner.

Discussion

The record in these appeals is somewhat confused because neither party maintained regular daily progress or inspection reports and testimony regarding events only approximated many dates. Although the record of contract performance cannot be precisely detailed, an adequate description for this decision can be gleaned from the briefs, transcript, and the appeal file.

At the preconstruction conference, appellant questioned the fact that no benchmark elevation appeared on the drawings. The drawings had been prepared for the Government by the firm of Tom W. Justice and Associates, Inc. under a contract with Bullock and Associates. The firm of Tom W. Justice and Associates, Inc. (hereinafter Justice) was retained by the Government to provide project inspection services during the construction of the sanitary sewer project. Appellant testified (Tr. 51) that he had determined the benchmark to be 6.74 by consulting a firm that had surveyed the island and from another contract he had, and that Justice advised that he would advise him if the elevation were other than 6.74. Government representatives at the conference did not recall this statement being made, but that Justice promised to confirm the correct benchmark elevation to appellant.

Appellant commenced work in late September or early October with the placement of the required precast concrete manholes using the benchmark elevation of 6.74. Justice indicated to appellant and the contracting officer that placement of the manholes prior to laying the pipe between manhole locations was not the preferred method of proceeding with the work. On Oct. 17, 1979, the contracting officer issued a change order deleting manhole 8 and the pipe from manhole 7 to manhole 8. On Oct. 29, 1979, Justice furnished appellant a letter specifying the benchmark of 5.96

as that used in preparing the engineering drawings. On that date, Justice checked the elevations of the six manholes that had been placed and determined that all varied from the elevations shown in the drawings. Records of telephone calls dated Oct. 30, 1979, indicate the contracting officer discussed with appellant the need for Government direction of the correct benchmark and the need to connect the sewerline to a lift station near manhole 1. Apart from noting that the benchmark given by Justice differed 9 inches from that used by appellant, no problem was indicated, and appellant was directed to tie-in to the lift station and submit a claim. A status report from Justice advises that prior to the furnishing of the benchmark, appellant had worked on laying pipe between manholes 3 and 4, between 4 and 5, and between manholes 1 and 2. The report indicates laying of pipe between manholes 2 and 5 from Nov. 2 to Nov. 8, after manhole 2 had been reset to lower it 20 inches. The tie-in to the lift station was accomplished on Nov. 8. The report also discusses alternatives to correct the problem that the system as installed would not drain into the lift station because of the differences in elevation.

On Nov. 9, the contracting officer issued a suspension of work notice until the benchmark issue was resolved, and appellant advised the contracting officer on Nov. 14, 1979, that he planned to use his work force on another project and would not be able to return for 2 weeks. Both parties retained consultants to verify the slope and elevations of the installed line during the suspension period. During this period, the Government determined that the slope on installed pipe between manholes 1 and 2 was less than the specified minimum and was too steep between manholes 3 and 4.

By letter dated Nov. 27, 1979, the contracting officer terminated the suspension of work order and directed the correction of certain deficiencies noted in the installed work, *i.e.*, that manhole 1 be installed at an elevation to ensure drainage into the lift station, and that the pipeline from manhole 5 to 1 be installed on a .40 percent slope. A clarifying letter dated Dec. 4, 1979, directed that the entire system be installed in accordance with the specifications and drawings utilizing the benchmark furnished by Justice. Appellant responded by mailgram dated Dec. 4, 1979, stating that the directive was considered as a change order, and advised the amount of the change was $89,989.12. On Dec. 11, 1979, the contracting officer wrote to Bullock Associates to request them to confirm that the system design would work properly using the benchmark elevation of 5.96. This confirmation was provided by letter dated Dec. 26, 1979.

Appellant advised the Government by letter dated Dec. 14, 1979, that he had contracted with another firm to complete the change order work, and that Mr. John Lockfaw had been appointed project manager. Mr. Lockfaw's efforts were summarized in a report to appellant dated Jan. 15, 1979. Using C. H. Overman & Associates to survey the site, the

manholes were reset using the specified benchmark of 5.96, and the pipe was reinstalled between Dec. 12, 1979, and Jan. 3, 1980. By letter dated Feb. 6, 1980, appellant repeated his frequently voiced complaint that directives given to reinstall piping running to various buildings using the benchmark of 5.96 would result in raising the pipe to an extent that the buildings run out would be higher than the sewerlines leaving buildings and that some of the pipes would be laying on the ground or above. By telex message dated Feb. 22, 1980, the contracting officer responded to appellant's insistence that the plans required redesign because of the elevations shown on the drawings. The response indicated that the drawings contained notations that connections were to be made to existing pipes from various buildings with a minimum slope of .5 percent and that no change was required. The message further stated that a completion date of Mar. 28, 1980, was unilaterally determined and that failure to prosecute the work with such diligence as to ensure completion by the date, shall be addressed in accordance with the Termination for Default provision of the contract. The work proceeded with appellant protesting in writing that the work was being done under duress of the contracting officer's order and compensation would be required. On Mar. 21, a change order was issued to route the pipe between manholes 9 and 10 over an existing water main that was discovered. The work necessary to accomplish this change was the subject of an agreement embodied in modification 7. The project was finally completed on Apr. 28, 1980.

Appellant's first claim for the relocation of manhole 2 stems from a directive given by Justice to move the manhole approximately 5 feet to the west. This directive was apparently given in late Oct. 1979. Manhole 2 is located in a long pipe run from manhole 1 to 5. Therefore, any pipe already installed from 1 to 2 and 2 to 5 would have to be removed. The parties differ on whether pipe had been installed from manhole 2 to manhole 5. Appellant's president, Mr. Porter, testified that the pipe had been installed between manholes 2 and 5 (Tr. 58). The Justice status report of the work indicates that the pipe between manholes 2 and 5 was placed from Nov. 2 to Nov. 8 after manhole 2 had been reset to correct the elevation. Appellant's letter dated Dec. 11, 1979, claimed $30,143.12 as a result of this change. This work was accomplished sometime prior to the suspension of work on Nov. 9, 1979.

Appellant's second claim stems from a directive of the Government project manager, Mr. Idlett, to install two wye fittings in the pipeline to enable sewage service to be provided to two new temporary buildings. Appellant claims to have interpreted the order to include connecting service to the buildings, while the Government contends that only the wyes were to be inserted in the line for later use. Appellant claimed $10,196.65

for this work in a letter dated Dec. 11, 1979. Appellant's brief argues that much of the material cost of $4,943 shown on exhibit 6 was for material purchased for this change and left at the site. The buildings were not connected by appellant, but the wyes were installed sometime between the directive on Oct. 22 and Nov. 9, 1979. Appellant's invoice 6 dated Apr. 16, 1980, shows $1,019.67 completed on this task.

Appellant's third claim for tying in the lift station resulted from a directive from Mr. Idlett on Oct. 24 or Oct. 30, 1979, and appellant claimed $11,311.33 for this task in the letter of Dec. 11, 1979. The work of making the connection and laying 18 feet of added pipe was accomplished by Nov. 9, 1979. Appellant claims the coupling required for the tie-in cost $250, and the Government claims the cost to be $50, noting that no evidence of the actual cost was presented.

In the final decision of the contracting officer dated Mar. 28, 1980, claims 1, 2, and 3 were treated together because the work was accomplished during the same time period from Oct. 22, 1979 to Nov. 9, 1979. The certified payroll records were used as the basis for determining the labor costs of the claims, and inasmuch as appellant claimed that only changes work was accomplished during the period, all labor charges for the period were allowed. Adding $50 material charges plus overhead and profit, a total of $2,805.77 was allowed.

Claims 4 and 5 concern the deletion of work between manholes 7 and 8 and the relocation of manholes 10 and 11. In his final decision, the contracting officer determined that the deletion of work between manholes 7 and 8 warranted a price reduction of $2,402. This amount was deducted from the allowance for claims 1, 2, and 3, and a total increase in price of $403.77 was included in modification 6, a unilateral amendment to the contract. Appellant's letter of Dec. 11, 1979, offered a reduction of $764.61 for the deletion of work between manholes 7 and 8, and the posthearing brief argues that appellant agreed to trade the deletion of work in claim 4 for the work in claim 5. It is noted that the work required by claim 5, *i.e.*, the relocation of manholes 10 and 11, was the subject of an agreement included in modification 7, a bilateral amendment increasing the contract price $2,200 for this and other work. Appellant contends that the credit claimed for claim 4 was excessive because the Government failed to consider the labor expended in unloading the pipe and moving it about the site in response to several directives (Tr. 114–18). Appellant also argues that the payment made for claim 5 was inadequate because it failed to pay for exploratory work and hand digging to locate high voltage lines in the area.

Appellant's claim 6 concerns the benchmark problem. Appellant argues that it reasonably concluded from the elevations on the drawings and its investigations that the benchmark elevation was 6.74, rather than 5.96 as directed by the Government on Oct. 30, 1979. The failure to include the benchmark on the drawings is alleged to be a design defect which

necessitated that much of the installed work had to be redone after rejection by the Government. In a final decision dated June 15, 1980, the contracting officer assumed 50 percent of the responsibility for the required rework and allowed $9,982 plus $297.26 interest on the costs computed for reinstalling the pipe from manholes 1 to 2 and 2 to 5. The Government contends this approach is equitable in that it recognizes that the Government failed to show the benchmark on the drawings, but that appellant's initial work in laying the pipe from manholes 1 to 5 was unacceptable for failure to maintain the proper slope.

Appellant's claim 7 for delay of the work occasioned by acts of the Government was denied by the contracting officer. Appellant argues that the numerous changes made by the Government, the lack of timely inspections by Justice, the lack of timely payment by the Government, and the lack of clarity in directives resulted in inefficiency, delay, and greatly increased the cost in completing the work.

Findings and Conclusions

Appellant's difficulties on this contract commenced with the fact that there was no benchmark elevation shown on the drawings. Mr. Porter recognized this fact at the preconstruction conference and despite assurances that Justice would determine the correct benchmark, the work was started using a benchmark that turned out to be incorrect. The incorrect benchmark was determined by appellant by extrapolating from the elevations shown on the drawings, from consultations with surveyors not connected with the Government, and from another contract appellant had to do work on Sabine Island. The work that had to be redone after the correct benchmark elevation was provided to appellant, was accomplished during the period between Dec. 12, 1979, and Jan. 3, 1980, under the supervision of appellant's project manager, Mr. Lockfaw. Nonetheless, appellant continued to insist that the benchmark provided was incorrect as evidenced by its letter of Feb. 6, 1980, indicating that the piping would not match up with the building outlets or would lay on top of the ground. The Government rejected this complaint, insisted that the work be completed with the existing plans, and on threat of termination for default, the work was finally completed. The testimony of Government witnesses and the statement in the posthearing brief that the plans were never changed, and that the system finally installed according to those plans properly functioned, is not controverted by appellant.

Appellant's testimony shows conclusively that he was aware that no benchmark elevation was shown on the drawings before work was started. Instead of insisting that the Government provide the benchmark, appellant proceeded to determine from other sources a different benchmark elevation which was used to

install the sewage system. With knowledge that the drawings lacked an essential item of information, appellant had a duty to inquire of the Government for a determination of the missing information. Failing to ascertain the proper benchmark elevation from the Government, appellant commenced work assuming the risk that the benchmark datum point he used was correct. Regardless of the fact that the Government found that much of the work installed using the wrong benchmark elevation was not acceptable for other reasons, the installed work could properly have been rejected because it was installed at the wrong elevation. The contracting officer made a decision to accept a portion of the responsibility for the cost and delay necessitated by reinstalling the work because the correct benchmark elevation was not provided to appellant until Oct. 30, 1979. We will not disturb that decision.

Claims 1, 2, and 3 were for work performed during the period from Oct. 22 to Nov. 9, 1979, prior to the time that the system had to be reconstructed using the proper benchmark. The contracting officer computed the cost of appellant's entire work force during this short period and agreed to assign the entire cost to the changes required by the Government. Claim 5 for the relocation of manholes 10 and 11 was the subject of a bilateral agreement evidenced by modification 7. Appellant offers no basis for setting aside this agreement, which must be deemed an accord and satisfaction. Claim 4 concerns the credit for deletion of manhole 8 and the piping from manhole 7 to 8 which was directed by change order dated Oct. 17, 1979. Therefore, apart from the benchmark problem and the general claims listed in claim 7, appellant's claim centers on work accomplished or deleted prior to Nov. 9, 1979.

There is agreement that quantum is the primary issue in these appeals, since entitlement is conceded by the Government on the directed changes and to the extent of a shared responsibility for the rework after the correct benchmark was provided. Appellant presented the Government with a number of estimates for directed changes to the work. The Government repeatedly requested detailed explanations and justification for the estimated costs. Such explanations were not provided and the Government finally determined the amounts due appellant from the payroll records for the time periods during which the changes were accomplished. An audit report by the Office of the Inspector General dated Oct. 3, 1980, stated that "the records of the firm and its accounting practices were 'revised' to a point where it was not possible to readily identify actual costs incurred" under the contract. The report showed appellant's claim totaling $1,423,768, excluding the original contract amount plus one modification and found $5,678 in accepted costs. The report states that the job cost ledger showed $119,752 in labor costs recorded as incurred under the claims portion of the contract.

At the hearing, Mr. Porter testifed that the work being done on

the base contract was charged to account 928 and that the change order work was charged to account 928–X (Tr. 94). Later, he testified as follows (Tr. 142):

Q. All right. Do you recall what the total of labor is shown on the Government payroll on this project?

A. Yes, sir, it's $16,069.69. All right. That's direct payroll for both 928 and 928–X.

Q. Now, does that represent all the costs that you've experienced on this project related to labor?

A. No, sir, that's only a small fraction of the total costs.

Mr. Porter testified that expenditures attributable to the individual claims 1, 2, and 3 or the combined claims could not be determined precisely (Tr. 175).

Appellant's exhibit 6 is a cost breakdown purporting to show the cost of the work involved in claims 1 through 6 (Tr. 175–76). The exhibit shows $13,488 for 928–X labor on Government payrolls and $14,055 in labor inefficiency allocable to this project as shown by daily time cards. Mr. Porter testified extensively concerning the method he used to allocate labor to 928–X or to labor inefficiency (Tr. 157–203). In the process of this allocation, $13,488 was assigned to account 928–X from the Government payrolls, leaving $2,581.69 ($16,069.69 minus $13,488) to be charged to the basic contract work (Tr. 198–99).

Mr. Fulton, a staff accountant for a certified public accountant firm, testified concerning accountancy services performed for appellant in 1979 and 1980 (Tr. 339–76). Mr. Fulton testified that the net income of appellant for book purposes for 1979 was about $144,000, including a profit reported on account 928 and 928–X of $87,199 (Tr. 363). He further testified that in May of 1980 the job cost ledgers for job 928 showed a transfer of $9,494 from 928 to 928–X (Tr. 365). Mr. Fulton confirmed that his workpapers showed that labor costs on 928–X for 1979 were $1,570.34 while the job cost ledgers showed $22,725 and assumed this was due to incorrect posting (Govt Exh. B). The labor shown for account 928 for 1979 by Mr. Fulton was $5,185.32.

Mr. Porter's description of the sewer project portrays frequent and confusing directives requiring repeated changes in the work at costs greatly exceeding the basic contract work. He testified that "there must be over 100 directives from all these government officials, and basically involved revising locations of manholes" (Tr. 149). The record shows that claims 1 through 6 arose in 1979, that the required changes were performed in 1979, and that the labor costs for the changes recorded by an accountant employed by appellant were insignificant compared with the costs later seen to be recorded in the job cost ledgers. The actual labor costs for the basic contract work and the changes work are impossible to determine from the record presented. The transfers of labor from the contract work to the changes account and the reporting of a booked profit on the two accounts greater than the original contract value mandate that the records of ap-

pellant cannot be relied on for a determination of actual costs.

Appellant has not attempted to show specific costs incurred for any of the changes claimed to have cost more than the amount allowed by the Government. Instead, appellant has attempted to show that his total costs greatly exceeded the basic contract price. Not only are the cost records seen to be unreliable, but also in order to attribute responsibility to the Government, appellant has relied only on general allegations of failures to timely inspect, failures to timely pay, and the issuance of over a hundred directives by Government representatives. Appellant's plumbing department head, Mr. Smith, who supervised the job remembers only one occasion when Justice failed to timely inspect (Tr. 412-13). The delays in payment of appellant's invoices were caused by appellant's actions to invoice for amounts claimed for changes work that had not been included in contract modifications. Appellant has not provided specific corroborated instances of Government directives that interfered with or increased the cost of the work other than the directives that are the subject of claims 1 through 6.

We find that appellant has failed to prove that the amounts allowed by the Government were inadequate to pay for the directed changes or that the Government caused compensable delays in the progress of the work. Therefore, the appeals are denied.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

TIMOTHY LUKE

6 ANCAB 340

Decided *February 16, 1982*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-14852-A and F-14852-B.

Dismissed with order to exclude certain lands from conveyance pending possible reinstatement and adjudication of allotment application.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

The Board is without jurisdiction to adjudicate the validity of a Native allotment.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

The Board will order the exclusion of a disputed Native allotment from the conveyance of lands pursuant to the Alaska Native Claims Settlement Act pending adjudication of the disputed allotment.

APPEARANCES: Daniel L. Callahan, Esq., Alaska Legal Services Corp., for appellant; M. Francis Neville, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeal

The appellant asks the Board to recognize, as a valid property in-

terest, a Native allotment application which was terminated by the Bureau of Land Management in 1967 for failure to submit proof of occupancy. The land in dispute has been segregated so that conveyance of the balance of land in the selection, unaffected by this appeal, would not be delayed. The appellant also asks that the affected land, now segregated, be excluded from the conveyance pending adjudication of the allotment. The appellant is seeking reinstatement of the application through review by the Assistant Secretary, Land and Water Resources.

The request that the Board recognize a valid property interest of the appellant in the disputed lands is untimely and not within the jurisdiction of the Board. As to the request for exclusion, insofar as the disputed lands were segregated in 1980, conveyance may already have been made, with the segregated lands excluded pending adjudication. If conveyance has not been made, the Board orders that the disputed lands be excluded from conveyance pending resolution of the allotment dispute. This disposes of all issues within the power of this Board to resolve, and the Board dismisses the appeal.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended,* 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision dismissing the appeal of Timothy Luke from the above-designated decision of the Bureau of Land Management.

Procedural Background

On Dec. 28, 1979, the Alaska State Office of the Bureau of Land Management (BLM) issued its above-designated decision approving the conveyance, pursuant to the Alaska Native Claims Settlement Act (ANCSA), of lands in the vicinity of Dot Lake.

On Feb. 1, 1980, appellant appealed the above-designated decision of the BLM on the grounds that it failed to exclude lands subject to a Native allotment for which appellant had applied prior to Dec. 18, 1971.

On Mar. 5, 1980, in response to the Board's request, appellant identified the lands in dispute in this appeal as "Allotment Application F–027271 USS 4292 T23N, R6E, CRM."

The Board, on Mar. 24, 1980, directed the appellant to show cause why the appeal should not be certified to the Interior Board of Land Appeals (IBLA) pursuant to 43 CFR 4.901(c) as a matter relating to the validity of a Native allotment application which was properly within the jurisdiction of IBLA and not of this Board. In the same order, the Board directed BLM to provide a more precise description of the land in dispute, if possible, for purposes of segregation.

On Apr. 8, 1980, responding to the Board's order requesting that BLM furnish a description of the disputed land, the BLM reported that U.S. Survey 4292 was an accurate description of land applied for as a Native allotment by the appellant.

BLM stated that they had issued a decision on Mar. 21, 1967, terminating the appellant's allotment application F-027271 and closing the case file; that no appeal was taken from this decision; and that BLM had subsequently, in 1979, refused a request by the Tanana Chiefs Conference, Inc., to reopen this application. Taking the position that since the case file was properly closed in 1967, the appellant cannot now claim a property interest based on the allotment application and therefore lacks standing to appeal pursuant to 43 CFR 4.902, BLM moved the Board to dismiss the appeal.

On Apr. 10, 1980, the Board received appellant's Statement of Jurisdiction, Interest Affected and Reasons. Appellant therein declared that "the issue is whether appellant's interest in the allotment land applied for is protected under the Native Claims Act," and asked the Board "only to recognize the valid property interest of appellant to the land in dispute in this appeal and to segregate it pending adjudication of the allotments."

The appellant also confirms that his allotment file was closed for failure to submit evidence of use and occupancy. He alleged that, while BLM's present policy was not to reinstate cases of this sort, that policy was under review, and that disputed allotments should be excluded from conveyances until their status is clear.

On Apr. 18, 1980, in accordance with appellant's description of lands in dispute in this appeal, the Board segregated U.S. Survey 4292, T. 23 N., R. 6 E., C.R.M., from the remainder of the lands approved for conveyance in the above-designated decision of the BLM.

On Apr. 28, 1980, the Board issued an Order to Show Cause which noted:

> The case file indicates that the appellant applied for his Native allotment in 1960, amending the application in 1965 to include additional acreage. The appellant was notified, apparently by regular mail, in 1961 and again in 1966, that he must submit proof of use and occupancy of the land applied for by January 16, 1967, and that if such proof was not filed, his application would terminate and his file would be closed, without prejudice to filing a new application after that time. The appellant did not file proof of use and occupancy, and on March 20, 1967, by Decision F-027271, his application was terminated and his file closed for failure to submit proof. The appellant did not appeal that decision. There is no indication that he filed a new application for the allotment now claimed.
>
> * * * * *
>
> The Board is inclined to grant BLM's motion to dismiss this appeal because the appellant does not appear to have a pending Native allotment application subject to adjudication, and therefore, there appears to be no basis for excluding the lands in question from the conveyance to Dot Lake Native Corporation. However, the Board recognizes that BLM's policy on Native allotment application is currently undergoing revision, and that the issue of whether or not the appellant received proper notice of various matters critical to his application has apparently not been resolved. Accordingly, the Board concludes that dis-

missal of the appeal at this time would be premature without further briefing.

The Board ordered the appellant to show cause why the appeal should not be dismissed, and to advise the Board in what manner adjudication of the appellant's allotment application was being sought. BLM was directed to advise the Board as to whether any administrative procedures remained open to the appellant for administrative adjudication of his claim.

BLM's response, on May 28, 1980, stated:

> In its recent review of allotment issues, the BLM State Office decided that allotment applications, including the appellant's, which were closed for failure to submit evidence of use and occupancy within the required period, could not be reinstated. As noted by the appellant, this decision was made over the objections of the Bureau of Indian Affairs and the Alaska Legal Services Corporation. Because of the disagreement concerning this and other allotment issues, Departmental officials in Washington, D.C. have been requested to review the decision of the BLM State Office.

In its response to the show cause order, the appellant also stated that the BLM policy on failure to timely file evidence of use and occupancy, as grounds for closure of an allotment application, was being reviewed. Appellant alleged that the decision on this policy would be made in the office of the Assistant Secretary for Land and Water Resources, and that this decision essentially constituted "adjudication" on the policy level by the Department. The appellant moved for the suspension of further proceedings in this appeal pending a Departmental decision on the reinstatement of cases in which evidence of use and occupancy was not filed timely, in order adequately to protect the interest of the appellant.

The Board, on June 13, 1980, granted this request in a suspension order stating:

> Both the appellant and BLM have advised the Board that BLM's refusal to reinstate the appellant's allotment application is being reviewed by the Assistant Secretary of the Interior for Land and Water Resources, and that BLM's policy on reinstatement may change as a result of this review.
>
> Therefore, at the request of the appellant, action on this appeal is hereby suspended pending such review and decision on reinstatement policy.

The suspension has remained in effect to this date and the Board has not been advised of any change in policy resulting from Departmental review.

Decision

Appellant has appealed the above-designated decision of the BLM to convey lands to Dot Lake Native Corporation (Dot Lake) in order to protect his claimed rights in his allotment application. Appellant asked the Board "only to recognize the valid property interest of appellant to the land in dispute in this appeal and to segregate it pending adjudication of the allotments." Statement of Jurisdiction, Interest Affected and Reasons at 1.

The jurisdiction of this Board is set forth in 43 CFR 4.1(b)(5):

> *Alaska Native Claims Appeal Board.* The Board considers and decides finally for the Department appeals to the head of the Department from findings of fact or decisions rendered by Departmental offi-

cials in matters relating to land selection arising under the Alaska Native Claims Settlement Act.

Sec. 18(a) of ANCSA provides:

> No Native covered by the provisions of this Act, and no descendant of his, may hereafter avail himself of an allotment under the provisions of the Act of February 8, 1887 (24 Stat. 389), as amended and supplemented, or the Act of June 25, 1910 (36 Stat. 863). Further, the Act of May 17, 1906 (34 Stat. 197), as amended, is hereby repealed. Notwithstanding the foregoing provisions of this section, any application for an allotment that is pending before the Department of the Interior on the date of enactment of this Act may, at the option of the Native applicant, be approved and a patent issued in accordance with said 1887, 1910, or 1906 Act, as the case may be, in which event the Native shall not be eligible for a patent under subsection 14(h)(5) of this Act.

The Board notes that there has been a Department decision closing the appellant's allotment application. The issue now raised by the appellant is whether the application must be reinstated and further adjudicated.

[1] Native allotments are issued pursuant to statutes other than ANCSA. While the option of the allotment applicant to proceed to patent is preserved by § 18(a) of ANCSA, decisions approving or denying applications for Native allotments are not "matters relating to land selection arising under" ANCSA. Thus, if the appellant's terminated application had been reinstated and there had been a Departmental decision as to its validity, the Board would not have jurisdiction to review it. This Board is without jurisdiction to adjudicate the validity of an allotment, and cannot determine the existence of a valid property interest in land based upon a disputed allotment application. If the appellant is successful in having his application reinstated, the BLM will determine whether appellant has a valid property interest in the affected land. Any appeal from that determination would be to the Interior Board of Land Appeals, and not to this Board.

At appellant's request, the Board has segregated the disputed land pending resolution of this appeal.

It is the policy of the Board to segregate lands affected by an appeal from the remainder of the lands proposed for conveyance in the decision appealed, so that conveyance of the unaffected lands is not delayed pending decision of the appeal. The segregated lands remain within the jurisdiction of the Board until the appeal before the Board is dismissed.

In the instant appeal, the appellant is attempting to establish the existence of a valid property interest in the disputed lands and to protect his interest by staying their conveyance under ANCSA pending reinstatement of his application. The Board can stay the conveyance pending resolution of the allotment dispute but, as shown above, cannot adjudicate the validity of the appellant's allotment, and is without jurisdiction to review a Departmental adjudication of the allotment. In these circumstances, there is no need for this Board to retain jurisdiction over lands which have been segregated from lands unaffected by the appeal.

[2] An order of this Board requiring the exclusion of the alleged allotment from the conveyance pursuant to ANCSA pending

adjudication of the allotment will protect the appellant's interests vis-a-vis Dot Lake regardless of the continuation of this appeal. Moreover, following issuance of the order, this Board would be a mere intermediary not further concerned with the appellant's rights. Therefore, the Board will order exclusion of the disputed Native allotment from the conveyance of lands pursuant to ANCSA pending adjudication of the disputed allotment, and will dismiss the appeal.

Order

The Bureau of Land Management is hereby Ordered to exclude U.S. Survey 4292, T. 23 N., R. 6 E., C.R.M., from conveyance pursuant to the Alaska Native Claims Settlement Act pending Departmental determination of whether appellant's terminated allotment application will be reinstated and, if so, pending adjudication of said application.

Further, the Board hereby dismisses the above-designated appeal.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

ROLAND REDFIELD *v.* ACTING DEPUTY ASSISTANT SECRETARY—INDIAN AFFAIRS (OPERATIONS)

9 IBIA 174

Decided *February 18, 1982*

Appeal from decision of the Acting Deputy Assistant Secretary—Indian Affairs (Operations) granting fee patent title to certain Indian trust lands on the Crow Reservation in Montana.

Appeal dismissed.

1. Bureau of Indian Affairs: Administrative Appeals: Generally—Rules of Practice: Appeals: Standing to Appeal

An appellant has standing to appeal a decision of a Bureau of Indian Affairs official granting fee patent title to Indian trust land only if it can be shown that the decision adversely affects his or her enjoyment of a legally protected interest.

APPEARANCES: Brenda C. Desmond, Esq., and D. Michael Eakin, Esq., Hardin, Montana, for appellant Roland Redfield; Kenneth L. Payton, Acting Deputy Assistant Secretary—Indian Affairs (Operations), Washington, D.C., and John W. Fritz, Deputy Assistant Secretary—Indian Affairs (Operations), Washington, D.C., for the Bureau of Indian Affairs; Douglas Y. Freeman, Esq., Hardin, Montana, for Oliver Redfield. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

This appeal arises from the decision of the Acting Deputy Assistant Secretary—Indian Affairs (Operations) (appellee) to grant fee patent title to certain Indian trust lands on the Crow Reservation in Montana to Oliver Redfield. Roland Redfield, appellant here, is the brother of Oliver Redfield.

On Sept. 30, 1981, appellee filed a motion to dismiss this case on the grounds that appellant has no standing to bring the appeal and that the Board lacks jurisdiction to consider the case. A similar motion was filed by counsel for Oliver Redfield on Oct. 13, 1981. Appellant timely responded to both motions on Oct. 21, 1981. For the reasons discussed below, the Board grants the motions to dismiss this appeal because of appellant's failure to show standing.

Standing to appeal to the Board of Indian Appeals from administrative actions of officials of the Bureau of Indian Affairs is governed by sec. 4.331 of the Board's regulations, 46 FR 7337 (Jan. 23, 1981), which states in pertinent part:

> Any interested party affected by a final administrative action or decision of an official of the Bureau of Indian Affairs issued under regulations in Title 25 of the Code of Federal Regulations in a case involving a determination, finding, or order protested as a violation of a right or privilege of the appellant may appeal to the Board of Indian Appeals.

[1] Appellant asserts that in order to have standing under this section he must show only that he is an "interested party" as defined in 25 CFR 2.1 and must merely show that the decision will adversely affect him. This argument overlooks the requirement in sec. 4.331 that any adverse effect be in "violation of a right or privilege of the appellant." In order to have standing, appellant must show that the decision adversely affects his enjoyment of some legally protected interest. 25 CFR 2.1 (f) and (g).

Appellant first argues that he has standing because as the guardian of his mother, Alice Redfield, he has instituted an action in the Crow Tribal Court to protect her interests in the land to which Oliver was granted a fee patent. The record indicates that the property at issue was originally purchased by Oliver's father, Perry Redfield, a non-Indian. In order to enjoy the advantages of holding this land in trust, the title was put jointly in the names of Alice and Oliver, the oldest son. These land purchases were largely financed through mortgages from the Farmers Home Administration and the Federal Land Bank. As a result of a partition, Oliver received 1,918.34 acres and assumed all of an outstanding mortgage to the Federal Land Bank. Alice received approximately 799 acres, mortgage-free. Appellant states that the complaint filed with the tribal court alleges that this partition was obtained through fraud or misrepresentation.

For purposes of this decision, the Board assumes that appellant was properly appointed Alice's guardian and that he has the

right to bring legal actions on her behalf. Appellant's argument raises doubts as to whether Oliver properly holds beneficial title to all of the trust land for which he has been determined to be eligible to receive fee title.

The sale, exchange, partition, or other conveyance of Indian trust lands is governed by Federal, not tribal, law. Specifically, any conveyance must be approved by the Secretary of the Interior in accordance with the provisions of 25 CFR Part 121. Any decision of the Crow Tribal Court as to the ownership of this trust land is void; BIA is not required to give effect to any decision that might be rendered by the tribal court.

Even though appellant may have had standing at one time as the guardian of his mother to challenge the Department's partition of the mutual trust holdings of Oliver and his mother, that does not mean that he has standing now to question the issuance of a fee patent on those lands to which Oliver properly holds beneficial title.[1]

Appellant further argues that, as a recorded leaseholder on one of the allotments at issue, he has standing to challenge the issuance of the fee patent as a competitor under *Hardin* v. *Kentucky Utilities* Co., 390 U.S. 1 (1968), and as a lessee of real property under *Barlow* v. *Collins,* 397 U.S. 159 (1970). In *Hardin,* the Supreme Court held that a private utility company competing for customers with the Tennessee Valley Authority (TVA) was a member of the class sought to be protected by a 1959 amendment to the TVA Act of 1933 that prohibited TVA from expanding its sales into new areas. Thus, the company had standing to challenge an alleged expansion. Likewise, in *Barlow* the Court found that tenant farmers were a protected group under the Food and Agriculture Act of 1965 and, therefore, had standing to challenge a change in Department of Agriculture regulations that would be detrimental to them while benefiting other land owners. Appellant here seeks to place himself in a protected class by arguing that sec. 2 of the Crow Allotment Act, 41 Stat. 751, 752 (1920), protects competition for land on the Crow Reservation by limiting the amount of land that can be conveyed to any one person.

Again assuming without deciding that the facts and the law are precisely as stated by appellant, they do not give standing in this case. Appellant does not and could not assert that sec. 2 of the Crow Allotment Act restricts Oliver's right to receive a fee patent on his trust lands. At most, appellant's argument is that the Act restricts Oliver's rights to dispose of the property. These restrictions would exist, however, whether or not Oliver had fee patent title. Should Oliver seek to convey this land in a manner prohibited by law, appellant might have standing to challenge that transaction.

[1] *See Hamlin* v. *Portland Area Director,* 9 IBIA 16 (1981). Regulations of the Department which provide for finality in administrative proceedings cannot be avoided merely by initiating successive proceedings to prevent decisions of the Department from execution. The record indicates that partition of the lands to which fee patent is now sought occurred some time ago.

The possibility, however, that Oliver might attempt at some future time to convey his land improperly is insufficient to give appellant standing to oppose the issuance of a fee patent.

Appellant next cites *In re Bulltail,* 1 Tribal Court Reporter A-42 (1978), a decision of the Crow Tribal Court, for the proposition that the Crow Tribe recognizes the rights of family members to bring suit over an issue of family interest. Appellant asserts that the Board should recognize these rights created by tribal law under the doctrine of *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64 (1938).

In re Bulltail dealt with the jurisdiction of the tribal court in a child custody case. The court found that it had jurisdiction to decide custody under sec. 10-130 of Title 10 of the Crow Tribal Code, sec. 101(a) of the Indian Child Welfare Act, and the *in rem* nature of child custody proceedings. Standing was not at issue in this case, and it cannot be cited as establishing a general right of a person to bring suit in a tribal court, or any other judicial forum, against a family member in order to settle family disputes.

Appellant further argues that he has standing as a tribal member to challenge the issuance of this fee patent. There appear to be two aspects to this argument. First, appellant again assumes how Oliver will dispose of the property if he has fee patent title. Based on that assumption, appellant states that the value of land he owns will be depreciated by this transaction. He then asserts that sec. 2 of the Crow Allotment Act was intended to prevent such depreciation of value. As previously discussed, the possibility that Oliver might make an improper conveyance of the property does not give appellant standing to challenge the issuance of a fee patent to that property.

Second, appellant cites 25 CFR 121.2 as Departmental recognition that other tribal members may be adversely affected by the issuance of a fee patent. He argues that as a member of the Crow Tribe, he has an interest in protecting the tribe's land base and, therefore, has standing to oppose the issuance of a fee patent. The Department does recognize that the granting of a fee patent may have impacts on other Indians or the tribe. The Department has never recognized, however, any right of an individual member of a tribe to bring an action for the tribe based on a personal assessment of what is or is not in the best interests of the tribe.[2]

Finally, appellant argues that the Department adopted a less demanding standing requirement in *State of Alaska* v. *Sarakovikoff,* 50 IBLA 284 (1980). That case, decided by the Interior Board of Land Appeals under the Alaska Native Claims Settlement Act and 43 CFR 4.450-2, held that the State of Alaska could protest against the allowance of an allotment to an Alaska Native even though the State had no cogniza-

[2] The record in this case reflects that at one time the Crow Tribe raised a challenge to the fee patent request of Oliver Redfield. *See* Notice of Appeal by Crow Tribe from decision of Acting Deputy Commissioner of Nov. 24, 1980, filed Jan. 19, 1981. This appeal was dismissed by the Board without prejudice by order dated Mar. 19, 1981, upon ascertaining that the Commissioner's office had elected to reconsider its Nov. 24, 1980, holding. *See* 8 IBIA 253 (1981).

ble interest in the specific land being sought.

The Appeals Boards of the Department of the Interior are governed by different statutes and regulations. Although there are many areas in which the laws governing the Boards converge and it is therefore appropriate for one Board to cite decisions of another Board, there are also many areas of difference. In distinction to 43 CFR 4.450–2, sec. 4.331, the regulation governing this appeal, specifically requires the violation of a right or privilege of the appellant. Appellant has not been able to show that any right or privilege of his will be violated by the issuance of a fee patent to Oliver.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals, 43 CFR 4.1, this appeal of the decision to issue a fee patent to Oliver Redfield is dismissed for appellant's failure to show that he has standing.[3]

This decision is final for the Department.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

JERRY MUSKRAT
Administrative Judge

[3] Because of this disposition, the Board does not reach appellee's second ground for dismissal, the Board's alleged lack of jurisdiction over this matter.

GARRETT CONNOVICHNAH *v.* ACTING AREA DIRECTOR, ANADARKO AREA OFFICE, BUREAU OF INDIAN AFFAIRS

9 IBIA 179

Decided *February 19, 1982*

Appeal of a denial of a request for disbursement of all funds held in the appellant's Individual Indian Money account.

Affirmed.

1. Indians: Fiscal and Financial Affairs—Indians: Indian Money Accounts

Under 25 CFR 104.9 the Bureau of Indian Affairs can require the holder of an Individual Indian Money account to submit a plan for disbursement of funds in the account upon a finding that the person, even though under no legal disability, needs assistance in managing his or her financial affairs.

2. Bureau of Indian Affairs: Administrative Appeals: Acts of Agents of the United States—Indians: Indian Money Accounts

When a plan for disbursement of funds in an Individual Indian Money account has been approved, under 25 CFR 104.9 the Bureau of Indian Affairs is obligated to disburse funds in accordance with the provisions of that plan. The denial of a request to release all funds in violation of an approved plan is, therefore, neither arbitrary, capricious, nor an abuse of discretion.

3. Constitutional Law: Generally—Regulations: Generally

The Boards of Appeals of the Department of the Interior do not have the authority to declare duly promulgated Departmental regulations invalid or unconstitutional.

4. Indians: Fiscal and Financial Affairs—Indians: Indian Money Accounts

An argument addressing the adequacy of an existing approved plan under 25 CFR 104.9 is properly raised to the appropriate officials of the Bureau of Indian Affairs in seeking a modification of the approved plan.

APPEARANCES: Amos E. Black III, Esq., for appellant Garrett Connovichnah. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATION JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

Garrett Connovichnah (appellant) seeks review of a Nov. 17, 1980, decision of the Acting Area Director, Anadarko Area Office, Bureau of Indian Affairs (BIA), denying his request for disbursement of the balance of funds in his Individual Indian Money (IIM) account. This appeal was referred to the Board of Indian Appeals on Apr. 23, 1981, by the Acting Deputy Commissioner of Indian Affairs pursuant to 25 CFR 2.19(b). For the reasons discussed below, the Board affirms the Acting Area Director's decision.

Background

Appellant is a legally blind Comanche Indian who has intermittently received blind disability assistance since about 1944. He has lived in his house with a sister and her family most of his life. Appellant owns interests in certain trust properties and has an IIM account into which, at different times, funds from grazing and oil and gas leases and from the sale of trust lands have been deposited. The administrative record reveals that throughout the years the welfare division of the Anadarko Area Office has assisted appellant in handling the funds in his IIM account, primarily because appellant appears to be very generous with his money and has repeatedly paid expenses for other family members, sometimes borrowing extensively when he did not have cash. A letter dated July 20, 1955, to appellant from a BIA social worker explains that, because appellant was receiving either state or BIA welfare assistance, the BIA's policy was to assist him in budgeting the funds in his IIM account in order "to help [him] * * * to live free of any indebtedness, live within his own income and earnings from employment and to have cash to satisfy his wants and desires each month when possible." In accordance with this policy, appellant had worked out budget plans several times with the BIA.

In 1978, the BIA agreed to a sale of certain of appellant's trust holdings only after he had submitted a budget stating how the funds would be used. Thus, when $71,910 was deposited into his IIM account after the July 19, 1978, land sale, appellant had agreed that $50,000 would be set aside and budgeted to him at the rate of $350 per month. This monthly figure was raised to $400, effective Jan. 1, 1980.

On Sept. 22, 1980, after receiving a request from appellant that all funds in his IIM account be released to him, the Anadarko Agency Superintendent denied

the request on the grounds that appellant had agreed to budgeting as a condition of the sale. Appellant appealed this decision. On Nov. 17, 1980, the Acting Area Director for the Anadarko Area Office affirmed the denial. Appellant's appeal of this decision, sent to the Secretary of the Interior, was referred to the Commissioner of Indian Affairs. On Apr. 23, 1981, the appeal was transferred to the Board pursuant to 25 CFR 2.19(b). Although a briefing time was given, appellant did not file a brief in support of his appeal.

Discussion, Findings, and Conclusions

The regulations governing IIM accounts are found in 25 CFR Part 104. Sec. 104.3 states that, "[e]xcept as otherwise provided in this part, adults shall have the right to withdraw funds from their accounts." Sec. 104.9 sets forth certain restrictions on this right:

> Funds derived from the sale of capital assets which by agreement approved prior to such sale by the Secretary or his authorized representative are to be expended for specific purposes, * * * shall be disbursed only in accordance with the agreements (including any subsequently approved modifications thereof) * * *. The funds of an adult whom the Secretary or his authorized representative finds to be in need of assistance in managing his affairs, even though such adult is not non compos mentis or under other legal disability, may be disbursed to the adult, within his best interest, under approved plans. Such finding and the basis for such finding shall be recorded and filed with the records of the account.

As expressed in the 1955 letter on budgeting sent to appellant, these regulations are intended to help the individual to live within his or her means as long as possible. Primarily they are intended to prevent brief periods of extravagance when lease rentals or land sale funds are deposited into the account followed by extended periods of need for financial assistance. It is not intended, and the Board has no reason to believe that it is ever used, to deprive an individual of access to his or her money, whether for daily needs or unexpected emergencies.

[1] Appellant raises four arguments in his notice of appeal why BIA's refusal to disburse all of the funds in his IIM account should be reversed. One argument is that he is mentally and physically competent and capable of handling his own affairs. The BIA made a finding, documented in the administrative record, that appellant needed assistance in managing his finances because he allowed family members to impose on his generosity and consequently was frequently in need of public financial assistance. Sec. 104.9, unlike sec. 104.5 which deals specifically with the handling of the IIM accounts of adults under legal disabilities, requires only a finding that an adult, otherwise competent, needs assistance in managing his or her finances. The BIA's finding in this case is supported by the record and is sufficient under 25 CFR 104.9 to disburse appellant's funds only in accordance with his approved budget, or with any approved modifications of that budget.

[2] A second argument is that the refusal to disburse all of the funds in appellant's IIM account is arbitrary, capricious, and an abuse of discretion. Under sec. 104.9, BIA is obligated to disburse the funds in appellant's IIM account in accordance with the approved budget and any subsequent modifications. The denial was based on properly promulgated regulations and, therefore, is neither arbitrary, capricious, nor an abuse of discretion.

[3] A third argument raised is that the withholding of these funds is a violation of rights guaranteed under the Oklahoma and United States Constitutions. This argument apparently alleges that 25 CFR 104.9, the authority under which disbursement was denied, is unconstitutional. The Boards of Appeals of the Department of the Interior do not have the authority to declare duly promulgated Departmental regulations invalid or unconstitutional. *See, e.g., Amanda Coal Co.,* 2 IBSMA 395, 87 I.D. 643 (1980); *Colorado-Ute Electric Association, Inc.,* 46 IBLA 35 (1980).

[4] Finally, Appellant argues that he "does not desire to have his money budgeted to him in the form of four hundred dollars ($400.00) monthly for the reason the same is totally inadequate to support himself and his family." This argument, which questions the adequacy of the existing budget, is properly presented to the appropriate division of the Anadarko Agency in an attempt to revise appellant's approved budget. Appellant has previously sought and obtained one modification to the monthly budget. It is possible that changes occurring since that modification necessitate further review of appellant's circumstances and financial needs. The alleged inadequacy of the amount budgeted monthly, however, does not invalidate the approved budget.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Nov. 17, 1980, decision of the Acting Area Director, Anadarko Area Office, is affirmed. This decision in no way limits appellant's right to seek a modification of his monthly budget.

This decision is final for the Department.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

JERRY MUSKRAT
Administrative Judge

SELDOVIA NATIVE ASSOCIATION, INC.

6 ANCAB 369

Decided *February 26, 1982*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management AA-6701-A2 and AA-6701-B2.

Decision of the Bureau of Land Management affirmed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

[2] A second argument is that the refusal to disburse all of the funds in appellant's IIM account is arbitrary, capricious, and an abuse of discretion. Under sec. 104.9, BIA is obligated to disburse the funds in appellant's IIM account in accordance with the approved budget and any subsequent modifications. The denial was based on properly promulgated regulations and, therefore, is neither arbitrary, capricious, nor an abuse of discretion.

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This decision is final for the Department.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

JERRY MUSKRAT
Administrative Judge

SELDOVIA NATIVE ASSOCIATION, INC.

6 ANCAB 369

Decided *February 26, 1982*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management AA-6701-A2 and AA-6701-B2.

Decision of the Bureau of Land Management affirmed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Where an application for selection made by a Cook Inlet village corporation pursuant to § 12(b) of ANCSA is rejected by the Bureau of Land Management so that the same lands may be conveyed to Cook Inlet Region, Inc., under the terms of an amendment to ANCSA, and when an issue on appeal is whether the status of the lands in question is affected by the amendment, the village corporation's interest in the rejected application constitutes a property interest affected by a determination of the Bureau of Land Management sufficient to confer standing under the regulations in 43 CFR 4.902.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Decisions

The Alaska Native Claims Appeal Board is bound by an enactment of Congress which amends the Alaska Native Claims Settlement Act and also by provisions of an agreement which is specifically ratified and given the effect of Federal law.

3. Alaska Native Claims Settlement Act: Conveyances: Regional Conveyances

When, by amendment to the Alaska Native Claims Settlement Act, an act of Congress expressly provides that specifically described lands shall be conveyed in fee simple to Cook Inlet Region, Inc., as part of its § 12(c) entitlement under ANCSA, the Bureau of Land Management is required to make conveyance notwithstanding that the same land was earlier made available and application for selection had been filed by a Native village corporation under provision of § 12(b) of ANCSA.

4. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Decisions

The Board holds that when § 12(b)(4) of P.L. 94-204 mandates the conveyance of specifically described lands in fee simple to Cook Inlet Region, Inc., this Board is without authority to overturn a Congressional directive and cannot rule on the validity of a claimed interest in the same unconveyed lands which purports to defeat conveyance under the mandate of Congress.

APPEARANCES: Fred H. Elvsaas, President, Seldovia Native Ass'n., Inc., Robert E. Price, Esq., and Steve K. Yoshida, Esq., Price & Yoshida, for appellant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; Stephen C. Hillard, Esq., Graham & James, for Cook Inlet Region, Inc.; Henry J. Camarot, Esq., Camarot, Sandberg & Hunter, Inc., for Ninilchik Natives Ass'n., Inc., Salamatoff Native Ass'n., Inc., Tyonek Native Corp., and Knikatnu, Inc.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeals

Seldovia Native Association, Inc.'s appeal rests upon the allegation that the Bureau of Land Management erred in its decision to convey lands to Cook Inlet Region, Inc., pursuant to a Congressional act amending ANCSA when equitable title had earlier passed by a completed selection of the same lands by the village corporation under § 12(b) of ANCSA.

The Board concludes that it cannot consider the issue of equitable title raised by Seldovia Native Association, Inc., and holds that the Bureau of Land Management correctly decided that it was bound by the express Congressional mandate to convey the specifically described lands in

fee simple to Cook Inlet Region, Inc., toward its entitlement under § 12(c) of ANCSA.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended,* 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

Seldovia Native Association, Inc. (Seldovia) filed selection application AA-6701-A2 on Dec. 15, 1975, pursuant to § 12(b) of ANCSA, which included the following described lands:

Seward Meridian, Alaska (Unsurveyed)
T. 1 S., R. 21 W.
Secs. 3 to 8, inclusive;
Sec. 10;
Secs. 15, 16 and 17;
Sec. 22.

On Feb. 17, 1978, Cook Inlet Region, Inc. (CIRI), filed selection application AA-11153-30 pursuant to § 12(b)(4) of the Act of Jan. 2, 1976, P.L. 94-204, 89 Stat. 1151,[1] and Sec. I.D. (3) of the Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area (Terms and Conditions); Dec. 10, 1975, as clarified Aug. 31, 1976, for the same described lands in T. 1 S., R. 21 W., Seward meridian, Alaska. Pursuant to § 12(c) of the Act of Jan. 2, 1976, *supra,* conveyances under § 12(b)(4) constitute the Region's entitlement under § 12(c) of ANCSA.

The Bureau of Land Management's (BLM's) decision dated July 28, 1981, rejected in part Seldovia's application for selection of the above-described lands and approved the lands for conveyance to CIRI pursuant to provision of § 12(b)(4) of P.L. 94-204, and of the Terms and Conditions entered into Aug. 31, 1976, between CIRI and the Secretary of the Interior. The decision states in part:

> The applications [Seldovia's] include lands to be conveyed to Cook Inlet Region, Inc., pursuant to Sec. 12(b)(4) of the act of January 2, 1976. Although the lands within T. 1 S., R. 21 W., Seward Meridian, were withdrawn by Public Land Order (PLO) 5174 of March 9, 1972, as amended by PLO 5411 of February 7, 1974, pursuant to Sec. 11(a)(3) of ANCSA for selection by Village Corporations, Sec. 12(b)(4) of P.L. 94-204 and Sec. I.D. (3) of the Terms and Conditions mandates conveyance of lands in this township to Cook Inlet Region, Inc. Section 12(b)(4) of P.L. 94-204 supersedes Sec. 12(b) of ANCSA as it applies to these lands. Therefore, selection AA-6701-A2, Methods D-1 and D-2, is hereby rejected as to the lands described * * *:

Seldovia filed a timely appeal of the BLM's decision dated July 28, 1981, covering land selections under ANCSA, *as amended.*

Statutes and agreements referred to by the parties as being relevant to issues raised in this appeal provide in pertinent part:

Sec. 12 of ANCSA:

> (b) The difference between twenty-two million acres and the total acreage selected by Village Corporations pursuant to subsection (a) shall be allocated by the Secretary among the eleven Regional Corporations (which excludes the Regional Corporation for southeastern Alaska) on the

[1] To avoid confusing § 12(b) of ANCSA with § 12(b) of P.L. 94-204, all references to the amendment are made to § 12(b)(4) of P.L. 94-204, whether the context is the authorization language of § 12(b), or the land description in § 12(b)(4).

basis of the number of Natives enrolled in each region. Each Regional Corporation shall reallocate such acreage among the Native villages within the region on an equitable basis after considering historic use, subsistence needs, and population. * * *

(c) The difference between thirty-eight million acres and the 22 million acres selected by Village Corporations pursuant to subsections (a) and (b) shall be allocated among the eleven Regional Corporations (which excludes the Regional Corporation for southeastern Alaska) * * *:

P.L. 94-204, § 12(b), 89 Stat. 1145, 1151 (1976):

(b) The Secretary shall make the following conveyances to the Region, in accordance with the specific terms, conditions, procedures, convenants, reservations, and other restrictions set forth in the document entitled 'Terms and Conditions for Land Consolidation and Management in Cook Inlet Area', which was submitted to the House Committee on Interior and Insular Affairs on December 10, 1975, the terms of which are hereby ratified as to the duties and obligations of the United States and the Region, as a matter of Federal law:

* * * * *

(4) title to township 1 south, range 21 west, S.M.: sections 3 to 10, 15 to 22, 29, and 30; * * *

P.L. 94-204, § 18:

Except as specifically provided in this Act, (i) the provisions of the Settlement Act are fully applicable to this Act, and (ii) nothing in this Act shall be construed to alter or amend any of such provisions.

Terms and Conditions, *supra:*

MEMORANDUM OF UNDERSTANDING

The attached Document, titled Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area, December 10, 1975, as clarified August 31, 1976, represents the obligations of the parties signatory hereto if the provisions of Section 12(a) of Public Law 94-204 take effect.

* * * * *

Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area

I. The United States shall convey to Cook Inlet Region, Inc. (CIRI), the following lands:

* * * * *

D. (1) All Federal lands and interests in lands within the following:

* * * * *

(3) Seward Meridian, Alaska
T. 1 S., R. 21 W., Secs. 3-10 all; Secs. 15-22, all: Secs. 29-30, all.

The Secretary shall transfer to CIRI the above described lands in fee simple.

Position of Parties

Seldovia states that the lands in question were included in the Secretary's withdrawals by public land order (PLO) for the purpose of making allocation of lands to CIRI for reallocation and selection by the various Native villages, including Seldovia, under terms of § 12(b) of ANCSA. Further, that CIRI had reallocated the village acreage prior to Seldovia's selection and that Seldovia had properly selected the lands. Seldovia denies that the terms of the agreement of Nov. 1975, between the various villages, constitutes a waiver of any claim of interest to selected lands.

In its statement of reasons for this appeal Seldovia urges the Board to hold that its earlier land selections made pursuant to § 12(b) of ANCSA are valid because equitable title had vested in Seldovia; that the BLM erred in concluding that the selections made under § 12(b) of ANCSA were superseded by the amendment to ANCSA, § 12(b)(4); and

that rules of statutory construction require the Board to interpret § 12(b)(4) in a manner compatible with the intent of § 12(b).

Seldovia asserts that it completed its selection of the lands in question under the provisions of § 12(b) of ANCSA, which resulted in the vesting of an equitable title. Seldovia contends that the vesting of equitable title in the land is not subject to a later divesting under the terms of amendment in P.L. 94-204, § 12(b)(4).

Seldovia claims to have standing to appeal BLM's decision within the meaning of 43 CFR 4.902, inasmuch as all necessary action, including CIRI's reallocation and Seldovia's selection of the lands in question, had been completed at the time the amendment P.L. 94-204 was enacted.

BLM's response to issues raised in Seldovia's appeal is that inasmuch as the provisions of the amendment to ANCSA by act of Congress in P.L. 94-204, § 12(b)(4), and the Terms and Conditions, I.D. (3), which are incorporated as Federal law, expressly require that conveyance of the lands in question be made to CIRI, that BLM's decision to act accordingly must be affirmed.

BLM asserts that the clear and unambiguous language of the § 12(b)(4) amendment mandating conveyance in fee simple of these specific lands of CIRI binds both the BLM and the Board. Therefore, it is unnecessary to consider any of the other issues raised by Seldovia and there is no discretion allowed and no condition to be met before conveyance to CIRI.

BLM states that Seldovia's claim that a vested equitable interest in the questioned lands resulted from its selections under § 12(b) of ANCSA, is untenable. BLM points out that various provisions of ANCSA and the regulations in 43 CFR 2651 et seq. show that the mere filing of land selection application under any provision of ANCSA cannot create a vested interest before an Interim Conveyance (IC) is issued. BLM further asserts that, although an agreement was made between the Native villages in Cook Inlet region to prioritize selections, it is the regional corporation, and not the Native village corporation, who is the final determiner of which lands are to be conveyed to each respective village under § 12(b) of ANCSA.

CIRI alleges that Seldovia lacks standing to bring this appeal because it does not have a "property interest in the land affected" by the BLM decision within terms of 43 CFR 4.902. CIRI argues that standing must depend on the status of the claimed land and the property right must be asserted in relation to land properly classified as suitable for selection. CIRI contends that the reallocation of lands in question by the regional corporation to Seldovia under § 12(b) of ANCSA prevents the lands in question from being classified for selection by Seldovia. Therefore, no interest could be claimed to provide standing under § 4.902. Further, any possible claim to this land by Seldovia was speculative as any selection depended upon the discretionary reallocation by CIRI which was not completed.

CIRI also contends that Seldovia's appeal is without merit and

that the BLM's decision to convey the lands in question in fee simple to CIRI is required by the express provision of the amendment to ANCSA in P.L. 94-204, § 12(b)(4), and the Terms and Conditions.

CIRI stresses that the stated impact of P.L. 94-204, § 12(b)(4), was to convey the lands described in fulfillment of the region's ANCSA § 12(c) entitlement, and to thereby prevent the lands from being available for acquisition by a village corporation under terms of § 12(b) of ANCSA.

CIRI further points out that any conveyance by BLM subject to any possible claim of interest by Seldovia under § 12(b) of ANCSA would be of less than a fee simple and not in compliance with the express language of the Terms and Conditions.

CIRI also reaches a conclusion contrary to Seldovia's regarding the application of § 18 of P.L. 94-204, and asserts that since the conveyance required of BLM was by a specific provision in the amendment, that provisions of ANCSA continue to be applicable to lands affected by the amendment.

Answer, filed by the Native villages of Ninilchik Natives Association, Inc., Salamatoff Native Association, Tyonek Native Corporation, and Knikatnu, Inc., adopts the reasons presented by CIRI why Seldovia's appeal is without merit and states that BLM's decision should be affirmed. It is further asserted that Seldovia waived the claimed interest in the questioned land as an issue on appeal by virtue of being a party to the agreement between the Native villages in Cook Inlet region in which a procedure was agreed upon for selection of lands reallocated by CIRI under § 12(b) of ANCSA.

Decision

An issue has been raised of Seldovia's standing to bring this appeal.

Standing to bring an appeal before the Board is governed by regulations in 43 CFR 4.902 (1979), which provide:

> Any party who claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed, or an agency of the Federal Government, may appeal as provided in this subpart. However, a regional corporation shall have the right of appeal in any case involving land selections.

Thus, to have standing to appeal, Seldovia must claim a property interest in lands affected by the BLM decision appealed. It is undisputed that Seldovia is entitled to receive conveyance to lands under the provisions of § 12(b) of ANCSA; that the lands in question were included within PLO withdrawals and were made available by the Secretary of the Interior for reallocation to the Native villages by CIRI. An agreement by the various village corporations in the Cook Inlet region established a prioritizing for selection of particular lands. It is also undisputed that Seldovia's application for selection of the lands in question was rejected in the decision by the BLM being appealed, and that the same lands were ap-

proved for conveyance to CIRI pursuant to P.L. 94-204, § 12(b)(4).

The Board has in earlier decisions held that under the standing requirement in 43 CFR 4.902, an appellant must claim an interest in land, and an affect on that interest must be caused by the BLM determination being appealed. *See Appeal of State of Alaska,* 3 ANCAB 196, 86 I.D. 225 (1979) [VLS 78-42].

In the *Appeal of Chickaloon Moose Creek Native Association, Inc.* (Chickaloon), 4 ANCAB 250, 87 I.D. 219 (1980) [VLS 80-1], the issue was raised of the appellant's standing under § 4.902.

While the basis of the Board's decision in *Chickaloon, supra,* is not wholly analogous to this case, the selection of lands by the appellant under the provisions of ANCSA was rejected in each because of the amendment in § 12 of P.L. 94-204.

The Board, in *Chickaloon, supra,* at 87 I.D. 226, stated: "With regard to those lands for which it filed the selection applications rejected by BLM in the decision here appealed, the Board rules that Chickaloon has standing."

CIRI argues that because the reallocation process under § 12(b) of ANCSA was not completed, the lands in question were never in fact "suitable for selection," and therefore Seldovia is unable to even assert a "property interest" and should be denied standing to bring this appeal.

The completion of CIRI's reallocation of lands for selection under § 12(b) of ANCSA is not required in order for Seldovia to have standing under § 4.902 to bring an appeal of the BLM's decision rejecting its application for selection.

A corporation's land entitlement under ANCSA is a property interest. If a village corporation has selected certain lands in satisfaction of that entitlement, this constitutes a claim of property interest within the meaning of § 4.902. Denial of such a selection by the BLM affects the Native corporation's property right and confers standing to appeal.

The Board rules that Seldovia has standing under 43 CFR 4.902 to bring this appeal.

[1] Where an application for selection made by a Cook Inlet village corporation pursuant to § 12(b) of ANCSA is rejected by the BLM so that the same lands may be conveyed to CIRI under the terms of an amendment to ANCSA, and when an issue on appeal is whether the status of the lands in question is affected by the amendment, the village corporation's interest in the rejected application constitutes a property interest affected by a determination of the BLM sufficient to confer standing under the regulations in 43 CFR 4.902.

The preamble to P.L. 94-204 states that the statute is "[t]o provide, under or by amendment of the Alaska Native Claims Settlement Act, for [certain purposes]"; the Terms and Conditions indisputably modifies the original provisions of ANCSA and therefore amends ANCSA; and finally the Terms and Conditions and its enabling statute also provide that "the provisions of the Settlement Act [ANCSA] are fully applicable

to this Act," [P.L. 94-204, § 18 (Jan. 2, 1976)].

The Board is bound by any amendment to ANCSA enacted by Congress and also by the Terms and Conditions which have been specifically ratified and given the effect of Federal law.

[2] The Alaska Native Claims Appeal Board is bound by an enactment of Congress which amends ANCSA and also by provisions of an agreement which is specifically ratified and given the effect of Federal law.

As the Board is bound in its decision by the amendments to ANCSA contained in the express provisions of P.L. 94-204, § 12(b)(4), and also by the applicable portion of the Terms and Conditions, I.D.(3), which are incorporated into the amendment as Federal law, there is no requirement to look further than the language of the amendment itself to determine its effect.

The issues raised by Seldovia in this appeal would require that the Board give first consideration to its claim that selections by Seldovia resulted in the vesting of an equitable title in the lands in question before passage of amendment P.L. 94-204. From resolution of this issue Seldovia would have the Board's decision based upon a finding of "compatibility" with the express provision in P.L. 94-204, § 12(b)(4), that the same lands be conveyed to CIRI with the result that BLM would adjudicate the application of Seldovia under § 12(b) of ANCSA. Thus, Seldovia contends that the Board can give effect to both ANCSA and the amendment, and require BLM to complete its adjudication of these lands under § 12(b) of ANCSA.

The Secretary of the Interior, by PLO 5174, 37 FR 5576 (Mar. 9, 1972), *as amended* by PLO 5411, 39 FR 5632 (Feb. 7, 1974), had earlier made withdrawal of lands under § 11(a)(3) of ANCSA, including the lands in question, for the purpose of making lands available for allocation to CIRI and reallocation to the Native villages, including Seldovia, under terms of § 12(b) of ANCSA.

However, any rights to the questioned lands which Seldovia may have asserted because of its selection application filed under § 12(b) of ANCSA, and pursuant to the terms of the village's agreement, and by virtue of steps taken by CIRI toward the reallocation of lands, can no longer be realized because the required conveyance to CIRI pursuant to P.L. 94-204, § 12(b)(4), satisfies entitlement under § 12(c) of ANCSA.

[3] The Board holds that when, by amendment to ANCSA, an act of Congress expressly provides that specifically described lands shall be conveyed in fee simple to CIRI as part of its § 12(c) entitlement under ANCSA, the BLM is required to make conveyance notwithstanding that the same land was earlier made available and application for selection had been filed by a Native village corporation under provision of § 12(b) of ANCSA.

The BLM's conveyance of the described lands is consistent with the Board's decision that the provisions of P.L. 94-204, § 12(b)(4),

was a statutory mandate and allowed no discretion.

Seldovia claims that because equitable title has passed to them as a result of their selection process, their interest in the selected land is superior to that of CIRI pursuant to the Terms and Conditions ratified by Congress. Seldovia would require BLM to adjudicate the validity of their claimed equitable title interest prior to conveyance under the Terms and Conditions as mandated by Congress.

This BLM cannot do. Where Congress has mandated conveyance of specifically described unconveyed land, BLM has no adjudicative authority other than to verify that such lands have not been conveyed by IC or patent. Insofar as BLM has complied with the Congressional directive, their decision must be affirmed.

[4] The Board holds that when § 12(b)(4) of P.L. 94-204 mandates the conveyance of specifically described lands in fee simple to Cook Inlet Region, Inc., this Board is without authority to overturn a Congressional directive and cannot rule on the validity of a claimed interest in the same unconveyed lands which purports to defeat conveyance under the mandate of Congress.

Seldovia's briefing asserts that various regulations and cited authorities support their appealed position that equitable title had passed and that the BLM erred in conveyance of the lands described in P.L. 94-204, § 12(b)(4), to CIRI. Because the Board holds that the BLM is bound by the express provisions of the Congressional mandate and that no consideration could be given to the claim of equitable title, those issues raised in support of Seldovia's claim of title are mooted and no findings are made by the Board.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

DANIEL A. ENGELHARDT
(On Reconsideration)

62 IBLA 93

Decided *February 26, 1982*

Reconsideration of a prior Board decision, 61 IBLA 65 (1981), that set aside a decision of the Utah State Office of the Bureau of Land Management rejecting appellant's application for a noncompetitive oil and gas lease, and ordered a hearing. U-46710.

Previous Board decision set aside and BLM decision affirmed as modified.

1. Mineral Leasing Act: Generally—Mineral Leasing Act: Combined Hydrocarbon Leases—Mineral Leasing Act: Lands Subject To—Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Competitive Leases—Oil and Gas Leases: Lands Subject To—Tar Sands

The Combined Hydrocarbon Leasing Act of 1981, P.L. 97-78, 95 Stat. 1070, amended the Mineral Leasing Act of 1920, sec. 17(b), 30 U.S.C. § 226(b) (1976), to require compet-

itive bidding in the leasing of lands within special tar sand areas, and appellant's simultaneous oil and gas lease application, being noncompetitive, must be rejected for a parcel within a special tar sand area.

2. Mineral Leasing Act: Generally—Mineral Leasing Act: Combined Hydrocarbon Leases—Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Competitive Leases—Tar Sands

An applicant for a Federal oil and gas lease has no rights in the land or its minerals until the lease is issued to him. The Secretary of the Interior is not required to, but "may" issue a lease for any given tract. Therefore, BLM can properly reject a first-drawn simultaneous application where before issuance of the lease the parcel won in the drawing is included in a special tar sand area, and thereby leasable only through competitive bidding, pursuant to the Mineral Leasing Act of 1920, *as amended* by the Combined Hydrocarbon Leasing Act of 1981.

APPEARANCES: Craig R. Carver, Esq., Denver, Colorado, for appellant; William R. Murray, Jr., Esq., Office of the Solicitor, Department of the Interior, for BLM.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

INTERIOR BOARD OF LAND APPEALS

By decision of Aug. 5, 1981, the Utah State Office, Bureau of Land Management (BLM), rejected simultaneous oil and gas lease application U-46710, submitted by Daniel A. Engelhardt, because the land involved had been determined to be within a known geologic structure (KGS) and therefore open to competitive bidding only.[1] Engelhardt appealed. Our decision in that case, *Daniel A. Englehardt,* 61 IBLA 65 (1981), set aside the BLM decision and ordered a hearing to resolve certain issues of fact regarding the KGS determination. On Jan. 28, 1982, the Board received a petition for reconsideration from the Office of the Solicitor. Having reviewed that petition, we find it meritorious and on reconsideration we set aside our previous decision and affirm BLM's decision of Aug. 5, 1981, as modified herein.

[1] Subsequent to the BLM decision, on Nov. 16, 1981, Congress enacted the Combined Hydrocarbon Leasing Act of 1981 (CHLA), P.L. 97-78, 95 Stat. 1070, which amended several provisions of the Mineral Leasing Act of 1920 (MLA). Sec. 4 of CHLA amends sec. 1, of MLA, 30 U.S.C. § 181 (1976), by adding after the first paragraph the following new paragraphs:

> The term "oil" shall embrace all nongaseous hydrocarbon substances other than those substances leasable as coal, oil shale, or gilsonite (including all vein-type solid hydrocarbons).
>
> The term "combined hydrocarbon lease" shall refer to a lease issued in a special tar sand area pursuant to section 17 after the date of enactment of the Combined Hydrocarbon Leasing Act of 1981.

[1] Engelhardt's simultaneous oil and gas lease application, U-46710, was drawn with first priority for parcel UT 128 in the July 1980 drawing. Parcel UT 128 included the E½, W½W½, SE¼NW¼, SE¼SW¼ Sec. 13, all sec. 14, N½ sec. 15, S½ sec. 22, N½ sec. 23, N½NE¼, SW¼NE¼, NW¼ sec. 24, N½, SE¼ sec. 27, E½ sec. 34, T. 15 S., R. 22 E., Salt Lake meridian. The lands in secs. 22, 27, and 34 were determined to be within an undefined addition to the Greater San Arroyo-Bar X KGS effective Sept. 2, 1980. The remaining lands in the application were determined to be within a further undefined addition to the Greater San Arroyo-Bar X KGS effective Dec. 2, 1980.

The term "special tar sand area" means (1) and area designated by the Secretary of the Interior's orders of November 20, 1980 (45 FR 76800-76801) and January 21, 1981 (46 FR 6077-6078) as containing substantial deposits of tar sand.

Sec. 6(a) of CHLA amended sec. 17(b) of MLA, 30 U.S.C. § 226(b), by adding a new subsection, part of which states that "[i]f the lands to be leased are within a special tar sand area, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations." [2]

In support of the petition for reconsideration is a memorandum dated Jan. 13, 1982, from the BLM Utah State Director, which states in part:

> The rejection of oil and gas lease offer U-46710 was based entirely on the KGS determination. However, all of the lands in U-46710 are also within the P.R. Spring Designated Tar Sand Area established by the Geological Survey, effective September 23, 1980, and outlined in their memorandum of November 5, 1980. A copy of this memorandum is enclosed.

Geological Survey publicly announced the establishment of that designated tar sand area by publication at 45 FR 76800-76801 (Nov. 20, 1980).

[2] Sec. 4 of CHLA has expressly declared that area to be a "special tar sand area," which, under sec. 6(a), can be leased only by competitive bidding. The question of the existence of a KGS is now irrelevant to the adjudication of Engelhardt's lease application, and therefore the hearing is no longer necessary. We are aware that the parcel won by Engelhardt in the simultaneous drawing was not designated a tar sand area until Sept. 23, 1980, which was several weeks after the drawing. But that fact has no bearing on the necessary disposition of this case, because an applicant for a Federal oil and gas lease has no rights in the land or its minerals until the lease is issued to him. Under the Mineral Leasing Act of 1920, *as amended,* 30 U.S.C. § 226(a) (1976), the Secretary of the Interior "may" lease lands subject to disposition under that Act which are known or believed to contain oil or gas deposits. But the word "may" is permissive, and does not require the Secretary to issue leases; he has the discretion to refuse to issue any lease at all on a given tract. *Udall* v. *Tallman,* 380 U.S. 1 (1965); *Burglin* v. *Morton,* 527 F.2d 486 (9th Cir. 1976), *cert. denied,* 425 U.S. 973 (1976). Such discretion may be exercised for any purpose in the public interst, *Lee B. Williamson* 54 IBLA 326 (1981), and the public's clear interest in development of the diverse minerals present in designated tar sand areas was evidenced by Congress' enactment of CHLA. Moreover, beyond the question of Secretarial discretion,

[2] Sec. 6 of CHLA states:

"(6)(a) Section 17(b) of such Act (30 U.S.C. 226(b)) is amended by inserting '(1)' after '(b)' and adding a new subsection to read as follows:

"'(2) If the lands to be leased are within a special tar sand area, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations in units of not more than five thousand one hundred and twenty acres, which shall be as nearly compact as possible, upon the payment by the lessee of such bonus as may be accepted by the Secretary. Royalty shall be 12½ per centum in amount or value of production removed or sold from the lease, subject to section 17(k)(1)(c). The Secretary may lease such additional lands in special tar sand areas as may be required in support of any operations necessary for the recovery of tar sands.'

"(b) Section 17(c) of such Act (30 U.S.C. 226(c) is amended by deleting 'within any known geological structure of a producing oil or gas field,' and inserting in lieu thereof 'subject to leasing under subsection (b),'.

"(c) Section 17(e) of such Act (30 U.S.C. 226(e)) is amended by inserting before the period at the end of the first sentence the following: ': *Provided, however,* That competitive leases issued in special tar sand areas shall also be for a primary term of ten years.' "

ultimate control of the disposition of public lands and resources belongs to Congress, and the responsibility of the Interior Department is to administer them in accordance with the dictates of the legislative branch. Since appellant's lease application was still pending on the date CHLA took effect, and was nonconforming thereunder, it must be rejected.[3]

No oil and gas lease may issue to Engelhardt on his simultaneous oil and gas lease application, because parcel UT 128 is within a special tar sand area, which is leasable only through competitive bidding.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the prior Board decision, 61 IBLA 65 (1981), is set aside, and the BLM decision is affirmed as modified.

DOUGLAS E. HENRIQUES
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

GAIL M. FRAZIER
Administrative Judge

[3] It might be argued that because the special tar sand area including parcel UT 128 was not so designated until after Engelhardt's success in the simultaneous drawing, CHLA should not have effect in this case and the Board's initial decision should remain in force. But sec. (4) of CHLA, *supra*, militates against such an argument by distinguishing all leases issued or to be issued "in a special tar sand area pursuant to section 17 [of MLA] after the date of enactment of" CHLA as "combined hydrocarbon lease[s]," indicating no deference for successful lease applications drawn before the designation of the tar sand areas. Sec. 8 of CHLA also clearly implies that CHLA applies to all leases not outstanding on Nov. 16, 1981. Likewise, sec. (6)(a) of CHLA cannot reasonably be read as affording appellant any relief: "'(2) If the lands to be leased are within a special tar sand area [regardless of whether the area's designation or the simultaneous drawing had priority in time, so long as the lease had not issued before the enactment of CHLA], they shall be leased to the highest responsible qualified bidder by competitive bidding.'"

APEX CO., INC.

4 IBSMA 19

Decided *March 2, 1982*

Petition by Apex Co., Inc., for review of the Feb. 26, 1981, decision of Administrative Law Judge Shepherd, in Docket No. CH 0-171-P, upholding enforcement action taken by the Office of Surface Mining Reclamation and Enforcement against petitioner on the basis of its alleged failure to comply with the requirement of 30 CFR 715.17(a) that all surface drainage from the areas disturbed by surface coal mining and reclamation operations be passed through a sedimentation pond before it leaves the permit area.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally—Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

A regulatory authority can grant an exemption from the requirement in 30 CFR 715.17(a) that all surface drainage from the disturbed area must be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area only upon a showing that the disturbed drainage area within the total disturbed area is small and that sedimentation ponds are not necessary to meet the prescribed effluent limitations and to maintain water quality in downstream receiving waters.

2. Surface Mining Control and Reclamation Act of 1977: Abatement: Generally

Where the record evidence does not support a finding that the recipient of a notice of violation requested an extension of time to abate a violation charged in the notice, prior to OSM's issuance of a cessation order for failure to abate the violation within the time prescribed for abatement, OSM's cessation order is properly upheld against the recipient's claim that conditions at the mine site warranted an extension of the abatement time.

3. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount

Under 30 CFR 723.15(b), OSM is required to assess a civil penalty of not less than $750 per day for each day during which a cessation order properly remains outstanding, up to a limit of 30 days.

APPEARANCES: George E. Fowkes, Esq., Fowkes and Cooper, Oakmont, Pennsylvania, for Apex Co., Inc.; William P. Larkin, Esq., Office of the Field Solicitor, Charleston, West Virginia, Glenda R. Hudson, Esq., and Walton D. Morris, Jr., Assistant Solicitor, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY INTERIOR BOARD OF SURFACE MINING & RECLAMATION APPEALS

The Board has granted the petition of Apex Co., Inc. (Apex), for discretionary review of a decision of the Hearings Division upholding enforcment action by the Office of Surface Mining Reclamation and Enforcement (OSM) pursuant to the Surface Mining Con-

trol and Reclamation Act of 1977 (Act).[1] OSM first issued a notice of violation to Apex for the company's alleged failure to pass all surface drainage from a surface coal mining and reclamation operation through a sedimentation pond, as required under the Department's regulations at 30 CFR 715.17(a). Subsequently, OSM issued a cessation order to Apex for the company's alleged failure to comply with the requirement for remedial action set forth in the notice of violation. The decision below upheld the notice and order, reduced the civil penalty assessed by OSM on the basis of the notice, and upheld the penalty assessed on the basis of the order.

Factual and Procedural Background

On June 20, 1979, three inspectors from OSM conducted an inspection of a surface coal mining and reclamation operation conducted by Apex in Allegheny County, Pennsylvania (Tr. 7, 57; Respondent's Exh. A). As a result of this inspection OSM issued to Apex Notice of Violation No. 79-I-25-33 (Tr. 8; Respondent's Exh. A). One of the violations charged in this notice was Apex's failure to pass all surface drainage from the disturbed area through a sedimentation pond.[2] Apex was required under the notice to abate this violation by July 18, 1979 (Respondent's Exh. A).

OSM conducted a followup inspection of the Apex operation on July 23, 1979 (Tr. 24, 57). By that time Apex had backfilled an graded some of the disturbed area observed by the OSM inspectors on June 20, but had not constructed a sedimentation pond (Tr. 24-25, 28-31; *compare* Respondent's Exhs. P-1 and P-3 (photographs taken during OSM's June 20 inspection) *with* Respondent's Exhs. P-5 and P-6 (photographs taken during OSM's July 23 inspection)). Because the abatement period prescribed in the notice of violation had expired without the required remedial action having been taken, OSM issued Cessation Order No. 79-I-25-1 pursuant to sec. 521(a)(3) of the Act, 30 U.S.C. § 1261(a)(3) (Supp. II 1978), and 30 CFR 722.13 (Tr. 25-26; Respondent's Exh. B).[3] On Aug. 14, 1979, OSM conducted an informal review of the cessation order at Apex's minesite (Tr. 58). By this time Apex had constructed a sedimentation pond, but an OSM inspector determined that it would be necessary for Apex also to construct a diversion ditch to insure that surface drainage from the disturbed area would pass through the pond (Tr. 65-67).[4] On

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

[2] 30 CFR 715.17(a) provides, in pertinent part:

"(a) *Water quality standards and effluent limitations.* All surface drainage from the disturbed area, including disturbed areas that have been graded, seeded, or planted, shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area. Sedimentation ponds shall be retained until drainage from the disturbed areas has met the water quality requirements of this section and the revegetation requirements of § 715.20 have been met. The regulatory authority may grant exemptions from this requirement only when the disturbed drainage area within the total disturbed area is small and if the permittee shows that sedimentation ponds are [not] necessary to meet the effluent limitations of this paragraph and to maintain water quality in downstream receiving waters."

[3] These provisions call for the issuance of a cessation order when a notice of violation has been issued and the permittee fails to abate the violation within the time originally fixed or subsequently extended for abatement.

[4] The record does not reveal exactly when Apex completed construction of the sedimentation pond, although it appears that the pond was completed about the time of the informal minesite hearing (Tr. 121, 124, 133). In any event there is no indication in the record that OSM was informed of the completion of the pond prior to the minesite hearing (*see id.*; Tr. 67-68).

Aug. 16, after construction of the required diversion ditch, OSM terminated the cessation order (Tr. 59, 67; Respondent's Exh. D).

On the basis of the notice of violation and cessation order issued to Apex, OSM first proposed a civil penalty assessment in the amount of $42,500 and subsequently reduced this assessment to $19,700.[5] Apex petitioned the Hearings Division to review OSM's enforcement action, and a hearing was conducted before an Administrative Law Judge on Dec. 18, 1980. In this proceeding Apex challenged the merits of the notice of violation with evidence that the State inspector who supervised its mining operation had not required the company to construct a sedimentation pond in the area addressed by OSM's enforcement action (*see* Tr. 140–41) and that the Pennsylvania Department of Environmental Resources had authorized Apex to remove the pond eventually constructed under OSM's direction (*see* Tr. 99–100; Apex Exh. 2). Apex also attempted to demonstrate that the cessation order was improper because an agent of the company had unsuccessfully attempted to contact OSM to request an extension of time for construction of a sedimentation pond (*see* Tr. 32–33, 110–11), and that such an extension was justified by conditions at the minesite during the abatement period prescribed by OSM (*see* Tr. 92–93, 112–13, 118, 128–29). Correspondingly, Apex argued that the civil penalty assessments by OSM for the notice of violation and cessation order should be vacated or at least reduced.

The Administrative Law Judge reduced the civil penalty assessed by OSM for the notice of violation, but otherwise upheld the challenged enforcement action (Decision of Feb. 26, 1981, Docket No. CH 0–171–P, at 4–5). In its petition and supporting brief to the Board, Apex reiterated the various challenges to OSM's enforcement action addressed in the proceeding below.

Discussion and Conclusions

[1] Apex's claim that the notice of violation should be vacated because the company was granted a variance from the sedimentation pond requirement of 30 CFR 715.17(a) by the Pennsylvania Department of Environmental Resources (PDER) is without merit. Sec. 715.17(a) does authorize the regulatory authority to grant exemptions from the sedimentation pond requirement; however, such an exemption must be based on a permittee's showings that "the disturbed drainage area within the total disturbed area is small" and that the use of a sedimentation pond is not necessary "to meet the effluent limitations of [sec. 715.17(a)] and to maintain water quality in downstream receiving waters." As is explained below, the record in this case does not disclose that such showings

[5] In its original proposed assessment, OSM assessed $1,700 for the notice of violation and $40,800 for the cessation order (Petition for Review, received by Hearings Division on Apr. 28, 1980, at pars. 16 and 23). Subsequently, OSM reduced the assessment on the cessation order to $18,000 (*id.* at par. 24).

were made to the Pennsylvania regulatory authority.

The State inspector's testimony in the proceeding below was to the effect that he had limited involvement with Apex's operations in the area covered by the notice of violation, and that the only advice he offered Apex with respect to those operations was that the company utilize some spoil materials to divert surface drainage (Tr. 140-41). The inspector did not testify that he advised Apex against the installation of a sedimentation pond. Moreover, his testimony regarding his authority to approve sedimentation control measures revealed that he is empowered only to advise a permittee as to the forms of sedimentation control that might be used in the mining operations (except under emergency circumstances not relevant to this case), and that formal approval of the control measures taken must be obtained from the PDER (Tr. 157-58).[6]

The letter from the PDER (Apex Exh. 2) which authorized removal of the sedimentation pond, and which Apex would have the Board recognize as a "*nunc pro tunc*" variance from the sedimentation pond requirement of 30 CFR 715.17(a) (Apex Brief at 7), was issued on Nov. 20, 1979, some 4 months after OSM's issuance of the notice of violation. No reference is made in the letter to any showings by Apex that the Department's effluent limitations could be met and the quality of downstream receiving waters maintained without the use of a sedimentation pond. Moreover, the authorization was expressly conditioned on the circumstances that "the area has been seeded, diversion ditches installed, and mining has been completed," and these circumstances were not extant at the time of issuance of the notice of violation. Thus, even assuming that a regulatory authority might properly grant a retroactive exemption from the sedimentation pond requirement of 30 CFR 715.17(a),[7] we hold that the PDER authorization to Apex to remove its sedimentation pond did not serve to grant such an exemption.

[2] Apex's contention that misconduct on the part of OSM precluded Apex from receiving an extension of time to abate the violation charge in the notice of violation and, thus, from avoiding issuance of the cessation order, is not supported in the record. Apex claims that its agent, Thomas Smith, attempted to contact OSM twice by telephone prior to the expiration of the abatement period specified in the notice of violation, and that his calls to OSM's Washington, Pennsylvania, office were

[6] The State inspector also testified to the effect that Apex's permit for the area of disturbance covered by the notice of violation did not contain a provision requiring the construction of a sedimentation pond prior to initiation of mining in the area (Tr. 146-48). The permit was not introduced into evidence, however, and the inspector's testimony in this regard does not establish either that Apex made the showings necessary to support an exemption from the requirement of a sedimentation pond under 30 CFR 715.17(a), or that the PDER, by its lack of reference to a sedimentation pond in the permit issued to Apex, intended to grant such an exemption. Accordingly, the lack of reference to a sedimentation pond requirement in Apex's permit cannot, per se, relieve the company from its general obligation under 30 CFR 715.17(a). *See generally Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979).

[7] *But cf. Carbon Fuel Co.*, 1 IBSMA 253, 86 I.D. 483 (1979); *Alabama By-Products Corp.*, 1 IBSMA 239, 86 I.D. 446 (1979). In these decisions the Board indicated that a permittee must obtain approval of the regulatory authority before substituting alternative materials for topsoil pursuant to 30 CFR 715.16(a).

not answered (Apex Brief at 4). Mr. Smith did not testify at the review hearing. William B. Ford, president of Apex, testified that he requested an extension, but he could not recall the date on which the request was made and he could not produce any documentary evidence of a request (Tr. 110–11). OSM's Inspector Blevins, who signed the notice of violation, testified that he received a call from Smith on July 29, 1981, 6 days after the cessation order was issued and 11 days after the time for abatement expired, in which Smith referred to earlier calls (Tr. 32). Blevins informed Smith that OSM had no record of a request for an extension (*id.*).

Even assuming that Apex could show justification for an extension (*Compare* Tr. 92–93, 112–13, 118, 120–21, and 128–29 *with* Tr. 24, 49–50, and 54–55), the company has not demonstrated that it made a timely request. The Board previously has ruled that "when the operator waits until after the time for performance has expired to * * * request [an extension], * * * OSM does not abuse its discretion by not granting an extension." *White Winter Coals, Inc.*, 1 IBSMA 305, 314, 86 I.D. 675, 679 (1979). In accordance with this ruling, and having concluded that Apex was properly charged with a failure to pass surface drainage through a sedimentation pond, we will not disturb the cessation order issued by OSM on the basis of Apex's failure to take remedial action within the time specified in the notice of violation.

[3] In the proceeding below the Administrative Law Judge reduced OSM's civil penalty assessment for the notice of violation from $1,260 to $440. We perceive no reason to alter the decision in this regard. OSM's assessment of $18,000 for the cessation order, which was upheld below, represents a daily penalty of $750 for the 24 days that the cessation order remained outstanding.[8] This is the minimum amount required under 30 CFR 723.15, and, therefore, we will affirm this assessment.

For the foregoing reasons the decision of the Hearings Division in Docket No. CH 0–171–P is affirmed.

WILL A. IRWIN
Chief Administrative Judge

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

[8] The cessation order was issued on July 23 (Respondent's Exh. B) and terminated on Aug. 16 (Respondent's Exh. D). In its brief to the Administrative Law Judge, Apex argues that the cessation order should have been terminated on Aug. 14, when OSM first observed the sedimentation pond constructed by Apex. Apparently Apex believes that OSM's requirement that Apex also construct a diversion ditch was not covered by the abatement action prescribed in the notice of violation.

The remedial action required by OSM in the notice was for Apex to pass all surface drainage from the disturbed area through a sedimentation pond (Respondent's Exh. A). It follows that the mere construction of a sedimentation pond would not suffice to abate the violation if the pond were located in such a way as not to receive all potential drainage from the disturbed area. This is the circumstance that was observed by OSM on Aug. 14 (Tr. 65–67). Accordingly, it was proper for OSM not to terminate the cessation order until the required diversion ditch was constructed on Aug. 16.

APPEAL OF SHAFCO INDUSTRIES, INC.

IBCA-1447-3-81

Decided *March 16, 1982*

Contract No. 14-08-0001-17666, United States Geological Survey.

Denied.

Contracts: Construction and Operation: Subcontractors and Suppliers—Contracts: Construction and Operation: Third Persons—Contracts: Contract Disputes Act of 1978: Jurisdiction—Contracts: Formation and Validity: Implied and Constructive Contracts

A claim for rental of blowout prevention equipment used in drilling a well under a Government prime contract is denied where the supplier of the equipment alleges that the equipment was furnished pursuant to oral orders received from a Government employee but the employee named denies having placed any orders with the supplier and the supplier's own order forms show the orders in question to have been placed by the prime contractor. The appellant's claim predicated upon a benefit to the Government is dismissed since, irrespective of any benefit derived from having the rental equipment used in drilling the well covered by the prime contract, the Board has no jurisdiction over contracts implied in law.

APPEARANCES: Paulette A. Marshall, Launer, Chaffee, Ward & Orman, Fullerton, California, for Appellant; William Silver, Department Counsel, San Francisco, California, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The appellant has timely appealed the decision of Feb. 19, 1981 (Appeal File 20),[1] by which the contracting officer denied its claim in the amount of $16,262.24,[2] plus interest. Concerning the claim, the appellant states: "[T]he Complaint seeks recovery on an alleged oral agreement involving certain equipment which, Plaintiff alleges, was provided for the United States Geological Survey (USGS) at its request" (Appellant's Brief 1).

Findings of Fact

1. On Sept. 25, 1978, the United States Geological Survey (hereinafter USGS) awarded Contract No. 14-08-0001-17666 to Grubbs and Sons Drilling Co. (hereinafter Grubbs or contractor) for drilling in the area of Dry Lake Valley near Hollister, California, for the purpose of conducting earthquake research in the San Andreas Fault zone. Drilling was contemplated to a depth of approximately 3,000 feet. The contract included the General Provisions set forth in Standard Form 32 (Apr. 1975 edition) and Alterations to General Provisions (Apr. 1975). In the estimated amount of $162,535 at the time of contract award, the amount of the contract was subse-

[1] Hereinafter all appeal file exhibits are referred to by AF followed by reference to the particular exhibit number.

[2] According to the appellant's letter of Sept. 18, 1979 (AF 14), the claim has been calculated on the following basis:

Invoice No.	Invoice Date	Amount
20-25585	5-31-79	$7,238.67
20-25950	6-30-79	5,070.00
20-26111	7-19-79	3,953.97
Total		16,262.64

quently increased to $342,650.81 (AF 7).

2. Modification No. 1 to the referenced contract (bearing an effective date of Nov. 9, 1978), provided compensation to Grubbs for the effort expended prior to a blowout and fire which occurred on Oct. 17, 1978,[3] as well as adding a requirement to the contract that the contractor equip the well with blowout prevention devices meeting all California State Division of Oil and Gas standards.[4]

3. When the contractor remobilized at the drill site in late March of 1979, Mr. Kenneth Grubbs advised Mr. John C. Roller (USGS inspector assigned to the project to monitor the progress of the drilling) that he had brought a blowout preventer which was suitable for use on the 12-inch drill hole called for by the contract. After drilling began, however, it became apparent that the blowout preventer intended to be used had only an 8-inch diameter. This would mean that the blow-out preventer would have to be removed each time the drill pipe was withdrawn from the well for the purpose of changing the 12-inch drill bit. Noting that such a procedure would not meet the requirements of the State of California Division of Oil and Gas that the blowout preventer be "maintained ready for use at all times," Mr. Roller [5] states: (i) that he advised Mark Zoback, the USGS Contracting Officer's Representative, not to allow Mr. Grubbs to continue drilling until a blowout preventer was in use that would permit a 12-inch drill bit to pass through it; and (ii) that the reason he was so concerned about the situation was that blowouts commonly occur when the drill pipe is out of the hole, and it would be extremely unsafe to allow Mr. Grubbs to remove the blowout preventer each time a bit change was necessary.[6]

4. In an affidavit filed with the Board in these proceedings (n. 5, *supra*), Mr. John C. Roller states:

> 8. In order to assist Kenneth Grubbs in locating the required blow-out prevention equipment, I telephoned several companies that supply such equipment to inquire if

[3] *See* memorandum dated Nov. 1, 1978 (AF 8), for action recommended to the contracting officer as a consequence of the blowout and fire.

[4] Sec. 16 entitled "Contractor Furnished Supplies/Services" (Sec. I, Special Provisions) was modified to add the following: "The Contractor will equip the well with blowout prevention devices that meet all California State Division of Oil and Gas standards" (AF 7, modification No. 1).

[5] *See* affidavit of John C. Roller dated July 22, 1981, at 2, 3. This affidavit and the affidavits of Susan E. McCullough, Dorothy M. Rolleri, Herbert Mills, and Robin M. Rebello accompanied the Government's Brief dated July 30, 1981, which was submitted in response to Order Settling Record dated July 2, 1981.

[6] In the concluding paragraph of his affidavit, Mr. Roller states:

> "11. I have examined Shafco's rental order, ticket No. 3210-3255, which states 'ORDERED BY Kenneth Grubbs'. The rental order form also states 'CHARGE TO USGS, Attn: John Rowland, 345 Middlefield Road, NS-85 Menlo Park, Ca. 94125'. Because the form states my name and address incorrectly and shows the address 'NS-85' [should be 'MS' for Mail Stop] of the Procurement and Contracts Section as it appears in the Grubbs and Sons contract, an address that was not known to me, I assume that Kenneth Grubbs told Shafco to charge the order to the USGS to my attention. Of course, Kenneth Grubbs had absolutely no authority to make any order on behalf of the USGS." (Roller affidavit (n. 5, *supra*) at 3, 4).

they had the necessary equipment available for rental.

9. One of the companies that I telephoned was Shafco. I identified myself as John Roller of the U.S. Geological Survey, and asked if Shafco has available a blow out preventor with the required pressure rating suitable for use on a 12" well. I was told that Shafco had the equipment available. I did not give my address at the USGS, which was and is MS (for Mail Stop) 77. I did not order any equipment from Shafco.

10. I then informed Kenneth Grubbs that Shafco had available for rental the blow out prevention equipment required by the contract. To the best of my knowledge, but not in my presence, Kenneth Grubbs telephoned Shafco and placed an order for the blow out prevention equipment.

5. An order for the required equipment was placed with Shafco Industries, Inc. (hereinafter Shafco or appellant) on Apr. 25, 1979, in the amount of $7,238.67. The face of the order (S.O. No. 3210) shows (i) that the equipment was ordered by Kenneth Grubbs; (ii) that it was to be charged to USGS; (iii) that it was to be shipped to the attention of John Rowland, 345 Middlefield Rd., NS-85, Menlo Park, Ca. 94025; and (iv) that the equipment was shipped on Apr. 25, 1979 (*i.e.*, on the same date the order was placed). Order No. 8258 covering additional equipment was placed with Shafco on June 1, 1979, in the amount of $5,070. The order shows that the equipment was ordered by Kenneth Grubbs, that it was to be charged to USGS and was to be shipped to the attention of John Rowland at the same address given in order No. 3210. Order No. 15697 for more equipment was placed with Shafco on July 1, 1979, in the amount of $3,953.97. According to the terms of that order, the equipment was shown to have been ordered by Kenneth Grubbs and was to be charged to the USGS with shipment to be made to the Menlo Park address marked for the attention of John Rowland (AF 1, 3, and 5).

6. On Aug. 20, 1979, the contracting officer forwarded Shafco's invoice in the amount of $7,238.67 (AF 2) to the contractor (Grubbs) for payment. The contracting officer appears to have been concerned about the possibility that Grubbs would file a claim for being required to replace the 8-inch blowout prevention equipment it had contemplated using with equipment meeting California Oil and Gas standards (AF 9-12).[7] The contractor filed no claim but returned the invoice previously submitted to him in the amount of $7,238.67,[8] accompanied by a handwritten note signed by Kenneth Grubbs, in which he states: "Grubbs and Sons Drilling is returning the Shafco bill for USGS to pay" (AF 13).

[7] In a memorandum to the contracting officer dated Aug. 21, 1979, Mr. Mark Zoback, Office of Earthquake Studies, refers to the requirement that the well be equipped with blowout prevention equipment devices meeting the California Division of Oil and Gas standards (n.4, *supra*). The concluding paragraph of the memorandum reads: "As the Contracting Officer's Representative on the subject contract, it is my position that the Shafco B.O.P. was procured to satisfy the contractor's obligation under the terms of the contract. Hence, the contractor is financially obligated for this procurement" (AF 10).

[8] The invoice in question is invoice No. 20-25585. The contracting officer who rendered the decision from which the instant appeal was taken states:

"[W]e maintain no central log or register of invoices received, but file and record each invoice with the applicable contract or order. Because of the missing, conflicting, and incorrect data on the Shafco invoices, we cannot determine how Shafco invoice no. 20-25585 was handled when it was first received at USGS and how it eventually came to the attention of Contracting Officer Rolleri. For the same reasons, it cannot be determined when or by whom, or even if, the originals of Shafco invoices no. 20-25950 and no. 20-26111 were received by USGS or, if they were received, what may have happened to them." (Affidavit of Susan E. McCullough (n. 5, *supra*) at 2, 3).

7. In a letter to USGS under the date of Sept. 18, 1979 (AF 14), Leland C. Launer, president of the appellant corporation, referenced telephone conversations with Ms. Robin Rebello on Sept. 17 and 18, 1979,[9] after which he stated that he was enclosing three invoices (n.2, *supra*). Over 2 months later in a letter to the contracting officer under date of Nov. 28, 1979 (AF 15), Mr. Launer referred to a conference he had attended on Nov. 21, 1979,[10] at which Mr. Mark Zoback and Ms. Robin Rebello had also been present. Since, in prior conversations, the appellant had been advised that its invoices had been approved and submitted for payment, Mr. Launer reported that he was greatly disappointed to learn at the conference that the matter had been in dispute for a considerable period.[11] He also noted that Shafco's posture may have been substantially impaired by reason of the failure of the USGS to acquaint the appellant with the unfortunate events which had transpired.

By letter dated Dec. 27, 1979 (AF 16), the contracting officer advised the appellant: (i) that payment to Shafco for the rental of the blowout prevention equipment was the direct responsibility of the contractor (Grubbs); (ii) that Shafco should pursue independent methods to obtain payment from Grubbs; and (iii) that any further money found to be due to Grubbs would be held pending evidence that all outstanding claims against Grubbs had been paid.[12]

8. In a letter to the contracting officer dated Oct. 23, 1980 (AF 19), counsel for the appellant identified the USGS employee who was said to have ordered the equip-

[9] In an affidavit dated July 23, 1981 (n.5, *supra*), Robin M. Rebello states:

"4. In response to Mr. Launer's phone call, I made inquiries within the Office of Earthquake Studies regarding the status of Shafco invoices. To the best of my recollection, I understood Nancy Crossley, Administrative Officer responsible for Branch of Tectonophysics, to say that the Shafco invoices had been processed for payment. It is now my understanding that she was relaying information from her conversation with Herb Mills, Asst. Branch Chief, and that what he had meant was that a Shafco invoice had been forwarded out of the office.

"5. I assumed Ms. Crossley's advise [*sic*] to mean that the invoices had been certified and submitted for payment to the USGS branch of Financial Management in Reston, Virginia, and on September 18, 1979, in a second telephone conversation, I told Mr. Launer that I believed that the invoices in question had been processed and sent to Reston for payment. Because we had no copies of the invoices in the office, I asked Mr. Launer to supply additional copies to me so I could follow up on them.

"6. I have subsequently learned that Shafco was a supplier of a USGS contractor, Grubbs and Sons, and that the USGS considered the Shafco invoices to be an obligation belonging to Grubbs and Sons."

[10] In her affidavit at paragraph 7 (n.9, *supra*), Ms. Rebello states that at the conference on Nov. 21, 1979, Mr. Mark Zoback (the contracting officer's representative) advised Mr. Launer that "the USGS regarded payment of the Shafco invoices as an obligation of the prime contractor, Grubbs and Sons."

[11] In her affidavit dated July 14, 1981 (n.5, *supra*), Dorothy M. Rolleri states at pages 2, 3:

"5. From the time I received Shafco Invoice No. 20–25585, I considered it to be an invoice which a supplier had mistakenly sent to the USGS rather than to the prime contractor, Grubbs and Sons, with whom Shafco had entered into the rental agreement covered by the invoice.

"6. Neither Inspector John Roller nor Contracting Officer's Representative Mark Zoback nor anyone else at the USGS who was involved in the Grubbs contract, except for myself, had the authority to place an order of the size of the Shafco order on behalf of the USGS. The limitations on the contracting authority of USGS employees are set out in the USGS Manual and have been published in the *Federal Register*. The limitations on the authority of Department of the Interior personnel to place oral orders are set out at 41 CFR § 14–3.650–1(a). The approval of the USGS of an invoice for payment on an oral order can be made only by someone with the authority to have placed an order of that kind and amount, and no one at the USGS who handled Shafco invoices, other than myself, had such authority. In any case, it is my belief that no USGS employee placed an order with, or otherwise contracted with, Shafco."

[12] In a letter to the contractor (Grubbs) dated Jan. 17, 1980, the contracting officer states: "Release of additional payment to you under the contract shall be withheld * * * until all outstanding claims have been paid in full * * *" (AF 17 at 2).

ment [13] covered by the claim and stated that the appellant considered the contract to be an obligation of the USGS because:

(a) The order for the equipment was initially made by an employee of USGS; hence, the contract was between Shafco and USGS.

(b) Irrespective of who, ultimately, under your contract with Mr. Grubbs, should be obligated to pay for the equipment, Shafco Industries, at all times reasonably expected and looked to USGS for payment.

(c) Regardless of who contracted with Shafco, a benefit was received by USGS at Shafco's expense, and it would be unjust for Shafco to remain uncompensated.

(AF 19 at 2).

9. In the decision from which the instant appeal was taken, the contracting officer found that no implied contract had been created between the USGS and Shafco on the following grounds, *inter alia:*

[T]he conduct Shafco relies on was not sufficient to create such an implied contract. There was nothing in Mr. Roller's dealings with Shafco which constituted a "meeting of the minds" between the parties. Mr. Roller did not order the equipment from Shafco, but merely inquired if the equipment was available. *Shafco's own order form identifies Kenneth Grubbs as the person who placed the order.*[14] Italics in original.]

10. Accompanying the appellant's brief was a Declaration of Leland C. Launer in which the president of the appellant's corporation states: (i) that early in Apr. 1979 a telephone inquiry came into Shafco's Bakersfield office from a USGS employee regarding the availability of blowout prevention equipment for a well near Hollister, California; (ii) that a few days prior to Apr. 25, 1979, a USGS employee involved with the drill site near Hollister telephoned Shafco's Bakersfield office to say that USGS would be ordering blowout prevention equipment for the well and that the "tool pusher" Kenneth Grubbs[15] would be calling to give Shafco the specifics on size requirements and so forth; (iii) that Shafco delivered all the equipment requested of it to the Hollister drill site on or about late Apr. 1979 as reflected in the billing invoices included in the appeal file (AF 3-6);[16] (iv)

[13] After asserting that the order for the equipment was originally made by telephone by a USGS employee, a Mr. John Rowland, the letter states:

"After the invoices were sent to your office during late 1979, and your office indicated initial rejection of the same, an officer of Shafco Industries contacted Mr. Grubbs by telephone. Basically, Mr. Grubbs substantiated and corroborated what was already known by Shafco concerning the contract. Specifically, Mr. Grubbs stated that John Rowland of USGS ordered the equipment. Grubbs' only involvement with the particular Shafco equipment was that he called in detailed information needed to insure proper equipment (flange size, etc.), and he signed for delivery of the equipment at the drill site."

(AF 19, letter from appellant's counsel to contracting officer dated Oct. 23, 1980, at 1).

[14] AF 20 at 4. Earlier in the decision the contracting officer had stated:

"[S]hafco maintains that it believed the equipment was being leased to the Government, and cites its failure to make a credit check on Mr. Grubbs' company as evidence of this belief. *Shafco's order form, however, reads: 'ORDERED BY Kenneth Grubbs.'* It is not clear whether Shafco knew Mr. Grubbs to be a Contractor of the USGS or whether it believed him to be an employee of the USGS."

(AF 20, contracting officer's decision dated Feb. 19, 1981, at 2 (italics in original)).

[15] More specifically the declaration states:

"8. SHAFCO's Bakersfield office received a call from Grubbs on or about April 25, 1979. Grubbs gave SHAFCO the specific requirements for equipment needed at the USGS drill site, which was to be billed to USGS, 345 Middlefield Road, NS-85 Menlo Park, CA. Grubbs informed SHAFCO that the USGS 'contact person' was John Rowland. SHAFCO at this point wrote up the order.

"9. SHAFCO did not investigate the credit of KENNETH GRUBBS because it relied upon statements made by USGS personnel who indicated previously the USGS would be paying the SHAFCO bills. SHAFCO has always believed the U.S. Government pays its debts."

(Declaration of Leland C. Launer (July 21, 1981) at 2).

[16] The appeal file shows that the $5,070 worth of equipment covered by order No. 8258 was not ordered until June 1, 1979, and was shipped on that date (AF 3, 4); and that the $3,953.97 worth of equipment covered by order No. 15697 was not ordered until July 1, 1979, and was shipped on that date (AF 5, 6).

With respect to the original invoices pertaining to the above two orders, the contracting officer raises a question as to whether they were ever received by the USGS (n.8, *supra*).

that in early August, Bob Jones, a USGS employee, assured Shafco that a check covering its invoices would be sent to it within 1 week; (v) that when Shafco telephoned the USGS in mid-August of 1979, its call was referred by Roger Goodwin, a USGS employee, to a Mr. Rolles, another USGS employee, who stated that Shafco's invoices would be paid soon; (vi) that in September of 1979, Nancy Crossley, a USGS employee, told Mr. Launer that all Shafco invoices had been approved and forwarded to Reston, Virginia, for payment but by reason of the end of the Government's fiscal year payment would not be received for 3 to 4 weeks;[17] (vii) that at a conference he attended on Nov. 1, 1979, Mr. Launer learned (a) that through the bidding process a USGS contract had been awarded to Grubbs (a minority driller) to drill the well(s) near Hollister, California, (b) that in Oct. 1978, while drilling a well for the USGS without blowout prevention equipment Grubbs had drilled into a high pressure gas zone which had precipitated a well fire with resultant injuries and destruction of property, and (c) that thereafter Grubbs drilled a second well in the area for the USGS using blowout prevention equipment furnished by Shafco; and (viii) that a written refusal to pay Shafco was not made until at the time of the contracting officer's letter of Dec. 27, 1979 (Declaration of Leland C. Launer at 1–5).

Discussion

Resolution of the instant appeal will entail passing upon the following questions:

1. Did any USGS employee place oral orders with the appellant for the blowout prevention equipment covered by its claim?

2. Did any of the persons named have authority to bind the Government by an oral contract?

3. Is the Government liable to the appellant on the basis of an implied contract by reason of the benefits said to have been derived from the use of appellant's blowout prevention equipment during the drilling of a well under a Government contract?

As to the first question, it is clear that appellant's claim against the Government is predicated principally[18] upon a verbal

[17] Commenting upon these allegations the Department counsel states:

"[S]hafco alleges for the first time in the declaration * * * that in addition to the statement of Robin Rebello in September 1979, similar statements were made by USGS drilling superintendent Jones and by a 'Mr. Rolles' in August 1979, and by Administrative Officer Nancy Crossley in September 1979. Nancy Crossley and Robert Jones have authority to contract on behalf of the USGS only in an amount not exceeding $500, and then only while in travel status. USGS Manual, Part 205, Chapter 4, paragraph .3.B. Nancy Crossley does not remember a telephone conversation with Mr. Launer, and Robert Jones is, at the time of filing of this brief, in the field and unavailable for interview. Even if Ms. Crossley and Mr. Jones did make such statements, however, Shafco would not as a result be entitled to the payment of the invoices by the USGS, for the same reasons that Robin Rebello's erroneous statement to Mr. Launer did not create such an entitlement. There is not, nor was there at any relevant time, an employee at the USGS named 'Mr. Rolles.'"

(Brief of the Department of the Interior at 14, footnote 3).

[18] The appellant also relies the some extent upon assurances that it would be paid for the blowout prevention equipment by USGS. These assurances were allegedly given by Mr. Bob Jones, Ms. Nancy Crossley, and a "Mr. Rolles" (finding 10) and were admittedly given by Ms. Robin Rebello (n.9, *supra*). According to the appellant, all of such assurances were received in Aug. and Sept. of 1979. It is undisputed that no equipment was ordered from Shafco after July of 1979. The Board therefore finds that in accepting and filfilling the orders for the rental of the equipment here in issue the appellant could not have relied upon assurances received from the individual named in Aug. and Sept. 1979.

order allegedly given to Shafco by a "John Rowland" in the spring of 1979 (n.13, *supra*, and accompanying text). The Government has treated appellant's allegations as if they refer to a USGS employee namd John C. Roller and so shall we. In his affidavit Mr. Roller states (i) that he did telephone Shafco to inquire whether it had available a blowout preventer with the required pressure rating suitable for use on a 12-inch well; (ii) that he was told that such equipment was available;[19] and (iii) that thereafter he informed Mr. Kenneth Grubbs[20] that Shafco had available for rental the blowout prevention equipment required by the contract.

The allegations made by the appellant with respect to the order placed by "John Rowland" (John Roller) are characterized by a lack of specificity. Appellant's counsel makes reference to having been "informed by my client that the order for the equipment was originally made by telephone by a USGS employee, a John Rowland"[21] (AF 19 at 1). From the Declaration of Leland C. Launer (Finding at 10) it is not possible to determine the identity of the USGS employee who telephoned Shafco's Bakersfield office a few days prior to Apr. 25, 1979, to say that the USGS would be ordering blowout prevention equipment for a well near Hollister, California; nor does the declaration identify the person in Shafco's Bakersfield office to whom such representation was allegedly made. According to the declaration, it was Grubbs who informed Shafco that the USGS contact person was "John Rowland" (n.15, *supra*).

In his affidavit, however, John C. Roller states that he did not order any equipment from Shafco. This statement by Mr. Roller is corroborated by appellant's own order forms, all of which state: "Ordered by Kenneth Grubbs" (n.14, *supra*, and accompanying text).

Based upon the record made in these proceedings, the Board finds that the appellant has failed to show that Mr. John C. Roller or any other USGS employee placed an oral order with the appellant for the rental of the blowout prevention equipment covered by its claim.

Addressing the second question, Ms. Dorothy M. Rolleri (the contracting officer during the time the orders for the blowout prevention equipment were placed with Shafco) states: "[N]either Inspector John Roller nor Contracting Officer's Representative Mark Zoback nor anyone else at the USGS who was involved in the

[19] By undertaking to determine the availability of blowout prevention equipment, the Government may have contributed in some measure to the apparent confusion of the appellant concerning the status of Mr. Grubbs. While asserting that Mr. Grubbs had absolutely no authority to make any order on behalf of USGS (n.6, *supra*), Mr. Roller's affidavit is silent as to what he did, if anything, to inform the appellant that this was the case. In the course of denying the claim, the contracting officer recognized that the appellant may have considered Mr. Grubbs to be an employee of USGS (n.14, *supra*).

[20] The Department Counsel asserts that in the declaration of July 21, 1981, Shafco's President virtually admits that it was Kenneth Grubbs who placed the order with Shafco and gave instructions to bill the order to USGS, attention "John Rowland" (Brief of the Department of the Interior, at 9, footnote 1). Appellant has not predicated its claim, however, upon oral orders received from Kenneth Grubbs. Instead, it has attempted to rely upon hearsay statements by Mr. Grubbs to support its allegation that the blowout prevention equipment was ordered by "John Rowland" (John Roller), a USGS employee (n.13, *supra*).

[21] Insofar as the record discloses, Mr. "John Rowland" was not named as the USGS employee who had ordered the blowout prevention equipment until Oct. 23, 1980 (AF 19), or more than 15 months after the last invoice covering such equipment had been submitted (AF 6).

Grubbs contract, except for myself, had the authority to place an order of the size of the Shafco order on behalf of the USGS * * *" (n.11, *supra*). After noting that the Government is not bound by the unauthorized acts of its agents and that anyone dealing with the Government must ascertain the limits of the agent's authority, the Department counsel states:

> [T]he limitations on the contracting authority of USGS employees are set out in the USGS Manual at Part 205, Chapter 4, published in the *Federal Register* at 40 FR 53275, November 17, 1975, and the limitations on the authority of all Department of the Interior personnel to place oral orders are set out in the Code of Federal Regulations at 41 CFR § 41-3.650-1(a), published in the *Federal Register* at 41 FR 19222, May 11, 1976. As a geophysicist in the Office of Earthquake Studies, Geologic Division, John Roller had authority to contract on behalf of the USGS only in an amount not exceeding $500, and then only while in a travel status. USGS Manual, Part 205, Chapter 4, Paragraph .3.B [22]

(Brief of the Department of the Interior at 11, 12).

The appellant has made no effort to show that any of the persons named had authority to enter into oral contracts on behalf of the USGS in any amount or to enter into contracts of any type in the dollar amounts involved in the Shafco orders.[23] Addressing the authority question, the appellant states: "[T]he USGS admits that it did not advise Shafco of any limitations on the contracting authority of USGS employees" (Appellant's Brief at 3). Parties are charged with knowledge of any limitations on the contracting authority of Government agents when published in the *Federal Register*,[24] however, and they cannot rely upon the doctrine of apparent authority when dealing with agents of the Government.[25]

The Board finds that none of the persons named by the appellant had authority to bind the Government by an oral contract and that none of those named had authority to contract in any form in the amounts involved in the Shafco orders here in question.

Remaining for consideration is the question of whether the Government is liable to the appellant

[22] Later in the brief, the Department Counsel addresses the question of ratification, stating:

> "Shafco's Invoice No. 20-25585 was in the amount of $7,238.67. (Appeal File, Tab 2) John Roller's project chief, Mark Zoback, who was the Contracting Officer's Representative on the Grubbs contract, had authority to contract only in an amount not exceeding $2,500. The Tectonophysics Branch Chief, Barry Raleign, had authority to contract only in an amount not exceeding $5,000, as did Assistant Branch Chief Herb Mills when he was acting as Branch Chief. Administative Officer Nancy Crossley, USGS drilling superintendent Robert Jones, and Robin Rebello, a clerk-stenographer in the Tectonophysics Branch, all had authority to contract only in an amount not exceeding $500 while in travel status. USGS Manual, Part 205, Chapter 4, Paragraph .3.B."

(Brief of the Department of the Interior at 13).

[23] Appellant's Brief at page 2 states: "Tab 8 of the Appeal File indicates at (3) that Halliburton Services was paid $14,066.89 by USGS to seal a well drilled by Kenneth Grubbs. Since Halliburton Services was paid directly by the USGS, Shafco should be also."

The Department counsel offers the following comment: "The sealing by Halliburton Services of a well in order to prevent gas leakage after the blowout and fire in the fall of 1978 * * * was a separate procurement by the USGS, outside the scope of the USGS—Grubbs contract, for which the USGS paid Halliburton. Halliburton also provided supplies to Grubbs and Sons, and for those supplies, Halliburton, like Shafco, had to look to Grubbs and Sons and not to the USGS for payment."

(Brief of the Department of the Interior at 18, footnote 4).

[24] *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384-85 (1947), in which the Supreme Court stated: "Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents. 49 Stat. 502, 44 U.S.C. § 307."

[25] *See R & R Construction Co.*, IBCA-413 and IBCA-458-9-64 (Sept. 27, 1965), 72 I.D. 385, 388-90, 65-2 BCA par. 5,109 at 24,061-62.

by reason of a contract implied in law. In its brief at 3, the appellant states that it is inequitable for the USGS to receive the benefit [26] and use of Shafco's equipment and yet refuse to make any payment to Shafco. Our finding that no order was placed with the appellant by anyone authorized to do so on behalf of the Government precludes a finding as to the meeting of the minds of the parties [27] from which a contract implied in fact could be inferred. The position of the appellant appears to be that as a matter of law [28] it should be paid for the blowout prevention equipment used in drilling a well under a Government contract. Even if the Board were to find this to be the case, it would still not be in a position to provide the appellant with any relief since the Board has no jurisdiction over contracts implied in law or quasi contracts.[29]

Decision

For the reasons stated and on the basis of the authorities cited, the appeal is denied insofar as it is based upon a contract-implied-in-fact and is dismissed insofar as it is based upon a contract-implied-in-law.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

APPEAL OF MILO WERNER CO.

IBCA-1202-7-78

Decided *March 22, 1982*

Contract No. 7-07-40-00627, Bureau of Reclamation.

Sustained

Contracts: Construction and Operation: Waiver and Estoppel—Contracts: Disputes and Remedies: Termination for Default

Upon finding that the Government waived the original completion date for performance of a fixed-price construction contract by permitting the contractor to work after default, failed to fix a new specific completion date after waiver, and failed to prove abandonment or anticipatory breach on the part of the contractor after the waiver, the Board holds the contractor to have been wrongfully terminated for default and entitled to have the termination for default converted to a termination for the convenience of the Government.

[26] The position of the Government is that the direct and primary benefit provided by Shafco was to Grubbs and Sons and as a consequence there was no "unjust enrichment" of the Government, which derived at most only an indirect benefit (Brief of the Department of the Interior at 18).

[27] In *Porter* v. *United States*, 204 Ct. Cl. 355, 365, 366 (1974), the Court of Claims stated:

"The general rule in government contract law is that a contract implied in fact is one 'founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding. Baltimore & Ohio R.R. v. United States, 261 U.S. 592, 597 (1923); Algonac Manufacturing Co. v. United States, 192 Ct. Cl. 649, 673-74 * * *' (Footnote omitted.)"

See also discussion of implied in fact contracts in *ABT Associates, Inc.*, DOT CAB No. 1059 (Sept. 8, 1980), 80-2 BCA par. 14,657 at 72,289-93.

[28] The Court of Claims has no jurisdiction over contracts implied in law. *See Porter* v. *United States* (n.27, *supra*) in which at footnote 5 the Court said: "We presume that plaintiff alleges an implied-in-fact contract since the court lacks jurisdiction over contracts implied in law. Merritt v. United States, 267 U.S. 338, 341 (1925); Putnam Mills Corp. v. United States, 202 Ct. Cl. 1, 8 n.3, 479 F.2d 1334, 1337 n.3 (1973)."

[29] Under sec. 8(d) of the Contract Disputes Act of 1978 (41 U.S.C. § 607(d) (Supp. II 1978) the agency boards of contract appeals are authorized to grant any relief available to a litigant asserting a contract claim in the Court of Claims. Since the Court of Claims has no jurisdiction over contracts implied in law, neither do agency boards of contract appeals. *See Dean Prosser & Crew*, IBCA-1471-6-81 (Aug. 28, 1981), 88 I.D. 809, 81-2 BCA par. 15,294.

APPEARANCES: Randall C. Schoonover, Tilly & Graves, Attorneys at Law, Denver, Colorado, for Appellant; Roland G. Robison, Jr., Department Counsel, Salt Lake City, Utah, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

The question presented by this appeal is whether appellant is entitled to have a termination for default converted to a termination for the convenience of the Government (1) because excusable causes of delay were established, or (2) because the Government waived its right to terminate for default.

Background

The subject contract was awarded to the contractor (appellant), the Milo Werner Co. of Penrose, Colorado, on July 26, 1977, at the fixed contract price of $177,000. The construction contract, on Standard Form 23 (January 1961 edition, Rev. 4-75), provided for the clearing of Crystal Reservoir created by Crystal Dam in the Black Canyon of the Gunnison River, located approximately 24 miles east of Montrose, Colorado, in Montrose County. Sec. 1.2.2 of the Specifications described the work to be performed to consist of clearing the reservoir area, specifically: Clearing and disposing of standing trees, stumps, and brush of specified sizes from approximately 170 acres between elevations 6,700 and 6,756 feet; topping or removing trees and brush of specified sizes protruding above elevation 6,700 feet; and clearing and disposing of floatable downed trees, brush, and combustible materials from approximately 170 acres between elevations 6,700 and 6,756 feet. The disposal process consisted of burning combustible debris and removing logs and incombustible debris from the reservoir area.

Notice to proceed with the work under the contract was given by letter to appellant, dated Aug. 17, 1977, and received on Aug. 20, 1977. The specifications required all work to be completed by Jan. 17, 1978, 150 calendar days from the date of receipt of the notice to proceed, and provided for liquidated damages to be assessed against the contractor in the amount of $100 per day for each calendar day of delay beyond the date fixed for completion of the contract.

The contractor performed well during the first part of the contract until around the middle of Nov. 1977, when it became apparent that the work would not be completed on time with the equipment and personnel then available (Tr. 15-16). On Nov. 18, 1977, Mr. Frank D. Carlson, the construction engineer for the Bureau of Reclamation (BOR) and supervisor of BOR inspection personnel for the project, sent the following letter (Appeal File Item 14, AF-14) to appellant:

> This letter is to remind you that January 17, 1978 has been established as the completion date for performing the work, required by this contract, within the 150

days allotted by the specifications. It appears that at your present rate of progress, this work will not be completed within the specified time. You are urged to review your schedule concerning completion of the work within the prescribed time period.

The contractor continued with the work through Dec. 19, 1977. However, on Dec. 20, 1977, the work was unilaterally suspended by the contractor and on Jan. 3, 1978, the president of the contractor, Mr. Milo Werner, sent the following letter (AF-15) to the construction engineer:

In reference to our recent conversation of December 20, 1977, I would like to request for a suspension of time and work on the Crystal Reservoir Clearing Project.

On the morning of December 19, 1977, we found Crystal Reservoir frozen over in parts keeping us from getting to over two-thirds of our work. Extreme low temperatures are causing us problems with starting our boats, snow on slopes making dangerous working conditions for the men and production very low.

Our company feels that the job could have been done within the 150 days allowed in the contract if done in a time when weather would have permitted normal production. We estimate that the project could be completed within 6 to 8 weeks under desireable [*sic*] weather conditions.

In consideration of request being granted, no additional charges will be requested by allowing us to continue in the spring of 1978.

For these reasons we would like to request that work be entirely suspended as of December 1, 1977 as of after that date we lost several days due to snow.

On Jan. 6, 1978, the then acting construction engineer, sent the following letter (AF-16) to the BOR regional director at Salt Lake City who was the contracting officer (CO) for the subject project:

Enclosed is a copy of the contractor's letter dated January 3, 1978 requesting suspension of work under the subject specifications. The contractor cites severe weather conditions and resulting unsafe working conditions as a reason for suspension of work.

At the present time at Crystal, the reservoir is covered with ice making access difficult and considerable snow on the slopes making working conditions hazardous. It does not appear to be practical to continue work under these conditions. Please review the contractor's request and advise this office concerning a proper answer to the contractor's letter.

Paragraph a. of Sec. 1.1.4 of the Specifications (AF-5) pertaining to safety and health provides:

The contractor shall not require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety, as determined under construction safety and health standards promulgated by regulations of the Secretary of Labor.

Nevertheless, the CO responded to the Jan. 6 letter by a letter to the construction engineer, dated Jan. 23, 1978 (AF-17), in the following manner:

We have reviewed the contractor's letter and find no reason to suspend the work until spring. In reviewing the opening of bids and award of contract, the bids were opened on July 14, 1977, and the contract was awarded on July 26, 1977, with notice to proceed on August 20, 1977. This does not appear to be an excessive amount of time as the bid acceptance period included a 60-day acceptance period.

The contractor should be informed that we find no reasons to suspend the work or the liquidated damages in the contract. The contractor should be advised that he should complete the remaining work as soon as possible to eliminate excessive liquidated damages.

The decision of the CO on the request for suspension was then transmitted to the contractor from the construction engineer by letter dated Jan. 30, 1978 (AF-18), which reads:

A review of the subject letter has been made concerning your request to discontinue clearing operations until the spring of 1978. We find no reason to suspend the work or the liquidated damages to be assessed under the contract. It is suggested that you complete the remaining work as soon as possible in order to avoid excessive liquidated damages.

Following the winter shutdown, the construction enginer sent the following letter, dated Apr. 14, 1978 (AF-19), to the contractor:

As you have been advised in a telephone conversation with a representative of your organization, the ice has gone off Crystal Reservoir and clearing operations can now be resumed.

Paragraph 1, Part b of Supplemental Notice No. 2 to the specifications states that the reservoir elevation will be controlled between El. 6700 and El. 6755 to within 5 feet plus or minus of the elevation requested by the contractor subject to changes by the unregulated side flows.

An early resumption and completion of the remaining work might avoid problems at a later date due to fluctuations in the reservoir elevation as a result of high runoff from Cimarron Creek and other side flows which cannot be regulated.

The contractor resumed work at the reservior site on Apr. 18, 1973, but encountered considerable difficulty because of congestion caused by floating logs and debris, and equipment breakdowns which seemed to persist for the remainder of April and on into the month of May (Ap. Ex. B, pp. 40-67, Inspector's Logs). As a result, the following letter, dated May 19, 1978 (AF-20), was sent to the contractor by the construction engineer:

All work under the subject contract was scheduled to be completed on or before January 17, 1978. As of May 19, 1978, you have accrued 122 days liquidated damages.

At the present time, we do not know of any delays to the work which would justify a time extension under the contract.

Our review indicates you are not pursuing the work in a diligent manner and your progress is unsatisfactory. You should take every step possible to complete work under the contract at the earliest possible date.

In June, the contractor's work continued to slow down and ceased on June 9. No payments were made by the Government to the contractor during 1978, because of the accrual of liquidated damages. To finance the work performance in 1978, Mr. Werner obtained a $20,000 loan from the United Bank of Pueblo by putting a second mortgage on "everything I owned except my house" (Tr. 71). On June 9, Mr. Werner advised the construction engineer at a meeting in Montrose, Colorado, that although he was running out of money, he was seeking additional funding from the bonding company and thought he could complete the project within 30 to 45 days (Tr. 81).

Nevertheless, on June 13, 1978, the CO sent the following telegram to Mr. Werner:

PROGRESS UNDER THE SUBJECT CONTRACT IS UNSATISFACTORY. WORK WAS TO HAVE BEEN COMPLETED BY JANUARY 17, 1978 BUT HAS NOT BEEN COMPLETED AS OF JUNE 13, 1978. ON JUNE 12, 1978, YOU FAILED TO CONTINUE THE WORK. WE KNOW OF NO BASIS UNDER THE CONTRACT FOR TIME EXTENSIONS.

YOU ARE HEREBY NOTIFIED THAT TERMINATION OF YOUR CONTRACT FOR DEFAULT APPEARS IMMINENT. YOU ARE TO ADVISE US NO LATER THAN JUNE 15, 1978 OF YOUR PLANS FOR COMPLETING THE WORK, AND SHOW CAUSE WHY THE CONTRACT

SHOULD NOT BE TERMINATED FOR DEFAULT.

On June 16, 1978, the CO sent the following final telegram to the contractor:

YOU HAVE NOT RESPONDED TO MY TELEGRAM OF JUNE 13, 1978 ASKING YOU TO SHOW CAUSE WHY YOUR CONTRACT FOR CLEARING CRYSTAL RESERVOIR SHOULD NOT BE TERMINATED FOR DEFAULT. YOUR RIGHT TO PROCEED WITH THE WORK OF CLEARING CRYSTAL RESERVOIR IS HEREBY TERMINATED FOR DEFAULT. CONFIRMING LETTER FOLLOWS.

The confirming letter of the same date constituted the findings of fact and final decision of the contracting officer. It confirmed the termination for default, reminded the contractor that he and his surety would remain liable for any damage resulting from the failure to complete the work on time, stated that the Government was taking measures necessary for the protection of Crystal Dam on an interim basis until the surety took over prosecution of the work under the contract, and advised the contractor of his rights of appeal under the Disputes Clause.

On July 18, 1978, the contractor filed a Notice of Appeal with the contracting officer. A hearing was held in Denver, Colorado, July 16, 1979, and the final posthearing brief was received by the Board on May 6, 1980.

Contentions of the Parties

Appellant contends that the decision of the contracting officer to terminate for default was erroneous and that the termination for default should be converted to a termination for the convenience of the Government. The two principal grounds asserted for the requested relief are: (A) excusable cause for delay, based on alleged (1) unusually severe weather, (2) delay in issuing the notice to proceed, (3) delay caused by performance of extra work, (4) delay caused by the failure of BOR to control the water surface elevation in the reservoir, (5) delay caused by the failure of BOR to make progress payments, and (6) delay caused by unforeseeable equipment breakdowns and mechanical problems; and (B) waiver of the right to terminate for default because of BOR's acquiescense in and encouragement of continued performance by the contractor in the spring of 1978.

Appellant also contends that the contracting officer erred: By denying the contractor's request of Jan. 3 to suspend the work, since the safety specifications prohibited the contractor from exposing his laborers to hazardous working conditions; by wrongfully withholding progress payments from Apr. 1978, to the termination date, after permitting the contractor to continue the work; and by not allowing the contractor at least the 30 to 40 estimated days after the meeting of June 9, 1978, to complete the contract work.

The Government contends that appellant did not establish excusable cause for delay under any of the stated reasons, and that the termination for default was not improper on the basis of waiver, because "[i]t was only after Appellant abandoned the job and was unable or unwilling to complete the work under the contract that the Bureau notified Appellant of

termination for default" (Govt. Reply Brief at 6). The Government's position was summarized at pages 7 and 8 of its Reply Brief as follows:

In summary, it is the Government's position that Appellant's request for an extension of time because of unusual conditions was properly denied; that Appellant was not unreasonably delayed in its performance of work under the contract by acts of the Government; and that the Government's termination of the contract for default was proper.

DISCUSSION

Excusable Causes for Delay

For the reasons discussed below, we conclude that appellant is entitled to the requested relief.

However, with one exception,[1] we agree with Government counsel that the record in this proceeding does not sustain a finding of excusable cause for delay under the itemized allegations of appellant, either as a mater of law or because of failure of proof of necessary elements.

Waiver

A leading case authority on the subject of waiver in Government contract disputes is *D. Joseph De Vito* v. *United States,* 188 Ct. Cl. 979 (1969). In that case the court held that the conduct of the Government, following the contractor's default of Nov. 29, 1960, delivery date, in accepting subsequent deliveries by the contractor constituted a constructive election to permit continued performance and a waiver of the breach, and in the absence of a "cure" notice under the Default clause, the termination on Jan. 16, 1961, was invalid. In the course of its opinion, at pages 990–92, the court enunciated the following principles pertaining to waiver and default terminations of Government contracts:

(1) The Government is habitually lenient in granting reasonable extensions of time for contract performance, for it is more interested in production than in litigation. Moreover, default terminations—as a species of forfeiture—are strictly construed. *Murphy, et al. v. United States,* 164 Ct. Cl. 332 (1964); *J. D. Hedin Construction Co. v. United States,* 187 Ct. Cl. 45, 47, 57, 408 F.2d 424, 431 (1969).

(2) Where the Government elects to permit a delinquent contractor to continue performance past a due date, it surrenders its alternative and inconsistent right under the Default clause to terminate, assuming the contractor has not abandoned performance and a reasonable time has expired for a termination notice to be given. * * * The election is sometimes express, but more often is to be inferred from the conduct of the non-defaulting party. McBride and Wachtel, Government Contracts, § 31.170. * * *

* * * * *

(3) The necessary elements of an election by the non-defaulting party to waive default in delivery under a contract are (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and implied or express consent.

(4) What is a reasonable time for the Government to terminate a contract after

[1] We have difficulty reconciling the contracting officer's denial of the contractor's request for winter suspension of the work on the ground that there "was no reason therefor" (AF–17) with the safety specification (Sec. 1.1.4, AF–5) prohibiting the contractor from working his men under hazardous conditions. This difficulty is compounded, when considering that the contracting officer's acting construction engineer, by letter (AF–16), confirmed the presence of ice and snow, stated that the working conditions were hazardous, and advised, "It does not appear practical to continue work under these conditions."

default depends on the circumstances of each case. See *Lumen, Inc.*, ASBCA 6431, 61-2 BCA 3210; *Foster Sportswear*, ASBCA 5754, 1962 BCA 3364. * * *

* * * * *

(5) Time is of the essence in any contract containing fixed dates for performance. When a due date has passed and the contract has not been terminated for default within a reasonable time, the inference is created that time is no longer of the essence so long as the constructive election not to terminate continues and the contractor proceeds with performance. The proper way thereafter for time to again become of the essence is for the Government to issue a notice under the Default clause setting a reasonable but specific time for performance on pain of default termination. The election to waive performance remains in force until the time specified in the notice, and thereupon time is reinstated as being of the essence. The notice must set a new time for performance that is both reasonable and specific from the standpoint of the performance capabilities of the contractor at the time the notice is given. (See *Lumen, Inc.* and *Foster Sportswear, supra,* and also *Bailey Specialized Buildings, Inc.* v. *United States,* 186 Ct. Cl. 71, 404 F.2d 355 (1968).

In numerous decisions involving issues similar to those in this appeal, Boards of Contract Appeals have cited the *De Vito* case and applied the principles for which it stands. *(See, e.g., Sidney G. Kornegay and Florence Kornegay,* ASBCA No. 18454 (Feb. 2, 1976), 76-1 BCA par. 11,744; *Amecom Division, Litton Systems, Inc.,* ASBCA No. 19687 (Jan. 21, 1977), 77-1 BCA par. 12,329; and *Telecommunications Services, Inc.,* VACAB Nos. 1185, 1218, 1219 (Nov. 8, 1977), 77-2 BCA par. 12,847. This Board did so in the *Appeal of Kenney Refrigeration,* IBCA-1230-12-78 (Sept. 28, 1979), 86 I.D. 503, 79-2 BCA par. 14,063. In that case, we held a default termination improper and appellant entitled to the benefits of a termination for convenience upon finding: that the Government had waived the original delivery schedule after breach by continuing to negotiate modifications to the specifications with the contractor; that no new delivery date had been agreed to; and that the Government's unilateral setting of a new delivery date within 10 days was unreasonable under the *De Vito* standard, since the contracting officer knew that the 10-day delivery was not within the performance capability of the contractor.

However, the contracting officer need not have relied on case authority alone for guidance on proper termination for default procedure. Such guidance also was, and is, spelled out in the Federal Procurement Regulations (FPR), 41 CFR 1-8.602-3, entitled "Procedure in case of default."[2] Paragraph (a) of that section of the FPR provides, among other things, that "if the Government has taken any action *which might be construed as a waiver* of the contract delivery or performance date, *a preliminary notice shall be sent the contractor* setting a new date by which the contractor will be permitted to make delivery or complete performance, * * *." (Italics supplied.) Paragraph (b) of the same section, among other things, provides, in the situation where the contractor fails to make progress so as to endanger performance of the contract in accordance with its terms, that "the contracting officer must formally notify the contractor of such fail-

[2] The applicability of this section to fixed-price construction contracts is spelled out in sec. 1-8.600, entitled, "Scope of subpart."

ure *and allow at least 10 days for cure of the failure before issuing a termination notice.*" (Italics supplies.)

In light of the undisputed facts set out above and the foregoing discussion of the legal authorities, we find and conclude:

1. That appellant was delinquent by not completing performance on or before Jan. 17, 1978, at which time the contracting officer had the option of electing to terminate for default or permitting appellant to complete performance of the contract on or before a new specified completion date;

2. That the action of the Government on Apr. 14, 1978, transmitting a letter to the contractor (AF-19), whereby the Government not only permitted the contractor to continue, but encouraged "early resumption and completion of the remaining work," constituted a waiver of the original completion date; and

3. That the contracting officer violated 41 CFR 1-8.602-3 (FPR) by failing to fix, either bilaterally or unilaterally, a new completion date within a reasonable time after waiver of the original completion date.

The Alleged Abandonment

In his posthearing reply brief (pages 6 and 7), Government counsel argues that: The BOR chose not to terminate in Jan. 1978 hoping that appellant could complete the work; by the letters of Jan. 23 and 30, Apr. 14, and May 19, 1978 (AF-17, 18, 19, and 20 respectively), BOR urged appellant to complete the work, but also reminded it of accruing liquidated damages, and appellant was notified of termination for default, only after appellant abandoned the job and was unable or unwilling to complete the work. Counsel then attempts to distinguish the facts in this case from those in *Amecom, Kornegay,* and *De Vito, supra,* contending that, in those cases, there was no showing that the contractors were unable or unwilling to perform, only that they were tardy in their performances, while here, "appellant had, in fact, abandoned the worksite, and there was substantial evidence that it was unable or unwilling to complete the work under the contract."

That argument, however, from our viewpoint, is not sufficiently supported by the evidence to sustain a finding of abandonment. First, we note that the letter of Apr. 14, 1978, referred to by counsel, and a key factor in our finding of waiver, makes no mention of liquidated damages (*see* AF-19 *supra).* Furthermore, the letter of Jan. 23 did not remind the contractor of anything, since it was from the contracting officer to his construction engineer (*see* AF-17, *supra*).

Second, the determination of whether abandonment occurred, rests heavily upon the conversations between Milo Werner and Frank Carlson during the early part of June, and particularly on June 9, 1978. Mr. Carlson's testimony at the hearing was substantially as follows: That during the first week in June, he had indicated concern to Mr. Werner regard-

ing the collection of debris in the reservoir and the hazard it posed to the safety of the dam (Tr. 27-28); that Mr. Werner indicated an understanding of the Government's concern, but that there was money enough left for approximately 2 weeks of operation, and then, he would not have any money to continue the job (Tr. 28); that Mr. Werner had the ability to do the work if he had the resources, and there was discussion about the possibility that the bonding company would supply funding to complete the work (Tr. 29); that Mr. Werner indicated he would go to the bonding company, and on the day of the meeting (presumably June 9), was awaiting some sort of a telephone reply (Tr. 29); and that he did not recall whether he (Carlson) made a recommendation on June 13, that the contract be terminated, but on or about that date, Mr. Werner had abandoned the job and had left the site (Tr. 30).

Mr. Werner's testimony confirms the Carlson testimony in some respects, but contradicts it in others. He testified, substantially: That after indicating to Mr. Carlson, at the meeting in Montrose, Colorado, on June 9 that it would take between 30 and 45 days to complete the job, Carlson replied that that was not quick enough, that they were going to start generating electricity and Werner would be costing the Government $60,000 a day, and that they needed to get the logs out of the reservoir immediately for the safety of the dam (Tr. 81); that in a day's time, with four men he could tie off the logs to prevent damage to the dam and had done so many times during the spring of 1978 (Tr. 81); that when work ceased on June 9 it was a temporary status, that June 9 was a Friday—there was no more money until he got more funding and was given the go-ahead to finish the project, that he was willing to leave his van, truck, and equipment there and to finish the project (Tr. 99); that there was no indication that he abandoned the site and that he was strictly waiting for funds (Tr. 98); that before termination he had the feeling that he was going to be allowed to finish because he still had $60,000 in the contract and the bonding company would have bonded him to work for 30 or 40 days, "would have pulled it out of the hole" (Tr. 99). There was also testimony by Mr. Werner (Tr. 83) to the effect that when he indicated to Mr. Carlson that he could complete the job in 6 to 8 weeks, he had already reserved a motor crane on a rental-purchase system at $3,000 a month rental from Case Power Equipment Company in Colorado Springs; that the salesman had filled out the contract and was awaiting his go-ahead; and it was by that means—using the crane to lift the logs over the dam onto dump trucks for hauling away from the dam—that he planned to complete the project. However, under cross-examination (Tr. 100), he admitted: That on June 9, when he indicated to Mr. Carlson that he could complete the job within 30 to 45 days, he did not then have the required financial backing; and, from the perspective of Mr. Carlson, the Government was being asked to continue the oper-

ation of appellant on the basis of a crane it did not then have, and financing it did not then have to obtain the crane.

Third, the inspectors' daily logs (App. Exh. B at 1–86), although showing no contractor activity from June 9 through June 16, 1978, do show that the contractor had not removed all its equipment from the site. In fact, for June 16, the termination date, the entry reads: "The contractor showed up with 1 man and moved the 1 ton winch truck from the dam crest to the contractor use area."

In *Fairfield Scientific Corp.*, ASBCA No. 21151 (Feb. 23, 1978), 78–1 BCA par. 13,082, where the contractor had ceased performance, locked his plant, and connected his telephone to an answering device, and the Government had contended that this was "abandonment" and an effective repudiation, the Board held that the contractor's actions did not constitute an unequivocal manifestation of its intention not to perform and that the default termination effected without the prior issuance of a cure notice was premature and improper. Thereupon, the termination for default was converted into a termination for convenience of the Government. In the course of its opinion, the Board discussed several points of law pertinent to our discussion here, and may be summarized as follows: [3]

A termination for default is a drastic sanction and the Government is held to strict accountability for its actions in enforcing this remedy. *H.N. Bailey & Associates v. United States,* 196 Ct. Cl. 156, 449 F.2d 387 (1971).

Provisions in a construction contract authorizing termination for anticipatory breach effect a result in the nature of a forfeiture, and one not liberally to be construed. *Murphy v. United States,* 164 Ct. Cl. 332, 349 (1964).

Failure to give the required 10-day cure notice is fatal to a default termination for failure to make progress. The only exception to the rule demanding strict compliance with the 10-day prerequisite arises where there has been an anticipatory repudiation by the contractor.

The hallmark of anticipatory repudiation is that there must be a definite and unequivocal manifestation of intention on the part of the repudiator that he will not render the promised performance when the time fixed for it in the contract arrives. *Corbin on Contracts* § 973. Therefore, to constitute an anticipatory repudiation the alleged repudiator's words or conduct must manifest a positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time. *Dingley v. Oler,* 117 U.S. 490, 503 (1886).

There is no anticipatory breach where the professed inability to perform can be overcome and the contractor expresses a willingness to continue performance. *Northeastern Engineering Inc.,* ASBCA No. 6504 (July 31, 1961), 61–2 BCA par. 3108; *Manhattan Lighting Equipment Co. Inc.,* ASBCA No. 5113 (May 18, 1960), 60–1 BCA par. 2646.

Whenever there is a positive, definite, unconditional, and unequivocal manifestation of intent, by words or conduct, on the part of a contractor of his intent not to render the promised performance when the time fixed therefor by the contract shall arrive, the contracting officer is not required to go through the useless motions of issuing a preliminary 10-day cure notice even though the time for performance has not yet arrived, but may terminate the contract forthwith on the ground of anticipatory breach. *Mission Valve and Pump Company, a Division of Mission Manufacturing Company,* ASBCA Nos. 13552, 13821

[3] We have not attempted to cite all the case authorities cited in the *Fairfield* opinion in support of the listed points of law. For those authorities, not cited herein, *see* pages 63,906–08 of the *Fairfield* opinion, *supra.*

(November 20, 1969), 69-2 BCA par. 8010, at p. 37,243.

Here the Government has presented no convincing evidence of either abandonment or anticipatory breach by the contractor. At least some of the contractor's equipment remained at the worksite through the date of termination. Mr. Werner testified that he never intended to abandon the project, but desired to complete it, if allowed to do so. Mr. Carlson admitted that Mr. Werner had the ability to do the work if he had the resources. There was certainly no evidence of an overt act or declaration on the part of the contractor unequivocally and unconditionally manifesting an intention not to perform. At most, the record shows the contractor, on June 9, to have temporarily discontinued performance until arrangements were made for additional funds. No new specific date for completion was ever fixed by the contracting officer subsequent to the default of the contractor on Jan. 17, 1978; thus, until he had done so, the contractor, after the waiver, had the right to assume that time was no longer the essence of the contract. The testimony of Mr. Werner indicates that he reasonably believed that he could obtain the necessary funds to complete the work sometime after June 9 since he still had over $60,000 retainage in the contract. The Government presented no evidence showing that the contracting officer, or any of his representatives, made any attempt to ascertain from the bonding company, or otherwise, whether Mr. Werner's anticipation was realistic. Certainly, there was no evidence that the funds were impossible to obtain, and the record is replete with Mr. Werner's willingness and intention to continue the work.

Therefore, we further specifically find and conclude that the Government has failed to establish its alleged defense of abandonment.

Decision

We have found that the Government: Waived the original completion date by permitting the contractor to continue work after default; failed to fix a new specific completion date after waiver; and failed to prove abandonment or anticipatory breach on the part of the contractor after the waiver. Thus, we hold that the appellant was wrongfully terminated for default and is entitled to have the termination converted to a termination for the convenience of the Government.

Accordingly, the appeal is sustained. The termination for default is converted to a termination for the convenience of the Government, and this matter is remanded to the contracting officer for negotiation of a termination settlement in accordance with the appropriate regulations.

DAVID DOANE
Administrative Judge

WE CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

RUSSELL C. LYNCH
Administrative Judge

APPEAL OF ELECTRONIC TECHNIQUES, INC.

IBCA-1474-6-81

Decided *March 22, 1982*

Contract No. 9-07-81-S0059, Bureau of Reclamation.

Denied.

Contracts: Construction and Operation: Contract Clauses—Contracts: Construction and Operation: General Rules of Construction—Contracts: Contract Disputes Act of 1978: Interest

The Board denies a contractor's claim for interest based upon Government delays in paying invoices in undisputed amounts where it finds neither a statutory nor a contractual basis for recovery of the interest claimed.

APPEARANCES: Vincent A. Sheetz, Vice President, Electronic Techniques, Inc., Fort Collins, Colorado, for Appellant; Gerald D. O'Nan, Department Counsel, Denver, Colorado, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The $4,000.59 involved in this appeal[1] represents interest claimed by the appellant for delayed payments by the Government of sums admittedly due under the contract.

Background

The facts material to the resolution of the instant appeal are undisputed. The contract was awarded to Electronic Techniques, Inc., on Feb. 28, 1979 (Appeal File, Tab A),[2] and included the General Provisions set forth in Standard Form 32 (April 1975 edition). It called for the delivery of 6 separate lots of 25 each of meteorological surface observation network stations for a total contract price of $1,522,930. At the contractor's request the contract was modified to provide for progress payments (Tab C). The weather stations supplied by the contractor were accepted as in accordance with the requirement of the contract specifications.

The contractor's final invoice was submitted on Jan. 16, 1981, in the amount of $11,404.95 (Tab J). By letter dated Apr. 8, 1981 (Tab N), the contractor requested that interest be paid as a result of the late payment of invoices submitted. The claim was denied by the contracting officer in his decision of May 6, 1981 (Tab O) in which he cited the general rule that in-

[1] Computed in the following manner:
(Appeal File, Tab N).

Interest charges for invoice #3165:	
$91,186.61, 30 days overdue 2-15-81	$1,367.80
$92,554.41, 60 days overdue 3-15-81	1,388.32
Total	2,756.12

Interest claimed by supplier:	
Handar invoice 001604 (3-17-81)	768.35
Handar invoice 001615 (3-20-81)	476.12
Total	1,244.47
Grand Total	4,000.59

[2] All references to exhibits are to those contained in the appeal file. Exhibits are identified by the word Tab followed by reference to the particular exhibit in the appeal file.

terest is not recoverable against the United States in the absence of a statute or contract provision authorizing its payment.

In the notice of appeal of May 28, 1981 (Tab P), the appellant states (i) that on Jan. 16, 1981, the contractor submitted a proper invoice for equipment purchased under the instant contract which was approved shortly thereafter by the contracting officer's technical representative (hereinafter COTR); (ii) that during March and April of 1981, the contractor made repeated efforts by telephone to obtain payment; (iii) that during the course of a meeting with the contracting officer and the COTR in the first week of Apr. 1981, it was determined that the paperwork still had not been forwarded to the accounting section for payment; (iv) that payment was not made until Apr. 13, 1981; (v) that the payment delays involved matters within the control of the contracting officer; (vi) that the delayed payments caused the contractor to incur additional expenses including interest payable to vendors on unpaid obligations and interest on indebtedness which could have been reduced or relieved if payments had been made on a timely basis; (vii) that paragraph 25 of the General Provisions[3] provides for the payment of simple interest on the amount of the claim to the contractor; and (viii) that the claim for interest represents a claim for additional costs in performing the contract.[4]

In an affidavit which accompanied the Government's Brief, the contracting officer on the instant contract states: (i) that final payment to the contractor was inadvertently delayed as a result of confusion between his office and the Bureau's finance office; (ii) that some of the confusion was attributable to a backlog of work which developed as a result of his staff being away from the office; (iii) that additional confusion was due to the contractor being uncertain as to how much had been paid on the contract; (iv) that there never was a dispute between the contrctor and the Bureau regarding the contractor's entitlement to the entire contract price; and (v) that the late payments for which the appellant claims interest do not relate to any changes made under the contract.[5]

Discussion

The question raised by the instant appeal is whether any authority exists for awarding interest to a contractor for delays in payment for which the Government was primarily responsible

[3] The cited clause reads as follows:

"25. Payment of Interest on Contractors' Claims

"(a) If an appeal is filed by the Contractor from a final decision of the Contracting Officer under the Disputes clause of this contract, denying a claim arising under the contract, simple interest on the amount of the claim finally determined owed by the Government shall be payable to the Contractor. Such interest shall be at the rate determined by the Secretary of the Treasury pursuant to Public Law 92-41, 85 Stat. 97, from the date the Contractor furnishes to the Contracting Officer his written appeal under the Disputes clause of this contact, to the date of (1) a final judgment by a court of competent jurisdiction, or (2) mailing to the Contractor of a supplemental agreement for execution either confirming completed negotiations between the parties or carrying out a decision of a board of contract appeals.

"(b) Notwithstanding (a), above, (1) interest shall be applied only from the date payment was due, if such date is later than the filing of appeal, and (2) interest shall not be paid for any period of time that the Contracting Officer determines the Contractor has unduly delayed in pursuing his remedies before a board of contract appeals or a court of competent jurisdiction."

[4] The appellant did not exercise its option to have the claim considered under the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613).

[5] Affidavit of Larry Harrell dated Oct. 22, 1981, at 1.

and concerning which there never was any dispute as to the contractor being entitled to be paid the amounts claimed as shown on its invoices.

In this case the appellant is in effect claiming that the delays in payment were unreasonable and that it is entitled to be paid interest by reason of the contract provision entitled Payment of Interest on Contractors' Claims (n. 3, *supra*). Similar contentions were advanced in the case of *The Diomed Corp.*, ASBCA No. 20399 (Sept. 8, 1975), 75-2 BCA par. 11,491.[6] In the course of denying the claim there asserted, the Armed Services Board stated at page 54,822:

[A]ppellant is claiming interest for alleged unreasonable delay in paying its invoice in the amount of $90,104.16. It is well established that absent a statute or contract provision specifically authorizing payment of such interest, it cannot be allowed. United States v. Thayer-West Point Hotel Co., 329 U.S. 585 (1947), Komatsu Manufacturing Co., Ltd. v. United States, 132 Ct. Cl. 314 (1955); Memco, ASBCA No. 18731, 74-1 BCA par. 10,626.

We have considered whether appellant might be entitled to recovery of interest pursuant to the Payment of Interest on Contractors' Claims clause. * * *

* * * * *

In our opinion the clause makes a clear distinction between a claim arising under the contract which is denied by the contracting officer, and interest on the amount of the claim which is finally determined to be owed by the Government. Here the claim itself is for interest. There is no dispute over appellant's entitlement to recover the invoiced amount of $90,104.16. Thus there is no "claim," as that term is used in the clause, to which interest can attach. We do not read the clause as providing broad authorization for payment of interest notwithstanding the absence of an underlying claim, other than for interest, which has arisen under the contract and has become the subject of an appeal.

We are unable to find any statutory or contractual basis for recovery of the interest here claimed by appellant.

The principles enunciated in *Diomed, supra,* are considered to be dispositive of the issues involved in this appeal.

Decision

Finding neither a statutory nor a contractual basis for recovery of the interest claimed by the appellant, the appeal is denied.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

[6] The passage of the Contract Disputes Act of 1978 (n.4, *supra*), has not altered the rule that interest is not payable for a Government delay in making payment of amounts as to which there is no dispute over entitlement. *See A.L.M. Contractors, Inc.*, ASBCA No. 23,792 (Aug. 31, 1979), 79-2 BCA par. 14,099 at 69,357 ("Neither the provisions of this contract nor the terms of the Contract Disputes Act of 1978, under which the appellant has elected to proceed, affect the prohibition against the award of interest for mere delay on part of the Government in making payments.").

DINCO COAL SALES, INC.

4 IBSMA 35

Decided *March 26, 1982*

Appeals by Ivan and Mary Debord, Wanda Gregory, Everett and Sadie Hunter, Georgie Keans, Danny Moore, Doug and Wanda Moore, Mary Moore, Tim and Debbie Pack, McIntire and Loretta Risner, and James Jr.

and Veronica Ward, intervenors, from the Dec. 14, 1981, decision of Administrative Law Judge David Torbett in Docket No. NX 1-120-R vacating Notice of Violation No. 81-2-71-12 on the grounds that the Dinco Coal Sales, Inc., coal processing facility is not a surface coal mining operation within the meaning of 30 CFR 700.5.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." Under the facts of this case a processing plant located 25 miles from the minesite that supplies coal to it is not "at or near" the mine-site within the meaning of the definition of "surface coal mining operations" in 30 CFR 700.5.

APPEARANCES: David Rubinstein Esq., Prestonsburg, Kentucky, and Thomas Fitzgerald, Esq., Lexington, Kentucky, on behalf of Ivan and Mary Debord; Robert L. Jordan, Esq., Inez, Kentucky, on behalf of Wanda Gregory, Everett and Sadie Hunter, Georgie Keans, Danny Moore, Doug and Wanda Moore, Tim and Debbie Pack, McIntire and Loretta Risner, and James Jr. and Veronica Ward; David C. Short, Esq., Frankfort, Kentucky, and William H. Gorin, Esq., Frankfort, Kentucky, on behalf of Dinco Coal Sales, Inc.; Charles Gault, Attorney, Office of the Field Solictor, Knoxville, Tennessee, John C. Martin, Attorney, and Walton D. Morris, Assistant Solicitor for Litigation and Enforcement, Office of the Solicitor, Division of Surface Mining, Washington, D.C., on behalf of the Office of Surface Mining Reclamation and Enforcement.

OPINION BY INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Factual and Procedural Background

Dinco Coal Sales, Inc. (Dinco), crushes and loads coal at a facility located in Floyd County, Kentucky. On July 20, 1981, an authorized representative of the Office of Surface Mining Reclamation and Enforcement (OSM) issued a notice of violation to Dinco for conducting a surface coal mining operation within 300 feet of occupied dwellings without having obtained written waivers from the owners as required by 30 CFR 761.11(e). The notice required Dinco to cease the operations until the waivers were obtained and to reclaim the areas within 300 feet of the dwellings whose owners did not provide waivers.

On Aug. 14, 1981, Dinco filed an application for review of the notice and on Sept. 10, 1981, filed an application for temporary relief. Thereafter, Ivan and Mary Debord petitioned for leave to intervene. Administrative Law Judge Torbett granted this petition on Sept. 28, 1981, and the next day issued a notice of hearing on the request for temporary relief only for Oct. 7, 1981. At the conclusion of the hearing the Administrative Law Judge granted temporary relief to Dinco on the grounds that its facility was not subject to OSM's regulatory au-

thority. The Debords appealed this decision and, on Oct. 20, 1981, we remanded the case to the Hearings Division with directions to set aside the order for temporary relief until Dinco had made the showings required by 30 U.S.C. §1275(c) (Supp. II 1978).

On Nov. 9, 1981, Wanda Gregory, Everett and Sadie Hunter, Georgie Keans, Danny Moore, Doug and Wanda Moore, Mary Moore, Tim and Debbie Pack, McIntire and Loretta Risner, and James Jr. and Veronica Ward also petitioned to intervene. Their motion was granted and a second hearing was held by the Administrative Law Judge on Dec. 2, 1981. On Dec. 14, 1981, he issued a decision vacating the notice of violation which read, in pertinent part:

> The proof shows that the owner of the tipple owns a coal mine which is approximately 25 miles from the tipple. This coal mine is regulated under the Act, and provided about 500 tons of coal in the month of July, 1981, which was processed by the subject tipple. There was no coal shipped to this tipple from any mine owned or operated by the Applicant or any other mine before July, 1981 or after July, 1981. At the hearing on temporary relief the Applicant introduced an agreement whereby the tipple in question would be used in the future almost exclusively by mines other than those mines owned by the Applicant.
>
> Under the facts of the case, the [*sic*] is the opinion of the undersigned that this tipple is neither at or near a minesite, nor is it operated in connection with a surface mine as defined by the Board in its' [*sic*] previous decisions.

Notices of appeal from this decision were filed both by the Debords and the other intervenors (Docket Nos. IBSMA 82-3-1 and 82-11, respectively), and briefs have been received from these parties as well as from Dinco. Subsequently, various ancillary motions from the intervenors and from OSM were also filed.[1]

Discussion

[1] The intervenors do not attempt to demonstrate how the plant in question is "at or near" a minesite. 30 CFR 700.5. Instead, they urge us to hold that nothing other than a loading facility need be "at or near" to be regulated, and that the plant in question is not a loading facility. This is to be accomplished by our finding that the preamble to the reenactment of 30 CFR 700.5 on Mar. 13, 1979 (44 FR 14915),[2] makes it clear that nearness is required only for the loading of coal and that no other listed activity need be "at or near" a minesite in order to be regulated by OSM. In order for us to make that finding, we must either overrule *Western Engineering, Inc.*, 1 IBSMA 202, 86 I.D. 336 (1979), and that line of cases culminating in *Reitz Coal Co.*, 3 IBSMA 260, 88 I.D. 745 (1981) and *Westbury Coal Mining Partnership* v. *OSM*, 3 IBSMA 402 (1981), or distinguish them because the instant plant was constructed after the enunciation of the preamble on Mar. 13, 1979. We decline to do either of these.

In *Western*, we noted that this preamble concerns the rules for a "Permanent Regulatory Program" (*see* 44 FR 14902 (Mar. 13, 1979)) and that the permanent program, unlike the initial one with which we are presently concerned, con-

[1] All motions not heretofore ruled upon are denied.

[2] Originally adopted in Dec. 1977. 42 FR 62639, 62676 (Dec. 13, 1977).

tains special performance standards (in 30 CFR Part 827) for processing plants and support facilities not located at or near a minesite. *Reitz* also contains acknowledgements of this distinction.[3]

In *Reitz,* the Board members all agreed on the principle that the Department, not the Board, should clarify the regulability of preparation plants. The majority stated that until such clarification is made by amending a regulation or a preamble to state in terms that some preparation facilities are to be treated otherwise, we will impose both the "in connection" and "at or near" requirements. We did this in order to resolve any doubt in favor of the regulated party who might be subjected to penalty.[4] The Department has not acted and we see no reason to deviate from this position merely by virtue of when a processing plant was constructed.[5]

Because the intervenors and OSM have made no attempt to show how a plant 25 miles from the minesite might be construed to be at or near the minesite, we find there has been no such showing. Consequently, the decision of the Hearings Division is affirmed.[6]

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE IRWIN DISSENTING:

With this decision my colleagues have gone astray. They have deviated from clear guidance in one of the principal aids available to us in carrying our administrative review functions on behalf of the Secretary, namely, the comments that accompany regulations promulgated to implement the statute. When the terms and applicabilitiy of the definition of surface coal mining operations were revised in 1979, the following guidance for interpreting that revised definition was published:

8. Changes have been made in the permit and performance standard provisions of the rules to reflect the Office's interpretation that *the phrase "at or near the minesite,"* used in the statutory definition of "surface coal mining operations," *modifies only "loading of coal."* The Office interprets the Act as setting no territorial limitation on its jurisdiction over other facilities identified in the statutory defini-

[3] In its construction of the permanent regulations, the district court found that "at or near" only modifies "loading of coal." *In re: Permanent Surface Mining Regulation Litigation,* Civ. No. 79-1144 (D.D.C. Feb. 26, 1980) (memorandum and order). This was the same court that interpreted the interim regulation. *In re: Surface Mining Regulation Litigation,* 452 F. Supp. 327, 456 F. Supp. 1301 (D.D.C. 1978). This question was not addressed in either of the earlier cases. It was answered administratively by our decision in *Western,* which was well before the 1980 decision on the permanent regulations, and an interpretation of which the district court, presumably, was aware. If the court had believed us to be wrong in our *Western* interpretation of the initial regulations, it could have straightened us out then. It did not and we do not feel bound by a decision which did not address the initial regulations in terms.

[4] Intervenors remind us of the rule of construction that remedial statutes are to be liberally construed. *Northeast Maine Terminal Co.* v. *Caputo,* 432 U.S. 249 (1977). There is a corresponding rule that any statute in derogation of the common law (viz., the right to utilize one's own property) is to be strictly construed. *Robert C. Herd & Co.* v. *Krawill Machinery Corp.,* 359 U.S. 297 (1959). Such "rules," then, are only bombast that justify, not rationally support, a decision.

[5] Intervenors tell us that in *Farmington Coal Co.,* 3 IBSMA 182, 88 I.D. 616 (1981), we held the amended definition in 30 CFR 700.5 to be applicable to the initial regulatory program. We did, indeed, as we do here. In *Farmington,* however, we were speaking of "gobpiles" which (1) are addressed in the amended definition, not merely its preamble, and (2) are not the subject of performance standards set forth only in the permanent program regulations.

[6] The dissent suggests that the people of Dinwood will be deprived of any protection against pollution by this decision. We do not enjoin them from access to other Federal agencies, state and county regulatory units, or the courts. We merely state that OSM has not been constituted to regulate this kind of activity during the initial regulatory program.

tion preceding "loading of coal." [Italics added.[1]]

We recognized that the revised definition of surface coal mining operations applied to both the initial and permanent regulatory programs in *Farmington Coal Co.*[2] For that reason I have taken pains to point out that, at least as far as I was concerned, the only reason we were not applying it in our previous decisions concerning coal processing facilities was that the enforcement actions involved in those cases occurred before the definition and its applicability were amended.[3] We had thought it would be unfair to apply the interpretation quoted in the comment above to activities that took place before it was published.

Apparently my colleagues think it is unreasonable to apply that interpretation at all during the initial program, even though its application is clearly intended by the comment, even though the interpretation has been affirmed more than once on judicial review,[4] and even though quite recently we were assured that the present policymakers in the Office of Surface Mining have adopted its application to the initial program.[5]

In this case not only the enforcement action but the construction of the processing facility itself occurred after the effective date of this interpretation. Thus, the only question should be whether that facility is operated in connection with a surface coal mining operation; if it is it should be regulated as a surface coal mining operation. In this case I answer that question affirmatively because the owner of the facility owns a mine that supplies a significant amount of the coal processed at the facility.[6] Under the interpretation published with the revised regulation, it does not matter that this mine is 20 or more miles away from the facility.

By ignoring this interpretation my colleagues allow the crushing and loading of hundreds of tons of coal to resume, unregulated so far as the surface mining act is concerned, within 300 feet of several residences[7] in Dinwood, Kentucky, because they deem the activity there is not a surface coal mining operation.[8] The people of

[1] 44 FR 14915, Mar. 13, 1979.

[2] 3 IBSMA 182, 88 I.D. 616 (1981): "This definition was made applicable during the initial regulatory program effective April 12, 1979 [5] (44 FR 14902 (Mar. 13, 1979); 44 FR 15485 (Mar. 14, 1979).)" *Id.* at 186–187, 88 I.D. at 619. Footnote 5 sets forth why this statements is so:

"[5] The definition of surface coal mining operations previously applicable to the initial regulatory program was contained in 30 CFR Chapter VII Part 700 as one of the 'General' regulations. (42 FR 62676 (Dec. 13, 1977).) The Mar. 13, 1979, amendment of 30 CFR Chapter VII recodified and revised Part 700. (44 FR 15312 (Mar. 13, 1979).) The revised definition appears in 30 CFR 700.5 as part of Subchapter A—General regulations. Subchapter A is 'intended to serve as a guide to the rest of the Chapter and to the regulatory requirements and *definitions generally applicable to the programs and persons covered by the Act.* (Italics added.) 30 CFR 700.1(a)." *Id.*

The Board's recognition of the applicabilitiy of the revised defintion to both the initial and the permanent regulatory programs came well after its decision in *Western Engineering, Inc.*, 1 IBSMA 202, 86 I.D. 336 (1979). The statement in footnote 9 of the decision in *Western* to the effect that the provisions of the permanent regulations are not relevant has thus been superseded by *Farmington.*

[3] *Reitz Coal Co.*, 3 IBSMA 260, 281–282, 88 I.D. 745, 756 (1981); *Westbury Coal Mining Partnership* v. *OSM*, 3 IBSMA 402, 406 (1981).

[4] *See In re: Permanent Surface Mining Regulation Litigation*, Civil Action No. 79–1144, (D.D.C., filed May 16, 1980), at 51–53; *Shawnee Coal Co.* v. *Andrus*, 661 F.2d 1083, 1093 (1981).

[5] Motion to vacate notice of violation, filed Mar. 1, 1982, by the Office of Surface Mining Reclamation and Enforcement.

[6] Transcript of Oct. 7–8, 1981, hearing at 23–24, 116.

[7] *See* 30 U.S.C. § 1272(e)(5) (Supp. II 1978).

[8] As to whether the crushing activity brings this facility within the meaning of the terms "physical processing"

Continued

Dinwood will marvel at what a wondrous thing the law is.

I DISSENT.

WILL A. IRWIN
Chief Administrative Judge.

ALASKA RAILROAD

7 ANCAB 8

Decided *March 26, 1982*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management AA-6661-A, B, C, H.

Remand.

1. Alaska Native Claims Settlement Act: Definitions: Withdrawal for National Defense Purposes—Alaska Native Claims Settlement Act: Withdrawals and Reservations: Generally

Where a public land order withdraws lands under the jurisdiction of the Bureau of Land Management as a source of materials for use in construction and maintenance of Federal projects, and the Alaska Railroad is not indicated expressly in the public land order as an agency benefiting from the withdrawal, the Railroad cannot invoke the national defense exception in § 11(a) of ANCSA to defeat Native selection of the withdrawn lands.

2. Alaska Native Claims Settlement Act: Withdrawals and Reservations: Generally—Federal Land Policy and Management Act of 1976: Generally

Where lands are withdrawn by public land order within the jurisdiction of the Bureau of Land Management, such lands are not formally under the administration of the Department of Transportation and 43 U.S.C. § 1714(i) (1976) does not apply to require the consent of the Secretary of Transportation to conveyance of such land to a Native corporation by the Bureau of Land Management under ANCSA.

3. Alaska Native Claims Settlement Act: Withdrawals and Reservations: Generally—Federal Land Policy and Management Act of 1976: Generally

The Secretary's power to delegate his withdrawal authority is limited by 43 U.S.C. § 1714(a) (1976). However, where lands under withdrawal for other purposes are withdrawn for Native selection by § 11(a)(1) of ANCSA, subject to § 3(e) of the Act, such withdrawal is mandated by Congress and authority to revoke the previous withdrawal, as between the Secretary and the Bureau of Land Management, is not in issue.

4. Alaska Native Claims Settlement Act: Definitions: Federal Installation—Alaska Native Claims Settlement Act: Definitions: Holding Agency—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Remand

Where the Alaska Railroad claims use of a tract of land and thus nominally meets the definition of the term "holding agency" in 43 CFR 2655.0-5(a), and where factual and legal questions relating to the issue of whether the Railroad actually used the land as claimed have not yet been determined by the BLM, the Board concludes that a finding on whether the ARR is the holding agency is properly an initial part of the § 3(e) determination, to be made by BLM if a remand is ordered.

5. Alaska Native Claims Settlement Act: Definitions: Frivolous Appeal—Alaska Native Claims Settlement Act: Alaska Native Claims Appeals Board: Appeals: Remand

Where regulations in 43 CFR 2655.4(b) provide that the Board must remand an appeal to the Bureau of Land Management for a § 3(e) determination unless the appeal is found to be "frivolous," and the term "frivolous" is not defined in such regulations, the Board will find the appeal

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or "other processing or pre-preparation" in the definition, *see* comment 6, 44 FR 14914 (Mar. 13, 1979).

frivolous only if the appellant can make no rational argument on the law or facts in support of his claim.

6. Alaska Native Claims Settlement Act: Definitions: Frivolous Appeal—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Remand

Where the Alaska Railroad raises issues of fact and law which were addressed for the first time in regulations implementing § 3(e) of ANCSA, and the Bureau of Land Management has not yet made a § 3(e) determination on the lands in dispute, the Railroad's appeal is not frivolous and the appeal will be remanded to the Bureau of Land Management for consideration of these issues in a § 3(e) determination.

APPEARANCES: William Wong, Esq., and David Roderick, Esq., for the Alaska Railroad; M. Francis Neville, Esq., and Dennis J. Hopewell, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; Edward G. Burton, Esq., for the Eklutna, Inc.; Joyce E. Bamberger, Esq., for Cook Inlet Regional Corp.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeal

The Appellant Alaska Railroad seeks to prevent conveyance to Eklutna, Inc., of two tracts of land: a 310-acre parcel claimed to be used as part of a gravel reserve and a 0.06-acre parcel within the Railroad's right-of-way.

The Board finds that the appellant is not protected against such conveyance by reason of coming within the national defense exception in § 11(a), or by reason of procedural restrictions in the Federal Land Policy and Mangement Act of 1976 affecting conveyance of lands administered by an agency other than the Department of the Interior.

The Board, in a majority opinion, with Judge Brady dissenting, finds that the appeal is not frivolous and remands to the Bureau of Land Management for a determination under § 3(e) of ANCSA, and implementing regulations, as to whether the Alaska Railroad is a "holding agency" within the meaning of 43 CFR 2655.0-5(a), and whether the lands claimed by the Railroad are actually used in connection with the administration of a Federal installation.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977) (ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Decision

The Bureau of Land Management (BLM), on Dec. 21, 1978, issued the decision here appealed which approved certain lands for conveyance to Eklutna, Inc. The Alaska Railroad (ARR) timely appealed this decision, contending that two parcels of land to be conveyed were not "public lands" as defined by § 3(e) of ANCSA, and therefore were not withdrawn for

selection or conveyance under that Act. Alternatively, the ARR contends that even if the parcels were public lands, they were protected from conveyance to Native corporations by other means.

The two parcels of land in question are described as:

> (1) Land withdrawn and reserved in 1962 by Public Land Order (PLO) 2672 "under the jurisdiction of the Bureau of Land Management, Department of the Interior, as an administrative site and as a source of materials for use in the construction and maintenance of Federal projects," and
> (2) 0.06 acre lying within Lot 15, Sec. 5, T. 15 N., R. 1 W., Seward Meridian, Alaska, and within one hundred feet of the centerline of the adjacent Alaska Railroad track, thus within the Railroad's right-of-way.

As to the lands withdrawn and reserved by PLO 2672, the ARR relies on three arguments: (1) that even if they are public lands, the lands in question are withdrawn for national defense purposes and therefore are exempt from withdrawals for Native selection under ANCSA; (2) that even if they are public lands, the Federal Land Policy and Management Act of 1976, P.L. 94-579, Title I, § 102, Oct. 21, 1976, 90 Stat. 2744, 43 U.S.C. § 1701 *et seq.* (1976) (FLPMA), prohibits transfer of the lands in question; and (3) that the Eklutna Gravel Reserve (comprising both PLO 2672 and the adjacent PLO 755) is an "area disturbed but not depleted" within the meaning of the regulations implementing § 3(e) of ANCSA and therefore does not constitute "public land" withdrawn for Native selection and conveyance under ANCSA.

If PLO 2672 was withdrawn for national defense purposes, then this appeal must be dismissed with respect to such lands because lands withdrawn for national defense purposes are excepted from the withdrawal under § 11(a)(1) of ANCSA for Native selection under § 12 of ANCSA. After stating which public lands were withdrawn for Native selection, § 11(a)(1) provides, in part: "The following lands are excepted from such withdrawal * * * lands withdrawn or reserved for national defense purposes."

The ARR argues that PLO 2672 was withdrawn for national defense purposes because those lands were withdrawn for the benefit of the ARR and the ARR was established, in part, to promote the national defense. The ARR supports its position by citing its enabling legislation for the proposition that it is an instrumentality of national defense. 43 U.S.C. § 975 (1976) states, in pertinent part:

> * * * to designate and cause to be located a * * * railroad in * * * Alaska * * * so as best to aid in the development of the agricultural and mineral or other resources of Alaska, and the settlement of the public lands therein, and so as *to provide transportation of * * * troops, arms, munitions of war,* the mails,* * * and for the transportation of passengers and property. [Italics added.]

The Board does not accept the position taken by the ARR and concludes that PLO 2672 was not withdrawn for national defense purposes within the meaning of the exception in § 11(a)(1). PLO 2672 withdrew lands "under the jurisdiction of the Bureau of Land Management, Department of the Interior, as an administrative site and as a source of materials for use in the construction and maintenance of Federal projects."

In *Appeal of Paug-Vik, Inc., Ltd.*, 3 ANCAB 49, 85 I.D. 229 (1978) [VLS 77-2], the Board found that nothing less than a formal withdrawal on behalf of a national defense agency was sufficient to trigger the national defense exception. In that case, the Air Force, under permit, had been using land withdrawn for the Federal Aviation Administration (FAA). Following notice of FAA's intention to relinquish the lands, the Air Force had applied for withdrawal, in its name, of the lands it was using. Due to suspension of all land disposition actions pending enactment of ANCSA, the withdrawal application was not processed and the land was subsequently selected by a Native corporation under ANCSA.

The issue on appeal was whether the Air Force was protected by the national defense exception. The Board found that it was not. The Board ruled that while the Air Force application for withdrawal segregated the lands for disposition under the public land laws, the segregation was not equivalent to a withdrawal for national defense purposes as contemplated by § 11(a) and, lacking a formal withdrawal, the Air Force was required to seek a determination by BLM of lands actually used, in order to protect such lands under § 3(e).

The ARR's situation is similar. PLO 2672 withdrew lands "under the jurisdiction of the Bureau of Land Management, Department of the Interior, as an administrative site and as a source of materials for use in the construction and maintenance of Federal projects." (PLO 2672, Appendix F, Response of Alaska Railroad, July 12, 1979.)

Case file A-054173, which sets forth the history of PLO 2672 and is a part of the appeal record, indicates that this withdrawal was initially requested by and for the benefit of the ARR. On Apr. 12, 1961, the General Manager of the ARR requested "withdrawal of an additional gravel pit site adjacent to our existing gravel reserve at Eklutna, P.L.O. 755, dated September 21, 1951." The land applied for was the 310 acres now in dispute. The ARR was, at that time, an agency of the Department of the Interior. Their request was approved by the Assistant Secretary, Public Land Management, and forwarded to BLM for processing. BLM's Land Office report notes, as the purpose of the withdrawal, that "[t]he applicant desires the subject lands for use as a gravel reserve due to depletion and conversion to other uses of their gravel reserves in Anchorage." (United States Department of the Interior, Bureau of Land Management, Area 4—Anchorage Land District Report (Dec. 12, 1961), at 2.) Noting that there were no protests or prohibitive conflicts, the report states under the heading, "Resource Management," "As the prime purpose of the reservation is to assure them a future source of gravel, materials should be reserved from disposition to private interests. Reservation of materials would not prohibit their use by governmental agencies." (*Report, supra,* at 4.)

The report concludes with the recommendation that the application be granted and a PLO issued which would "reserve the subject land for the benefit of the Alaska Railroad for use as a gravel reserve." (*Report, supra,* at 5.)

The resulting PLO 2672, however, did not name the ARR but instead withdrew the land "under the jurisdiction of the Bureau of Land Management, Department of the Interior, as an administrative site and as a source of materials for use in the construction and maintenance of Federal projects."

The transmittal letter with the draft PLO explained this by stating, "The draft order transmitted hereby has been designed to meet the needs of the Alaska Railroad, and at the same time make the gravel deposits available for use in the construction and maintenance of other Federal projects." (Memorandum to Secretary of the Interior, from Director, Bureau of Land Management, Subject: Proposed Land Order, Apr. 30, 1962.)

The arrangement was questioned by the Alaska State Director of BLM, who queried the Director of BLM on May 14, 1962, as follows:

> Reference is made to the subject public land order which originated from a request by the Alaska Railroad to withdraw approximately 310 acres of land for use as a gravel reserve. The recommendations in our field report were in accord with their request. The resulting public land order withdrew the lands "under the jurisdiction of the Bureau of Land Management, Department of the Interior, as an administrative site and as a source of materials for use in the construction and maintenance of Federal projects."
>
> Does this wording constitute an error or is it the result of negotiations of which we were not informed? Unless there is a valid reason for withdrawing the land under the jurisdiction of the Bureau of Land Management, we recommend that PLO 2672 be amended to the effect that the lands are reserved under the jurisdiction of the Alaska Railroad, Department of the Interior, for use as a gravel reserve.

The response simply recited, "Public Land Order No. 2672 was designed to meet the needs of the Alaska Railroad, and at the same time to make the gravel deposits available for use in the construction and maintenance of other Federal projects." No further action was taken, although after reviewing the PLO in 1972, the Anchorage District Manager of BLM referred the case file back to the State Office, recommending contact with the Railroad to ascertain its need for the withdrawal and, if justified, transfer of jurisdiction to them.

Thus, like the Air Force in *Paug-Vik, supra,* the ARR had sought a withdrawal in its name, but for administrative reasons had not received it at the time ANCSA was enacted.

[1] Nothing contained in the language of PLO 2672 suggests that the ARR has an interest in the lands withdrawn. Where a public land order withdraws lands under the jurisdiction of the BLM as a source of materials for use in construction and maintenance of Federal projects, and the ARR is not indicated expressly in the public land order as an agency benefiting from the withdrawal, the ARR cannot invoke the national defense exception in § 11(a) of ANCSA to defeat Native selection of the withdrawn lands. It is not necessary to reach the question of whether the ARR's activities can be considered to be for national defense purposes within

the meaning of the exception in § 11(a).

The ARR advances a second position which would protect PLO 2672 from conveyance to the Native corporation under ANCSA even if the lands in question were found to be public lands. ARR argues that FLPMA prohibits the transfer of ARR lands. The ARR refers to two specific provisions of FLPMA in this regard. First, the ARR refers to 43 U.S.C. § 1714(i) (1976) which states in pertinent part:

> In the case of lands under the administration of any department or agency other than the Department of the Interior, the Secretary shall make, modify, and revoke withdrawals only with the consent of the head of the department or agency concerned.

The ARR argues that the Secretary of Transportation has not consented to the modification or withdrawal of railroad lands in PLO 2672 and, therefore, BLM is prohibited from transferring those lands. However, the lands in question are not formally under the administration of the Department of Transportation but the Department of the Interior, and therefore the Board concludes that 43 U.S.C. § 1714(i) (1976) does not apply.

[2] Where lands are withdrawn by public land order within the jurisdiction of the BLM, such lands are not formally under the administration of the Department of Transportation and 43 U.S.C. § 1714(i) (1976) does not apply to require the consent of the Secretary of Transportation to conveyance of such land to a Native corporation by the BLM under ANCSA.

Second, according to 43 U.S.C. § 1714(a) (1976), the Secretary of the Interior is

> authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section. The Secretary may delegate this withdrawal authority only to individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate.

The ARR argues that in light of this subsection of FLPMA, the PLO lands cannot be transferred to Eklutna, Inc. because the local BLM officials do not have the power to make, modify, extend, or revoke withdrawals, for they are not "individuals in the Office of the Secretary."

The Board cannot agree. Sec. 11(a)(1) of ANCSA withdrew for Native selection all public lands in the State except lands in the National Park System and lands withdrawn or reserved for national defense purposes other than Naval Petroleum Reserve Numbered 4. Lands withdrawn for other purposes at the time of enactment of ANCSA were not, because of such withdrawal, exempt from the general withdrawal provisions of § 11(a)(1). Insofar as such lands, withdrawn for the benefit of various nondefense agencies, were not "actually used" as contemplated by § 3(e) of ANCSA, they were public lands within the broad definition of that section and therefore were withdrawn, pursuant to § 11(a)(1) for Native selection. The record does not indicate that PLO 2672 has been formally revoked. If it has,

in connection with withdrawals under § 11(a)(1) of ANCSA, then such revocation was mandated by Congress.

[3] The Secretary's power to delegate his withdrawal authority is limited by 43 U.S.C. § 1714(a) (1976). However, where lands under withdrawal for other purposes are withdrawn for Native selection by § 11(a)(1) of ANCSA, subject to § 3(e) of the Act, such withdrawal is mandated by Congress and authority to revoke the previous withdrawal, as between the Secretary and BLM, is not in issue.

The central issue raised by the ARR concerns whether lands in PLO 2672 are public lands within the meaning of § 3(e) of ANCSA. It is the ARR's contention, based on regulations implementing § 3(e), that they are not. The ARR designates both PLO 2672, within the conveyance area, and the adjacent PLO 755, outside the conveyance area, as the "Eklutna Gravel Reserve." They contend that the entire "Reserve" is one "area disturbed but not depleted" within the meaning of regulations implementing § 3(e); accordingly, although all gravel extraction to date has taken place in PLO 755 and none has been performed in PLO 2672, nevertheless PLO 2672, as part of the overall "area disturbed," was "actually used" by the ARR and was not public land available for selection by a Native corporation under ANCSA.

At the time this appeal was filed, no regulations had been published to implement § 3(e). The Board, on Nov. 29, 1979, suspended the issue relating to PLO 2672 pending the issuance of the final regulations. On the same basis, the Board suspended the right-of-way issue on Jan. 29, 1980.

The final § 3(e) regulations were published Oct. 22, 1980, at 45 FR 70204 [effective date Nov. 21, 1980], and established a procedure for making future § 3(e) determinations by BLM. They also address the situation where an appeal is taken from a decision to issue a conveyance on which the BLM neglected to make a § 3(e)(1) determination. Under these circumstances, 43 CFR 2655.4(b) provides that "the matter shall be remanded by the Alaska Native Claims Appeals Board to the Bureau of Land Management for a determination pursuant to sec. 3(e)(1) of the act and these regulations." The only qualification on this mandatory remand is the following provision: "*Provided,* That the holding agency or Native corporation has reasonably satisfied the Board that its claim is not frivolous." Thus, when a holding agency appeals a decision on the basis that BLM neglected to make a determination pursuant to § 3(e)(1), and the Alaska Native Claims Appeal Board does not find such claim frivolous, then the Board must remand the matter to BLM for such a determination.

A threshold issue in connection with the requested remand is whether the ARR, or the BLM, should be considered the holding agency for the purpose of seeking a § 3(e) determination under 43 CFR 2655.4.

If BLM is the holding agency, the issue of whether the appeal must be remanded for a § 3(e) determination is moot, since BLM made the decision here appealed

and opposes remand. If the ARR is considered the holding agency, then the remand must be made unless the Board finds their position frivolous.

Eklutna contends that BLM, not the ARR, is the holding agency because, under PLO 2672, BLM has jurisdiction over the lands withdrawn.

The term "holding agency" is defined in 43 CFR 2655.0–5(a) as "any Federal agency claiming use of a tract of land subject to these regulations."

This definition was not included in the proposed § 3(e) regulations. (44 FR 54254, Sept. 18, 1979.) The comment preceding the final regulations explains that the term "holding agency" was added to the definition section in response to a comment that the agency actually controlling the land might not be the agency which was using the land on Dec. 18, 1971 (45 FR 70204, Oct. 22, 1980). Neither the regulations nor § 3(e) of the Act expressly require a formal withdrawal on behalf of an agency as a prerequisite to that agency's proof of actual use under § 3(e).

Usage of the term "holding agency" in the § 3(e) regulations is far from consistent or clear in meaning. On one hand, references to the holding agency are phrased in terms of use, claimed use, actual control, and the like. The means by which the agency "controls," whether through formal withdrawal, through permit from the agency having such a withdrawal, or simply through the fact of claimed use of the land, is never specified.

On the other hand, the responsibilities of the holding agency with regard to BLM's § 3(e) determinations seem to be more consistent with having a formal withdrawal. Regulations in 43 CFR 2655.3, Determination Procedures, place on the holding agency the total burden of proving use for the § 3(e) determination, and provide expressly that if the holding agency fails to sustain this burden, the lands in dispute will be conveyed to the selecting Native corporation. Thus, if the holding agency was considered to be an agency using land by permit arrangement with an agency for which the land was formally withdrawn, the agency under permit would bear the responsibility and the risk of losing that land to the Federal Government. Such a responsibility would seem more appropriately to be borne by the agency in whose name lands were withdrawn.

As previously discussed, the record file of PLO 2672 withdrawal discloses application by the ARR for the withdrawal, and a clear intention on the part of BLM to benefit the ARR. There is no indication that the ARR was denied the withdrawal in favor of another applicant; rather, the record indicates a belief by BLM that the withdrawal was for the ARR's benefit and that the PLO by express wording should have placed jurisdiction in the ARR rather than in BLM. The ARR's claim of connection with this

withdrawal does not appear to be without foundation.

The ARR claims use of the lands in question, and whether or not their claim is warranted would be the subject of the requested § 3(e) determination.

The term "holding agency" is defined for the first time in the context of ANCSA in the regulations here discussed, under which a § 3(e) determination would be made.

[4] Where the ARR claims use of a tract of land and thus nominally meets the definition of the term "holding agency" in 43 CFR 2655.0–5(a), and where factual and legal questions relating to the issue of whether the ARR actually used the land as claimed have not yet been determined by the BLM, the Board concludes that a finding on whether the ARR is the holding agency is properly an initial part of the § 3(e) determination, to be made by BLM if a remand is ordered.

As to the direct question of whether the ARR's claim to PLO 2672 is frivolous, BLM affirms that it never made a § 3(e)(1) determination with respect to the ARR's claim to lands withdrawn by PLO 2672, but that a remand for such a determination is inappropriate because the ARR's claim is "frivolous," and therefore should be dismissed. The BLM's argument is based upon regulations in 43 CFR 2655.2(b)(3) which provide that tracts to be retained by Federal agencies may include:

> (iv) Lands containing gravel or other materials used in direct connection with the agency's purpose and not used simply as a source of revenue or services. *The extent of the areas reserved as a source of materials will be the area disturbed but not depleted* as of the date of the end of the appropriate selection period. [Italics added.]

It is undisputed that the ARR has never removed gravel from the lands in PLO 2672. Since no portion of the disputed lands has ever been disturbed for the purpose of removing gravel by the ARR, BLM concludes initially that the above-quoted regulations do not permit any portion of the tract to remain in Federal ownership as a gravel reserve. Therefore, argues BLM, the ARR's claim to these lands must be "frivolous" under 43 CFR 2655.4.

The ARR takes the position that PLO 2672, and PLO 755 (the existing gravel pit used by the ARR adjacent to PLO 2672, and outside the conveyance area), are part of one gravel reserve. This one combined gravel reserve is an "area disturbed but not depleted" within the meaning of 43 CFR 2655.2(b)(3)(iv) as quoted above.

The ARR also contends, in its response of Feb. 12, 1981, that it is necessary for BLM to determine whether PLO 2672 is needed as a buffer zone in connection with gravel mining operations pursuant to 43 CFR 2655.2(b)(3)(ii).

Eklutna, Inc. concurs with BLM that the ARR claim is frivolous because the land in question is untouched and 43 CFR 2655.2(b)(3)(iv) requires that it be "disturbed but not depleted." Eklutna also argues that another portion of that regulation precludes the ARR's claim of actual use of the entire alleged gravel reserve within the contemplation of § 3(e). 43 CFR 2655.2(b)(3)(iv) provides the Federal Government may retain "[l]and containing

gravel * * * used in direct connection with the agency's purpose and *not used simply as a source of revenue or services."* [Italics added.] Eklutna, Inc., contends that ARR, in its utilization of PLO 755, used it is simply "a source of revenue or services," therefore could not now claim retention under the above-cited regulation. Eklutna opposes the ARR's position on buffer zones, arguing that PLO 2672 is located between PLO 755 and the sea, thus buffering PLO 755 from nothing; that PLO 2672 is too large to constitute a buffer zone as the term is commonly understood; and that the concept is incompatible with ANCSA in that it sanctions exempting additional land from Native selection to protect Natives against noxious uses of land initially taken improperly from them.

With regard to the portion of this appeal concerning the railroad right-of-way in Lot 15, Sec. 5, T. 15 N., R. 1 W., S.M., the parties agree that this issue should be remanded back to BLM for a determination pursuant to § 3(e)(1) of the Act as provided for by 43 CFR 2655.4(b).

The Board concludes from its reading of 43 CFR 2655.4(b), and facts as they have been alleged by the parties, that both the issue concerning PLO 2672 and the question of the ARR right-of-way in Lot 15, Sec. 5, T. 15 N., R. 1 W., S.M., must be remanded to BLM for determination pursuant to § 3(e)(1) of the Alaska Native Claims Settlement Act of 1971 (43 U.S.C. § 1601 *et seq.* (1976)) and the regulations (43 CFR 2655.0-3—43 CFR 2655.4).

The BLM decision here appealed was issued before promulgation § 3(e) regulations, and the ARR's basis for appeal is that BLM did not make a § 3(e) determination. Accordingly, the Board must remand the appeal to BLM for a § 3(e) determination unless it determines that the appeal is frivolous within the meaning of 43 CFR 2655.4(b).

The word "frivolous" is not defined in the regulations, but the drafters of the regulation equated the term "frivolous" with "baseless," as indicated by the supplementary information published with the regulation at page 70206 of the *Federal Register,* Vol. 45, No. 206, Wednesday, Oct. 22, 1980. There the drafter states: "Paragraph (b) of § 2655.4 was modified because the comments suggested that *baseless appeals* might be filed on any determination that was objectionable to a Federal agency or a Native interest." [Italics added.]

The Federal courts have interpreted the term, "frivolous appeal." In a habeas corpus case, the court discussed the term as follows:

> There is a vast difference between a weak case, even a very weak case, and a frivolous one. In this regard the test employed by the Ninth Circuit is a good one: "it is frivolous only if the applicant can make no rational argument on the law or facts in support of his claim for relief". *Blair* v. *California,* 340 F.2d 741, 742 (9th Cir.1965). It may well be that there are arguments that can be made on behalf of the petitioner that are well beyond the law's existing frontier but well within the frontier of rationality. Only when the frontier of the latter is passed does the case become frivo-

lous. Sokol, *Federal Habeas Corpus,* 2d Ed., Sect. 26, p. 196 (1969).

Dillingham v. *Wainwright,* 422 F. Supp. 259, 261 (D.C. Fla. 1976).

[5] Where regulations in 43 CFR 2655.4(b) provide that the Board must remand an appeal to BLM for a § 3(e) determination unless the appeal is found to be "frivolous," and the term "frivolous" is not defined in such regulations, the Board will find the appeal frivolous only if the appellant can make no rational argument on the law or facts in support of his claim.

The ARR's position turns on interpretation of the word "area." With respect to the lands withdrawn in 1962 by PLO 2672, the ARR claims that such lands, in conjuction with land in PLO 755 which is an existing gravel pit, comprise one gravel reserve which, taken as a whole, is an "area" disturbed but not depleted. Thus, the ARR claims that their use of land withdrawn by PLO 2672, outside the conveyance area, is in some manner inseparable from their use of land, withdrawn by PLO 755, inside the conveyance area. The ARR's contention that both PLO's were issued for their benefit and that lands within the two PLO's comprise one reserve for purposes of use, is not without foundation in view of the history of PLO 2672, previously discussed.

While both Eklutna and BLM challenge the ARR's position, the Board does not reach the merits because there has been no determination by BLM as to whether the ARR actually uses the land in question pursuant to § 3(e) and the 1980 implementing regulations. The ARR's claim raises the following questions of law and fact:

1. Is the ARR a holding agency as defined in 43 CFR 2655.0-5(a)?

2. Do PLO 755 and PLO 2672 together comprise one gravel reserve so as to constitute one "area" within the meaning of 43 CFR 2655.2(b)(3)(iv)?

3. If so, does the area which is disturbed but not depleted extend into PLO 2672?

4. Does all or any portion of PLO 2672 constitute a buffer zone which must be retained by the ARR pursuant to 43 CFR 2655.2(b)(3)(ii)?

5. Does all or any portion of PLO 2672 constitute unimproved lands used for storage which must be retained by the ARR pursuant to 43 CFR 2655.2(b)(3)(iii)?

These matters are addressed for the first time in the new implementing regulations and should be a part of the § 3(e) determination by BLM.

[6] Where the ARR raises issues of fact and law which were addressed for the first time in regulations implementing § 3(e) of ANCSA, and BLM has not yet made a § 3(e) determination on the lands in dispute, the ARR's appeal is not frivolous and the appeal will be remanded to BLM for consideration of these issues in a § 3(e) determination.

With regard to the question ARR's right-of-way claim within Lot 15, Sec. 5, T. 15 N., R. 1 W., S.M., all parties agree that the issue should be remanded to BLM for a § 3(e)(1) determination. The Board agrees. The record indicates that there is no dispute as to the fact that the appellant uses

the right-of-way, and therefore as to this issue, its claim cannot be considered frivolous. The only issue in dispute is whether a fee or easement interest should be retained in Federal ownership.

43 CFR 2655.2(c) provides as follows:

> (1) Generally, full fee title to the tract shall be retained; however, where the tract is used primarily for access, electronic, light or visibility clear zones or right-of-way, an easement may be reserved in lieu of full fee title where the State Director determines that an easement affords sufficient protection, that an easement is customary for the particular use and that it would further the objectives of the act.
>
> (2) Easements reserved in lieu of full fee title shall be reserved under the provisions of section 17(b) of the act and § 2650.4-7 of this title.

It is clear from the foregoing provisions that the State Director is required to decide whether a fee or easement interest is to be reserved. In this case, no such decision has been made. Since the appellant's claim is not frivolous and since BLM failed to make a § 3(e) determination for these lands, a remand for a finding on the interest to be reserved is required pursuant to 43 CFR 2655.4(b).

The finding that this appeal is not frivolous is made pursuant to 43 CFR 2655.4(b) for the sole purpose of determining whether remand for a § 3(e) determination is precluded. This finding does not reach the merits of the appeal and should not be considered by BLM as a factor in that determination.

Accordingly, the Board hereby remands this appeal to BLM for action consistent with the findings discussed herein.

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

ADMINISTRATIVE JUDGE BRADY DISSENTING:

I disagree with the majority opinion that the lands withdrawn by PLO 2672 should be remanded to the Bureau of Land Management for a § 3(e) determination on behalf of the Alaska Railroad. I conclude that the ARR's claim to these lands is frivolous, as that term is defined by the Board in this decision: "[T]he Board will find the appeal frivolous only if the appellant can make no rational argument on the law or facts in support of his claim."

I find that the ARR has not made the one rational argument of law or fact required to meet this test.

The ARR's claim of use to PLO 2672 is based on a single premise: that PLO 2672 is part of one gravel reserve—which it calls the Eklutna Gravel Reserve—comprising both PLO 755 and PLO 2672.

The ARR's insistence that PLO 2672 cannot be considered by itself, but must be considered with PLO 755 as a single ARR gravel reserve is critical for two reasons: The regulation determining which gravel lands may be retained by Federal agencies flatly requires evidence of use; [1] and the uncon-

[1] The regulation establishing which gravel lands will be retained by a Federal agency states: "The extent of

Continued

tested fact of this appeal is that the ARR has never used the land in PLO 2672 for any purpose.

The inescapable conclusion is that the ARR has no basis to argue that PLO 2672, by itself, is an "area disturbed but not depleted."

The record does show that the ARR has extracted gravel from an adjacent withdrawal, PLO 755. Being unable to assert use of PLO 2672, by itself, the ARR bases its entire claim on its assertion that PLO 755 and PLO 2672 constitute one Railroad gravel reserve and it is this one gravel reserve that is the "area disturbed but not depleted." (Answer to Motion for Remand and Dismissal, Dec. 29, 1980.)

All of the ARR's claims to the lands within PLO 2672, including its claims to buffer zone areas and storage areas, pursuant to § 2655.2(b)(3)(ii) and (iii), are based on the premise that the lands in that withdrawal are part of a single Railroad gravel reserve, and thus are Railroad lands.

It is evident that if PLO 2672 is not part of a single Railroad gravel reserve, the Railroad's claims fail. Therefore, it is this assertion—that PLO 2672 and PLO 755 constitute a single Railroad gravel reserve—that must be supported by at least one rational argument of fact or law to meet the test of a frivolous claim.

A close examination of the record shows that the Railroad's rationale for finding that the two PLO's constitute one gravel reserve is based entirely upon its own conclusion that this is so:

> Just as PLO 689 and PLO 2308 are both *considered* by the Railroad to be one explosive storage reserve, The Alaska Railroad *considers* PLO 2672, the public land order which withdrew the land under appeal, and PLO 755 to be part of one reserve. See Appendices D, E, F, H, I, and J. [Italics added.]

Response of the Alaska Railroad, July 12, 1979, at 5.

The Railroad does not provide any further explanation; and further explanation is required since the exhibits referred to clearly show that while the Railroad has treated PLO 689 and PLO 2308 as one reserve, it has treated PLO 755 and PLO 2672 as separate reserves.

PLO 689 and PLO 2308 are identified, in Appendix D, as the *Eagle River Explosive Storage Reserve.* Both are withdrawn pursuant to the Alaska Railroad's Enabling Act (43 U.S.C. § 975 *et seq.* (1976)), for the identical purpose of "use by the Alaska Railroad, Department of the Interior, for storage of explosives." The holding agency is identified as the Alaska Railroad.

PLO 755 is identifed, in Appendix E, as the *Eklutna Gravel Reserve.* It is withdrawn pursuant to the Alaska Railroad's Enabling Act, *supra,* for "use of the Alaska Railroad * * * as a source of gravel." The holding agency is identified as the Alaska Railroad.

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the areas reserved as a source of materials will be the area *disturbed but not depleted.*" (43 CFR 2655.2(b)(3)(iv).) The "disturbed but not depleted" language represents a much stricter standard than that proposed for comment on Sept. 18, 1979 (44 FR 54254). The proposed regulation allowed both for consideration of "*projected prudent and reasonable needs* of the agency for the material at that location in the immediate future" and that the "*actual use of areas * * * includes a reasonable extension,* as determined by the Director, *of present use* into areas where the material is available." (Sec. 2655.0-5(a)(4).) All language allowing consideration of "projected needs," and "reasonable extensions" was deleted from the final regulations. [Italics added.]

PLO 2672 is identified, in Appendix F, as the *BLM-Railroad Withdrawal.* It is shown, in Appendix J, to be withdrawn pursuant to Executive Order No. 10335 of May 26, 1952, under the jurisdiction of the Bureau of Land Management, Department of the Interior, as an administrative site and as a source of materials for use in the construction and maintenance of Federal projects. The holding agency, in Appendix F, is identified as the Bureau of Land Management; the Alaska Railroad with respect to its right-of-way.

The Railroad's own exhibits identify PLO 755 and PLO 2672 as separate reserves, withdrawn under two separate authorities; under the administration of two separate agencies; for two separate purposes; and only one, PLO 755, for the use of the Alaska Railroad.

The Railroad cannot advance the argument that it either requested to use, or did use, PLO 2672 for a purpose connected with its use of PLO 755 because the fact is uncontested that it made absolutely no use of the withdrawn lands for any purpose, during the entire 20-year withdrawal period.

The Railroad cannot advance the argument that PLO 2672 was withdrawn as an addition to PLO 755, because the withdrawal order does not mention PLO 755.

The Railroad cannot advance the argument that because PLO 2672 and PLO 755 share a common boundary, they must be considered as one reserve. The fact of a common boundary does not, in itself, establish any ownership rights to adjacent land.

The Railroad cannot advance the argument that PLO 2672 was withdrawn for its particular benefit, because the withdrawal order states that it is for the use "of Federal projects."

Apart from repeatedly insisting that the two PLOs are part of one gravel reserve, and assigning a name to that reserve, the Railroad advances no legal or factual rationale on which such conclusion might be based.

If there is no basis to consider PLO 2672 as part of a single Railroad gravel reserve along with PLO 755, then there is no basis on which to remand for a § 3(e) determination.

Since the Board has concluded, earlier in this remand, that PLO 2672 does not, as a matter of law, constitute "railroad lands" for purposes of the Railroad's claim to a national withdrawal exception or protection under FLPMA, it is difficult to comprehend the jump in logic that leads the Board to conclude that PLO 2672 can be construed as "railroad lands" for purposes of a § 3(e) determination.

The Railroad's mere assertion that it considers PLO 2672 and PLO 755 to constitute one railroad gravel reserve does not constitute a rational argument of fact or law. I cannot conclude that an unreasoned assertion defeats the "frivolous case" test established by this decision.

JUDITH M. BRADY
Administrative Judge

ROGER ST. PIERRE & THE ORIGINAL CHIPPEWA CREE OF THE ROCKY BOY'S RESERVATION *v.* COMMISSIONER OF INDIAN AFFAIRS

9 IBIA 203

Decided *March 30, 1982*

Appeal from the decision of the Acting Deputy Commissioner of Indian Affairs affirming decisions of the Area Director, Billings Area Office, and the Superintendent of the Rocky Boy's Agency whereby the Bureau of Indian Affairs refused to recognize actions of the Chippewa Cree Business Committee which require Bureau of Indian Affairs review or approval because of violations of the Chippewa Cree tribal constitution by tribal officials.

Affirmed.

1. Board of Indian Appeals: Jurisdiction

The jurisdiction of the Board of Indian Appeals is governed by 43 CFR 4.330 (a) and (b).

2. Board of Indian Appeals: Jurisdiction

The jurisdiction of the Board of Indian Appeals is not determined by the characterization or descriptive title placed on agency action by the deciding official.

3. Administrative Procedure: Administrative Review—Board of Indian Appeals: Jurisdiction

The characterization of a decision as "discretionary" is a legal conclusion and the product of a legal analysis.

4. Administrative Procedure: Administrative Review—Appeals—Bureau of Indian Affairs: Administrative Appeals: Generally

The Board of Indian Appeals is bound by statutes, regulations, case law, and principles of judicial self-restraint not to interfere with substantive decisions of the BIA issued under its discretionary authority.

5. Indians: Guardianship—Indians: Trusts

The United States is charged with the responsibility of safeguarding, from both external and internal threats, the political existence of Indian tribes, including protecting and guaranteeing tribal self-government and "the political rights of Indians."

6. Indians: Guardianship—Indians: Trusts

The United States is empowered to apply "all appropriate means" to fulfill its general trust obligations and in the course of doing so, is limited only by principles of trust law and relevant constitutional considerations.

7. Indian Reorganization Act—Indians: Guardianship—Indians: Trusts

Examination of the history, purpose, wording, and structure of the IRA leads to the conclusion that Congress intended to impose a specific trust responsibility on the Secretary of the Interior and the Bureau of Indain Affairs with respect to tribes organized under the Act.

8. Indian Reorganization Act—Indian Tribes: Constitution, Bylaws and Ordinances— Indian Tribes: Elections—Indian Tribes: Federal Recognition—Indians: Guardianship—Indians: Trusts

The government-to-government relationships between the United States and Indian tribes organized under the IRA are governed by the trust responsibility established by the IRA and consequently are "subject to limitations inhering in * * * a guardianship and to pertinent constitutional restrictions." Under the circumstances of this case, the actions and decisions of the BIA comport with the requirements of law.

APPEARANCES: Francis X. Lamebull, Esq., for appellant Chippewa Cree Tribe; James W. Zion, Esq., for appellants Roger St. Pierre and the Original Chippewa Cree of the Rocky Boy's Reservation; Robert S. Thompson, Esq., Office of the Solicitor, U.S. Department of the Interior, for appellee Commissioner of Indian Affairs. Counsel to the Board: Kathryn Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

Findings of Fact

Appellants seek review of the July 7, 1980, decision of the Acting Deputy Commissioner of Indian Affairs affirming decisions of the Area Director, Billings Area Office, and the Superintendent of the Rocky Boy's Agency, rendered on Feb. 25, 1980, and Sept. 7, 1979, respectively. Under these decisions, the Bureau of Indian Affairs (BIA, Bureau) refused to recognize those actions of the Chippewa Cree Business Committee,[1] as constituted following the 1978 general tribal election, which require BIA review or approval, but would continue to recognize, for housekeeping functions necessary to ensure continuation of ongoing programs, actions of the four Business Committee members and the Tribal Chairman elected in the 1976 general tribal election. These decisions were based upon determinations made by Bureau officials that certain individuals who sought elective office during the tribe's June 7, 1978, primary election did not meet the residency requirements of art. IV, § 2 of the Constitution of the Chippewa Cree Tribe [2] and, therefore, should not have been certified as qualified candidates by the Tribal Election Board. Because of these errors by the Chippewa Cree Election Board, the Bureau concluded that in the Nov. 1978 general election, unqualified candidates were elected to the Business Committee in violation of the tribal constitution. Therefore Bureau officials refused to recognize the actions of the Business Committee.

From the record before the Board, the following appears to be the chronology of events. On June 7, 1978, a primary election was held to select candidates for the Nov. 9, 1978, general election of the Business Committee of the Chippewa Cree Tribe. The primary election (and possibly the ensuing general election) was challenged by Peter J. St. Marks, a Chippewa Cree Tribal member. St. Marks pursued his challenge through both tribal and Bureau channels. St. Marks' appeal to the Bureau ultimately resulted in a decision on Sept. 7, 1979, by the Superintendent of the Rocky

[1] Amendment I of the Constitution and bylaws of the Chippewa Cree Indians of the Rocky Boy's Reservation, Montana, provides that: "The governing body of the Chippewa Cree Tribe shall be known as the 'Business Committee.'" Hereinafter we use the terms, as do the parties themselves, "Business Committee" and "tribal council" interchangably when referring to the governing body of the Chippewa Cree Tribe.

[2] Constitution and Bylaws of the Chippewa Cree Indians of the Rocky Boy's Reservation, Montana, approved Nov. 23, 1935; *amended* May 17, 1972.

Boy's Agency. The following excerpts reflect the relevant portions of that decision:

September 7, 1979

Mr. John Windy Boy, Tribal Chairman
Chippewa Cree Business Committee

* * * * *

* * * [T]here has been a cloud over the tribal council because of Mr. Peter St. Mark's allegations of irregularities committed by the Chippewa Cree Election Board. St. Marks, a tribal member, has appealed * * * to both tribal officials and Bureau officials for action on his contentions that the Election Board acted beyond the scope of their authority by certifying and allowing certain tribal members to be candidates both as tribal councilmen and Tribal Associate Judge for the June 7, 1978 Tribal Primary Election. Months have passed and St. Marks still has received no answers from tribal officials.

* * * When the Bureau of Indian Affairs * * * has reason to believe that the tribal government * * * may be acting in violation of its Constitution, a decision must be made whether to become involved, when to become involved, how to evaluate the tribal action, and what to do to correct violations.

We are * * * concluding that Mr. St. Marks has exhausted his tribal administrative and tribal judicial remedies and we are responding to * * * his appeal * * *.

We have reviewed this matter thoroughly because the Bureau of Indian Affairs cannot ignor any information which casts a doubt in the legality of the manner in which tribal elections or decisions are rendered.

* * * We have concluded that the Election Board did not follow the Tribal Constitution's qualifications in certifying people to be candidates for tribal councilmen. [According to] The Consitution and By-Laws of the Chippewa Cree Indians, Article IV—Elections and Nominations, Section 2—"To be eligible for membership on the Business Committee, candidates must have the following qualifications:"

* * * * *

"b) Must have physically resided within the general area which encompasses the main body of the reservation or on any land under the jurisdiction of the tribe for two (2) years immediately prior to the date of the general election."

The Election Board certified certain people to be candidates for tribal councilmen when, in fact, they did not meet all qualifications to become tribal councilmen.

We believe that the following people who were certified by the Chippewa Cree Election Board as constitutionally qualified candidates, in fact, did not meet the constitutional qualifications for tribal councilmen: * * *

1) Bert Corcoran—Mr. Corcoran resided on the reservation for less than a year prior to the primary election. He did not physically reside on the reservation for two years prior to the general election.

2) Paul Eagleman—moved away from the reservation to take employment in Canada. He did not physically reside on the reservation for the two years prior to the general election.

3) Roger St. Pierre—Roger returned to live on the reservation from Billings, Montana either in May or June 1977. He did not physically reside on the reservation for two years prior to the date of the general election.

4) Edward Parisian, Jr.—Mr. Parisian was in graduate school in South Dakota for part of the two years prior to the election. Prior to his attending graduate school, Mr. Parisian lived and worked on the Blackfeet Indian Reservation. Mr. Parisian did not physically reside on the reservation the required two years prior to the general election.

We also concluded that Ted Lamere, Jr. was not constitutionally qualified for a seat on the tribal council because he was in California for several months in the fall of 1977. He did not physically reside on the reservation two years prior to the general election.

The Election Board allowed the electorate to vote on a tainted list of tribal candidates. The votes received by the tainted candidates could have gone to any number of fully qualified candidates and would have materially affected the outcome of the election.

As shown above there were several people whose names should not have been submitted to the electorate. If only one person was unqualified there still would be a violation of the tribal Constitution and election ordinance and the electorate

would be allowed to vote on a tainted list of tribal candidates.

As a result of the Constitutional errors by the Election Board we cannot recognize those actions of the tribal council that require Bureau of Indian Affairs review or approval that are presented to it. This action is effective this date.

In order that the Chippewa Cree Tribal government not totally cease we will recognize the actions of the remaining four councilmen and the Tribal Chairman who were elected in the 1976 General Tribal Election provided that such actions are only those housekeeping functions necessary to insure continuation of ongoing programs.

We recommend that a new election be held as soon as possible to elect four constitutionally qualified councilmen so that the affairs of this reservation can be handled in a legal manner and further that Rocky Boy's Indian Reservation can become a productive and viable reservation.

* * * * *

[/s/] Leo Brockie, Jr.
Superintendent

The Chippewa Cree tribal government formally filed notice of appeal of this decision with the Superintendent of the Rocky Boy's Agency on Sept. 12, 1979, who in turn forwarded the appeal to the Area Director, Billings Area Office. This was followed on Oct. 9, 1979, by the tribe's request that the Billings Area Director grant an extension of time for filing a brief and to allow settlement of the disputed matter by tribal institutions. Also on Oct. 9, Roger St. Pierre and Joe Big Knife, members of the Business Committee elected in the 1978 general election, filed an appeal with the Billings Area Director. Still another appeal was filed with the Area Director on Oct. 15, 1979, by the Original Chippewa Cree of the Rocky Boy's Reservation[3] on Nov. 6, 1979, the Area Director granted the tribe's Oct. 9 request for a 60-day extension (*i.e.*, until Dec. 11, 1979). Then, on Nov. 8, 1979, the tribe again requested of the Area Director still additional time for briefing and to allow the disputed matter to be resolved internally through tribal institutions. The Acting Area Director granted this second extension on Dec. 7, 1979, extending the filing deadline for briefs to Feb. 9, 1980. On Jan. 23, 1980, a hearing was held before the Chippewa Cree Tribal Appellate Court in regard to St. Marks' challenge to the 1978 tribal election(s). St. Marks was present and allowed to participate. The appellate court, in a written opinion issued Jan. 28, 1980, denied St. Marks' appeal on procedural grounds. In a brief submitted to the Area Director on Feb. 8, 1980, St. Pierre and Big Knife, for themselves and purportedly on behalf of the Chippewa Cree tribal government, argued that the decision of the tribal appellate court had rendered the dispute moot. The Area Director was, therefore, requested to take immediate action to overturn the Superintendent's decision of Sept. 7, 1979.

The Billings Area Director issued a decision on Feb. 25, 1980. Relevant portions of that decision follow:

[3] Appellant Original Chippewa Cree is a nonprofit Massachusetts trust organized under the laws of the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana, and the State of Montana. All members of the Original Chippewa Cree are tribal members and eligible voters of the Chippewa Cree Tribe. The Original Chippewa Cree had previously filed an appeal with the Superintendent of the Rocky Boy's Agency on Sept. 27, 1979.

Feb. 25, 1980

Mr. John Windy Boy, Chairman
Chippewa Cree Business Committee

* * * * *

This is to advise you that we are upholding the September 7, 1979 decision of the Superintendent, Rocky Boys Agency. [The] appeal * * * [is] denied.

Superintendent Brockie's decision stipulated that "as a result of the constitutional errors by the election board, we cannot recognize those actions of the tribal council that require Bureau of Indian Affairs review or approval that are presented to it." His action was based on the fact that, "the Election Board certified certain people to be candidates for tribal councilmen when, in fact, they did not meet all qualifications to become tribal councilmen. He further listed the questionable candidates and gave reasons for their questionable status.

* * * * *

On two occasions the Chippewa Cree Tribe's general counsel * * * requested extensions of the appeal period to allow the tribe to resolve the matter. We are advised * * * that a January 23, 1980 hearing was held on Mr. St. Marks' appeal concerning the election. Mr. St. Marks' appeal was denied on procedural grounds. We are convinced that tribal remedies have been exhausted and inasmuch as the extended appeal period expired on February 9, 1980 our action must now be taken.

Inasmuch as the questions about the qualifications of certain tribal council candidates was [*sic*] not addressed by the tribal forum nor by the two additional appeals we find it appropriate to deny the appeals.

* * * * *

[/s/] A. A. Baker
Area Director

An appeal of the Area Director's decision affirming the Superintendent's earlier decision was filed on Mar. 24, 1980, with the Area Director who forwarded it to the Commissioner of Indian Affairs. The Acting Deputy Commissioner for Indian Affairs issued a decision on July 7, 1980, relevant portions of which include the following:

July 7, 1980

Mr. John Windy Boy, Chairman
Chippewa Cree Business Committee

* * * * *

We view the tribe's constitution as the primary embodiment of tribal laws and evidence of a delegation of authority from the tribal membership to those responsible for governing the tribe. The tribal officials elected or appointed to positions of authority, therefore, have the responsibility for conducting the tribe's affairs in compliance with the constitution. The qualifications necessary to be a bonafide candidate for the tribal council are set forth in the constitution and to waive or ignore that established criteria is clearly a violation of the constitution and constitutes a breach of those laws adopted by the membership of the tribe.

There is no doubt that the conduct of this election as well as election board and tribal court decisions related to it are strictly internal tribal matters. Nevertheless, our approval of the tribe's constitution makes us a party to the terms of that document. It is our duty, as a party to the constitution, to recognize and deal with the legitimate representatives of the tribe. Additionally, we would be derelict in our responsibility when we have knowledge that a violation of the constitution's election provisions has occurred and do not advise the tribe for the purpose of bringing about corrective action.

Because of the clear candidacy requirements stated in the constitution and since no evidence has been presented to contradict or disapprove the Superintendent's contentions of unsatisfactory residence, we must uphold his decision. Accordingly, the subject appeal seeking a reversal of the decision by the Superintendent, Rocky Boy's Agency not to recognize the results of the June 7, 1978, tribal election is hereby denied. This decision is based on the exercise of my discretionary authority, and it is final for the Department of the Interior. * * *

/s/ Theodore C. Krenzke
Acting Deputy Commissioner
of Indian Affairs

On Aug. 18, 1980, an appeal was filed with the Interior Board of Indian Appeals by Roger St. Pierre and the Original Chippewa Cree of the Rocky Boy's Reserva-

tion from the July 7, 1980, decision of the Acting Deputy Commissioner. The appeal was docketed by the Board on Sept. 19, 1980, and full briefing privileges allowed. No brief was filed by the Chippewa Cree Tribe.

Contentions of the Parties

Appellants St. Pierre and the Original Chippewa Cree assert the following in support of their appeal from the Acting Deputy Commissioner's decision of July 7, 1980: (1) The Interior Board of Indian Appeals has jurisdiction in that the decision of the Deputy Commissioner is based on an interpretation of law and, therefore, subject to review by the Board; (2) the decisions in this matter violate the rights of the appellants under the United States Constitution, the Constitution of the Chippewa Cree Tribe,[4] the Indian Reorganization Act (IRA) (codified in 25 U.S.C. §§ 461–486 (1976)); and the Indian Self-Determination Act (codified in 25 U.S.C. §§ 450–458e (1976)); (3) the decisions of the tribal election board and the tribal courts of the Chippewa Cree Tribe upholding the tribal election of Nov. 1978 are binding on the BIA; (4) The BIA is estopped from refusing to recognize the actions of the tribal council as constituted after the Nov. 1978 general election by virtue of its continued recognition of the tribal council after the November election even though it had notice of purported election irregularities prior to the election; (5) the Superintendent's decision denied appellants due process in that it was made without notice or a hearing from persons and/or entities with a legal interest in the decision; (6) the election irregularities were not such as to support the invalidation of the election or the exercise of any purported authority by the BIA to refuse recognition to the acts of the duly elected tribal council of the Chippewa Cree Tribe; (7) decisions of the Superintendent, Area Director, and Acting Deputy Commissioner were made without proper factual basis and are not supported by substantial evidence; and (8) the decisions constitute impermissible interference by the BIA in the internal affairs of the Chippewa Cree Tribe. Therefore, appellants request that the Board reverse the decision of the Acting Deputy Commissioner of Indian Affairs and enter an order that BIA officials not interfere with or otherwise fail to give recognition to the 1978 election of the Chippewa Cree Tribe. In the alternative, appellants by separate motion under 43 CFR 4.337(a) assert that there exists need for further inquiry into genuine issues of material facts and, therefore, request the Board to require a hearing by an Administrative Law Judge of the Office of Hearings and Appeals to resolve such issues.

Appellee asserts that: (1) The Interior Board of Indian Appeals lacks jurisdiction over the subject matter of this proceeding in that the decision of the Acting Deputy Commissioner was rendered pursuant to his discretionary authority and therefore is final for the Department; (2) although they have had ample opportunity during the appeals process, the appellants have failed to show

[4] *Supra*, n.2.

that the constitutional infirmities associated with the tribal election did not occur and that because the appellants failed to refute the Superintendent's findings, the findings must be taken as admitted and consequently there is no genuine issue of material fact and appellee is entitled to judgment as a matter of law; (3) the Commissioner's responsibility to oversee the government-to-government relationship between the United States and the Chippewa Cree Tribe authorizes the action taken by BIA in this case; (4) the broad discretionary authority of the BIA in the conduct of Indian affairs authorizes the decisions in this instance; (5) the Secretary's order of Nov. 23, 1935, approving the Chippewa Cree tribal constitution and ordering all officers and employees of the Department of the Interior to abide by its provisions, made it mandatory that the BIA take the action it did, for to have done otherwise would have been an act in contravention of the tribal constitution and the Secretary's directive; and (6) it would violate the trust responsibility of the United States for the Commissioner to deal, regarding trust assets, with a tribal council which is constitutionally invalid, for to do so would expose the United States to potential liability.

These arguments of the respective parties are addressed in the following analysis.

Conclusions of Law

I. Procedural Motions

Jurisdiction

[1] Appellee moves to dismiss this appeal for lack of jurisdiction on grounds that the decision of the Acting Deputy Commissioner was based on the exercise of his "discretionary authority" and that, pursuant to the provisions of 25 CFR 2.19(c)(1), the decision was "final for the Department of Interior." [5] To be sure, 25 CFR 2.19(c) directly applies to actions by the Commissioner regarding appeals from administrative action:

> § 2.19 Action by Commissioner on appeal.
>
> * * * * *
>
> (c) When the Commissioner renders a written decision on an appeal, he shall include one of the following statements in the written decision:
>
> (1) If the decision is based on the exercise of discretionary authority, it shall so state; and a statement shall be included that the decision is final for the Department.
>
> (2) If the decision is based on interpretation of law, a statement shall be included that the decision will become final 60 days from receipt thereof unless an appeal is filed with the Board of Indian Appeals pursuant to 43 CFR [4.332] and [4.333].

However, this procedural requirement necessitating a ministerial act regarding the format of an agency decision is certainly not to be interpreted as determinative of the substantive issue of the jurisdiction of the Board of Indian Appeals.[6] Instead, other Departmental regulations specifically govern the appellate process and the jurisdiction of the Board.[7] The provisions of 43 CFR 4.330 (a) and (b) are dispositive of the issue:

[5] *See* Motion to Dismiss dated Oct. 22, 1980; decision of Acting Deputy Commissioner of Indian Affairs, Theodore C. Krenzke, July 7, 1980, at 2.

[6] The Board does not take issue with the substantive content of section 2.19(c)(1) in that it is a correct statement of law to conclude that a "discretionary decision" of the Bureau of Indian Affairs is not generally reviewable by the Board of Indian Appeals (*see* 43 CFR 4.330(b)(2)) and because such a decision is not subject to review, it is therefore "final for the Department." (The provisions of 43 CFR 4.330(b) however do permit discretionary actions of the Bureau to be reviewed by the Board in special circumstances not existent in this case.)

[7] The Bureau's regulations regarding administrative appeals explicitly defer to those regulations directly governing the appellate process of the Board. *See* 25 CFR 1.3 and 2.3(c).

§ 4.330 Scope

(a) * * * These regulations apply to the practice and procedure for (1) appeal to the Board of Indian Appeals from administrative actions or decisions of officials of the Bureau of Indian Affairs issued under regulations in Chapter 1 of 25 CFR, in cases involving determinations, findings and orders protested as a violation of a right or privilege of the appellant * * *.

(b) * * * [T]he Board shall not adjudicate: * * * (2) matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority.

Consequently, the jurisdiction of the Board as challenged here by appellee depends on whether the decision appealed is or is not "discretionary." If it is, the Board does not have jurisdiction and must grant appellee's motion for dismissal.

Was then the decision "discretionary" and who is authorized to decide that question? For the following reasons, we find the Board of Indian Appeals is the proper authority to determine this issue and that the decision itself was not "discretionary." We therefore deny appellee's motion for dismissal.

[2] It is a fundamental principle of judicial procedure that a court has "jurisdiction to determine its jurisdiction." *See* Charles Alan Wright, *Handbook of the Law of Federal Courts,* sec. 16 (2d ed. 1970). As a quasi-judicial tribunal charged with the responsibility of performing objective independent review of agency action, the Board of Indian Appeals also has inherent authority to determine its own jurisdiction under 43 CFR 4.330(b)(2). Thus, upon appeal to the Board, it is for this tribunal in ascertaining its jurisdiction to determine whether the decision appealed is or is not "discretionary." *See Hamel* v. *Nelson,* 226 F. Supp 96, 98 (N.D. Cal. 1963). Because the matter of jurisdiction is both a judicial and a legal question, courts and by analogy the Board, in its quasi-judicial capacity, are not bound by the characterization or descriptive titles placed on agency action by the agency itself. *See Ligon Specialized Hauler, Inc.* v. *I.C.C.,* 587 F.2d 304, 314 (6th Cir. 1978).

[3] The characterization of a decision as "discretionary" is a legal conclusion and the product of a legal analysis. Accordingly, the Board, as a quasi-judicial tribunal, is specifically qualified, equipped, and authorized to perform such functions. In *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 410 (1971), the Supreme Court observed that the exception to judicial review of agency action committed to discretion under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1976), is "a very narrow exception * * * applicable in those rare instances where '* * * in a given case there is no law to apply.' " Purely discretionary decisions then involve situations in which there is no law to apply. Here there is "law to apply" for in this instance the agency action rested on interpretation of the tribal constitution, sec. 16 of the IRA,[8] and general principles of trust law applicable to the specific situation and surrounding circumstances.

[8] "[T]he Secretary's (or his delegate's) construction [of a statute] * * * and his determination as to the extent of his authority thereunder * * * are legal questions subject to judicial review." *Suwannee Steamship Co.* v. *United States,* 354 F. Supp. 1361, 1366 (Cust. Ct. 1973).

[4] The Board then is not precluded from entertaining an appeal from a BIA action or decision merely because the issue has been labeled "discretionary" by the agency.[9] However, the Board recognizes that its review under these circumstances is limited and that it must exercise extreme care so as to not usurp the properly authorized discretionary authority of the agency. The Board is bound by statutes, regulations, case law, and principles of judicial self-restraint not to interfere with substantive decisions of the agency issued under its discretionary authority. With that caveat in mind, we hold that the decision of July 7, 1980, issued by the Acting Deputy Commissioner of Indian Affairs was not discretionary but rather was based on interpretations of law and consequently, the Board has jurisdiction to hear this appeal. Appellee's motion to dismiss for lack of jurisdiction is therefore denied.

Summary Judgment

Appellee asserts that throughout the administrative appeals process the appellants have failed to refute the Superintendent's findings or offer evidence in regard to the constitutional violations enumerated in the Superintendent's decision of Sept. 7, 1979. Appellee concludes that the constitutional violations are admitted, that no genuine issue of material fact exists, and it is entitled to a judgment as a matter of law. Appellee thus moves for summary judgment.

Under the circumstances of this case, appellee's motion for summary judgment is misdirected. The Board agrees that based on the record, prima facie violations of the tribal constitution have occurred. Appellants, as appellee correctly observes, have never offered proof to the contrary nor in any way attempted to refute BIA's findings and conclusions regarding the constitutional violations.[10] In this respect, no genuine issue of material fact exists. However, the case before us concerns the legal authority of the Bureau to take the action it did based on evidence of a violation of the tribal constitution of a tribe organized under the IRA. This is an issue in controversy between the parties and an issue which deserves a judgment on the merits. Therefore, appellee's motion for summary judgment is denied because appellee is not entitled to prevail as a matter of law because a controverted question of law exists as to whether the Bureau has the authority to act as it did based on the given facts of this appeal.

[9] In *Ahtone* v. *Canan*, 8 IBIA 278, 279 (1981), the Board deemed itself obliged to accept the Acting Deputy Commissioner's characterization of final agency action in a tribal election dispute as "discretionary" and "final for the Department." Indeed, the Board did not request nor review the administrative record utilized by the Acting Deputy Commissioner in *Ahtone* in rendering his decision on the tribal election dispute.

In accordance with the legal principles expressed in this opinion, which were not considered by the Board in *Ahtone*, it is here concluded that it is not incumbent on the Board to accept the agency's characterization of a matter as discretionary and nonreviewable.

The action taken by the Acting Deputy Commissioner in *Ahtone* is presently under judicial review. *Kiowa Business Committee* v. *Department of the Interior*, Civ. No. 81-386D (W.D. Okla., filed May 25, 1981). By delimiting its holding in *Ahtone*, the Board does not imply it may have reached a different conclusion on the merits of the case than that of the Acting Deputy Commissioner. Since it did not have the agency record before it, it is even speculative whether the Board would have characterized the disposition in *Ahtone* as other than a purely discretionary matter.

[10] Even the tribal appellate court decision failed to address the merits regarding the alleged constitutional violations, rendering its decision instead on procedural grounds. *See* Letter Opinion of the Chippewa Cree Appellate Court, Jan. 28, 1980, denying the appeal of Peter J. St. Marks.

II. Analysis

The actions and decisions of the Bureau of Indian Affairs in this case are justified under its trust responsibility to administer the government-to-government relations between the United States and Indian tribes organized under the IRA.[11] The following discussion examines in detail the general trust relationship[12] involving tribal governments and the United States, and the specific trust responsibility established by the IRA.

The Trust Relationship

"[A]n unbroken line of Supreme Court decisions [exists] which, from the beginning, have defined the fiduciary relationship between the Federal Government and the Indian tribes as imposing a distinctive obligation of trust upon the Government in its dealings with the Indians." *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton,* 388 F. Supp. 649, 662 (N.D. Me.), *aff'd,* 528 F.2d 370 (1st Cir. 1975). In numerous cases, spanning over 150 years of Federal Indian law, the Supreme Court of the United States has established and applied a trust responsibility to the relationship between the United States and the Indian tribes and people. The Supreme Court has recognized that this trust obligation requires the United States to protect Indian sovereignty and political existence, and consequently, it has acknowledged the power and authority necessary to fulfill this commitment. Beginning with the landmark decision of Chief Justice Marshall in *Cherokee Nation* v. *Georgia,* 30 U.S. (5 Pet.) 1, 16–18 (1831), the Court established, as a foundation principle of Federal Indian law, the doctrine of the trust relationship. According to Marshall the unique relationship existing between the United States and the Indians resembled that of a guardian and ward. Furthermore, because Indian tribes were within the territorial and jurisdictional boundaries of the United States and had themselves acknowledged that they were under the protection of the United States and that the United States had the right to manage all their affairs, they were in what could be considered a protectorate status and therefore properly de-

[11] 25 U.S.C. §§ 461–486 (1976); also known as the Wheeler-Howard Act, Act of June 18, 1934, 48 Stat. 984.

Sec. 16 of the Act (25 U.S.C. §476 (1976)) provides for the organization of tribal governments and thus serves as the statutory basis for the United States trust responsibility toward those tribal governments organized according to its provisions. Sec. 16 provides:

"Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

"In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress."

[12] "The courts have used interchangeably the terms 'trust,' 'fiduciary,' and 'guardian-ward' to describe the relationship between the Federal Government and the Indian tribes." *Joint Tribal Council of the Passamaquoddy Tribe.* v. *Morton,* 388 F. Supp. 649 (N.D. Me.), n.13 at 660, *aff'd,* 528 F.2d 370 (1st Cir. 1975).

nominated "domestic dependent nations."[13]

The following year in *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515, 552, 560–61 (1832), Chief Justice Marshall more accurately analyzed and appraised the protectorate status of the Indian nations vis-a-vis the United States. As Marshall explained, under principles of international law, Indian nations under the protection of the United States are afforded protectorate status, and consequently, while their right to self-government is reserved, it is simultaneously protected and guaranteed by the United States.[14]

Fifty years later, in *United States* v. *Kagama,* 118 U.S. 375, 381–85 (1886), the Supreme Court reaffirmed the trust relationship and recognized within it the dependency of the Indians on the United States for their "political rights." In elaborating on the trust responsibility, the Court specifically referred to the power and obligations which the trust relationship imposed upon the United States. The Court expanded on these powers and responsibilities in *Heckman* v. *United States,* 224 U.S. 413, 431, 434 (1912). The Court reasoned that the fulfillment of the trust responsibility by the United States was a matter of national honor and in the national interest, and that during the period of "guardianship" the United States possessed the power to fulfill its trust responsibilities "by all appropriate means." The Court further noted that the United States as trustee could act on behalf of the Indian beneficiary without the Indian beneficiary's prior consent and that furthermore the Indian beneficiary could not interfere with actions of the United States, as trustee, in fulfilling its trust responsibility.

In *United States* v. *Creek Nation,* 295 U.S. 103, 109–110 (1935), the Court again reaffirmed that the "property and affairs"[15] of an Indian tribe under "guardianship" were subject to the control and management of the United States. The Court held, however, that the power of the United States as trustee was not absolute, and though it extended to "all appropriate means," it was nevertheless subject to limitations inhering in "guardianship" (*i.e.,* principles of trust law) and "pertinent constitutional restrictions."

The most definitive description of the trust responsibility arising from the trust relationship was enunciated by the Supreme Court in *Seminole Nation* v. *United States,* 316 U.S. 286, 296–97 (1942). There the Court held that the United States Government, in its

[13] "When a state resigns the control of a part of its sovereign functions to another state, or to other states, it is under a protectorate; the degree of authority exercised by the protecting state varies greatly in different cases." (Footnote omitted.) 48 C.J.S. *International Law* § *6* (1981).

[14] "The status of a political entity under a protecting state may be that of almost complete independence, or of such dependence as to deprive it of any standing as a person in international law, even though the protected state may have control of its internal affairs." (Footnote omitted.) Wilson, *Handbook of International Law* at 33 (3rd ed., 1939).

[15] "It has been established that the trust doctrine is not limited to situations in which the government has retained legal title to the Indian land," *Carlo* v. *Gustafson,* 8 I.L.R. 3040, 3042 (D. Alaska 1981), or "to situations in which the government is managing property owned by an Indian tribe," *Eric* v. *Secretary of the United States Department of Housing and Urban Development,* 464 F. Supp. 44, 49 (D. Alaska 1978). (In support of these propositions, both *Carlo* and *Eric* cite the United States Supreme Court in *Morton* v. *Ruiz,* 415 U.S. 199, 236 (1974).)

For an example of the United States acting to protect the tribal government interest of the trust res, *see United States* v. *Pawnee Business Council of the Pawnee Indian Tribe of Oklahoma,* 382 F. Supp 54 (N.D. Okla. 1974).

relations with Indians, was charged with moral obligations of the highest responsibility and trust and that its conduct "should therefore be judged by the most exacting fiduciary standards."

[5, 6] These decisions of the Supreme Court regarding the trust relationship of the United States to the Indian tribes and people establish, as a general proposition, the protectorate status of the Indian tribes vis-a-vis the United States and the corresponding powers and obligations of the United States to act for their protection. As trustee, the United States is charged with the responsibility of safeguarding, from both external and internal threats, the political existence of Indian tribes, including protecting and guaranteeing tribal self-government and "the political rights of Indians." Accordingly, as trustee charged with these responsibilities, the United States is empowered to apply "all appropriate means" to fulfill its general trust obligations and, in the course of doing so, is limited only by principles of trust law and relevant constitutional considerations. The trust relationship is a matter of national honor and its fulfillment in the national interest. Those agents to whom the United States has delegated this duty will be judged by "the most exacting fiduciary standards." Within this general trust relationship we focus our inquiry next on the specific trust responsibility established by the IRA.

The Trust Responsibility

In *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1st Cir.), *aff'g* 388 F. Supp. 649 (N.D. Me. 1975), the circuit court provided an analytical method for determining whether a specific trust responsibility on the part of the United States exists with regard to a particular Indian tribe. The first circuit cited with approval the reasoning and analysis which the lower court had applied to determine the existence of a trust responsibility between the United States and the Passamaquoddy Tribe. The district court, the first circuit explained, properly examined a series of decisions by the United States Court of Claims involving the trust responsibility of the United States and an extensive body of Federal cases holding that when the Federal Government enters into a treaty or enacts a statute on behalf of Indian tribes, the Government commits itself to a "guardian-ward relationship" with those tribes. Analysis of a statute to determine the existence or nonexistence of a specific trust responsibility, the court of appeals continued, included examination of the history, purpose, wording, and structure of the act. Furthermore, when the trust responsibility is established by a statute, the rights and duties of the trust responsibility are likewise encompassed or created by the statute. When the Government guarantees a right to an Indian tribe by statute, "clearly there can be no meaningful guaranty without a

corresponding Federal duty to * * * take such action as may be warranted under the circumstances" (*Passamaquoddy Tribe, supra,* 528 F.2d at 379). Once the trust responsibility is so established, it is appropriate, initially at least, for the departments of the Federal Government charged with responsibility in these matters to give specific content to the congressionally declared fiduciary role.

To the extent the fiduciary relationship must be based upon a specific statute, treaty, or agreement, which in turn helps to define and in some cases limit the relevant duties under the trust responsibility, it is appropriate to examine whether the Indian Reorganization Act, and sec. 16 in particular, establishes a specific trust responsibility on the part of the United States toward tribes organized in accordance with its provisions.

[7] Examination of the history, purpose, wording, and structure of the IRA leads to the conclusion that Congress intended to impose a specific trust responsibility on the Secretary of the Interior and the Bureau of Indian Affairs with respect to tribes organized under the Act. Review of the legislative history of the Wheeler-Howard Indian Rights Bill, which, when enacted became the IRA,[16] reveals that on Feb. 19, 1934, John Collier, then Commissioner of Indian Affairs, submitted a memorandum of explanation to the members of the Senate and the House Committees on Indian Affairs. The memorandum, consisting of a narrative description and analysis of the bill as introduced and entitled "The Purpose and Operation of the Wheeler-Howard Indian Rights Bill,"[17] explained that the bill, while curbing Federal absolutism, provided Indians with "Home Rule under Federal guidance." As Collier explained: "The bill does not bring to an end, or imply or contemplate, a cessation of Federal guardianship and special Federal service to Indians. On the contrary, it makes permanent the guardianship services * * *." Although the bill sought ultimately to eliminate the BIA in the governance of Indian communities, it nevertheless contemplated an advisory role for the Bureau as a special service body. Furthermore, according to the memorandum, it contemplated a transition (*i.e.,* a period of guardianship) while the process of Indian self-determination was effectuated. The Collier memorandum further explained that the bill initially entitled Indian communities to "some self-government" and that they would be entitled to more as they demonstrat-

[16] Although altered in the course of the legislative process, the Wheeler-Howard Indian Rights Bill essentially was enacted as the IRA. As Congressman Frear explained on June 15, 1934, during the final floor debate regarding the House version of the Act:

"As I understand it, the bill in its earlier form as introduced had the same principles as the bill now awaiting a vote. What have been changed are the details and the mechanisms of the bill, but not the principles of the bill, and that, I understand, is why the President, by personal letter, Secretary Ickes, and Indian Commissioner Collier are urging the pending bill just as earnestly as they favored the original draft."

(Final House floor debate, 78 Cong. Rec. H,11743 (daily ed. June 15, 1934).) *See also* letter from Commissioner of Indian Affairs John Collier to Congressman Frear dated June 15, 1934, explaining the differences and similarities between the bill as introduced and the final House and Senate versions (reprinted in 78 Cong. Rec. H,11743 (daily ed. June 15, 1934).)

[17] Reprinted in "Hearings Before the Comm. on Indian Affairs, U.S. Senate, on S. 2755," 73rd Cong., 2d Sess. 16 (1934) (hereinafter Senate Hearings). Also reprinted in "Hearings Before the Comm. on Indian Affairs, House of Representatives, on H.R. 7902," 73rd Cong., 2d Sess. 15 (1934) (hereinafter House Hearings).

ed their "capacity" to exercise such functions. The Secretary of the Interior could grant such additional powers of self-government as were necessary but in any event, the powers granted by the Secretary were required to contain such provisions for "Federal supervision" as would "assure protection of individual rights and liberties." According to the memorandum, the Secretary would continue to exercise those powers (including those of the "trust responsibility") with which he was then vested. In addition, restrictions imposed on the tribal governments by their charters were to be enforced by either administrative supervision (*i.e.,* the United States as trustee) where so provided by the tribal charter or by judicial proceedings brought by the Secretary or the Commissioner (*i.e.,* the agents of the trustee).

In testimony before the House Committee on Indian Affairs on Feb. 22, 1934, regarding the bill as introduced, Commissioner Collier again emphasized the permanence of the Federal guardianship regarding tribal governments organized under the Act by explaining that, in the event of the failure of tribal governments to fulfill their responsibilities and the revocation by Congress of the tribal charters, the Secretary was to reassume control and responsibility for the administration of tribal government.[18]

In a letter dated Apr. 28, 1934, to the Chairman of the House and Senate Committees on Indian Affairs endorsing the Wheeler-Howard Bill as introduced, President Franklin D. Roosevelt explained that the bill established a new standard for dealings between the Federal Government and its Indian "wards"; that it extended "fundamental rights" of political liberty and local self-government to the Indian community; and that finally, the bill sought to fulfill the "obligation of honor" toward "people dependent upon our protection." [19]

Finally, on June 15, 1934, in the final floor debate regarding the House version of the bill, Representative Howard, the bill's sponsor in the House, succinctly and conclusively stated the purpose of the bill:

> Mr. Howard * * *
>
> It may well be asked, What are the ultimate goals of the policy embodied in this bill?
>
> * * * * *
>
> It seeks the functional and tribal organization of the Indians so as to make the Indians the principal agents in their own economic and racial salvation, and will progressively reduce and largely decentralize the powers of the Federal Indian Service.
>
> In carrying out this program, the Indian Service will become the adviser of the Indians rather than their ruler. The Federal Government will continue its guardianship of the Indians, but the guardianship envisaged by the new policy will constantly strengthen the Indians, rather than weakening them.[20]

[18] *See* House Hearings, *supra* at 43. Similarly, in testimony before the Senate Committee on Indian Affairs on Feb. 27, 1934, Collier likewise emphasized that if tribal administrative control failed, then it was to be taken back by the Secretary. (*See,* Senate Hearings, *supra* at 32).

[19] Reprinted in House Hearings, *supra* at 8 and Senate Hearings, *supra* at 3-4. Cited with approval in *Morton* v. *Mancari,* 417 U.S. 535, 542 at n.10 (1974).

[20] Final House floor debate, 78 Cong. Rec. H,11732 (daily ed. June 15, 1934).

Likewise, examination of the statute itself (*i.e.,* the IRA generally and sec. 16 specifically) reveals its trust character. As provided by sec. 16, the administrative role of the Secretary in authorizing and calling special elections in accordance with rules and regulations which he prescribes for the purpose of adopting, ratifying, revoking, or amending the tribal constitutions (*see* 25 CFR Parts 52 and 53) and approving tribally ratified constitutions and amendments is indicative of the Federal trust responsibility provided by the Act.

Furthermore, although the case law involving the IRA is relatively sparse,[21] the most definitive statement recognizing the specific trust responsibility established by the Act came from the United States Supreme Court in *Morton* v. *Mancari,* 417 U.S. 535, 541 (1974). The Court, in examining the Indian employment preference in sec. 12 of the Act (*i.e.,* 25 U.S.C. § 472 (1976)), found the trust obligation to be a rationale for the preference: "Congress repeatedly has enacted various preferences of the general type here at issue. The purpose of these preferences, as variously expressed in the legislative history, has been * * * to further the Government's trust obligation toward the Indian tribes." (Footnotes omitted.)

Based on the preceding analysis, the Board finds that the IRA establishes a specific trust responsibility on the part of the United States with regard to tribal governments organized in accordance with its provisions.[22] Therefore, inquiry now turns to the specific powers and responsibilities of the United States under that trust responsibility.

The trust responsibility established by the IRA has all the necessary elements of a common law trust—a trustee (the United States), a beneficiary (the Indian tribes and their members), and a trust corpus or res (the tribal governments and their constitutions). *See* Restatement (Second) of Trusts § 2, Comment H (1959). In administering this trust, the United States and its agents will be held to " the most exacting fiduciary standards." *Pyramid Lake Paiute Tribe of Indians* v. *Morton,* 354 F. Supp. 252, 256 (D.D.C. 1973).[23]

The Supreme Court has stated that the United States serves in a fiduciary capacity with respect to Indians and is bound to exercise "great care" in administering its trust. *United States* v. *Mason,* 412 U.S. 391, 398 (1973). Thus the general standard of conduct for the United States as trustee is "not

[21] In *Pyramid Lake Paiute Tribe of Indians* v. *Morton,* 354 F. Supp. 252, 256 (D.D.C. 1973), the court found that the vast body of case law recognizing the trust obligation was complemented by the detailed regulatory scheme for Indian affairs set forth in Title 25 of the *United States Code.* The court then cited 25 U.S.C. § 476 (1976) (*i.e.,* § 16 of the IRA) as an example.

[22] Even in the complete absence of the IRA, an argument can be made that based on the general trust relationship, the United States has a trust responsibility in regard to tribal governments per se. The Court of Claims recently concluded in *Menominee Tribe of Indians* v. *United States,* 8 I.L.R. 5060, 5062 (Ct. Cl. 1981), that express trust language may not be required to establish an Indian trust, rather an Indian trust may also arise out of other historical sources and a very long course of conduct. It could be argued then that the general trust relationship suffices as just such an historical source and course of conduct and thus establishes a trust responsibility on the part of the United States toward tribal governments. Since we find an express trust responsibility emanating from the IRA, we need not and do not consider this argument.

[23] *See also Carlo, supra* at 3042: "In essence, case law makes clear that when Congress provides specific legislation for the benefit of Indians, government officials are held to strict fiduciary standards in implementing that legislation."

mere 'reasonableness,' but the highest of fiduciary standards." *American Indians Residing on Maricopa-Ak Chin Reservation* v. *United States,* No. 235, slip op. at 14 (Ct. Cl. Dec. 2, 1981); *Duncan* v. *United States,* 597 F.2d 1337, 1343 (Ct. Cl. 1979), *vacated and remanded,* 446 U.S. 903 (1980), *on remand,* No. 10-75 (Ct. Cl. Dec. 2, 1981). These fiduciary standards in turn are analogous to those governing general fiduciary relationships (*Maricopa-Ak Chin, supra; Navajo Tribe of Indians* v. *United States,* 624 F.2d 981, 988 (Ct. Cl. 1980)) if not identical to those of a private trustee (*Manchester Band of Pomo Indians, Inc.* v. *United States,* 363 F. Supp. 1238, 1245 (N.D. Cal. 1973)).

For a more specific determination of the duty and standard of care of the United States as trustee, courts have looked: (1) to the source of the specific trust—*i.e.,* the statute, order, executive agreement, or treaty specifically establishing the trust (*Passamaquoddy Tribe, supra,* 528 F.2d at 379; *Sac and Fox Tribe of Indians of Oklahoma* v. *United States,* 383 F.2d 991, 1001 (Ct. Cl. 1967); *United States* v. *Seminole Nation,* 173 F. Supp. 784, 790 (Ct. Cl. 1959)); or (2) to general principles of trust law to the extent appropriate (*Navajo Tribe of Indians, supra* at 988); or (3) to the specific situation and the surrounding circumstances (*Mitchell* v. *United States,* Nos. 772-71, *et al.,* slip op. at 13-14 (Ct. Cl. Oct. 21, 1981)). Thus, as the Court of Claims declared in *Oneida Tribe of Indians of Wisconsin* v. *United States,* 165 Ct. Cl. 487, 494, *cert. denied,* 379 U.S. 946 (1964): "The measure of accountability depends, whatever the label, upon the whole complex of factors and elements which should be taken into consideration. The real question is: Did the Federal Government do whatever it was required to do, in the circumstances * * *. That is the standard." (Footnote omitted.)

After the trust responsibility is established, it is appropriate for those departments of the Federal Government charged with executing the trust to determine, initially at least, the specific content of the fiduciary role. *Passamaquoddy Tribe, supra,* 528 F.2d at 379. However, courts and by analogy the Board, in its quasi-judicial capacity, have the authority to review actions of the trustee (*see Seminole Nation, supra,* 173 F. Supp. at 789) and to direct the trustee in regard to the fulfillment of its trust responsibilities. *See Harjo* v. *Andrus,* 581 F.2d 949 (D.C. Cir. 1978). In fact, once the trust responsibility is established, there can be judicial establishment of the standard of care owed by the Government under its fiduciary duty. *Gila River Pima-Maricopa Indian Community* v. *United States,* 427 F.2d 1194, 1196 (Ct. Cl.), *cert denied,* 400 U.S. 819 (1970). And, as the Supreme Court has indicated, "Generally, when a trustee is in doubt as to what course to pursue, the proper procedure for him to follow is to conform his conduct to the instructions given him by the courts." *Mason, supra* at 399.

The judiciary's determinations regarding the trust responsibility and the corresponding duties and authority of the United States as trustee include both substantive and procedural matters. *See Duncan, supra,* No. 10-75 at 14; *United States* v. *Truckee-Carson Irrigation District,* 8 I.L.R. 2104 (9th Cir. 1981); *Duncan, supra,* 597 F.2d at 1344. In *United States* v. *Sioux Nation of Indians,* 448 U.S. 371, 415-16 (1980), the Supreme Court suggested standards for judicial review of the Federal Government's actions in regard to control and management of a tribe's affairs under its trust responsibility. The Court explained that such actions were "'subject to limitations inhering in * * * a guardianship and to pertinent constitutional restrictions.'" The Court went on to explain that the question of whether a particular action taken by the trustee was appropriate to the fulfillment of the trust responsibility was factual in nature and the answer must be based on consideration of all the evidence presented. Accordingly, courts in the course of their review were not to "second-guess from the perspective of hindsight" but rather were to "engage in a thorough-going and impartial examination of the historical record." Presumption of the trustee's "good faith" was not sufficient to advance such an inquiry, the Court concluded.

With the foregoing analytical standards in mind, the Board holds that the government-to-government relations of the United States and the Indian tribes organized under the IRA are governed by the IRA and the specific trust responsibility it engenders. With respect to the case before us then, the Board believes the following disposition is in order.

III. Disposition

The Board concludes that the Bureau fulfilled its substantive and procedural obligations under the trust responsibility of the IRA in that: (1) The Bureau had reasonable cause to believe that a violation of the tribal constitution of a tribe organized under the IRA had occurred; (2) in fact, a prima facie material and significant violation of the tribal constitution occurred; (3) under the circumstances, this violation constituted an imminent and substantial threat to the tribal government (*i.e.,* the trust res) sufficient to justify independent action by the United States (*i.e.,* the trustee) or its agents (*i.e.,* the BIA); and (4) the action by the trustee or its agents was substantially related to the fulfillment of the specific trust responsibilities created by the IRA and in accordance with applicable principles of guardianship and pertinent constitutional restrictions.

These conclusions are based on facts found in the record presented the Board, viz. (1) Peter J. St. Marks' original complaint to the Bureau put it on notice and resulted in the Bureau having reasonable cause to believe a violation of the Chippewa Cree Constitution had occurred; (2) the nature of the specific violations and the fact the appellants failed to offer evidence in refutation leads to the conclusion that a prima facie material and significant violation of the Chippewa

Cree Constitution was shown; (3) a constitutional violation of this character, involving as it does the electoral process and the ultimate composition of the tribal governing body, poses a substantial and imminent threat to the integrity of the constitution and the legality of the government of a tribe organized under the IRA and as such warrants independent action by the United States to secure redress; and (4) the actions and decisions of the Bureau taken in response were substantially related to the fulfillment of the trust responsibility which the United States incurred under the IRA in that the Bureau initially sought a tribal remedy and only when a satisfactory tribal remedy failed to materialize [24] were unilateral actions, narrowly drawn so as to be least disruptive of tribal sovereignty and self-determination, initiated which in turn were carefully calculated to effectively protect the trust res. Such actions were in accordance with general principles of guardianship and pertinent constitutional restrictions.

Therefore the Board upholds the decision of the Acting Deputy Commissioner of Indian Affairs affirming decisions of the Area Director, Billings Area Office, and the Superintendent of the Rocky Boy's Agency whereby the BIA refused to recognize actions of the Chippewa Cree Business Committee which require BIA review or approval because of violations of the Chippewa Cree tribal constitution by tribal officials.

Because of our disposition of this case on a theory of the trust responsibility established by the IRA, we need not and do not reach the remaining contentions of the appellee and therefore express no opinion regarding their validity or applicability. However, we do feel compelled to respond specifically to the remaining contentions of the appellants.

Appellants contend that the BIA has no legal authority to act in this case. Clearly the trust responsibility not only authorizes responsive action by the Bureau in this matter, but requires it,[25] and failure to so act could result, as appellee correctly contends, in liability for breach of trust. In *Seminole Nation, supra,* 316 U.S. at 297, the Supreme Court observed:

> Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation. If those were the circumstances, either historically notorious so as to be judicially noticed or otherwise open to proof, * * * the Seminole Nation is entitled to recover * * *. [Footnote omitted.]

[24] *See Patrick Stands Over Bear* v. *Billings Area Director,* 6 IBIA 98 (1977), where actions of BIA officials regarding a tribal election dispute were reversed because the record disclosed that tribal remedies had not been exhausted.

[25] Violation of the tribal constitution may well be the most serious legal wrong sufferable by individual tribal members and/or the tribe as an entity. The Board believes that the United States trust responsibility precludes it from furthering, even indirectly, such a wrong and that it is incumbent for the United States to take appropriate action in redress. However, measures taken by the trustee in regard to the trust res (*i.e.,* tribal governments and/or their constitutions) must be narrowly tailored so as to be least disruptive of tribal sovereignty and self-determination which are themselves major tenets of the IRA, yet nevertheless effective to fulfill the trust responsibility of protecting the trust res.

The fact that the tribe or some of its agencies have been delegated duties by the Federal Government does not exonerate the Government from its trust obligations for the trust responsibilities cannot be delegated away. *Eric* v. *Secretary of the United States Department of Housing and Urban Development,* 464 F. Supp. 44, 49 (D. Alaska 1978). Furthermore, the Supreme Court has also held that the United States as trusteee has authority to act on behalf of the Indian beneficiary without the beneficiary's prior consent and that the Indian beneficiary cannot interfere with the actions of the United States in fulfilling its trust responsibility. *Heckman, supra.*

The fact that the threat or danger to the trust res emanates from the tribe and/or individual tribal members likewise does not excuse the United States from its trust responsibilities nor restrict its authority to react. *Oneida Tribe, supra* at 498. As was explained in *United States* v. *Camp,* 169 F. Supp. 568, 572 (E.D. Wash. 1959):

> The Secretary [of the Interior] is charged not only with the duty to protect the rights and interest of the tribe, but also the rights of the individual members thereof. And the duty to protect these rights is the same whether the attempted infringement is by non-members or members of the tribe [26] [Italics omitted.]

Appellants also contend that tribal sovereignty prohibits BIA interference with internal tribal matters. This case however is not controlled by the doctrine of tribal sovereignty. Instead this dispute is governed by application of the rules and principles of the trust responsibility. The decisions and actions under review here involve the unilateral obligations and authority of the Bureau under the trust responsibility. The Board's review then is not directly concerned with the actions per se of the tribal government. Consequently, the doctrine of tribal sovereignty is not directly applicable. *Cf. Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978) (doctrine of tribal sovereignty invoked to portect actions of tribal government). However, neither the doctrine of the trust responsibility nor tribal sovereignty may be used to undermine the other and it would clearly be improper for the Bureau to invade the legitimate domain of tribal sovereignty under the guise of the trust responsibility. As the court observed in *Cheyenne River Sioux Tribe* v. *Kleppe,* 424 F. Supp. 448, 451 (D.S.D.), *rev'd on other grounds,* 566 F.2d 1085 (8th Cir. 1977), *cert. denied,* 439 U.S. 820 (1978):

> The federal government's trust responsibility is not to be broadly used as an administrative tool to overcome the policy of Indian self-determination.
>
> * * * It seems to this Court that, at the administrative level, the recurrent clashes between the trust responsibility and the policy of self-determination are resolved in a manner detrimental to tribal self-government. All too often, Courts seem to pay little more than lip service to the right and power of Indian peoples to govern themselves. It must be remembered that this right and power is subject to diminution only by express Congressional enactment, not administrative rule-making which under the guise of the trust respon-

[26] *See also Pawnee Business Council, supra,* where the United States sought to protect the tribe by enjoining those individual tribal members who had violated the tribal constitution and bylaws and by enforcing the Secretary of the Interior's determinations made in accordance with the tribal constitution.

sibility seeks to erode what vestiges of Indian sovereignty remain.

Furthermore, any abuse of power by the BIA by improperly interfering with tribal governments and their constitutions would constitute not only a violation of the concept of tribal sovereignty but of the trust responsibility as well (*see Logan* v. *Andrus,* 457 F. Supp. 1318, 1330 (N.D. Okla. 1978)). Just as the trustee must protect and safeguard the trust res even from the beneficiary, so too the trustee itself may not invade or threaten the res. Consequently, under its trust responsibility, the BIA must respect and protect tribal governments and their constitutions. Failure to do so can result in legal and/or equitable relief.[27]

The Board recognizes complications are presented in this case by the fact that under tribal sovereignty, tribes have a unilateral and exclusive interest in their governments apart from their beneficiary interest in the trust res. This fact further exacerbates a situation involving conflicts between the trustee and the beneficiary in regard to the res. However, because the trustee is ultimately held to have legal responsibility for the trust res, it therefore must have ultimate authority to act concerning the res. Therefore, while the BIA does not have independent authority to interfere with tribal governments, which are protected by the doctrines of tribal sovereignty and the trust responsibility, it nevertheless must, as trustee, act to protect and safeguard the res. The BIA's actions in this case are a proper exercise of the trust responsibility and are therefore upheld, the doctrine of tribal sovereignty notwithstanding.[28]

Appellants further contend that the decisions of the tribal election board and the tribal courts, certifying and validating the tribal election of 1978, are binding on the BIA. The Board rejects this contention to the extent it seeks to limit or restrict the action of the United States as trustee. Neither tribal sovereignty nor the tribal constitution can be invoked to relieve or restrict the trust responsibility of the United States.[29] The tribal constitution and its governmental organization, powers, and procedures are matters of internal or domestic concern to the tribe. As such it has no extraterritorial jurisdiction or external legal effect. Tribal constitutions cannot limit the power of the United States, a superior sovereign, any more than a state constitution could. *See*

[27] Actions of the BIA contravening tribal constitution may give rise to Federal court equitable relief (*see, e.g., Harjo* v. *Kleppe,* 420 F. Supp. 1110 (D.D.C. 1976), *aff'd,* 528 F.2d 949 (D.C. Cir. 1978), and *Morris* v. *Watt,* 640 F.2d 404 (D.C. Cir. 1981)).

[28] With respect to the relationship between the doctrines of tribal sovereignty and the trust responsibility, the Supreme Court stated in *United States* v. *Wheeler,* 435 U.S. 313, 323 (1978):

"The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, *Indian tribes still possess those aspects of sovereignty not withdrawn* by treaty or statute, or *by implication as a necessary result of their dependent status." (Italics added.)*

[29] Inasmuch as the trust responsibility of the Secretary to protect tribal governments may not be circumvented by the beneficiary, nor delegated away by the trustee, it is no bar to the Bureau's action in this case that the tribal constitution provides at art. IV, sec. 10, that "[t]he Business Committee shall be the sole judge of the qualifications of its members" (Constitution and Bylaws of the Chippewa Cree Indians of the Rocky Boy's Reservation, Montana, approved Nov. 23, 1935).

United States v. *Anderson,* 625 F.2d 910, 916 (9th Cir. 1980). That the United States is bound by a tribal constitution would be an especially incongruous result considering that an Indian tribe is not correspondingly bound by the United States Constitution (*Talton* v. *Mayes,* 163 U.S. 376 (1896)).[30]

Appellants also contend that the BIA should be estopped from refusing recognition of actions of the tribal council as constituted after the Nov. 1978 general election, because of its continued recognition of the tribal council after the November election even though it had notice of purported election irregularities prior to the election. The Board rejects this argument. The facts indicate that the BIA delayed its decision and continued its recognition because Mr. St. Marks was exhausting his appeal through the tribal appellate process. Furthermore, during the course of appeal through BIA channels, the tribe itself requested several extensions of time in order to prepare briefs and allow the matter to be resolved internally by tribal institutions. Finally, as the challenged decisions indicate, the Bureau, for the tribe's own benefit, continued to recognize caretaker actions of the tribal council. Under these circumstances, the Board does not believe the doctrine of estoppel is applicable in this instance and further that it does not warrant superseding the trust responsibility of the United States.[31]

Further, appellants sweepingly contend that the Bureau's decisions in this matter violate their rights under the United States Constitution, the Constitution of the Chippewa Cree Tribe, the IRA, and the Indian Self-Determination Act. Where there is a proper exercise of power and authority under the trust responsibility to protect tribal governments, as has been shown in this case, no such violations of appellants' rights occur.

Appellants' contentions regarding the factual basis of the Bureau's decisions, the sufficiency of the evidence upon which they were based, the seriousness and magnitude of the constitutional violations, and the denial of due process are negated by the findings of a prima facie violation of the tribal constitution resulting in the election of a constitutionally infirm tribal council which thus threatens the legality of the tribal government and the integrity of the tribal constitution in contravention of the IRA. Furthermore, although offered ample opportunity, in accord with due process, during the course of the administrative appeal, the appellants failed to deny or refute the facts, the evidence, or the legal conclusions of the Bureau in regard to the constitutional violations. In essence, there was no genuine issue of material fact before the

[30] Whatever legal effect the Constitution of the Chippewa Cree Tribe has on the United States Government, it is the result not of the constitution itself, but of the order of the Secretary issued under his own authority and initiative and in accordance with sec. 16 of the IRA whereby the Constitution and Bylaws of the Chippewa Cree Tribe were approved. *See* Order of the Secretary of the Interior approving the Constitution and Bylaws of the Chippewa Cree Tribe of the Rocky Boy's Reservation dated Nov. 23, 1935.

[31] "It is clear, however, that termination of the Federal Government's [trust] responsibility for an Indian tribe requires 'plain and unambiguous' action evidencing a clear and unequivocal intention of Congress to terminate its relationship with the tribe." *Passamaquoddy Tribe, supra,* 388 F. Supp. n.15 at 663.

Board. For these reasons then, the Board denies appellants' alternative motion for a hearing before an Administrative Law Judge of the Office of Hearings and Appeals.

[8] By way of summary, the Board holds that the government-to-government relationships between the United States and Indian tribes organized under the IRA are governed by the IRA. More specifically, the actions of the United States with regard to these relations are governed by the trust responsibility established by the IRA and consequently are "subject to limitations inhering in * * * a guardianship and to pertinent constitutional restrictions." Because the BIA had reasonable cause to believe a violation of a tribal constitution of a tribe organized under the IRA had occurred, and because a prima facie material and significant violation of the tribal constitution in fact occurred, and because said violation did constitute an imminent and substantial threat to the tribal government sufficient to justify independent action by the United States, and because said action was substantially related to fulfillment of the trust responsibility established by the IRA and in accordance with applicable principles of guardianship and pertinent constitutional restrictions, the actions and decisions of the BIA in this instance comport with the requirements of law and are therefore affirmed.

Pursuant to the authority delegated to the Interior Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this decision is final for the Department.

JERRY MUSKRAT
Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

WM. PHILIP HORTON
Chief Administrative Judge

J. F. SHEA CO., INC.

IBCA-1191-4-78

Decided *March 30, 1982*

Contract No. 14-06-D-7644, Bureau of Reclamation.

Sustained in part.

1. Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)

In a differing site condition claim under a contract for excavation of a tunnel in the Central Arizona Project where consulting geologists retained by three different bidders, as well as the manufacturer of the tunneling machine, each independently concluded that the geological data furnished by the Bureau of Reclamation indicated there would be sufficient standup time in the top and sides of the tunnel to permit installation of tunnel supports in accordance with the specifications, the Board found a differing site condition existed when the contractor encountered large blocks of rock with no standup time which fell immediately out of the top and

sides of the tunnel, interfering with the cutterhead of the tunneling machine and with placement of the precast concrete segments for supporting and lining the tunnel.

2. Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)

In two separate differing site condition claims where the contractor encountered soft invert which would not support the weight of the tunneling machine, the Board found that a differing site condition existed when the machine encountered a 9-foot layer of clay between two drill holes, neither of which showed a layer of clay, but the Board found there was no differing site condition when the machine encountered very soft rock between two drill holes where only 45 and 50 percent of the core material was recovered from the drill holes and the lack of recovery indicated that soft material, not suitable for coring, was present at the invert level.

3. Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)—Contracts: Disputes and Remedies: Equitable Adjustments

Where the contractor selected a reference reach of the tunnel to establish a normal cost of excavation for comparison with greater costs in the claim reach of the tunnel, but the evidence showed that some costs were understated in the reference reach and other costs were overstated in the claim reach, the Board found the contractor's approach to be unacceptable as a basis for an equitable adjustment and resorted to the jury verdict method for determining the amount of the equitable adjustment.

APPEARANCES: Messrs. David P. Yaffe, William J. Ingalsbe, Monteleone & McCrory, Los Angeles, California, for the Appellant; Mr. William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

Appellant has taken a timely appeal from a decision of the contracting officer which denied appellant's claim for an equitable adjustment based on differing site conditions.

The Bureau of Reclamation awarded Contract No. 14-06-D-7644 to the J. F. Shea Co., Inc., on Feb. 20, 1975, for the construction of the Buckskin Mountains Tunnel of the Central Arizona Project. The contract was prepared on the standard forms for construction contracts, including General Provisions (Standard Form 23-A, Oct. 1969 edition), Supplement to General Provisions, and numerous detailed specifications and drawings. The contract called for construction of a tunnel approximately 22 feet in diameter and 6.9 miles long at a contract price of $58,256,638 (Appeal File Exh. 1).

The contract specifications allowed the contractor a choice among three methods of constructing the tunnel. The first method was conventional construction by drilling and blasting. This method provided for temporary supports inside the tunnel until the entire tunnel had been driven and then lining the tunnel with cast-in-place concrete. The second method allowed use of a tunnel boring machine, temporary supports until the entire tunnel had been driven, and lining with cast-in-place concrete. The third method allowed the tunnel to be

excavated with a tunnel boring machine and lined with precast concrete sections as the tunnel was being driven. Shea chose the third method of excavating and lining the tunnel (Appeal File Exh. 1).

Around June 1, 1976, Shea began excavating the tunnel at the south end of the project (Tr. 29). In order to test the capability of the tunnel boring machine, Shea drove a short section of the tunnel and reached a maximum penetration rate of 15 feet an hour (Tr. 661). The machine was stopped and backed up about 20 feet to allow inspection of the face of the tunnel. The tunnel face was observed to be composed of highly fractured, closely jointed rock which stood up without support. Such conditions were the ones anticipated by Shea (Tr. 660–64).

The excavation of the tunnel proceeded rather slowly, with 155 linear feet excavated in June 1976, and 180 linear feet excavated in July 1976 (App. Exh. P). By Aug. 1, 1976, at the approximate location of Drill Hole 123, Shea began to encounter large blocks of rock which fell from the top and sides of the tunnel, creating voids in areas which were not required to be excavated. The large blocks of rock fell against the dust shield of the tunnel boring machine, which is located directly behind the cutterhead, and conditions finally became so severe that Shea had to stop excavation and replace the damaged dust shield with a reinforced shield (Tr. 37–42).

Excavation of the tunnel continued on an intermittent basis until Oct. 6, 1976, when large blocks of rock fell from the top and sides of the tunnel to such an extent that there was a large void around the machine and it could no longer advance (Tr. 59–60).

Shea consulted with a geologist and with the Robbins Co. which had designed and built the tunnel boring machine to determine if the machine could be modified to function in the conditions which had been encountered. The machine was not designed to withstand large blocks of rock, 3 to 5 feet in one dimension, falling onto the machine (Tr. 696–97). The Robbins Co., has designed other tunnel boring machines to deal with unstable rock conditions and could have so designed the present machine if such conditions had been anticipated (Tr. 697–706). The modifications agreed upon consisted of installing additional steel plates on the cutterhead to reduce the space between the edge of the cutters and the cutterhead from 16 to 4 inches, to prevent the large blocks of rock from falling between the cutterhead and the face of the tunnel (Tr. 70).

Modification of the cutterhead involved lifting about 60 tons of steel plates through a small opening to the front of the cutterhead where installation took place (Tr. 72–74). No excavation took place during the 3 months required for modification of the cutterhead (Tr. 75). Excavation of the tunnel resumed on Jan. 3, 1977. Large blocks of rock continued to fall on

the tunneling machine and so distorted the roof shield and the outer skin of the tunneling machine that the precast concrete segments could not be erected to line the tunnel. Excavation of the tunnel was halted again on Jan. 13, 1977 (Tr. 80–85).

To deal with the problem of the deformation of the roof shield and the outer skin of the tunneling machine, Shea removed damaged portions of skin, reinforced the outer skin with steel plates and stiffening rings, and replaced the roof shield with a heavier shield that extended to about three-quarters of the circle (Tr. 88–90). These modification required 2 months to complete and excavation of the tunnel was resumed on Mar. 16, 1977 (Tr. 107). because of the large void around the machine, there was insufficient surface for the tunneling machine to grip in order to generate the necessary forward thrust, and work progresed slowly until the end of March when the machine had advanced out of the void area (Tr. 110–11).

Thereafter, although the machine continued to encounter rock with little or no standup time, the modifications prevented large blocks of rock from falling in front of the cutterhead, and the strenghened shield supported the rock which fell from the sides and top of the tunnel until the precast concrete segments could be erected under the tail shield to support the rock when the machine moved on (Tr. 266). After the end of Mar. 1977 excavation proceeded at a normal pace except for delays of 4 days beginning on May 12, 1977, and 10 days beginning on July 9, 1977, when the tunneling machine encountered soft material in the invert of the tunnel which would not support the weight of the machine (Tr. 138–49, 163–76). Excavation was haltered on those two occassions while Shea installed a steel and concrete foundation in front of the machine to provide the support necessary to bring the tunneling machine back up to grade.

Shea filed written notice by letter of Aug. 31, 1976, of a potential differing site condition as required by paragraph 4 of the General Provisions of the contract (Appeal File Exh. 3). On Sept. 19, 1977, Shea presented its claim for $5,300,335 and an extension of 189 days as a result of blocky, open-jointed rock conditions which it contended were both category one and category two differing site conditions. Also, by letter of Sept. 19, 1977, Shea presented its claim for $542,292 and an extension of 11 days as a result of the delays caused by soft inverts in May and July of 1977, alleging differing site conditions under both category one and category two (Appeal File Exhs. 19, 20).

The contracting officer denied both claims on the basis that the conditions complained of could reasonably have been foreseen from the conditions indicated in the contract (Appeal File Exh. 2). A timely appeal was taken from the decision of the contracting officer. At the hearing, Shea alleged that the total amount of the equitable adjustment to which it was entitled should be $6,961,401.

Claim for Blocky, Open-Jointed Rock Conditions

In connection with this claim, Shea contends that it is entitled to an equitable adjustment under either category one or two of the differing site conditions clause. We turn our attention first to the category one claim.

Shea presented testimony of three consulting geolgists who were engaged by bidders on the Buckskin Mountains Tunnel to advise them of the conditions that could reasonably be expected in excavating the tunnel. One geologist was retained by Shea and two other bidders each retained one of the other geologists. All three of the geologists independently reviewed the geologic data furnished by the Bureau of Reclamation, including the preconstruction geologic report. The report, beginning with the second paragraph on page 7 (Appeal File Exh. 30) describes the site geology as follows:

> The majority of rocks comprise andesite flows that range in total thickness up to hundreds of feet. Individual beds of andesite vary significantly in thickness, even locally. The andesite flows are typically fresh, dense, non- to slightly vesicular, hard, and randomly and closely jointed (see P344-314-176). The interflow zones are typically closely jointed, brittle, moderately to highly vesicular, and brecciated, and include sporadic zones of cinders and/or tuff and volcanic breccia. Calcite moderately to heavily coats most joint surfaces and partially to fully fills many vesicles. In local areas, significant intervals of brecciated and decomposed andesite occur. These areas are interpreted as being associated with fault zones.
>
> Tuff and/or agglomerate occur between most andesite flows, commonly ranging in thickness from a few feet to 25 feet (see P344-314-180). Locally, however, they attain thicknesses of a few fundred feet. The tuff is typically a massive, compact, widely jointed, weakly to moderately cemented, relatively homogeneous rock comprised of sand- to fine-gravel-size ejecta and andesite fragments. Calcium carbonate and to a lesser extent iron oxide are the cementing agents and also coat most joint surfaces. The agglomerate is typically a heterogeneous admixture of gravel- to boulder-size ejecta, and andesite fragments, moderately to well cemented in a tuffaceous matrix by calcium carbonate, and is widely jointed (see P344-314-179 and -175).
>
> The above prevailing sequence is intruded by numerous near-vertical andesite dikes that range in width from 1 to 20 feet and commonly are hundreds to thousands of feet in length. This andesite is typically fresh, hard, dense, and closely jointed.

Each of the three consulting geologists had extensive experience in tunnel projects. After reviewing all of the geologic data furnished by the Bureau of Recalamation in the invitation for bids and the preconstruction geologic report, each submitted a written report to his client. None of the three anticipated that a tunneling contractor would encounter large blocks of rock with no standup time which would fall out of the top and sides of the tunnel immediately upon excavation. All three of the geologists expected that the orientation and spacing of the joints in the rock would cause sufficient interlocking or arching action to allow time for placing the roof supports in accordance with the contract specifications (Tr. 299-301, 509, 510, 611-15; Appeal File Exhs. 31, 32, 33).

The views of the three consulting geologists with respect to the interlocking action were consistent with those of the Robbins Co.

which designed and manufactured the tunneling machine. The company sent its engineers to examine the core samples from the test drill holes and conducted discussions with personnel from the Bureau of Reclamation regarding the feasibility of using a tunneling machine for the Buckskin Mountains Tunnel. The main concern of the Bureau was whether a machine could bore a tunnel in rock having the degree of hardness shown in some of the core samples. There was no evidence that the Bureau was concerned about fallout of large blocks of rock on the tunneling machine. Although the Robbins Co. had successfully designed tunneling machines to deal with fallout of large blocks of rock and to support such rock by means of the roof and tail shields until the tunnel support could be placed, it did not design the machine for this contract with the capability to deal with immediate fallout of large blocks of rock because its analysis of the geologic data and its discussions with the Bureau did not indicate any necessity for such capability (Tr. 697–706).

In addition to testimony the three geologists and the president of the Robbins Co. as to their views on the subsurface conditions at Buckskin Mountains Tunnel based on their interpretation of the indications in the drill logs and the preconstruction geologic report, Shea also relied on indications in the specifications that the rock to be encountered in excavating the tunnel could be supported by only a roof shield. Paragraph 5.2.1 of the specifications required that the tunneling machine be equipped to handle and erect the precast concrete segments behind the cutterhead and under a roof shield (Appeal File Exh. 1). The Bureau's expert witness testified that a roof shield generally covers the top portion of the tunnel, extending to about 120 degrees of a circle (Tr. 999).

The tunneling machine used by Shea was equipped with a roof shield, but when the large blocks of rock with no standup time were encountered, the roof shield could not support such a condition and had to be modified so that it was not merely a roof shield but a tail shield extending to about 270 degrees of a circle (Tr. 118, 119).

Other indications in the contract as to the subsurface conditions to be expected are set forth in contract drawings 3444–D–96 and 344–D–99 (Appeal File Exh. 1). The two sheets show cross sections of the tunnel under the various options as to method of construction. The first drawing shows a tunnel excavated by the drill and blast method and indicates that the section would be irregular and that there would be some overbreak or fallout beyond the line to which the contractor was required to excavate. The second drawing shows a tunnel excavated by machine with a smooth contour and no overbreak.

The latter drawing also shows the design of the precast concrete segments used for lining the tunnel, with each segment having eight pieces with a minimum thickness of 6 inches. Steel reinforcing bars or wire fabric could be included if the contractor chose to do so (Tr. 449, 450).

The segments used by Shea were redesigned by a structural engineer engaged to simplify the erection of the segments. The redesigned segment had only four pieces with a thickness of 7 inches and the longitudinal joint had a trapezoidal groove instead of the cup-shaped joint designed by the Bureau (Tr. 639–42). The structural engineer testified that in subsurface conditions in which no fallout occurred, both the Bureau's design and the redesigned segments could perform satisfactorily. Under the conditions actually encountered in the claim reach of the tunnel, where large blocks of rock fell immediately from the crown of the tunnel and rested directly on the concrete segments before the annular space around the segment could be filled with pea gravel and grouted, the Bureau design would be quite likely to fail (Tr. 643–47, App. Exh. Y).

The Government offered no evidence to rebut the testimony of the structural engineer. Instead, it relied on the testimony of the Chief Geologist of the Bureau of Reclamation and on a report and testimony of a consulting geologist who was retained on Jan. 31, 1978, to analyze the differing site condition claim of Shea.

The Bureau's chief geologist assumed that position on Apr. 28, 1974, after much of the preliminary geologic data had been gathered for the Buckskin Mountains Tunnel and after the initial consultations with the Robbins Co. regarding the feasibility of using a tunneling machine to excavate the tunnel (Tr. 769, 814). He testified that based on his experience with machine bored tunnels, particularly with the Bureau of Reclamation and having observed what has happened regarding immediate fallout in those tunnels, that he would expect that immediate fallout would occur from the crown, the sides, and the face of the tunnel and that the fallout would be from zero feet up to several feet (Tr. 800). The chief geologist stated that he did not feel that it was the responsibility of the Bureau of Reclamation to interpret the geologic data furnished by the Bureau in its specifications and that a contractor could have his own geologists look at the data and arrive at their own conclusions as to the conditions to be encountered (Tr. 810, 811). There is no evidence of record that the chief geologist expressed his views about fallout in the Buckskin Mountains Tunnel prior to the time the fallout occurred. More specifically, there is no evidence to show that the chief geologist communicated his expectation of fallout to the Bureau engineers who designed the precast concrete segments so that sufficient strength could be designed to support the fallout.

The differing site conditions clause requires the contractor promptly and before the conditions are disturbed to notify the contracting officer in writing of subsurface conditions differing materially from those indicated in the contract. Shea gave such notifications by letters of Aug. 31, 1976, Oct. 19, 1976, and Jan. 20,

1977. (Appeal File Exhs. 3, 6, 8). The clause further provides that the contracting officer shall promptly investigate the conditions, but the record does not disclose any geologic investigation of the conditions complained of in these three letters. The Bureau's responses by letters of Sept. 16, 1976, Oct. 23, 1976, and Jan. 27, 1977, merely state that the Bureau disagreed with Shea's assertion of a differing site condition (Appeal File Exhs. 4, 7, 9).

It was not until after Shea presented its detailed claim for an equitable adjustment of 189 days extension and $5,300,335 by letter of Sept. 19, 1977 (Appeal File Exh. 19) that the contracting officer undertook to investigate the conditions about which Shea complained. On Jan. 31, 1978, the contracting officer issued a purchase order to a consulting geologist for an evaluation of the technical aspects of the claims by Shea. The geologist examined the rock cores from the drill holes, visited the tunnel, and flew over the tunnel alignment in a helicopter on Feb. 1, 1978. On Feb. 2, 1978, he met with members of the Contract Administration Branch and the Geology Division of the Bureau of Reclamation in Denver. His 12-page evaluation was submitted on Mar. 5, 1978 (Appeal File Exh. 27).

On page 5 of his report, the geologist retained by the Bureau stated in part: "It is difficult to pinpoint the exact geologic features most responsible for the problems because, unfortunately, the Bureau did not have a site geologist assigned to the project who could have made appropriate geological observations on a continuous day-by-day basis" (Appeal File Exh. 27 at 5, lines 16–19).

Despite the difficulty, the Bureau's consulting geologist attempted to pinpoint the causes for the problems and expressed his opinion that joint blocks of the andesitic lava falling from the arch created one of the main problems (Appeal File Exh. 27 at 5, lines 20–21). He further noted that photographs are available showing the massively jointed, blocky andesite. In analyzing the geologic conditions stated in the bidding documents he was unable to find any reference to massively jointed rock (Tr. 996–97). The Bureau's consultant set forth his conclusions on pages 11 and 12 of his report as follows:

> 6. *Discussion and Conclusions*
>
> (a) *The Test of Changed Conditions*—Applying the writer's test of changed conditions, it becomes a question of whether or not the geologic features and conditions of adverse nature which were given in the bidding documents (and highlighted in the previous section) could cause the construction problems which were met with in the claim reach. It is concluded that, indeed, such geologic conditions could and did lead to the problems of erratic nature of raveling, fall-out, overbreak, and soft, weak sides and invert which plagued the mechanical tunneling and segment-lining operations.
>
> The geologic conditions as described would include great variability in rock type, rock hardness, rock strength, rock fracturing and jointing, occurrence of clay on some joints, raveling type rock of small-size blockiness, medium-size blockiness, and large-size blockiness, and locations and angles of contacts and thicknesses of units. These predictable geologic conditions were, indeed, encountered (to the extent that I can reconstruct the records) and appear with reasonable certainty to have been responsible for the various problems in construction.
>
> I am convinced in my own mind that because of the experience with tunnel boring

machines that I and my associate, Dr. Merritt, have had on a number of TBM tunnels in many countries where adverse geological conditions have been met, we would have warned a potential bidder of the considerable hazards that would be involved in bidding the TBM alternate on this job.

(b) *TBM Modifications*—I believe that credit must be given to the Bureau in specifying the TBM as an alternate method with the provision that the machine must have a tail shield for use with the pre-cast concrete segment lining alternate. The design of the machine including the tail shield, erector, etc. was left to the Contractor and the machine manufacturer. It is apparent that the Bureau designers considered the rock to be of such character as to require nearly full steel rib support in Schedule 1 (Drill and Blast) where 15,000,000 pounds of structured-steel tunnel supports were given in the quantity estimate. In Schedule 2 (Machine Boring plus cast-in-place concrete lining) the amount of steel was reduced to 4,400,000 pounds but large quantities of shotcrete (25,000 cu ft), rock bolts (386,000 lin ft), and chain link fabric (15,000 sq yd) were specified for initial support. For the Schedule 3 (Machine Boring plus pre-cast concrete segments) the initial support as well as the final lining were provided by the concrete segments.

In my opinion, it is also to the credit and courage of the Contractor, J. F. Shea Co. Inc., and their machine manufacturer, Robbins, that they undertook to bid the project with the TBM and concrete segment Schedule 3. This is in light of the heterogeneous, volcanic series of soft to hard rocks through which tunneling had to be conducted, some of which was under low rock cover where surface weathering and a general low stress field due to erosion could be expected to exist. This condition would make it quite likely that the blocks of andesite would have slightly opened joints, some degree of weathering along the joints, and when coupled with a probable low horizontal stress field would make it very difficult to hold an arch across a 23'-5½" width without some fall-outs, particularly considering the prevalence of the many curved, steep, near-vertical joints, at least some of which were clay-coated or filled.

Because of the foresight and persistence of the Contractor and the machine manufacturer, the TBM was not removed from the tunnel but modifications were made to the machine to adapt to the adverse rock conditions. The TBM system with pre-case concrete segments has now emerged as a proven method which will have a strong position in future tunnels of the Bureau and other agencies in the U.S. and abroad. However, I feel that the changed conditions claims are not justifiable in light of the geologic conditions which could reasonably have been foreseen and provided for.

1. *Decision on the Claim for Blocky, Open-Jointed Rock Conditions*

The Government asserts on page 3 of its brief that when one undertakes to bore a tunnel 7 miles long and more than 20 feet in diameter one must expect the unexpected. As a basis for the arguments which follow, this assertion has one unique disability: it is contrary to law.

The purpose of the differing site conditions clause is to take the gamble on subsurface conditions out of bidding. Bidders need not include a contingency for adverse subsurface conditions since faithful administration of the differing site conditions clause will insure that there will be no windfalls and no disasters. The Government benefits from lower bids without inflation for supposed risks that may not occur. It pays for difficult subsurface work only when it is encountered and was not indicated in the logs. *Foster Construction C. A.* v. *United States,* 193 Ct. Cl. 587, 614 (1970).

The standard differing site conditions clause as mandated by the Federal Procurement Regulations, 41 CFR 1-7.604-4, represents a

long-standing, deliberately adopted procurement policy of the Government which has been enforced by the Court of Claims and boards of contract appeals on numerous occasions. In the course of enforcing the differing site conditions clause, the Court of Claims has severely restricted the effect of broad exculpatory clauses (such as paragraph 1.5.23.f. on page 39 of the specifications, Appeal File Exh. 1) by which various agencies of the Government have attempted to disclaim responsibility for drill hole data furnished in their contracts. *Foster Construction C.A.* v. *United States, supra* at 616; *United Contractors* v. *United States,* 177 Ct. Cl. 151, 165-66 (1966); *Fehlhaber Corp.* v. *United States,* 138 Ct. Cl. 571, 584, *cert. denied,* 355 U.S. 877 (1957). The net effect of these cases is that Shea and other bidders were entitled to rely on indications of the subsurface in logs included in the invitation for bids. They are not required to expect the unexpected. On pages 5 and 6 of its claim submission of Sept. 19, 1977, appellant referred to the report of its consulting geologist which stated that the blocky or seamy rock indicated in the contract does not react immediately to the change in stress produced by excavating a tunnel, and that it would be highly unusual for rock of the type described in the preconstruction geologic report to have stand-up time so short that massive rock fallouts would occur between the time that the rock is excavated by the machine and the time that the rock is supported by the shield of the tunneling machine. Paragraph 5.2.1 on page 77 of the specifications required the machine to have the capability to erect precast concrete segments under a roof shield. This is an indication that the Bureau of Reclamation expected that support of the roof of the tunnel could be accomplished by means of the roof shield until erection of the precast concrete segments which were designed for both support and lining of the tunnel. The requirement for only a roof shield is a further indication that the Bureau expected no fallout on the sides of the tunnel. An additional indication that the Bureau expected no massive fallout from the top and sides of the tunnel is found in the unrefuted testimony of Shea's consulting structural engineer that the Bureau's original design of the eight piece precast concrete segment would be likely to fail where massive blocks of rock fell on the segment before the space around the segment could be filled with pea gravel and grouted.

Although the Government relies on the testimony of the chief geologist for the Bureau of Reclamation to support its contention that no differing site condition was encountered by Shea, it must be noted that his testimony that the conditions actually encountered could have been anticipated from the geologic data furnished was given with the benefit of hindsight. There is no evidence of record that the chief geologist or anyone on his staff advised the Bureau engineers who designed the tunnel support and lining that massive fallout of rock could be expected, nor is there any evidence that they considered that more than a roof shield would be

necessary to support the tunnel prior to placing the supports. Regardless of the view of the chief geologist that it was not his responsibility to interpret geologic data for the benefit of bidders, there is no reason for him to have withheld his interpretations from the Bureau of Reclamation engineers who designed the tunnel supports and who drafted the specifications for a roof shield instead of a full tail shield. It would have been irresponsible for the chief geologist to have allowed an inadequate design for the shield of the tunneling machine and an inadequate tunnel support system to be included in the invitation for bids if, in fact, he believed that the geologic data indicated that massive and immediate fallout would occur. There is no basis for presuming that the chief geologist or his staff acted irresponsibly, so we conclude that no one in the Geology Division anticipated that massive and immediate fallout from the top and sides of tunnel would occur.

The Government also relied on the testimony and report of the geologist it retained to analyze the claim submitted by Shea. Although he described a number of predictable conditions which he concluded could and did lead to problems in mechanical tunneling and segment lining operations, there is no evidence of record that Shea had any particular difficulty with any condition other than encountering sound, hard rock, divided by widely spaced but open joints into large blocks that were not mechanically interconnected and which had no standup time.

After stating in his report that joint blocks of andesitic lava falling from the arch created one of the main problems and that photographs are available showing the massively jointed, blocky andesite, the geologist retained by the Bureau testified that in analyzing the geologic conditions stated in the bidding documents, he was unable to find any reference to massively jointed rock. With reference to standup time, the Bureau's consultant did not state that he would have anticipated the immediate fallout of large blocks of rock which blocked the cutterhead and jammed the buckets, hopper, and conveyer belt of the tunneling machine. Instead, in a carefully worded statement of his conclusions, the Bureau's consultant stated that the conditions that could be expected to exist would make it very difficult to hold an arch across a 23 foot by 5½ inch width without some fallout. It is significant that he did not say there would be difficulty forming an arch. A reasonable expectation that there would be some fallout after the arch had formed is a materially different condition than the condition actually encountered, where large blocks fell immediately from the top and sides of the tunnel without forming an arch.

In accord with the above, the Board finds that the subsurface conditions at the site of the tunnel differed materially from those indicated in the contract and that a category one differing

site condition existed with respect to Shea's claim for blocky, open-jointed rock conditions. The Board further finds that Shea is entitled to an equitable adjustment for this category one differing site condition. The amount of the equitable adjustment will be addressed in a later section of this decision. Having found that the Government is liable for an equitable adjustment for a category one differing site condition, we do not reach the question whether there was also a category two differing site condition. We note that most of the Government's argument on brief was directed toward showing that there was no category two differing site condition.

2. *Decision on Claim for Soft Invert*

Shea claims that it encountered differing site conditions in the form of soft inverts in the tunnel which could not be foreseen from the Bureau's drill logs of the nearest drill hole. Soft invert was encountered on two occasions. On May 12, 1977, about 50 to 60 feet north of drill hole 108, the invert of the tunnel became so soft that it would not support the weight of the tunneling machine. As excavation progressed, the tunneling machine began to sink below the design grade of the tunnel. Operation of the controls on the tunneling machine could not bring the machine back to the proper grade. The machine was stopped and then backed up 10 feet. Shea's crews then built a steel and concrete ramp in front of the cutterhead and built an extension on the rear of the cutterhead shoe support to increase the bearing area (Tr. 138–49).

The measures taken to bring the machine back up to grade were successfully completed on May 16, 1977, and the machine was able to resume excavating at the proper grade (Tr. 162–63).

Shea's project manager testified that he observed a 9-foot high layer of clay gouge in the bottom of the tunnel where they ran into difficulty maintaining the proper grade (Tr. 157–60). The geologic log of drill hole 108 described the classification and physical conditions in pertinent part as follows:

> 4.0—122.5 *Volcanic rock:* Andesite: gray with few brown stained zones: dense except for scattered vesicles: hard—requires strong hammer blow to break.
>
> * * * * *
>
> 15.0—122.5 *Moderately jointed:* joints spaced 1″ to 18″ apart, variously oriented from horizontal to vertical, smooth and planar to rough and irregular, commonly coated or partially filled with calcite, few clay coatings; several closely broken clay-filmed zones; due to fracturing or to drilling along near vertical joints, most prominent fractured zones at 19.6–20.0, 25.5–26.5, 31.0–33.5, 49.9–51.4 and 82.5–84.0; recovered as about 90% core in 2″ to 8″—average 8″—core pieces and 10% core fragments.

Appellant asserts that it should be able to rely solely on the log of drill hole 108 which was 50 or 60 feet away from the soft invert for indications of the subsurface conditions. The Government argues that Shea should also look to the nearest drill hole on the other side of the area in question for an interpretation of the condition that should be expected. Whatever merit the Government's argument may have in the abstract, in the particular facts of this instance, the argument is to no avail. Drill hole 104 on the other

side of the affected area has the following classification and physical conditions shown in the geologic log:

136.4–161.7 *Agglomerate* with highly vesicular andesite at 136.4–142.6 consists of ¼″ to 8″ fragments of dense to vesicular gray andesite in matrix of brown tuff or clayey sand; grades into tuff in lower two feet; calcite cemented; weak to moderately hard, hardest requires medium hammer blow to break, weakest can be crumbled in hand; poorly defined joints, most core breaks due to weakness of material.

Neither of the two drill holes closest to the affected area indicate that a layer of clay or clay gouge in the tunnel invert of at least 9 feet in thickness could be expected. Accordingly, the Board finds that Shea encountered a subsurface site condition which differed materially from the conditions indicated in the contract. The Board further finds that Shea is entitled to an equitable adjustment for the 4 days delay from May 12 to 16, 1977. The amount of the equitable adjustment will be addressed in a later section of this decision.

With respect to the soft invert encountered in July 1977, Shea relies on drill log data from drill hole 102. On brief, Shea quoted the following descriptions as the pertinent part of the data:

12.5–56.3 *Volcanic Rock:* Andesite, largely fractured and brecciated and variably altered to decomposed.

* * * * *

39.2–56.3 Highly fractured and slightly to strongly altered, reddish brown to gray; mostly hard, requiring hammer blow to break; minor weak material can be broken in hand. . . .

Shea did not cite the concluding statement in the drill log data: "[r]ecovered about 30% of interval as hard 2″ to 8″ cores, 25% as ½″ to 2″ fragments, and 45% not recovered.

Shea's project manager testified that on July 8, 1977, the tunneling machine passed under the Osborne Wash, the area of the tunnel having the lowest cover, with about 10 to 14 feet of rock overhead and deposits of sand about 15 to 20 feet thick. This was an area of concern to Shea because of the low cover. The project manager made a note in his diary that the ground changed to highly fractured andesite and it was hard holding grade (Tr. 163–64).

On July 9, 1977, the project manager made a note in his diary that the ground was highly fractured and was the softest material encountered to date (Tr. 165). On July 14, 1977, he recorded in his diary that the top half of the tunnel was blocky andesite and the lower half highly fractured andesite (Tr. 168–69).

Shea offered testimony of a consulting geologist that the construction and foundation materials test data (Appeal File Exh. 29), showed test results from 16.5 and 31.9 feet in test hole 102 that indicated that the tunneling machine could be supported by ground having the unconfined compressive strength of those samples (Tr. 602–03). His testimony was that the tunnel invert was at a depth of 48 feet. The geologist's testimony did not address the problem posed by the fact that 45 percent of the material from drill hole 102 was not recovered.

The chief geologist of the Bureau of Reclamation testified that with respect to drill hole 101, which was near the location of the July soft invert claim, the bottom core run covering the tunnel invert had 50 percent of the material which could not be recovered, indicating that it was weak material which would not lend itself to coring. He deduced that, on the basis of the core loss at the bottom of the hole, it was very weak rock and possibly extremely weak rock (Tr. 804-05). This testimony was unrefuted.

Accordingly, the Board finds that the conditions encountered by Shea in July 1977 did not differ materially from those indicated in the drill hole data for the nearest two drill holes, 101 and 102. Shea offered no evidence to show that the soft invert in July was of an unknown or unusual nature which differed materially from conditions ordinarily encountered in work of the type provided for in the contract. Therefore, the Board finds that neither a category one nor a category two differing site condition was encountered in the tunnel in July 1977.

3. *Equitable Adjustment for Blocky Rock*

Shea presented evidence directed toward showing the costs which it asserted were increased by the blocky rock differing site condition (App. Exh. R). The cost summary was prepared by Shea's chief engineer, who calculated the additional costs by comparing the average cost per linear foot of tunnel excavated during the claim period, Aug. 1, 1976, to Mar. 31, 1977, with the average cost per linear foot incurred during a period of time after adverse conditions were no longer a problem, Aug. 1, 1977, to Oct. 31, 1977 (Tr. 320-26).

An examination of appellant's exhibit R and the testimony of the chief engineer discloses that the total costs incurred by Shea during the claim period were computed and then adjusted downward by the costs involved in the manufacture of the precast concrete segments which were not affected by the differing site condition claim. The adjusted total cost during the claim period was allocated to the number of linear feet excavated during the claim period and compared to the cost per linear foot during the reference period. Although the chief engineer testified that 1, 325 feet were excavated during the claim period (Tr. 327), the total shown in appellant's exhibit P is 1,371 linear feet of excavations during the claim period of Aug. 1, 1976, to Mar. 31, 1977. The chief engineer then multiplied the cost per linear foot during the reference period by 1,325 to get the alleged cost of performing the excavation if no differing site condition had been encountered. The difference between the cost of performing 1,325 feet of excavation during the reference period and the adjusted total cost of performing the excavation during the claim period equals the amount of costs claimed.

Aside from the distortion of the claim by using 1,325 rather than 1,371 for the number of linear feet excavated during the claim period, Shea's method of computation of the equitable adjustment is

flawed in many respects in both conception and computation. Shea's chief engineer testified that a total of 4,240 linear feet were excavated during the reference period, for an average of 1,413 linear feet per month (Tr. 326–27). In order for the Board to accept the basic premise in Shea's calculation, it would be necessary for the Board to find that, but for the differing site condition, Shea would have been able to increase its excavation progress from 155 feet in June 1976 and 180 feet in July 1976 to an average of 1,413 linear feet per month for the 8-month period beginning on Aug. 1, 1976. The only evidence on this point was testimony of Shea's project engineer that the learning curve had flattened out by Aug. 1, 1976 (Tr. 279–80). Such evidence is insufficient to support a finding that without the differing site condition, Shea could have achieved almost a tenfold increase in the progress of the excavation for the period in question.

It would appear that a fairer method of establishing a reference period would be to include the 2 months prior to encountering the claim period along with the reference period chosen by Shea's chief engineer since the 2 months prior to the claim period are much closer in both time and distance to the start of the claim reach. Such calculation cannot be made on the basis of the present record which contains no cost figures for June and July 1976.

A further difficulty with Shea's formula is that despite testimony by its project engineer that his cost experience on this job was that $1 for supplies was expended for every dollar of labor cost (Tr. 1033–34), the computation of the claim by the chief engineer transferred only 30 cents of supply costs from the subaccounts to the main cost accumulation for every dollar of labor costs during the claim period (Gov. Exh. 7 at 4). The understatement of the supply costs in the reference period resulted in a wider disparity between the reference period and the claim period and increased the amount of the claim by the amount of the understatement of costs (Tr. 864–66).

Another flaw in Shea's presentation appears on pages 10 and 11 of its exhibit R where column 1 lists the value of 50 items of equipment under the heading "Purchase Price or Fair Market Value." Shea's chief engineer testified (Tr. 435) that 42 of the amounts represented his estimate of fair market value. The Government auditor testified that the description of much of the equipment was in such general terms that no verification of fair market value could be made by reference to standard guides (Tr. 880–81).

On brief, the parties argued at length about applying Associated General Contractors (AGC) rates or actual rates derived from Shea's accounts to the equipment values for the purpose of determining depreciation and equipment ownership costs during the claim period. When the first figure in a computation is an estimate, the end result is still an estimate, regardless of which rates

are applied. The conclusory testimony of Shea's chief engineer as to the fair market value of the equipment, unsupported by any other evidence of record, is not the type of hard evidence upon which an exact calculation of costs may be based.

Although the method used by Shea in presenting its claim is not a classic total costs claim in that it does not attempt to compare the total contract costs with a bid estimate, Shea's method suffers from many of the same problems. It assumes without proving, that Shea's costs were reasonable and that Shea was not responsible for any increases in cost.

Where, as here, the contractor has not segregated costs and its method of presenting costs has proven to be unacceptable, the Board has determined the amount of the equitable adjustment by resorting to the jury verdict method. *JB&C Co.*, IBCA 1020-2-74 and IBCA 1033-4-74 (Sept. 28, 1977), 84 I.D. 495, 582, 77-2 BCA par. 12,782 at 62,154-55; *A & J Construction Co., Inc.*, IBCA 1142-2-77 (Dec. 28, 1978), 85 I.D. 468, 480-92, 79-1 BCA par. 13,621 at 66,788-94; and *Fluor-Utah, Inc.*, IBCA 1068-4-75 (Jan. 15, 1981), 88 I.D. 41, 222, 81-1 BCA par. 14,876 at 73,535.

At the hearing, Shea presented its claim for an equitable adjustment of $4,916,164 for blocky rock (App. Exh. R). The Government auditor who testified at the hearing had examined Shea's books in conjunction with the earlier presentation of Shea's claims to the contracting officer. The auditor questioned $1,343,233 of the costs in Shea's claim (Tr. 853, 869-74) which had the effect of reducing the total claim, including profit, to $3,438,597. In addition to the claim for increased costs, appellant asked for an extension of 189 working days.

She introduced no evidence to explain how it computed the delay for blocky rock to be 189 days. Appellant's exhibit R shows that its monetary claim was based on 7 months delay during the 8-month claim period. Shea's chief engineer testified that he used the figure 21 working days per month in calculating the soft invert claim (Tr. 392). The Board finds that Shea is entitled to an extension of 147 working days ($7 \times 21 = 147$).

Taking into account the entire record it is not possible to determine with mathematical precision the increase in costs resulting from the differing site condition; therefore, the Board finds, in the nature of a jury verdict, that Shea is entitled to an equitable adjustment of $3,800,000 for the blocky rock differing site conditions claim.

Equitable Ajustment for Soft Invert

Shea presented its claim for an equitable adjustment for differing site conditions in the form of soft inverts as if the two periods in May and July were one claim (App. Exh. S). They were not. Having found, above, that Shea was entitled to and equitable adjustment for encountering soft invert in May but not in July, we face the problem of separating the cost for May from the total claim of $586,582 for soft inverts.

The Government analysis of Shea's soft invert claim is not persuasive. The Government established a reference period from Aug. 1977 through July 1978 and identified an average cost of $310.32 per linear foot of excavation during the reference period. For the month of May 1977, the Government auditor identified recorded costs, as adjusted, of $288,286 for excavation of 1,050 linear feet. This results in an average cost of $274.56 per linear foot of excavation in May 1977. The Government concluded that since the May average cost per linear foot was less than the average cost in the reference period, Shea therefore suffered no additional costs and actually had reduced costs of $37,550 in May (Gov. Exh. 7; Brief at 62).

The Government's analysis ignores the fact that Shea averaged 59.41 linear feet of excavation per day for the days when it was not delayed by soft invert (1,010 feet divided by 17 days) but while it was in the area of soft invert, it excavation only 40 feet in 4 days. There can be no question but that it cost more per foot to excavate 40 feet during the claim period of 4 days than the cost per foot to excavate 1,010 feet in 17 days outside the claim period.

At the hearing, the parties stipulated that in the event the Board found liability for soft invert, the equitable adjustment should include the cost of cast-in-place concrete in the reach of the tunnel where precast lining segments could not be installed because of the soft invert (Tr. 420).

Taking into account the fact that Shea used the same unsubstantiated estimates of fair market value for equipment prices in computing its soft invert claim that it used in computing its major blocky rock claim, the Board finds that Shea is entitled to an equitable adjustment of $160,000 and 4 days extension of the contract period for the differing site condition encountered in the form of soft invert in May 1977.

Equitable Adjustment for Shield Modification

When Shea was required to modify the roof shield of the tunneling machine into a full tail shield to support the fallout from the top and sides of the tunnel, the increased thickness of the outer skin and the additional bracing made it impossible to install the 7-inch thick segments of the precast tunnel support and lining. Shea received permission to reduce the thickness of the precast segments to 6 inches to permit handling and installation of the segments inside the modified tail shield (Tr. 180). At the time of the modification of the shield, production of the 7-inch thick segments had been running ahead of tunneling excavation and enough segments to line about a mile of tunnel had already been produced. The cost of the segments was roughly estimated by Shea's project engineer to be at least $1,400,000 (Tr. 182). After the tunneling machine advanced beyond the area where immediate fallout of blocky rock was

a problem, the machine was stopped from Dec. 27, 1977, through Jan. 3, 1978, to allow for further modification of the tail shield to give enough clearance to erect the 7-inch segments.

The cost of the modification work to permit use of the 7-inch segments was $146,742, according to appellant's exhibit T. As a result of the Government auditor's examination of Shea's accounts, the Government questioned $8,057 of the $24,038 amount for equipment charge and $7,800 of the $16,709 total for additional overhead (Gov. Exh. 7). These reductions had the effect of reducing the total amount of the claim to $129,290.

It was reasonable for Shea to expend a sum approximately 1/10th the cost of the 7-inch segments in order to avoid wasting the segments which had already been manufactured. Since the original modification of the shield was a direct consequence of the different site condition for blocky rock, the inability to use the 7-inch segments inside the modified shield would have been for consideration in determining the amount of the equitable adjustment for blocky rock if the 7-inch segments could not have been used. The board finds that Shea is entitled to an equitable adjustment of $138,000 for modifying the shield to permit use of the 7-inch segments. This amount represents a substantial saving from the cost of the 7-inch segments if they could not have been used.

Claim for Additional Grout and Pea Gravel

At the end of the hearing, after appellant had rested its case, the record was left open for the purpose of admitting the testimony of the consulting geologist hired by the Government to evaluate appellant's claims. When the hearing was reconvened to admit the geologist's testimony, appellant requested and was granted permission to reopen its case to supply evidence which it characterized as omitted by oversight in its previous presentation. The omission was that when the thickness of the precast concrete segments was reduced from 7 to 6 inches as a result of modification of the shield, the volume of space outside the segments was increased by the reduction of the thickness of the segments. Additional quantities of pea gravel and grout were required to fill the space. Further, appellant represented that it failed to take into account in its claim that additional amounts of pea gravel and grout might be required to fill the large areas of overbreak encountered in the claim reach of the tunnel (Tr. 1010–15).

Shea's claim was set forth in appellant's exhibit DD and by testimony from its project engineer (Tr. 1018–50). He began with the total amount of cement ordered for grout at the time of his testimony and estimated the amount necessary to complete grouting of the space behind the precast segments for the remainder of the tunnel. In addition, he estimated the amount of cement necessary to go back and fill in the areas of

overbreak in the claim area. The project engineer then computed the theoretical amount of cement required to grout the whole tunnel using 7 inch segments and subtracted that amount from the total estimated amount of cement for grout for the entire tunnel. The remainder was represented as excess cement for grout. The amount of pea gravel required for this amount of cement was computed by multiplying the number of pounds of cement by a factor of .00536. Costs were then figured for the theoretical overruns of cement and pea gravel. To this, the project engineer added theoretical amounts for the cost of labor and equipment maintenance to place the estimated overrun of grout. Overhead was computed at 15.4 percent and profit at 10 percent for a total claim of $1,311,613.

Shea's presentation of this claim which was "omitted by oversight" leaves much to be desired. No attempt was made to show how many 6 inch segments of precast concrete were placed and how many segments of 7 inch concrete were placed. There was no evidence to show whether actual experience with placement of grout behind the different sizes of segments bears any relationship to the theoretical computations.

With respect to the possibility of going back to place additional grout in the areas of overbreak, the project engineer did not know at the time of his testimony how much, if any, additional grout he would be required to place in those areas. The claim was presented prematurely at the hearing for this aspect.

As to the entire presentation of this element of its claim, the Board notes that Shea's posthearing briefs offer no argument in support of its belated presentation of the claim for placement of an overrun of cement and pea gravel.

The Board finds that Shea failed to present the best evidence of an overrun, actual experience of placement of grout behind the 6 inch segments as compared to placement behind 7 inch segments. The claim for placement of excess amounts of cement and pea gravel is denied for failure of proof.

Summary

1. The Board finds that Shea encountered differing site conditions when it encountered sound, hard rock divided by widely spaced and open joints into large blocks which were not mechanically interlocked and which had no standup time. By reason thereof, Shea is entitled to an equitable adjustment in the amount of $3,800,000 and a contract time extension of 147 days.

2. The Board finds that Shea encountered a differing site condition during May of 1977 when it encountered soft invert in the form of a layer of clay which would not support the tunneling machine. By reason thereof, Shea is entitled to an equitable adjustment in the amount of $160,000 and a contract time extension of 4 days.

3. As a direct result of the differing site condition for blocky rock, Shea is entitled to an equitable adjustment of $138,000 for further modification of the tail shield to permit use of 7 inch concrete segments which had been manufactured prior to the original modification of the shield to support the blocky rock.

4. The aggregate equitable adjustment to which Shea is found to be entitled is in the amount of $4,098,000 and a contact time extension of 151 days.

5. Interest shall be payable on the aggregate equitable adjustments in accordance with clause 6A of the contract, "Payment of Interest on Contractor's Claims."

6. The appeal is otherwise denied.

G. HERBERT PACKWOOD
Administrative Judge

WE CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

RUSSELL C. LYNCH
Administrative Judge

SODIUM LEASE RENEWALS*

M-36943

March 18, 1982

Sodium Leases and Permits: Leases

Sodium leases, which have a determinate 20-year primary term, are not automatically extended or renewed. The Secretary may renew the lease upon the lessee's timely application for renewal.

The lessee's preference right at the time of renewal under sec. 24 of the Mineral Lands Leasing Act is only to be preferred above other applicants and is not an entitlement, as against the United States, to a renewal lease.

In adjudicating an application for renewal of a sodium lease, the Secretary retains his discretion respecting whether or not to lease. That discretion is limited in that if the decision is made to lease, a preference is extended to the existing lessee who has made timely application.

Existing sodium leases which are beyond their primary term but for which the lessee has made timely application for renewal are continued in force by the provisions of sec. 9 of the Administrative Procedure Act so long as it takes the Department to adjudicate the application.

OPINION BY OFFICE OF THE SOLICITOR

TO: DIRECTOR, BUREAU OF LAND MANAGEMENT, ACTING DIRECTOR, MINERALS MANAGEMENT SERVICE

FROM: SOLICITOR

SUBJECT: SODIUM LEASE RENEWALS

You have informally asked us a number of questions relating to expiration and renewal of sodium leases [1] pursuant to section 24 of the Mineral Lands Leasing Act of 1920 (MLLA), 30 U.S.C. § 262. Those questions include:

1) Does section 24 of the MLLA provide for indeterminate leases with stated periods of readjustment or for leases of determinate periods subject to rights of renewal?

2) What is the status of a lease that was issued over 20 years ago, which has never been in production and for which no renewal action has been taken?

3) Is the Bureau restricted in imposing new terms and conditions on renewal leases to the 20-year or 10-year succeeding anniversary dates?

4) At the time of lease renewal may the Secretary revise some lease terms and conditions and reserve the right to revise other terms at a future date?

5) Does the Secretary have the authority to provide different royalty rates for different "families" of sodium leases (*i.e.*, leases of the same sodium compound) either at the time of lease issuance or at the time of lease renewal?

6) May the Secretary impose escalating rentals, minimum royalties or due diligence stipulations as a means of encouraging production and development of the leased sodium resources?

Summary

We are of the opinion that:

*Not in chronological order.

[1] As used herein, sodium refers to all "sodium compounds and other related products" that are included in the grant of a leasehold pursuant to 30 U.S.C. § 262.

1) Sodium leases are for a 20-year determinate period. Such leases are not automatically extended and may be renewed only upon the lessee's timely application for such renewal.

2) Leases which have run their 20-year term are properly considered expired. In the absence of an application for renewal by the previous lessee, such lands may be properly offered to the public for leasing.

3) The Secretary is not restricted to establishing the terms and conditions upon which he will renew the lease on or before the anniversary date of a lease. (Decision in *Rosebud Coal Sales Co.* v. *Andrus,* distinguished.)

4) The Secretary may reserve the power to set some terms and conditions of lease renewal subsequent to the renewal of a lease.

5) The Secretary may, by regulation or by case-by-case adjudication, provide different royalty rates for different "families" of sodium leases.

6) The Secretary has the authority to encourage production and development of federally leased sodium resources both through minimum development and production requirements and minimum royalties imposed on each lease.

Discussion

An understanding of the Secretary's leasing authority under section 24 of the MLLA, 30 U.S.C. § 262, is gained by examining not only section 24, but also the legislative history and administrative interpretation of the oil and gas leasing language in the MLLA as originally enacted and the 1927 Potassium Act, 44 Stat. 1057, as well as the 1928 amendments to section 24. Both the oil and gas and potassium leasing sections provided for determinate 20-year leases with a preference right to 10-year successive term renewal of the leases.

I. *Legislative History*

Congress first employed the device of a 20-year lease with preference right of renewal in section 17 of the MLLA, 41 Stat. 443.[2] In 1927, Congress employed the same lease term and right of renewal language in its revision of the 1917 Potassium Act. Act of February 7, 1927, § 3, 44 Stat. 1057.[3] In 1928, Congress, at the suggestion of the Department, patterned its amendments to the sodium provisions of section 24 of the MLLA after the provisions of the Potassium Act of 1927.[4] H.R. Rep. No. 1003, 70th Cong., 1st-Sess. 1 (1928).

Congress, with respect to coal, phosphate, oil shale and sodium in the 1920 MLLA provided for leases of indeterminate periods

[2] Section 17, as enacted, provided: "Leases [for oil and gas] shall be for a period of twenty years, with the preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the time of the expiration of such periods."

[3] In 1948, Congress returned to indeterminate term leases subject to 20-year readjustments for potassium. Act of June 3, 1948, section 9, 62 Stat. 292, 30 U.S.C. § 282 (1976).

[4] The potassium provisions are not technically part of the MLLA. The 1917 Potassium Act, 40 Stat. 297, preceded the MLLA. The 1917 Act was amended by the Potassium Act of 1927, 44 Stat. 1057. The 1927 Potassium Act was neither an amendment nor an addition to the MLLA. The 1927 Act, however, did make sections 1 and 26 to 38 inclusive of the MLLA applicable to permits and leases issued under the 1927 Act. Act of February 7, 1927, section 5, 44 Stat. 1058. It has thus been treated judicially as part of the MLLA. *E.g., Transwestern Pipeline Co.* v. *Kerr-McGee Corp.,* 492 F.2d 878, 884 (10th Cir. 1974).

upon the condition that they be subject to readjustment at the end of each 20-year period succeeding lease issuance. (Act of February 25, 1920, sections 7, 11, 21 and 24 respectively, 41 Stat. 438 *passim*). Likewise, Congress in the 1917 Potassium Act provided for indeterminate leases subject to readjustment periods of 20 years. Act of October 2, 1917, section 2, 40 Stat. 297.

The legislative history of the 1920 Act frequently equates lease renewal with lease readjustment. *E.g.,* 56 Cong. Rec. 7045, 7046 (May 24, 1918) (Remarks of Rep. Robbin). Congress, however, did employ different language in section 17 (oil and gas leases) than it did in other sections. Further evidence of the fact that Congress recognized a difference between renewal and readjustment is seen in the subsequent legislative history, sketched above, of the lease term language of both the original sodium and potassium provisions.[5] In examining the question of coal lease readjustments, we concluded that:

> The legislative history of the 1920 Act suggests that Congress chose indeterminate coal and phosphate leases and twenty-year oil and gas leases primarily to satisfy what Congress perceived to be a greater need for reliability of investment in coal mines and phosphate plants. *See* 51 Cong. Rec. 14945 (Sept. 10, 1914) (Remarks of Rep. Thomson of Ill.); Letter dated September 12, 1914 from George H. Ashley, Acting Director of the U.S. Geological Survey to Rep. Scott Ferris, Chairman of the House Committee on Public Lands. Both readjustable leases in the 1920 Act allow the lessee to continue operations until the mineral is extracted. The critical difference in the reliability of investment provided by an indeterminate and a determinate lease is in the termination procedures. With an indeterminate lease, if a lessee fails to comply with a condition the lessor must go to court in order to end the lease. Section 31(a) of the Act, 30 U.S.C. § 188(a) (1976). But if a lessee fails to comply with the terms and conditions of a twenty-year lease, the lessor can end the lease simply by notifying the lessee [of non-renewal] at the end of the lease term. This difference provides the added security that Congress sought for coal and phosphate leases by assuring lessees their leases can be terminated only by judicial order.

Solicitor's Opinion M-36939, 88 I.D. 1003 (September 17, 1981), "Whether leases issued prior to August 4, 1976, subject to readjustment after that date must be readjusted to conform to the Federal Coal Leasing Amendments Act of 1976."

Unfortunately, Congress did not focus on the *mechanics* of lease renewal in its consideration of the 1920 Act, the 1927 Potassium Act or the 1928 sodium amendments. In 1948, when Congress changed potassium back to an indeterminate lease term, it did note the Department's description of how the change would affect the exiting lease renewal process.

> Section 9 of S. 1006, as amended, would in effect authorize the issuance of potassium leases for a 20-year period and so long thereafter as the lessee complies with the terms and conditions of the lease, [6] subject to any reasonable adjustments of those terms and conditions as may be prescribed by the Secretary of the Interior at

[5] The mere fact that Congress enacts an amendment indicates it intended to change legal rights. *Argosy Ltd.* v. *Hennigan,* 404 F.2d 14, 20 (5th Cir. 1968); *Magnolia Petroleum Co.* v. *Carter Oil Co.,* 218 F.2d 1, 5 (10th Cir. 1955).

[6] This is, in essence, and indeterminate lease term. *Cf.* Act of August 4, 1976, section 6, 30 U.S.C. § 207(a) (1976). (Footnote added.)

the end of each succeeding 20-year period. The benefits of the new section 9 would also be extended, upon application of the lessee, to outstanding potassium leases. The presently effective section 3 of the act of February 7, 1927 (30 U.S.C. 283), *authorizes the issurance of such leases for a fixed term of 20 years, with a preferential right in the lessee to renew for successive 10-year periods* upon such reasonable terms as the Secretary may fix. The change proposed by section 9 of S. 1006 is very desirable since it will result in the elimination of a great deal of unnecessary paper work in the Department, *entailed by issurance of renewal leases* at the end of the first 20-year period and at the end of each subsequent 10-year period. Under newly proposed section 9, a simple decision, authorizing readjustment at the end of each 20-year period, will avoid the now necessary time-consuming actions required in the *adjudication of renewal lease applications or* in *the drafting of renewal leases.*

H.R. Rep. No. 1541, 80th Cong., 2d Sess. 8 (1948) (italic supplied.)

We are of the opinion that the legislative history demonstrates that Congress knew of, and intended that there be, a difference between indeterminate leases subject to readjustment and 20-year leases with a preference right of renewal.

II. Specific Issues.

A. *Sodium Leases Are For a Determinate 20-Year Term And Are Subject to Renewal by the Existing Lessee in the Discretion of the Secretary.*

As noted above, sodium leases are for a definite 20-year term. While there is a paucity of Departmental decisions construing the statutory sodium language, there is a considerable body of decisions dealing with the identical language found in the 20-year oil and gas lease provisions of the original section 17 of the MLLA.

In considering the question of whether an application for renewal of a 20-year oil and gas lease issued pursuant to the original section 17 of the MLLA could be entertained *after* the expiration of the lease, the Board of Land Appeals noted that the BLM State Office had issued a decision holding the oil and gas lease to have expired by its own terms at the end of its 20-year term. The Board states that "[t]he BLM decision *was proper* at the time it was rendered as appellant had not applied for renewal." *Homestake Oil and Gas Co.*, 40 IBLA 262, 263 (1979) (*italics* added). *See also Peacock Oil Co., Inc.*, 29 IBLA 74 (1977) (holding delay in filing lease renewal application not excused and 20-year oil and gas lease expired), *rev'd, Peacock Oil Co., Inc.*, 30 IBLA 103 (1977) (holding delay excusable on reconsideration); *Oscar L. Butcher*, 61 I.D. 120 (1953). (For cases dealing with waiver of delay in filing a renewal lease application, see Part II.B.2. *infra.)*

There is no provision in the sodium language (nor was there in the original 20-year oil and gas language) for extension of the lease by production as there currently is for oil and gas leases. *Compare* section 24 of MLLA, 30 U.S.C. § 262, *with* section 17(e) of MLLA, 30 U.S.C. § 226(e) (1976). In the case of 20-year oil and gas leases, the lack of such language has been held to mean that the lease cannot be held after the primary 20-year term by production alone.[7] *Melvin N. Armstrong,*

[7] With respect to 20-year oil and gas leases, Congress has provided other means of extending oil and gas leases

Continued

A-26474 (Aug. 22, 1952), *rev'd on other grounds,* A-26474 (Supp.) (Nov. 14, 1952). (See infra Part II.B.1. for discussion of effect of timely filing of application for renewal of lease.)

Having concluded that 20-year sodium leases are for a determinate period *(i.e.,* they expire of their own force in the absence of renewal), the question remains whether the "preferential right in the lessee to renew" reserves to the Secretary the right to decline to issue a renewal lease. In answering this question, we turn again to the Department's experience in administering like provisions in the oil and gas leasing program.

In the Act of July 29, 1942, 56 Stat. 726, Congress provided that holders of five-year term noncompetitive oil and gas leases would, upon expiration of the lease, be "entitled to a preference right over others to a new lease for the same land" under rules and regulations in force when application for the new lease was made, and provided that the application was filed within 90 days prior to expiration. In several cases, the Department held that this granted only a legal right to be preferred against third parties when the United States decided to dispose of the land. *Harry J. Lane,* A-24028 (April 30, 1945), and *Harold W. C. Prommel,* A-24219 (March 14, 1946) (applications rejected for reason that the land was currently withdrawn); *Helen F. Carlile,* A-24201 (April 4, 1947) (application rejected for reason that the land was within one mile of Naval Petroleum Reserve No. 1); *see also Timothy A. Pedley,* A-24223 (March 14, 1946); *Lucy H. Campbell,* A-24313 (June 18, 1946) (application rejected for reason that the land was currently in a wildlife refuge and upon determination that prospecting or drilling for oil and gas would defeat the purpose for which the refuge was established); *A. E. Blackner,* A-24440 (February 14, 1947) ("In no case does it appear that an application for a preference right lease has been treated as other than an application for a new lease.")

In adjudicating a lease renewal, the lessee can be required to make the same showings as required of an initial lessee. *A. E. Blackner, supra* (citizenship, acreage control, corporate status showings and first year's rental required; *Newton Oil Co.,* A-30453 (Nov. 30, 1965) (showing of current qualifications to hold lease and furnishing of $5,000 bond held prerequisites to approval of an application for a 10-year oil and gas lease renewal). Further, the lease may not be renewed where there is a conflict with existing regulations. *Sinclair Wyoming Oil Co.,* A-24269 (January 6, 1947) (existing 20-year oil and gas lease subject to 10 percent overriding royalty could not be renewed until overriding royal-

generally. Such extension provisions have been held to be triggered by the "unless otherwise provided by law" language of the original section 17 of the MLLA. *See generally Omaha National Bank,* 11 IBLA 174 (1973). Since there are no other new or amended provisions of law relating to extension of sodium leases, the discussion in *Omaha National Bank* on that particular point is not germane to the question of extension of sodium leases. *See also* Solicitor's Opinion M-36939, *supra* at 3 88 I.D. at 1005, n.4, discussing the "unless otherwise provided by law" provision in coal leasing.

ties reduced to 5 percent in conformity with 43 C.F.R. § 192.81a (Cumm. Supp. 1942) and such leases have no "absolute assurance" of renewal). *Cf.* 43 C.F.R. § 3107.8-3(b) (1980) (unacceptable renewal applications for 20-year oil and gas leases will be denied).

The "preferential right to renew" of the sodium provisions and the "preference right" to a new oil and gas lease in the Act of July 29, 1942, are clearly different from the so-called "preference right" to a lease gained by a prospecting permittee under other leasing provisions of the MLLA, including the oil and gas provisions extant from 1920 to the 1930's. 30 U.S.C. §§ 221-223. In describing the rights of a prospecting permittee who complies with the requirements of the statute, Congress does not use the phrase "preference right." Congress speaks not in terms of "preference" but rather in terms of entitlement. *See* 30 U.S.C. § 262 (sodium prospecting permittee "shall be entitled to a lease"); 30 U.S.C. § 271 (sulphur prospecting permittee "shall be entitled" to lease); 30 U.S.C. § 282 (potassium prospecting permittee "shall be entitled" to lease); 30 U.S.C. § 211(b) (phosphate prospecting permittee "shall be entitled" to lease); 30 U.S.C. § 201(b) (1970) (coal prospecting permittee "shall be entitled" to lease). Such entitlement language has been held to make the issuance of a lease nondiscretionary upon satisfaction of the statutory criteria by the prospecting permittee. *NRDC* v. *Berklund,* 458 F. Supp. 925 (D.D.C. 1978), *aff'd,* 609 F. 2d 553 (D.C. Cir. 1979). While these leases have been popularly denominated "preference right leases," they are more properly known as noncompetitive "entitlement" leases.[8]

The difference between the renewal language and the entitlement language regarding successful prospecting permittees under the MLLA, and the similarity of the sodium language to the language in the Act of July 29, 1942,[9] persuades us that the grant of an initial lease gives the renewal lease applicant the legal right to be preferred against other parties should the Secretary, in the proper exercise of his discretion, decide to continue leasing. Based on the Departmental precedent dealing with both section 17 of the MLLA and the Act of July 29, 1942, that discretion may be exercised in the same manner as in an initial discretionary leasing decision.

B. *Applications For Renewal*

The regulations dealing with renewal of sodium, sulphur or hardrock leases provide that applications for renewal "*must* be filed in the appropriate land office within 90 days prior to the expiration of the lease term." 43 C.F.R. § 3522.1-1 (1980) (*italics* added).

[8] *Cf.* Section 24 of the MLLA as originally enacted, 41 Stat. 447, which provided for an "entitlement" lease for one-half of the sodium prospecting permit area and a "preference right" lease to the remaining one-half. In order to make any sense, the entitlement lease must be construed as a legal right to the lands as against the United States and the preference right lease construed as a legal right to be preferred against other parties *if* the United States decides to lease. *See The Yosemite Valley Case,* 82 U.S. (15 Wall.) 77, 93-94 (1812), see also section 14 of the MLLA, 30 U.S.C. § 223; *Wilbur v. United States ex rel. Barton,* 46 F.2d 217, 221 (D.C. Cir. 1930), *aff'd,* 283 U.S. 414 (1931).

[9] The Act of July 29, 1942, uses the words "over others" in describing the preference right to a new lease. Given the difference recognized by Congress between "entitlement" and "preference," we are of the opinion that the words "over others" are for emphasis rather than words of limitation.

Two questions which arise are: (1) what effect does timely filing have on an existing lease; and (2) what effect does an untimely application have? Another way of asking this second question is: may an application be filed one week prior to lease expiration or may it be filed even after lease expiration?

1. *Effect of Filing*

Section 9 of the Administrative Procedure Act (APA), 5 U.S.C. § 558, provides in part:

> (a) This section applies, according to the provisions thereof, to the exercise of a power or authority.
>
> * * * * *
>
> (c) * * * When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

Applying this directive to a sodium renewal lease application, it is our opinion that timely and sufficient application for renewal of such a lease will preserve the existing lease until such time as the Secretary decides to issue the applicant a renewal lease or deny the application. This section has been applied to applications for coal prospecting permit extensions under 30 U.S.C. § 201(b) (1970), repealed subject to valid existing rights by section 4 of the Federal Coal Leasing Amendments Act of 1976, 90 Stat. 1085. *Rosebud Coal Sales Co.* v. *Andrus,* Civ. No. C78-261K (D. Wyo., October 17, 1979). It should be noted that the extension effected by section 9 of the APA is not a set period but lasts only so long as it takes to adjudicate the renewal application. Those sodium leases for which application for renewal have been filed timely and which are currently pending are covered by section 9, 5 U.S.C. § 558(c). Section 9 of the APA allows the Secretary to establish rules defining what constitutes a timely filing.

2. *Effect of Non-timely Filing*

The regulatory provisions for 20-year oil and gas leases provide that an application to renew "*should* be filed * * * at least 90 days, out [but] not more than six months, prior to the expiration of its term * * *." 43 C.F.R. § 3107.8-2 (1980) (*italics added*). This language has been held to be permissive rather than mandatory and may be waived upon a clear and persuasive showing that the delay in filing was not unreasonable.[10] *Melvin N. Armstrong,* A-26474, *supra; Oscar L. Butcher, supra; Peacock Oil Co. Inc., supra; Homestake Oil and Gas Co., supra; but see* concurrence of Administrative Judge Burski, in *Homestake,* 40 IBLA at 264.

Though not expressly stated, these cases appear to turn on the Secretary's power to do equity where there are no third party rights intervening and where the

[10] The Department has been exceedingly lenient in accepting lessees' "clear and persuasive" showings. Such showings include: compliance with operating regulations, presence of plugged and abandoned wells, efforts to resume operations and maintenance of oil-well equipment on leasehold, *Butcher, supra* (application made five months after expiration); investments, production on lease, payment of royalties, *Peacock Oil, supra* (application made by holders of shallow operating rights, *i.e.,* non-record title holder, 4½ years after lease expiration); failure to apply due to lessee's administrative oversight, maintenance of bond and payment of minimum royalty, faithful performance and investment for over 40 years, alleged unprofitability for another lessee to come in and re-open wells, *Homestake, supra* (application filed over one year after expiration).

interests of the United States would not be prejudiced thereby. The regulatory language for renewal of sodium leases ("must be filed") is less susceptible to waiver. Administrative Judge Burski in the *Homestake* case argued that where a lease renewal application was filed after the date of the expiration of a 20-year oil and gas lease such an application might be considered untimely and ineffective to resuscitate the lease "as there would no longer be anything *in esse* which might be renewed or extended. *Cf. Jones-O'Brien, Inc.*, 85 I.D. 89 (1978)." The *Jones-O'Brien* case cited in the concurrence in *Homestake,* however, dealt with suspensions of existing leases pursuant to section 39 of the MLLA, 30 U.S.C. § 209. There it was held that when the lease had expired a subsequently filed application for suspension had nothing on which to work. In the case of lease renewal, on the other hand, Congress has provided for continuance or renewal of the lease. That is, the original 20-year sodium lease expires and a new lease with a 10-year term is issued. (*Cf.* H.R. Rep. No. 1541, *supra.*) That being the case, it does not matter whether the renewal application is filed while the preceding lease is in being ("*in esse*"), since the application is not for the extension of the existing lease but rather for a new lease.

We are of the opinion that the Secretary may waive the provisions of 43 C.F.R. § 3522.1-1 where to do so would not prejudice the interests of the United States and would not interfere with third party rights.[11] Since that provision is couched in mandatory language, such a waiver, or discretionary possibility of waiver, should be effected by rulemaking. The Secretary may also wish to impose on sodium lessees the same requirement imposed on 20-year oil and gas lessees, that the renewal lease applicant must make a clear and persuasive showing for excuse of delay in filing. Such a waiver would deem the application as timely made and the provisions of 5 U.S.C. § 558(c) (1976) discussed above would apply. There is sufficient difference in the language of 43 C.F.R. § 3522.1-1 (sodium renewals) and 43 C.F.R. § 3107.8-2 (oil and gas renewals) to support a policy decision *not* to waive untimely filing. Such a policy is superficially inconsistent with long-standing Departmental practice with regard to waiver of deadlines for oil and gas lease renewal applications, but it can be cleanly defended on the difference in the regulatory language—"should" for oil and gas and "must" for sodium. Should the Secretary wish *not* to waive untimely filing of sodium renewal lease applications, the safest course would be to provide, as part of 43 C.F.R. § 3522.1-1, that untimeliness is not subject to waiver.

C. *Timing of Renewal*

One of the critical issues faced by the Bureau is the timing of the establishment of lease terms and conditions. While the Bureau

[11] Third party rights may attach where a sodium lease expires at the end of its term without application for renewal and where the Bureau subsequently leases the land to a third party or initiates an offer for competitive leasing pursuant to 43 C.F.R. § 3521.2 prior to the original lessee filing an application for renewal.

should certainly act in a timely fashion in adjudicating lease renewal applications, the question arises whether the Secretary's ability to fix terms and conditions different than those found in the expiring lease is lost through the passage of time. We are of the opinion that such ability is not lost.

The distinction between 20-year leases with a preference right of renewal and indeterminate leases subject to re-adjustment at the end of successive 20-year periods is of critical importance to the issue of the timing of the establishment of lease terms and conditions. In the case of a coal lease readjustment, it has been held that such readjustment must occur "at the end" of the 20-year period and that an attempted readjustment by the United States after that date is ineffectual. *Rosebud Coal Sales Co.* v. *Andrus,* No. 80-1842 (10th Cir. 1982); *California Portland Cement Co. v. Andrus,* No. 81-1249 (10th Cir. 1982); and *Western Slope Carbon* v. *Andrus,* Civ. No. 79-M-1438 (D. Colo., 1981). The circuit and district courts have reasoned that the words "at the end" mean that once a 20-year period has ended and a new 20-year period has begun that the Secretary is precluded from exercising his readjustment powers until the end of the next period.

The nature of a 20-year determinate lease with a preference right to renew, as discussed previously, provides the distinction between sodium renewal leases and coal readjustments. In the case of sodium, the 20-year lease expires at the end of its term. The lessee has a preference right to receive a renewal lease should the United States decide to lease. However, the lessee has no "absolute" right to a lease because the Secretary may exercise his discretion in deciding whether to continue leasing. (See discussion *supra* at Part II. A. and B.). A coal lessee, on the other hand, has a lease of indeterminate term.[12] The courts' holding in *Rosebud, California Portland and Western Slope Carbon* is that failure of the Secretary to readjust lease terms and conditions timely allows the lease to continue under existing terms and conditions. In the absence of a renewal application a sodium lease expires after 20 years. The renewal application continues the old lease under its existing terms solely by virtue of 5 U.S.C. § 558(c), and then only until action is taken on the application. Hence, some affirmative action by the Secretary must occur to breathe life into the renewal lease. In the absence of a decision to lease by the Secretary, the lessee has not lease. Therefore, the fact that an existing sodium lease has expired prior to the Secretary's exercise of his discretionary leasing authority does not strip him of the ability to exercise that authority, including the ability to renew the lease under revised terms.

[12] Upon readjustment now, the coal lease is given a term of 20 years "and so long thereafter as coal is produced in commercial quantities" subject to readjustment of terms at ten year intervals in the process of conforming the lease to the provisions of the Federal Coal Leasing Amendments Act of 1976. 30 U.S.C. § 207(a) (1976); see Solicitor's Opinion M-36939, *supra.*

D. *Reservation of Power to Fix Lease Terms at Future Date*

You have asked whether the Secretary may issue a renewal lease containing revised reasonable terms and conditions but subject to the reservation of authority in the United States to fix other terms at a future date. For example, may the Secretary issue a renewal lease containing revised environmental terms and conditions but subject to the establishment of a revised royalty rate at some furture time when economic studies are completed. It would be wholly defensible to specify that the lease remains subject to its original provisions (for instance, royalty rate on a producing lease) until the reserved power to specify new terms is exercised. You have asked, however, whether revised terms set after the renewal term has begun can apply retroactively to the beginning of the renewal term. We believe if this power is properly reserved and exercised, it will not render the lease unenforceable for lack of specificity as to a principal term or condition of the lease contract.

In *Sinclair Wyoming Oil Co., supra,* the applicant filed a renewal application for a 20-year oil and gas lease. The applicant requested permission to continue operations pending issuance of the renewal lease and agreed to continue such operations "under and subject to the terms and conditions which may be prescribed by said renewal oil and gas lease when issued."

On the basis of that interim agreement, Sinclair was allowed to continue operations. Prior to lease renewal, Geological Survey determined that drainage was occurring from the leased lands and ordered Sinclair to drill a protective offset well or pay compensatory royalties. The renewal lease was finally issued 2½ years after expiration of the previous lease, effective as of the date of expiration. Sinclair did not drill any offsetting wells. In answering Sinclair's argument that it had been prudent in not drilling a well while it had no assurance that a renewal lease would issue, the Department noted that Sinclair had bound itself to the terms of the renewal lease and that the renewal lease, in fact, had issued. Even though the company may have been "prudent" in not drilling a well because it had no "absolute" assurance that a lease would issue, it was bound by its agreement to be subject to the compensatory royalty obligation in the renewal lease.

Applying this decision to applications for renewal which are filed upon producing sodium leases, the United States may require continued operations to be subject to the terms and conditions fixed by the renewal lease. Such a requirement may be imposed by applicable rules or agreed to on a case-by-case basis. The rationale for requiring the lessee to be subject to such conditions is that if the lease is finally granted its term relates back to the time of expiration of the previous lease. Of course, a lessee may argue that the effect of 5 U.S.C § 558 (see *supra* at Part II.B. 1) is to make any production during the period of lease renewal adjudication is under the terms of the old lease. Such an argument can be met in several ways. First,

the third sentence of § 9(b) of the APA is to protect licensees and the public from hardships occasioned by the *expiration* of a license prior to agency adjudication of its renewal, (*Pan-Atlantic Steamship Corp.* v. *Atlantic Coast Line R.R.*, 353 U.S. 436, 444-445 (1957) (dissent); *County of Sullivan* v. *C.A.B.*, 436 F.2d 1096 (2d Cir. 1971); Attorney General's Manual on the Administrative Procedure Act 91-92 (1947)); but does not, on its face, insulate a lessee from liability under the renewal lease to reasonable terms and conditions. Second, the rulemaking provision suggested above for waiving untimely applications could be conditioned upon acceptance of lease terms and conditions which accrue at the date of expiration of the original lease and subsequent thereto. Where applications are timely, both a rulemaking and notification to lessees at time of lease expiration should be used to establish the position that the new royalty rate applies during the period of lease renewal adjudication. Finally, again in the case of timely applications, it would appear to be proper to issue a "partial" renewal lease specifically establishing certain terms and conditions *so long as* the lessee expressly consents to be bound by the other reasonable lease terms and conditions which are still to be fixed.

E. *Royalty Rates*

The Secretary may provide for different royalty rates among sodium leases either at the time of lease issuance or lease renewal. Section 24 of the MLLA as amended by the Act of December 11, 1928, provides that sodium leases are to be "conditioned upon the payment by the lessee of such royalty as may be fixed in the lease, not less than 2 percentum of the [royalty valuation]." Originally, section 24 had provided for a royalty of not less than 12½ percent but this was changed in 1928 because it was felt that such a royalty was "entirely too high for the successful operation of a large amount of the sodium deposits of the United States, and thus prevents the successful leasing thereof." S. Rep. No. 657, 70th Cong., 1st Sess. 1 (1928); *see also* H.R. Rep. No. 1003, 70th Cong., 1st Sess. 2 (1928).

The only constraint we preceive to establishing royalties is that they not be arbitrary and capricious. In discussing the issue in the context of coal readjustments, the Department has considered several ways of setting new royalty rates. *See* Secretarial Issue Document, Vol. I Federal Coal Management Program at 141-149 (1979). We see no legal impediment to using one of the alternatives listed there or of adopting a variation of those alternatives, *e.g.*, royalties established for similarly situated leases on the basis of an economic analysis of development and other costs associated with those leases.[13]

F. *Means To Encourage Development*

You have suggested several possible ways to promote develop-

[13] Once royalties are set, individual lease relief may always be granted, if warranted, under section 39 of the MLLA, 30 U.S.C. § 209.

ment and production of leased sodium resources at the time of lease renewal. These include the imposition of a due diligence requirement and a definition of what production satisfies that requirement; the imposition of a minimum royalty payable in advance of production; or the imposition of escalating rentals. We are of the opinion that section 24 of the MLLA allows the first two mentioned methods of promoting production, and render it unnecessary to examine possible authority to increase rentals under renewal leases.

1. *Due Diligence*

Section 24 of the MLLA, as amended in 1928, does not specifically speak to diligence. As enacted in 1920, section 24 provided for readjustment of indeterminate leases, such readjustment including "covenants relative to mining methods, waste, period of preliminary development, and minimum production * * *." 41 Stat. 447.

When section 24 was amended generally in 1928 (changing the lease from indeterminate subject to readjustment to a 20 year term with preference right of renewal), the above quoted language was dropped. Under the 1928 revision, the Secretary may renew leases "upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior unless otherwise provided by law at the expiration of such period." 30 U.S.C. § 262 (1976). Since section 24 on its face does not specifically prescribe due diligence requirements and there is nothing in the legislative history of the 1928 sodium amendments which suggests that the Secretary has no authority to use minimum production or similar lease provisions, the general rulemaking powers of the Secretary applicable to all leases under the MLLA are controlling.[14] Section 32 of the MLLA, 30 U.S.C. § 189, authorizes the Secretary to "prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter * * *." Inasmuch as the purpose of the MLLA was to promote prospecting and development, consistent with the public interest, H.R. Rep. No. 398, 66th Cong., 1st Sess. 18 (1919), we are of the opinion that the Secretary thus has ample authority to fix reasonable diligence terms at the time of lease renewal. That authority has been repeatedly exercised by the Secretary at the time of initial lease issuance. *See* § 2(a) and (n) of Sodium Lease, 47 L.D. at 536, 538 (1920); § 2(d) of Sodium Lease (Form 4-1134) of December 1958.

2. *Minimum Royalty*

Much of what we have said with respect to due diligence is applicable to minimum royalties. Section 2(d) of Form 4-1134 (Dec. 1958) already provides for a minimum royalty in lieu of production. Such a provision was then and is now authorized in the form of either a rule (under section 32 of the MLLA) or as a lease term (under section 30 of the MLLA 30

[14] The history of administrative practice as revealed in the sodium lease forms confirms this. Apparently, the Department did not consider the 1928 amendments as affecting the authority of the Secretary to impose due diligence requirements, as those requirements are identical in the 1920 lease form and the 1929 and later lease forms. *Compare* § 2(a) and (n) of lease, 47 L.D. at 536 and 538 (1920) *with* § 2(a) and (n) of lease, 52 L.D. 651 at 659, 661 (1929), and § 2(a) and (n) of lease 43 C.F.R. § 195.26 (1933).

U.S.C. § 187). We are of the opinion that the Secretary may either raise the amount of the minimum royalty in order to encourage a lessee to produce rather than pay that minimum royalty, or the Secretary may preserve the power to decline to accept payment in lieu of production. As there are no express limits in section 24 of minimum royalties, they may be used for any purpose for which escalating rentals might be. It is thus unnecessary to construe the Secretary's authority to revise rental rates in sodium renewal leases.

Conclusion

We reiterate the conclusions set forth in the beginning of this memorandum.

We are of the opinion that:

1) Sodium leases are for a 20-year determinate period. Such leases are not automatically extended but may be renewed only upon application for such renewal.

2) Leases which have run their 20-year term are properly considered as expired. In the absence of an application for renewal by the previous lessee, such lands may be properly offered to the public for leasing.

3) The Secretary is not restricted to establishing terms and conditions upon which he will renew the lease at or in advance of the anniversary date of a lease.

4) The Secretary may reserve the power to set some terms and conditions of lease renewal subsequent to the execution of a renewal lease.

5) The Secretary may, by regulation or by case-by-case adjudication, provide different royalty rates for different "families" of sodium leases.

6) The Secretary has the authority to encourage production and development of federally leased sodium resources both through minimum development and production requirements and minimum royalties imposed on each lease.

WILLIAM H. COLDIRON
Solicitor

LAWRENCE C. HARRIS *ET AL.*

63 IBLA 132

Decided *April 5, 1982*

Appeals from decisions of Colorado State Office, Bureau of Land Mangement, rejecting simultaneous oil and gas lease applications and canceling oil and gas leases and overriding royalty interests, in whole or in part. C–30503, *et al.*

Reversed and Remanded.

1. Oil and Gas Leases: Applications: Drawings

Where individuals who are officers and/or directors of a corporation file noncompetitive oil and gas lease applications for the same parcels in the same drawings, and where the corporation has filed no applications, cancellation by BLM of leases awarded to such individuals pursuant to those drawings is improper when the individuals establish that there was no breach of their fiduciary duty to the corporation creating a corporate interest in the individual applications.

2. Oil and Gas Leases: Applications: Drawings

Where individual officers and/or directors of a corporation file noncompetitive oil and gas lease applications for the same parcels in the same drawings, but the corporation has not filed any applications, rejection of the applications by BLM is improper when the individuals establish that there was corporate authorization for such individual filings; that any prior assignments to the corporation of Federal oil and gas leases previously acquired through the simultaneous system were motivated by personal financial and business considerations, rather than by corporate obligations; and that no arrangement, agreement, scheme, or plan giving the corporation an interest in any of the applications ever existed.

APPEARANCES: John H. Pickering, Esq., and Timothy N. Black, Esq., Washington, D.C., and Sim B. Christy IV, Esq., Roswell, New Mexico, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

INTERIOR BOARD OF LAND APPEALS

Lawrence C. Harris and others [1] have appealed from various decisions of the Colorado State Office, Bureau of Land Management (BLM), rejecting their simultaneous oil and gas lease applications or canceling noncompetitive oil and gas leases or overriding royalty interests in whole or in part because of alleged violations of the regulatory provisions relating to multiple filings.[2]

In each case, BLM acted on the basis that either two or more of the officers of the Abby Corp. or the New Mexico Oil Corp. (the corporations) had filed applications or offers for the respective leases in the relevant simultaneous oil and gas lease drawings and that, thereby, those corporations had more than a single opportunity of obtaining a noncompetitive oil and gas lease by virtue of an interest in each of the officers' applications. BLM noted that a review of its records had revealed that such officers were also either directors or substantial shareholders, or both, of the corporations. In the decisions appealed in IBLA 81-961 and 81-1091, BLM stated that these individuals had "fiduciary duties" to the corporations which were breached. In the decisions appealed in IBLA 81-928, 81-1097, and 82-42, BLM noted that such individuals had in the past "frequently" assigned leases acquired in simultaneous oil and gas lease drawings to the corporations.

BLM cited two regulations in support of its decisions rejecting applications. The first, 43 CFR 3112.2-1(f), provides that: "No person or entity shall hold, own or control any interest in more

[1] Appendix A contains a list of the appellants, the 27 leases affected, the relevant simultaneous oil and gas lease drawings, and the dates of the BLM decisions. Marion V. Harris is the wife of Lawrence C. Harris. Scott A. Harris, Judy Harris, and Abby Harris Yates are their adult children.

[2] In IBLA 81-928, 81-1097, and 82-42, BLM rejected simultaneous oil and gas lease applications drawn with the first priority in various simultaneous oil and gas lease drawings. In IBLA 81-961, BLM approved the assignment of shallow operating rights in a portion of noncompetitive oil and gas lease C-22205 to Paul S. Coupey, as a bona fide purchaser, and cancelled the remainder of the lease, held by New Mexico Oil Corp., as a result of an assignment from Lawrence C. Harris effective Aug. 1, 1980, and the overriding royalty interests held by Lawrence C. Harris in the lease and by New Mexico Oil Corp. in the approved assignment. In IBLA 81-1091, BLM canceled noncompetitive oil and gas leases held by New Mexico Oil Corp. as a result of assignments from Lawrence C. and Marion V. Harris effective Aug. 1 and Sept. 1, 1980, and Mar. 1, 1981, noncompetitive oil and gas leases held by Lawrence C. Harris, and overriding royalty interests held by Lawrence C. and Marion V. Harris.

than one application for a particular parcel."

The second, 43 CFR 3112.6-1(c), provides, in relevant part, that:

> Any agreement, scheme, plan or arrangement entered into prior to selection, which gives any party or parties more than a single opportunity of successfully obtaining a lease or interest therein is prohibited and any application made in accordance with such agreement, scheme, plan or arrangement shall be rejected.[3] Specifically:
>
> * * * * *
>
> (3) Filings by members of an association (including a partnership) or officers of a corporation, under any arrangement, agreement, scheme, or plan whereby the association or corporation has an interest in more than a single filing for a single parcel are prohibited.[4]

In their statement of reasons for appeal, appellants contend that "[t]here was no agreement, scheme, plan, or arrangement of any sort giving any of the appellants more than a single opportunity for successfully obtaining a lease" (Statement of Reasons at 20). Appellants submit affidavits signed by each of the individual appellants in which they deny under oath the existence of any such agreement, scheme, plan, or arrangement. Appellants assert that no legal or factural basis exists for the grounds variously stated in the decisions, *i.e.*, breach of fiduciary duty and "frequent" assignments, for rejection of applications and cancellation of leases and overriding royalty interests.

Appellants argue that the corporations do not have an interest in applications filed by the individual appellants, by virtue of a fiduciary duty owed to the corporations, because "[t]he minutes of each corporation, beginning as far back as 1969, flatly state that the officers, directors, and stockholders are free to acquire oil and gas leases for their own individual benefit, without any obligation to the corporation." *Id.* In support appellants submit copies of these corporate minutes. Appellants also contend that no inference of a prohibited agreement can be drawn from the mere fact that the individual appellants have made assignments to the corporations of leases obtained in simultaneous oil and gas lease drawings. Appellants also deny BLM's characterization that such assignments have been "frequent," pointing out that Lawrence C. and Marion V. Harris have assigned leases to the New Mexico Oil Corp. on only one occasion, the corporation having been assigned only two leases previously in 1966 for qualifying purposes, and that

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[3] In addition, 43 CFR 3112.6-3 provides for cancellation of a lease already issued or any interest therein where the lease "has been issued on the basis of an application or offer which properly should have been rejected," and for preservation of the rights of a bona fide purchaser.

[4] Prior to June 16, 1980, the applicable regulation, 43 CFR 3112.5-2 (1979), similarly provided, in relevant part:

"When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person or party acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, *under any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease, or interest therein,* in any public drawing, held pursuant to § 3110.1-6(b), all offers filed by either party will be rejected. * * * In the event a lease is issued on the basis of any such offer, action will be taken for the cancellation of all interests in said lease * * *." (Italics added.)

The BLM decisions appealed in IBLA 81-961 and 81-1091, both of which concerned cancellation of leases, cited this regulation as being in effect at the time the offers were filed in those cases. The decisions stated that pursuant to this regulation the offers should have been rejected or the leases canceled, and that the authority to cancel leases has been carried over in 43 CFR 3112.6-3.

Scott A. Harris, Judy Harris, and Abby Yates have assigned only one-third of their leases to the Abby Corp. in its 10-year history. Appellants point to other evidence to support the lack of a prohibited agreement or understanding, namely: (1) Such assignments as have been made were done for personal economic reasons; (2) assignments "often occurred a year or more after a lease was awarded"; (3) the individual appellants "have always paid the filing fees for their applications, as well as rental payments on resulting leases, out of their personal funds"; (4) the individual appellants retained "substantial overriding royalties" in return for each assignment; (5) over the years the individual appellants have assigned an almost equal number of leases to third parties as to each of the corporations; and (6) the individual appellants have treated their state and private oil and gas leases in the same manner as their Federal leases (Statement of Reasons at 42-43).[5]

Based on affidavits and other documents submitted by appellants on appeal, the following picture of the corporations emerges. New Mexico Oil Corp. was organized in 1960. Each of the individual appellants is presently a shareholder and director of the corporation. Lawrence C., Marion V., Scott A., and Judy Harris are officers of the corporation. The Articles of Incorporation provide that one of its corporate purposes is "to acquire and hold real estate of all kinds including oil and gas leases" (Appellants' Exh. 17 at 20). Prior to 1980, the corporation had virtually no assets or income. In 1980, Lawrence C. and Marion V. Harris transferred all of their existing Federal, state, and private oil and gas leases to the corporation in exchange for outstanding shares of stock. Since that time, Lawrence C. and Marion V. Harris have assigned only one Federal oil and gas lease to the corporation. While that lease, W-68603, was issued Feb. 1, 1981, and assigned Mar. 3, 1981, it resulted from priority given an offer filed in June 1979 and was considered part of the July 1980 transfer (Supp. Affidavit of Lawrence C. Harris at 2-4).

Abby Corp. was organized in 1962. Each of the individual appellants is presently a director of the corporation. Scott A. Harris, Judy Harris, and Abby Yates are shareholders, and Scott A., Judy, and Lawrence C. Harris are officers of the corporation. The Articles of Incorporation provide that one of its corporate purposes is "[t]o acquire, hold, and deal in oil and gas leases" (Appellants' Exh. 3 at 2). Neither the New Mexico Oil Corp. nor the Abby Corp. has filed, on their own behalf, applications for Federal oil and gas leases in a simultaneous oil and gas lease drawing.

[1] We will first address those BLM decisions (IBLA 81-961 and 81-1091) which canceled leases and overriding royalties on the basis that Lawrence C. Harris and Marion V. Harris both had filed offers in the drawings; that at the time for the filing of the offers both had fiduciary duties to New Mexico Oil Corp.; and that both

[5] Despite requesting and receiving an extension of time to file an answer in this case, the Office of the Solicitor has filed no answer in support of BLM's decisions.

owned substantial portions of the company's stock. BLM considered the filings a breach of fiduciary responsibility and as prohibited multiple filings.

We can find no support for BLM's position. Appellants correctly point out that the filing of offers by corporate officers or directors does not breach a fiduciary obligation where the shareholders have expressly permitted such filings and the corporation has not filed for the same parcels. Appellants assert that the decisions in *Raymond J. Stipek,* 74 I.D. 57 (1967), and *D. M. Dowdle,* 46 IBLA 83 (1980), control the outcome in this case.

The *Stipek* case involved BLM's rejection of certain simultaneous oil and gas lease offers. In that case, each of the two appellants was, at the time the offers were filed, an officer and 50 percent stockholder in a corporation organized for the purpose of acquiring, holding, or disposing of oil and gas leases. Each of the appellants had filed offers in the drawings; the corporation had not. *Id.* at 58. The Department concluded that it was error to reject the offers on the sole basis of the corporate relationship stating that under the facts the corporation would not have had an interest in the appellants' filings, and the corporation therefore would not have had an unfair advantage. *Id.* at 63.

Regarding the fiduciary relationship, the Department stated in *Stipek* at pages 61–62 that

> [t]he mere existence of a fiduciary relationship between the appellants and their corporation would not create a corporate interest in the filings made by the appellants. The Bureau was therefore in error in holding that it did. The critical question then is whether the appellants breached their fiduciary duty so as to create a corporate interest in their offers.
>
> In *McKay* v. *Wahlenmaier, supra,* [226 F.2d 35 (D.C. Cir. 1955)] there could be no question but that Culbertson's [president and director of the corporation] offer, if intended for his own benefit, was in direct opposition to the interests of the corporation which he represented in a fiduciary capacity since the corporation filed an offer in its own right. Because Culbertson knew that the corporation wanted the lease and that acquisition of the lease was in the corporation's line of business and because he was competing with it for a potentially valuable business opportunity, the court concluded that Culbertson would be held in a suit brought by the corporation or a stockholder to hold his lease for the use and benefit of the corporation.
>
> We do not have the same situation here. There is no evidence in the form of an offer filed by the corporation that the corporation was directly interested in obtaining leases on the lands applied for by the individual offerors. There is no other evidence of interest unless that interest is to be conclusively presumed from the nature of the corporation's business. The cited authorities clearly indicate that such a presumption is not conclusive and that, even if it were, the violation of a fiduciary duty would not automatically be found in the acquisition of the business opportunity by a corporate officer but that the particular facts of each case must be examined to determine the nature of the interests involved. [6]

In IBLA 81-961 and 81-1091 the following facts are relevant. Offers were filed by corporate officers. Stockholders had approved such filings.[7] The corporation did

[6] *D. M. Dowdle, supra,* involved a similar situation in which officers of a corporation filed simultaneous oil and gas offers and the corporation did not. The Board reversed BLM's rejection of the offers citing *Stipek.*

[7] At an annual meeting of the stockholders of the New Mexico Oil Corp. held on July 21, 1969, the stockholders adopted the following motion:

Continued

not file competing offers. Therefore, in each instance the person who filed an offer did so pursuant to an agreement of record permitting such individuals to acquire oil and gas leases in his/her individual capacity. There is no evidence of any agreement, scheme, or plan which resulted in New Mexico Oil Corp. gaining a greater possibility of obtaining a lease or interest therein. *See* 43 CFR 3112.5-2 (1979). In fact, all evidence is directly contrary to such a conclusion. We must conclude that the corporation did not have any interest in the offers involved herein, and that BLM improperly canceled the leases and overriding royalty interests.

There is no factual or legal basis for distinguishing the cases herein from *Stipek*. It is controlling. The BLM decisions appealed in IBLA 81-961 and 81-1091 must be reversed.

[2] We turn now to consideration of the BLM decisions appealed in IBLA 81-928, 81-1097, and 82-42. In all of those cases simultaneous oil and gas lease applications were rejected because BLM believed that there was some type of arrangement, agreement, scheme, or plan whereby New Mexico Oil Corp. and/or Abby Corp. gained an unfair advantage over other applicants in the drawings. As support for this conclusion, BLM indicated that its records showed that officers and/or directors, and/or substantial stockholders in these corporations, all or some of whom participated in the drawings, "frequently" assigned leases acquired through the simultaneous system to one or the other of the corporations.

The applicable regulation, 43 CFR 3112.6-1(c)(3), cited by BLM in its decisions, does not prohibit filings for the same parcel made by two or more officers of a particular corporation. Rather, it prohibits filings by corporate officers "under any arrangement, agreement, scheme, or plan whereby the * * * corporation has an interest in more than a single filing for a single parcel." BLM cities "frequent" assignments as evidence of such an arrangement, agreement, scheme, or plan.

Clearly, if at the time of filing the individual appellants had an arrangement, agreement, scheme, or plan to assign any Federal oil and gas lease obtained in a simultaneous oil and gas lease drawing to the corporation, the corporation would have had an interest

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"L. C. Harris, Marion V. Harris, Judy Harris, Scott Harris or Abby Harris had no obligation nor is there an arrangement of any kind whereby these named individuals have an obligation to make a conveyance or grant an interest of any kind to a Federal oil and gas lease in any state to New Mexico Oil Corporation or Abby Corporation; that any lease or interests of any kind acquired by any of the named persons is their *sole and separate property* and each has the right to operate separately and independently of each other and New Mexico Oil Corporation."

(Appellants' Exh. 17 at 8-9, italics added). This policy of allowing officers, directors, and stockholders to acquire oil and gas leases was also documented in minutes of annual meetings of both directors and stockholders in 1980 and 1981. *Id.* at 12-15, 17, and 19.

The Department stated in *Raymond J. Stipek, supra* at 62-63:

"[W]here there is a duty owed to a corporation there must, in fact, be a duty owed to some person or persons. If all of the officers and stockholders of a corporation agree upon a course of action which may be detrimental to the corporation as such or which may result in its dissolution, can the corporation, unrepresented by anyone having an interest in the corporation, maintain an action in its own right against the officers and stockholders? Obviously, it cannot, and the question of fiduciary duties does not arise in the case of such concerted action. The duty of a fiduciary to his corporation, then, is his duty to the other officers, directors and stockholders of the corporation, and if he has violated no duty to any of these he has breached no trust with respect to the corporation."

See Graybill Terminals Co., 33 IBLA 243, 245-46 (1978).

in more than a single filing, and the individual applications would have been properly rejected. However, the fact that in the past the individual appellants have assigned to the corporation leases acquired pursuant to the simultaneous system does not necessarily support a conclusion that there was such an understanding. Indeed, even the frequent assignment of such leases would not, itself, require rejection of applications.

All of the individual appellants have submitted affidavits that any assignments that were made to the corporations were not made pursuant to any agreement or understanding at the time the lease applications were filed. Appellants further state that no such agreement or understanding has ever existed. The individual appellants have submitted detailed documents and statements outlining their assignments of Federal oil and gas leases, both to the corporations in question and to third parties. From these submissions the following may be derived. Lawrence C. Harris, prior to July 1980, had assigned only two Federal oil and gas leases to New Mexico Oil Corp.; however, he and his wife has assigned hundreds of Federal oil and gas leases to third parties prior to that time (Affidavit of Lawrence C. Harris at 17–18; Exh. 50 at 1). In July 1980 he and his wife transferred all their interests in their oil and gas leases, including Federal, state, and private fee leases, retaining overriding royalty interests, to New Mexico Oil Corp. The transfer was made on the advice of their tax accountant and was based on personal income tax considerations and a desire to ease future estate administration. While Lawrence C. Harris continues to acquire and hold Federal oil and gas leases, he states that any future decision to assign leases to New Mexico Oil Corp. will depend on his assessment of his personal situation at the time (Supp. Affidavit of Lawrence C. Harris at 2–5).

Over the years the children have assigned between 30 and 35 percent of their Federal leases to Abby Corp. They state that such assignments were made solely on the basis of economic benefits to them. All have made assignments to third parties also. None has assigned any lease to the corporation since 1979.

There is absolutely no evidence to support the conclusion that the individual appellants were engaged in any arrangement, agreement, scheme, or plan that leases obtained by them through the simultaneous system would be assigned to either of the corporations, thereby giving the corporations an interest in the applications.

We must conclude that the individual appellants undertook their activities in the Federal oil and gas simultaneous system independently of the corporations; that such activities were fully disclosed and approved by the corporations and their stockholders; that assignments were made by the individual appellants to the corporations, but that there was no un-

derstanding giving the corporations an interest in any of the applications filed by individual appellants; that assignments of leases have been motivated by personal financial and business considerations, rather than because of any preexisting understanding; and that there never has been an understanding giving the corporations an interest in any of the applications filed by the individual appellants. The BLM decisions appealed in IBLA 81-928, 81-1097, and 82-42 must also be reversed.

Therefore, while BLM has sought to infer regulatory violations based on its perception of appellants' simultaneous oil and gas leasing activities, appellants have presented a wealth of information which evidences a scrupulous adherence to Departmental regulations and precedents governing the simultaneous oil and gas leasing system.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are reversed and the cases remanded to BLM for further action consistent herewith.

BRUCE R. HARRIS
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

C. RANDALL GRANT, Jr.
Administrative Judge

APPENDIX A

IBLA Nos.	Names of Appellants	Lease Nos.	Drawings	Dates of BLM Decisions
81-928	Abby H. Yates	C-30503	July 1980	July 27, 1981
		C-30523	July 1980	
		C-30599	July 1980	
	Scott A. Harris	C-30514	July 1980	
		C-30595	July 1980	
		C-31309	January 1981	
	Lawrence C. Harris	C-30515	July 1980	
	Judy Harris	C-30519	July 1980	
	Marion V. Harris	C-30539	July 1980	
81-961	New Mexico Oil Corp. and Lawrence C. Harris.	C-22205	November 1974	Aug. 12, 1981
81-1091	New Mexico Oil Corp. and Marion V. Harris.	C-22120	October 1974	Sept. 10, 1981
		C-23533	January 1976	
		C-23617	February 1976	
		C-24474	September 1976	
		C-25190	February 1977	
		C-27597 (Acq.).	December 1978	
		C-27160	December 1978	

April 8, 1982

APPENDIX A—Continued

IBLA Nos.	Names of Appellants	Lease Nos.	Drawings	Dates of BLM Decisions
		C-28123 (Acq.).	April 1979	
		C-28159	April 1979	
	New Mexico Oil Corp. and Lawrence C. Harris.	C-25319	March 1977	
		C-27042	July 1978	
		C-27844	February 1979	
	Lawrence C. Harris	C-26458	February 1978	
81-1097	Lawrence C. Harris	C-30907	September 1980	Aug. 17, 1981
82-42	Abby H. Yates	C-30902	September 1980	Oct. 6, 1981
	Lawrence C. Harris	C-31264	January 1981	
		C-31281	January 1981	

ESTATE OF WILLIS ATTOCKNIE

9 IBIA 249

Decided *April 8, 1982*

Appeal from order issued following rehearing by Administrative Law Judge Daniel S. Boos affirming prior determination of heirs in probate of intestate Indian trust estate.

Affirmed.

1. Indian Probate: Children, Illegitimate: Right to Inherit: Acts of Congress Controlling—Indian Probate: State Law: Applicability to Indian Probate, Intestate Estates

The right of an illegitimate daughter to inherit from the trust estate of her Indian father is controlled by the provisions of 25 U.S.C. § 371 (1976) notwithstanding the inconsistent provisions of any state statute. Under 25 U.S.C. § 371 the illegitimate daughter of an Indian beneficiary of trust lands is entitled to share in his estate in the same manner as his legitimate children.

2. Indian Probate: Evidence: Insufficiency of

Where appellant children sought to overturn finding that appellee was a daughter of decedent, which finding was based in part upon a birth certificate showing decedent to be appellee's father and upon testimony of a relative of the mother concerning the circumstances of appellee's birth, the offered testimony of another man that he instead could possibly have been the father, which was vague and uncorroborated by other evidence, was insufficient to support reversal of prior findings concerning heirship.

APPEARANCES: Robert T. Keel, Esq., for appellants Roberta Attocknie, Franchon Willene Attocknie Douglas, Jesse Attocknie, Willis Attocknie, Jr., and Alvie Allen Attocknie.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

On Oct. 22, 1978, Willis Attocknie died intestate leaving a surviving wife and four legitimate

children, appellants here. On Mar. 18, 1980, the Administrative Law Judge conducting the probate administration of decedent's estate found appellee Wanda Mae Medrana to be the illegitimate daughter of decedent entitled to share in his trust estate. Applying the Oklahoma law of evidence pursuant to 43 CFR 4.232(a) the Administrative Law Judge admitted a birth certificate dated as received at the Kiowa agency on Mar. 1, 1937, showing appellee to be the daughter born on Feb. 24, 1937, of Anna Ahboah and decedent. He also took official notice of the transcript of hearing in the probate of the Indian trust estate of Anna Ahboah, which contains testimony of Anna Ahboah's sister to the effect that decedent was appellee's father.

Appellants sought a rehearing on the question of appellee's paternity, which was held on Nov. 6, 1980. On Jan. 7, 1981, an order issued, affirming the prior determination concerning appellee's paternity.

At the rehearing, appellants offered testimony by Howard Neconie who testified that he might have been the father of appellee based upon circumstances he ascribed to the summer of 1936. However, Neconie testified, "I wouldn't say for sure whether I'm the father or not" (Tr. 7). The direct testimony of Neconie was contradicted by evidence offered by Mildred Ahboah who testified decedent and Anna Ahboah lived together in the same house in the summer of 1936 and thus Anna became pregnant following that cohabitation. According to Mildred Ahboah, the circumstances described by Howard Neconie to have existed in the Ahboah household in 1936 did not occur until much later. Her testimony was supported by the testimony of Alfred Pohlemann who testified that he lived in the house with Anna Ahboah and decedent in 1936 and that decedent and Anna Ahboah lived together in the same room. He also testified that Howard Neconie had earlier denied the truth of the recorded testimony he gave concerning appellee's paternity. Additionally, evidence was offered at the rehearing by appellee and Pohlemann that decedent had orally acknowledged his paternity of appellee.

Finding the testimony of Howard Neconie to be "inconclusive," the Administrative Law Judge held the appellants had failed to offer sufficient proof to support a reversal of his initial findings concerning heirship.

On appeal, decedent's surviving wife and children argue, first, that an illegitimate cannot inherit under Oklahoma law absent compliance with certain statutory proofs, regardless of whether she is, in fact, the natural daughter of decedent and, second, that the Administrative Law Judge failed to make findings sufficient to support his conclusion on rehearing that appellee is the natural child of decedent, and therefore entitled to share in his estate.

[1] Appellants' first contention is wrong as a matter of law. Under the provisions of the Act of Feb. 28, 1891, 26 Stat. 795, 25 U.S.C. § 371 (1976),

> whenever any male and female Indian shall have cohabited together as husband

and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child. [1]

Since Federal, rather than state, law controls the probate of Indian trust estates, the Administrative Law Judge correctly found because appellee was proven to be the natural daughter of decedent, she was entitled to share in decedent's trust lands (*Estate of Keahtigh,* 9 IBIA 190 (1982); *Estate of Green,* 3 IBIA 110, 81 I.D. 556 (1974)).

[2] Appellants' second contention also fails. The Administrative Law Judge, basing his ruling upon the transcript of the hearings developed in this case, first found that appellee was shown by uncontradicted evidence received at the initial hearings into the estate to be the natural daughter of decedent. Upon rehearing he found, following a recitation of relevant evidence, that appellants had failed to offer proof sufficient to overcome his initial finding concerning heirship. In making this finding, he rejected findings proposed by appellants which would have given full weight to the evidence offered by Howard Neconie, for the reason that Neconie's testimony was inconclusive. A review of the entire transcript supports his finding in this regard. Neconie's evidence is vague. Even without considering the attack upon his credibility by witness Pohlemann, the nature of the testimony given by Neconie is such that it is properly characterized by the finder of fact below. The evidence offered at rehearing is insufficient to require reversal of the order determining inheritance dated Mar. 18, 1980.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order appealed from dated Mar. 18, 1980, is affirmed.

This decision is final for the Department.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:
WM. PHILIP HORTON
Chief Administrative Judge.

JERRY MUSKRAT
Administrative Judge.

[1] The primary purpose of this statute is to provide for legitimation of the issue of Indian parents by finding an Indian custom marriage. *See Attocknie* v. *Udall,* 261 F. Supp. 876, 883 (W.D. Okla. 1966), *rev'd on other grounds,* 390 F. 2d 636 (10th Cir.), *cert. denied,* 393 U.S. 833 (1968). In addition, the statute declares illegitimate children to be the legitimate issue of their fathers. The statute is silent regarding the rights of illegitimates to inherit from or through their mothers. The settled administrative and judicial construction of this omission is that Congress intended to leave the matter of illegitimates' right to inherit from or through their mothers to the law of the state where the trust property is situated. *See Eskra* v. *Morton,* 524 F. 2d 9, 18 (7th Cir. 1975); *Solicitor's Opinion,* 58 I.D. 149 (1942).

ALEUTIAN/PRIBILOF ISLANDS ASSOCIATION, INC. *v.* ACTING DEPUTY ASSISTANT SECRETARY—INDIAN AFFAIRS (OPERATIONS)

9 IBIA 254

Decided *April 9, 1982*

Appeal from the disapproval of a grant application under the Indian Child Welfare Act of 1978.

Reversed and remanded.

1. Board of Indian Appeals: Jurisdiction

The Board has jurisdiction to determine whether a decision by an official of the BIA is properly characterized as discretionary.

2. Regulations: Binding on the Secretary—Regulations: Force and Effect as Law

Once a regulation is adopted by the Department, and so long as it remains extant, the Secretary and his representatives are bound by it and it has the force and effect of law.

APPEARANCES: Madelon Blum, Esq., and Mark C. Manning, Esq., for appellant Aleutian/Pribilof Islands Association, Inc.; David C. Case, Esq., Office of the Regional Solicitor, for appellee, Acting Deputy Assistant Secretary—Indian Affairs (Operations). Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

The Aleutian/Pribilof Islands Association, Inc. (appellant), has appealed the July 9, 1981, decision of the Acting Deputy Assistant Secretary—Indian Affairs (Operations) upholding a Mar. 4, 1981, decision of the Juneau Area Director, Bureau of Indian Affairs (BIA), disapproving appellant's grant application under the Indian Child Welfare Act of 1978, Act of Nov. 8, 1978, 92 Stat. 3069, 25 U.S.C. §§ 1901–1963 (Supp. II 1978) (Act). Appellant alleges that its application was disapproved in violation of regulations published at 25 CFR 23.29. For the reasons discussed below, the decision appealed is reversed and the case is remanded to the Deputy Assistant Secretary for further proceedings.

Background

Subchapter II of the Act provides for Federal grants to Indian tribes and organizations for the development and implementation of programs to carry out the purposes of the Act. Regulations governing this grant program are published in 25 CFR Part 23. Pursuant to these provisions, appellant filed an application for a grant of $250,000 for fiscal year 1981 with the Superintendent of the Anchorage Agency, BIA, on Dec. 22, 1980.

On Mar. 4, 1981, appellant received a letter from the Juneau Area Director disapproving its application. This was the first communication concerning the application that appellant received from BIA. Appellant appealed the disapproval on Apr. 2, 1981. The Acting Deputy Assistant Secretary—Indian Affairs (Operations) upheld the denial on July 9, 1981. Appellant filed an appeal with the

Board of Indian Appeals (Board) on Aug. 18, 1981.

Issue

Appellant argues to the Board, as it did in its earlier appeals, that BIA's disapproval of its grant application was made in violation of regulations in 25 CFR 23.29(b)(1), (4), and (6). These regulations state:

> Upon receipt of an application for a grant under this part, the Superintendent shall:
>
> (1) Acknowledge receipt of the application in writing within 10 days of its arrival at the Agency Office.
>
> * * * * *
>
> (4) Inform the applicant, in writing and before any final recommendation, of any special problems or impediments which may result in a recommendation for disapproval; offer any available technical assistance required to overcome such problems or impediments; and solicit the applicant's written response.
>
> * * * * *
>
> (6) Promptly notify the applicant in writing as to the final recommendation. If the final recommendation is for disapproval, the Superintendent will include in the written notice to the applicant the specific reasons therefor.

Appellant does not argue that it was entitled to approval of its application and does not request that the Board reverse the Acting Deputy Assistant Secretary's decision on the merits of the application. Instead, it argues only that the regulations create a legal right to an opportunity to revise an application after initial review and that it was denied this right.

Jurisdiction

In his July 9, 1981, letter to appellant, the Acting Deputy Assistant Secretary stated: "This decision is based on the exercise of discretionary authority. Under redelegated authority from the Secretary of the Interior, this decision is final for the Department." This statement derives from 25 CFR 2.19(c), which states:

> When the Commissioner [1] renders a written decision on an appeal, he shall include one of the following statements in the written decision:
>
> (1) If the decision is based on the exercise of discretionary authority, it shall so state; and a statement shall be included that the decision is final for the Department.
>
> (2) If the decision is based on interpretation of law, a statement shall be included that the decision will become final 60 days from receipt thereof unless an appeal is filed with the Board of Indian Appeals.

Appellee argues that the characterization of this decision as discretionary by the Acting Deputy Assistant Secretary insulates it from Board review. In support of this proposition, appellee cites *Ahtone* v. *Acting Deputy Assistant Secretary—Indian Affairs,* 8 IBIA 278 (1981).

[1] In *Ahtone* the Board deemed itself obliged to accept the Commissioner's characterization of a tribal election dispute as a "discretionary" matter. The Board did not attempt to independently evaluate whether or not the controversy may in fact have entailed a legal dispute cognizable under the Board's regulations. In this regard, the Board did not even have the administrative record before it which was utilized by the

[1] The duties of the Commissioner were assigned to the Deputy Assistant Secretary—Indian Affairs (Operations) by memorandum dated May 15, 1981, and signed by the Assistant Secretary—Indian Affairs.

Commissioner in rendering his decision; rather, the Board dismissed the *Ahtone* appeal for lack of jurisdiction merely on the grounds that the matter had been labeled as discretionary and nonreviewable by the Commissioner.

The Board has recently reevaluated its obligations as a quasi-judicial tribunal charged with furnishing objective, independent review of the Bureau's actions. In *St. Pierre* v. *Commissioner,* 9 IBIA 203, 89 I.D. 132 (1982), also a tribal election controversy, the Board denied the Bureau's motion for dismissal in a matter characterized by the Commissioner as discretionary, stating at 9 IBIA 218–20:

> It is a fundamental principle of judicial procedure that a court has "jurisdiction to determine its jurisdiction." *See* Charles Alan Wright, *Handbook of the Law of Federal Courts,* section 16 (2d ed. 1970). As a quasi-judicial tribunal charged with the responsibility of perfoming objective independent review of agency action, the Board of Indian Appeals also has inherent authority to determine its own jurisdiction under 43 CFR 4.330(b)(2). Thus, upon appeal to the Board, it is for this tribunal in ascertaining its jurisdiction to determine whether the decision appealed is or is not "discretionary." *See Hamel* v. *Nelson,* 226 F. Supp 96, 98 (N.D. Cal. 1963). Because the matter of jurisdiction is both a judicial and a legal question, courts and by analogy the Board, in its quasi-judicial capacity, are not bound by the characterization or descriptive titles placed on agency action by the agency itself. *See Ligon Specialized Hauler, Inc.* v. *I.C.C.,* 587 F.2d 304, 314 (6th Cir. 1978).
>
> * * * The characterization of a decision as "discretionary" is a legal conclusion and the product of a legal analysis. Accordingly, the Board, as a quasi-judicial tribunal, is specifically qualified, equipped, and authorized to perform such functions. In *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 410 (1971), the Supreme Court observed that the exception to judicial review of agency action committed to discretion under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1976), is "a very narrow exception * * * applicable in those rare instances where '* * * * in a given case there is no law to apply.'" Purely discretionary decisions then involve situations in which there is no law to apply. Here there is "law to apply" for in this instance the agency action rested on interpretation of the tribal constitution, section 16 of the I[ndian] R[eorganization] A[ct], and general principles of trust law applicable to the specific situation and surrounding circumstances.
>
> * * * The Board then is not precluded from entertaining an appeal from a BIA action or decision merely because the issue has been labeled "discretionary" by the agency. [Footnotes omitted.[2]]

In this case, the sole issues on appeal are whether Departmental regulations in 25 CFR 23.29 were violated and, if so, what are the consequences of that violation. This is a legal question that does not involve the exercise of discretion. It is, therefore, within the Board's jurisdiction.

Discussion and Conclusions

Appellant argues in essence that, because of BIA's failure to follow 25 CFR 23.29 and to inform it of deficiencies in its application, it was deprived of the opportunity to correct its application so that it could be seriously considered. The BIA contends that there was substantial compliance with the regulations, which are themselves not mandatory because they are merely "designed to secure order,

[2] Omitted footnote 9 specifically addresses the Board's action in *Ahtone, supra,* stating among other things:

"By delimiting its holding in *Ahtone,* the Board does not imply it may have reached a different conclusion on the merits of the case than that of the Acting Deputy Commissioner. Since it did not have the agency record before it, it is even speculative whether the Board would have characterized the disposition in *Ahtone* as other than a purely discretionary matter."

system, and dispatch in proceedings." [3]

[2] The provisions of 25 CFR 23.29(b)(4) require BIA to take specific actions when its review of an Indian Child Welfare Act grant application indicates that the application may be disapproved. This regulation is not the type of "housekeeping" provision that BIA alleges. It creates substantive rights to advance notification of possible disapproval of a grant application and to assistance as available in remedying the problems in the application. Although the Act did not require the Secretary of the Interior to adopt this particular regulation, the regulation was clearly within his discretionary authority to establish in implementation of the statute. Once this regulation was adopted, and so long as it remains extant, the Secretary and his representatives are bound by it and it has the force and effect of law. *United States* v. *Nixon,* 418 U.S. 683, 694–96 (1974); *Service* v. *Dulles,* 354 U.S. 363, 388 (1957); *David V. Udy,* 45 IBLA 389 (1980); *Wilfred Plomis,* 34 IBLA 222 (1978).

The BIA attempts to distinguish several cases finding due process violations from this case. It is true that the cases are distinguishable on their facts. The legal proposition established by all of the cited cases, however, applies in this case: Regulations adopted by an agency that grants substantive or significant procedural rights are binding on the agency and will be enforced as law unless and until they are deleted or amended. Thus, while BIA may be correct that an agency normally has some freedom in determining how to exercise authority committed to its discretion, the agency can limit itself by promulgating regulations governing its conduct. *Service* v. *Dulles, supra.*

Neither is it true that BIA substantially complied with the regulation. Although BIA did provide some general orientation to potential applicants, including appellant, on Sept. 2, 1980, this assistance did not amount to specific notice of deficiencies following initial review which is contemplated in 25 CFR 23.29(b)(4). Without such notice, appellant was deprived of the right guaranteed in the regulation to attempt to remedy problems in its application in order that the application might receive initial approval.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the July 9, 1981, decision of the Acting Deputy Assistant Secretary—Indian Affairs (Operations) is reversed and the case is remanded to the Bureau of Indian Affairs so that it may expeditiously follow the procedures outlined in 25 CFR 23.29(b)(4). This decision does not require BIA to approve appellant's application or to give grant funds to appellant should the application be approved. It requires only that BIA follow its regulations in dealing with appellant's application.

The Board has considered this case ahead of other appeals previ-

[3] Appellee's answer brief at page 4, quoting *French* v. *Edwards,* 80 U.S. (13 Wall.) 506, 511 (1872).

ously docketed in recognition of the fact that an adjudication over fiscal year 1981 grant funds is subject to mootness.[4] So as not to require the Bureau to take actions which would be futile for all concerned, the Board will retain limited jurisdiction in this matter to rule on a motion that the Bureau be relieved of remand requirements imposed by this decision on grounds of mootness. Any such motion, however, must be filed within 10 days from receipt of this decision and must set forth specific factual circumstances indicating that even if appellant's application for fiscal year 1981 funds were to be approved, no funds could now be provided.

This decision is final for the Department.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

JERRY MUSKRAT
Administrative Judge

SHOSHONE & ARAPAHOE TRIBES *v.* COMMISSIONER OF INDIAN AFFAIRS

9 IBIA 263

Decided *April 16, 1982*

Appeal from decision of the Commissioner of Indian Affairs requiring that per capita payments to Indian minors in institutional and foster care be considered in determining their eligibility for child welfare assistance.

Affirmed in part; vacated in part.

1. Indians: Fiscal and Financial Affairs—Indians: Social Welfare

An examination of the legislative history of 25 U.S.C. § 613 (1976) reveals that it was not intended to exempt per capita payments from being used by Indian minors to meet costs of foster home assistance or institutional care.

2. Indians: Fiscal and Financial Affairs—Indians: Guardianship—Indians: Individual Indian Money Accounts—Indians: Social Welfare

Under 25 CFR 104.4, disbursement from a minor's IIM account must be made in accordance with "the best interest of the minor." This regulation obligates BIA to make individualized determinations before disbursing funds for, among other things, the cost of custodial care.

APPEARANCES: Reid Peyton Chambers, Esq., Sonosky, Chambers, Sachse & Guido, for appellant Shoshone Tribe; R. Anthony Rogers, Esq., and Susan Berghoef, Esq., Wilkinson, Cragun & Barker, for appellant Arapahoe Tribe; Penny Coleman, Esq., Office of the Solicitor, Division of Indian Affairs, Department of the Interior, for appellee Commissioner of Indian Affairs. Counsel to the Board: Kathryn A. Lynn.

[4] Appellant points out, however, that pursuant to 31 U.S.C. § 701 (1976) appropriated funds are available for obligation for 2 years following the expiration of the fiscal year in which they are appropriated.

April 16, 1982

OPINION BY ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

The Shoshone and Arapahoe Tribes (appellants) filed this appeal with the Board of Indian Appeals on Jan. 19, 1981. Appellants sought review of the action taken by the Commissioner of Indian Affairs as expressed in various memoranda, including those of Apr. 14 and Dec. 1, 1980, requiring that the "personal financial resources" of Indian minors be used to pay the cost of placement in foster or institutional care. The administrative record in this case, which the Board received on Mar. 27, 1981, contained a copy of a Mar. 11, 1981, memorandum from the Acting Deputy Commissioner of Indian Affairs amending the Apr. 14, 1980, memorandum.[1] After the conclusion of briefing, the Board heard oral arguments in this case on Jan. 29, 1982.

Background

The Shoshone and Arapahoe Tribes share the Wind River Reservation in Wyoming. Tribal trust lands on the reservation are leased for oil and gas development. Pursuant to 25 U.S.C. § 613 (1976), 85 percent of the trust funds generated by these leases is "paid per capita to the members of the respective tribes in equal monthly installments on the first day of each month." Presently it appears that each Shoshone receives $510 per month and each Arapahoe receives $216 per month.[2] For minors placed in foster or institutional care, these payments are held by the Bureau of Indian Affairs (BIA) in "Individual Indian Money accounts" (IIM account) as defined at 25 CFR 104.1.[3]

One hundred dollars of each per capita payment made to a minor in foster or institutional care is currently applied by BIA to the cost of custodial care,[4] which is $264 per child per month.[5] The rest of each per capita payment is retained in the minor's IIM account. The balance of the cost of foster or institutional care is paid by the BIA.

[1] The Mar. 11, 1981, memorandum states:

"The policy of this Bureau is to provide social services grant assistance based upon need to otherwise eligible clientele, including children.

"Accordingly, Social Security benefits, Veterans Administration benefits and all other income accruing to children, except income exempted by Federal statute, shall be considered as a resource available to meet need. This includes all income deposited in a child's Individual Indian Money (IIM) account with the exception of per capita shares of judgment funds which shall be protected in full accordance with the provisions of 25 CFR 60.10 and 25 CFR 104.4.

"However, in those individual locations where the prevailing state standard of assistance provides for preservation of clientele minor's funds through a specified allowance limitation, the Bureau's social services program shall follow that allowance limitation.

"This policy pertaining to use of children's personal financial resources applies to all instances where this Bureau is called upon to assume financial responsibility for child placements in foster or institutional care as provided for in 25 CFR 20. The policy also applies in all instances where children are included in a general assistance application.

"This policy supersedes the Commissioner's April 14, 1980 policy memorandum, subject above. However, nothing in this policy supersedes, modifies or in any way changes the regulatory requirements of 25 CFR 20, 25 CFR 60.10 or 25 CFR 104.4."

[2] Parties' Stipulation No. 4, Jan. 8, 1982. Shoshone Indians receive larger payments because the tribal membership is less than that of the Arapahoe tribe (Tr. 1).

[3] Parties' Stipulation No. 2, Jan. 8, 1982.

[4] The Business Councils of the two tribes agreed informally to this arrangement (Tr. 3-5).

[5] Parties' Stipulation No. 4, Jan. 8, 1982.

The above procedure would be significantly changed under the terms of the Mar. 11, 1981, memorandum.[6] Specifically, the BIA would consider all income accruing to Indian minors as a resource eligible to meet social service needs with three exceptions. Under the Mar. 11 memorandum, the three resources not eligible to be considered by the Bureau in determining need are (1) income exempted by Federal statute, (2) per capita shares of judgment funds, and (3) the amount of funds which under applicable state law is reserved for minors in state public assistance programs. Thus, in Wyoming, where the Wind River Reservation is located, Indian minors would be entitled under exception three to accumulate $750 free and clear from consideration by the BIA in its assessment of financial need.[7] As to appellants, then, BIA would apparently pay the entire cost of institutional or foster care for each minor until $750 had accumulated in that minor's IIM account. At that time, the minor would become responsible for paying the cost of care to the extent of all available resources.[8]

[6] *Supra,* n.1. The effectiveness of the Mar. 11, 1981, memorandum was stayed until Dec. 18, 1981, by order of the Board dated Nov. 25, 1981, pursuant to the provisions of 43 CFR 4.21(a) and (b). The stay was subsequently extended to Jan. 20, 1982 (by order dated Dec. 16, 1981), and then "until the issuance of a decision in this case or until further notice" (order dated Jan. 18, 1982).

[7] This is because Wyoming law establishes $750 as an allowance limitation for the preservation of clientele minors' funds in the administration of its own public assistance program (Appellant's Opening Brief at 2).

[8] As previously noted the present practice at Wind River requires minors to contribute no more than $100 of each per capita payment towards the cost of institutional or foster care assistance.

Discussion, Findings, and Conclusions

This case presents two major issues: First, whether the position set forth in the Mar. 11, 1981, memorandum of the Acting Deputy Commissioner accurately states the applicable law; second, whether per capita payments made to minor members of the Shoshone and Arapahoe Tribes under 25 U.S.C. § 613 (1976), are "resources" available to meet "need" within the meaning of 25 CFR Part 20.

The BIA contends that the Mar. 11 memorandum merely restates regulatory requirements found in 25 CFR Part 20. These regulations, it argues, incorporate state standards for determining an individual's need for assistance and the "resources" available to meet such need. A close reading of the regulations, however, negates this contention.

"Resources" is defined in 25 CFR 20.1(w) as "services or income available to an Indian person or family unless excluded by Federal statute for public assistance or Supplemental Security Income from being considered as income for the purpose of determining financial need." This section clearly does not incorporate state definitions of resources. The only possible provision within Part 20 that might require reference to state standards for determining an individual's "resources" is in sec. 20.1(s):

"Need" means the deficit between resources and money amounts necessary to meet the cost of basic items and/or special items by the applicant or recipient *as established pursuant to the Social Security Act by the public welfare agency of the*

state in which the applicant or recipient resides and which shall be used by the Bureau in determining the amount of financial assistance to be provided to the applicant or recipient residing in that state. [Italics added.]

The BIA incorrectly interprets the emphasized wording of this regulation as modifying both "resources" and "money amounts." A careful reading of the regulation reveals that the emphasized words refer to "the cost" of basic items and/or special items. That is to say, state standards (*i.e.*, cost estimates for basic and/or special items) will be used to determine money amounts necessary to meet the defined necessities of an individual. "Need," therefore, is computed by subtracting the available "resources" of an individual from the "money amounts" necessary under state law to meet the cost of basic and/or special items of individual necessity. Consequently, the Board agrees with appellants that the plain meaning of sec. 20.1(s) is "that the level of support * * * shall be set by state standards" or "[i]n other words, the regulations provide that the payments for foster or institutional care, and their overall cost, shall be established by state standards" (Appellants' Reply Brief at 3).

The Board therefore rejects the Bureau's contention that the Mar. 11 memorandum merely constitutes an "interpretive directive" regarding requirements already set forth in 25 CFR Part 20 (Appellee's Brief at 3). Instead, the memorandum impermissibly attempts to establish a new rule [9] without following the public notice and comment procedures established under the Administrative Procedure Act, 5 U.S.C. § 553 (1976). *See Morton* v. *Ruiz,* 415 U.S. 199 (1974). For this reason, the Mar. 11, 1981, memorandum of the Acting Deputy Commissioner must be vacated.[10]

[1] The next question is whether, as appellants argue, per capita payments made to minor tribal members are exempted by Federal statute from consideration in determining the extent of a minor's resources within the meaning of 25 CFR 20.1(w). Appellants base their argument on the fourth proviso in 25 U.S.C. § 613 (1976) which reads: "That said per capita payments shall not be subject to any lien or claim of any nature against any of the members of said tribes unless the business council of such member shall consent thereto in writing." Certain specific types of debts owed to the United States not relevant here are excluded from this exemption.

On its face, the above-quoted proviso of sec. 613 plainly conveys that per capita funds payable to tribal members are exempt from use for the payment of any form of debt or claim not otherwise per-

[9] 5 U.S.C. § 551(4) (1976) states in pertinent part: "'[R]ule' means the whole or a part of an agency statement of general * * * applicability and future effect designed to implement, interpret, or prescribe law or policy."

[10] This holding does not prohibit BIA from adopting state standards for preserving the funds of a minor in institutional or foster care if after proper rulemaking proceedings such standards are determined to be proper. (As previously noted, BIA has already used rulemaking to adopt state standards for determining the level of support which should be provided Indians eligible for assistance. 25 CFR 20.1(s).)

mitted under the proviso or consented to by the tribal business council. Since the business councils of the appellant tribes have only consented to the use of $100 of Indian minors' per capita funds monthly to help defray the cost of their institutional or foster care, the tribes submit that it is an obvious violation of Federal statute for the Bureau of utilize more than $100 of minors' funds on the Wind River Reservation to meet custodial care costs.

The broad prohibition contained in sec. 613, above, appears to imply that no member of the appellant tribes, including competent adults, can be required to use per capita funds to pay any debt. This interpretation strains credulity upon recognition of the fact, acknowledged by appellants, that once per capita payments are received by adult members of the tribes, the monies are not regarded as trust personalty.[11] The Board cannot dismiss the possibility that Congress may not have intended sec. 613 to serve as the equivalent of a safety net against ordinary claims and debts which individuals, Indian or non-Indian, may be expected to incur.[12]

The maxim that extrinsic aids in statutory construction may be considered only when a statute is ambiguous and not where the language is clear has given rise to several exceptions. Thus, it has been said that the "plain meaning rule * * * is not to be used to thwart or distort the intent of Congress by excluding from consideration enlightening material from the legislative files." *Federal Communications Commission* v. *Cohn,* 154 F. Supp. 899, 910 (S.D.N.Y. 1957). The Supreme Court has declared that "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent" and found such contrary evidence in legislative history. *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453, 458 (1974). Under the circumstances of the case before us, the Board believes it is justified in looking to the legislative history of sec. 613 as an aid to construction.

The legislative history on sec. 613 and its fourth proviso is not extensive, but is edifying. H.R. 1098, which became sec. 613, was introduced into the 80th Congress by Congressman Frank A. Barrett of Wyoming, for his constituents, the Shoshone and Arapahoe Tribes, and with the concurrence of the State of Wyoming.[13] Hearings were held before the Subcommittee on Indian Affairs of the House Committee on Public Lands on Mar. 15, 1947. Congressman Barrett, who was a member of the Subcommittee, and other witnesses supporting the bill testified about conditions on the Wind River Reservation. Although over $1 million from oil and gas rentals had accrued in the tribes' joint

[11] Tr. 44. *See also* F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 630.

[12] Proceeds derived from Indian land on the Wind River Reservation by tribal members are almost entirely from per capita payments authorized by sec. 613. The reservation contains very few allotted lands (Tr. 7). (For a discussion of the Secretary's authority to use trust funds to pay legal debts of deceased Indians in the probate of estates, *see Estate of John Joseph Kipp,* 8 IBIA 30, 87 I.D. 98 (1980).)

[13] Trust Funds, Shoshone and Arapahoe Indian Tribes: Hearings on H.R. 1098 before the Subcomm. on Indian Affairs of the House Comm. on Public Lands, 80th Cong., 1st Sess., 1-3, 14-15 (1947) (Hearings).

account in the United States Treasury,[14] the people lived in abject poverty, without the basic necessities of life, including food, clothing, and shelter.[15] The Secretary of the Interior had on previous occasions made small per capita payments to the tribal members in order to permit them to purchase these necessities.[16] Witnesses who were members of the tribal councils of each of the tribes explained that the Shoshone and Arapahoe were very individualistic people who preferred to take care of their own needs, rather than depend on money from the Bureau or be subject to Federal regulations on how the money could be spent.[17] Tribal members, the testimony shows, preferred to have a portion of their tribal money paid to the people, rather than have such funds retained in the Treasury on the possibility that someday some tribal use might be found for the money.[18] It was admitted that some tribal members, like any other person who received unearned or large amounts of money, might waste the payments, but it was felt that these people were few and that there were other measures that might be taken to protect them and their families.[19] The tribes asked only an opportunity for their members to care for themselves and to "live as decent American citizens."[20]

[14] Hearings, 2, 8, 10.
[15] Hearings, 2, 5–6, 15–16, 22–25.
[16] Hearings, 10, 12, 38.
[17] Hearings, 8–9, 15, 18–20, 26–27.
[18] Hearings, 8, 20–21.
[19] Hearings, 8, 15, 17, 20, 24.
[20] Hearings, 2, 7.

The fourth proviso in sec. 613 was authored by Congressman Barrett as an amendment to H.R. 1098[21] to ensure that normally the full amount of the per capita payment would be paid to the individual, but recourse would be available against those persons who might be wasting their money. In explaining the amendment to the Subcommittee, Congressman Barrett stated:

> The purpose of my amendment is that the per capita payment shall be paid out to each of the members of the tribe without deductions unless the council, for reasons that seem proper to them, shall withhold it and apply it on loans the individual may owe on the theory that if a man is wasting his money, that he will be required to pay off his loan first before he gets his per capita payment.[22]

This statement is clarified by the testimony of the tribal witnesses that when per capita payments were made in the past, deductions had been taken for debts allegedly owed to the United States. Some of those debts, such as certain irrigation charges, were disputed when the deductions were made. Since in many cases little, if any, of the payment remained after the deductions were withheld, the people realized little benefit from the payment.[23]

The legislative history thus reveals that the fourth proviso was not intended to exempt per capita payments from legitimate debts owed by an individual. The restriction was enacted to guarantee that the individual would receive the full per capita payment so

[21] Hearings, 20.
[22] Hearings, 7.
[23] Hearings, 38.

that he or she could take care of his or her own debts, like any other responsible citizen, free from restrictions imposed by the Bureau.[24] Read in light of this legislative history, the proviso is seen to protect the initial payment owing to an individual, but not to restrict the use of money once the payment was made.

The fourth proviso in sec. 613, therefore, does not of itself exempt per capita payments to minor members of appellant tribes from being considered as a resource available to meet their needs. Instead, it appears that basic necessities, such as are included in the cost of foster or institutional care, are precisely the type of expenses that were intended to be met with the per capita payments.[25] The Board so holds.[26]

[2] This holding does not mean that all of a minor's per capita payments may be devoted to the cost of foster or institutional care.[27] Under 25 CFR 104.4, BIA must disburse the IIM funds of a minor in accordance with "the best interest of the minor." This regulation obligates the Secretary to make individualized determinations as to what constitutes a particular minor's best interests. In some cases, a minor's best interests may be served by allowing per capita payments to accumulate for future educational needs. In others, a minor may need specialized health care. In still others, a minor with severe handicaps who may never become a self-sufficient member of society may be best served by applying a large percentage of the payments to the costs of institutional care.

The Board is not unmindful of the fact that minors in foster and institutional care need assistance in becoming fully functioning adults because of special problems that are often exacerbated by the absence of a stable homelife. Such individuals frequently require public assistance throughout part or all of their lives. The BIA's responsibility in integrating 25 CFR Part 20 with 25 CFR 104.4 is to determine how public assistance can best be used to give a minor an opportunity to develop his or her own potentials so that he or she can become, if possible, a self-reliant adult, able to function in society without further need for public assistance. A secondary goal, which is properly subordinated to the minor's best interests under the Department's regulatory scheme, is to reduce to the extent possible the expenditure of public assistance funds. Thus, BIA may consider per capita payments made to a minor under 25 U.S.C. § 613 (1976) as a resource available for use in paying the costs of foster or institutional care when

[24] "We are not asking for direct help from the Government. We have money, and where we have it we are asking for that money to relieve our situation." Hearing, 25.

[25] A 1956 amendment to sec. 613 added a provision giving the Secretary authority to protect and conserve funds payable to minors and incompetents. Act of July 25, 1956, 70 Stat. 642. This provision was deleted in 1958. Act of Aug. 8, 1958, P.L. 85-610, § 2, 72 Stat. 541. *See* Tr. 9-11.

[26] The Board's holding does not deprive the fourth proviso of sec. 613 of meaning or effect. Evaluated in light of its legislative history, Congress merely intended by this proviso to ensure that per capita funds payable to tribal members would not be subject to diminution prior to receipt by the Indian payee, except for special debts owed to the United States and unless otherwise agreed upon by the tribal business councils in writing.

[27] In their briefs appellants argued that the Commissioner of Indian Affairs was "attempting to use the property of minor trust beneficiaries to pay for services the United States is legally obligated to provide as trustee," citing *White* v. *Califano*, 581 F.2d 697 (8th Cir. 1978) (Appellants' Opening Brief at 7). As a practical matter, appellants abandoned this theory during oral argument (*see* Tr. 6-8; 42-44).

such use is not otherwise in violation of law or detrimental to the best interests of the minor.

Pursuant to authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, it is ordered as follows: The Mar. 11, 1981, memorandum issued by the Acting Deputy Commissioner of Indian Affairs to BIA Area Directors, which the Board has found seeks to promulgate standards required by law to be published in the *Federal Register*, is vacated; the decision of the Bureau of Indian Affairs that per capita payments received by minors of the Shoshone and Arapahoe tribes of the Wind River Reservation under authority of 25 U.S.C. § 613 may be considered as a resource eligible to meet need under the BIA's social services program is affirmed.

This decision is final for the Department.

WM. PHILIP HORTON
Chief Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

JERRY MUSKRAT
Administrative Judge

ROMOLA A. JARETT

63 IBLA 228

Decided *April 16, 1982*

Appeal from the decision of the California State Office, Bureau of Land Management, canceling in part, oil and gas lease CA 4275.

Affirmed.

1. Accounts: Refunds—Oil and Gas Leases: Rentals

Where a noncompetitive oil and gas lease is canceled in part because some of the lands were already patented, the Department may return the excess rentals pursuant to the repayment provision of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1734(c) (1976). However, in absence of statutory provisions, no interest may be paid by the Government on such funds.

APPEARANCES: Romola A. Jarett, *pro se.*

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

INTERIOR BOARD OF LAND APPEALS

This appeal is taken from a decision dated Jan. 13, 1982, by the California State Office, Bureau of Land Management (BLM), canceling in part noncompetitive oil and gas lease CA 4275, issued effective June 1, 1977, as to the following lands: "T. 22 S., R. 11 E., Mount Diablo meridian, sec. 5, lots 5 and 6 (81.92 acres)." The decision states that when the lease was issued it was mistakenly believed that the above-described lands were available for oil and gas leasing. Subsequently, however, it was found that these lands were patented under Homestead Patent No. 734052, Feb. 11, 1920, with no mineral reservation to the United States. The decision indicates that the lease rental totalling $410 (5 years x $82 per year) would be refunded when the decision became final.

In the statement of reasons, appellant does not challenge the partial cancellation of her lease. She does, however, request that the refund to her include interest in the amount of $107.10. This figure is based on computations applying a 9½ percent per month interest rate to the payment applicable to the 81.92 acres over the number of months elapsed since the lease was issued.

[1] Statutory authorization for refunds is provided by sec. 304(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1734(c) (1976), as follows:

> (c) Refunds
> In any case where it shall appear to the satisfaction of the Secretary that any person has made a payment under any statute relating to the sale, lease, use, or other disposition of public lands which is not required or is in excess of the amount required by applicable law and the regulations issued by the Secretary, the Secretary, upon application or otherwise, may cause a refund to be made from applicable funds.

The Board has held that refunds are appropriate in instances where lease rentals were paid for lands which were never really subject to oil and gas leasing and where the lessees derived no benefits from the lease. *See Bruce Anderson,* 30 IBLA 118 (1977) and cases there cited. Exaction of interest from the Government, however, requires statutory authority. *Rosenman* v. *United States,* 323 U.S. 658, 663 (1945). In *United States* v. *Thayer-West Point Hotel Co.,* 329 U.S. 585, 588 (1947), the Court referred to the traditional rule that interest cannot be recovered against the United States upon unpaid accounts or claims in the absence of an express provision to the contrary in a relevant statute or contract. Thus, no foundations are present in the case at bar upon which appellant could base a recovery of interest in addition to the refund properly computed by BLM.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

GAIL M. FRAZIER
Administrative Judge

WE CONCUR:

EDWARD W. STUEBING
Administrative Judge

JAMES L. BURSKI
Administrative Judge

NOLA GRACE PTASYNSKI

63 IBLA 240

Decided *April 19, 1982*

Appeal from the decision of the Acting Director, Geological Survey, denying an appeal from the decision of the Area Oil and Gas Supervisor, Casper, Wyoming, requiring payment of compensatory royalty on oil and gas lease W-39532.

Affirmed as modified.

1. Oil and Gas Leases: Compensatory Royalty—Oil and Gas Leases: Drainage—Oil and Gas Leases: Drilling

Neither the standard lease terms nor the applicable regulation, 30 CFR 221.21(c), require the payment of compensatory royalty for drainage from Government lands, where it can be established that a prudent operator would not drill an offsetting well.

2. Rules of Practice: Appeals: Failure to Appeal—Rules of Practice: Appeals: Timely Filing

Where the Geological Survey informs an oil and gas lessee that completion of a well on an adjacent tract of land has resulted in substantial drainage from the Government's land and directs the lessee to either complete an offset well or tender compensatory royalties, the lessee may attempt to show that the drainage is not substantial or that a prudent operator would not attempt to complete a paying well. Where, however, the lessee does not challenge the factual predicates of the Survey demand within a reasonable time after he has been informed of them, the right to subsequently contravene the factual determinations of Survey on these points is waived.

3. Oil and Gas Leases: Compensatory Royalty—Oil and Gas Leases: Drainage

Where a lessee, after due notice, fails to submit evidence that a requested offset well was unneeded, and also fails to timely complete the well, compensatory royalty is properly assessed, regardless whether the well which is eventually drilled is "a paying well."

4. Oil and Gas Leases: Compensatory Royalty—Oil and Gas Leases: Drainage

Before a lessee may plead impossibility of performance as a bar to fulfillment of a contractual requirement, the lessee must show that no alternate method of compliance is possible. Where possible alternatives exist, a lessee is not excused from a contractual obligation merely because one alternative is not feasible.

5. Oil and Gas Leases: Compensatory Royalty—Oil and Gas Leases: Drainage

Compensatory royalties for failure to complete a protective well are properly assessed after a reasonable time from notice of drainage by the lessor until an offset well has been completed.

APPEARANCES: W. F. Drew, Esq., Casper, Wyoming, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

Nola Grace Ptasynski has appealed the decision of the Acting Director of the Geological Survey (Survey), dated June 18, 1979, denying her appeal of the decision of Survey's Casper, Wyoming, Area Oil and Gas Supervisor requiring payment of compensatory royalty on oil and gas lease W-39532. Only the part of this lease which embraces the NW¼NE¼ of sec. 33, T. 36 N., R. 69 W., sixth principal meridian, Converse County, Wyoming, is the subject of the dispute in this case.

By certified letters, dated Sept. 24, 1976, and Apr. 26, 1977, Survey notified appellant and the lessees of oil and gas lease W-35689 that completion of a well, designated as No. 2-33 on the NE¼NW¼ of sec. 33, T. 36 N., R. 69 W., sixth principal meridian, on Apr. 13, 1976, would result in drainage of the lands covered by their leases and therefore required communitization of the area and drilling of a protective well or, alternatively, payment of compensatory royalties.[1] Noting that, under the standard terms of the leases, appellant and the

[1] While both letters referred only to drainage being caused by well No. 2-33 in the NE¼NW¼ sec. 33, subsequent assessments of compensatory royalty indicated that drainage was also being caused by well No. 1-33 in the NE¼SW¼ sec. 30.

other lessees had agreed to drill any wells necessary to protect the leased lands from drainage or to compensate the Federal Government for the estimated loss of royalty through drainage, Survey informed appellant that, in the absence of diligent drilling operations, compensatory royalties would be assessed as of Apr. 13, 1976. Both letters, gave appellant the opportunity to contravene Survey's determination that drainage was occurring. Thus, the Apr. 26, 1977, letter stated "if you contend that no offset protection is necessary, detailed engineering, geologic, and economic data should be furnished to justify this position." When appellant did not submit any justification or evidence of drilling on her leased lands, Survey issued a decision letter, dated Sept. 28, 1977, assessing compensatory royalty on appellant's lease.

Appellant responded by letter dated Oct. 25, 1977, asserting that the demand for compensatory royalty was inappropriate and requesting that the decision be changed. She claimed that, under the established drilling and spacing units for sec. 33, it was impossible for her to drill on her 40 acres independently,[2] and that the other lessees in the NE¼ had earlier declined to drill because they believed that any well would be of doubtful commercial value. She indicated that, nevertheless, they had proceeded jointly to drill a well on the NE¼NE¼ of sec. 33 and would attempt completion. Appellant argued that she has diligently developed the other portions of her lease, and suggested that it was inequitable to assess her compensatory royalties under the totality of the relevant circumstances.

By letter dated Feb. 3, 1978, Survey notified appellant that the compensatory royalty assessment for drainage from the offset wells would terminate as of Nov. 14, 1977, the completion date of the protective well located on the NE¼NE¼ of sec. 33.[3] The letter reiterated that the royalty payments were then due and payable without addressing the contentions in appellant's Oct. 1977 letter. In response, appellant reiterated the arguments in the October letter and again requested that the decision assessing compensatory royalty be reversed. On Feb. 28, 1978, Survey again notified appellant that the royalty payments were due and stated that "the assessment to protect your Federal lease W-39532 from drainage * * * will not be waived. This assessment is not a penalty but protection against drainage by offset wells to Federal leases." The letter also stated that appe-

[2] By order dated Dec. 2, 1975, the Wyoming Oil and Gas Conservation Commission had established 160-acre drilling and spacing units for the production of oil and associated gas from the Teapot formation in the Well Draw Field, Converse County, Wyoming. The order covered all of sec. 33, T. 36 N., R. 69 W., sixth principal meridian, and provided that the permitted location for a test well in the NE¼ would be the center of the NE¼NE¼. The Commission later entered a permanent order establishing the 160-acre units for sec. 33 and the same permitted drilling location. Appellant, as lessee of the NW¼NE¼ of sec. 33, was therefore prohibited from drilling on her own leasehold and held no interest in the leases covering the NE¼NE¼ of sec. 33. In Feb. 1977 appellant executed an authorization for expenditure whereby she agreed to pay her 25 percent share of the cost of drilling and completing the well in the NE¼NE¼ of sec. 33, but the lessees of the E½NE¼ of sec. 33 declined to drill the well at that time because of the questionable commercial value of such well.

[3] The Feb. 3 letter noted that until a communitization plan was approved by Survey, appellant would be assessed, for royalty purposes, 25 percent of the production of the well. A communitization plan was eventually approved on Mar. 22, 1978, with an effective date of Oct. 1, 1977.

lant had the right to appeal the decision to the Director of Survey.

Appellant filed a notice of appeal with the Director and statement of reasons on Mar. 29, 1978,[4] which summarized her arguments as follows:

WHEREFORE, for the reason that this Appellant was prohibited by orders of the Wyoming Oil and Gas Conservation Commission from drilling a test well to the Teapot formation in the NW¼NE¼ of Section 33, Township 36 North, Range 69 West; because this Appellant could not drill on a lease owned by another party at the approved location in the NE¼NE¼ of said Section 33; and, for the reason this Appellant did in 1976, agree to pay her proportionate 25% of the cost of drilling a test well to the Teapot formation in the NE¼NE¼ of said Section 33, and said well was not at that time drilled because the owners of the oil and gas leasehold estate in the E½NE¼ of said Section 33 declined to participate in a well at a location in accordance with the orders of the Wyoming Oil and Gas Conservation Commission, it is inequitable and unjust to assess this Appellant compensatory royalty.

The Acting Director of Survey denied this appeal by a decision dated June 18, 1979, which stated:

The order appealed from is presumptively valid. *Gables by the Sea* v. *Lea,* 365 F. Supp. 826 (S.D. Fla., 1973), aff'd 498 F.2d 1340 (C.A. 5, 1974), Cert. den., 419 U.S. 1105. Thus, appellant had the burden of showing its invalidity.

Appellant did not establish that offset protection was unnecessary since she failed to show that there was no drainage from her lease, and the record indicates that the offset well will be a paying well.

Appellant alleges that (1) the spacing orders of the Wyoming Oil and Gas Commission prohibited drilling of an offset well on her lease; and (2) the offset well was not drilled earlier because participation by the owners of adjacent private lands was required by the State Oil and Gas Commission, and such adjoining property owners initially declined to participate in the drilling of the well. However, none of these alleged events relieve appellant of her obligation to make compensatory royalty payments. Under the regulations (30 CFR 221.21(c)), where there is drainage a lessee is obligated to pay compensatory royalties in the absence of a protective well irrespective of whether the lessee is in fact able to drill a protective well.

From this decision, appellant has taken this appeal. In her statement of reasons, appellant focuses on the emphasized portion of the following paragraph of Survey's Sept. 28, 1977, decision letter:

Our District Engineer, Mr. James Shelton, notified you by certified mail on April 26, 1977, *that in the absence of commencing a protective well or submitting convincing evidence that a paying well could not be drilled on a legal location* to protect our lease W-39532 from drainage by well No. 2-33 in the NE¼NW¼ section 33 and well No. 1-33 in the NE¼SW¼ section 33, both in T. 36 N., R. 69 W., Well Draw field, Converse County, Wyoming, that compensatory royalty would be assessed for the estimated value of the drainage. [Italics added.]

Reiterating arguments made to the Director of Survey, appellant contends that the only "legal location" on which a protective well could have been drilled was in the NE¼NE¼ of sec. 33, the lease for which was held by other parties. She argues that it was not through lack of her own diligence that she could not drill the necessary protective well. She further indicates that Survey "has interpreted the regulations as not re-

[4] By letter dated Apr. 24, 1978, appellant also requested that payment of the compensatory royalties be held in abeyance pending the decision on appeal. On June 30, 1978, the Acting Director of Survey denied this request and indicated that the contested royalty payments would be refunded or credited to the proper account should the decision on appeal be favorable to appellant.

quiring the payment of compensatory royalty or the drilling of an offset well in a case where the lessee shows that such well would not be a paying well." She argues that the well which eventually was drilled on the NE¼NE¼ of sec. 33 was not a "paying well" and, thus, she should not have to pay compensatory royalties.

[1] Before commencing an analysis of appellant's argument we must take note of a legal memorandum from the Associate Solicitor, Energy and Minerals, to the Chief, Conservation Division, Geological Survey, dated Apr. 11, 1979, which related to the instant appeal and appears as part of the case record. In the course of this memorandum, the Associate Solicitor stated that, under the terms of the lease, the prudent operator standard was not applicable and, therefore, it was error for the Supervisor to advise a lessee that "convincing evidence that a paying well could not be drilled on a legal location" would relieve the lessee of the obligation to either drill or pay compensatory royalty. The Associate Solicitor stated further:

> When a Federal lease is being drained, the supervisor has authority to assess compensatory royalty liability under regulation 30 CFR 221.21(c). That provision requires the lessee to receive approval from the supervisor to pay royalties in lieu of drilling offset wells. However, it does not authorize the supervisor to relieve the lessee of both her obligation to drill and to pay compensatory royalties, unless, of course no drainage is occurring. If drainage occurs the regulations only authorize the supervisor to accept compensatory royalties in lieu of drilling.
>
> Therefore, we conclude that unless and until 30 CFR 221.21(c) is amended to incorporate the prudent operator rule of profitability, waivers of compensatory royalty liability in cases where lessees cannot drill a paying well should be halted.

This argument goes to the heart of appellant's contention, for if, indeed, the obligation to prevent drainage is absolute, failure to drill an offset well cannot be excused regardless whether the failure is occasioned by forces beyond a lessee's control. While we have carefully considered the argument advanced by the Associate Solicitor, we cannot give our agreement to his position.

First, we do not agree that the prudent operator standard is inapplicable to Federal leases. The prudent operator rule is, in essence, a limitation on the generally recognized implied duties of a holder of an oil and gas lease, including the duty to prevent substantial drainage from the leased land and to drill offset wells for this purpose. Thus, courts have long noted that:

> Under the usual statement of the standard for prudent operation there is no obligation upon the lessee to drill offset wells unless there is a sufficient quantity of oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling and operating the well.

Olsen v. *Sinclair Oil & Gas Co.*, 212 F. Supp. 332, 333 (D. Wyo. 1963). *See also Gerson* v. *Anderson-Prichard Production Corp.*, 149 F.2d 444, 446 (10th Cir. 1945); *Vickers* v. *Vining*, 452 P.2d 798, 802 (Okla. 1969).

The conceptual basis of the prudent operator rule lies in the fact that oil and gas leases are business arrangements entered into with an expectation of financial gain on both sides. As such, one could not rationally expect that a lessee would drill an offset well to

prevent drainage where there was no likelihood that such a well would be profitable. Accordingly, the law implies no such obligation.[5]

The question presented to this Board, however, is slightly different. The memorandum of the Associate Solicitor did, indeed, recognize that the prudent operator rule generally applied to the *implied covenant* to prevent drainage. The memorandum argued, however, that the lease terms and the applicable regulations established an express obligation to prevent drainage—an obligation which was not modified by the prudent operator rule.

This analysis was based primarily on an interpretation of 30 CFR 221.21(c). That regulation provides:

> The lessee shall drill diligently and produce continuously from such wells as are necessary to protect the lessor from loss of royalty by reason of drainage, or, in lieu thereof, with the consent of the supervisor, he must pay a sum estimated to reimburse the lessor for such loss of royalty, the sum to be computed monthly by the supervisor.

Thus, this regulation provides (1) that the lessee shall drill "to protect the lessor from loss of royalty by reason of drainage," or (2) in the alternative, the Supervisor may allow payment of compensatory royalty which will be computed on the basis of the lessor's loss of royalty.[6]

The lease also expressly sets out the same requirement. Sec. 2 states that the lessee agrees:

> (c) *Wells.*—(1) To drill and produce all wells necessary to protect the leased land from drainage by wells on lands not the property of the lessor, or lands of the United States leased at a lower royalty rate, or as to which the royalties and rentals are paid into different funds than are those of this lease; or in lieu of any part of such drilling and production, with the consent of the Director of the Geological Survey, to compensate the lessor in full each month for the estimated loss of royalty through drainage in the amount determined by said Director.

Based on these provisions the Associate Solicitor concluded that the obligation to drill offset wells was absolute in nature and that the only way to avoid unproductive drilling was by payment of compensatory royalty. We cannot assent to this interpretation.

While it has been recognized that express terms may modify the implied convenant to prevent drainage, the argument advanced by the Associate Solicitor is unique. The cases dealing with express modifications have almost universally grown out of attempts by the lessee to evade the requirement that an offset well be drilled, in situations where the prudent operator standard has been met, by pointing to an express limitation on the duty to

[5] We do recognize that the prudent operator limitation does not necessarily apply where the lessee of the area being drained is also the owner of the well that is draining the leased tract, the so-called "fraudulent drainage" situation. Since this situation is not present in the instant appeal, we will not further explore the rules that apply in this specialized situation. *See generally* 5 Williams and Meyers, *Oil and Gas Law* § 824 (1981); *Williams* v. *Humble Oil & Refining Co.*, 290 F. Supp. 408, 417-19 (D. La. 1968), *aff'd*, 432 F.2d 165 (5th Cir. 1970).

[6] The last phrase represents an election on the part of the Government to pursue compensation on the basis of the royalty which would have been paid on the hydrocarbons drained by the offending well as opposed to the royalty which would have resulted had an offset well been drilled when it should have been.

protect the leased lands.[7] In contradistinction, here the Associate Solicitor is positing an express requirement that a lessee drill where a reasonably prudent operator would not. Our analysis of 30 CFR 221.21(c) does not support the Associate Solicitor's conclusion.

In the first place, it can scarcely be argued that the language of the regulation clearly attempts to nullify the prudent operator limitation. As the Associate Solicitor pointed out, the substance of the regulation has been the same since 1942. *See* 30 CFR 221.21(c) (1949). Yet, since 1942, Survey has apparently allowed proof of economic infeasibility to nullify the requirement that a lessee either drill or pay compensatory royalty.[8]

Secondly, the wording of the regulation, even given the Associate Solicitor's interpretation that the "either/or" dichotomy is incapable of waiver, could easily be interpreted as implicitly embracing the prudent operator standard. The key word here is "drainage." As a general rule, the implied covenant to prevent drainage arises only where the drainage is "substantial." *See, e.g., Gerson* v. *Anderson-Prichard Production Corp., supra* at 446. Regardless of whether one views this requirement as merely a restatement of the requirement that there must be a reasonable prospect of success for the drilling of a paying well, or as an additional standard which must be met before recovery may be had for breach of the protection covenant,[9] the fact remains that, for the Solicitor's interpretation of 30 CFR 221.21(c) to be correct, the regulation must be construed as not requiring "substantial" drainage, *in addition to* not requiring a likelihood of a paying well. It would be expected, however, that if so marked a variance from the general rules relating to protective wells were intended it could have been accomplished with greater precision and specificity.

Finally, the Associate Solicitor's conclusion is suspect precisely because it results in the imposition of economic obligations on the lessee which clearly do not involve rational economic considerations. If the recoverable oil underlying the land where drainage is occurring is insufficient to support the cost of recovery, no intelligent *landowner* would make out-of-pocket expenditures to drill a well. The oil lost through drainage is not an economic loss to the landowner, because its attempted recovery would actually cost the landowner money. Thus, while in some conceptual sense the landowner has lost the oil drained, there has been no economic loss occasioned by the drainage.[10] The landowner is no worse off than he was before the offending well commenced to drain his meager reserves, and considerably better off then he would be if he tried to recover them by drilling an offset

[7] *See, e.g., Williams* v. *Humble Oil & Refining Co., supra* at 413–17; *Shell Oil Co.* v. *Stansbury,* 410 S.W.2d 187–88 (Tex. 1967).

[8] We say "apparent" since not only did the Oil and Gas Supervisor afford appellant the opportunity in this case to show that a paying well could not be drilled, but the decision of the Director ignored the Associate Solicitor's memorandum and reiterated the standard.

[9] *See* 5 Williams and Meyers § 822.1.

[10] In the legal sense, of course, where the law of capture applies, the landowner has suffered no legal loss whatsoever since the right of ownership of such fugacious substances arises only when they are reduced to the landowner's possession.

well. A lessee should not be obligated to pursue a course of economic folly which a prudent owner would forego.

It is difficult to understand why the Government would contend that, while no prudent operator would drill in such a situation, it is nevertheless required that the Government's lessee drill or pay compensatory royalty. For one thing, it is hard to quantify proper "compensation" when there is, in point of fact, *no real economic loss* to the Government through drainage. The Government is not seeking to be made whole, but, on the contrary, is attempting to obtain an actual benefit beyond any economic loss actually suffered. It may be that the United States might desire to enforce such a requirement. But, in the absence of a regulation specifically countenancing this result, thereby giving notice to all prospective lessees, we cannot agree with the Associate Solicitor's analysis. *Cf. Pan American Petroleum Corp.* v. *Udall,* 192 F. Supp. 626, 630 (D.D.C. 1961). Accordingly, we expressly hold that where the evidence establishes that a prudent operator would not drill an offset well to protect against drainage there is no requirement that the lessee nevertheless either drill the offset well or tender compensatory royalty.

[2] Having determined that the prudent operator exemption does apply to Federal oil and gas leases, the next question we must examine is whether or not appellant timely interposed an objection to the order that she drill or pay compensatory royalty. As we noted above, both the Sept. 24, 1976, and the Apr. 26, 1977, letters afforded appellant an opportunity to show that "no offset protection is necessary." Appellant made no effort at either time to show that a paying well could not be completed. When appellant finally responded to the Sept. 28, 1977, letter assessing compensatory royalty, she did argue, in passing, that an offset well might not be productive but, even at that time, the thrust of her argument was that she had made a good faith effort to drill a well but had been unable to drill without the cooperation of the other parties holding the operating rights in the NE¼ sec. 33. By this time, over a year had passed since appellant was first afforded an opportunity to respond to Survey's directive. When she failed to contravene, in a timely manner, the determination of Survey that substantial drainage was occurring which necessitated the drilling of an offset well, she waived her right to contest the Survey determination on the ground that substantial drainage was not occurring. Indeed, the fact that appellant and the other parties did subsequently complete a well indicates that the possibility of the existence of substantial drainage was at least sufficient enough to justify the expenditure of $408,575.

[3] The fact that the well which was drilled may not be a paying well does not affect the validity of the compensatory royalty determi-

nation.[11] Appellant was allowed an opportunity to submit evidence that an offset well was not needed. Failing in this, she was required to (1) drill an offset well or (2) pay compensatory royalty. Appellant offered no evidence that an offset well was unneeded. When she failed to drill the well within a reasonable period of time, compensatory royalty was properly assessed.

The Government's right to indemnification by the assessment of compensatory royalty attached a reasonable time after notification and continued until the completion of a protective well. From the point of its initiation, compensatory royalty was a continuous obligation until an offset well had been completed. Even if it could be shown that the completed well was not a paying well, there could be no refund of compensatory royalty payments as they had already accrued through the failure of the appellant to take specified steps to avoid the assessment.

Indeed, there was a *quid pro quo* involved herein since the continuation of the lease was, in the absence of a protective well, totally dependent upon compensatory royalty. When the protective well was completed the compensatory liability terminated, but until such completion only the compensatory royalty payment prevented the Government from taking action to cancel the lease. Further, appellant failed to appeal timely the Survey determination that compensable drainage was occurring.

[4] We recognize that the main thrust of appellant's argument goes to the inability of appellant to drill absent the approval of the other leasehold owners in the NE¼. Appellant argues that:

> This Appellant did, under date of February 7, 1977, agree to pay her proportionate 25% of the cost and expense of drilling a test well to the Teapot formation at the said legal location in the NE¼ of said Section 33 and this well was not drilled at that time because the owners of the oil and gas leasehold in the E½NE¼ of section 33 declined to participate in a well at the legal location. It is therefore inequitable and unjust to assess this Appellant compensatory royalty.

It is, of course, generally accepted that where performance of a contract has been rendered impossible by a judicial or administrative order, a contractual duty thereby prohibited is considered discharged. *See, e.g., Restatement (Second) on Contracts* § 264. Courts have also recognized that "[a] lessee who fails to drill an offset well *in violation* of a valid well spacing regulation does not breach his duty under the prudent operator standard." *U.V. Industries, Inc.* v. *Danielson,* 602 P.2d 571, 580 (Mont. 1979). Appellant contends that since it was not possible, consistent with state spacing requirements, for her to drill on her lease, there was no breach of the protection covenant and, thus, she should not be assessed compensatory royalty. We disagree.

In *Ashland Oil & Refining Co.* v. *Cities Service Gas Co.,* 462 F. 2d 204 (1972), the Tenth Circuit Court of Appeals examined the question of the consequence of

[11] We recognize that the Area Oil and Gas Supervisor has contended that the well is a paying well. *See* memorandum of May 30, 1978, to Chief, Conservation Division. As the text indicates, however, the question is not dispositive of the issues presently before the Board.

failure "because of impossibility of one of two alternate performance provisions in a contract." *Id.* at 211. The court held that the impossibility of one alternative rendered the alternate undertaking operative. This holding was reaffirmed in *Cook* v. *El Paso Natural Gas Co.*, 560 F. 2d 978, 982 (10th Cir. 1977). In the instant case, while appellant might not have been able to drill on her lease, not only did she have the alternative provided of paying compensatory royalty, she had the additional possibility of applying for a spacing exemption. Before appellant can be allowed to plead impossibility of performance, she must show that all reasonable steps were taken, and that performance was, indeed, impossible. *Cf. U. V. Industries, Inc.* v. *Danielson, supra.* Appellant, having never applied for a spacing exception, will not be permitted to complain that she had no possible method of complying with the requirement that she drill to prevent drainage. *See Kirkpatrick Oil and Gas Co.*, 15 IBLA 216, 229-30, 81 I.D. 162, 168-69 (1974).[12]

[5] We turn now to the last question which this appeal poses. In the letter of Sept. 28, 1977, the Oil and Gas Supervisor assessed compensatory royalty at the rate of 8 percent of the value of production from well No. 2-33 times the 12½ percent royalty rate, effective Apr. 13, 1976, and also levied an assessment of 2 percent of the value of production of offending well No. 1-33 times the 12½ percent royalty rate effective Oct. 17, 1975. As appellant has not challenged the percentage assessed, we will let it stand. What concerns us, however, is the assessing of royalty from Apr. 13, 1976, and Oct. 17, 1975, respectively.

The two dates used for computation of the compensatory royalty are the completion dates of the respective offending wells. Survey has contended throughout this appeal that compensatory royalties are assessed to recover royalties lost due to drainage and not as a form of penalty. However, as we shall show, utilization of the completion dates of the offending wells, as the starting point for assessment of compensatory royalty, imposes precisely the type of penalty for noncompletion of a protective well that Survey insists it does not intend.

The obligation to protect a leasehold from drainage arises not upon completion of the draining well, but only after the passage of a reasonable time subsequent to notification by the lessor that an adjoining well is draining the leasehold.[13] *See U. V. Industries, Inc.* v. *Danielson, supra* at 585. Thus, had appellant herein proceeded to complete an offset well within a reasonable time after notice, there would have been no assessment for intervening drainage. If compensatory royalty is de-

[12] Since appellant failed to object timely to Survey's determination that substantial drainage was occurring and its implicit holding that a paying well could be drilled, consideration of appellant's argument as to impossibility must be premised on a veiw that a paying well was possible.

[13] We recognize that, where the lessee is responsible for the draining well, the requirement of notice may be dispensed with.

signed to compensate the lessor for drainage occurring *because of a failure to complete a protective well,* it is difficult to understand why the lessor should be compensated for the period of time during which the lessee was under no obligation to drill, *viz.,* from completion of the offending well to a reasonable time after notification. The only way we could justify such an assessment was if, indeed, the Government was penalizing the lessee for failure to drill an offset well. The compensatory royalty of the initial period of time would therefore be a form of damages applicable only where an offset well was not drilled.

We need not decide whether the Department could, or should, provide for such damages. We think it clear that the Department has not yet so acted. Nothing in either the lease terms or the applicable regulation, 30 CFR 221.21(c), can remotely be said to evidence a determination to penalize those who tender compensatory royalties. The regulation itself was expressly interpreted in *Pan American Petroleum Corp.* v. *Udall, supra,* as barring liquidated damages.

In the *Pan American* case, Pan American held leases to adjacent parcels of land, the first of which was allotted to one Woodrow Star, and the second allotted to one Ella Many Ribs, both Indians of the Fort Berthold Indian Reservation in North Dakota. In 1953, a producing well was completed on the land within the Star allotment. In 1955, the Department assessed compensatory royalty against Pan American on behalf of Ella Many Ribs based on 100 percent of the production of the Star well. This assessment was subsequently decreased to 50 percent of the production from the Star well, together with 50 percent of the production from another producing well, which was also on land adjacent to the Ella Many Ribs allotment. The compensatory royalty was tendered under protest as to the manner of its computation. In 1957, a well was completed on the Ella Many Ribs tract, thereby terminating compensatory royalty liability. Pan American eventually brought the dispute over the rate of assessment to Federal court.

Before the district court, the Department argued that under the terms of the lease and regulations, the Secretary could have absolutely required the drilling of the offset well, and, therefore, he had equal authority to assess 100 percent compensatory royalty in lieu of drilling a well as a form of liquidated damages. While the court admitted that the Secretary did have the "absolute" right to require the drilling of an offset well,[14] it held that once he elected to permit the payment of compensatory royalty he was required to assess it so as to actually compensate for the loss. And, as Assistant Secretary Anderson subsequently noted, "compensatory royalties are, in essence, payments made to 'compensate' the lessor for production royalties estimated to be lost *as a result of a failure to drill offset wells." Pan American Corp.,*

[14] The word "absolutely" in the quotation should not be read as contrary to our earlier analysis. In *Pan American* there was no question that substantial drainage was occurring. *Id.* at 628. The court's use of the term should be read as an anlaysis of the "absolute" right of the Secretary, under 30 CFR 221.21(c), to require the drilling of an offset well rather than accepting compensatory royalty, where substantial drainage is occurring.

IA-1578 (Feb. 29, 1968) (italics supplied). Royalties lost because of a failure to drill an offset well do not commence on the completion of the offending well but rather upon the failure to offset that well in a reasonable time after notice.

While the Secretary might, for good and sufficient reasons of policy, determine to relate the assessment of compensatory royalty back to the completion of a draining well as an incentive to the drilling of offsetting wells, it is impossible to read the present regulation as encompassing this intent. Therefore, we find that Survey's decision assessing royalty from the date of the completion of the offending wells is unjustified and we hereby modify the decision below to authorize the imposition of compensatory royalty for the period from Apr. 26, 1977, to Nov. 14, 1977.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as to the assessment of compensatory royalty, as modified herein.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

EDWARD W. STUEBING
Administrative Judge

ALASKA RAILROAD

7 ANCAB 43

Decided *April 22, 1982*

Appeal from the Decisions of the Alaska State Office, Bureau of Land Management AA-24198, AA-24199 and AA-24201.

Dismissed.

1. Alaska Native Claims Settlement Act: Conveyances: Generally

The conveyance to Cook Inlet Region, Inc. (CIRI) of lands previously patented to the State of Alaska pursuant to P.L. 94-204, 89 Stat. 1145, *as amended* (1976), is in satisfaction of CIRI's ANCSA entitlement; must be treated as a conveyance pursuant to ANCSA; and, unless expressly excepted, is governed by the provisions of ANCSA as interpreted by the courts.

2. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska Native Claims Settlement Act: Easements: Railroads, Telegraph and Telephone Lines

Pursuant to § 3(a) of P.L. 95-178, 91 Stat. 1369 (1977), the reservation of easements on lands already conveyed to Cook Inlet Region, Inc., in satisfaction of its entitlement under ANCSA, is subject to the determination of the Court in *Alaska Public Easement Defense Fund* v. *Andrus*, 435 F. Supp. 664, 680-681 (D.C. Alaska 1977), which held that floating railroad easements under 43 U.S.C. § 975d may not be reserved in conveyances made pursuant to ANCSA.

3. Alaska Native Claims Settlement Act: Easements: Public Easements

Criteria for reserving public easements for future roads, including railroads, in 43 CFR 2650.4-7(b)(1)(v) require that such easements be both site specific and actually planned for construction within five years of the date of conveyance. The mini-

mal submission of a map, along with a letter stating that the map depicts proposed railroad extensions, cannot be found to demonstrate an actual plan for construction within the meaning of the regulation.

APPEARANCES: William J. Wong, Esq., for Alaska Railroad; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; Russell Winner, Esq., Graham & James, for Cook Inlet Region, Inc.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeal

The Alaska Railroad appeals three decisions reserving easements on lands already conveyed to Cook Inlet Region, Inc., asserting that the Bureau of Land Management erred by not including 43 U.S.C. § 975d easement reservation language and by not including a specific railroad extension to the Beluga coal fields pursuant to § 17(b) of ANCSA. The ARR argues that the Court's decision in *Alaska Public Easement Defense Fund* v. *Andrus,* 435 F. Supp. 664, 680–681 (D.C. Alaska 1977), holding that § 975d reservations are inapplicable to ANCSA conveyances, does not apply here because these conveyances to CIRI are fundamentally an exchange of land pursuant to § 22(f) of ANCSA, rather than a conveyance within the application of the Court's decision.

The Board holds that the conveyances to Cook Inlet Region, Inc., pursuant to P.L. 94–204, *as amended* by § 3 of P.L. 94–456, 90 Stat. 1934, 1935 (1976), are in satisfaction of CIRI's ANCSA entitlement and to come within the provisions of ANCSA as interpreted by the Court in *Alaska Public Easement Defense Fund, supra;* therefore, 43 U.S.C. § 975d easement reservations may not be included in these conveyances.

As to the Alaska Railroad's assertion that the Bureau of Land Management erred in failing to reserve a public easement for a railroad extension to the Beluga coal fields, the Board holds that the submission of a map is insufficient to meet the requirement of 43 CFR 2650.4–7(b)(1)(v), that future railroads may be reserved as public easements only if they are both site specific and actually planned for construction within five years of the date of conveyance.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended,* 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977) (ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

On Jan. 12, 1981, the Bureau of Land Management (BLM) in Decisions AA–24199, AA–24198, and AA–24201, modified three interim conveyance (I.C.) documents (I.C. No.'s 146, 147, and 148) to identify easements pursuant to P.L. 95–178, 91 Stat. 1369 (1977). Sec. 3(a) of P.L. 95–178 amended § 12(b) of

P.L. 94-204, 89 Stat. 1145 (1976), by adding, *inter alia,* authority for the Secretary of the Interior to identify and reserve easements within two years after initial conveyance of lands pursuant to §§ 14(e) and 22(j) of the Alaska Native Claims Settlement Act of Dec. 18, 1971, 85 Stat. 688, 704, 715; 43 U.S.C. §§ 1601, 1613(e), 1621(j), and § 12(c) of P.L. 94-204, *as amended* by § 3(a) of P.L. 95-178.

The lands conveyed by I.C. No.'s 146, 147, and 148 are lands that had been previously patented to the State of Alaska (State), and which the State, pursuant to statute, had conveyed back to the United States. The United States, in turn, conveyed the lands to Cook Inlet Region, Inc. (CIRI), in satisfaction of CIRI's § 12(c) and § 14(h)(8) entitlement under ANCSA.

The Alaska Railroad (ARR), on Feb. 17, 1981, filed its Notice of Appeal appealing the three decisions of the BLM numbered AA-24199, AA-24198 and AA-24201 modifying I.C. No.'s 146, 147, and 148, respectively.

The ARR contends that the conveyance documents to CIRI must contain language granting the general railroad right-of-way reservations mandated by 43 U.S.C. § 975d and, further, that the ARR is entitled to a specifically located easement connecting the existing railroad to the Beluga coal fields, pursuant to § 17(b) of ANCSA.

The ARR argues that all patents issued in Alaska after Mar. 12, 1914, must contain 43 U.S.C. § 975d reservations, under the terms of the statute.

43 U.S.C. § 975d provides:

> In all patents for lands taken up, entered, or located in Alaska after March 12, 1914, there shall be expressed that there is reserved to the United States a right-of-way for the construction of railroads, telegraph and telephone lines to the extent of one hundred feet on either side of the center line of any such road and twenty-five feet on either side of the center line of any such telegraph or telephone lines.

Because the lands conveyed to CIRI, were, in fact first patented to the State after Mar. 12, 1914, and transferred to the United States for conveyance to CIRI; and because the original State patents did include 43 U.S.C. § 975d reservations, the patents to CIRI must contain the same § 975d reservations.

Further, the ARR asserts it has planned the extension to the Beluga coal fields as depicted on two maps filed with the BLM in 1978, and that under § 17(b) of ANCSA it is entitled to an easement for this extension.

BLM, in its Answer, argues that an easement based on 43 U.S.C. § 975d could not have lawfully been reserved prior to conveyance and following conveyance the court in *Alaska Public Easement Defense Fund* v. *Andrus, supra,* determined that § 975d reservations were inapplicable to ANCSA conveyances.

As to the contention of the ARR that conveyance to CIRI must contain the § 975d reservation since the State's interest in the lands was subject to § 975d provisions, BLM replies that conveyance to CIRI is subject only to the reser-

vations contained in the State conveyance to the Federal Government and does not authorize addition of other reservations:

The BLM's obligations and authority under section 3(a) of P.L. 95-178 are, in pertinent part, as follows:

"Any provision of law to the contrary notwithstanding, the United States *shall accept upon tender* the State Deed of Title, *including the State's legal descriptions,* for lands to be reconveyed to the Cook Inlet Region, Inc. . . .

"Within sixty days the Secretary shall, without adjudication, issue conveyance to said lands of the interests conveyed by the State *subject to any lawful reservations of rights or conditions contained in such state conveyance . . ."* (Italics added).

BLM's Answer, Apr. 10, 1981, at 4-5.

In regards to the ARR assertion that it is entitled to a § 17(b) of ANCSA easement, the BLM argues that the ARR has not shown that a railroad extension was "actually planned for construction within 5 years" as required by 43 CFR 2650.4-7(b)(1)(v). The BLM Answer refers to two maps (enclosures to an ARR letter dated Oct. 23, 1978). The BLM contends that [though the maps show a "proposed" route to the lands on appeal] such filing does not meet the regulatory requirements since it does not demonstrate that the railroad extension was "actually planned for construction within 5 years" of the date of conveyance.

The ARR summarizes its response to BLM's Answer as follows:

The Bureau of Land Management errs in not recognizing that the fundamental characteristic of these conveyances is that they are part of a *land exchange.* [Sec. 22(f) of ANCSA.]

Although the lands obtained by Cook Inlet Region, Incorporated are part of its ANCSA entitlement, and although the land exchanges are themselves authorized by amendments to ANCSA, these lands are obtained through *land exchanges* rather than through the withdrawal, selection and conveyance process of sections 11, 12, 14 and 16 of ANCSA.

Alaska Public Easement Defense Fund v. Andrus does effect those lands obtained in the 11(a)(1) and 11(a)(2) and 16(a) withdrawals around Native villages and in the 11(a)(3) deficiency withdrawals but does not effect lands obtained by *exchanges,* purchases, gifts and devises.

Therefore, the Alaska Native Claims Appeal Board should rule that the 43 U.S.C. § 975d railroad reservations be included among the easements and reservations reserved in the patents.

ARR's Response to the Answer of the BLM, May 1, 1981, at 4th page.

The ARR points out that Sec. II of Appendix C of the Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area (T&C) required that "[a]ll Conveyances of lands made in accord with this Appendix C shall pass all of the State's right, title and interest in the lands * * * as if those conveyances were made pursuant to Section 22(f) of ANCSA."

The ARR contends that the exchanged parcels are governed by ordinary real property law, not by ANCSA or decision of the court in *Alaska Public Easement Defense Fund, supra.* The ARR argues that § 22(f) does not give the Secretary of the Interior the right to exchange interests, such as railroad reservations under 43 U.S.C. § 975d, because that reservation is still not within the Secretary's jurisdiction.

The ARR emphasizes that the conveyance to the State included

reservations to the United States of a right-of-way for the construction of a railroad. The ARR contends that the rights-of-way were not transferred *from* the State because the State never owned that interest. The reservation would not be transferred to CIRI because § 22(f) of ANCSA allowed the Secretary only to exchange interests in land under the Secretary's jurisdiction. The ARR asserts that the 43 U.S.C. § 975d right-of-way was under the Alaska Railroad/Federal Railroad Administration/Department of Transportation jurisdiction and not under the Secretary's, therefore, the reservation could not be transferred.

CIRI filed Opposition of Cook Inlet Region, Inc., to this Appeal on June 3, 1981, agreeing with the BLM that the ARR is not entitled to a § 17(b) easement for the same reasons given by the BLM, and asserting that the ARR's claim to a floating railroad easement pursuant to 43 U.S.C. § 975d was rejected by *Alaska Public Easement Defense Fund, supra.*

CIRI directs the Board's attention to the provisions of the T&C which states that conveyances under Paragraphs I and II of the T&C constitute CIRI's entitlement under § 12(c) and § 14(h)(8) of ANCSA. CIRI argues that BLM's powers to reserve easements to the subject lands are limited by the general restrictions of §12(b) of P.L. 94-204, *as amended* by §3, P.L. 95-178 in pertinent part: "The Secretary is authorized hereby to identify and reserve within two years after initial conveyance any easement he could have lawfully reserved prior to conveyance, and to issue immediately thereafter a revised conveyance reflecting such reservation." [Opposition of Cook Inlet Region, Inc. to this Appeal, June 3, 1981, at 4.]

CIRI concludes that BLM must comply with court decisions construing BLM's power to reserve easements in land conveyed to Native corporations under ANCSA and *Alaska Public Easement Defense Fund, supra,* is explicit in preventing BLM from reserving a floating railroad easement.

Decision

The decisions here appealed are not decisions to issue conveyance, but are decisions modifying previously issued interim conveyances by identifying and reserving easements. The process is unusual because, pursuant to ANCSA and implementing regulations (43 CFR 2650.0-5(h)), interim conveyance grants title. Upon issuance, the Department of the Interior loses jurisdiction over the land conveyed, and accordingly could not reserve easements following issuance of I.C. *Appeal of James W. Lee,* 3 ANCAB 334 (1979) [VLS 79-11].

The reservation of easements following issuance of Interim Conveyance, as well as the conveyance to CIRI of lands previously patented to the State, was made possible and mandated by a unique series of agreements ratified by Congress. Since it is the terms of these agreements that

are in contention here, it is useful to review the key sections.

As recited in the decisions appealed, the basic agreement, entitled "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area," which by its terms required implementing legislation, was ratified by Congress; the entire T&C was incorporated into Federal law in P.L. 94-204, *as amended.*

The T&C provides for a three-way land transaction between the Secretary of the Interior, CIRI, and the State.

Sec. II of the T&C authorized the State to convey patented lands to the United States, for reconveyance to CIRI. These lands had previously been patented to the State under the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339, *as amended* (1958).

Sec. II of the T&C specifically provides that "[r]econveyance must be made within 60 days from acceptance by the United States of the State conveyance, and without adjudication."

The conveyances to CIRI, however, are subject to later identification and reservation of any easement that could have lawfully been reserved prior to conveyance. Sec. 3(a) of P.L. 95-178 authorized the Secretary to identify and reserve, within two years after initial conveyance to CIRI, any easement he could have lawfully reserved prior to conveyance, and to issue a revised conveyance reflecting such reservations.

The purpose of this procedure was to allow CIRI to receive land conveyance before judicial determination of easement issues which were in litigation, while allowing those easements found proper by the court to be reserved after conveyance of the land. One of the easement issues in litigation at the time, *Alaska Public Easement Defense Fund, supra,* was the question of whether 43 U.S.C. § 975d reservations could be included in ANCSA conveyances.

Provisions contained in other sections of the T&C are also relevant.

Sec. II provides that the State shall convey to the United States for reconveyance to CIRI lands described in Appendix C. This Appendix lists the lands to be conveyed, and states in its own Sec. II:

> All Conveyances of land made in accord with this Appendix C shall pass all of the State's right, title and interest in the lands, including the minerals therein, as if those conveyances were made pursuant to Section 22(f) of ANCSA, except that dedicated or platted section line easements and highway or other rights-of-way may be reserved to the State.

Sec. IV of the T&C provides:

> The lands and interests conveyed to CIRI under paragraphs I and II of this Document shall constitute CIRI's full entitlement under Section 12(c) of ANCSA, except that the mineral estate conveyed pursuant to subparagraph I.B(1) of this Document shall constitute full entitlement of CIRI's surface and subsurface entitlement under Section 14(h)(8) of ANCSA.

Finally, Sec. IX of the T&C provides:

> Lands conveyed to CIRI and/or its Village and Group Corporations in accordance with this Document, notwithstanding their source (whether Federal or State), shall be considered and treated as conveyances under and pursuant to ANCSA, except as may be expressly provided otherwise in this document.

In this appeal, the ARR contends that BLM erred in failing to include, in the I.C.'s to CIRI, the general easement language authorized by 43 U.S.C. § 975d. The ARR argues that the reconveyances to CIRI are fundamentally an exchange pursuant to § 22(f) of ANCSA. This being so, they are exempt from application of the court's ruling in *Alaska Public Easement Defense Fund, supra,* which make § 975d reservations inapplicable to ANCSA conveyances.

Based on its reading of the T&C, the Board cannot agree with the ARR's contention. The ARR's reliance on Sec. II of the T&C for the proposition that the entire three-party agreement is a § 22(f) exchange is misplaced. The purpose of Sec. II of the T&C is to provide a standard to which the State conveyance to the United States can be compared; the conveyance to the United States for reconveyance to CIRI is to have equal validity and pass an interest of equal dignity, as those exchanges already authorized by § 22(f) of ANCSA. Moreover, Sec. II of the T&C deals with the State's conveyance of land to the United States, but not with the United States' reconveyance of the same land to CIRI.

Both Sec. IV and Sec. IX of the T&C, previously quoted, clearly state that the lands conveyed to CIRI are in satisfaction of CIRI's ANCSA entitlement, and shall be considered and treated as conveyances under and pursuant to ANCSA, notwithstanding their source, whether Federal or State.

[1] Therefore, the Board holds that the conveyance to CIRI of lands previously patented to the State pursuant to the T&C, incorporated into Federal law in P.L. 94-204, *as amended,* is in satisfaction of CIRI's ANCSA entitlement; must be treated as a conveyance pursuant to ANCSA; and unless expressly excepted, is governed by the provisions of ANCSA as interpreted by the courts.

The question of whether a § 975d reservation could be later reserved in these conveyances was not excepted in the agreements. Quite the opposite of being excepted, the effect of the future ruling of the court in the then pending *Alaska Public Easement Defense Fund, supra,* as to the applicability of § 975d easement reservations on these conveyances, was made part of the agreement ratified by Congress.

Sec. 3(a) of P.L. 95-178 allowed BLM to reserve, after conveyance, those easements which the court found lawful. Sec. 3(a) makes the reservation of these easements subject to a Jan. 18, 1977, agreement between CIRI and the Secretary of the Interior which leaves no doubt as to the effect of the decision in *Alaska Public Easement Defense Fund, supra:*

> If it is determined as a result of any final judicial ruling to which the Secretary or the United States is a party that rights-of-way for the construction of ditches and canals reserved under 43 U.S.C. 945 or of railroads, telegraph and telephone lines under 43 U.S.C. 975(d) could not validly be reserved by the Secretary in respect to conveyances to Alaska Native corporations under ANCSA, the Secretary shall extinguish any such easements or rights-of-way

theretofore reserved in conveyances to CIRI Parties.

Agreement of Jan. 18, 1977, at 4, para 7.

The inapplicability of such floating easements as those required by 43 U.S.C. § 975d was determined by the court in *Alaska Public Easement Defense Fund, supra,* at 680–681.

> In addition to the previously considered orders the Secretary has reserved and indicates an intent to reserve in the future easements for * * * railroads, telegraph and telephone lines pursuant to 43 U.S.C. § 975d. * * *
>
> * * * * *
>
> The ANCSA contains a preemption section which states:
>
> "To the extent that there is a conflict between any provision of this Act and any other Federal laws applicable to Alaska, the provisions of this Act shall govern."
>
> Pub. L. 92-203, 85 Stat. 688, Section 26. [Footnote omitted.] The easements reserved to the United States under the two non-ANCSA sections are floating easements. *For the reasons previously developed the court concludes that such floating easements were not contemplated over ANCSA lands and these provisions must be considered as conflicting and inapplicable.*
>
> As a second related basis for this result the court notes that the criteria of subsection 17(b)(1) would appear to allow an easement for these purposes if it were specifically located. This specific right to reserve such easements must be seen as superceding the prior general legislation and would prevail even absent section 26. *Cf. State Department of Highways* v. *Crosby,* 410 P.2d 724, 728 (Alaska 1966). This conclusion is further bolstered by the fact that under ANCSA easements there are certain procedural safeguards not present in these other Acts. Accordingly, although reservations of specific easements for these purposes pursuant to subsection 17(b)(1) and 17(b)(3) might be appropriate *these easements cannot stand.* [Italics added.]

[2] Therefore, the Board holds that, pursuant to § 3(a) of P.L. 95-178, the reservation of easements on lands already conveyed to CIRI, in satisfaction of its entitlement under ANCSA, is subject to the determination of the court in *Alaska Public Easement Defense Fund, supra,* which held that floating 43 U.S.C. § 975d railroad easements may not be reserved in conveyance made pursuant to ANCSA.

The ARR's argument that the State must convey what it has, which includes a 43 U.S.C. § 975d reservation, is similarly misplaced. A § 975d easement reservation is not an interest held by the State; it is a limitation on the State's interest, reserved by the United States at the time of patent to the State. The State, pursuant to the T&C, must return to the United States all interests the State holds, with the exception of certain dedicated section line road easements which the State may retain, and subject to any valid existing rights created by the State in the lands. The United States must then convey all of the State's interest to CIRI, subject only to such easements as the United States may lawfully reserve. Pursuant to *Alaska Public Easement Defense Fund, supra,* such easements no longer include railroad easements under 43 U.S.C. § 975d.

The ARR's request for a § 17(b) easement for a future railroad extension to the Beluga coal fields must also be denied. Sec. 17(b)(1) of ANCSA provides:

> The Planning Commission shall identify public easements across lands selected by Village Corporations and the Regional Corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee international treaty obligations, a full right of

public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important.

The general regulatory criteria for such easements are based on present existing use. However, the reservation of easements for future use is permitted under certain circumstances.

43 CFR 2650.4–7(b)(1)(v) provides that public easements for transportation purposes may be reserved "for future roads, including railroads and roads for future logging operations, only if they are site specific and actually planned for construction within 5 years of the date of conveyance."

The only indication of planned construction in the appeal record is a letter dated Oct. 23, 1978, from the ARR to BLM, enclosing two maps on which lines are drawn delineating, apparently, proposed railroad extensions. The letter states only: "These proposed extensions cover the entire state of Alaska and are designed to alert you to any possible area in this state where the easement of the Railroad set forth in 43 U.S.C. 975(d) will be needed." The ARR makes no further arguments or assertions concerning its possible claim to this easement.

[3] The criteria for reserving public easements for future roads, including railroads, in 43 CFR 2650.4–7(b)(1)(v) requires that such easements be both site specific and actually planned for construction within five years of the date of conveyance. The Board holds that the minimal submission of a map, along with a letter stating that certain lines on the map depict proposed railroad extensions, cannot be found to demonstrate an actual plan for construction within the meaning of the regulation.

Accordingly, for the reasons discussed herein, the appeal must be and hereby is dismissed.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

WE CONCUR:
ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.

63 IBLA 347

Decided *April 29, 1982*

Appeal from decision of Wyoming State Office, Bureau of Land Management, dismissing protest challenging imposition of annual rental charges for communications site right-of-way. W 70867.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way—Fees—Rights-of-Way: Federal Land Policy and Management Act of 1976

While sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1976), indicates that the Secretary of the Interior may charge less than fair market value for an annual

public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important.

The general regulatory criteria for such easements are based on present existing use. However, the reservation of easements for future use is permitted under certain circumstances.

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JUDITH M. BRADY
Administrative Judge

WE CONCUR:
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TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.

63 IBLA 347

Decided *April 29, 1982*

Appeal from decision of Wyoming State Office, Bureau of Land Management, dismissing protest challenging imposition of annual rental charges for communications site right-of-way. W 70867.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way—Fees—Rights-of-Way: Federal Land Policy and Management Act of 1976

While sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1976), indicates that the Secretary of the Interior may charge less than fair market value for an annual

right-of-way rental, including no charge, the legislative history of that provision reveals that Congress intended that free use be restricted to agencies of the Federal Government and to those situations where the charge is token and the cost of collection unduly large.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way—Fees—Rights-of-Way: Federal Land Policy and Management Act of 1976

Under sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1976), the Secretary of the Interior may charge less than fair market value for a right-of-way rental. The regulation, 43 CFR 2803.1-2(c), implementing that provision sets forth the circumstances under which no fee or a fee less than fair market rental may be authorized; however, it specifically excludes cooperatives whose principal source of revenue is customer charges from such consideration.

APPEARANCES: Linda M. Lazzerino, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

INTERIOR BOARD OF LAND APPEALS

Tri-State Generation and Transmission Association, Inc., has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated July 22, 1981, dismissing its protest challenging the imposition of annual rental charges for its communications site right-of-way, W 70867.

On July 22, 1981, appellant was granted a communications site right-of-way for the "Bear Park Microwave Site," for a term of 30 years, pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1976). The site is situated in sec. 6, T. 25 N., R. 81 W., sixth principal meridian, Carbon County, Wyoming.

The annual rental charge for appellant's right-of-way was determined to be $250, "subject to appraisal." Appellant paid the annual rental in advance of issuance of its right-of-way but, in a cover letter accompanying payment, dated June 30, 1981, appellant stated: "By making payment of this estimated rental charged, Tri-State does not wish to create the impression of agreeing with the amount or the practice of payment of an annual rental."

BLM treated appellant's cover letter as a protest and responded thereto in its July 22, 1981, decision. BLM held that appellant fell within the class of right-of-way holders required to pay annual rental, based on the fair market value for the use of their rights-of-way. BLM recognized that it had discretionary authority to charge no fees or a fee less than the fair market value in the case of certain holders, but concluded that such authority did not apply in the case of "municipal utilities and cooperatives," citing 43 CFR 2803.1-2(c)(1).

Sec. 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1976), provides that the holder of a FLPMA right-of-way "shall pay annually in advance the fair market value therof as determined by the Secretary granting, issuing, or renewing such right-of-way." *See* 43 CFR 2803.1-2(a). In addition, the statute provides:

Rights-of-way may be granted, issued, or renewed to a Federal, State, or local government or any agency or instrumentality

thereof, to nonprofit associations or nonprofit corporations which are not themselves controlled or owned by profitmaking corporations or business enterprises, or to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary concerned * * * *for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest.* [Italics added.]

Regulations implementing the right-of-way provisions of FLPMA were not promulgated in final form until July 1, 1980. *See* 45 FR 44526 (July 1, 1980). Prior to that time, 43 CFR 2802.1-7(c) (1979) provided, in relevant part:

(c) No charge will be made for the use and occupancy of lands under the regulations of this part:

(1) Where the use and occupancy are exclusively for irrigation projects, municipally operated projects, or non-profit or Rural Electrification Administration projects, or where the use is by a Federal governmental agency.

See 35 FR 9637 (June 13, 1970).

On Oct. 9, 1979, the Department published proposed rules governing rights-of-way. *See* 44 FR 58106 (Oct. 9, 1979). These proposed rules included responses to comments made regarding an "outline of procedures" for granting rights-of-way submitted to user groups, states, and other involved governmental agencies and interested public and private groups on Nov. 14, 1977. In response to comments regarding entities entitled to free or lesser charges and in explanation of the proposed rules, BLM stated:

Failure to charge fair market value provides a subsidy by all the public. It follows that free or lesser charges should be used only in those circumstances where all the public benefits from the use. Non-profit entities that are essentially tax or donation supported and which are engaged in a public or semi-public activity designed for the public health, safety or welfare will qualify for lesser charges. *As a matter of equity, we believe it is inappropriate to charge lesser fees or grant free use when the holder is engaged in similar business and follows practices comparable to private commercial enterprise. For this reason, REA cooperatives and municipal utilities whose principal source of revenue is customer charges will, hereafter, be charged fair market value fees.* [1] [Italics added.]

44 FR 58112 (Oct. 9, 1979). The proposed rules in this area were subsequently adopted, unchanged, as the final rules.

The relevant regulation, 43 CFR 2803.1-2(c), which was part of that rulemaking, states:

(c) No fee, or a fee less than fair market rental, may be authorized under the following circumstances:

(1) When the holder is a Federal, State or local government or any agency or instrumentality thereof, excluding municipal utilities and cooperatives whose principal source of revenue is customer charges.

(2) When the holder is a nonprofit corporation or association which is not controlled by or is not a subsidiary of a profit making corporation or business enterprise.

(3) When a holder provides without charge, or at reduced rates, a valuable

[1] Also cited in the response was a quotation from the legislative history of FLPMA. That quotation, taken from Senate Report No. 583, reads in full:

"*Subsection (f).* This subsection provides that no right-of-way shall be issued for less than 'fair market value' as determined by the Secretary. The proviso at the end of the subsection qualifies this standard where the application is a state or local government or a nonprofit association. In this case, the right-of-way may be granted for such lesser charge as the Secretary determines to be equitable under the circumstances. However, it is not the intent of this Committee to allow use of national resource land *without charge* except where the holder is the Federal Government itself or where the charge could be considered token and the cost of collection would be unduly large in relation to the return to be received."

S. Rep. No. 583, 94th Cong., 1st Sess. 72-73 (1975) (italics added).

benefit to the public or to the programs of the Secretary. [2]

In its statement of reasons for appeal, appellant contends that it is qualified under 43 CFR 2803.1-2(c)(2) and (3) to be considered for free or lessor charges for its right-of-way.[3] Appellant states that it qualifies under 43 CFR 2803.1-2(c)(2) because it is a nonprofit cooperative

supplying electric energy at wholesale to twenty-five rural electric distribution cooperatives serving consumers in the three states of Wyoming, Colorado and Nebraska. It is member owned and is not a subsidiary of a profit-making business or enterprise. This business is a public utility under the laws of Wyoming * * * Colorado * * * and Nebraska * * * [4]

(Statement of Reasons at 1).

Appellant asserts that cooperatives are only specifically excluded from the enumerated exceptions, under 43 CFR 2803.1-2(c)(1), in the case of governmental agencies.

Appellant argues that it is a nonprofit corporation, within the meaning of 43 CFR 2803.1-2(c)(2) because neither FLPMA nor the regulations contain a definition of "nonprofit corporation" and that that term is defined in Black's *Law Dictionary* at page 1207 (4th ed. 1951) as "not designed primarily to pay dividends on invested capital." Appellant states that there is no basis in law for distinguishing nonprofit corporations on the basis of whether they are tax or donation supported, rather than depending on customer charges. Appellant makes this argument in response to a statement in BLM's decision that "[n]on-profit entities essentially are tax- or donation-supported and engage in a public or semi-public activity designed for the public health, safety, or welfare."

Appellant also contends that it qualifies under 43 CFR 2803.1-2(c)(3) because it provides a valuable benefit to the public and the programs of the Secretary at reduced rates, and that its services are provided "at cost," with rates "reduced by that amount which would otherwise be charged as profit." It states that it provides a vital service to its members and its members are, in turn, "under a duty to furnish the service to

[2] In the preamble to the final rules governing "[r]ental fees" for rights-of-way, BLM stated:

"The rulemaking attempts, *with certain enumerated exceptions,* to treat all those who use the public lands for the same purpose in the same way. It would not be appropriate to charge one holder a rental based on fair market value for the right-of-way grant and not charge the same fair rental to another holder in like circumstances who is using the public lands for the identical purpose."

45 FR 44523 (July 1, 1980) (italics added).

[3] Appellant states that the amount of the annual rental charges is "not at issue in this appeal," because fair market value has yet to be determined by a BLM appraisal. Accordingly, we will not consider this issue.

[4] In its application for a right-of-way dated Jan. 28, 1980, at page 2, appellant described the intended purpose of its proposed microwave site, as an important part of its electrical transmission network, as follows:

"As part of our long-range expansion plans to improve the efficiency and dependability of electrical service to our customers, we are constructing a microwave communication system in the three-state area in which we operate. This system will allow Tri-State to constantly monitor power availability and demand at virtually every substation and power supply point. Major substations will be connected to the microwave backbone system directly by means of dedicated microwave links aimed directly at the substations. Small substations will communicate with the microwave system by VHF telemetry radio. Both for normal switching operations and in times of emergency, such as ice or snow storms, tornadoes, etc., we can automatically switch power routes at our substations to keep electricity flowing over alternate line routes by means of a radio signal sent through the microwave and VHF radio system. A VHF radio telemetry system will be installed at the microwave sites to send and receive data from numerous electrical substations located around the microwave sites. The microwave sites will also provide facilities for a UHF mobile radio system which will allow Tri-State's field crews to have reliable communications with the dispatch offices. Tri-State's service area is primarily in rural or sparsely populated regions where communication facilities are lacking. The UHF mobile relay stations located at the proposed microwave sites will be paramount in promoting the maintenance and and restorative system operations within the service area."

any applicant within their certificated territory." Appellant states further that its "transmission lines and associated communication components are part of an interconnected system that supports the reliability of electrical power" in other areas. Finally, as a purchaser of Federal Hydroelectric power, appellant asserts that it supports Federal programs.

[1] The question presented is whether appellant qualifies for no fee or a lesser fee under the statute and regulations.[5] The legislative history of sec. 504(g) of FLPMA precludes consideration of no fee for appellant in this case. That legislative history (*see* note 1, *supra*) indicates that free use is restricted to agencies of the Federal Government and to those situations where the charge is token and the cost of collection unduly large. However, we must still determine whether a lesser fee is applicable.

[2] Were this case to be decided merely on the language of sec. 504(g) of FLPMA, it might be possible to conclude that appellant was entitled to be considered for the imposition of a "lesser charge" for the use of its right-of-way. However, we must also consider those regulations promulgated to implement sec. 504(g) of FLPMA. While under 43 CFR 2802.1-7(c)(1) (1979) "cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936 [*as amended,* 7 U.S.C. § 901 (1976)]" were exempt from any annual rental charges (*Continental Telephone of the West,* 35 IBLA 279, 288, 85 I.D. 186, 191 (1978)), the present regulations do not dictate that an exemption be granted for any organization. Rather, they provide that the Secretary *may* authorize no fee or a fee of less than fair market rental under certain listed circumstances.

Appellant would not qualify under 43 CFR 2803.1-2(c)(1) because "cooperatives whose principal source of revenue is customer charges" are specifically excluded from that category. At first blush it might appear that the exclusion is limited to this category; however, the preamble to the proposed regulations, which were promulgated unchanged in final, states that "REA cooperatives * * * whose principal source of revenue is customer charges will, *hereafter,* be charged fair market value fees." 44 FR 58112 (Oct. 9, 1979) (italics added). We believe that this statement clearly indicates that the exclusionary language of 43 CFR 2803.1-2(c)(1) eliminates cooperatives from consideration for reduced charges under any category of 43 CFR 2803.1-2(c).

Appellant argues that it qualifies under 43 CFR 2803.1-2(c)(2) and (3). We cannot agree for the reason stated above. Admittedly, the regulation could have been drafted more precisely to make clear that the exclusion applied to all categories; it makes no sense

[5] As the amount of rental to be charged has not yet been determined pending competition of an appraisal of fair market value, the only issue before the Board is the legal issue, on the record, of whether appellant qualifies for no fee or a lesser fee. In the absence of an issue of material fact, no hearing is appropriate and appellant's request for a hearing is denied. *See John J. Schnabel,* 50 IBLA 201 (1980).

logically to exclude cooperatives under the first category, yet let them qualify under category 2 or 3. Such a construction would render the exclusion meaningless. While we realize that this is a departure from previous policy, the Secretary has indicated his intent through rulemaking to charge cooperatives, whose principal source of revenue is customer charges, fair market value fees. We are without authority to disregard this duly promulgated regulation. *See Colorado-Ute Electric Association, Inc.*, 46 IBLA 35, 47 (1980), *aff'd, Colorado-Ute Electric Association, Inc.* v. *Watt*, No. 80-C-500 (D. Colo. Feb. 3, 1982).

Appellant makes a number of arguments that it should not be charged fees because of the type of operation it is and the type of services it provides. It points out that there is substantial precedent in other statutes for according rural electric cooperatives preferential treatment. All these arguments, however, are in essence directed at the regulation itself. Appellant takes exception with the policy of charging cooperatives fair market value rental fees. That issue was decided in the rulemaking and, as indicated above, we are bound to follow the regulation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

BRUCE R. HARRIS
Administrative Judge

WE CONCUR:

C. RANDALL GRANT, Jr.
Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

APPEAL OF LEE ROOFING CO.

IBCA-1506-8-81

Decided *May 11, 1982*

Contract No. N00-C-1420-7711, Bureau of Indian Affairs.

Government Motion for Summary Judgment granted.

Contracts: Construction and Operation: Contract Clauses—Contracts: Contract Disputes Act of 1978: Interest—Rules of Practice: Appeals: Motions

A Government's motion for summary judgment is granted and an appeal is dismissed where in connection with a claim for interest for the Government's delay in making progress payment the Board finds there is no genuine issue of material fact and that neither the payments clause nor the Contract Disputes Act of 1978 authorize the payment of interest on undisputed underlying claims on which the claim for interest is based.

APPEARANCES: Vernon H. Lee, Owner, Lee Roofing Co., Redlands, California, for Appellant; William D. Back, Department Counsel, Window Rock, Arizona, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The instant appeal involves a claim for interest in the amount of $7,014.35 asserted under the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613) and predicated upon Government delays in making progress payments. Both parties have said that they do not want a hearing.[1]

Findings of Fact

1. The instant contract was entered into under date of Sept. 26, 1977, in the estimated amount of $769,357.40. The project covered by the contract involved a total set aside for small business. The contract called for the reroofing or resurfacing of existing roofs on buildings at various locations (13) in Arizona (Appeal File (hereinafter AF) A).

2. Prepared on standard forms for construction contracts, the contract included the General Provisions of Standard Form 23-A (Apr. 1975 Rev.). In addition to the standard Disputes clause, the contract included the following especially pertinent provisions:

7. Payments to Contractor

(a) The Government will pay the contract price as hereinafter provided.

(b) The Government will make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer. If requested by the Contracting Officer, the Contractor shall furnish a breakdown of the total contract price showing the amount included therein for each principal category of the work, in such detail as requested, to provide a basis for determining progress payments. In the preparation of estimates the Contracting Officer, at his discretion, may authorize material delivered on the site and preparatory work

[1] While the appellant has elected to submit the case for decision without a hearing in accordance with secs. 4.112 and 4.113 of the Board's rules (reply to Government motion to dismiss at 3), there is nothing to indicate whether the election being exercised is to have the appeal considered as a small claims (expedited) or an accelerated procedure case, both of which procedures are provided for in rule 4.113. Absent any indication as to the procedure which the appellant desires to be followed, the appeal is being treated as an accelerated procedure case.

done to be taken into consideration. Material delivered to the Contractor at locations other than the site may also be taken into consideration (1) if such consideration is specifically authorized by the contract and (2) if the Contractor furnishes satisfactory evidence that he has acquired title to such material and that it will be utilized on the work covered by this contract.

(c) In making such progress payments, there shall be retained 10 percent of the estimated amount until final completion and acceptance of the contract work. However, if the Contracting Officer, at any time after 50 percent of the work has been completed, finds that satisfactory progress is being made, he may authorize payment in full of each progress payment for work performed beyond the 50 percent stage at completion. Also, whenever the work is substantially complete, the Contracting Officer, if he considers the amount retained to be in excess of the amount adequate for the protection of the Government, at his discretion, may release to the Contractor all or a portion of such excess amount. Furthermore, on completion and acceptance of each separate building, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made therefore without retention of a percentage.

* * * * *

19. Payment of Interest on Contractors' Claims

(a) If an appeal is filed by the Contractor from a final decision of the Contracting Officer under the Disputes clause of this contract, denying a claim arising under the contract, simple interest on the amount of the claim finally determined owed by the Government shall be payable to the Contractor. Such interest shall be at the rate determined by the Secretary of the Treasury pursuant to Public Law 92-41, 85 Stat. 97, from the date the Contractor furnishes to the Contracting Officer his written appeal under the Disputes clause of this contract, to the date of (1) a final judgment by a court of competent jurisdiction, or (2) mailing to the Contractor of a supplemental agreement for execution either confirming completed negotiations between the parties or carrying out a decision of a board of contract appeals.

(b) Notwithstanding (a) above, (1) interest shall be applied only from the date payment was due, if such date is later than the filing of appeal; and (2) interest shall not be paid for any period of time that the Contracting Officer determines the Contractor has unduly delayed in pursuing his remedies before a board of contract appeals or a court of competent jurisdiction.

(AF A).

3. By letter dated Feb. 5, 1981, the contractor returned a "Release of Claims," containing the following exception: "Claim for interest in the amount of $6,600.47 to February 28, 1981 (See Exhibit A dated 5 February 1981)."[2] The letter states that the claim is for interest between Oct. 12, 1979, and Feb. 28, 1981, and that a grace period of 45 days had been allowed for plant facility management, contracting office and disbursement office to exercise their procedure (AF J). In response to a request from the contracting officer, the locations and dates involved in the claim were itemized in the contractor's letter of Apr. 17, 1981, in which the claim was adjusted to Apr. 3, 1981 (the date final payment was received), thereby increasing the net amount claimed to $7,014.35 (AF E).

Exhibit A to the revised claim letter was also included as exhibit A to appellant's complaint. According to the complaint, exhibit A shows that after giving effect to a 45-day grace period, there were 17 occasions in which payments to the contractor were delayed for periods ranging from 3 to 910 days. An analysis of the exhibit shows that in eight instances the computations on which the claim for interest is based include peri-

[2] A copy of the executed release accompanied the Government's motion to dismiss.

ods of time prior to the effective date of the Contract Disputes Act of 1978 (*i.e.*, prior to Mar. 1, 1979).[3]

4. The contracting officer denied the claim for interest by letter of June 26, 1981 (AF C). The decision was timely appealed by the appellant in its letter of July 8, 1981, in which it states: "[I] hereby appeal the final decision of the contracting officer dated 26 June 1981, which denies our claim for interest due to substantial delays in processing progress payments on certain completed work during the course of subject contract" (AF B).

5. In the complaint the appellant asserts (i) that the contracting officer's representative (COR) was responsible for the initiation of monthly estimates and payment requests for progress payments; (ii) that the Payments to Contractor clause provides that "the Government will make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer"; (iii) that the Government violated the cited contract provision on 17 occasions by delaying monthly payments due the appellant with the delays ranging from 3 to 910 days after allowing 45 days grace as shown in exhibit A;[4] and (iv) that throughout the life of the contract, the contractor appealed to the Government to make timely monthly progress payments as shown in exhibit B.

The various letters and one mailgram included in exhibit B to the complaint show that from June 27, 1978, to Jan. 19, 1981, the contractor made repeated efforts to get the Bureau of Indian Affairs (BIA) to promptly pay for completed work and to arrange for progress payments to be made semimonthly. The exhibit appears to involve some prolonged delays in making payments to the contractor. The record does not reflect what response, if any, may have been made to the repeated efforts by the contractor to secure prompter payment of the amounts considered to be due.

6. The record does indicate, however, that the contractor was responsible for a portion of the delays experienced in receiving payment.[5] In the course of com-

[3] *See Brookfield Construction Co., Inc., and Baylor Construction Corp. (A Joint Venture)* v. *United States,* 661 F.2d 159 (Ct. Cl. 1981), in which the Court of Claims stated at page 165:

"Denial of pre-Act interest also harmonizes with the 'long-established, deeply-imbedded principle that interest is not allowed on monetary claims against the Federal Government unless Congress (or a contract) plainly authorizes such an addition * * *.' * * * Because there can be no award of interest against the United States in the absence of a 'contract [a provision not applicable here] or Act of Congress expressly providing for payment thereof,' 28 U.S.C. § 2516(a) (1976), the only way plaintiff can recover interest is if the Contract Disputes Act provides for it. * * * While section 12 does expressly provide for the recovery of interest prospectively, pre-Act interest is not included within the express (or in our view implied) terms of that section. * * * In the light of the precept that 'limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied,' *Soriano* v. *United States,* 352 U.S. 270, 276, * * * we should not expand the boundaries of section 12 to cover territory not necessarily or clearly included within its terms and perimeters." (Footnote omitted.)

[4] Adding the figures shown in exhibit A under the column headed "Amount Completed" and adjusting them to correspond to the treatment accorded figures appearing on the same line under the column headed "interest 12.00%," it appears that the delayed progress payments on which interest is being claimed total approximately $140,000.

[5] Exhibit A to the complaint shows the total amount of interest involved to be $11,186.39. This amount less the figure of $4,172.04 designated as "Portion forgiven"

Continued

menting upon the claim, the COR charges: (i) That the contractor delayed confirming the "as built" quantities for 62 calendar days; (ii) that the contractor took excessive time to provide prices on some materials or cost for additional work performed that was not covered in the price list; and (iii) that most of the time the contractor's foreman did not call for final inspection after a building had been completed, although it was the contractor's responsibility to do so (AF D, H, and L). It also appears that the contractor failed to respond for over a year to the contracting officer's written request for a credit for the deletion of gravel at Many Farms (AF N, O, and P). *See also* contractor's letter of Jan. 18, 1979 (Exh. B to complaint).

7. The complaint states that the Government's failure to make timely monthly progress payments constituted a material breach on 17 separate occasions, citing *Northern Helex Co.* v. *United States,* 197 Ct. Cl. 118, 124-25 (1972).[6] For recovery on its interest claim the appellant relies principally upon the cases of *Aerojet-General Corp.,* ASBCA No. 17171 (Sept. 11, 1974), 74-2 BCA par. 10,863 (constructive change found where Government wrongfully refused to make progress payments)[7] and *Virginia Electronics Co., Inc.,* ASBCA No. 18778 (Feb. 24, 1977), 77-1 BCA par. 12,393 (equitable adjustment provided contractor for a delay attributed to delayed progress payments).[8] According to the complaint, the appellant is seeking relief on the theory of breach of contract[9] or a constructive change.[10]

Discussion

The Government has moved to dismiss the instant appeal or, alternatively, it has moved for summary judgment. The Government's motion to dismiss the

leaves the net figure for which claim is being made of $7,014.35. The "Portion forgiven" figure may reflect a recognition by the appellant that it was partially responsible for some of the delays experienced in receiving progress payments.

[6] *Northern Helex* (text, *supra*) did not involve simply a delay in making payments of amounts admittedly due, however, but rather entailed a breach by the Government of its contractual obligation to pay for helium purchased. Nothing at all was paid to the contractor for over a year and the sum of $8,671,632 was owed to the plaintiff at the time the suit was filed (197 Ct. Cl. 124).

[7] In *LTV Electrosystems, Inc.,* ASBCA No. 14832 (May 22, 1975), 75-1 BCA par. 11,310 at 53,909, the Armed Services Board characterized its decision in *Aerojet* as involving a unique factual situation, noting that the Government had misinterpreted the contract provisions as a result of which it had unilaterally revised the contract price and ceased to make progress payments.

Commenting with respect to the *Aerojet* decision (text, *supra*), a standard reference work states: "The *Aerojet* and Ingalls exceptions to the general rule disallowing interest on claims for nonpayment are narrowly framed. In no subsequent case has a contractor brought himself within their confines * * *." (Nash and Cibinic, Federal Procurement Law (Third Edition) Volume II, p. 1,948).)

[8] It does not appear that in *Virginia Electronics* (text, *supra*) the Armed Services Board considered, or, given the circumstances present, was required to consider a regulation prohibiting the allowance of interest on borrowings. In any event, it is clear that the initial letter contract was issued prior to the effective date of Defense Procurement Circular No. 79 (DPC No. 79), prohibiting the allowance of interest on borrowings under fixed price contracts.

The Armed Service Procurement Regulations currently provide that interest on borrowings (however represented) are unallowable except when authorized by Federal legislation (*see* ASPR 15.713-7). A comparable provision is contained in the Federal Procurement Regulations (*see* FPR 15.713-7).

[9] After quoting from the Court of Claims decision in *Ramsey* v. *United States,* 121 Ct. Cl. 426, 432 (1952), a commentator on Government Contracts states: "Thus the rule is well established that a claim for interest occasioned by Government failure or delay in payment is a claim for damages and, in the absence of a statute or contract provision to the contrary, cannot be recovered." (McBride & Touhey, sec. 25.20[2].)

[10] The appellant is not contending that the interest for which claim is being made involved money borrowed to perform changes in the contract work, as was the case in *Bell* v. *United States,* 186 Ct. Cl. 189 (1968); nor is it contending that the interest claim is attributable to the issuance of an unilaterial change order modifying the contract terms as was the case in *Aerojet-General Corp.* (note 7, *supra,* and accompanying text).

appeal is premised on the principle that the jurisdiction of the Board must arise, if at all, from a specific clause in the contract providing relief for the type of wrong alleged.[11] As this view of our jurisdiction fails to take into account the great increase in the scope of the jurisdiction of the agency boards of contract appeals by reason of the enactment of the Contract Disputes Act of 1978,[12] and as the interest claim is asserted thereunder, the Government's motion to dismiss the instant appeal is denied.

Remaining for consideration is the Government's motion for summary judgment. In support of the motion for summary judgment, the Department counsel asserts that there is no genuine issue of material fact in dispute and that the Government is entitled to judgment as a matter of law. In the comparatively recent case of *McCutcheon-Peterson (JV),* IBCA-1392-9-80 (Mar. 12, 1981), 88 I.D. 361, 81-1 BCA par. 14,997, the Government's motion for summary judgment was granted where no genuine triable issue of material fact was found to exist.

If interest is to be awarded in this case because of the delay in making progress payments provided for in Clause 7 (Payments to Contractor) [13] the Board must find the appellant is entitled to interest under Clause 19 (Payment of Interest on Contractors' Claims) (Finding 2) or by reason of the provisions of the Contract Disputes Act of 1978. The especially pertinent portions of the Act, as they relate to interest, are as follows: "Section 12. Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) [14] from the contractor until payment thereof * * * " [15]

Cited by the Government in support of its motion are the decisons of the Armed Services Board in *The Diomed Corp.,* ASBCA No. 20399 (Sept. 8, 1975), 75-2 BCA par. 11,491, and in *A.L.M. Contractors, Inc.,* ASBCA No. 23792 (Aug. 31, 1979), 79-2 BCA par. 14,099. The appellant seeks to distinguish these cases on the grounds that *Diomed* was a pre-Contract Disputes Act case and in *A.L.M. Contractors,* the Armed Services Board had found the payments made in that case to have been in substantial compliance with the provisions of payments clause

[11] This was the jurisdictional rule governing agency boards of contract appeals for many years (*see,* for example, *Placer County, California,* IBCA-777-5-69 (Apr. 8, 1971), 78 I.D. 113, 71-1 BCA par. 8,801)) and it is still the rule for cases not covered by the Contract Disputes Act of 1978.

[12] The Act provides: "[I]n exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims" (41 U.S.C. § 607(d)).

[13] The appellant has stated that it "recognizes that interest on borrowed money to finance its contract is not recoverable * * *" (appellant's reply to motion to dismiss at 1). In view of this statement, it appears that appellant may be relying on cases in which the Armed Services Board allowed recovery of interest (without regard to whether debt or equity capital had been used) on the basis of an increased profit allowance.

The Court of Claims has refused to follow the line of cases represented by *Fischbach & Moore International Corp.,* ASBCA No. 18146 (Dec. 13, 1976), 77-1 BCA par. 12,300. *See Framlau Corp.* v. *United States,* 215 Ct. Cl. 185, 199 (1977) and *Dravo Corp.* v. *United States,* 219 Ct. Cl. 416, 429-31 (1979). This Board has followed the Court of Claims, *Cen-Vi-Ro of Texas, Inc.,* IBCA-718-5-68 and IBCA-755-12-68 (June 27, 1980), 87 I.D. 230, 244-45, 80-2 BCA par. 14,536 at 71,659-60.

[14] Sec. 6(a) requires that all claims by a contractor against the Government be in writing and submitted to the contracting officer for a decision (41 U.S.C. § 605(a)).

[15] *See* 41 U.S.C. § 611.

included in the contract. As the ensuing discussion will disclose, these distinctions, although true, are not of sufficient significance to affect the conclusion reached.

The dispute in *Diomed, supra,* concerned a negotiated fixed-price contract under which the appellant asserted a claim for interest for an allegedly unreasonable delay in paying appellant's invoice in the amount of $90,104.16. In the course of denying the claim on the ground that no statutory or contractual basis for allowing the claim had been found, the Board held that, by its terms, the Payment of Interest on Contractors' Claims clause did not afford a basis for recovery. After noting that the clause makes a clear distinction between a claim arising under the contract which is denied by the contracting officer and interest on the amount of that claim which is finally determined to be owned by the Government, the Board stated at page 54,822:

> [H]ere the claim itself is for interest. There is no dispute over appellant's entitlement to recover the invoiced amount of $90,104.16. Thus there is no "claim," as that term is used in the clause, to which interest can attach. We do not read the clause as providing broad authorization for payment of interest notwithstanding the absence of an underlying claim, other than for interest, which has arisen under the contract and has become the subject of an appeal.

In *A.L.M. Contractors, supra,* one of the questions presented for decision was whether the appellant was entitled to recover interest under the Payment of Interest on Contractors' Claims clause or by reason of the provisions of the Contract Disputes Act of 1978. While in the circumstances present in that case, the Armed Services Board did find that the progress payments made by the Government were in substantial compliance with the provisions of the payments clause of the contract, it does not appear that that finding was crucial to the decision reached.

As stated in the opinion, the grounds for the decision rendered were: (i) That a claim for interest, based solely upon Government delays in making progress payments, runs counter to the established rule that absent a statute or contract provision specifically authorizing such interest, it cannot be allowed; (ii) that the Payment of Interest on Contractors' Claims clause does not provide broad authorization for payment of interest where there is no dispute with respect to the appellant's entitlement to recover the invoiced amount; (iii) that the applicable provisions of the Contract Disputes Act requiring payment of interest "on amounts found due contractors on claims" are quite similar to the provisions of the Payment of Interest on Contractors' Claims clause requiring the payment of interest "on the amount of a claim finally determined owed by the Government"; (iv) that a difference between the two provisions concerning the time from which interest commences to run has no effect upon the proscription against the payment of interest solely for Government delays in making payments for amounts invoiced or estimated under the payments clause; [16] and

[16] For a recent case in which this principle was recognized, *see Brookfield Construction Co., Inc.* v. *United States* (note 3, *supra*) in which the Court of Claims stated:

Continued

(v) that any claims for interest on delayed payments must be rejected.

The necessity of a dispute concerning an underlying claim on which the claim for interest is based has been emphasized not only in *Diomed* and *A.L.M. Contractors, supra,* but in later cases as well. *See,* for example, *Monaco Enterprises, Inc.,* ASBCA No. 24110 (Feb. 12, 1980), 80-1 BCA par. 14,282; where, after citing *Diomed* and other cases, the Armed Services Board stated at 70,333:

> The text of Section 12 of the Contract Disputes Act, on its face, clearly makes a similar distinction between an underlying claim and a request for interest thereon. Under Section 12 a contractor is entitled to interest from the date the contracting officer receives the claim "pursuant to Section 6(a)" from the contractor. * * * What is significant here is the statutory distinction between a claim, on the one hand, and interest on the claim on the other. In the absence of legislative history to the contrary, and there is none, we conclude that absent the existence of some underlying claim, there is no basis for recovery of interest under Section 12. Appellant's request for interest, standing by itself, divorced from any underlying claim, cannot be regarded as a "claim" for the purpose of Section 12. [17]

Turning to the case at hand, we find (i) that the Payments to Contractor clause and the Payment of Interest on Contractors' Claims clause involved in the instant appeal (Finding 2) are virtually identical to the comparable clauses or the portions thereof quoted in *Diomed* or in *A.L.M. Contractors, supra;* (ii) that the claim for interest in the amount of $7,014.35 is based on the stated failure of the Government to make proper payments to the appellant within the time indicated in the Payments to Contractor clause; (iii) that the appellant has described the appeal as involving a "claim for interest due to substantial delays in processing progress payments on certain completed work during the course of subject contract" (Finding 4); (iv) that the claim for interest has been computed on the approximately $140,000 of delayed progress payments reflected in exhibit A to the complaint; [18] and (v) that there is nothing in the record to indicate that at any time prior to final payment on Apr. 3, 1981 (Finding 3), the right of the appellant to receive any part of the approximately $140,000 involved in

"A.L.M. Contractors, Inc., ASBCA No. 23792, 79-2 BCA par. 14,099 (Aug. 31, 1978), is quite different. There was no dispute over the amount of the underlying claim due that claimant; the claim for interest was based solely on the government's delay in making payment. Id. at 69,357-58. The Board held that neither the contract interest clause nor the Act affected the prohibition against recovery of interest for delay. Id. But in A.L.M. there was no 'claim' because there was never a dispute over entitlement to the underlying payments, while in the current case the 'claims' were in fact disputed—they were truly 'claims'—and thus remained 'pending claims' until the written decision covering them was issued in October 1979." (661 F.2d 168).

[17] Earlier in the *Monaco* decision the Armed Services Board had stated:

"[T]his is not to say that a claim for interest can never constitute the underlying claim. In *McDonnell Douglas Corporation, supra,* the underlying claim in dispute as the quantum of interest payable under the Payment of Interest on Contractor Claims clause. In that appeal interest was held allowable on the amount of interest which was determined to have been improperly withheld. However, the relevant distinction to be made for these cases is the existence of an underlying claim, which is in dispute and a request for interest thereon." (80-1 BCA par. 14,282 at 70,333 (italics in original).

[18] In *Aluminum Specialty Co.,* ASBCA No. 6228 (July 26, 1963), 1963 BCA par. 3,859, the delays involved in making payment of progress payments withheld were even greater than the maximum amount of delay claimed in this case. There the Armed Services Board stated at page 19,204:

Continued

the delayed progress payments was ever disputed.

Decision

The Government's motion for summary judgment presents the question of whether the appellant is entitled to interest in any amount by reason of the Government's admitted delay in making progress payments to which the appellant was entitled under the terms of the contract and concerning which no question of the right of the appellant to receive any of such progress payments was ever raised. Exhibit A to the complaint shows the dates payments were due and the dates payments were received. In the absence of the Government undertaking to contest the dates shown for payments due and for payments received, the Board accepts as true the dates for such events as shown in exhibit A. For the same reason, the Board accepts as true that on 17 occasions the Government delayed making payments to the appellant for the periods reflected in exhibit A.

In this case, the appellant has shown that the progress payments to which it was entitled under the terms of the contract were repeatedly delayed and sometimes for prolonged periods. While the Government asserts and the record indicates that the appellant was responsible for some of the delays experienced, the Government has not undertaken to seriously contest the overall pattern of delay in the processing of the progress payments. Instead it has filed a motion for summary judgment on the ground that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

For the purposes of the motion for summary judgment, the Board finds that on 17 occasions the Government delayed in making progress payments to the appellant for the periods of time shown in the complaint. So finding, however, we are unable to conclude that the appellant is entitled to prevail on its interest claim. This is because there is nothing in the record to indicate that a dispute between the parties ever arose concerning the right of the appellant to receive the sums ultimately paid as progress payments. As is clear from the decisions cited and quoted from herein, a request for interest, standing alone, divorced from any underlying claim, cannot be regarded as a "claim" under either the Payment of Interest on Contractors' Claims clause or under sec. 12 of the Contract Disputes Act of 1978.

For the reasons stated and in reliance upon the authorities cited, the Government's motion for summary judgment is granted and the appeal is dismissed.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:
G. HERBERT PACKWOOD
Administrative Judge

"[T]he contractor suggested that it ought to be reimbursed, as a part of its allowance for post-production administrative costs, an interest charge at 6 per cent for the 3½ year period on the amount above indicated * * *. In the absence of statute or contract provision specifically so indicating, interest is not chargeable against the Government in this type of situation, and the interest claim in the amount of $22,689 is disapproved in its entirety * * *"

IN RE ATTORNEY'S FEES REQUEST OF MADELON BLUM

9 IBIA 281

Decided *May 11, 1982*

Request for attorney's fees filed under the Equal Access to Justice Act.

Denied.

1. Attorney's Fees: Equal Access to Justice Act

An administrative appeal not required by statute to be adjudicated according to the provisions of 5 U.S.C. § 554 (1976) is not covered by the attorney's fees provisions of the Equal Access to Justice Act.

APPEARANCES: Madelon Blum, Esq., Bradbury, Bliss & Riordan, Inc., Anchorage, Alaska, *pro se.* Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

On May 3, 1982, movant filed a motion and supporting memorandum under the Equal Access to Justice Act, 5 U.S.C. § 504 (Supp. IV 1980), seeking $5,009.64 allegedly incurred in costs and attorney's fees in the prosecution of an appeal to the Board of Indian Appeals. That appeal concerned the denial of grant funds under the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (Supp. II 1978) and resulted in a decision for movant's client. *Aleutian/Pribilof Islands Association, Inc.* v. *Acting Deputy Assistant Secretary—Indian Affairs (Operations),* 9 IBIA 254, 89 I.D. 196 (1982).

This motion is docketed under the above case name and number. The Board issues this decision without establishing a briefing schedule because the motion demonstrates on its face that it is without merit.

The Equal Access to Justice Act provides for the payment of costs and attorney's fees in certain adversary adjudications conducted by agencies of the Federal Government. Sec. 504(b)(1)(C) states in pertinent part: " '[A]dversary adjudication' means an adjudication under section 554 of this title." Sec. 554 of Title 5 "applies, according to [its] provisions * * *, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."

Grants under the Indian Child Welfare Act are governed by 25 U.S.C. §§ 1931-1934 (Supp. II 1978). Nowhere in these sections is an administrative appeal from a denial of a grant application required to be conducted under 5 U.S.C. § 554 (1976).

Furthermore, the regulations implementing the grant program also demonstrate that the decisionmaking process regarding grant applications is not governed by the statutory requirements of sec. 554. These regulations state that appeals from adverse decisions are taken under the provisions of 25 CFR Part 2. *See* 25 CFR Part 23, Subpart F. The regulations in 25 CFR Part 2 provide procedures for Departmental ap-

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peals from administrative decisions of the Bureau of Indian Affairs in the absence of a statutory requirement that those decisions be reviewed under 5 U.S.C. § 554 (1976). *See generally* 25 CFR Part 2, Subpart A. (Proceedings before the Board of Indian Appeals are governed by procedural requirements found at 43 CFR 4.310-.340.)

[1] Because neither the agency's initial determination concerning the grant application of the Aleutian/Pribilof Islands Association nor the Association's administrative appeal from the agency's determination are required by statute to be conducted according to the provisions of 5 U.S.C. § 554 (1976), the adjudication in question was not covered by the Equal Access to Justice Act.[1] There being no other provision for the award of attorney's fees to litigants in administrative appeals before the Board, movant's request for fees is denied.

WM. PHILIP HORTON
Chief Administrative Judge

WE CONCUR:
FRANKLIN D. ARNESS
Administrative Judge

JERRY MUSKRAT
Administrative Judge

[1]The Department of the Interior has yet to publish regulations implementing the Equal Access to Justice Act. Such regulations have been published, however, by the Department of Justice. *See* 47 FR 15776 (Apr. 13, 1982). As mandated by the Act, the regulations of the Department of Justice limit the award of attorney's fees to adversary adjudications required by statute to be conducted by the Department under 5 U.S.C. § 554 (1976).

ERVIN K. TERRY

7 ANCAB 63

Decided *May 19, 1982*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management AA-6690-A through AA-6690-L.

Partial decision on appellant's standing.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing—Rules of Practice: Appeals: Generally

Where an appellant fails to meet criteria in 43 CFR 1.3 for who may practice before the Department, he may not appear on behalf of others, and his standing must be determined based on his claim of property interest on his own behalf.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

A riparian owner cannot claim that a determination that a water body is nonnavigable adversely affects his property interest so as to confer standing to appeal within the meaning of regulations in 43 CFR 4.902, where the appeal seeks to have the same water body found navigable and thereby deprive the appellant of a claim of riparian ownership rights.

3. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Decisions made pursuant to ANCSA affect property interests differently with the effect depending, in part, upon the section of the Act on which each decision is based. Therefore, application of the standing test in 43 CFR 4.902 must take into account the section of the Act relied upon in the decision under appeal.

4. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Stand-

ing—Alaska Native Claims Settlement Act: Easements: Access

Since the purpose of a § 17(b)(1) public easement is to provide access across Native lands to lands not selected, the Board has concluded that a § 17(b)(1) easement necessarily affects lands other than those to be conveyed. Therefore, a member of the public who claims a private interest in land other than the land to be conveyed, in asserting standing to appeal a § 17(b)(1) easement decision, may rely on this private holding as his or her "property interest" affected within the meaning of 43 CFR 4.902.

5. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing—Alaska Native Claims Settlement Act: Easements: Access

Where access by appellant to appellant's property is dependent upon use of a water body, and upon access to the water body by a public easement, then the appellant's property interest is affected by failure to reserve such a public access easement.

6. Alaska Native Claims Settlement Act: Easements: Access

Where determination of a lake's status as a major waterway is relevant to reservation of public access easements to the lake, and the appellant has appealed the Bureau of Land Management's failure or refusal to reserve a trail easement to the lake, and appellant's assertions indicate some possibility that the lake is a major waterway, then the appellant may attempt to prove that the lake is a major waterway in order to justify reservation of the public access easement he seeks.

7. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing—Alaska Native Claims Settlement Act: Easements: Access

In the absence of any indication that a water body is a major waterway, where appellant lacks standing to appeal the navigability of the water body, and where appellant has thus failed to indicate that the absence of an easement in any way affects access between his land and public lands or a major waterway, an appellant will be found to lack standing to appeal that particular easement.

8. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing—Alaska Native Claims Settlement Act: Easements: Access

Where appellant's land is surrounded by Native-selected lands, and the only means of access by appellant and members of the public to appellant's land and public lands beyond the Native selections is by a public road, the failure of the Bureau of Land Management to reserve a public access easement for such road adversely affects the appellant's property interest so as to confer standing under 43 CFR 4.902 to appeal the lack of such an easement. Appellant's property interest is similarly affected by BLM's failure to reserve a site easement providing access from appellant's land to submerged lands underlying navigable waters.

9. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Parties

The State of Alaska's motion to intervene will not be granted where the granting of such motion would permit the State to pursue, as an appellant, issues which the State failed to appeal timely and which the appellant has been denied standing to raise.

APPEARANCES: Ervin K. Terry, *pro se;* Thomas S. Gingras, Esq., and Elizabeth B. Johnston, Esq., for Bristol Bay Native Corp.; Saul R. Friedman, Esq., for Pedro Bay Native Corp.; G. Kevin Jones, Esq., and M. Francis Neville, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeal

The appellant seeks to challenge the Bureau of Land Management's (BLM) determination that several bodies of water are nonnavigable, and BLM's failure to reserve public site and access easements.

To have standing to appeal under applicable regulations, a party must claim a property interest in land affected by the decision appealed. Since riparian ownership confers property rights to the bed of a water body if the water body is nonnavigable, but not if the water body is navigable, the appellant as a riparian owner cannot claim that a determination of nonnavigability adversely affects his property interest so as to confer standing. As to other water bodies, not adjacent to appellant's property, navigability determinations cannot affect the appellant's title to his property in any way and he lacks standing to appeal.

As to public access easements, the Board finds that the appellant claims a property interest in land which is affected by lack of easement access, for himself and the public, between his property and public lands and waters. Therefore, as to issues involving access easements, the appellant has standing to appeal.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended,* 43 U.S.C. §§1601–1628 (1976 and Supp. I 1977) (ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

On Feb. 7, 1980, Ervin K. Terry appealed the above-designated decision of the BLM. Such appeal was stated to be on "behalf of himself and other parties similarly situated."

On Mar. 20, 1980, the Board ordered Mr. Terry to show cause within 30 days why this appeal should not be dismissed on the grounds that the appellant has not asserted, and has no basis to assert, a claim of property interest sufficient to confer standing under 43 CFR 4.902.

In response, the appellant asserted that the following water bodies within the conveyance area are navigable:

1. Iliamna River,
2. Pile River,
3. Chinkelyes Creek,
4. Long Lake,
5. unnamed lake in secs 8 and 17, T. 5 S., R. 27 W., S.M.
6. unnamed lake in sec 9, T. 5 S., R. 27 W., S.M.,
7. Knutson Creek,
8. Chekok Creek, and
9. Canyon Creek.

Appellant also asserted that the following public easements should have been reserved pursuant to § 17(b) of ANCSA:

1. a site easement adjacent to each lake the navigability of which is in issue;
2. a site easement adjacent to Pile Bay (on Lake Iliamna) at the end of the Williamsport (Cook Inlet) to Pile Bay Portage Road;
3. a trail easement following the creek south from the unnamed lake in Sec. 9,

T. 5 S., R. 27 W., S.M., to the Iliamna River; and

4. a 30' wide trail easement for the existing homestead road running from the Williamsport-Pile Bay Portage Road to U.S. Survey 1750.

In support of his claimed standing to appeal, appellant asserted that he owns interests in Tracts 2 and 3 of U.S. Survey 1750, which is adjacent to the Iliamna River and traversed by Chinkelyes Creek, and which is surrounded by lands approved for conveyance by the subject BLM decision. Appellant also claimed to represent "two privious [sic] owners of property lots located on Tract 1 of the U.S. Survey 1750 and the two current owners of the two lots that I have sold since my appeal was filed." (Appellant's letter of May 13, 1980, at 1.) Further, appellant claimed to represent John K. Spencer, who owns the "balance of the property encompassed in U.S. Survey 1750."

Appellant asserted that the BLM's determination that the Iliamna River is nonnavigable has caused a drop in land values within U.S. Survey 1750. Such drop in values was claimed to have affected Terry both as a land owner and as a real estate broker working on a commission basis.

Appellant further asserted that planned or potential use of real property within U.S. Survey 1750 are affected by BLM's easement and navigability determinations:

> Without free and unencumbered use and access to the rivers, lakes and resources of the area, many long range plans may never materialize. * * * Without free access to the sand bars and the bottom of the [Iliamna] River itself [a planned fishing lodge on the river] that would be be [sic] very hard if not impossible.

Appellant's letter of May 13, 1980, at 3.

Finally, Mr. Terry claimed an ownership interest in property on Lake Clark used as a commercial hunting and fishing lodge. He asserted that without free access to the disputed water bodies, the lodge would fail as a business.

On June 3, 1980, the BLM moved for dismissal of the appeal. BLM asserted that appellant had not established his standing. The BLM also pointed out that the applicable Departmental regulations do not provide for class actions and representation of other parties does not in itself confer standing on the appellant. Regarding easements, BLM moved that appellant, if he is found to have standing, be ordered to file a more definite statement concerning the easement issues raised.

A conference was held on June 20, 1980, to establish the nature of Mr. Terry's asserted property interest and to identify the lands affected by the appeal. Mr. Terry submitted copies of statutory warranty deeds conveying to him and others lands comprising Tracts 2 and 3 of U.S. Survey 1750. Mr. Terry also submitted a copy of the plat of U.S. Survey 1750 (showing Tracts 1 through 4), and subsequently submitted copies of justification statements filed with the BLM in the name of John Spencer *et al.* in support of requested public easements within the conveyance area.

Briefs on the appellant's standing were subsequently submitted

by the State of Alaska (State), BLM, Bristol Bay Native Corporation (BBNC), and the appellant. BBNC moved that the appeal be dismissed for lack of standing. The State moved to intervene as a necessary party for the purpose of determining the issues which appellant has raised relating to the navigability of water bodies, regardless of the appellant's standing.

On Aug. 19, 1980, the Board issued an order clarifying the status of pending motions. The BLM's Motion to Dismiss, and/or Motion for a More Definite Statement was held to have been rendered moot by the Board's Conference Summary and Order of June 25, 1980. The Board allowed all parties until Sept. 25, 1980, to file additional briefing on the issue of standing and deferred the State's Motion to Intervene for future consideration.

Decision

Initially, the Board must consider the appellant's purported representation of other individuals who own property in the Iliamna area.

Regulations in 43 CFR 1.3 govern who may practice before the Department. "Practice" is defined in 43 CFR 1.2(c) as "any action taken to support or oppose the assertion of a right before the Department."

43 CFR 1.3 provides that individuals who have been formally admitted, or attorneys, may practice before the Department. In § 1.3(b)(3), the regulation provides:

> An individual who is not otherwise entitled to practice before the Department may practice in connection with a particular matter on his own behalf or on behalf of (i) a member of his family; (ii) a partnership of which he is a member; (iii) a corporation, business trust, or an association, if such individual is an officer or full-time employee; (iv) a receivership, decedent's estate, or a trust or estate of which he is the receiver, administrator, or other similar fiduciary; (v) the lessee of a mineral lease that is subject to an operating agreement or sublease which has been approved by the Department and which grants to such individual a power of attorney; (vi) a Federal, State, county, district, territorial, or local government or agency thereof, or a government corporation, or a district or advisory board established pursuant to statute; or (vii) an association or class of individuals who have no specific interest that will be directly affected by the disposition of the particular matter.

[1] The record does not indicate that Mr. Terry meets any of the above criteria for practice before the Department on behalf of another. Accordingly, he is precluded from appearing on behalf of other property owners and his standing must be determined based on Mr. Terry's claims of property interest on his own behalf.

The appellant's standing to appeal has been challenged on the grounds that he does not meet the requirements of regulations in 43 CFR 4.902 which govern standing before this Board, and which provide: "Any party who claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed * * * may appeal as provided in this subpart."

In the present appeal, standing to appeal the two categories of issues raised, *i.e.*, navigability and public access easements, will be considered separable because of distinctions between the two types

of issues as they relate to property interests claimed by the appellant.

Questions of navigability as it affects title to submerged lands must be decided finally by the courts, rather than in any administrative forum. (*Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U.S. 10 (1935).) However, BLM makes determinations on navigability for several purposes, including that of determining whether lands are public lands. (*State of Montana*, 80 I.D. 312 (1973).) Pursuant to § 13 of ANCSA and implementing regulations, BLM makes navigability findings to determine which lands, including submerged lands, are public lands within the definition of § 3(e) of ANCSA and are therefore available for conveyance to Native corporations. In addition, under 43 CFR 2650.5-1(b), which deals with the computation of acreage entitlement, BLM is required to take into account the navigability of water bodies within areas withdrawn for selection by Native corporations.

BLM's determinations on navigability do affect title, because these determinations are the basis for charging the submerged lands against the Natives' acreage entitlement, if the waters are found nonnavigable, or for recognizing title in the State, if found navigable. Accordingly, while BLM's navigability determinations do not finally adjudicate title to the submerged land, these determinations establish the Department's position on title, and so affect title status.

If the water bodies were found navigable, title to the underlying lands would be in the State. (Submerged Lands Act of 1953, 43 U.S.C. §§ 1301(a), 1311(a), (b) (1976); *Utah* v. *United States*, 403 U.S. 9 (1971); *United States* v. *Utah*, 283 U.S. 64 (1931); *Organized Village of Kake* v. *Egan*, 174 F. Supp. 500 (D.C. Alaska 1959).) If BLM's findings that the waters are not navigable were affirmed, title to the submerged lands would arguably be in the riparian owner.

The Iliamna River and Chinkelyes Creek front on property owned at least in part by Mr. Terry. The Iliamna River borders Tract 2 of U.S. Survey 1750, and Chinkelyes Creek is adjacent to Tract 3 of U.S. Survey 1750. In each instance, Mr. Terry, as an owner of the subject property, possesses riparian rights with regard to the water body and its bed.

None of the other water bodies within the scope of this appeal are adjacent to lands owned by Mr. Terry. Accordingly, Mr. Terry can claim no riparian property right, nor does he claim any private property interest, in the disputed water bodies other than the Iliamna River and Chinkelyes Creek.

In *Walt Hanni*, 6 ANCAB 307 at 329, 89 I.D. 14 at 22-23 (1982) [VLS 80-13], the Board held:

> An appellant's property interests cannot be affected by the outcome of BLM's navigability determinations where the appellant cannot claim a private property interest in the disputed water bodies, or in the underlying submerged lands, nor does ownership of these water bodies affect title to the property interests he claims.

Standing before the Board is determined by 43 CFR 4.902, which provides in pertinent part:

> Any party who claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed, or an agency of the Federal Government, may appeal as provided in this subpart.

Mr. Terry's claimed property interests could be affected, within the meaning of 43 CFR 4.902, only by those BLM navigability determinations regarding the Iliamna River and Chinkelyes Creek, because of his riparian ownership in relation to these water bodies. He does not possess standing to dispute the navigability of the other water bodies named in this appeal because he owns no property adjacent to these water bodies and therefore, as in *Hanni, supra,* "appellant cannot claim a private property interest in the disputed water bodies, or in the underlying submerged lands, nor does ownership of these water bodies affect title to the property interests he claims."

However, although the appellant is a riparian property owner with respect to the Iliamna River and Chinkelyes Creek, he does not claim a property interest which could be affected by BLM's navigability determination because he is opposing their finding that these water bodies are nonnavigable. If, as BLM determined, these waters are nonnavigable, then the appellant as a riparian owner can assert a right to the bed of the streams. (R.E. Clark, *Waters and Water Rights,* §§ 37.3, 41.3 (1967).) However, if as the appellant claims, these waters are navigable, then they are public waterways and title to the streambed is in the State (Submerged Lands Act, *supra*) thus negating any claim of property interest by the appellant.

[2] A riparian owner cannot claim that a determination that a water body is nonnavigable adversely affects his property interest so as to confer standing to appeal within the meaning of regulations in 43 CFR 4.902, where the appeal seeks to have the same water body found navigable and thereby deprive the appellant of a claim of riparian ownership rights.

As to the issues concerning public access easements, the Board concludes, as discussed below, that at least one of the appellant's property interests, the fishing lodge, is affected by each of the easement decisions appealed; therefore, as to easement issues, he has standing.

[3] The Board has held, and here reaffirms, that decisions made pursuant to ANCSA affect property interests differently, with the effect depending, in part, upon the section of the act on which each decision is based. Therefore, application of the standing test in 43 CFR 4.902 must take into account the section of the Act relied upon in the decision under appeal. (*Joseph C. Manga et al.,* 5 ANCAB 224, 88 I.D. 460 (1981) [RLS 80-1].)

Where, in seeking public access easements, an appellant relies on § 17(b)(1) of ANCSA for continuing public access to public lands across lands conveyed to Native corporations, the effect of a decision implementing § 17(b)(1) must be on access to public lands as this affects an appellant's proper-

ty, rather than on any change in land ownership caused by the conveyance.

Although the Board has held that the property claimed to be affected must be located within the conveyance area, the Board has reached a different result in public access easement cases.

[4] Since the purpose of a § 17(b)(1) public easement is to provide access across Native lands to lands not selected, the Board has concluded that a § 17(b)(1) easement necessarily affects lands other than those to be conveyed. Therefore, a member of the public who claims a private interest in land other than the land to be conveyed, in asserting standing to appeal a § 17(b)(1) easement decision, may rely on this private holding as his or her "property interest" affected within the meaning of 43 CFR 4.902.

Thus, in public access easement appeals, the Board finds that the property interest affected, within the meaning of the standing regulation, may be outside the conveyance area, as is the appellant's property within U.S. Survey 1750.

This property interest is affected by BLM's failure to reserve the public access easements which the appellant seeks.

Appellant asserts a need for a site easement on the unnamed lake in Sec. 9, T. 5 S., R. 27 W., S.M., so he can land and tie up an airplane. Appellant also states "[w]e also need an easement following the creek south from the lake to the Iliamna River. This easement is for access in the winter when the Iliamna River is open and the lake is frozen. The trail easement would be for walking from the lake to our property. This lake is the closest and has been used in the past during certain weather conditions." [Appellant's response to Board's order of May 5, 1980, May 13, 1980, 4th page, Easement 2.]

[5]. The Board holds that where access by appellant to appellant's property is dependent upon use of a water body, and upon access to the water body by a public easement, then the appellant's property interest is affected by failure to reserve such a public access easement in the conveyance here appealed.

The Board has found that as to issues involving the need for site and lineal easements associated with a water body, the appellant may rely on his property interest in land outside the conveyance area, and such property interest is affected by the decision appealed. Therefore, as to issues involving site and trail easements on and to the unnamed lake in Sec. 9, T. 5 S., R. 27 W., S.M., the appellant has standing.

The Board notes that § 17(b)(1) of ANCSA and implementing regulations specifically envision the need for access easements to bodies of water which are used for transportation access to public lands.

Sec. 17(b)(1) of ANCSA provides for the reservation of public easements "at periodic points along the courses of major waterways" in order to guarantee "international treaty obligations, a full right of public use and access for

recreation, hunting, transportation, utilities, docks, and * * * other public uses" as determined to be important. The major waterways, along which easements are to be reserved, are defined in 43 CFR 2650.0-5(o):

> [A]ny river, stream, or lake which has significant use in its liquid state by watercraft for access to publicly owned lands or between communities. Significant use means more than casual, sporadic or incidental use by watercraft, including floatplanes, but does not include use of the waterbody in its frozen state.

Regulations in 43 CFR 2650.4-7(a) limit reservation of public easements to those "reasonably necessary to guarantee access to publicly owned lands or major waterways." Regulations in 43 CFR 2650.4-7(b)(1) provide:

> Public easements for transportation purposes which are reasonably necessary to guarantee the public's ability to reach publicly owned lands or major waterways may be reserved across lands conveyed to Native corporations. Such purposes may also include transportation to and from communities, airports, docks, marine coastline, groups of private holdings sufficient in number to constitute a public use, and government reservations or installations.

Status as a major waterway is a regulatory matter, properly determined by BLM and appealable to this Board. Since the need for access to major waterways justifies reservation of an easement, under 43 CFR 2650.4-7(b), a determination that a body of water is a major waterway is clearly related to an asserted need for a public easement.

Major waterways are not required to be navigable, although the characteristics of a major waterway as defined in ANCSA and the regulations are not incompatible with those of waters found navigable under traditional tests. The appellant made assertions concerning traditional use of the unnamed lake in Sec. 9, T. 5 S., R. 27 W., S.M. The appellant's purpose in making such assertions was clearly to obtain public access easements to the lake, but such assertions are equally relevant to the issue of whether or not the lake is a major waterway.

[6] Where determination of a lake's status as a major waterway is relevant to reservation of public access easements to the lake, and the appellant has appealed BLM's failure or refusal to reserve a trail easement to the lake, and appellant's assertions indicate some possibility that the lake is a major waterway, then the appellant may attempt to prove that the lake is a major wateway in order to justify reservation of the public access easement he seeks.

The appellant also asserts a need for a site easement adjacent to the unnamed lake in Secs. 8 and 17, T. 5 S., R. 27 W., S.M. However, appellant gave no indication that such site easement was for any purpose other than to facilitate use of the lake itself. Appellant did not assert the need for a trail easement leading away from the lake, and there is no indication that the lake is a "major waterway." Further, the Board has found that appellant lacks standing to appeal the navigability of said lake.

[7] In the absence of any indication that a water body is a major waterway, and where appellant lacks standing to appeal the navigability of the water body, and where appellant has thus failed to

indicate that the absence of an easement in any way affects access between his land and public lands or a major waterway, an appellant will be found to lack standing to appeal that particular easement. Accordingly, Mr. Terry lacks standing to appeal BLM's failure to reserve a site easement adjacent to the unnamed lake in Secs. 8 and 17, T. 5 S., R. 27 W., S.M.

Appellant also appealed BLM's failure to reserve two other easements:

(1) a site easement adjacent to Pile Bay at the end of the Portage Road, and
(2) a 30' wide trail easement for the existing road running from the Portage Road into U.S. Survey 1750, which road borders both Tracts 2 and 3.

BBNC pointed out that EIN 2d D9, actually reserved by BLM in the subject decision, appears to provide the Pile Bay site easement requested by appellant. Appellant countered that land presently at the end of the Portage Road and used for access to Pile Bay and intended as the site of EIN 2d D9 was presently in private ownership and thus could not be reserved as an easement and was not a guaranteed means of access in the future.

U.S. Survey 1750 is surrounded by lands selected by Pedro Bay Native Corp. (and approved for conveyance?) pursuant to ANCSA. The road running from the Portage Road into U.S. Survey 1750 is the only existing road shown on the BLM status plats which provides access and egress to Tracts 2 and 3 within that survey, and the Board has received no indication of any other road providing access to said lands. The BLM's failure to reserve an easement for the road thus clearly affects access to Tracts 2 and 3, and thus affects appellant's property interest in those lands. Further, BLM's possible failure to reserve a site easement on public lands adjacent to Pile Bay at the end of the Portage Road affects appellant's property interest in Tracts 2 and 3 by affecting access from those tracts to the public lands underlying the navigable waters of Pile Bay.

[8] Where appellant's land is surrounded by Native-selected lands, and the only means of access by appellant and members of the public to appellant's land and public lands beyond the Native selections is by a public road, the failure of BLM to reserve a public access easement for such road adversely affects the appellant's property interest so as to confer standing under 43 CFR 4.902 to appeal the lack of such an easement. Appellant's property interest is similarly affected by BLM's failure to reserve a site easement providing access from appellant's land to submerged lands underlying navigable waters.

The State sought to intervene, pursuant to 43 CFR 4.909(b), to pursue the issues raised by appellant, regardless of the Board's decision on appellant's standing. The granting of said motion would, as conceded by the State, in effect make the State an appellant regardless of the State's failure to appeal within the time allowed by regulation. Further, the

granting of the State's motion would allow the State to pursue issues as to which the appellant has explicitly been found not to have standing.

[9] The State's motion to intervene will not be granted where the granting of such motion would permit the State to pursue, as an appellant, issues which the State failed to appeal timely and which the appellant has been denied standing to raise. The Board thus denies the State's Motion to Intervene.

Accordingly, the appellant has standing to seek a site easement adjacent to Pile Bay at the end of the Williamsport - Pile Bay Portage Road; a 30' wide trail easement for the existing road running from the Williamsport - Pile Bay Portage Road to U.S. Survey 1750 and a trail easement following the creek south from the unnamed lake in Sec. 9, T. 5 S., R. 27 W., S.M., to the Iliamna River. Insofar as the need for a public access easement to a water body is dependent upon the status of such water body as a major waterway, the appellant may attempt to prove that the water body has such status. It should be noted that the use of a water body in a frozen state is specifically excepted from those uses qualifying as "significant use" pursuant to the definition of "major waterway" in 43 CFR 2650.0-5(o).

Those issues with regard to which appellant has been found not to have standing are hereby dismissed. A conference will be set by separate order to determine what procedure should be followed to resolve this appeal.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

DONALD BENALLY *v.* NAVAJO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, & NAVAJO TRIBE

9 IBIA 284

Decided *May 26, 1982*

Appeal from decision by Navajo Area Director finding the Department lacked jurisdiction to entertain appeal from tribal disposition of tribal election dispute.

Affirmed.

1. Bureau of Indian Affairs: Administrative Appeals: Generally—Indian Tribes: Elections

Following repeal of tribal law permitting appeal to the Department, appellant election candidate at Navajo tribal election held not entitled to appeal to the Secretary from adverse determination by tribal council.

APPEARANCES: Eric D. Eberhard, Esq., for appellant; Gary Verburg, Esq., for appellee Navajo Tribe; Scott Keep, Esq., Office of the Solicitor, for appellee Bureau of Indian Affairs. Counsel to the Board: Kathryn A. Lynn.

May 26, 1982

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

Procedural and Factual Background

On Apr. 24, 1981, the Acting Deputy Commissioner of Indian Affairs referred this appeal to the Board of Indian Appeals pursuant to 25 CFR 2.19. Appellant Donald Benally seeks reversal of a decision rendered on about Dec. 12, 1980, by the Navajo Area Director, Bureau of Indian Affairs (Area Director, Bureau). The Area Director's decision found that the Department lacked jurisdiction to review a Navajo tribal election controversy. The record indicates that appellant had been disqualified as a candidate at a tribal election held on the Navajo Reservation in 1978.

On July 10, 1978, appellant was nominated to be a candidate for election to the Navajo Tribal Council. On Aug. 9, 1978, he received the highest number of votes cast at the primary election. On Sept. 5, 1978, the tribal board of election entered a finding that appellant was disqualified to be a candidate by reason of his age. He appealed the election board's decision to the Navajo Court of Appeals, which reversed the board. The election board appealed to the Navajo Supreme Judicial Council, which affirmed the board's initial order disqualifying appellant, reversing the Navajo Court of Appeals. Pursuant to the Navajo Supreme Judicial Council's order, appellant was removed as a candidate from the general election ballot. On Feb. 9, 1979, appellant sought review of the tribal actions by the Navajo Area Director, basing his appeal to the Department on the provisions of Navajo Resolution CJY 85-66, which provides:

> All questions of interpretation of the Navajo Election Law of 1966 and any amendments thereto shall be subject to the decision of the Navajo Tribal Council, or any committee or board of the Navajo Tribal Government duly designated by said Navajo Tribal Council, subject to the right to appeal to the Secretary of the Interior.

11 NTC (Navajo Tribal Code) § 1 *note*. Since the Navajo Tribe has not organized under or accepted the provisions of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461-479 (1976), or adopted a formal written constitution, there is no tribal constitutional provision for the settlement of election disputes.

On Apr. 13, 1979, the Area Director referred the matter back to the tribe to permit exhaustion of tribal remedies, and on Feb. 15, 1980, the Navajo Tribal Council affirmed the prior decision of the Navajo Supreme Judicial Council in Resolution CF-23-80, which provides, in pertinent part:

> [The Area Director] has requested the Navajo Tribal Council to make a final determination on the Donald Benally election dispute; and
>
> 5. Almost fifteen (15) months have passed since the 1978 Navajo Nation General Council Election, and it is time to declare the Benally matter closed; and
>
> 6. This right of self-determination has been recognized by the U.S. Congress in such acts as the Indian Self-Determination

Act, P.L. 93-638 and U.S. Supreme Court in the case of Martinez-Santa Clara Pueblo 436 U.S. 49 (1978).

NOW THEREFORE BE IT RESOLVED THAT:

1. The Navajo Tribal Council hereby affirms the decision of the Board of Election Supervisors on the Donald Benally election dispute.

2. The Election Law of 1966 as set forth in N.T.C. Resolution CJY-85-66 is hereby amended by deleting paragraph 3 of the "Resolved" Section of that Resolution and substituting therefor:

"All questions of interpretation of the Navajo Election Law of 1966 and any amendments thereto shall be determined by the Navajo Election Commission."

On Feb. 21, 1980, appellant again sought review by the Area Director; on about Dec. 12, 1980, the Area Director declined to review the election dispute. His decision was based upon a finding that Resolution CF-23-80 deprived the Department of whatever review authority it had earlier possessed. The Area Director, in reaching his decision to defer to provisions of tribal law opined, in pertinent part:

Clearly, prior to February 15, 1980, the sole authority for the Secretary of the Interior to review a dispute involving the interpretation of the Navajo Election Law was found in CJY-85-66.

Because no federal statute authorizes Secretarial action in cases such as this, the Navajo people, acting through their Tribal Council, are free to withdraw the authority they have conferred on the Secretary to hear an appeal on the interpretation of Tribal law; and when they have done so, neither the Secretary nor his representative, the Area Director, can continue to exercise appeal jurisdiction.

(Area Director's Decision at 5).

On Feb. 23, 1982, the Assistant Secretary—Indian Affairs, following appeal from the Area Director's decision, issued a directive addressed to the Chairman of the Navajo Tribal Council. Referring to Resolution CF-23-80, the directive recites:

I hereby approve the February 15, 1980, action to remove the right of Secretarial appeal with the understanding that it only be prospectively applied. In that the substance of Mr. Benally's appeal relates to an event that took place in the 1978 election, we believe he is entitled to pursue the matter with this Department under the election law in effect at that time.

(Decision of Assistant Secretary—Indian Affairs dated Feb. 23, 1982, at 2).

Contentions of the Parties

Appellant contends that the Department should review his disqualification by the tribal authorities on the merits urged, citing numerous errors allegedly committed by the tribal reviewing bodies. He argues that jurisdiction to review this matter attached in the Department when he first appealed to the Area Director under the tribal ordinance then in effect, and that the subsequent repeal by the tribal council of the provision of Navajo law permitting such review was an impermissible retroactive application of tribal authority. He endorses the Feb. 23, 1982, directive by the Assistant Secretary.

The Bureau argues that the tribe lacked authority, without prior approval, to terminate the provision of tribal law permitting appeal to the Secretary. It also contends that, until action by the Assistant Secretary—Indian Affairs was taken on Feb. 23, 1982, there had been no Secretarial approval of Resolution CF-23-80 and that without such approval, the resolution was ineffective.

The Navajo Tribe argues that the extinguishment of the provision allowing Departmental review of tribal action on election disputes was not retroactive as a matter of law. The tribe further argues that the tribal ordinance did not require Bureau approval before becoming effective and, therefore, the conditional approval of the amended ordinance issued by the Bureau on Feb. 23, 1982, was without effect.

Discussion and Decision

The Department has long recognized the Secretary's authority in Indian affairs to be limited to the execution of the laws. It is accepted by the Department that Secretarial discretion in Indian affairs is not a general power but exists only where specifically stated in Federal statutes. Acting Solicitor Cohen (referring to 25 U.S.C. § 2) stated the rule thus in *Solicitor's Opinion,* 58 I.D. 103, 106 (1942):

> This was the statute which established the office of the Commissioner of Indian Affairs. It was designed not to add to the business or the authority of the Federal Government in Indian matters, nor to diminish the scope of self-government then exercised by the Indian tribes and nations, but merely to locate a particular mass of Government business in a statutory office. The reference to "management of all Indian affairs" did not confer a power to manage the affairs of Indians or of Indian tribes or nations any more than a reference to "foreign affairs" in defining the duties of the State Department could be construed to confer upon that Department a power to manage the affairs of foreigners or of foreign nations. Just as our "foreign affairs" are affairs of our Government relating to foreign matters, so our "Indian affairs" are affairs of our Government relating to Indian matters.

Continuing, at 58 I.D. 109, he observed:

> It is true that statements may be found in a number of court opinions which refer to general supervisory powers exercised by the Department of the Interior over Indian affairs; but it will be found that in each case where such language appears there is some specific statutory authorization for departmental action and the general statutes discussed above are invoked only for the purpose of filling in gaps of detail on which those statutes are silent. On the other hand, actions which this Department purported to justify on the basis of "general supervisory powers" have been repeatedly condemned by the Federal courts as unauthorized and unlawful. [Footnote omitted.]

Unlike the situation presented to this Board in *Roger St. Pierre* v. *Commissioner of Indian Affairs,* 9 IBIA 203, 89 I.D. 132 (1982), there is here no tribal constitution establishing a "government-to-government relationship," and, because the Navajo Tribe is not organized under sec. 16 of the Indian Reorganization Act, *supra,* there is no statutory basis for exercise of the Secretarial trust responsibility.[1] The question now before the Board is whether in this case a right to Secretarial review conferred by Navajo Resolution CJY 85-66 vested prior to

[1] Assuming, without deciding, that there exists broad power in the Secretary to protect tribal governments under a general trust responsibility, whether or not such governments are formed under provisions of the Indian Reorganization Act (*see Roger St. Pierre, above* at 234 n. 22) it is the Board's opinion that the violation alleged by appellant in this case does not constitute an "imminent and substantial threat to the tribal government (*i.e.,* the trust res) sufficient to justify independent action by the United States." *Roger St. Pierre, above* at 238. The briefs filed in *Benally* do not address this theory of justifying review by the Bureau of Indian Affairs in the Navajo election dispute. Further, to the extent appellant's dispute with the tribe may be cognizable under the Indian Civil Rights Act of Apr. 11, 1968, 82 Stat. 77, 25 U.S.C. §§ 1301-1341 (1976), the Supreme Court's holding in *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978), requires that appellant seek relief in a tribal forum.

repeal of that law by Resolution CF-23-80, or whether the Secretary's review jurisdiction under Resolution CJY 85-66 was legally removed by Resolution CF-23-80. For the following reasons, the Board holds that Resolution CF-23-80 effectively removed the Secretary from his review jurisdiction over Navajo tribal election disputes.

Relying principally upon *U.S. Fidelity and Guaranty Co.* v. *United States,* 209 U.S. 306 (1908), appellant contends that the Area Director erred by making a retroactive application of the 1980 Navajo law which limited review of tribal elections to tribal forums. This reliance is misplaced: *U.S. Fidelity* is distinguished in *Hallowell* v. *Commons,* 239 U.S. 506, 508 (1916), for reasons which are relevant here. In *Hallowell* the Court held that restoration by Congress to the Secretary of the Interior of Indian probate review powers, which had previously been taken from him and vested in the Federal courts, had operated to transfer the review of all pending Indian probate cases to the Secretary:

> It made his jurisdiction exclusive in terms, it made no exception for pending litigation, but purported to be universal and so to take away the jurisdiction that for a time had been conferred upon the courts of the United States. The appellee contends for a different construction on the strength of Rev. Stats., § 13, that the repeal of any statute shall not extinguish any liability incurred under it, *Hertz* v. *Woodman,* 218 U.S. 205, 216, and refers to the decisions upon the statutes concerning suits upon certain bonds given to the United States. *United States Fidelity & Guaranty Co.* v. *United States,* 209 U.S. 306. But apart from a question that we have passed, whether the plaintiff even attempted to rely upon the statutes giving jurisdiction to the courts in allotment cases, the reference of the matter to the Secretary, unlike the changes with regard to suits upon bonds, takes away no substantive right but simply changes the tribunal that is to here the case. In doing so it evinces a change of policy, and an opinion that the rights of the Indians can be better preserved by the quasi-paternal supervision of the general head of Indian affairs. The consideration applies with the same force to all cases and was embodied in a statute that no doubt was intended to apply to all, so far as construction is concerned.

(239 U.S. at 508).

[1] The same rule applies here: The limitation by the tribe of the review authority over tribal elections to tribal agencies eliminated review of such matter by the Department, including pending cases. The general rule of law, restated by the court in *Bruner* v. *United States,* 343 U.S. 112 (1952) (citing *Insurance Co.* v. *Ritchie,* 5 Wall. 541 (1867)) (72 U.S. 541), has consistently been that:

> [W]hen the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction. And it is equally clear, that where a jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction.
>
> * * * * *
>
> In another case arising under the same jurisdictional statutes, the Court, in following *Ritchie,* stated the applicable rule as follows:
>
> "Jurisdiction in such cases was conferred by an act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as jurisdiction depended entirely upon the act of Congress." *The Assessors* v. *Osbornes,* 9 Wall. 567, 575 (1870).

(343 U.S. at 116).

The Area Director correctly applied the tribal law to the facts of this appeal when he determined

that, following repeal of the tribal ordinance permitting Secretarial review the Department lacked jurisdiction to review tribal election disputes. As a result, the Bureau lacked authority to make the attempted reconsideration of the case on Feb. 23, 1982, while the matter was pending before this Board, and the attempted modification of the Area Director's ruling is therefore void. Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's decision appealed from is affirmed. Appellant's complaint is not reviewable by the Department.

This decision is final for the Department.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:
WM. PHILIP HORTON
Chief Administrative Judge

JERRY F. MUSKRAT
Administrative Judge

IN RE ATTORNEY'S FEES REQUEST OF RONALD CLABAUGH [1]

9 IBIA 294

Decided *May 26, 1982*

Appeal from decision by the Commissioner of Indian Affairs denying payment of attorney's fees claimed pursuant to provisions of the Indian Child Welfare Act of 1978.

Affirmed as modified.

1. Attorney's Fees: Indian Child Welfare Act of 1978

Under the circumstances of this case, there is no authority under the Indian Child Welfare Act of 1978 to pay attorney's fees to appellant.

APPEARANCES: Ronald Clabaugh, Esq., *pro se;* David C. Etheridge, Esq., Office of the Solicitor, Department of the Interior, for appellee Commissioner. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

Background

On Mar. 10, 1978, following a hearing in the Oglala Sioux Tribal court initiated upon complaint by the tribal prosecutor that Hope, Faith, Edward, J. Donovan, Elliot, Edsel, and Kahyle Star were dependent children, an order was entered referring the children to the South Dakota Social Services Department for temporary custodial placement. A subsequent hearing was held by the tribal court on May 12, 1978, at which time the children were placed under the custody of the tribal court, with supervision to be exercised by the State Social Services Department.

[1] In a Notice of Docketing issued by the Board on July 17, 1981, this case was styled *Edward Star, et al.* v. *Commissioner of Indian Affairs.* This style has been changed in order to describe more accurately the appeal.

The children remained in temporary foster care for 2 years.

On June 17, 1980, the tribal court reviewed the circumstances of the children. The children were represented by the tribal prosecutor at this hearing. The tribal court continued its prior orders in the matter for 3 months, and ordered a psychological evaluation of the children's mother and a report to it on Von Reckilinghausens Disease, a degenerative nerve disorder that afflicted several of the children. The tribal court order recited an intention to hold another hearing in 3 months, following receipt of these reports, to determine whether the parental rights of the children's mother should be terminated.

On Nov. 4, 1980, a South Dakota Circuit Court, reciting a report made to it by the State Welfare Department, entered an order finding that Edward, Elliot, Edsel, and Kahyle Star were residents of the circuit over which it exercised jurisdiction and appointing Ronald Clabaugh to be their attorney "in regard to certain Orders entered by the Oglala Sioux Tribal Court placing said children under the supervision of the State Welfare Department." [2] This order was entered more than 3 months after the tribal court's June 17, 1980, order, but before the tribal court had held the further hearing contemplated in that order. The State court's order does not evidence any awareness of the tribal court's most recent action in regard to the children.

Following a hearing held on Dec. 12, 1980, the tribal court ordered the State Social Services Department to find long-term placement for the children.

Ronald Clabaugh (appellant), following the order from the State court, presented a bill to the Department of the Interior for services rendered in connection with further proceedings before the tribal court. The bill, which indicates that appellant began work on the children's behalf on Oct. 17, 1980, includes expenses incurred in connection with appearances before the tribal court, including travel, telephone, official fees advanced, and licensing by the tribal court as well as attorney's fees earned until Dec. 19. 1980.

On Apr. 15, 1981, the Commissioner of Indian Affairs (Commissioner), in a decision based upon an interpretation of the Indian Child Welfare Act of Nov. 8, 1978 (Act), 92 Stat. 3069 (codified at scattered sections of 25 U.S.C.), set forth in a seven page legal opinion, refused to allow payment of appellant's fees from funds of the United States.[3] At page 4 of his decision, the Commissioner sets out the reason for his holding:

> Section 1912 [of the Act] applies to "any involuntary proceeding in a *state* court. . . ." [Italics supplied]. The legislative history of the Act removes any doubt that the appointed counsel provisions are directed at *state* court rather than tribal court adjudications:

[2] Nov. 4, 1980, order, South Dakota Seventh Judicial Circuit Court.

[3] Federal counsel has directed argument to the authority of the Board to review "discretionary" decisions of Bureau Officials in apparent anticipation of a ruling adopting arguments by appellant that payment of attorney's fees may be allowed without statutory or regulatory basis in law. For a discussion of the meaning of the limitation upon the Board's authority to review "discretionary" actions by the Bureau, *see St. Pierre* v. *Commissioner*, 9 IBIA 203, 89 I.D. 132 (1982) and *Aleutian/Pribilof Islands Ass'n* v. *Acting Deputy Assistant Secretary*, 9 IBIA 254, 89 I.D. 196 (1982).

"Subsection (b) provides that an indigent parent or Indian custodian shall have a right to court appointed counsel in any involuntary *state* proceeding for foster care placement or termination or parental rights. Where state law makes no provision for *such appointment*, the Secretary is authorized, subject to the availability of funds, to pay reasonable expenses and fees of *such counsel*." [Italics supplied]

H.R. Rep. No. 1386, 95th Cong. 2d Sess. 22 (1978).

Congress had previously decided explicitly not to impose on Indian tribes the requirement that they provide appointed counsel in tribal courts when it enacted the Indian Civil Rights Act. 25 U.S.C. § 1301 *et seq.* This exception was made even though many other restrictions imposed on state and federal governments by that Act were imposed on tribal governments. *Tom v. Sutton*, 533 F.2d 1101 (9th Cir. 1976). Nothing in the Indian Child Welfare Act indicates any decision of Congress to alter this policy. Although the high rate of removals [of Indian children from Indian families and tribes] occurring in state courts led Congress to take steps to assure that indigent Indians had counsel to assist them in presenting their arguments in state court, no such concern with respect to tribal courts existed.

Appellant filed an appeal from this decision with the Board on June 2, 1981.

Discussion and Conclusions

Appellant contends that the Act requires his fees to be paid from Federal funds administered by the Bureau of Indian Affairs (Bureau). In support of this contention he argues (1) the appointment of an attorney by the State court was required by an emergency situation; (2) the children had little contact with their Indian heritage for a significant period and jurisdiction had therefore passed to the State court in this instance to enable the court to make a binding order appointing an attorney for them; (3) the children have a constitutional due process right to an attorney appointed at public expenses to represent them because of their indigency; (4) effective implementation of the statutory mandate of the Indian Child Welfare Act is impossible in this case without the assistance of appointed counsel; (5) but for the intervention of the State court, the children would have been unrepresented in this matter; (6) the Snyder Act of Nov. 2, 1921, 42 Stat. 208, codified *as amended* at 25 U.S.C. § 13 (Supp. II 1978), provides a vehicle for payment of attorney's fees in the event the Indian Child Welfare Act does not provide a basis for payment; and (7) the Department is obligated to pay these attorney's fees under binding regulations codified at 25 CFR 23.13(a) which require payment under the circumstances of this case.

The Indian Child Welfare Act was declared by Congress to be an attempt to promote the stability of Indian families and tribes.[4] The Act's primary purpose is to avoid removal of dependent Indian children from their Indian culture when they are taken from Indian parents who are unable to continue to care for them.[5] Tribal jurisdiction over affected reservation children and children who, like those involved in this case, are wards of a tribal court, is made exclusive by the Act,[6] which im-

[4] 25 U.S.C. § 1902 (Supp. II 1978).

[5] *Id.* sec. 1901(4) and (5). The Act is limited in scope to "Indian child" "child custody proceedings." 25 U.S.C. § 1903(1) and (4) (Supp. II 1978).

[6] *Id.* sec. 1911(a).

poses strict procedural limitations upon state and private welfare agencies dealing with dependent Indian children.[7]

The provisions of the Act for court-appointed counsel appear at 25 U.S.C. § 1912(b) (Supp. II 1978), which, referring to state proceedings (*see* sec. 1912(a)), reads:

> In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.[8]

Implementing regulations for this section appear at 25 CFR 23.13. Contrary to appellant's assertions, payment of his fees is not required under the above statutory authority or its implementing regulations.

First and foremost, appellant's contention that the children were unrepresented is refuted by the record of proceedings in the tribal court. The original 1978 hearing was initiated by the tribal prosecutor on behalf of the children. The 1980 tribal court order recites: "[P]arties present at this proceeding were: Lester White Butterfly, Tribal Prosecutor representing the children, Ardith Sand, Social Services of Rapid City, Mrs. Anna Mae Blume, Social Services of Custer County, Sandi Bird and William J. Grubbs of Social Services Department in Pine Ridge, South Dakota."[9] In the absence of a direct evidentiary attack upon this record, it is accepted as correct. There was, therefore, no need for a court-appointed attorney to represent the children.

[1] Futhermore, even if the facts had indicated a need for a court-appointed attorney, the State court was without jurisdiction to appoint such an attorney in this case. In support of his claim that the State court had jurisdiction over the children and therefore had the authority to appoint him to represent them, appellant cites 25 U.S.C. § 1922 (Supp. II 1978). That provision, which authorizes a state court to exercise emergency jurisdiction over children located off the reservation even though they are normally subject to exclusive tribal jurisdiction, applies only when state court intercession is necessary "to prevent imminent danger of physical damage or harm to the child." Appellant has not alleged and the State court did not find that the children

[7] *Id.* sec. 1901(4).

[8] "Section 13 of this title" is the Snyder Act of 1921, which authorizes the Bureau, under the supervision of the Secretary of the Interior, to direct the expenditure of congressional appropriations for the benefit, care, and assistance of Indians. The Snyder Act is a legislative procedural act, intended to facilitate the passage of subsequent Indian appropriation bills, including annual Bureau budget appropriations. *See* discussion of the purposes of the Snyder Act, F. Cohen, Handbook of Federal Indian Law (1982 ed.) at 141, 142. It appears appellant's argument that the Secretary ought to approve the payment of attorney's fees as a discretionary matter under authority of the Snyder Act is made as an alternative to the contention that he is entitled to payment of fees under the Indian Child Welfare Act. As Federal counsel points out, this Board does not have power to review purely discretionary decisions by Bureau officials, but must decide cases presented to it based upon legal considerations. Furthermore, Federal counsel advises that the BIA, in exercise of its discretion, has decided to pay attorney fees for clients in Indian child custody cases in tribal court only when an Indian tribe or organization has obtained a grant for that purpose under 25 U.S.C. § 1931(a)(8).

[9] Order of Oglala Sioux Tribal Court dated June 17, 1980.

were in imminent danger of physical damage or harm.[10] Therefore, sec. 1922 does not provide a basis for State court jurisdiction.

Appellant's argument that the children had lost significant contact with their Indian heritage during foster care does not confer jurisdiction upon the State court. Nowhere does the Act provide that children under the active supervision of a tribal court can come under the jurisdiction of a state court merely because their foster care is provided in homes outside the reservation.

Since this case was never properly in State court, it was not transferred from State court to tribal court as appellate attempts to argue. Rather it has always been pending before the tribal court, which here exercises the exclusive jurisdiction provided for by 25 U.S.C. § 1911(a). Because the State court never had jurisdiction, there is no statutory basis[11] for payment of attorney's fees to appellant.[12]

Finally, contrary to appellant's contentions, the due process provisions of the United States Constitution do not require a court-appointed attorney because the children are indigent. These Federal constitutional provisions do not apply to actions in tribal court.[13] The possibility that Federal legislation may have influenced the nature and extent of tribal jurisdiction does not convert tribal courts into Federal instrumentalities subject to Federal constitutional restrictions.[14]

Even if Federal constitutional law did apply, the Supreme Court recently observed in *Lassiter* v. *Department of Social Services,* 452 U.S. 18, 25 (1981), also a child custody case: "The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." The Court then held that only where compelling circumstances exist do concerns for due process outweigh the general presumption that there is no right to appointed counsel when personal liberty is not at stake.[15] No such circumstances have been shown to exist in this case.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Apr. 15, 1981, decision of the Commissioner denying payment of

[10] *See* note 2, *supra.* Appellant argues that the children's placement was "temporary" rather than "permament" and that his condition was harmful. Even assuming that temporary placement may, in some way, be "harmful" to a child, such harm is not the actual, physical danger contemplated in the statute.

[11] The regulations in 25 CFR 23.13 can go no further than the statute they implement. Because the Act does not authorize payment of attorney's fees in this case, the regulations cannot provide an independent basis for awarding fees.

[12] This opinion does not reach the suggested question posed by appellant involving a situation where an attorney is appointed by a state court having jurisdiction over an Indian child custody matter which is subsequently transferred to tribal court.

[13] *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 56 (1978).

[14] *United States* v. *Wheeler,* 435 U.S. 313, 328 (1978).

[15] It is noted that in 25 U.S.C. § 1302(6) (1976), the Indian Civil Rights Act limits the right to counsel in criminal cases to counsel at the defendant's own expense. Since there is no right to appointed counsel in criminal cases where personal liberty is frequently at stake, it would be incongruous to maintain that the due process clause of the Indian Civil Rights Act requires appointed counsel in a dependent child proceeding where no loss of personal liberty is threatened.

attorney's fees to appellant is affirmed as modified by this decision.[16]

This decision is final for the Department.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:
WM. PHILIP HORTON
Chief Administrative Judge

JERRY MUSKRAT
Administrative Judge

UNITED STATES V. KAYCEE BENTONITE CORP. *ET AL.*

64 IBLA 183

Decided *May 27, 1982*

Appeal from decision of Administrative Law Judge Robert W. Mesch, declaring 5 mining claims null and void and 125 mining claims valid. W-22183, W-22184, W-22227, W-22228, W-24294, W-24295, W-24299, W-10269, W-10270, W-10271, W-10272.

Affirmed.

1. Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Locatability of Mineral: Generally—Mining Claims: Specific Mineral(s) Involved: Clay

In determining whether a deposit of clay is locatable as a valuable mineral deposit under the mining laws, there is a distinction between a deposit considered to be common or ordinary clay, which is not locatable, and a locatable deposit having exceptional qualities useful and marketable for purposes for which common clays cannot be used.

2. Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Locatability of Mineral: Generally—Mining Claims: Specific Mineral(s) Involved: Clay

Common clay includes clay usable for structural and other heavy clay products, for pressed or face brick, as well as ordinary brick, tile, and pipe, for pottery, earthenware, stoneware, and cement.

3. Administrative Authority: Generally—Regulations: Force and Effect as Law

A Bureau of Land Management instruction memorandum is merely a document for internal use by BLM employees. Such documents are not regulations and have no legal force or effect.

4. Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Locatability of Mineral: Generally—Mining Claims: Specific Mineral(s) Involved: Clay

A deposit of bentonite which can profitably be removed and marketed for pelletizing taconite is an exceptional clay locatable under the mining laws, even though blending and additives are necessary to make the deposit suitable for such use.

5. Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally

Mining claims are properly declared invalid where the mining claimants fail to show that the mineral deposits on the claims can be mined, removed, and marketed at a profit.

6. Mining Claims: Contests—Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally

A prima facie case against the validity of a mining claim is established by the testimony of an expert witness who has examined

[16] Because of the Board's disposition of this case, it does not reach the question, addressed in the Commissioner's decision, whether award of attorney's fees is limited to state court proceedings.

the mineral deposit on the claims and the costs of mining that deposit, and who concludes that the mineral deposit cannot be mined, removed, and marketed at a profit.

7. Mining Claims: Contests—Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally

A presumption is raised that mining claimants have failed to discover a valuable mineral deposit if there has been little or no development or operations on the claims over a long term. This presumption can be overcome by evidence that the mineral deposits can be mined, removed, and marketed at a profit.

8. Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally

A mining claimant has not made a discovery of a valuable mineral deposit where further exploration is necessary to determine whether there is a reasonable prospect of success in developing a valuable mine.

9. Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Contests—Mining Claims: Determination of Validity—Mining Claims: Locatability of Mineral: Generally

Even if a mining claimant establishes that a deposit of bentonite is the same quality as other deposits sold for pelletizing taconite, the claimant must establish that his deposit can be marketed for this purpose rather than for a purpose for which common clay can also be used. The claimant must establish that the material on his claim, not some other claim, may be mined, removed, and marketed at a profit.

APPEARANCES: Lowell L. Madsen, Esq., Office of the Solicitor, Department of the Interior, Denver, Colorado, for the Bureau of Land Management, appellant; Randy L. Parcel, Esq., and Bonnie Starr Mandell, Esq., Denver, Colorado, for appellees, Kaycee Bentonite Corp., James R. Harlan, Joanne H. Harlan, Virginia R. Keith, Elden L. Keith (a.k.a. Leon Keith), Emily B. Keith, Lee E. Keith, R. L. Greene, and Rose Greene; Richard S. Dumbrill, Esq., Newcastle, Wyoming, for contestees, Henry L. Martens, Thelma V. Martens, Jay E. Engle, Martha Engle, Chester S. Jones, Maurine E. Jones, Robert A. Martens, Ann Martens, Lucille C. Dumbrill, and Richard S. Dumbrill; Don H. Sherwood, Esq., and William R. Marsh, Esq., Denver, Colorado, for intervenor, Wyo-Ben Products, Inc.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

Henry L. Martens, *et al.*, have appealed from a decision of Administrative Law Judge Robert W. Mesch declaring the Bowl, Rattlesnake, Bedspring, Wolftrap, and Horseshoe placer mining claims null and void. W-10269, W-10270, W-10271, and W-10272.[1] Judge Mesch determined that regardless of whether the bentonite on these claims was an exceptional clay, it could not be mined and marketed at a sufficient profit to justify a person of ordinary prudence in the expenditure of his labor and means in mining the bentonite at the present time.

In the same decision, Judge Mesch held 125 mining claims

[1] Henry L. Martens is joined in this appeal by Thelma V. Martens, Jay E. Engle, Martha Engle, Chester S. Jones, Maurine E. Jones, Robert A. Martens, Ann Martens, Lucille C. Dumbrill, and Richard S. Dumbrill.

valid because they contain deposits of exceptional clay. W-22183, W-22184, W-22227, W-22228, W-24294, W-24295, and W-24299. These claims are held by Kaycee Bentonite Corp. (Kaycee) and others.[2] Wyo-Ben Products, Inc. (Wyo-Ben), and N L Industries, Inc.,[3] participated as intervenors. The Bureau of Land Management (BLM) has appealed from that part of Judge Mesch's ruling declaring these claims valid; Kaycee and Wyo-Ben have filed extensive answers.

In 1973, BLM filed contest complaints against the bentonite claims involved in this appeal as well as other claims for which a patent application had been filed by another bentonite producer.[4] During the 5-year period between the filing of the complaints and the hearing, the parties engaged in a protracted discovery process in connection with the administrative contest as well as related judicial proceedings.[5]

The hearing before Judge Mesch in Jan. and Feb. 1978, is recorded on over 2,000 pages of transcript supplemented by voluminous exhibits and briefs. Most of this evidence, however, is not concerned with the quality and quantity of bentonite on the claims and the marketability of those particular deposits. The bulk of the contestant's evidence has been introduced to provide a basis for a new legal theory to govern the locatability of bentonite. Much of the evidence introduced by the contestees and intervenors is directed against the contestant's theory.

On Apr. 26, 1979, Judge Mesch issued his decision. He summarized his findings as follows:

> I find or include in this decision that (1) the test of the locatability of bentonite is the "exceptional/common clay" test; (2) the "exceptional/common clay" test of locatability is not the same as the "uncommon/common variety" test of locatability; (3) the Contestant is precluded in these proceedings from arguing that the bentonite is a "common variety" mineral under the Act of July 23, 1955, 30 U.S.C. § 601 *et seq.;* (4) in any event, bentonite is not subject to the "uncommon/common variety" test of locatability applied under the 1955 Act, *supra;* (5) the fact that bentonite may be of widespread occurrence has no bearing on the locatability issue; (6) the physical-chemical standards adopted by BLM to determine the locatability of bentonite have no relationship to the "exceptional/common clay" test of locatability; (7) the Contestant presented no evidence that the bentonite is a "common" rather than "exceptional" clay; (8) bentonite suitable for use in the taconite processing industry is an "exceptional" clay; (9) the bentonite within 125 of the claims is suitable for use in the taconite industry; (10) the suitability of the bentonite for use in the taconite industry is not affected by blending and/or chemical additives; (11) the 125 claims are valid and patents should issue; (12) the bentonite within five of the claims does not meet the prudent man-marketability test; (13) the five claims are invalid.
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> (Decision at 5–6).

Like the record that Judge Mesch reviewed, the greater part of his decision is directed at deter-

[2] Contests W-22183, W-22184, W-22227, and W-22228 were filed against Kaycee Bentonite Corp. and involve the KC Nos. 1 through 53, KC Nos. 55 through 65, KC Nos. 67 through 94, and KC Nos. 101 through 121 placer mining claims.

Contests W-24292 and W-24295 involving the Virginia No. 3 and the Jim Harlan Nos. 2 through 4 placer mining claims, were filed against James R. Harlan, Joanne H. Harlan, Virginia R. Keith, Elden L. Keith, Emily B. Keith, and Lee E. Keith.

Contest W-24299 involving the R. L. Greene Nos. 80 through 87 placer mining claims, was filed against Lee E. Keith, R. L. Greene, Rose Greene, Leon Keith, and Emily B. Keith.

[3] N L Industries has not appeared in this appeal.

[4] The complaint against Dresser Industries was dismissed on Dec. 5, 1977.

[5] *Dresser Industries, Inc.* v. *United States,* Civ. No. C-74-196 (D. Wyo.) (suit pending).

mining the proper legal standard applicable to bentonite claims.

The contestant challenges the validity of the contested claims by asserting that the bentonite on the claims is a common clay not subject to location under the general mining laws. Contestees agree that compared with other deposits of bentonite, the deposits on the contested claims are not distinctive. (*See* Contestant's Exh. 27 at 18.) The contestees, however, contend that it is not appropriate to compare their deposits with other deposits of bentonite; rather, a comparision should be between their deposits and what has been traditionally regarded as common clay generally. The differing perspectives of the parties to this case help to explain their disagreement over this issue.

From the perspective of a Wyoming land manager whose concerns initially prompted the Government to take a close look at the legal status of bentonite under the laws relating to mineral development, there is no doubt that bentonite is widespread in the State of Wyoming. It is generally strip mined from beds near the surface, and its development poses the same problems to a surface manager in Wyoming as the development of other common variety minerals. From the surface manager's standpoint, there is no reason why bentonite should not be treated similarly. In his view, it was just such difficulties that the Surface Resources Act of 1955, 30 U.S.C. § 601 (1976), was intended to resolve. (*See* Exh. K 42, quoted *infra.*) From the perspective of the producers of bentonite and their customers, however, the situation is entirely different. Taconite producers in Minnesota and Canada cannot get a binder from a local clay pit which produces material for bricks, tile, pottery, and other similar products. The material they use must be shipped from Wyoming or perhaps Greece. They feel that the market pattern is more characteristic of a mineral which has intristic value, rather than mineral which is a common variety. Eighty percent of the steel produced in the United States is made from pellets of taconite (Tr. 1629). Without the bentonite to make those pellets, the taconite mines would shut down. In a sense, their taconite owes its value to the availability of bentonite as a binder. Before exploring further the complex legal theories upon which the parties' competing assertions are based, it is helpful to offer a description of bentonite generally with particular attention to how it is used in pelletizing taconite, since that is the major purpose for which contestees contend their deposits can be marketed.

The following definition of bentonite is provided in Bureau of Mines, U.S. Department of the Interior, *A Dictionary of Mining, Mineral, and Related Terms,* 1968, at page 98:

> A montmorillonite-type clay formed by the alteration of volcanic ash. It varies in composition and is usually highly colloidal and plastic. Swelling bentonite, for example, is so named because of its capacity to absorb large amounts of water accompanied by an enormous increase in volume. *Bureau of*

Mines Staff. Occurs in thin deposits in the Cretaceous and Tertiary rocks of the Western United States. It is used for making refractory linings, water softening, decolorizing of oils, thickening drilling muds, and the preparation of fine grouting fluids. As a mud flush, bentonite is used at a concentration of about 3 pounds per cubic foot of water. *Nelson.*

There are two major types of industrial bentonites. The sodium-rich or "Wyoming" bentonites are capable of swelling in water and exhibit high dry-bond strength.[6] Calcium-rich "Mississippi" bentonites have high green bond strength and very low swelling capability. Claudia A. Wolfbauer, "Bentonite Resources in the Eastern Big Horn Basin, Wyoming" (Exh. K 198). In 1978-79, over 85 percent of the bentonite sold or used by producers in the United States was the swelling type. *See* Sarkis G. Ampian "Clays," U.S. Department of the Interior, Bureau of Mines, *Minerals Yearbook* (1978-79), page 223, Table 17.[7] Over 85 percent of the swelling bentonites sold or used by producers in the United States during those years came from the State of Wyoming. (*See id.* at 221, Table 16). In 1979, 3,285,002 short tons of bentonite were sold or used by producers in Wyoming. This bentonite had a value of $74,405,909. This compares with 3,846,583 tons of bentonite sold or used by producers in the United States as a whole, having a value of $91,992,995. (*See id.,* Table 16). Of the 3,161,983 tons of swelling bentonite used domestically in 1979, 1,261,477 short tons were sold for drilling mud, 595,697 tons were used for foundry sand, and 888,204 tons were used for pelletizing iron ore. Of the 684,600 tons exported, 180,067 tons were sold for drilling mud, 250,066 tons were sold for foundry sand, and 172,515 tons were sold for pelletizing iron ore. (*See id.* at 223, Table 17). Thus, of all the bentonite produced or sold in the United States during 1979, over 85 percent was dedicated to these three end uses.

The high-swelling Wyoming bentonites makes excellent drilling mud because their high viscosity enables rock cuttings to be carried up the drill hole and also helps to cool and lubricate the drill bit. The drilling mud helps prevent fluid loss and caving of the drill hole by forming a filter cake on the drill hole wall. Although the mud acts as a fluid when the drill is active, it gels when the drill is inactive, thereby preventing the settling of rock cuttings yet allowing quick resumption of the drilling process (Exh. K 198). This was perhaps the first major use of bentonite. Bentonite's bond strength makes it suitable as a binder in foundry sands. In the late 1950's, however, a new use was developed for bentonite, a use which now accounts for almost one-third of bentonite sales; *i.e.*, as a binder in making taconite pellets. Since the claimants assert that the taconite industry is the major market for the material from these claims, it is important to understand how bentonite is used in the taconite industry to reach a proper determination whether the material on these claims is an exceptional clay or a common clay.

[6] This swelling capability is often measured by mixing bentonite with water until it reaches a specified viscosity. The resulting number of 42-gallon barrels so produced from 1 ton of bentonite is called the "barrel yield."

[7] The chapter on clays from the 1975 edition of this publication was introduced as contestant's exhibit 40.

Taconite is a low-grade iron ore which remained undeveloped by the domestic iron and steel industry until the higher grade ores were depleted. At that point, the industry was forced to rely on high-grade deposits obtained from foreign mines, or develop an economic means of developing the low-grade taconite which could be mined domestically.

In processing taconite, the first problem is to find a way to concentrate the iron content. Huge pieces of the rock are blasted from the ground and are crushed to particles the size of small pebbles or coarse sand usually containing over 20 percent iron. This crude taconite is ground to a very fine consistency so the iron-bearing particles can be separated, often by means of powerful magnets. The resulting concentrate contains over 60 percent iron and resembles a fine black powder. It cannot feasibly be sent directly to the blast furnace. If sent in open cars, it would blow away; if added directly to the blast furnace, much would escape up the chimney; and what remained would hamper the proper functioning of the furnace. Thus, it is necessary to form this powdery concentrate into pellets.

To form the pellets, the taconite concentrate is placed in a revolving drum with a bentonite binder. About 20 pounds of bentonite are added for each ton of concentrate. As the drum revolves, the taconite concentrate and the bentonite combine to form small pellets, about one-half inch in diameter, called "green balls." These green balls are conveyed to furnaces for hardening. The green balls must have sufficient strength to keep from breaking up during this handling and sufficient moisture retention to avoid fragmenting during the heating process. The hardened pellets are then shipped to steel plants, placed in a blast furnace, and converted to iron and steel (Tr. 1842–44). The hardened pellets must have sufficient strength to avoid fragmenting while being shipped to the steel plants and being placed in the blast furnaces.

The evidence illustrating the importance of bentonite in the taconite industry was summarized by Judge Mesch as follows:

> The process is now used by plants in Minnesota, the Upper Michigan Peninsula, and in other relatively small operations scattered throughout the United States. (Tr. 1628–1631). Taconite pelletizing is also being done in foreign countries. Approximately 85 to 90 percent of the iron ore production in the United States is by way of the pelletization process. (Tr. 1164).
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> The birth of the taconite industry created an entirely new demand and use for bentonite by both national and international consumers (Tr. 1628–1631, 1688, 1689, 1848, 2000, 2001, 2038, 2041). Bentonite has been used exclusively and consistently since the inception of the pelletizing process as the binding material for the powdered taconite. (Tr. 716, 822, 999, 1169, 1848, 1930). It is the only known material of any sort economically suitable for use as a binder in the taconite industry. There is not and never has been any material of any nature that could function as a substitute for bentonite in the taconite industry. (Tr. 998–1000, 1043–1045, 1059, 1184, 1185, 1848, 1849, 1932, 2002, 2041, 2042). No clay of any sort is used, either to the exclusion of or in combination with bentonite, in connection with the taconite industry. This

is true, even though many other clays have been tested for suitability to bind taconite. (Tr. 714, 715, 857, 996-999, 1166-1169, 1188, 1746, 1846, 1849, 1850, 1997, 2001, 2002, 2037, 2041, 2043, 2044). One company that operates seven taconite processing plants has experimented in its laboratories with some 60 different substances in an attempt to find a suitable substitute for bentonite. The company has not found anything that can be used in the place of bentonite. (Tr. 2042).

The bentonite used by the domestic taconite industry is almost exclusively "Wyoming" or "western" bentonite mined in Wyoming, with some supplied from Montana and South Dakota. (Tr. 1845, 1996, 2035, 2036). It is purchased from this area despite the facts that there are bentonite deposits in nearly every state and the cost of transportation often exceeds the price of the bentonite at the plant. (Tr. 288, 673, 1631, 2039). For example, Cleveland Cliffs Iron Company tried Saskatchewan bentonite in its Canadian operations, but, as it did not work out quality wise, they continue to ship bentonite from Wyoming some 1,600 miles to their Canadian plants. (Tr. 2038, 2066). A pelletizing plant in Tasmania, Australia, uses bentonite shipped some 10,000 miles from Wyoming. (Tr. 1168, 1177).

(Decision at 28, 29).

Physical properties of bentonite which make it useful for taconite pelletizing, then, are its capability of combining with taconite to form balls with sufficient strength to ensure handling. These physical requirements are quite distinct from the requirements for other uses of bentonite.

[1] In *United States* v. *Peck*, 29 IBLA 357, 362, 84 I.D. 137, 139 (1977), we held:

[T]here has been a distinction between what has been called "common" or "ordinary" clay which has *not* been considered a "valuable mineral deposit" within the meaning of the mining laws, and deposits of clays having exceptional qualities useful for purposes for which common clays cannot be used, which make them locatable as valuable mineral deposits. [Italics in original.]

[2] Judge Mesch based his conclusions that bentonite suitable for pelletizing taconite is exceptional on the following analysis of the meaning of common clay:

The Bureau of Mines recognizes common clays as those clays that are virtually unlimited in occurrence and used chiefly for building brick, drain tile, vitrified sewer pipe, other heavy clay products, light weight aggregate, and in cement manufacturing (Exh. K-200 pp. 3, 4, 7).

In *Holman* v. *State of Utah*, * * * [41 L.D. 314 (1912)] the Department recognized common clays as those found in vast deposits underlying great portions of the arable land of the country which might be used on account of a temporary local demand for brick.

The Materials Act of July 31, 1947, 61 Stat. 681 [30 U.S.C. § 601 (1976)], authorized the Secretary of the Interior to dispose of "common clay." In commenting on the bill which became that Act, the department recognized "common clay" as "[c]lay to be used for the manufacture of brick, tile, pottery, and similar products." [S. Rept. No. 204, 80th Cong., 1st Sess. 3 (1947), *cited in*] *United States* v. *Mattey*, 67 I.D. 63, 65, 66 (1960).

In *United States* v. *Peck, supra*, the Department found that clay used only for structural brick, tile, and other heavy clay products, pressed or face brick, pottery, earthenware and stoneware was a common clay. The Department also recognized that "certain clays with special characteristics making them useful for particular uses * * * outside the manufacture of general clay products, have been considered locatable." [29 IBLA at 381, 84 I.D. at 149.]

Based upon the above, "common clays" might properly be defined as those clays that are virtually unlimited in occurrence throughout the United States and are useful only on a limited geographic basis for general clay products such as ordinary brick, title, pottery, earthenware, stoneware, cement and other heavy clay products.

(Decision at 10-11).

He observed several differences between such clay and bentonite:

The *Bureau of Mines Mineral Facts and Problems*, 1975 Edition, draws the follow-

ing distinctions between bentonite and common clay and shale used for structural or "heavy clay" products such as building brick, drain tile, and vitrified sewer pipe:

1. Deposits of common clays, shales, and fire clays are wide spread. Ball clay, bentonite, fuller's earth, and kaolin deposits occur in smaller geographic areas. Reserves of common clay and shale are virtually unlimited. Reserves of bentonite, owned or controlled by domestic producers, are estimated at 100 million short tons.

2. Common clay and shales are relatively low in unit value. The actual price in dollars per short ton is approximately $1.80. The actual price in dollars per short ton for bentonite is approximately $15.49.

3. Transportation costs are critical for common clays. The economic radius for shipment of common clay or shale products is usually 200 miles or less. The other clays, being less abundant and higher in unit value, can be marketed at greater distances from production centers. Consumers had little choice but to use bentonite even though in many cases the shipping costs exceeded the value of the clay at the mine or processing plants. (Exh. K-200, pp. 1, 2, 4, 7-9).

(Decision at 8).

Although contestant dismisses Judge Mesch's concept of common clay as "simplistic" and "inadequate," it differs little from the description that served Under Secretary Chapman's purpose in identifying to Congress the common clay which is not locatable but which would become salable under the Materials Act of 1947, *supra,* cited in Judge Mesch's opinion. Moreover, it closely follows the concept of common clay used in *Peck,* a decision in which a century of precedent relating to clay was analyzed. This Board noted: "Early in the administration of the General Mining Laws * * * the mineral character of land or locatability of a clay deposit depended upon the usability of the deposit for various purposes." 29 IBLA at 368, 84 I.D. at 142. In reviewing the applicable legal precedents, the Board catalogued those uses which were held to make a deposit locatable and those which did not. In holding that a common clay is one marketable for the purposes recited, or similar ones, Judge Mesch is merely articulating one of the most well-established principles in the history of the mining law, as our *Peck* decision makes clear.

Judge Mesch noted that the Bureau of Mines classifies clays in six groups: Kaolin, ball clay, fire clay, bentonite, fuller's earth, and common clay and shale.

No decision has ruled on the locatability of bentonite that has been proven to be marketable for pelletizing taconite. However, the position of the contestant represents the culmination of 20 years of thinking about the status of bentonite under the laws relating to mineral development. A narration of this history is necessary for a full appreciation of the issues in this proceeding.

Judge Mesch summarized the past policies of the BLM which recognized bentonite as a locatable mineral:

Between 1946 and 1969, BLM issued mineral patents covering 76,237 acres containing bentonite. Of this total, almost 64,500 acres or 85 percent of the lands were in Wyoming. Over 6,400 acres, or 8.5 percent of the lands, were in Montana. The remaining lands were in various other states. (Exh. K-18, p. 22). Until the late 1960's the policy and practice of BLM was to issue patents for bentonite claims if there was, in fact, a bentonitic clay within the claim and the bentonite could be mined and marketed at a profit. (Tr. 74-

76, 1085-1086; Exh. K-28, p. 1). The sole test of locatability was whether the clay was bentonite, which was often determined on the basis of a "taste test" in the field. (Exh. G-41, p. 109-111).

This policy was recognized in *Ed. L. Messersmith el al.* v. *American Colloid Company,* BLM-A 039020 (Wyoming) (November 27, 1957), where the Director of BLM stated, by way of dicta, that "[b]entonite . . . has distinct and special value, and is locatable on public domain lands of the United States." (p. 2). This decision was appealed. In *I. B. Griffith el al.,* A-27615 (July 24, 1958), the delegate of the Secretary stated, "I have carefully examined the statements of law made by the Director and find no error in them." (p. 2).

(Decision at 18).

Because the widespread occurrence of this mineral in Wyoming was creating surface management problems, BLM managers began to question bentonite's classification as a locatable mineral as early as 1961. On June 30, 1961, the Worland District Manager wrote the Wyoming State Director:

> Without proper management this entire range land must come to a standstill since management can not continue without range improvements and they can no longer be constructed in an area where the land may possibly move into private ownership. The present improvements are being lost or are losing their effectiveness, for example, one mining claim located on a fence line can destroy the fence and return the area to open range. Loss of management such as this destroys all that has been gained in the past years. Mining claims of this type interfere tremendously with the watershed planning and systematic watershed improvement approach.
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> In an area such as this where the so-called mineral is in widespread abundance the Bentonite would be comparable to sand and gravel, not actually being a mineable mineral. If this were the case as you have suggested, Bentonite could be handled under the Material Sales or the Mineral Leasing Act. In either land law, leasing or sales, stipulations could be used to guard against surface destruction and at the same time allow range development and improvement of the land since it would not be leaving Federal ownership.

(Exh. K-42 at 2).

It was never asserted that all bentonite should be considered leasable. But because bentonites may be divided into calcium bentonites and sodium bentonites, it was suggested that the sodium bentonites should be subject to those provisions of the Mineral Leasing Act that provide for issuance of leases for silicates of sodium. 30 U.S.C. §§ 261-262 (1976). In 1972, however, the Office of the Solicitor issued a memorandum to the Director, BLM, which noted that the Geological Survey had made no determination that a particular type of bentonite is a silicate of sodium within the meaning of the Act. The memorandum left open the possibility that at some future date some bentonites may be determined to be silicates of sodium. Even so, this would not affect the validity of claims located for that mineral when it was legally locatable. *Applicability of the Mineral Leasing Act to Deposits of Bentonite,* 79 I.D. 642 (1972). To be sure, those physical properties which give this particular bentonite its value have been associated with the presence of sodium as an exchangeable cation. In *United States* v. *Union Carbide Corp.,* 31 IBLA 72, 84 I.D. 309 (1977), we held that the presence of the sodium cation in deposit of zeolite did not make that material leasable since the sodium ion was an exchangeable cation and was not essential to the nature of the mineral. The Director, Geological

Survey, suggests that this is conclusive of the issue for bentonite as well (Exh. W-6). One expert witness testified that sodium is an exchangeable cation and its concentration in the clay can be modified by additives. He speculated that the special properties of bentonite often associated with its sodium concentration are more properly attributable to the way the clay was crystallized, the unique size and shape of the particle, and its charge (Tr. 1802-03).

Furthermore, the extent to which the common variety test could be applied to deposits of bentonite was not clear. The syllabus of BLM's *Messersmith* decision, cited by Judge Mesch, *supra,* states that bentonite is not a common variety mineral under the Surface Resources Act, 30 U.S.C. § 601 (1976). On Sept. 26, 1968, the Associate Solicitor, Division of Public Lands, advised the Denver Regional Solicitor as follows:

> In the absence of a determination that a particular deposit of bentonite had no values other than as ordinary clay (disposable only as a mineral material under 30 U.S.C. § 602), it is questionable that the "common varieties" test of section 3 of the 1955 Act (30 U.S.C. §611) is pertinent since bentonite is not among the materials specifically mentioned in that section and may well not fall within any of those categories. See *United States* v. *Harold Ladd Pierce,* A-30564 (Aug. 30, 1968).

(Exh. K-51). In *United States* v. *Gunn,* 7 IBLA 237, 79 I.D. 588 (1972), we considered an assertion by a mining claimant that a deposit of bentonite found on his claim was exceptional because it could be used for pelletizing iron ore. Nevertheless, we found the claim invalid. The contestant argues that this constitutes a determination by this Board that bentonite suitable for pelletizing taconite is not an exceptional clay. Nothing in our decision, however, supports this interpretation. After reviewing the evidence submitted by the mining claimant, we held as follows:

> Most of his testimony, however, is actually more in the nature of advice for future work to be done on the claims and for investigating market possibilities. There is insufficient evidence that there is clay of a quality that can be marketed profitably for commercial purposes for which common clays cannot be sold. There is little concerning the quantity of clay within the claim that may be based on more than inference. Other than the discussion concerning freight costs, there is no evidence concerning the economic realities of a mining operation within the claims, such as evidence concerning possible prices for which the clay could be sold and possible costs of a mining operation. Without an adequate showing that the clay is of a quality and quantity which can be marketed profitably for commercial purposes for which common clay cannot be sold, the claim is not a valid claim based on the clay alone. *United States* v. *Mary A. Mattey, supra.*

7 IBLA at 250-51, 79 I.D. at 594 (1972). The decision established that bentonite would be considered as a form of clay, so that mining claimants would be required to establish that the bentonite from their claims was marketable for purposes for which ordinary clays could not be used.

Meanwhile, BLM commissioned a survey to determine the extent of bentonite resources in Wyoming, and issued a series of instruction memoranda (IM) setting forth criteria to be used in deter-

mining the validity of mining claims located for bentonite. Judge Mesch summarized the development of these IM's as follows:

IM No. 70-429 was issued on July 27, 1970. This IM required a determination as to whether the bentonite within a claim was an "uncommon variety" with "distinct and special value" and therefore subject to location under the mining laws. The IM stated that "[t]he requirement of distinct and special value is met when the physical-chemical properties of the bentonite despoit are such that a marketable bentonite can be produced from the deposit tested." No specific minimum physical or chemical standards were specified. The IM recognized that bentonite could be blended and physical and/or chemical means used to produce a marketable product. The IM cautioned that industry "standards for some uses (e.g. taconite processing) vary according to the consumer and that certain benefication practices (e.g. blending) make comparison with existing standards difficult." (Exh. K-5).

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IM No. 74-343 was issued on September 3, 1974. This IM required a determination as to whether the bentonite within a claim was of an "exceptional nature." The IM noted that the test for determining whether a deposit of bentonite is of an "exceptional nature" is similar to that for determining an "uncommon variety." The IM listed minimum standards for (1) viscosity or yield, (2) green bond strength, (3) dry bond strength, (4) grit content, (5) water loss, and (6) pH value. It also provided that blending or the use of chemical additives "are prohibited in meeting the above-listed standards." The IM stated that a bentonite deposit would not be considered locatable unless *all* standards were met. (Exh. K-4).

IM No. 77-226 was issued on April 22, 1977. This IM again stated that "[t]he test for determining whether a deposit of bentonite is of an 'exceptional nature' [and therefore locatable] is similar to that for determining what an 'uncommon variety' is." This IM modified the 1974 IM by eliminating all of the previously required minimum physical-chemical standards except those relating to (1) viscosity or yield and (2) water loss. It also reduced the required minimum yield from 91 barrels to 80 barrels and raised the water loss standard from 13.5 milliliters to 17.0 milliliters. The IM provided that blending between claims or the use of chemical additives are prohibited in meeting the standards. (Exh. K-2).

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Although the contest Complaints were filed in 1973 and the standards set forth in IM No. 77-226 were adopted by BLM in 1977, the Contestant nevertheless insists that the bentonite found within the claims is not locatable unless it meets or exceeds the "80-barrel yield" and "17 milliliter water loss" specificiations contained in the 1977 IM.

According to the Contestant, the 1977 IM "was designed to define locatable bentonite." (Contestant's Answer Brief, p. 22). The yield and water loss standards "define exceptional or uncommon deposits of bentonite." (Contestant's Opening Brief, p. 152). They are "the criteria by which a deposit of bentonite can be measured to determine whether or not it is locatable." (Contestant's Opening Brief, p. 152). If deposits of bentonite do not "meet or exceed those criteria, they must be held to be common varieties of bentonite and not locatable under the mining laws." (Contestant's Opening Brief, p. 160). [Italics in original.]

(Decision at 19-20).

This history demonstrates that BLM's position on the legal standard for the locatability of bentonite has undergone a considerable evolution during the past 25 years, a period when bentonite's use for pelletizing taconite had emerged from its experimental beginnings to one of the major uses of that clay. Once, a bentonite deposit was locatable merely on the basis of being identified as such. Now, BLM contends, bentonite is subject to location only if a deposit meets certain numerical criteria, regardless whether a deposit falling below those criteria can

still be marketed for one of the major industrial uses for bentonite. We will now consider the contestant's legal theory in support of this contention.

The contestant scorns the Judge's decision as making bentonite locatable by definition. Judge Mesch did no such thing. He merely held that if a claimant can establish that a deposit of bentonite is marketable for purposes for which common clay cannot be used, the deposit is locatable. As we have seen, Judge Mesch applied a concept of common clay that is consistent with over a century of precedent concerning that mineral, which includes Departmental decisions and legislative material.

The contestant's attack on Judge Mesch's decision only masks its own redefinition of common clay to include material which is not so widespread in relation to its market as any mineral that Congress or the Department has characterized as common, a mineral which can be marketed for a purpose utterly unlike any used to characterize, if not define, common variety minerals.[8] Although contestant articulates a plausible theory to support this redefinition, that theory is not supported by the authorities upon which it relies.

The contestant's theory is basically this: (1) Bentonite is sufficiently widespread to be considered a common variety of clay; (2) the test for distinguishing common clay from exceptional clay is the same test employed to distinguish uncommon variety from common variety minerals; (3) that test requires us to compare bentonite deposits with other bentonite deposits, rather than with deposits of ordinary clay; (4) in order to make this comparison, criteria must be developed to distinguish common bentonite from uncommon bentonite; and (5) under those criteria, the bentonite deposits on these claims are not locatable. We will pass over the first contention for the moment, and address the second.

The contestees, intervenors, and Judge Mesch vehemently disagree with contestant's argument that the test to distinguish common clay from exceptional clay is the same as the test for distinguishing common varieties of sand, stone, gravel, pumice, pumicite, and cinders from uncommon ones. Under 30 U.S.C. § 611 (1976), the term "common varieties" does not include "deposits of such materials which are valuable because the deposit has some property giving it a distinct and special value * * *." The contestant feels that refinements of this test expressed in cases concerning stones apply equally in cases involving clay, and cites a number of clay cases in which the Department has invoked this general test. *E.g., United States* v. *Schneider Minerals, Inc.*, 36 IBLA 194 (1978). We note that common clay is not listed among the common variety minerals withdrawn from location under 30 U.S.C. § 611 (1976). However, the term "common clay" is employed in 30 U.S.C. § 601 (1976), which was originally enacted in

[8] *See* note 10, *infra.*

1947 and authorizes the disposition of certain minerals including common clay that are not subject to disposition under the mining laws. Because common clay, unlike sand or gravel, was not subject to location before 1955, its status was not changed by the 1955 Act. *United States* v. *O'Callaghan,* 8 IBLA 324, 79 I.D. 689 (1972). Thus, the uses of clay cited by Under Secretary Chapman in his comments on the 1947 legislation remain operative in distinguishing common from exceptional clay, as *Peck* recognized.

Accordingly, in *Peck* the Board recognized a distinction between the test used to determine common clay and the test used to determine common varieties of sand and gravel. This distinction arises from the fact that a century of precedent holds that common clay is not subject to location and constitutes a body of law historically distinct from law relating to other common minerals, the status of which has varied from time to time. This fact prompted the Board to observe that "although many of the criteria in determining what constitutes a common variety of material under section 3 of the Surface Resources Act may be applicable in determining whether a deposit of clay is locatable generally, the basis for determination should not be confused." 29 IBLA at 375, 84 I.D. at 146. It is quite plain that the author of *Peck* consciously confined her authority to the body of law regarding clay and disregarded the body of law involving other common minerals, although it is not clear how this distinction affected the outcome of the case. However, the distinction is not so great as the parties and the Judge would have us believe, and as we shall demonstrate, it has no effect here.

The test Congress chose to distinguish between common and uncommon varieties of minerals in 1955 was not a new creation. It echoes the test established in *Zimmerman* v. *Brunson,* 39 L.D. 310 (1910), overruled, *Layman* v. *Ellis,* 52 L.D. 714 (1929).[9] In *Zimmerman,* the Department held that deposits of gravel and sand, suitable for mixing with cement for concrete construction, but having no peculiar property or characteristic giving them special value, and deriving their chief value from proximity to a town, do not render the land in which they are found mineral in character within the meaning of the mining laws or bar entry under the homestead laws notwithstanding the land may be more valuable on account of such deposits than for agricultural purposes. The authorities cited for this holding included two cases involving deposits of common clay, *Dunluce Placer Mine,* 6 L.D. 761 (1888), and *King*

[9] When *Zimmerman* was overruled in 1929, common varieties of gravel became subject to location while common clay remained unlocatable. *See United States* v. *Mattey,* 67 I.D. 63, 67 (1960). It is interesting to note, however, that the arguments advanced by the Department for overruling *Zimmerman* are difficult to distinguish from rationales that would support making common clay locatable. *Zimmerman* noted that "a search of the standard American authorities has failed to disclose a single one which classifies a deposit such as [gravel] as mineral." In *Layman,* the Department noted that this was no longer true, and cited a number of authorities suggesting that economically valuable substances should be classified as mineral. Among the authorities cited in *Layman* was Lindley, whose treatise on mines criticized Departmental decisions such as *Dunluce Placer Mine,* 6 L.D. 761 (1888) (holding common brick clay to be nonlocatable), for essentially the same reasons that *Layman* cited for making gravel subject to location. 1 C. H. Lindley, *A Treatise on the American Law Relating to Mines and Mineral Lands* § 424 (1897).

v. *Bradford,* 31 L.D. 108 (1901). In those cases, *Zimmerman* noted, a common clay valuable solely for general building purposes, and whose chief value arose from its proximity to a town or city, was held not to be a mineral. Thus, while *Peck* recognized a distinction between the common clay test and the common variety test, the *Zimmerman* case establishes some common origin. The contestant has cited a number of clay cases in which the Department has applied the tests interchangeably.

If we accept, for the purpose of argument, the contestant's assertion that the criteria for determining common varieties of stone are the same as the criteria for determining whether a clay is common clay, we must then consider the contestant's third premise, that those criteria require us to compare Kaycee's deposits of bentonite with other deposits of bentonite, rather than with deposits of common clay in general. This results from the contestant's view that we are required to make "a comparison of the mineral deposit in question with other deposits of such minerals generally." *United States* v. *U.S. Minerals Development Corp.,* 75 I.D. 127, 132 (1968). In that case, the Department held a deposit of colored quartzite ("Rosado stone") to be a common variety, after comparing it with other deposits of colored quartzite rather than deposits of quartzite generally. Similarly, in *Brubaker* v. *Morton,* 500 F.2d 200 (9th Cir. 1974), the court sustained the Department's comparison of the deposits of colored stone with other deposits of colored stone rather than with deposits of gray stone. In *Boyle* v. *Morton,* 519 F.2d 551 (9th Cir.), *cert. denied,* 423 U.S. 1033 (1975), it was held that the Department properly compared the deposit at issue with "similar" decorative decomposed granite rather than with decomposed granite generally.

The application of this principle sometimes requires us to enlarge rather than contract the range of minerals with which a particular deposit must be compared. For example, in *United States* v. *Dunbar Stone Co.,* 56 IBLA 61 (1981), the claimant asserted that a deposit of Yavapai schist, a stone which was used for facing on buildings and other building purposes, was an uncommon variety because it was an uncommonly good deposit of schist. We ruled, however, that simply because it might be an uncommonly good schist did not necessarily make it uncommonly good stone. Other types of common stone were suitable for wall facing. We held further:

> We are not obliged to consider how a particular deposit of a common stone type ranks when compared only with other deposits of the same generic type (*i.e.,* limestone, sandstone, shale, granite, basalt, slate, etc.), and hold that a superior or unusual occurrence *of that particular type* is an uncommon variety, when its special characteristics only make it suitable to be used in the same manner as common varieties of other types. [Italics in original.]

Id. at 65–66.

Thus, contestant maintains, we are required to compare deposits of bentonite with other deposits of bentonite, since that admittedly is

the only clay which can be used for certain purposes. One example demonstrates the obvious fallacy of extending this argument too far: gemstones would become common varieties of stone if comparison were limited only to other gemstones. Even jewelers distinguish between investment grade diamonds and those which are of lower quality but still suitable for jewelry, and these can be distinguished from industrial diamonds.

A mineral does not have to be so scarce as diamonds before we stop comparing one deposit with a similar deposit in order to determine its common or uncommon character. This issue was squarely presented in *United States* v. *Bolinder*, 28 IBLA 187, 83 I.D. 609 (1976), which involved a deposit of geodes. The Government had contended that the contested deposit of geodes was a common variety because it did not differ from other deposits of geodes. We agreed that the contested deposit did not differ from other geodes; we disagreed that it was a common variety. We held that the proper basis of comparison was with deposits of stone generally, not other deposits of geodes. The decision states no general rule when a deposit of stone will be compared with common stone generally rather than with stone just like itself. The decision, however, affords ample basis for such generalization. The Board noted that geodes possessed an economic value in trade and the ornamental arts, apart from whatever commercial value may be attributed to their uniqueness as a so-called "natural curiosity," a use which would not have made them valuable within the meaning of the mining laws. The uses making them locatable can be distinguished from use as a building material which has typified common variety minerals in the cases relied on by contestant.[10] The Board also noted that geodes are not widespread. The *Bolinder* case then governs the comparison of deposits when (1) the contested deposit is marketable for purposes which are not typical of common variety minerals; and (2) the material is not widespread. Only bentonite can be used to pelletize taconite, which is not a typical common variety use. How widespread must a deposit be before the rule in the *Bolinder* case will no longer apply? This brings us

[10] The legislative history of the 1955 Act makes clear that Congress and this Department identified common variety minerals as those used primarily for building purposes and deriving their value from proximity to market.

A House Report on an early version of the bill included the following characterization by this Department of the minerals which would no longer be subject to location:

"Many of these commonplace materials are found in deposits of varying thickness over the earth's surface. They can be removed usually by stripping the surface in a very short period of time. Those genuinely interested in the use or sale of these materials ordinarily have no real interest in title to the land itself. *The value of such materials is difficult to ascertain, moreover, since it depends so much on incidental factors like the proximity of the deposits to prospective consumers, local needs, and the like, rather than on any generally recognized value of the materials such as may be ascribed to valuable deposits of gold, coal, or similar minerals.*" H.R. Rep. No. 306, 84th Cong., 1st Sess. 3 (1955) (italics added).

Congressman Engle, Chairman of the House Interior Committee and a sponsor of the bill which was enacted, explained why that bill would prohibit future location of claims for common variety minerals:

"*The reason we have done that is because sand, stone, gravel, pumice, and pumicite are really building materials,* and are not the type of material contemplated to be handled under the mining laws, and that is precisely where we have had so much abuse of the mining laws, because people can go out and file mining claims on sand, stone, gravel, pumice, and pumicite taking in recreational sites and even taking in valuable stands of commercial timber in the national forests and on the public domain." 101 Cong. Rec. H 7454 (daily ed. June 20, 1955) (italics added). Of course, there can be uncommon varieties of building stone. *E.g., United States* v. *McClarty*, 17 IBLA 20, 81 I.D. 472 (1974). *See generally United States* v. *Coleman*, 390 U.S. 599 (1968).

back to considering the contestant's first premise: that bentonite is widespread. The point of contestant's contention is that because bentonite is widespread and abundant, it is, perforce, a "common clay." Therefore, only deposits of bentonite with distinct and special values not found in ordinary "common" bentonite are subject to location, which requires that bentonite deposits be compared only with the other bentonite deposits.

Judge Mesch held that the fact that bentonite may be of widespread occurrence has no bearing on the issue of its locatability.

To support its contention that bentonite is widespread, BLM conducted a resource study which concluded that in Wyoming there are 963 million tons of betonite resources (Contestant's Exh. 17, p. 23).[11] Another exhibit asserts that there are 1.82 billion metric tonnes (1 tonne equals 2,204 pounds) of identified bentonite resources in the United States, although it does not distinguish between swelling and nonswelling bentonites (Contestant's Exh. 23, Table 2).[12] The contestant has made an offer of proof that 15,220 bentonite mining claims covering 775,200 acres have been located in Wyoming, 4,667 claims covering 200,410 acres in Montana, and 493 claims covering 19,250 acres in South Dakota.[13]

One can easily be impressed by these figures. Even Thorsen's testimony that the minable reserves in Wyoming total up to 125 million tons does not diminish their awesomeness (Tr. 1140). Their legal significance diminishes, however, when one considers the other minerals Congress has classified as common. Common clay deposits usable for the manufacture of common brick are identified as "virtually unlimited." United States Department of the Interior, Bureau of Mines, *Mineral Facts and Problems,* 256 (1975).[14] United States sand and gravel resources are described as "inexhaustible." *Id.* at 936. The United States reserves of pumice, pumicite, pozzolan, scoria, and volcanic cinders are estimated at 1,250,000,000 short tons. *Id.* at 873, Table 1. The bulk of the United States demand, however, is for uses which do not require material of an exceptional nature and for which other common vari-

[11] To be included, a deposit must have a yield of 75 barrels per ton or more and a grit content of less than 8 percent, or a green compressive strength of at least 5 pounds per square inch and a dry compressive strength of no less than 50 pounds per square inch. The stripping ratio for the deposit could not be greater than 25 to 1 (Contestant's Exh. 17 at 1-2). We note that much of this material is subeconomic, since a stripping ratio of 8 to 1 is considered only marginally profitable. *See* Contestant's Exhs. 21 and 22.

[12] "Identified resources" are defines as "specific bodies of mineral-bearing material whose location, quality, and quantity are known from geologic evidence supported by engineering measurements with respect to the demonstrated category." "Reserves" are defined as "that portion of the identified resources from which a usable mineral can be economically and legally extracted at the time of determination" (Contestant's Exh. 23, Table 2).

[13] Contestee and intervenors have moved to strike this offer of proof from the record. In light of our disposition of the merits of this case, it is not necessary to rule on this motion. Even if the record were opended to allow its admission, this evidence would not prompt us to change the result.

We do note that the offer was properly made. Under 43 CFR 4.452-6(b), a party may make an offer of proof to this Board of evidence excluded by an Administrative Law Judge at a contest proceeding. However, we do not rule upon the merits of Judge Mesch's exclusion of this evidence.

[14] In *Peck, supra,* we took official notice of this publication. 29 IBLA at 367, 84 I.D. at 141-42. In this proceeding, a preprint of this publication's chapter on clays was admitted into evidence as exhibit K-200.

ety minerals may be substituted. *See id.* at 875, Table 2.[15] When one looks at the figures for reserves and resources for kaolin and fire clay, and compares them with consumption listed in the *Minerals Yearbooks,* one finds that the reserves of these clays bear an equal or greater relationship to consumption than is true for bentonite. Almost a century of precedent precludes classification of deposits of these clays as common unless they are marketable only for common brick or other common clay uses.

Some locatable minerals may be more abundant than bentonite. In *United States* v. *Oneida Perlite Corp.,* 57 IBLA 167, 88 I.D. 772 (1981), 15 claims covering almost 2,000 acres had been located for the mineral perlite which is not a common variety mineral. The estimated total reserves on the claims were at 200–300 million tons. The Board estimated that the reserves on those claims alone could have satisfied United States production for some 332 to 498 years, including total domestic consumption and total exports. Nevertheless, the total *reserves* of perlite in one contest proceeding involving a single patent applicant bear a greater relationship to the national demand for that mineral than the estimated *resources* of bentonite in the State of Wyoming. Other minerals which are universally recognized as locatable are also widespread and abundant, such as silica sand and gypsum. *See United States* v. *Duval,* 1 IBLA 103 (1970), *aff'd,* 347 F. Supp. 501 (D. Oregon 1972), *aff'd,* Civ. No. 72-2839 (9th Cir. 1973); *United States* v. *Bartlett,* 2 IBLA 274, 78 I.D. 173 (1971).

Having demonstrated the error in contestant's theory that deposits of bentonite must be compared with deposits of common clay generally, we must determine the effects of this ruling on the remaining issues in this contest. In *United States* v. *Hooker,* 48 IBLA 22 (1980), we held that where a mineral examiner applies an incorrect legal standard, his opinion cannot serve, by itself, to establish a prima facie case of invalidity. In *United States* v. *Bolinder, supra,* we were called upon to review another decision by Judge Mesch holding that the Government had not made a prima facie case that geodes were a common variety where that case rested only upon a comparison of that deposit with geodes from other areas, instead of comparing the deposit with stone generally. We saw no reason to change that holding. However, in *United States* v. *Gunn, supra,* we held that a prima facie case is established by the Government through the testimony of an expert witness who had examined the claims and performed tests on the deposits which showed that the bentonite clay did not meet commercial standards for certain uses for which some bentonite clays are suitable.

Thus, we cannot reject BLM's standards of locatability simply because they are based on an erroneous legal theory. We must consider contestant's argument that the standards still indicate

[15] One should not draw too close a comparison between the estimated reserves of pumice minerals with the estimated reserves of bentonite referred to above. The same publication estimates the reserves of bentonite at only 100 million tons in contrast to the 1 billion tons reserve estimated in the Government study in this case.

whether a bentonite deposit is marketable for uses for which common clays cannot be used.

[3] We note that much of the evidence introduced by the Government in this proceeding appears to be directed at establishing the criteria set forth in these IM's as the conclusive determinants of the locatability of deposits of bentonite. However, an IM is merely a document for internal use by BLM employees. As the Supreme Court recently noted in *Schweiker* v. *Hansen,* 450 U.S. 785, 789 (1981), such documents are not regulations and have no legal force. Such memoranda may be useful to those BLM employees who are given the responsibility of evaluating mining claims, and, indeed, they are obliged by the conditions of their employment to abide by the policies and to follow the instructions handed down by their Director. *See Margaret A. Ruggiero,* 34 IBLA 171 (1978). If such criteria are consistent with commercial standards for uses other than those for which common clays can be used, failure of a deposit to meet those specifications would constitute a prima facie case that the deposit was not locatable. *See United States* v. *Gunn, supra.* Of course, such a case could be overcome if the claimants establish that they could be marketed for such a purpose, notwithstanding the failure of the material in the deposits to meet the BLM specifications.

Judge Mesch summarized the testimony relating to how these standards were derived:

> The "80-barrel yield" and "17 milliliter water loss" standards set forth in IM No. 77-226 were derived from a report prepared by an Industrial Minerals Specialist with BLM. (Tr. 680, 681, 801). This witness testified that he arrived at the standards "wholly independent of industry specifications" (Tr. 861) and "really didn't consider industrial uses that much." (Tr. 712, 713). He stated that all three major bentonite consuming industries "could not" have common specifications for barrel yield. (Tr. 956). He said that a bentonite could meet the specifications for gray iron foundry and not meet the specifications for oil drilling mud, and a bentonite could meet the specifications for taconite and not meet the specifications for a drilling mud. (Tr. 710). *He would not consider a bentonite that could meet only the specifications of one industry as an exceptional or locatable bentonite. (TR. 711). He stated that the barrel yield and water loss figures in the IM were not specifications for the taconite industry, but were "simply guidelines which define what we consider to be high-grade, locatable bentonite . . . [i]t's some kind of a handle to evaluate bentonite deposits with." (Tr. 811). He admitted there are many bentonite deposits that are being actually mined that do not satisfy the standards adopted in IM 77-226.* (Tr. 864, *865).* [Italics added.]

(Decision at 22).

BLM defends those standards by noting there is a close correlation between the industrial specifications found in contestant's exhibit 14 with the suggested specifications for locatable bentonite. However, as we have established, a deposit of bentonite need not be marketable for all major industrial uses before it will be considered locatable; it only needs to be marketable for one use which common clay cannot serve, such as pelletizing taconite. Contestant admits that it was not the purpose of the criteria to establish a standard for determining whether a deposit of bentonite could be

marketed for this use (Statement of Reasons at 50; Tr. 810-11). It necessarily follows that a prima facie case is not made merely by showing that a bentonite deposit falls below those criteria. *Cf. United States* v. *Gunn, supra.*

Judge Mesch concluded:

> The Contestant's definition of "exceptional" bentonite, i.e., bentonite with an "80-barrel yield" and "17 milliliter water loss" or bentonite that is suitable for use in every one of the three major bentonite consuming industries, appears to be based on nothing more than an arbitrary set of standards that bear no relationship whatever to the test of locatability of clays applied by the Department. The definition has absolutely nothing to do with an unusual property or characteristic of bentonite making it suitable for any specified commercial purpose or use for which common clays cannot be used.

(Decision at 25).

Despite the fact that a number of witnesses have testified that barrel yield is not an important criterion in measuring bentonite's performance as a binder, the mere fact that many customers still adhere to a barrel yield specification establishes that criterion as relevant to the issue of marketability. *See* Contestant's Exh. 27 at 6. Although failure of a deposit to meet the criteria of the IM would not establish a prima facie case of invalidity, such a case would be made under *Gunn* if the contestant's evidence showed that the clay did not meet criteria such as barrel yield that are still prevalent in the taconite industry.

[4] Nevertheless, one difficulty posed by BLM's criteria is the prohibition on blending and additives. These are common practices in the bentonite industry. Judge Mesch offers the following description of Kaycee's procedures:

> Kaycee Bentonite Corporation blends its bentonite in order (1) to provide its customers with a consistent product that will not vary over a long period of time, and (2) to provide as long a mining life as possible for the property. (Tr. 1094, 1095). All bentonite producers follow a blending practice. (Tr. 1095; Exh. G-42, p. 56). * * *
>
> Kaycee Bentonite chemically treats some of its bentonite for some of its taconite customers in order to increase the barrel yield. (Tr. 1096). This is done where the particular consumer still maintains a barrel yield specification. (Tr. 1096). At the present time the only additive the company uses is a polymer, an organic compound. (Tr. 1096). They use from one-quarter to one-third of a pound of a polymer to a ton of bentonite. (Tr. 1097). The polymer costs on the order of 70 cents a pound and increases the overall cost of a ton of bentonite by about one to one and one-half percent. (Tr. 1097). In the opinion of the President of Kaycee Bentonite, the bentonite within the contested Kaycee Claims could be marketed to their taconite customers who have eliminated the barrel yield specification without the use of a polymer. (Tr. 1098).

(Decision at 35).

If common clay could be used as a blender or respond to treatment, then similar bentonite would not be subject to location. The following findings by Judge Mesch, however, indicate otherwise:

> As previously noted, "Wyoming" or "western" bentonites have a unique set of chemical and physical properties. (Tr. 1791-1794). No earth or non-bentonitic clay, however treated or blended, can duplicate those chemical and physical properties. (Tr. 1014, 1097, 1098, 1184). It is the chemical and physical properties of bentonite, itself, which make it useful for purposes for which common clay cannot be used. Blending or the use of chemical additives does not add to or alter its chemical or physical properties, it merely enhances the properties inherent in bentonite as it occurs in nature. A witness, with excellent qualifications, testified:
>
> "This is the reason they do add monovalent cation to enhance the property of the clay that's already there, but they could put a monovalent cation in some mont-

morillonites, a ton of it to a ton of the clay, and it wouldn't do anything at all because that particular montmorillonite does not have the characteristic charge, shape, and size that is necessary to do the particular job that you are trying to get done. It just doesn't do anything." (Tr. 1804).

(Decision at 36).

The evidence establishes that the amenability of bentonite to blending or treatment with additives distinguishes it from common clay.

The Martens Claims

Judge Mesch did not rely on BLM's criteria for the locatability of bentonite in holding that the five Martens claims were invalid. Instead, he found that the claimants had failed to show that the bentonite deposits on the claims could be mined, removed, and marketed at a profit. On appeal, the claimants allege that Judge Mesch erred in failing to grant their motion to dismiss the contest; that his decision is not supported by substantial evidence or relevant authority; that his decision is arbitrary, capricious, and characterized by an abuse of his discretionary power; and that the Judge's actions deprived them of their property rights without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. In addition, these claimants contend:

That the Administrative Law Judge incorrectly applied the prudent man marketability test to the facts in this case. The rule as applied would require that the bentonite from the claims had been sold rather than proof that is was saleable. Bentonite producers could, if this rule were applied, prevent any individuals from patenting any placer mining claims by refusing to buy the bentonite from individual claims. When the individuals lose those claims because of an inability to market the bentonite then the bentonite producers could acquire the lands and the bentonite. Thus the rule as applied tends to thwart the intent of the law and promote a monopolistic control of the mineral by the producing companies.

* * * That the Administrative Law Judge failed to consider the evidence of the other contestees, and its effect on the case of these appealing contestees, in making his decision upon the question of marketability for the reasons that it was shown that bentonite of similar quality and quantity was being mined and marketed at a profit by Kaycee Bentonite from a distance of 80 miles from a bentonite plant when the bentonite on the claims of the contestees is only 45 miles from a bentonite plant in Worland, Wyoming.

(Statement of Reasons at 2).

BLM responds that these claimants' assertions are largely unsupported and erroneous conclusions of law. BLM further notes that a mining claimant must show that the mineral deposit on *his* claim is marketable. Proof of a market for similar material is inadequate. *Melluzzo* v. *Morton,* 534 F.2d 860, 863-64 (9th Cir. 1976).

[5] The Bowl, Rattlesnake, Bedspring, Wolftrap, and Horseshoe claims were located on various dates in Aug. of 1959, Sept. of 1962, and Oct. of 1964. These claims are included in four patent applications filed in Dec. of 1967. The five claims cover about 364 acres in Washakie County, Wyoming. Judge Mesch held these claims invalid because he found that the claimants had failed to show that the material can be mined, removed, and marketed at a profit. *See United States* v. *Cole-*

man, 390 U.S. 599 (1968). To be found valid a mining claim for any mineral must meet this test. *See Converse* v. *Udall*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969).

[6] The Judge held that a prima facie case against the validity of the claims was established by the testimony of a geologist who examined the claims of 1970 and 1974 (Tr. 210, 216). Judge Mesch summarizes his testimony as follows:

> [This witness] concluded that the bentonite within the claims could not be mined and marketed at a profit because of the low quality of the bentonite, the excessive overburden that would have to be removed, the costs of road construction for access to the claims, the hauling distances from the claims to processing plants, and the absence of any evidence of development that would indicate the bentonite had a present value for mining purposes as opposed to a speculative value based on the possibility that it might be valuable for mining at some unknown time in the future. (Exh. G-22, Tr. 216).

(Decision at 37).

The report prepared by this witness, contestant's exhibit 22, indicates that these claims hold reserves of over 400,000 tons of low grade bentonite. Thirteen out of 25 samples had a barrel yield lower than 40; the two best samples showed a yield of 80 and 82 barrels per ton. The report also concluded that the overburden was so great that no prudent operator would mine the claims.

[7] We do not find that Judge Mesch incorrectly applied the prudent man/marketability test in this case. He did not, as appellants contend, require them to show that the bentonite from the claims had been sold rather than prove that it was saleable. In his decision, Judge Mesch merely noted the holding of the court in *United States* v. *Zweifel*, 508 F.2d 1150 (10th Cir. 1975), that a presumption is raised that the claimants have failed to discover a valuable mineral deposit if there has been little or no development or operations on the claims over a long term. Where there has been no development of a claim, this presumption can be overcome by evidence that the mineral deposits on the claims can be mined, removed, and marketed at a profit. *United States* v. *Williamson*, 45 IBLA 264, 87 I.D. 34 (1980). Judge Mesch properly held, however, that appellants failed to meet this burden.

The Judge noted that these claimants also own six patented bentonite mining claims lying adjacent to one of the contested claims. The claimants' witnesses testified that the bentonite on the patented claims is the same bed of strata found on the contested claims. However, no bentonite has been produced or sold from the patented claims (Tr. 1272). The Judge noted that Federal Bentonite Co. had obtained an option to purchase approximately 60 bentonite claims held by this group of appellants, including the five claims involved in this contest. These claimants contended that the evidence derived from Federal Bentonite's work on these claims establishes a discovery of a valuable mineral deposit. Although the contestees' witnesses testified that the bentonite can be mined, removed, and marketed at a profit, we agree with the following analysis by Judge Mesch of the contestees' strongest evidence:

The mining claimants base their case that the bentonite within the contested claims can presently be mined and marketed at a profit on the "pencil studies" and staff discussions of employees of Federal Bentonite where they arrived at the conclusions that it would be economically feasible to mine the optioned properties and therefore the company should look at the property for another three years. It is obvious that the conclusions reached from the "pencil studies" and staff discussions were based on many assumptions that may or may not be correct and will remain unknown until proved or disproved during another three years of exploration and evaluation. The conclusions reached concerning economic feasibility simply established to the satisfaction of employees of Federal Bentonite that another option for three years should be taken on the property. They fall far short of establishing that the property or the five contested claims can, at the present time, be mined at a sufficient profit to warrant the commencement of a mining operation.

The conclusions reached in the "pencil studies" and staff discussions can be placed in even better perspective by considering the testimony of the Mining Superintendent for Federal Bentonite. When asked whether he determined the cost of mining from the five contested claims from the standpoint of the removal of overburden, he replied, "[n]o sir, I had no information as to mining costs on those claims." (Tr. 1435). When asked whether he knew how much road work would have to be done before you could haul from the contested claims he answered, "I have no estimation of the miles of road, no, sir." (Tr. 1440). He then testified further:

"Q There would need to be some road work done?

"A Yes, sir.

"Q Do you have any idea how expensive it is to build roads suitable for use for producing bentonite?

"A Again, I don't have a per mile cost figure that I could give you for that, no, sir." (Tr. 1449).

When asked about hauling the bentonite from the Martens properties to Worland, Wyoming, and then on to some other place by rail, he testified:

"A Yes, we have talked about that.

"Q Have you made any cost analysis of this?

"A No, sir." (Tr. 1460).

The Mining Superintendent eventually stated, "I think before we would go to the board of directors with a proposal for opening Tensleep area and a plant site that there would be more studies made, start-up costs considered, capital cost, and things like that that I didn't take into consideration in making the comparison." (Tr. 1457, 1458).

(Decision at 39–40).

[8] Judge Mesch correctly concluded that the past actions and future plans of Federal Bentonite did not indicate that a valuable mineral deposit had been found within the option claims or any of the five contested claims. He concluded that the evidence simply shows that Federal Bentonite wanted another 3 years to "explore and evaluate" the option property in an attempt to ascertain whether the bentonite might be mined and marketed at a sufficient profit to justify exercising its option to purchase. Judge Mesch properly concluded that this evidence of Federal Bentonite's exploratory activity failed to overcome the Government's prima facie case. No discovery is made where further exploration is necessary to determine whether there is a reasonable prospect of success in developing a valuable mine. *United States* v. *Edeline,* 39 IBLA 236 (1979).

[9] As for appellants' contention that Judge Mesch failed to take into account the fact that bentonite of similar quality and quantity was being mined and marketed at a profit by Kaycee Bentonite at a distance of 80 miles from the bentonite plant when the bentonite

on the claims of these contestees is only 45 miles away, there is no reason that the Judge should have done so. Appellants did not establish that their bentonite was of similar quality as that being mined by Kaycee Bentonite. Moreover, the validity of their claims must be established by a showing that the material on those claims, not some other claim, can be mined, removed, and marketed at a profit. Deposits which no prudent man would develop because they cannot be mined, removed, or marketed at a profit are not subject to location under the mining laws. Even if they could establish that the bentonite was of the same quality as other deposits sold for pelletizing taconite, they would have to show that their deposit could be marketed for this purpose rather than for a purpose for which common clay could also be used. In *United States* v. *Peck, supra,* we held that a deposit of clay marketable only for brickmaking was not subject to location. The Board cited, *inter alia, Holman* v. *State of Utah,* 41 L.D. 314 (1912), which held that deposits of kaolin or fire clay were not subject to location if marketable only for brickmaking, notwithstanding prior decisions holding such deposits subject to location if marketable for other purposes. *E.g., Dobbs Placer Mine,* 1 L.D. 565 (1883).

The Kaycee Claims

The 113 Kaycee claims were located in July of 1969, and four mineral patent applications were filed in December of that year. The Virginia No. 3 and the Jim Harlan Nos. 2 through 4 were located in Nov. of 1966; patent applications for them were filed in June 1970. The R. L. Greene Nos. 80 through 87 were located on various dates in July 1958, Jan. 1959, and Apr. 1959; a patent application was filed in June 1970. These claims cover about 4,098 acres in Johnson and Natrona Counties, Wyoming. The mineral report on these claims (Contestant's Exh. 21) shows that a large number of the 10-acre subdivisions on those claims contain no bentonite and are nonmineral in character. Although Judge Mesch found these claims valid, he excluded any 10-acre tracts that are nonmineral in character (Decision at 40). The contestees do not challenge this exclusion.

The mineral report estimated the total mineable reserves of bentonite on these claims at 3,548,035 tons, and contains a table setting forth the specifications for bentonite for 16 companies which pelletize taconite. *Id.* at 102. The report concluded: "The specifications indicate that the bentonite on only nine 10-acre portions are acceptable to the industries. This limited quantity would not support a profitable mine. Adulteration of the bentonite on the claims with soda ash, cypan, or possibly other additives may in some cases upgrade the clays to acceptable standards." *Id.* at 106.

The report contained the following recommendation:

> The results of the field and laboratory examinations and review of the applicants' patent data indicate that a sufficient quantity of clay is present for a mining and milling operation; however, the quality of bentonite clay is sub-specification when

compared to the industries' accepted standards.

The clay from the properties examined and tested may be used as a diluent, that is, to blend with clay of superior quality to produce an acceptable product. The clay may respond to upgrading by artificial means, that is, by the addition of chemicals such as soda ash, aerosols, and organic electrolytes or polymers. None of these possibilities was elaborated upon by the patent applicant.

Id. at 1-2.

The contestant introduced no evidence to show that bentonite from the deposits on Kaycee's claims was not marketable. As the contestant was closing its case, Judge Mesch asked what evidence had been presented on the marketability issue. With respect to the Kaycee claims, counsel for the contestant replied: "We have submitted no evidence, Your Honor, other than lack of development" (Tr. 988). Indeed, material has been sold from only five of the claims; 118,000 tons from Kaycee 76 through 78 (Tr. 1135) and 44,250 tons from Kaycee 107 and 109 (Tr. 1072-73). This is not an impressive degree of development in view of the fact that Kaycee markets 400,000 tons per year. Nevertheless, it does not appear that the marketability of the deposit was seriously questioned by Dale Gobel and Walter Ackerman, the BLM examiners who examined the claims and prepared the Government's mineral report on Kaycee's patent application. Gobel testified as follows in response to questions from Kaycee's counsel:

Q * * * So within these claims, the reserves within these claims could have been mined economically, 3,548,035 tons; is that correct?

A This is our opinion.

Q Would it be correct to state that tonnage could have been mind, marketed at a profit considering the markets, demands, prices, and costs at the time of this mineral application?

A This was our opinion.

* * * * *

Q And all of this bentonite, this approximately three and a half million tons could have been sold to some market; is that not correct?

A This was what the data that we acquired indicated.

Q And it would have been to one of Kaycee's markets to which it was presently marketing; is that correct?

A This was our supposition.

Q And what markets were those?

A At the time I believe they were selling to taconite industries and maybe some foundry industries. They also in their application mentioned bond sealant. I don't know if they had a market for this or what.

(Tr. 170, 171).

On the basis of this testimony, Judge Mesch concluded that the contestant had made no prima facie case that the bentonite was not suitable for use in the taconite industry.[16] He summarized the evidence establishing the locatability of the deposits:

Kaycee Bentonite Corporation markets in excess of 400,000 tons of bentonite a year. Its principal market is the taconite processing industry. Approximately 80 percent of its sales are to that industry. Slightly more than 15 percent of its sales are to the oil well drilling industry and the remaining 5 percent or less are to the foundry and related miscellaneous industries. The company has been marketing bentonite for taconite pelletizing since the

[16] We note that the entitlement to a patent cannot be earned merely by the contestant's failure to make a prima facia case. *See United States* v. *Taylor,* 19 IBLA 9, 82 I.D. 68 (1975). The patent applicant must establish that all the requisites of validity are met. *Id.*

inception of the industry in 1955. It ships bentonite to nearly every pelletizing operation which includes plants in Michigan, Minnesota, Canada, Pennsylvania, and Missouri. The gross sales value of the bentonite marketed by the company in 1977 was in excess of six million dollars. (Tr. 1066-1068).

The test results the company obtained from drilling on the Kaycee claims indicated that the quality of the bentonite within the claims was as high or higher than the quality of the bentonite within other claims that it has mined and marketed. (Tr. 1071). Bentonite from uncontested claims across the road from the contested claims is being mined and marketed to the taconite and oil well drilling industries. (Tr. 1073, 1074). The beds of bentonite that are being mined from those claims are the same beds as those within the contested claims. (Tr. 196, 197, 1074).

A witness with extensive experience in the bentonite industry, and in particular as it relates to the taconite industry, testified that he had examined the BLM mineral report covering the 125 Kaycee Claims and, in his opinion, the bentonite that BLM found within the claims could be sold to the taconite market. He stated that the quality of the bentonite as shown in BLM's report was adequate to meet the requirements of the taconite customers that he was familiar with. He asserted several times that in his opinion the bentonite within the Kaycee Claims could be sold in the taconite market at a profit. (Tr. 1639, 1640, 1667, 1686).

Kaycee Bentonite Corporation has in the past and is at the present time mining bentonite from some of the contested claims. The bentonite was and is being sold principally to the taconite market. (Tr. 1072, 1073, 1135-37).

(Decision at 32).

The contestant challenges these holdings. It contends that there is no evidence other than unsupported and contradictory supposition that the bentonite deposits in the claims involved will serve as a binder in the taconite processing industry (Statement of Reasons at 65). Contestant directs our attention to Mr. Thorson's testimony that Kaycee sells only bentonite which in its natural and untreated state has a yield of at least 75 barrels (Tr. 1122, 1155). Contestant notes that very few of the samples gathered from Kaycee's claims have a barrel yield of more than 75, and that the vast majority of samples show yields of less than 52 barrels.

Nevertheless, Judge Mesch found that Gobel's testimony, quoted earlier, supported the conclusion that the material on these claims could be marketed for pelletizing taconite. This testimony suggests that the data acquired by the examiners indicated that the material could have been sold to some market; that is was the examiner's supposition that it could be marketed to one of Kaycee's markets which he identified as the taconite industry and maybe some foundry industries (Tr. 170, 171). The contestant emphasizes that this was supposition. We do not view this as vitiating the probative nature of this testimony. One of the most basic questions in any mining claim contest is whether the material on the claims is of sufficient quality and quantity that it can be mined, removed, and marketed at a profit. If an examiner has not examined a claim sufficiently to form an opinion on this most basic question, the competence of the entire examination would be open to question. However, the mineral report admitted into evidence in this proceeding, prepared in part by Mr. Gobel, manifests a meticulous preparation seldom seen in Government mining claim contests. The only inference that can be drawn is that the examiners found nothing in their examina-

tion of the claim to abandon their supposition that the mineral could be marketed to one of Kaycee's markets.

The contestant notes that the examiner concluded that only the bentonite in nine 10-acre portions of the contested claims contained bentonite acceptable to the bentonite consuming industries listed in the report. This conclusion was based on the application of a 90-barrel yield criterion in addition to a prohibition on blending or treatment.

The contestant then cites the lack of evidence that bentonite found on the contested claims will in fact satisfactorily serve as a binder in the taconite processing industry. Contestant cites the testimony of some of the witnesses of the contestees and intervenors that the critical test to be used for determining the ability of a deposit of bentonite to serve as a binder is the "balling test" (Tr. 997), the "dry ball test" (Tr. 1171, 1174), and the "batch ball" test (Tr. 1661). Appellants note that Mr. Auer, the vice president of Wyo-Ben Products, Inc., testified that he would require some "batch ball tests" before he would purchase the contested Kaycee claims (Tr. 1669).

Clearly the absence of these tests raises some doubt about whether the material on these claims can be marketed as the testimony of Kaycee's witnesses would have us believe. We note that a mining claimant need only establish the validity of his claim by a preponderance of the evidence; he does not have to establish their validity beyond a reasonable doubt. *See Foster* v. *Seaton,* 271 F.2d 836 (D.C. Cir. 1959); *see also United States* v. *Taylor,* 19 IBLA 9, 82 I.D. 68 (1975). A reversal of Judge Mesch's decision would be warranted only if the inference to be drawn from the absence of these tests negates the positive testimony concerning the marketability of the material on these claims for pelletizing taconite, or if it renders that testimony so insubstantial that it cannot be given any weight in determining which evidence preponderates.

Judge Mesch found that the material from the claims is suitable for use in the taconite industry without blending or additives (Decision at 36). This is based in part on Thorsen's testimony that the material could be marketed at a profit without blending (Tr. 1095). Thorsen noted that Hanna Mining and others have dropped the barrel yield specification (Tr. 1098, 1156). However, he testified that he has never attempted to sell bentonite having a 52-barrel yield to the taconite industry and that the bentonite he presently sells is in the range of 75 barrels untreated but blended (Tr. 1152). Fifty-barrel yield bentonite may be used for this blending (Tr. 1123). We find no positive evidence in the record to support the opinion of any witness or of Judge Mesch that more than a small amount of the bentonite on those claims can be sold as a binder for taconite without blending or treatment.

Contestant's exhibit 27 is an interrogatory answered by Thomas Thorsen, president of Kaycee Bentonite. At page 6 it sets forth the bentonite specifications of several taconite producing customers. The barrel yield specifications range from 79 to 104 barrels. The contestee further states: "It has been Contestees' experience that if the barrel yield is acceptable to the customer, no problems are encountered with the binding properties of the bentonite." The exhibit also contains the following interrogatory:

> Have Contestees develop criteria to be applied to determine whether a deposit of bentonite is a valuable mineral deposit? If the answer to this question is other than an unqualified negative, state in detail the criteria Contestees have developed.
>
> * * * Yes. The criteria involved in evaluating prospective bentonite properties include quality, transportation to processing plant, overburden, and proximity of property to other active company mining areas.
>
> *The quality should be 60-barrel yield or higher or react favorably with cypan and soda ash.* The transportation should be comparable to present transportation costs. The overburden should be 6:1 or less, and it is important that any new property be within 20 miles of existing mining operations. In the final analysis the property must be able to be mined at a profit. [Italics added.]

Id. at 17.

This prompted the following testimony from Andrew Regis, BLM's industrial minerals specialist:

> One of the things that probably convinced me more than ever was that Kaycee Bentonite themselves admitted on Page 17 in their interrogatories that the quality should be 60-barrel yield or higher or react favorably with cypon and soda ash. The fact that only 64 of 232 samples, or about 28 percent, had a barrel yield of 60 or better is evidence that the majority of the bentonite is of low quality.
>
> * * * * *
>
> * * * But Kaycee themselves admit that they consider bentonite less than 60 barrels to be valueless, have no value as far as they are concerned, and yet that's the majority of the bentonite that's on their claims.

(Tr. 296-97). Regis did testify that the bentonite was salable without treatment for canal lining or sealants, pet absorbents, grey iron foundry, and other uses that do not require a high-swelling bentonite (Tr. 694-95). He also suggested use as an animal feed binder (Tr. 803).[17]

He doubted that additives would give the deposits the performance characteristics of a high swelling bentonite: "Most of that bentonite that is that low, which is about, if I recall, minus 52 barrels or less, I would imagine, in my professional opinion, that probably only about one-fourth of that would ever react to chemical additives or would be upgraded probably 25 percent—" (Tr. 695). When asked whether the deposits would provide an acceptable product for the taconite industry he replied: "I don't think the product would be acceptable to the taconite industry. That would average—well, 75 percent of the claims average 52 barrels or less. I don't think that would be acceptable to the taconite industry" (Tr. 810).

Regis' testimony, however, does not take into account that this

[17] In *United States* v. *O'Callaghan, supra,* the fact that clay was sold as an additive in cattle feed was held to make it not exceptional. This ruling was affirmed in *O'Callaghan* v. *Morton,* Civ. No. 73-129S (S.D. Cal. May 13, 1974), but the court remanded the case in part to determine the validity of one claim based on sand and gravel deposits.

material can be blended with higher grade bentonite, something for which common clay cannot be used. Kaycee's answers to contestant's interrogatories explain how this blending is done (Contestant's Exh. 27 at 11-14).

Furthermore, Kaycee answered specific questions concerning the suitability of the deposits for the taconite industry:

> 35- Specifications in the Taconite industry are not uniform. All the bentonite would have to be treated to meet all of the specifications. Some of the bentonite would not have to be treated to meet some of the specifications.
>
> * * * * *
>
> * * * The remainder of the bentonite can be made suitable for Taconite with chemical additives. Approximately ⅛# to ½# of cypan per ton and possibly soda ash could be added to obtain a Fann Viscometer reading of 90 bbls. If this reading is obtained, other specifications such as bonding strength, grit, etc. will also be met.

Id. at 22.

The recommendation in the mineral report on those claims makes clear that these claims were contested only because the evidence showed that the deposits contained on these claims would have to be blended before they could be marketed to the taconite industry. While the contestant has characterized this as adulterating or extending the higher-grade bentonite, the preponderance of the evidence introduced in this case suggests that only bentonitic clays can be used in this way. As we noted above, this is a unique property which imparts a special value in comparison with common clay generally.

Accordingly, we hold that a preponderance of the evidence in the record establishes that bentonite on these 125 claims is an exceptional clay and subject to location under the mining laws.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

EDWARD W. STUEBING
Administrative Judge

WE CONCUR:

DOUGLAS E. HENRIQUES
Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

415-259 O - 83 - 19

ESTATE OF WILMA FLORENCE FIRST YOUNGMAN

10 IBIA 3

Decided *June 4, 1982*

Appeal from a Mar. 17, 1981, order by Administrative Law Judge Alexander H. Wilson reopening estate and modifying inheritance decision. (Probate 1711-57.)

Affirmed in part, reversed and remanded in part.

1. Indian Probate: Appeal: Dismissal

Under 43 CFR 4.320 (1981), service of a copy of a notice of appeal on all interested parties is not a jurisdictional requirement, and an appeal will not be dismissed for failure of service when interested parties have received actual notice of the pendency of the appeal.

2. Indian Probate: Reopening: Generally

When reopening is denied by the Administrative Law Judge, a person seeking reopening should offer the evidence that would be presented at an evidentiary hearing to the Board of Indian Appeals which shall then decide, based upon that evidence, whether a sufficient showing was made to mandate reopening.

3. Indian Probate: Reopening: Generally

Reopening is granted for the purpose of preventing a miscarriage of justice based upon a showing that the evidence presented at the original hearing was incorrect, incomplete, or otherwise inadequate.

APPEARANCES: Steven R. Marks, Esq., Glasgow, Montana, for appellant Patricia First McBride; Warren C. Youngman, *pro se.* Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

On Mar. 17, 1981, an order to reopen and to modify a Jan. 31, 1957, order was issued in the estate of Wilma Florence First Youngman, Fort Peck Allottee No. 3879 (decedent). The Mar. 17, 1981, order found that Patricia First McBride (appellant) was the daughter of decedent and was entitled to share in her estate. The order specifically denied reopening the question whether Warren C. Youngman (appellee) was decedent's surviving spouse.

On Apr. 27, 1981, appellant filed a letter notice of appeal with Administrative Law Judge Keith L. Burrowes.[1] On May 13, 1981, counsel for appellant filed a formal appeal, entitled "petition for reopening" with Judge Burrowes.[2] This petition sought

[1] This case, with others at the Fort Peck Agency, was temporarily transferred to Judge Burrowes following Judge Wilson's retirement. The case was eventually assigned permanently to Administrative Law Judge Daniel S. Boos. Appellee alleges that these reassignments were to his detriment. This contention is without merit.

The notice of appeal was filed with the Administrative Law Judge based on an attachment to the Mar. 17, 1981, order which incorrectly informed interested parties that notices of appeal were to be filed in accordance with 43 CFR 4.291. This regulation had been deleted. *See* 46 FR 7335 (Jan. 23, 1981). The regulation in effect when the appeal was filed, 43 CFR 4.320, provides that notices of appeal are to be filed with the Board of Indian Appeals. In view of the fact that appellee did receive actual notice of the appeal, this mistake constitutes harmless error.

[2] Appellee contends that these various documents were mischaracterized by appellant, the several Administrative Law Judges, and the Board to his detriment. Although appellee may have experienced some initial confusion about what appellant was seeking, that confusion has been removed and appellee has been afforded an opportunity to respond to appellant's contentions.

review of the denial of reopening on the question whether decedent and appellee were married.[3] On appeal, appellant offers affidavits and other documentary evidence, which she intends to present at any evidentiary hearing, indicating that decedent and appellee may not have been married.

Appellee opposes this appeal principally on the grounds that the Board lacks jurisdiction because appellant failed to serve him with a copy of the notice of appeal. In support of his contention that service upon all interested parties is a jurisdictional prerequisite, appellee cites *Estate of Grace First Eagle Tolbert (Talbert),* 1 IBIA 209, 79 I.D. 13 (1972). In that case the Board construed sec. 4.291(b) of its former regulations, 36 FR 7185, 7199 (Apr. 15, 1971). That regulation stated in pertinent part:

> It is a jurisdictional requirement that, at the time of filing the original notice [of appeal], [the appellant] shall forward copies of the notice of appeal by regular mail or otherwise to all Superintendents named on the Examiner's notice of decision, to all parties who share in the estate under the decision being appealed, and to all other parties who have appeared of record.

[1] Although appellee notes that "the former regulations were more stringent regarding service" (Appellate Memorandum at 3-4), he fails to note that sec. 4.291(b) had been amended to delete the phrase "[i]t is a jurisdictional requirement that"[4] and that 43 CFR 4.320 (1981) was the regulation in effect at the time the Mar. 17, 1981, order in this case was issued. Under the current regulations, the Board is not deprived of jurisdiction by the failure of the appellant to serve interested parties with a copy of the notice of appeal.[5]

[2] Appellee also contends that appellant has attempted to present evidence on appeal that is not part of the record. Appellant is seeking reopening of the estate. Since reopening was denied by the Administrative Law Judge, she presented to the Board on appeal the evidence that she would attempt to prove in an evidentiary hearing. This evidence was supported by affidavits and other documents. This is precisely the procedure envisioned in the regulations in 43 CFR 4.242, which deal with reopening of estates. *See Estate of Mary Martin Mataes Andrew Caye,* 9 IBIA 196 (1982).

[3] Appellee argues that because the evidence taken at the original probate hearing supports the 1957 decision, no contradictory evidence can be heard.[6] Reopening, however, is granted for the purpose of preventing a miscarriage of justice based on a showing that the evidence presented at the original hearing was incorrect, incomplete, or otherwise inadequate. Appellant has made a sufficient showing that the evidence upon which the 1957 decision was based may not have been correct. Under the regulations of the Department of the Interior she is en-

[3] No appeal has been taken from the finding that appellant is decedent's daughter and entitled to share in her estate. This finding is affirmed.

[4] 36 FR 24813, 24814 (Dec. 23, 1971).

[5] Failure of service would, of course, be considered in establishing a briefing schedule in a particular case.

[6] Appellee's citation of *Estate of Asmakt Yumpquitat (Millie Sampson),* 8 IBIA 1 (1980), is inappropriate. In that case the Board held merely that a decision of an Administrative Law Judge based on demeanor evidence would not be disturbed.

titled to an opportunity to prove her position.

Appellee suggests that this estate has been closed too long to reopen. The Department's regulations permit reopening any estate, regardless how long it has been closed. Prudential considerations must enter into the determination of whether finality should be accorded to old decisions. In this case the record before the Board indicates that decedent's estate remains intact and within the jurisdiction and control of the Department. At the time of the original order of Jan. 31, 1957, appellant was 2 years old. Furthermore, appellant was adopted by non-Indians on Mar. 4, 1957, and learned of the existence of her mother's trust estate on the Fort Peck Reservation only shortly before instituting this action. The regulations at 43 CFR 4.242 require that in order to reopen estates closed for more than 3 years, "manifest injustice" be shown. The Board has held that "manifest injustice" means plain error. *See Estate of Snipe,* 9 IBIA 20 (1981). It appears to the Board that appellant has made a sufficient showing to require a complete review of the determination of inheritance made in decedent's estate on Jan. 31, 1957, despite the age of that decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, that portion of the Mar. 17, 1981, order which found that Patricia First McBride is the daughter of Wilma Florence First Youngman is affirmed. That portion of the order which denied rehearing on the question of whether Warren C. Youngman was the surviving spouse of Wilma Florence First Youngman is reversed and the case is remanded to the Hearings Division for an evidentiary hearing and decision on this issue.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

JERRY MUSKRAT
Administrative Judge

UNITED STATES STEEL CORP.

7 ANCAB 106

Decided *June 17, 1982*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management AA-6984-A and AA-6984-B.

Decision affirmed.

1. Alaska Native Claims Settlement Act: Native Land Selections: Generally—Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

The interest of an appellant-owner in a millsite located under 30 U.S.C. § 42(b) and situated within lands selected by a Native corporation under ANCSA, constitutes a location under the general mining laws and is therefore included within meaning of interests protected under the provisions of § 22(c) of ANCSA.

2. Alaska Native Claims Settlement Act: Native Land Selections: Generally—Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Pursuant to § 22(c) of ANCSA the interest of the owner of an unpatented millsite location under 30 U.S.C. § 42(b) does not constitute any impediment to the Bureau of Land Management conveying the legal title of the same lands to a selecting Native corporation.

3. Alaska Native Claims Settlement Act: Native Land Selections: Generally—Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Pursuant to § 22(c) of ANCSA and regulations in 43 CFR 2650.3–2(c), the Bureau of Land Management may convey title to lands selected by a Native corporation without excluding thoes lands situated within an unpatented millsite location under provisions of 30 U.S.C. § 42(b).

4. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska Native Claims Settlement Act: Native Land Selections: Generally

The interest of an unpatented millsite location under 30 U.S.C. § 42(b) situated within lands properly selected by a Native corporation under ANCSA does not cause a segregation of such lands which requires the lands to be excluded from a conveyance.

5. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests—Millsites: Determination of Validity

The owner of an unpatented millsite location situated within lands selected by a Native corporation under ANCSA is not denied any interests acquired under 30 U.S.C. § 42(b) notwithstanding that the provisions of § 22(c) of ANCSA and regulations in 43 CFR 2650.3-2(c) establish a time limit within which steps must be taken to proceed to patent.

6. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests—Millsites: Determination of Validity—Millsites: Patents

The terms of § 22(c) of ANCSA and regulations in 43 CFR 2650.3-2(c) requiring that the owner of an unpatented millsite location must proceed to patent within a time limit is not in derogation of the general mining laws which contain no time limit within which a mining claimant needs to proceed to obtain patent.

7. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally—Regulations: Generally

The Board is bound by duly-promulgated Departmental regulations as well as by Departmental policy expressed in Secretarial Orders published in the *Federal Register* or set forth in Departmental manuals.

8. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests—Mining Claims: Determination of Validity

Thus, pursuant to 601 DM 2, requirements in Secretary's Order No. 3029, as to adjudication of Federally-created interests, do not apply to unpatented mining claims and the Bureau of Land Management is not required to adjudicate mining claims before conveyance. Pursuant to ANCSA and Secretary's Order No. 3029, *as amended,* lands selected by a Native corporation must be conveyed by BLM notwithstanding the existence of an unpatented mining claim within such lands which has not been adjudicated for validity under the general mining laws.

9. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party In-

terests—Millsite: Determination of Validity

When an unpatented millsite location is situated within lands selected and approved for conveyance under ANCSA, the possessory interest of the mining claimant is protected under provisions of § 22(c) and 43 CFR 2650.3-2 as a valid existing right notwithstanding that the Bureau of Land Management has not adjudicated the validity of such millsite prior to conveyance.

APPEARANCES: John Regis Coogan, Esq., for United States Steel Corp.; Dan A. Hensley, Esq., Duncan, Weinberg & Miller, P.C., for Sealaska Corp.; Robert G. Mullendore, Esq., Roberts, Shefelman, Lawrence, Gay & Moch, for Klawock Heenya Corp.; Robert C. Babson, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary

The Appellant, United States Steel Corp., alleges that the Bureau of Land Management erred in failing to exclude its unpatented millsite locations situated within lands approved for conveyance to the Klawock Heenya Corp., because of having acquired a defeasible equitable title under 30 U.S.C. § 42(b), and alternatively, that the BLM failed to recognize its millsites as valid existing rights under ANCSA and to explicitly include assurance in the conveyance that it may proceed to obtain patent under the general mining laws any time within five (5) years after conveyance.

The Board finds that United States Steel Corp.'s interests in its unpatented millsite locations are protected under § 22(c) of ANCSA, in a manner similar to unpatented mining claims, and therefore have no right to proceed to patent contrary to this section and regulations in 43 CFR 2650.3-2(c); that although the Bureau of Land Management is not required to adjudicate unpatented millsite locations as a prerequisite to conveyance under ANCSA of lands on which they are situated, that such interests constitute a valid existing right with the possessory interest protected under § 22(c) of ANCSA; and that the BLM's required conveyance of the legal title to Native-selected lands on which unpatented millsite locations are situated does not affect the appellant's protected interest under ANCSA.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended,* 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977) (ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural and Factual Background

Klawock Heenya Corp. (Klawock), for the Native Village of Klawock, on May 6, 1974, filed

selection applications AA-6984-A and B, *as amended,* under the provisions of § 16(b) of the Alaska Native Claims Settlement Act of Dec. 18, 1971 (85 Stat. 688, 706; 43 U.S.C. §§ 1601, 1615(b), for the surface estate of certain lands in the vicinity of Klawock.

On Apr. 7, 1980, the Bureau of Land Management (BLM) published in 45 FR 24249 (1980), a Decision to Issue Conveyance (DIC) to Klawock pursuant to § 14(b) of ANCSA including certain lands in question located in T. 73 S., R. 81 E., C.R.M., Alaska, described as follows:

LANDS WITHIN THE TONGASS NATIONAL FOREST (Proclamation No. 846, February 16, 1909)

* * * * *

Mineral Survey No. 2201, Alaska, [including:] * * * 7/54/1 Wadleigh, 7/54/2 Wadleigh * * * Wadleigh 7/56/27—placer mining claims, situate on unsurveyed public land, Ketchikan Mining District, at latitude 55°34'N, longitude 133°08'W at corner No. 3 of the 7/54/1 Wadleigh placer.

* * * * *

Mineral Survey No. 2204, Alaska, known as the Wadleigh 40, 41 and 43 Placers, situate on unsurveyed public land, Ketchikan Mining District, Wadleigh Island, at latitude 55°34'N, longitude 133°08'W at corner No. 1 of the Wadleigh 40 placer.

* * * * *

Mineral Survey No. 2224, Alaska, known as the Wadleigh 42 Placer, situate on unsurveyed public land, Ketchikan Mining District, Wadleigh Island, at latitude 55°34'N, longitude 133°08'W at corner No. 1 of the Wadleigh 42 placer.

On May 6, 1980, United States Steel Corp. (USS) filed a Notice of Appeal. On June 5, 1980, USS filed its Statement of Reasons asserting that the BLM erred in failing to exclude its unpatented millsites from lands approved for conveyance in the DIC or, in the alternative, that the BLM must make an explicit inclusion of the millsites in the conveyance as valid existing rights and further that assurance be made of the right to proceed to patent.

On June 27, 1980, the BLM's Answer contends that the appellant's appeal is without merit as there is no basis to exclude its millsites from conveyance to the selecting Native corporation. Further, that although the millsites are not specifically included as a valid existing right in the DIC, the conveyance as approved by the BLM affords full recognition of USS's rights under the mining laws.

On Aug. 1, 1980, the USS's reply reiterated its earlier stated position that the unpatented millsites should be excluded from the DIC and denied that the authorities cited by the BLM require the Board to find to the contrary.

The Native regional corporation for Southeastern Alaska, Sealaska Corp.; and the Native village corporation, Klawock Heenya Corp., both made appearances but have not filed briefs on the merits of any issue raised in this appeal.

During July 1965, Appellant, USS, filed twenty-four (24) millsite locations (designated as Thor 1 through 24) situated on Wadleigh Island and being on portions of Sec. 5 and 8 in T. 73 S., R. 81 E., C.R.M.

While not involved in any issue decided in this appeal the Board notes that in compliance with 43 U.S.C. § 1744(b) (1976) and with CFR Subpart 3833, USS submitted for recordation photocopies of the aforementioned Certificates of Lo-

cation, with a location map, to the BLM.

Further, in compliance with 43 U.S.C. § 1744(b) and with CFR Subpart 3833, USS filed its Notice of Intention to Hold Mill Sites, dated July 24, 1979. The Notice of Intention to Hold was recorded by the Ketchikan Recording District July 27, 1979.

Decision

The Appellant, USS, asserts that the BLM erred in failing to exclude from the DIC its unpatented millsite location situated within lands approved for conveyance to the Native Village of Klawock.

USS's Unpatented millsite involved in this appeal are contiguous with each other and lie adjacent to USS's patented mining claims which BLM excluded from the DIC as being a portion of mineral survey 2201. (Patent No. 56-66-6031, dated Sept. 7, 1965.)

USS's claim of interest in the lands approved for conveyance to Klawock is based solely upon its unpatented millsite locations under the terms of 30 U.S.C. § 42(b) and regulations in 43 CFR 3864, which state in pertinent part:

30 U.S.C. § 42(b):

Where nonmineral land is needed by the proprietor of a placer claim for mining, milling, processing, beneficiation, or other operations in connection with such claim, and is used or occupied by the proprietor for such purposes, such land may be included in an application for a patent for such claim, and may be patented therewith subject to the same requirements as to survey and notice as are applicable to placers. No location made of such nonmineral land shall exceed five acres and payment for the same shall be made at the rate applicable to placer claims which do not include a vein or lode.

43 CFR 3864.1-1:

(a) Land entered as a mill site must be shown to be nonmineral. Mill sites are simply auxiliary to the working of mineral claims. R.S. 2337 (30 U.S.C. 42) provides for the patenting of mill sites.

* * * * *

(c) The Act of March 18, 1960 (74 Stat. 7; 43 U.S.C. 42(b)), amends R.S. 2337 to allow the holders of possessory right in a placer claim to hold nonmineral land for mining, milling, processing beneficiation, or other operations in connection with the placer claim. Applications for patent for such mill sites are subject to the same requirements as to survey and notice as one applicable to placer mining claims. No one mill site may exceed five acres and payment will be $2.50 per acre or fraction thereof.

No contention is made that the Board would reach a different decision on the issues raised in this appeal because USS's claim of interest in the lands it seeks to have the BLM exclude from the DIC arises from unpatented millsite locations under 30 U.S.C. § 42(b) rather than from unpatented mining claims under the general mining laws in 30 U.S.C. § 22 *et seq.*

While § 22(c) of ANCSA does not include a specific reference to "mill sites" within its provisions, implementing regulations in 43 CFR 2650.3-2 state in part:

Pursuant to section 22(c) of the act, on any lands to be conveyed to village or regional corporations, any person who prior to August 31, 1971, initiated a valid mining claim or location, including millsites, under the general mining laws and recorded notice thereof with the appropriate State or local office, shall not be challenged by the United States as to his possessory rights, if all requirements of the general mining laws are met.

Inasmuch as 30 U.S.C. § 42(b) provides that millsite locations may be included in the same patent application as an unpatented mining claim and because a millsite location made under the general mining laws is specifically included as being protected under the regulations in § 2650.3-2, the Board finds there is no basis to distinguish between a millsite and a mining claim within the meaning of those interests and rights protected under § 22(c) of ANCSA.

[1] The Board holds that the interest of an appellant-owner in a millsite located under 30 U.S.C. § 42(b) and situated within lands selected by a Native corporation under ANCSA, constitutes a location under the general mining laws and is therefore included within meaning of interests protected under the provisions of § 22(c) of ANCSA.

The primary issue raised in this appeal is whether the BLM erred in failing to exclude the lands within USS's unpatented millsite claims from the DIC because the interest acquired in its claims under 30 U.S.C. § 42(b) constitutes "an equitable defeasible fee simple."

As an alternative issue appellant asserts that the claim of interest acquired in its millsite locations is effective even against the Federal Government and thereby causes the lands to be segregated from the public domain. Therefore, it is contended that the BLM's conveyance of lands to a Native corporation, which includes the millsite claims, should explicitly be made subject to the possessory interest of the site locations and also subject to the right to proceed to patent within five (5) years after issuance of the Interim Conveyance.

No assertion is made in this appeal by USS that any steps were timely taken under the general mining laws toward obtaining a patent for its unpatented millsite locations at the time of the enactment of ANCSA or that any action was subsequently taken for the same purpose pursuant to 43 CFR 2650.3-2(c). Therefore, the Board's consideration of issues raised as to USS's claim of interest in the Native-selected lands is limited in this appeal to that interest which is acquired by the owner of an unpatented millsite location under 30 U.S.C. § 42(b).

Both USS and the BLM presented authorities and made arguments in support of their respective position as the appropriate basis for the Board's decision on the question of what interest is acquired in a millsite location under 30 U.S.C. § 42(b) and also in what manner that interest in the millsite is affected by or impacts the provisions of ANCSA.

It is, however, unnecessary that independent findings and conclusions be made in detail in this appeal as the Board shall rely upon the holdings of the U.S. Court of Appeals in the case of *Alaska Miners* v. *Andrus,* 662 F. 2d 577 (9th Cir. 1981), which considered the precise issues here raised by USS, as well as upon the Board's previous decision in the case of *Oregon Portland Cement Co.,* 6 ANCAB 65, 88 I.D. 760 (1981) [RLS 79-3].

The basis for USS's assertion that the BLM erred in failing to exclude its unpatented millsite lo-

cations from the DIC is that the interest acquired under 30 U.S.C. § 42(b) had the effect of segregating the lands within the millsites from the public domain, that a defeasible equitable title was created which precluded any conveyable interest remaining with the Federal Government and also that provisions of ANCSA could not be construed so as to prevent the obtaining of a patent to its millsites under the appeal mining laws.

The Court in *Alaska Miners, supra,* decided contra to the position of USS in each of these assertions.

In that case the Court clearly enunciates how the owner's interest in a valid unpatented mining claim situated within lands approved for conveyance to a Native corporation is protected under § 22(c) of ANCSA and sets forth the principles under which the legal title to such lands is retained by the Federal Government and may in turn be conveyed by the BLM without conflicting with any property interest of the mining claimant.

The appellants in *Alaska Miners, supra,* were owners of perfected unpatented mining claims located prior to the enactment of ANCSA on lands later selected by a Native corporation who brought action seeking a declaratory judgment and injunctive protection against the BLM's conveyance of their alleged vested property rights in the claims as well as to their ability to later obtain patent to the mineral claims. The District Court for the District of Alaska entered a summary judgment for the Government on the question of "whether the United States may transfer whatever legal interest it retains in perfected unpatented mining claims to a third party * * *, "Alaska Miners vs Andrus," A-76-263 (D. Alaska), Memorandum and Order dated Oct. 19, 1979."

In its decision affirming the District Court's conclusion, the Court of Appeals framed the issues as follows, *inter alia:*

> I. Does ANCSA allow the federal government to convey land covered by the Act which is subject to valid mining claims?
>
> II. * * * [I]s the time limitation on the ability to patent placed on valid mining claims under 43 U.S.C. § 1621(c) constitutional?

At 578.

The Court's decision rejected all contentions that the owner of a valid unpatented mining claim had acquired, under the general mining laws, an interest which had any segregative effect against the retained Federal title or that the Federal Government was prohibited from conveying the legal title subject to the mining claim and found that:

> The argument of appellants that a valid location of a mining claim *segregates that area* of the claim from the public domain and thus prevents the United States from disposing of the legal title is manifestly unsound. * * * Even more on point is *Teller v. United States,* 113 F. 273, 283-84 (CA8 1901), where the court held that a valid mining location does not limit the rights of the United States as the paramount title holder. [Italics in original.]

At 597.

The Court then described the limited interest held by the owner

of an unpatented mining claim as follows:

> For that matter, it has been held that the interest of a claimant in a mining claim, prior to the payment of any money for the granting of the patent for the land, is nothing more than a right to the exclusive possession of the land based upon conditions subsequent, a failure to fulfill which forfeits the locator's interest in the claim.

and concludes:

> We find it unnecessary to discuss in detail the many cases * * * which hold that the government may withdraw or convey the title to land subject to valid, unpatented claims.

At 597-580.

The Court's decision further made clear that the title interest retained by the Federal Government in unpatented mining claims situated within Native-selected lands was a legal title subject to being conveyed by the BLM under the provisions of ANCSA by stating that:

> [1] Section 22(c) of ANCSA, 43 U.S.C. § 1621(c), covers the precise factual situation which is before us on this issue. That section provides:
>
> * * * * *
>
> Clearly, the manifest intention of Congress was that lands subject to a "valid mining claim" may be "conveyed to Village and Regional Corporations." It would have been senseless for Congress to include § 22(c) unless it intended to grant authority to make such conveyances.

At 578.

Thus, the effect of the Court's holding is that pursuant to the provisions of § 22(c) of ANCSA the interest of an unpatented mining claim does not constitute any impediment to the BLM conveying the legal title of the same lands to the selecting Native corporation.

USS's assertion that BLM must accept its claim of interest in the millsite locations as being an interest "leading to acquisition of title" and therefore to be excluded from conveyance of lands under ANCSA is rejected by the Board.

In this appeal USS relied upon the case of *Benson Mining and Smelting Co.* v. *Alta Mining and Smelting Co.*, 145 U.S. 428 (1892) for its assertions of having acquired an equitable title interest in its unpatented millsites which would require the BLM to exclude the lands from the DIC. The Board disagrees with USS's contention that the Court's holding in *Benson Mining, supra,* is relevant to the issues in this appeal and further disagrees that the holding of the Court in *Alaska Miners, supra,* can be so construed that the issues raised in this appeal were not there addressed.

In the case of *Benson Mining, supra,* the Court found that because the applicant-owner of mining claims had performed all acts necessary under the general mining laws, including payment, and had received in return a certificate of purchase, that an equitable title had accrued and in reaffirming that principle in earlier cases, stated:

> With one voice they (earlier cases) affirm that when the right to a patent exists, the full equitable title has passed to the purchaser, with all the benefits, immunities and burdens of ownership, and that no third party can acquire from the government interests as against him.

At 434.

After the Court described the various statutory steps necessary which the owner of a mining claim must perform before an

equitable title can be said to accrue and any right to a patent exist, the Court concludes: "In other words, when the price is paid the right to patent immediately arises." (At 431–432.)

It is unnecessary to discuss the merits of the Court's holding in *Benson Mining, supra,* inasmuch as the Board finds that USS's reliance on the findings is misplaced because no contention is made in this appeal, nor does the file record disclose, that any steps were taken toward seeking patent to the millsite locations in question. The only basis upon which the Court in *Benson Mining, supra,* found that an equitable title accrued to a mining claimant was upon the completed performance of all necessary acts, including full payment of the purchase price, which is absent from this appeal. Therefore, the basis for the Court's finding of an accrued equitable title in *Benson Mining, supra,* can not serve as supporting authority for making a determination of the interest of USS in its unpatented millsite locations.

Consistent with the holding in *Alaska Miners, supra,* the Board has previously held in *Oregon Portland Cement Co., supra,* that the interest of the holder of an unpatented mining claim situated within lands selected and approved for conveyance under ANCSA is protected under § 22(c) and the implementing regulations in 43 CFR 2650.3–2.

[2] Therefore, the Board holds that pursuant to § 22(c) of ANCSA the interest of the owner of an unpatented millsite location under 30 U.S.C. § 42(b) does not constitute any impediment to the BLM's conveying the legal title of the same lands to a selecting Native corporation.

[3] Pursuant to § 22(c) of ANCSA and regulations in 43 CFR 2650.3–2(c), the BLM may convey title to lands selected by a Native corporation without excluding those lands situated within an unpatented millsite location under provisions of 30 U.S.C. § 42(b).

[4] The interest of an unpatented millsite location under 30 U.S.C. § 42(b) situated within lands properly selected by a Native corporation under ANCSA does not cause a segregation of such lands which requires the lands to be excluded from a conveyance.

The Court in *Alaska Miners, supra,* further found that the time limit specifically provided in § 22(c) of ANCSA and regulations in § 2650.3–2(c), within which the owner of an unpatented mining claim must proceed to patent, showed that Congress intended to treat mining claims situated on Native-selected lands differently from the interest of a homesteader or other entryman under Federal land laws who had no time limit established under ANCSA. The Court held that because the owner of an unpatented mining claim was not required to proceed to patent in order to be assured of protection of rights under the general mining laws that the placement of such a time limit under § 22(c) was not in

derogation of any interest in the mining claim.

Based on the Court's determination, the Board rejects USS's contention that the BLM should include in its decision any reference to a time limit within which a patent may be obtained.

[5] The owner of an unpatented millsite location situated within lands selected by a Native corporation under ANCSA is not denied any interests acquired under 30 U.S.C. § 42(b) notwithstanding that the provisions of § 22(c) of ANCSA and regulations in 43 CFR 2650.3-2(c) establish a time limit within which steps must be taken to proceed to patent.

[6] The terms of § 22(c) of ANCSA and regulations in 43 CFR 2650.3-2(c) requiring that the owner of an unpatented millsite location must proceed to patent within a time limit is not in derogation of the general mining laws which contain no time limit within which a mining claimant needs to proceed to obtain patent.

The issue alternatively raised by USS that the BLM failed to recognize its unpatented millsite locations as valid existing rights under ANCSA was previously determined by the Board in the case of *Oregon Portland Cement Co., supra,* which held that unpatented mining claims situated within Native-selected lands constitute a valid existing right under ANCSA.

To include USS's millsite locations in BLM's issued DIC as a specifically-identified valid existing right under ANCSA would require an adjudication of the validity of its interest at the time of conveyance.

The issue of whether the BLM is required to adjudicate the validity of unpatented mining claims located within Native-selected lands prior to a conveyance pursuant to provisions of ANCSA was addressed in *Oregon Portland Cement Company, supra.*

The Board there determined that it was bound by Departmental policy expressed in Secretarial Order No. 3029, dated Nov. 20, 1978, 43 FR 55287 (1978) (S.O. 3029), as modified by amendment dated Nov. 20, 1979, 45 FR 1692 (1980), and found:

> Thus the Department policy is that determination by BLM of the validity of unpatented mining claims is not a prerequisite to conveyance to a Native corporation and land on which an unpatented mining claim is located will be conveyed to the selecting Native corporation.

88 I.D. 767.

The Court in *Alaska Miners, supra,* responded to the contention that the BLM was required under ANCSA to make an adjudication of mining claims as follows:

> In any event, their contention that § 22(c) is a direction to the Secretary of the Interior to adjudicate the validity of all unpatented mining claims on lands conveyed to native corporations is groundless.

At 580.

Based upon these authorities the Board reiterates its previous position and holds that:

[7] The Board is bound by duly-promulgated Departmental regulations as well as by Departmental policy expressed in Secretarial Orders published in the *Federal Register* or set forth in Departmental Manuals.

[8] Thus, pursuant to 601 DM 2, requirements in S.O. 3029, as to adjudication of Federally-created interests, do not apply to unpatented mining claims and BLM is not required to adjudicate mining claims before conveyance. Pursuant to ANCSA and S.O. 3029, *as amended,* lands selected by a Native corporation must be conveyed by BLM notwithstanding the existence of an unpatented mining claim within such lands which has not been adjudicated for validity under the general mining laws.

Having determined that within the meaning of § 22(c) of ANCSA that there is no distinction to be made between the interest in unpatented mining claims and unpatented millsite locations under 30 U.S.C. § 42(b) the Board further holds that:

[9] When an unpatented millsite location is situated within lands selected and approved for conveyance under ANCSA, the possessory interest of the mining claimant is protected under provisions of § 22(c) and 43 CFR 2650.3-2 as a valid existing right notwithstanding that the BLM has not adjudicated the validity of such millsite prior to conveyance.

Therefore, the Board concludes that this appeal is hereby dismissed and the BLM is affirmed in its decision to convey the selected lands including the unpatented millsite locations of the appellant.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

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TETLIN NATIVE CORP.

7 ANCAB 132

Decided *June 18, 1982*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-20518 (Sept. 30, 1980).

Partial decision; hearing ordered.

1. Alaska Native Claims Settlement Act: Conveyances: Regional Conveyances—Alaska Native Claims Settlement Act: Generally

Where a portion of the regional boundary between Ahtna and Doyon Regions has been described by the Secretary as following the Tetlin Reserve boundary, but the location of the Tetlin Reserve was and remains in dispute, Tetlin Native Corp. cannot now be held to a boundary which delineates their entire land entitlement and sole benefit under ANCSA when such boundary was determined by an agreement to which Tetlin was not a party.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

Where the present appeal is Tetlin's first opportunity to challenge BLM's delinea-

tion of the land to which they are entitled under ANCSA, their appeal directly addresses a land selection matter within the meaning of 43 CFR 4.1(b)(5) and the appeal is within the Board's jurisdiction.

3. Alaska Native Claims Settlement Act: Conveyances: Regional Conveyances—Alaska Native Claims Settlement Act: Generally

Insofar as a segment of the Doyon–Ahtna boundary was located in 1972 along a portion of the Tetlin Reserve boundary which was unadjudicated, and which is now disputed by Tetlin, the Ahtna–Doyon boundary remains the boundary of Tetlin Reserve but is subject to resolution of the issues raised by Tetlin. If Tetlin prevails and the boundary as delineated by BLM is found to be in error, the regional boundary will continue to be the Reserve boundary, wherever the latter is found to be correctly located.

4. Alaska Native Claims Settlement Act: Survey: Generally

Where § 13(b) of ANCSA addresses events in the land conveyance process which occur over a period of three years or longer, during which time surveys and protraction diagrams may be changed or corrected, it would be unreasonable to conclude that such changes or corrections must be ignored in deference to the survey or protraction in existence on Dec. 18, 1971.

5. Alaska Native Claims Settlement Act: Survey: Generally

Sec. 13(b) of ANCSA is not a mechanism to determine land entitlement, but is intended to ensure that land is described through use of the most accurate protraction diagrams or surveys.

6. Alaska Native Claims Settlement Act: Conveyances: Regional Conveyances—Alaska Native Claims Settlement Act: Generally

Where there appears from the appeal record to have been an ongoing boundary dispute, culminating in this appeal, between Tetlin Native Corp. and Departmental officials, and where election to take Reserve lands did not require boundary description, the Board cannot conclude that at the time of such election, Tetlin acquiesced by silence in the Reserve boundary as depicted on survey plats still current.

APPEARANCES: Frederick H. Boness, Esq., Preston, Thorgrimson, Ellis & Holman, for Tetlin Native Corp.; M. Frances Neville, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; Elizabeth S. Ingraham, Esq., for Doyon, Ltd.; Shelley J. Higgins, Esq., Department of Law, for the State of Alaska; Eastaugh & Bradley, for Resource Associates of Alaska; James B. Gottstein, Esq., Goldberg & Gottstein, for Ahtna, Inc.; Daniel L. Callahan, Esq., Alaska Legal Services Corp., for Emma Northway, Charley James, Myra David, Lucy David, Lulu David, Lucy David as heir to Andrew David, and Annie John; Robert H. Hume, Jr., Esq., Keane, Harper, Pearlman & Copeland, for Northway Natives, Inc.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeal

Having elected under § 19(b) of ANCSA to receive the former Tetlin Indian Reserve lands in lieu of other lands and benefits, Tetlin Native Corp. has appealed BLM's proposed conveyance on the grounds that by incorrectly describing the former Reserve, the Bureau of Land Management fails to convey several parcels of land, comprising approximately sixty thousand acres, which were part of the Reserve.

In this partial decision, the Board reaches the following conclusions on issues of law raised by the parties:

1. Sec. 7(a) of ANCSA does not deprive the Board of jurisdiction to determine the boundary of the former Reserve, even though a part of the disputed boundary is also the boundary between Ahtna and Doyon Regions.

2. Sec. 13(b) of ANCSA does not limit Tetlin's land entitlement pursuant to § 19(b) to lands within the former Reserve as it was depicted on Bureau of Land Management Survey plats or protraction diagrams on Dec. 18, 1971, or on Nov. 15, 1973, the date of Tetlin's election to take title to the Reserve.

3. Although Tetlin did not object to the delineation of the Reserve boundaries on Bureau of Land Management survey plats or protraction diagrams in 1973 when it elected to take the Reserve lands, Tetlin is not precluded from now challenging BLM's depiction of the Reserve boundaries in conveyance documents.

Having concluded that these legal issues are not dispositive of this appeal, the Board orders a factual hearing on the location of the disputed boundaries of Tetlin Reserve.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended,* 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977) (ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

On Nov. 15, 1973, pursuant to § 19(b) of ANCSA, Tetlin Native Corp. (Tetlin) elected to receive title to the lands within the former Tetlin Indian Reserve (Reserve), established in 1930 by Executive Order No. 5365. On Sept. 30, 1980, the Bureau of Land Management (BLM) issued its decision to convey to Tetlin some of the lands within the Reserve. Tetlin appealed that decision on Oct. 24, 1980, on the grounds, *inter alia,* that the decision wrongfully declared that the lands described in it and an earlier decision "comprise all of the lands withdrawn for the benefit of the Natives at Tetlin (and that) Tetlin Native Corporation is not eligible for any other land selections." Tetlin claimed that the BLM incorrectly described the boundaries of the Reserve as created by Executive Order No. 5365 and made available for selection by Tetlin by § 19(b) of ANCSA, and thus wrongfully excluded four specific parcels of land.

In decisions dated Apr. 15, 1981, and Apr. 17, 1981, the Board dismissed all portions of this appeal except those portions pertaining to excluded Parcels B, C, and D as defined and designated by Tetlin.

On May 19, 1981, the BLM filed notice that Tetlin had, on May 18, 1981, elected to receive legislative conveyance of the Reserve pursuant to § 1437(b)(3) of the Alaska National Interest Lands Conservation Act, 94 Stat. 2371 *et seq.,* 16

U.S.C. §§ 3101-3233 (Supp. IV 1980) (ANILCA).

Pursuant to § 1437(c) of ANILCA, upon filing the notice of election, Tetlin was conveyed all of the right, title, and interest of the United States in and to the surface and subsurface estates in the Reserve as it existed on Dec. 18, 1971, subject to valid existing rights and such public easements as the Secretary or his delegate might validly reserve.

The Board in an order dated May 29, 1981, adopted the position that the BLM decision herein appealed could be treated as a decision to issue a confirmatory patent under § 1437(f) of ANILCA. In essence, the Board retains jurisdiction over Tetlin's claim to lands impliedly denied by BLM's exclusion of such lands from conveyance.

As directed by the Board in its May 29 order, the parties have briefed the following legal issues:

1. Does § 17(a) of ANCSA preclude jurisdiction in this Board to determine the boundary of the former Tetlin Indian Reserve insofar as such boundary comprises a portion of the Ahtna-Doyon regional boundary?

2. Was the depiction on approved BLM plats of survey, prior to enactment of ANCSA, of portions of U.S. Survey No. 2547 which are pertinent to establishing the boundary of the former Tetlin Indian Reserve to the exclusion of Parcels B and D dispositive of the issue as to the location of the boundary of U.S. Survey No. 2547 adjacent to Parcels B and D?

(a) Does § 13(b) of ANCSA limit Tetlin's land entitlement pursuant to § 19(b) to those lands within the borders of the Tetlin Indian Reserve as those boundaries are depicted on BLM survey plats or protraction diagrams in effect on (a) Dec. 18, 1971, or (b) Nov. 15, 1973, the date on which Tetlin elected to acquire title to the Reserve? If so, which date is applicable?

(b) Is the above-said depiction of the Reserve boundary conclusive as to which lands are properly to be conveyed to Tetlin pursuant to § 19(b)?

(c) Is Tetlin, having in 1973 elected to acquire title to the Reserve without at that time objecting to the delineation of its borders on BLM survey plats or protraction diagrams in effect then or on Dec. 18, 1971, now precluded from complaining of the location of the boundary as depicted on such plats and diagrams?

Tetlin has moved for a factual hearing on the disputed Reserve boundary.

Decision

The Board first concludes that neither the inherent nature of this dispute, nor the arbitration provisions in § 7(a), deprive the Board of jurisdiction to determine the disputed Tetlin Reserve boundary, including that segment which comprises a portion of the Ahtna-Doyon regional boundary.

Sec. 7(a) of ANCSA provides in pertinent part:

> For purposes of this Act, the State of Alaska shall be divided by the Secretary within one year after the date of enactment at this Act into twelve geographic regions, with each region composed as far as practicable of Natives having a common heritage and sharing common interests. In the absence of good cause shown to the

contrary, such regions shall approximate the areas covered by the operations of the following existing Native associations:

* * * * *

(5) Tanana Chiefs' Conference * * *;

* * * * *

(12) Copper River Native Association * * *

Any dispute over the boundaries of a region or regions shall be resolved by a board of arbitrators consisting of one person selected by each of the Native associations involved, and an additional one or two persons, whichever is needed to make an odd number of arbitrators, such additional person or persons to be selected by the arbitrators selected by the Native associations involved.

Doyon, Limited is the Native regional corporation representing the Tanana Chiefs' Conference, and Ahtna, Inc. was formed from the Copper River Native Association.

On Dec. 11, 1972, pursuant to § 7(a), the Secretary established regional boundaries for Ahtna and Doyon, including a common boundary which runs west along the line between Townships 10 and 11 North, Range 15 East, C.R.M., to its most easterly intersection with the boundary of the Reserve, "thence westerly and northerly along said boundary to its intersection with the surveyed north boundary of T. 15 N., R. 12 E., C.R.M.; thence, along surveyed township lines, west 708.47 chains to the west corner common to surveyed Tps. 15 and 16 N., R. 11 E., C.R.M."

Although the Ahtna-Doyon boundary was not settled until Apr. 2, 1973, in connection with litigation and arbitration proceedings, the above-described portion of the boundary, following the boundary of Tetlin Reserve, remained unchanged.

The west boundary of the former Tetlin Reserve appears to intersect the north boundary of T. 15 N., R. 12 E., C.R.M., whether the Reserve boundary is as depicted by the BLM in U.S. Survey No. 2547 or as claimed by Tetlin in this appeal. As depicted by Tetlin, however, the Reserve boundary is less than 708.47 chains from the west corner common to surveyed Tps. 15 and 16 N., R. 11 E., C.R.M. The "708.47 chains" figure appears appropriate only as the Reserve boundary is depicted by BLM in U.S. Survey No. 2547. Accordingly, Tetlin's depiction of the Reserve boundary appears not to coincide with the Ahtna-Doyon regional boundary as established by the Secretary in 1972, but rather to extend into the Ahtna region. A portion of "Parcel B," claimed by Tetlin, appears to lie within the Ahtna region as established by the Secretary, and left unchanged by Doyon and Ahtna in their boundary settlement. Tetlin Reserve as depicted by BLM, however, lies entirely within Doyon region, and the record indicates that in Jan. 1973, residents of the Village of Tetlin, organized as the Village Council, confirmed in writing that they were a member of the Tanana Chiefs' Conference, to become Doyon, Limited. Doyon in July 1973 approved their articles of incorporation and in Dec. 1973, the village elected to take the Reserve lands in lieu of all other land and benefits under ANCSA.

Arguments by Ahtna and BLM on the jurisdictional issue are essentially as follows. First, the dispute is inherently outside the jurisdiction of this Board because the decision appealed does not relate to a land selection but to a boundary dispute. Regulations in 43 CFR 4.1(b)(5) limit the Board's jurisdiction to appeals from Departmental decisions "in matters relating to land selections" under ANCSA. Land selections are the process of choosing lands to satisfy a village's statutory acreage entitlement from lands withdrawn by § 11 of ANCSA. Tetlin's decision to take the entire former Reserve under § 19(b), in lieu of choosing lands withdrawn by § 11, is not a selection, but an election.

Further, it is asserted, that village corporations under ANCSA can only be located within one region. If Tetlin, a Doyon village, were to receive the land it seeks in Parcel B, which is located in Ahtna region, the effect would be to place such land within the jurisdiction of Doyon region. Therefore, the dispute over Parcel B constitutes a regional boundary dispute which must, pursuant to § 7(a), be decided only by arbitration.

The Board cannot agree entirely with this line of reasoning.

The Board agrees with BLM that, under the general ANCSA scheme for distribution of land and money benefits, village corporations may not claim land within more than one region. To allow villages location and participation in dual regions would be incompatible with numerous provisions of ANCSA, including those in § 7(k) for fund distributions based on shares of regional stock held, and those in § 12(b) for allocation of unselected acreage based on enrollment of residents of villages within the region.

Village corporations which elect to receive their former reserve lands thereby receive both the surface and subsurface of the land in lieu of all other ANCSA land rights and benefits. Therefore, it can also be argued persuasively that villages electing to take their reserves have no interacting relationship with any regions, regardless of whether the village is contained within the boundaries of one region. However, it is unnecessary to reach this question.

The central issue on appeal is the location of the boundary of Tetlin Reserve.

This issue is particularly crucial because of the conditions imposed by § 19(b) on election of Reserve lands; *i.e.,* forfeiture of all other village corporation benefits conferred by ANCSA. To take its reserve lands, a village corporation gives up all other land selections as well as its rights to distribution of regional funds, and the village residents forego ownership of the regional stock issued to others. Having made the election, all a Reserve village corporation gets is its Reserve land. Therefore, the location of the Reserve boundaries determines the amount and character of land which the Reserve village elects to take as its only benefit under ANCSA.

In the present appeal, the record indicates that the Reserve was originally created in 1930 by Executive Order 5365, which described the Reserve only by metes and bounds. Over a period of

years, surveys were done for other purposes which defined portions of the Reserve boundaries. (*See* Exhibit 4, Affidavit of Samuel J. Bacino and supporting documents, Tetlin's Brief Submitted Pursuant to ANCAB's Order of May 29, 1981.)

Tetlin asserts, without contradiction, that BLM, between 1948 and 1951, considered changing the boundaries of the Reserve as established in 1930 to accommodate settlement along the Slana/Tok Road, which became the Glenn Highway. However, quadrangle maps Tanacross B-4 and Tanacross A-4 and A-5, issued in 1951 and 1952, did not make these changes.

Tetlin further asserts that Tetlin residents opposed another boundary change proposed by BLM in 1961 and that subsequently, in 1962, BLM reinterpreted the description of the Reserve contained in E.O. 5365, in connection with a 1962 survey resulting from State selection of adjacent lands. The 1962 survey depicted the Reserve boundary as BLM now delineates it. Tetlin asserts, without contradiction, that the Tetlin people were unaware of the effect of the 1962 survey on the Reserve boundary; that they objected to the Bureau of Indian Affairs concerning certain State selections within the 1930 Reserve boundaries, but were told they could not protest; and that in 1975, responding to Tetlin Native Corp.'s description of the Reserve in their selection documents, BLM advised Tetlin that any boundary disputes would be settled in the summer of 1976, upon completion of the official Tetlin survey. (Brief of Tetlin, *supra,* at 24-25.)

Finally, Tetlin asserts that the plat of survey of the Tetlin Reserve was accepted Oct. 25, 1979, without any indication that any proceeding had taken place to resolve the boundary dispute.

It was within this ongoing situation that the Secretary in 1972 described a portion of the boundary between Ahtna and Doyon as running along the boundary of Tetlin Reserve, and Ahtna and Doyon chose to acquiesce. There is no indication that Tetlin was consulted or participated in this arrangement.

In 1973, the Village Council of Tetlin announced that it considered itself to be a Doyon village. Subsequently, Doyon approved the articles of incorporation for Tetlin Native Corp. The Board has ruled that a village corporation organized under ANCSA is not bound by the actions of a village council organized prior to ANCSA where there is no evidence of any identity of interest or membership between the two organizations. (*Appeal of Eklutna, Inc.,* 1 ANCAB 190, 249-251, 83 I.D. 619, 650 (1976) [VLS 75-10].) Similarly, the actions of Tetlin Village Council cannot be held binding on Tetlin Native Corp. However, even if Tetlin Native Corp. was bound, the Village Council's statement did not incorporate a map or in any way locate the boundaries of either the Reserve or of Doyon Region.

[1] Accordingly, a portion of the regional boundary between Ahtna

and Doyon Regions has been described by the Secretary as following the Tetlin Reserve boundary, but the location of the Tetlin Reserve boundary was and remains in dispute. Tetlin Native Corp. cannot now be held to a boundary which delineates their entire land entitlement and sole benefit under ANCSA, as determined by an agreement to which Tetlin was not a party.

[2] Where the present appeal is Tetlin's first opportunity to challenge BLM's delineation of the land to which they are entitled under ANCSA, the Board concludes that their appeal directly addresses a land selection matter within the meaning of 43 CFR 4.1(b)(5) and finds the appeal within the Board's jurisdiction.

[3] Insofar as a segment of the Doyon-Ahtna boundary was located in 1972 along a portion of the Tetlin Reserve boundary which was unadjudicated, and which is now disputed by Tetlin, the Ahtna-Doyon boundary remains the boundary of Tetlin Reserve but is subject to resolution of the issues raised by Tetlin. If Tetlin prevails and the boundary as delineated by BLM is found to be in error, the regional boundary will continue to be the Reserve boundary, wherever the latter is found to be correctly located.

The remaining legal issues are, in essence, whether Tetlin is now bound, either by § 13(b) of ANCSA or by its own actions, to the location of Tetlin Reserve's boundaries as depicted on BLM survey plats or protraction diagrams in effect on Dec. 18, 1971 (date of enactment of ANCSA), or on Nov. 15, 1973 (date of their election to take the Reserve).

The Board finds that they are not.

Sec. 13(b) of ANCSA provides in pertinent part, "All withdrawals, selections, and conveyances pursuant to this Act shall be as shown on current plats of survey or protraction diagrams of the Bureau of Land Management."

Confusion arises because the term "current" is not defined expressly; ANCSA is not explicit as to whether plats are to be current as of the date of enactment, Dec. 18, 1971, or as of the dates of other events during the conveyance process.

BLM takes the position that the relevant date is Dec. 18, 1971, and that Tetlin's § 19(b) entitlement is limited by § 13(b) to the Reserve as shown on survey plats in existence on that date. BLM relies on the intent of Congress to settle land claims with certainty. BLM also argues that at the time ANCSA was enacted, much of the land claimed by Tetlin (approximately 37,000 acres) had been patented or tentatively approved to the State, and that Native allotments and homesteads had also been filed on these lands in reliance on the fact that the disputed lands were outside the Reserve as depicted on existing plats of survey.

BLM points out that ANCSA in § 11(a)(2) and § 12(a)(1) limits the amount of State TA'd land which a Native village may select and receive, and asserts that Congress did not intend conveyance to Tetlin of the State TA'd lands they now seek.

The Board cannot agree that § 13(b) imposes one controlling date, Dec. 18, 1971, on land descriptions during all steps of the conveyance process, or that Congress intended § 13(b) to control the land entitlement of reserves under § 19(b).

First, it must be noted that the events listed in § 13(b)—withdrawal, selection, and conveyance—would, under ANCSA, occur years apart. Withdrawals under §§ 11(a)(1) and 11(a)(2), for example, were to take place virtually immediately upon enactment of ANCSA, while deficiency lands to be withdrawn under § 11(a)(3) were to be made within 60 days of ANCSA or as soon as possible thereafter. Pursuant to § 12(a)(1), village selections are to be made within three years from enactment, or by Dec. 18, 1974, with conveyances under § 14(a) to follow immediately. In fact, conveyances are still in process. Final survey, as directed by § 13(a), may not occur for years after issuance of interim conveyances.

[4] Where § 13(b) of ANCSA addresses events in the land conveyance process which occur over a period of three years or longer, during which time surveys and protraction diagrams may be changed or corrected, it would be unreasonable to conclude that such changes or corrections must be ignored in deference to the survey or protraction in existence on Dec. 18, 1971.

[5] Sec. 13(b) is not a mechanism to determine land entitlement but is intended to insure that land is described through use of the most accurate protraction diagrams or surveys.

This is consistent with case law cited by Tetlin,

> If there is a general rule, then it is that an incorrect survey may not be relied upon to reduce the legal boundaries of an Indian reservation. The United States "could not . . . by an incorrect survey deprive the Indians of their right of occupation of the land within the legal boundries of the reservation . . ." *Northern Pac. Ry. Co.* v. *United States,* 191 F.947, 958 (9th Cir. 1911), *aff'd* 227 U.S. 335, 33 S. Ct. 368, 57 L.Ed. 544 (1913). Any "error in failing to extend the survey so as to include the lands in controversy cannot prejudice the rights of the Indians." *United States* v. *Romaine,* 255 F.253, 260 (9th Cir. 1919). And, the "executive order defining the limits [to the reservation] is conclusive as to the boundaries . . ." *United States* v. *Stotts,* 49 F.2d 619, 620 (W.D. Wash. 1930).
>
> *Sekaquaptewa* v. *MacDonald,* 626 F.2d 113, 118 (9th Cir. 1980).

As to limitations on the availability of State patented and TA'd land, insofar as such lands have been patented, they are beyond the jurisdiction both of BLM and this Board. However, the Board concludes that limitations on selection of State TA'd land, contained in § 11(a)(2), do not apply to the disputed Reserve. The State is entitled to select only from "vacant, unappropriated and unreserved" land. (43 CFR 2627.3(a).) Tetlin Reserve has been continuously reserved land since its creation in 1930 by E. O. 5365. Congress in § 13(b) did not intend to safeguard State selections from Tetlin's election to take the reserve, for Congress had no reason to believe that the State might have selected Reserve lands.

While Tetlin Reserve was not an Indian reservation, the Board

finds the above principles persuasive.

Finally, the Board does not believe that Tetlin is bound by its failure to object to the depiction of the Reserve on survey plats at the time of election to take the reserve. As Tetlin points out, the election procedure set forth by Departmental regulations did not require, or even address, settlement of boundaries.

Tetlin properly filed its application for selection of its former reserve by sending to the Secretary a certified copy of the vote of its stockholders as required by Departmental regulations. This certification was all that was required by Departmental regulations; no map or other description was required and none was included. (See, 43 CFR 2654.2(a) and *compare with* 43 CFR 2650.2.)

As noted, Tetlin also asserts that on Jan. 2, 1974, it requested Doyon's assistance in clarifying the former Reserve boundaries, and that in Dec. 1974, Tetlin filed a new application which included a detailed description of the reserve and included within the reserve Parcels A, B, C, and D. In Feb. 1975, the Alaska State Director, BLM, returned the application to Tetlin noting that the certified election results previously submitted constituted [Tetlin's] application. He noted that the returned application form indicated a possible boundary dispute. He stated that the official Tetlin boundary survey would be completed in 1976 and that any boundary disagreement could be identified and settled at that time.

Tetlin has asserted that at least as early as Mar. 1962, both the BIA and the BLM were aware of the Tetlin people's opposition to BLM's configuration of the Reserve boundaries as now depicted by U.S. Survey No. 2547. In 1964, Tetlin contends, the President of the Tetlin IRA Council requested that BIA object to a State selection of lands near Midway Lake (near Tetlin's eastern border).

[6] There appears from the appeal record to have been an ongoing boundary dispute, culminating in this appeal, between Tetlin and Departmental officials. Election to take Reserve lands did not require boundary description. The Board cannot conclude that, at the time of election to take its Reserve, Tetlin acquiesced by silence in the Reserve boundary as depicted on survey plats then current.

There appears to be a substantial factual dispute as to the boundaries of the former Tetlin Reserve. The Board finds that none of the legal issues raised by the parties are dispositive.

The Board therefore grants the motion of Tetlin Native Corp. for an evidentiary hearing on the boundaries of the former Tetlin Reserve, and refers this appeal to the Hearings Division, Office of Hearings and Appeals, for that purpose.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

JEWELL SMOKELESS COAL CORP.

4 IBSMA 51

Decided *June 18, 1982*

Appeals by Jewell Smokeless Coal Corp., from two decisions of the Hearings Division: One by Administrative Law Judge McGuire, IBSMA 81-47, Docket Nos. CH 0-169-R and CH 0-206-R; one by Administrative Law Judge Allen, IBSMA 81-39, Docket No. CH 1-12-R. Each decision upheld enforcement action by the Office of Surface Mining Reclamation and Enforcement based on performance standards for road construction and maintenance and for waste material handling in steep-slope mining operations.

IBSMA 81-39 affirmed in part, reversed in part; IBSMA 81-47 affirmed in part, reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally—Surface Mining Control and Reclamation Act of 1977: Roads: Generally

The mere nominal status of a road as a public road is not enough to bring the road within the exclusionary language of 30 CFR 710.5.

2. Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally

Entitlement to an exemption from regulation must be asserted and proven by the one claiming the exemption.

3. Surface Mining Control and Reclamation Act of 1977: Roads: Generally

The exemption from regulation provided by the exclusionary language in the definition of "roads" in 30 CFR 710.5 is for the benefit of governmental entities.

4. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally—Surface Mining Control and Reclamation Act of 1977: Roads: Generally

To be exempt from regulation under the Act, in accordance with the exclusionary language of the definition of "roads" in 30 CFR 710.5, a road must be shown to be maintained with public funds.

5. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally—Surface Mining Control and Reclamation Act of 1977: Roads: Generally—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Roads maintained with public funds." Where an access and haul road's public status is conditioned on a coal operator's agreement to be primarily responsible for maintaining the road, it is not a road "maintained with public funds" within the meaning of this phrase in the definition of "roads" in 30 CFR 710.5.

6. Surface Mining Control and Reclamation Act of 1977: Steep-Slope Mining: Generally

The special performance standards set forth in 30 CFR 716.2 do not pertain to a mining operation subject to regulation as a mountaintop removal operation in accordance with the provisions of 30 CFR 716.3.

APPEARANCES: Rudolph L. Ennis, Esq., Knoxville, Tennessee, for Jewell Smokeless Coal Corp.; Billy Jack Gregg, Esq., Office of the Field Solicitor, Charleston, West Virginia; Susan A. Shands, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor, Branch of Litigation and En-

forcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

On March 27, 1981, the Board consolidated these cases for review on appeal. Although procedurally and factually distinct, they concern enforcement action taken at the same mining operation and based on the same regulatory provisions. The background of each case is set forth separately, below, followed by a joint discussion of both.

Factual and Procedural Background

IBSMA 81-47

Appellant Jewell Smokeless Coal Corp. (Jewell) conducts a mountaintop removal mining operation in Buchanan County, Virginia. In Jan. 1980, Inspector Virts of the Office of Surface Mining Reclamation and Enforcement (OSM) visited the minesite and issued Notice of Violation (NOV) No. 80-1-43-1, charging Jewell with 16 violations of the initial regulations promulgated under the authority of the Surface Mining Control and Reclamation Act of 1977 (Act).[1] Later, the inspector issued Cessation Order (CO) No. 80-1-43-1 on the basis of Jewell's alleged failure to abate four violations charged in the NOV.[2] On Mar. 4, 1980, Jewell applied to the Hearings Division for review of four violations charged in the NOV, and on Mar. 27, 1980, Jewell filed applications for review of and temporary relief from the CO. The three applications were consolidated for a review hearing conducted on Mar. 31, 1980.[3] At the conclusion of this proceeding the Administrative Law Judge issued an oral decision denying Jewell temporary relief from the CO and upholding the challenged enforcement action by OSM.[4] On June 12, 1980, the Administrative Law Judge issued a written decision to the same effect.

The three violations charged in the NOV which Jewell contested were: (1) Placement of spoil, waste materials or debris on the downslope, as prohibited by 30 CFR 716.2(a); (2) failure adequately to drain the access and haul road, as required by 30 CFR 715.17(*l*)(2)(iii) and 715.17(*l*)(3); and (3) failure to construct the access and haul road in compliance with the grade restrictions of 30 CFR 715.17 (*l*)(2)(ii). Although the first of these alleged violations was described in the NOV as pertaining to distinct areas of Jewell's operations (Applicant's Exh. 1), the

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

[2] Sec. 521(a)(3) of the Act, 30 U.S.C. § 1271(a)(3) (Supp. II 1978), requires a cessation order "[i]f, upon expiration of the period of time as originally fixed or subsequently extended [in a NOV] * * * the Secretary or his authorized representative finds that the violation has not been abated."

[3] At the beginning of the review hearing Jewell orally amended its application for review with the result that the company sought review of three violations alleged in the CO and three corresponding violations alleged in the underlying NOV (Tr. 5-13). Given the commonality of issues thus presented by the applications for review of the NOV and CO, the Administrative Law Judge granted Jewell's motion for consolidation of these applications (Tr. 13).

[4] Tr. 200-03. Apparently by its motion for consolidation of its applications for review of the NOV and CO, discussed *supra* at note 3, Jewell also intended that the Administrative Law Judge consider these applications together with the company's application for temporary relief from the CO. *Compare* Tr. 201 *with* Tr. 13.

supporting evidence presented by OSM at the review hearing concerning only the area adjacent to and below the road which was the subject of the other two alleged violations. Correspondingly, Jewell's only defense against the alleged violation of 30 CFR 716.2(a) was the same as that raised against OSM's other enforcement action concerning the road, namely, that OSM lacked regulatory authority over the road because it was a county road maintained with public funds. This defense was based on Jewell's interpretation of the definition of "roads" set forth in 30 CFR 710.5. A summary of the evidence adduced by the parties in this regard follows.

The access and haul road was constructed in Feb. and Mar. of 1979 (Tr. 21, 89–91) and was identified as part of the area permitted to Jewell for surface coal mining operations on Mar. 21, 1979 (Tr. 56). On Mar. 23, 1979, Jewell deeded to Buchanan County a 40-foot-wide easement over 6,200 feet of the road (Tr. 21, 56, 59; Applicant's Exhs. 3 and 4).[5] The chairman of the Buchanan County Board of Supervisors formally acknowledged this deed on Mar. 26, 1979 (Tr. 112–13; Applicant's Exh. 3); the county clerk recorded the deed on Mar. 27, 1979 (Applicant's Exh. 3).[6] On Apr. 25, 1979, Jewell requested the State regulatory authority to remove all but 100 feet of the road from the coverage of the company's mining permit; the permit was so amended on May 3, 1979 (Tr. 102–05).

Buchanan County conditioned its acceptance of the road easement from Jewell on agreements that Jewell would be primarily responsible for the maintenance of the road and that Jewell would reimburse the county for any expenses incurred by it in performing maintenance on Jewell's behalf (Tr. 117–20; Applicant's Exh. 6; Respondent's Exhs. D and E). There is no evidence of record that any public funds were spent on the road between the time of the transfer of Jewell's interest in the road and the time of OSM's first enforcement action (*cf.* Tr. 123, 124–25, 127–31—concerning county expenditures to maintain other roads); instead, the evidence shows that Jewell maintained the road to facilitate its use by the company for access and haulage (Tr. 48, 80, 176–78).[7]

IBSMA 81–39

When the Hearings Division denied Jewell temporary relief from the cessation order addressed in IBSMA 81–47, Jewell chose to use a different road rather than to perform the remedial work required by OSM as a condition of the company's further use of its original access and haul road (*see* 2 Tr. 63).[8] Jewel

[5] The total length of the road was said to be 6,300 feet (Tr. 33–34). Purportedly, under Virginia law, the first 100 feet of the road were required to be included within Jewell's permit area (Tr. 15–16).

[6] The deed was recognized by Buchanan County pursuant to a "road ordinance" adopted by the county on May 1, 1978. *See* Respondent's Exh. D.

[7] Other users of the road, which have included loggers and local surface landowners, appear to have been merely incidential beneficiaries of Jewell's maintenance work (Tr. 47, 75, 93).

[8] Where the number 2 precedes citation of a transcript page, the reference is to the transcript of the hearing conducted on Nov. 18, 1980, in Docket No. CH-1-12-R.

began to use the new access and haul road, called the Mot Branch Road, in May or June of 1979 (2 Tr. 62–63).

On Aug. 27, 1979, OSM Inspector Virts again visited Jewell's mining operation. He inspected the new access and haul road and issued NOV No. 80–1–43–31 (Respondent's Exh. 10), charging Jewell with four violations of the Department's interim regulations. Jewell applied to the Hearings Division for review of and temporary relief from two of the alleged violations: (1) Failure to maintain routinely the access and haul road, and associated drainage structures, in violation of 30 CFR 715.17(*l*)(3)(i) and (ii); and (2) placement of spoil on the down-slope of the road cuts associated with the access and haul road, in violation of 30 CFR 716.2(a).[9] The defense raised by Jewell against OSM's enforcement action, was, as in the earlier case, that OSM did not have regulatory authority over the road (Application for Review and for Temporary Relief, Oct. 9, 1980; 2 Tr. 6–7, 19, 96–98).

At the conclusion of the review hearing on Nov. 18, 1980, Administrative Law Judge Allen upheld the contested enforcement action (2 Tr. 99–103). He issued a written decision to the same effect on Jan. 13, 1981. A summary of the evidence presented at the review hearing on the issue of OSM's regulatory authority over the road follows.

The road is located on land owned by members of the Looney family (*compare* Applicant's Exh. 1 and 2 Tr. 52–55 *with* Respondent's Exh. 1 and 2 Tr. 12–13). According to Ernest Looney, the family has always permitted public use of the road (2 Tr. 56), which provided direct access to the sites of a television antenna and cemetery until it was intersected by Jewell's operations (2 Tr. 44–45). The road continues to provide access to a farmhouse, owned by the Looneys and located near the site of Jewell's mining operations (2 Tr. 61), and to several residential properties along its lower reaches (2 Tr. 44). Looney testified that the county has performed maintenance work on the road "pretty often" over many years, particularly after flooding in 1957 and 1977 (2 Tr. 45–46).

On May 15, 1980, five members of the Looney family granted Buchanan County a 40-foot-wide easement over the 4,690-foot length of the road by a deed which was recorded on May 29, 1980 (Applicant's Exh. 1). Also on May 15, Jewell granted the county its interest in an easement over part of the road used for access and haulage (Respondent's Exh. 13), and on May 30 Jewell granted the county its interest in an easement over the remaining part of the road used for access and haulage (Respondent's Exh. 14). The record does not contain an explanation of the origin or precise nature of the interest in the road purportedly transferred by Jewell to the county.

The county issued written acknowledgments and acceptances of Jewell's deeds which specified that the acceptances were "subject to the terms of the Ordinance

[9] The other two violations alleged in NOV No. 80–1–43–31 concerned 30 CFR 715.15(a)(10) and 715.19(c). OSM vacated one of these on the day the NOV was issued and terminated the other on the date of its follow-up inspection, Sept. 9, 1980 (Respondent's Exh. 10).

adopted by the Buchanan County Board of Supervisors at their regular meeting on the 1st of May, 1978, and the agreement entered into by Jewell Smokeless Coal Corporation and the Buchanan County Board of Supervisors for maintenance of said road" (Respondent's Exhs. 13 and 14). A copy of the referenced ordinance is included in the record. No copy of the "agreement * * * for the maintenance of said road" is contained in the record; however, Wayne Horne, the County Administrator, testified to the effect that this agreement places responsibility on Jewell for the maintenance of the road (2 Tr. 77).[10]

The evidence concerning the maintenance work performed on the road since Jewell began to use it for access and haulage is somewhat ambiguous and contradictory as it relates to the respective roles of Buchanan County and Jewell. First, we are informed by John Matney, the superintendent of the mining operation and an employee of Nova Mining Co., Jewell's contractor (2 Tr. 58), that the road was first used in the mining operation in May or June of 1980 (2 Tr. 62-63). Matney also testified that his company did not perform any grading of the road "as such" to facilitate coal hauling (2 Tr. 68), but that Ben Looney, who was not employed by Nova Mining Company, widened portions of the road to provide his family with better access to their farmsite, in late July or early August of 1980 (2 Tr. 61). Matney claimed that the only maintenance work performed by his company has been to fill cuts occasionally, and he suggested that this work has been primarily for the benefit of other users of the road (2 Tr. 59-60, 70-71).

Both Matney and Steve Herald, the chief engineer for Jewell (2 Tr. 82), testified that Ben Looney had stated that he performs road maintenance work for the county (2 Tr. 71—testimony of John Matney; Tr. 83—testimony of Steve Herald). Also, Ernest Looney testified that his son, Ben, performs road work for the county (2 Tr. 46). However, none of these witnesses expressly testified that Ben Looney has been paid by the county for his work on the road used by Jewell. Wayne Horne, the county administrator, testified that Ben Looney is not on the county payroll he administers, but that Looney could have been employed by a county supervisor (2 Tr. 93). Horne also testified, on direct examination, that he had issued purchase orders for gravel for the road, but he could not identify who might have placed the gravel on the road (2 Tr. 73). On cross-examination he referred to only one such order, issued on Nov. 17, 1980, and did not produce a copy of this order for the record (2 Tr. 74).[11]

[10] In the hearing record in IBSMA 81-47, there is evidence that Buchanan County's acceptance of the easement against Jewell's original access and haul road was conditioned on the agreement that Jewell would bear primary responsibility for maintaining the road and would reimburse the county for expenses incurred by it in performing maintenance on Jewell's behalf (Tr. 117-20; Applicant's Exh. 6; Respondent's Exhs. D and E).

[11] Horne indicated that he could not verify whether the county had performed such work on the road as was described in Ernest Looney's testimony (Tr. 73-74).

Apparently to cast doubt on Jewell's claims about the extent of work it performed on the road, OSM introduced a portion of the transcript of the hearing in IBSMA 81-47 (2 Tr. 90-91; Respondent's Exh. 17). The pages introduced report the testimony of a Jewell employee that, as of the time of the hearing conducted on Mar. 31, 1980, the road was merely a "Jeep trail" and not large enough to accommodate a coal haul truck.

Discussion

I. Claim of Exemption

Under the Act and the general regulations, a surface coal mining operation is defined to include roads. 30 U.S.C. § 1291(28)(B) (Supp. II 1978); 30 CFR 700.5. The initial regulations, applicable to these cases, then define roads to mean "access and haul roads constructed, used, reconstructed, improved, or maintained for use in surface coal mining and reclamation operations," and expressly exclude from this definition roads that are maintained with public funds. 30 CFR 710.5. Jewell claims that both roads which it has used for access and haulage in the mining operation considered in these appeals are public roads maintained with public funds and, thus, are exempt from OSM's regulatory authority.

[1, 2] We previously have held that the mere nominal status of a road as a "public" road, by virtue of its being accepted by a municipal corporation and carried on its lists as such, is not sufficient to bring the road within the exclusionary language of 30 CFR 710.5. *Fetterolf Mining Sales, Inc.*, 4 IBSMA 29 (1982); *Rayle Coal Co.*, 3 IBSMA 111, 88 I.D. 492 (1981). We also have held that entitlement to an exemption from regulation must be asserted and proven by the one claiming the exemption. *E.g., Daniel Brothers Coal Co.*, 2 IBSMA 45, 51, 87 I.D. 138, 141 (1980). Before proceeding further, it is advisable for us to merge those holdings and, in so doing, we must first address the question of who can be entitled to the exemption (and its corollary: who must assert it).

[3] The legislative history of the Act indicates that Congress, when considering the appropriate scope of regulation of roads, was concerned primarily with possible burdens upon governmental units, not operators.[12] The exemption, then, is for the benefit of the relevant governmental entity, not the operator. There is nothing in these records to show that Buchanan County, by any acceptable formal standard, asserted the exemption on its own behalf.[13]

II. Applicability of Exemption

Even had the claim of exemption been properly made, the Administrative Law Judge in IBSMA 81-47 concluded that the road was not one described in the exclusionary language of 30 CFR 710.5 and was thus subject to OSM's enforcement authority. We agree.

[12] In responding to a query by Senator McClure as to whether a public road that an operator was required to maintain would be regulable, Senator Baker stated: "That is correct. It would not put any additional burden of responsibility on the part of the government." S. Cong. Rec. 18871 (Oct. 9, 1973).

[13] We are not requiring that the relevant governmental entity be made a party, although that would be appropriate. We do require, though, that the claim be made on behalf of that entity by a suitable representative, and that the claim be documented.

[4, 5] The exemption is based on two conditions: that the road be public *and* that it be maintained by public funds. Although open to the public, actual use of the road by anyone other than Jewell was not shown to be more than minimal, and the road's nominal public status may be terminated by the county at the conclusion of Jewell's use of the road for access and haulage.[14] As for maintenance of the road with public funds, none was shown. Indeed, the evidence on this point indicated that Jewell bears the financial and operational responsibilities for maintaining the road under the agreements which conditioned the county's acceptance of an interest in the road.[15] Under these circumstances, according the conveyance the effect Jewell urges would be exalting form over substance.

In the proceeding from which the appeal in IBSMA 81-39 was taken, the Administrative Law Judge expressed a similar opinion about the significance of the conveyances involved.[16] In that case there was evidence of more extensive and regular use of the road by members of the public other than Jewell;[17] however, the evidence concerning county involvement in the maintenance of the road was ambiguous.[18] Further, there was some indication that the county's acceptance of Jewell's conveyance of its interest in the road was, as in the case of the original access and haul road, conditioned on Jewell's accepting primary responsibility for maintaining the road.[19]

As we held in *Daniel Brothers Coal Co., supra,* a party seeking to come within an exception to a prevailing rule (such as a general definition) can do so only by an affirmative showing with clear proof. Jewell has failed to carry that burden by showing that the county was maintaining this road, and, whatever else may be said, that is the crucial factor. We therefore agree with the decision below that Jewell's second access and haul road was also subject to OSM's enforcement jurisdiction.

III. Spoil on the Downslope

[6] In each case before us the Administrative Law Judge upheld an alleged violation of 30 CFR 716.2(a), a regulation which prohibits the placement or retention of "[s]poil, waste materials or debris, including that from clearing and grubbing, and abandoned or disabled equipment, * * * on

[14] *See* note 7, *supra,* concerning use of the road. According to the ordinance under which the road was given formal public status by the county, an access and haul road "may, at the option of the Board of Supervisors of [Buchanan] County, be discontinued as a part of the County road system" when its use in coal mining ceases (Respondent's Exh. D).

[15] Tr. 117-20; Applicant's Exh. 6; Respondent's Exhs. D and E.

[16] The Decision of Jan. 13, 1981, Docket No. CH 1-12-R, at page 5 states:

"The only thing that should make a road exempt from this Act is where it is [within] a class of public road intended by the statute that depends [for] its existence [upon] the continuous expenditure of public funds for its maintenance, not merely token maintenance or sporadic maintenance but the kind of maintenance as performed on federal highways, state roads, and published county roads. If a road is that type of public road whereby its existence depends upon the expenditures of public funds from the public treasury for its existence and for its continued use by the general public and that is irrespective of occasional contributions by individuals or coal mining operations, then such a road would meet the test and criteria and would indeed be a public road as contemplated by the Act."

[17] *Compare* 2 Tr. 44-45, 56, and 61 *with* Tr. 47, 75, 93.

[18] *See* text, *supra* at 59-61.

[19] Note 10, *supra,* and accompanying text.

the downslope." [20] In IBSMA 81-47, Jewell has protested the portion of the decision below concerning this alleged violation only by its general argument that OSM lacked regulatory authority over the access and haul road (Brief for Appellant, filed Apr. 20, 1981, at 3-6). In IBSMA 81-39, Jewell has similarly protested the decision below and also has argued that OSM failed to present any evidence linking Jewell with the conditions described as the violation of 30 CFR 716.2(a).

Having recognized OSM's authority to regulate the two access and haul roads, we are left with Jewell's contention that it was not responsible for the conditions associated with the second road which prompted OSM's enforcement action pursuant to 30 CFR 716.2(a). We do not address this contention, however, for we have determined that OSM improperly relied on the cited regulation.

The introductory language to 30 CFR 716.2 provides that the performance standards set forth therein do not apply where mining is subject to regulation as a mountaintop removal operation under the provisions of 30 CFR 716.3.[21] The records of these two cases inform us that Jewell's operation involves mountaintop removal; [22] therefore, it is not subject to regulation pursuant to the provisions of 30 CFR 716.2 for steep-slope operations.[23]

Were there among the special standards governing mountaintop removal an express prohibition, as in 30 CFR 716.2, against the placement or retention of spoil, waste material, or debris on the downslope, we might examine the challenged enforcement action despite OSM's improper reliance on the steep-slope standards.[24] There is, however, no such provision among the special standards for mountaintop removal.[25] Accordingly, we limit our approval of OSM's enforcement actions concerning the access and haul roads to those actions based on 30 CFR 715.17(*l*), described above, and do not recognize 30 CFR 716.2(a) as a basis for enforcement action under the facts of this case.

For the foregoing reasons, the decisions on appeal are affirmed except for the parts upholding OSM's enforcement action based on 30 CFR 716.2(a); those parts of the decision below are reversed,

[20] In both NOV No. 80-1-43-1 and NOV No. 80-1-43-31 OSM specified 30 CFR 716.2(a)(1) as the regulatory provision violated by Jewell. As originally published in the *Federal Register*, at 42 FR 62692 (Dec. 13, 1977), the quoted language was so designated; however, for publication in the *Code of Federal Regulations*, its designation was changed to 30 CFR 716.2(a), to which we refer in this decision.

[21] Part 716 contains "special performance standards" for six categories of mining circumstances. Sec. 716.2 applies to operations on "steep slopes." Sec. 716.3 applies to operations involving "mountaintop removal."

[22] *E.g.*, Tr. 46; 2 Tr. 9.

[23] In conjunction with this conclusion we only assume that were Jewell's operation governed by the special performance standards of 30 CFR 716.2 then the circumstances of waste material and debris below the road cut, as described by OSM, might be prohibited by the provisions of subsection (a) of that regulation; we do not, for example, venture to determine whether the slope below the road cut was properly described by OSM as "downslope," within the meaning of the steep-slope performance standards.

[24] *See, e.g., Island Creek Coal Co.*, 2 IBSMA 125, 87 I.D. 304 (1980).

[25] Sec. 716.3(b)(5) contains provisions for the handling of "spoil" in mountaintop removal operations. The term "spoil" is, however, defined in 30 CFR 710.5 to mean overburden—*i.e.*, material that overlies a coal deposit—removed during mining (presumably, to expose the coal deposit). *Tennessee Consolidated Coal Co., Inc.*, 3 IBSMA 145, 88 I.D. 508 (1981). "Spoil," then, is not a generic term which describes all waste material or debris generated in a mining operation, and the records do not show that the unconsolidated materials below the road cuts were "spoil" materials that Jewell might be required to handle in accordance with 30 CFR 716.3(b)(5).

and the corresponding enforcement action by OSM is vacated.

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

ADMINISTRATIVE JUDGE FRISHBERG CONCURRING:

I concur in the holding, but disassociate myself from the dictum that the governmental entity must assert the exemption. It is gratuitous and not necessarily correct.

NEWTON FRISHBERG
Administrative Judge

STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

7 ANCAB 157

Decided *June 23, 1982*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-14942-A.

Affirmed in part; modified in part.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Where pursuant to lawful authority, lands are withdrawn by Secretary's Order for an Air Navigation Site for the benefit of the Territory of Alaska, and when the Secretary's Order was not rescinded upon Statehood, and the State of Alaska continued operation of the ANS facility, the State has standing to assert a claim of property interest, within the meaning of 43 CFR 4.902, for purposes of appealing the status of the ANS.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Generally

When the State of Alaska has continued operation of an Air Navigation Site withdrawn by Secretary's Order for use by the Territory, but has never made application for the withdrawn land under any Federal law, the State's use of the ANS is not "issued" within the meaning of § 14(g) of ANCSA and whatever right the State has to continued use of the land is not protected pursuant to § 14(g).

3. Alaska Native Claims Settlement Act: Conveyances: Reconveyances—Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

When the State of Alaska has continued operation of facilities on an Air Navigation Site withdrawn by Secretary Order for use by the Territory, but has never applied for the land under Federal law, the State's interest in the ANS is protected pursuant to § 14(c)(4) of ANCSA, *as amended,* which requires the Native corporation to convey title to the State, together with such additional acreage and/or easements as are necessary.

4. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Conveyances: Reconveyances—Alaska Native Claims Settlement Act: Conveyances: Interim Conveyance

Having ruled that Air Navigation Site 131 is protected under § 14(c)(4), the Board holds that the Secretary is bound by his own regulations and therefore, as to the State of Alaska's claim to ANS 131, will include in the conveyance to the village corporation, any and all covenants which he deems necessary to insure the fulfillment of the corporation's obligation under § 14(c)(4), as required by 43 CFR 2651.6(b).

APPEARANCES: James E. Sandberg and Martha T. Mills, Esq., for State of Alaska, Dept. of Transportation and Public Facilities; M. Francis Neville, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; Larry A. Wiggins, Esq., for MTNT, Limited; Elizabeth S. Ingraham, Esq., for Doyon, Limited.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeal

This appeal questions the status of an Air Navigation Site withdrawn by Secretary's Order for use by the Territory and following Statehood, operated by the State of Alaska. No specific transfer of title was ever requested or took place between the Federal Government and the State. The first question is whether the State even has a property interest in the Air Navigation Site, sufficient to appeal within the Board's standing regulations in 43 CFR 4.902. The Board holds that the use by the State is an authorized use, and therefore sufficient for standing to raise the question of the status of the land.

The second question is whether the State of Alaska's use is an interest leading to a fee or is a less-than-fee interest protected by § 14(g) of ANCSA. The Board holds that the State's interest could not lead to a fee without specific act, and since the use interest was not "issued" as that term is used in § 14(g), is not protected under that section of ANCSA.

The Board holds that the State of Alaska's interest is protected under § 14(c)(4) of ANCSA, and pursuant to requirements of 43 CFR 2651.6(b), the Secretary will include in the conveyance to the village corporation any and all covenants deemed necessary to insure fulfillment of the corporation's obligation.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act (ANCSA), 85 Stat. 688, *as amended,* 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

Selection Application F-14942-A was filed Nov. 27, 1974, by Gold Creek Limited for the Native Village of Takotna under provisions of § 12(a) of ANCSA for the surface estate of lands near Takotna. On Nov. 15, 1976, Gold Creek Limited consolidated with other Native villages and formed a single new corporation, MTNT, Limited (MTNT).

The Bureau of Land Management's (BLM's) Decision F-14942-A, dated Mar. 30, 1979, published in 44 FR 19257 (Apr. 2, 1979), approved for conveyance to MTNT, pursuant to § 14(a) of ANCSA, lands, including those at issue in this appeal.

On May 4, 1979, the State of Alaska, Department of Transpor-

tation and Public Facilities (State), filed its appeal of BLM's decision. In its statement of reasons, the State asserts that "[t]he BLM has failed to recognize and exclude (Air Navigation Site) ANS 131 from the DIC to MTNT."

The BLM's Answer, filed on June 22, 1979, requests that the Board dismiss the State's appeal of the decision to convey the lands in question to MTNT and asserts,

(1) that Appellant, State of Alaska, has failed to allege sufficient facts to establish standing to bring appeal;
(2) that no basis is shown by State of any Federal-created interest which requires recognition of ANS 131 as a valid existing right; and
(3) that the interest, if any, of appellant to continue operation of this airport is protected under § 14(c) of ANCSA.

The State's response, filed on July 10, 1979, reiterated that its operation of the Takotna Airport, Air Navigation Site (ANS) 131, is a sufficient basis for standing as an appellant and further that the withdrawal of ANS 131 constitutes such an interest as to require BLM to exclude the affected land from the Decision to Issue Conveyance (DIC).

At the conclusion of a conference held on Aug. 20, 1979, certain initially raised issues were resolved by agreement of the parties and the Board ordered that:

1. The facilities at Air Navigation Site 131 are not a terminal airport within the meaning of the exception contained in the statute under which ANS 131 was withdrawn (49 U.S.C. § 214).

2. Public Land Order 5444 is not relevant to this appeal and references to it in the State's brief should be disregarded.

The State and the BLM filed a further stipulation on Aug. 29, 1979, in which it was agreed that, (1) the legal description for the Takotna Airport is the same as the legal description in the State's Statement of Reasons, and (2) the Takotna Airport consists of a landing strip, reflectors, a storage building, and a wind sock. The runway has a gravel surface.

The State filed a supplemental memorandum on Sept. 21, 1979, and BLM's response to the State's supplemental memorandum was filed on Oct. 17, 1979.

Withdrawal of ANS 131 for the Takotna Airport was by Secretary's Order, filed on Nov. 15, 1939, in F.R. Doc. 39-4223, which included the following:

Air Navigation Site Withdrawal No. 131
Alaska

It is ordered, under and pursuant to the provisions of section 4 of the act of May 24, 1928, 45 Stat. 728, that the public lands lying within the following described boundaries in Alaska be, and they are hereby, withdrawn from all forms of appropriation under the public-land laws, subject to valid existing rights, for use by the Alaska Road Commission in the maintenance of air navigation facilities:

Beginning at Corner No. 1, which is 1719.5 feet N. 8°44′ W. from Corner No. 2 of U.S. Survey No. 2058, approximate latitude 63° N., longitude 156°05′ W; thence N. 36°36′30″ E. 1880.3 feet to Corner No. 2; thence S. 41°23′ E. 1595.4 feet to Corner No. 3; thence S. 59°50′ W. 1014.7 feet to Corner No. 4; thence No. 81°21′ W. 1313.9 feet to place of beginning, taining [sic] approximately 34.4 acres;

Withdrawal Modification was filed June 20, 1955, in FR 55-4739 signed by Lowell M. Puckett, Area Administrator pursuant to § 4 of the Act of May 24, 1928 (45 Stat. 729; 49 U.S.C.A. § 214 and to § 1.5(b), Delegation Order No. 541

of Apr. 21, 1954, which, *inter alia,* provides:

> [T]he following existing withdrawals are modified to delete in the first paragraph thereof *"for the use of the Alaska Road Commission" and substitute therefor "under the jurisdiction of the Department of the Interior, for the benefit of the Territory of Alaska,* Department of Aviation." The following withdrawals are so modified: * * * A. N. S. 131, Colorado, Takotna, and Tatina River, Alaska: [Italics added.]

Sec. 4 of the Act of May 24, 1928, Ch. 728 (45 Stat. 729); 49 U.S.C.A. § 214:

> The Secretary of the Interior is hereby authorized, in his discretion and under such rules as he may prescribe, to grant permission for the establishment of beacon lights and other air-navigation facilities, except terminal airports, upon tracts of unreserved and unappropriated public lands of the United States of appropriate size, and may withdraw the lands for such purposes.

Sec. 704(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, Title VII, 90 Stat. 2792 (Oct. 21, 1976), provides in pertinent part: "[T]he following statutes and parts of statutes are repealed: * * * Act of May 24, 1928, Chapter 729, Section 4, Statute at Large 45:729, 49 U.S.C. 214."

Sec. 701(a) provides:

> Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act.

Regulations adopted by the Department of the Interior were published Aug. 22, 1928, as Circular 1161 in 52 D.L. 476, Leasing of Public Lands for Airports and Aviation Fields—Act of May 24, 1928, provides that Government departments and agencies operating aircraft may be granted permission to establish beacon lights and other navigation facilities, except terminal airports, on tracts of unreserved and unappropriated public lands and that the Secretary of the Interior may withdraw such lands.

Regulations implementing the provisions of 45 Stat. 728 are set forth in 43 CFR Part 251—Airports and Aviation Fields, §§ 251.1 through .16 (1938), state that the Act of May 24, 1928 (45 Stat, 728; 49 U.S.C. 211-214) authorizes the Secretary of the Interior, in his discretion and under such rules and regulations as he may prescribe to *grant permission for the establishment of beacon lights and other air navigation facilities,* except terminal airports, upon unreserved and unappropriated public lands and to withdraw such lands for such purposes.

Position of the Parties

APPELLANT

Appellant, State of Alaska, asserts that, while ANS 131 was never conveyed by specific document to the State, the State has nonetheless acquired an ownership interest sufficient to defeat selection by a Native corporation pursuant to ANCSA. The State takes the position that ANS 131 is a valid existing right leading to a fee interest protected by § 14(g) of ANCSA and therefore must be excluded from the conveyance document.

The State points out that the Territory of Alaska, succeeded by the State of Alaska, has been operating the Takotna Airport facilities for approximately 40 years on lands withdrawn for this specific

purpose by the Federal government, and this lawful operation is the result of an ownership interest in ANS 131 which cannot be denied or ignored by the BLM.

The State asserts that while the withdrawal for ANS 131 was made in 1928 by Secretarial Order for the benefit of the Alaska Road Commission, for maintenance of air navigation facilities, the withdrawal modification of 1955 specifically struck the language referring to the Road Commission and substituted "under jurisdiction of the Department of the Interior, for the benefit of the Territory of Alaska, Department of Aviation." It is this modification language, making the Territory the beneficiary of the withdrawal, that created a trust which the State maintains has not been specifically revoked.

The State argues that by terms of statutory authorization (49 U.S.C. § 214) and regulations (43 CFR 251.14) the withdrawal is treated similar to a lease, and while indefinite in term, it cannot be terminated unless there has been a failure to comply with all requirements of use for stated proper purpose. The State contends that the Department of Interior holds the land in ANS 131 withdrawal for benefit of the State which is a legal equivalent of a fee simple on a condition subsequent. The condition subsequent being that no termination or cancellation of the State's interest could be made by the Secretary of Interior without a concurrence by the State of a condition causing a revocation. Withdrawal of ANS 131 for benefit of a State agency cannot be revoked without response of that agency.

The State asserts that the Alaska Statehood Law, Pub. L. 85-508, July 7, 1958, 72 Stat, 339, *as amended,* in § 5 and § 6(k), as well as the Alaska Omnibus Act, Pub. L. 86-70, June 25, 1959, 73 Stat. 141, *as amended,* appears to have intended to transfer to the State all interests of the Federal Government which would normally be the province of a state government.

BLM

BLM contends that due to the failure of the State to allege and establish a sufficient property interest in the land included within ANS 131, there is no standing to bring this appeal within the provisions of 43 CFR 4.902.

BLM denies that the Territory acquired a property interest in the lands withdrawn for ANS 131 because the withdrawal of ANS 131 does not convey a property interest but merely restricts that land from application of public land laws and sets it aside for a specific purpose. BLM points out that the language permitting such withdrawals in 49 U.S.C.A. § 214 gives no authority for conveyance of any property interest, but only gives permission for a restricted purpose use.

BLM asserts that since the Territory acquired no property interest in lands by virtue of ANS 131, none could pass to the State under terms of either § 5 or § 6 of the Statehood Act. Further, grants passing to the State under

§ 6 do not describe any possible interest included within an ANS withdrawal.

The BLM asserts that the Omnibus Act also makes no transfer of any interest of an ANS to the State inasmuch as § 35 is specifically limited by its terms to those public airports under jurisdiction of FAA and constructed and maintained under the Act of May 28, 1948 (48 U.S.C. § 485 *et seq.).* Sec. 21 involves only a transfer of Bureau of Public Roads interests from the Department of Commerce to the State and therefore has no applicability to any possible interest under an ANS withdrawal.

Sec. 45 of the Omnibus Act gave the Secretary of the Interior discretion, to July 1, 1966, to transfer various interests in Federal functions in Alaska. Sec. 46 provides a Jan. 1, 1965 deadline for settlement of disputed interests which may arise between the Federal and State Governments. BLM argues that while either section could have been the source of possible authority to transfer an ANS interest, neither was utilized in this instance.

BLM further asserts that ANCSA is itself a specific statutory authority for conveyance of land within the ANS withdrawal inasmuch as provision is made that all Federal interests in land surrounding Native villages is available for selection, except for only those omitted Federal interests specified in the Act, and whatever interests the State has in ANS 131 are, specifically protected under § 14(c)(4).

Decision

The issues before the Board in this appeal are: (1) whether the State has standing to appeal the BLM's decision to convey lands within ANS 131; and (2) in the event standing to appeal is allowed, whether the BLM erred in failing to exclude the lands within ANS 131 from its decision approving the same lands for conveyance to the Native corporation of MTNT.

Standing of a party to appeal the BLM's decision before the Board is governed by regulations in 43 CFR 4.902:

> Any party who claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed, or an agency of the Federal Government, may appeal as provided in this subpart. However, a regional corporation shall have the right of appeal in any case involving land selections.

BLM asserts that the mere use by the State, although authorized, is not sufficient to constitute a property interest within the standing requirement of § 4.902. BLM cites the prior ANCAB decisions of *Appeal of Lois A. Mayer,* 3 ANCAB 77 (1978) [VLS 78-46], *Appeal of State of Alaska,* 3 ANCAB 11, 85 I.D. 219 (1978) [VLS 77-11], and *Appeal of State of Alaska,* 3 ANCAB 196, 86 I.D. 225 (1979) [VLS 78-42], as appeals dismissed by the Board for failure to show a property interest.

The circumstance common to each of these decisions is that the appellant was unable to show that the land approved for conveyance to the Native corporation was the same land claimed by appellant as a property interest.

It is undisputed in this appeal that ANS 131 is located within the lands selected by MTNT and further that the BLM's decision approved these same lands for conveyance without excluding any lands within ANS 131 or without including any interest showing its existence. Therefore, the basis upon which standing was denied in these cited cases has no application to the issue before the Board in this appeal.

It is also undisputed that the Federal Government did not, by specific document, convey ANS 131 to the State. BLM's position is simply that without a conveyance made to the State of ANS 131, there can be no basis to assert any property interest within the meaning of 43 CFR 4.902.

The Board agrees with the BLM that the Secretary's Order withdrawing lands for ANS 131 created no fee interest or right to fee interest in the land in either the Alaska Road Commission, or upon modification, the Territory of Alaska; nor does the statutory authorization contemplate a transfer of title from the Federal Government on the basis of the withdrawal.

A PLO which withdraws and reserves public lands for the use or need of a Federal agency is limited to the purpose and intent stated or which can be construed from its terms. See *The Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska,* M-36911, 86 I.D. 151 (1978). *Louis J. Hobbs,* A-31051, 77 I.D. 5 (1970), also *Appeal of Paug-Vik, Inc., Ltd.,* 3 ANCAB 49, 85 I.D. 229 (1978) [VLS 77-2].

The Board also agrees with the position of the BLM that no fee interest to ANS 131 was transferred by inference to the State under any provisions of either the Omnibus Act or the Statehood Act. It is uniformly held that authorization to convey title to Federal lands must be specific and will not be merely inferred when statutory provision can be construed otherwise. *Union Oil Co. of California* v. *Morton,* 512 F.2d 743, 748 (9th Cir. 1975); also, *Sun Studs, Inc.,* 27 IBLA 278, 287-88, 83 I.D. 518, 522 (1976), and cases cited therein.

The Board does not find that any authority submitted by the State would enable a construction of the Secretary's Order, as modified, or of the provisions of the Statehood Act, or the Omnibus Act that title to lands within ANS 131 could pass to the State without a specific conveyance from the Federal Government. The State's argument that such general provisions can be construed as authorization to pass title to ANS 131 without a specific conveyance is contrary to the holdings noted above as well as the express provisions of § 45(a) of the Omnibus Act. The Board's adoption of the State's position would render the provisions of § 45(a) of the Omnibus Act which authorizes the transfer of lands by the Federal Government to the State as being superfluous.

However, the Board's finding that no fee interest in ANS 131 transferred either to the Territory

or to the State does not preclude a finding that the State has sufficient property interest to appeal the status of ANS 131 under ANCSA. Both ANCSA and its regulations protect valid existing rights of a less than fee nature and the Board has never held that fee interest is required for standing under 43 CFR 4.902. The Board has found that mere use, unauthorized by statute, lease, contract, or permit, does not constitute a claim of "property interest" required by 43 CFR 4.902. *Appeal of Sam E. McDowell,* 2 ANCAB 350 (1978).

It is undisputed in this appeal that the Territory was authorized to use land for a specific purpose; that it did so; and that the operational functions and maintenance of the facility, to whatever degree such exist, continued to be performed after Statehood by the State of Alaska.

Provisions of § 6(k) of the Statehood Act and §§ 21, 35 and 45 of the Alaska Omnibus Act were to assure that those Territorial functions which are being carried out pursuant to Federal law, would be continued by the State. Sec. 5 of the Statehood Act reflects a clear intent to effect a transfer of interests which may have accrued in the Territory at time of statehood.

Therefore, without giving any weight to the assertion by the State that it did acquire a specific title interest to the lands within ANS 131, the Board concludes that for purposes of standing, it is sufficient to show that no diminution of any interest the Territory may have had was caused by Alaska becoming a State, and, so long as the Secretary's Order was not rescinded, the State succeeded to the use of the land for the same purposes and under the same conditions as granted the Territory.

[1] The Board holds that, when pursuant to lawful authority, lands are withdrawn by Secretary's Order for an Air Navigation Site for the benefit of the Territory of Alaska, and when the Secretary's Order was not rescinded upon statehood, and the State continued operation of the ANS facility, the State has standing to assert a claim of property interest, within the meaning of 43 CFR 4.902, for purposes of appealing the status of the ANS.

The next question is whether the interest the State has is protected under ANCSA in such manner that BLM erred in failing to exclude the lands within ANS 131 from its decision approving the same lands for conveyance to the Native Corporation of MTNT.

The Board has already held that the State did not receive a title interest to ANS 131 because neither the language of the enabling statute nor the Secretary's Order transfers a title interest to the Territory; and no specific transfer of ANS 131 resulted from the Statehood Act or the Omnibus Act. Therefore, because ANS 131 is neither a fee interest, nor an interest leading to a fee, it does not come within the requirement of 43 CFR 2650.3-1(a) that "all conveyances issued under the act shall *exclude* any lawful entries or entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title." [Italics added.]

The only other regulation which requires exclusion of airport-related facilities is 43 CFR 2651.6(a):

> Every airport and air navigation facility owned and operated by the United States which the Secretary determines is actually used in connection with the administration of a Federal program will be deemed a "Federal installation" under the provisions of section 3(e) of the Act, and the Secretary will determine the smallest practicable tract which shall enclose such Federal installations. Such Federal installations are not public lands as defined in the act and are therefore not "lands available for selection" under the provisions of these regulations.

However, as no contention is made in this appeal that a Federal interest, within the meaning of the regulation, existed in ANS 131 after Statehood there is no basis to exclude the withdrawn land pursuant to § 3(e) of ANCSA.

The State also argues that ANS 131 could be considered in the nature of a lease and as such would be protected as a valid existing right pursuant to § 14(g) of ANCSA. The Board has ruled that valid existing rights protected by § 14(g) include both interests of a temporary or limited nature, and interests leading to the acquisition of title, when such interests were created prior to ANCSA and are being perfected or maintained pursuant to State or Federal law. (*Appeal of Tanacross, Inc.*, 3 ANCAB 219, 86 I.D. 257 (1979) [VLS 76-13].) Sec. 14(g) states:

> All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been *issued* for the surface of minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. [Italics added.]

The State has continued operation of ANS 131 on land withdrawn for the Territory, but has never made application for the land under Federal law, although it could have done so. The term "issued" as used in § 14(g) clearly contemplates application by a claimant for a use or right to land available under public laws and subsequent response. This was the situation in *Appeal of Tanacross, Inc.* In that appeal, the State has applied for title to an ANS site withdrawal pursuant to § 16 of the Federal Airport Act (49 U.S.C.A. § 1101 *et seq.* (1963), 60 Stat. 170, 179, *as amended*). The Board held that "application by the State of Alaska for lands under the Federal Airport Act and compliance with such law leading to the acquisition of title prior to ANCSA is sufficient to create a valid existing right in the State of Alaska protected by § 14(g) of ANCSA," *Appeal of Tanacross, Inc., supra,* at 265.

[2] In the present appeal, the State has never made application for ANS 131. The Board concludes that when the State has continued operation of an ANS withdrawn by Secretary's Order for use by the Territory, but has never made application for the withdrawn land under any Federal law, the State's use of the ANS is not "issued" within the mean-

ing of § 14(g) of ANCSA and whatever right the State has to continued use of the land is not protected pursuant to § 14(g).

It is unnecessary in this appeal that the Board make a determination of the precise manner the BLM would be required to give recognition in the decision to the State's interest in ANS 131.

The conclusion not to make such a finding is based upon the specific provisions of § 14(c)(4), *as amended,* which enables the implementing of the merits of the State's interest to be made only after conveyance by the BLM to the selecting Native corporation after which the Board would lose jurisdiction. *See Appeal of James W. Lee,* 3 ANCAB 334 (1979) [VLS 79-11].

After reviewing the relevant statutes and legislative history, it is evident to the Board that the State's interest in ANS 131 is the subject of § 14(c)(4) of ANCSA *as amended* by § 1404 of the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487, 94 Stat. 2493 (Dec. 2, 1980):

> (c) Section 14(c)(4) of such Act is amended to read:
>
> "(4) the Village Corporation shall convey to the Federal Government, State, or to the appropriate Municipal Corporation, title to the surface estate for airport sites, airway beacons, and other navigation aids as such existed on December 18, 1971, together with such additional acreage and/or easements as are necessary to provide related governmental services and to insure safe approaches to airport runways as such airport sites, runways, and other facilities existed as of December 18, 1971."

The requirement that, after receiving patent, a Native corporation shall convey title of airport lands to the proper governmental entity, was introduced as an amendment to the final version of the ANCSA legislation by U.S. Senator Mike Gravel:

> There are many airports around various villages which were acquired under verbal agreement. This gives title for the airports and airways so that title can be vested with the State of Alaska, so that these services can continue. It is in the best interest of the State and the individual villages in question. That is why I have offered the amendment.

92 Cong. Rec. S. 17276, 17309 (1971).

[3] Thus, § 14(c)(4) makes special provision to guarantee title to the State, and other government entities, of airport-related lands not otherwise protected under ANSCA. The Board holds that when the State has continued operation of facilities on an ANS withdrawn by Secretary's Order for use by the Territory, but has never applied for the land under Federal law, the State's interest in the ANS is protected pursuant to § 14(c)(4) of ANCSA, *as amended,* which requires the Native corporation to convey title to the State, together with such additional acreage and/or easements as are necessary.

The Board has previously held that it is without jurisdiction to adjudicate claims of interest arising from § 14(c). A Native corporation is not required to reconvey land under this section until after it receives interim conveyance; therefore, an appeal brought prior to interim conveyances as to which lands were or were not reconveyed to the applicant would be premature. At the same time, the Board has ruled that the Department loses jurisdiction after interim conveyance, that is, after the land has been conveyed to the

Native corporation. *Appeal of James W. Lee, supra.* Therefore, the Board's rulings in this appeal do not purport to determine what acreage, within or in addition to the ANS site, must be conveyed or reserved to the State pursuant to § 14(c)(4).

The Board also held in *Appeal of James W. Lee, supra,* that:

> A reservation in a decision to convey, stating that conveyance to the village corporation is subject to the requirements of § 14(c) of ANCSA, protects rights in use and occupancy of the land, if any, claimed by the appellant under § 14(c), until the village corporation makes a determination as to the appellant's rights under § 14(c).

The Board's finding that the general reference to § 14(c) is sufficient to protect the rights of claimants, was based on 43 CFR 2651.5: "[C]onveyances issued to village corporations shall provide for the transfer of the surface estates specified in section 14(c) of the Act."

However, regulations in 43 CFR 2651.6(b) require different treatment for conveyances subject to § 14(c)(4) reconveyances. 43 CFR 2651.6(b) provides that:

> The surface of all other lands of existing airport sites, airway beacons, or other navigation aids, together with such additional acreage or easements as are necessary to provide related services and to insure safe approaches to airport runways, shall be conveyed by the village corporation to the State of Alaska, and the *Secretary will include in the conveyance to any village corporation any and all covenants which he deems necessary to insure the fulfillment of this obligation.* [Italics added.]

The question of what covenants the Secretary can include in conveyances to Native corporations pursuant to this regulation is not the subject of this appeal. However, it is evident that the Board's previous holding in *James W. Lee, supra,* that a general reference to § 14(c) is sufficient to protect the rights of claimants, may not be applied to § 14(c)(4).

[4] Having ruled that ANS 131 is protected under § 14(c)(4), the Board holds that the Secretary is bound by his own regulations and therefore, as to the State's claim to ANS 131, will include in the conveyance to the village corporation, any and all covenants which he deems necessary to insure the fulfillment of the corporation's obligation under § 14(c)(4), as required by 43 CFR 2651.6(b).

Order

The conveyance document issued pursuant to the above-designated decision of the Bureau of Land Management will include any and all covenants which the Secretary deems necessary to insure the fulfillment of the village corporation's obligation pursuant to § 14(c)(4) of ANCSA, *as amended.*

JUDITH M. BRADY
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

REBEL COAL CO., INC. ISLAND CREEK COAL CO.

4 IBSMA 69

Decided *June 24, 1982*

Appeal by the Tug Valley Recovery Center from the Oct. 2, 1980,

decision of Administrative Law Judge Tom M. Allen denying its petition for intervention in Docket No. CH 0-1-A, a permit suspension or revocation proceeding.

Affirmed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Intervention—Surface Mining Control and Reclamation Act of 1977: Appeals: Generally

An order by an Administrative Law Judge denying a petition to intervene may be appealed to the Board under 43 CFR 4.1271(a).

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Intervention—Surface Mining Control and Reclamation Act of 1977: Suspension or Revocation of Permits: Generally

Where a corporation petitions to intervene in a suspension or revocation proceeding on its own behalf and not as a representative of its members, but alleges no injury to itself, it is not entitled to intervene as a matter of right under 43 CFR 4.1110(c)(2).

3. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Intervention—Surface Mining Control and Reclamation Act of 1977: Suspension or Revocation of Permits: Generally

Where the only interest asserted by one petitioning to intervene in a suspension or revocation proceeding is in the precedential effect of the ruling to be made, and the ultimate interest of petitioner may be asserted in another, more appropriate proceeding, denial of permission to intervene under 43 CFR 4.1110(d) is not an abuse of discretion.

APPEARANCES: L. Thomas Galloway, Esq., and Richard L. Webb, Esq., Center for Law and Social Policy, Washington, D.C., and Tobias J. Hirshman, Esq., Appalachian Research and Defense Fund, Charleston, West Virginia, for Tug Valley Recovery Center; Billy Jack Gregg, Esq., Office of the Field Solicitor, Charleston, West Virginia, Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; Gregory R. Gorrell, Esq., and Mark C. Russell, Esq., Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia, for Island Creek Coal Co. and Rebel Coal Co., Inc.

OPINION BY INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Tug Valley Recovery Center (TVRC) has sought review of the Oct. 2, 1980, decision of Administrative Law Judge Tom M. Allen denying TVRC's petition to intervene in a proceeding initiated by the Office of Surface Mining Reclamation and Enforcement (OSM) with an order to show cause why a surface coal mining permit should not be suspended or revoked. For the reasons set forth below, we affirm that decision and remand the case to the Hearings Division for further proceedings.

Background

On Apr. 8, 1980, OSM issued to Rebel Coal Co., Inc. (Rebel), and Island Creek Coal Co. (Island Creek), an order to show cause why Rebel's West Virginia surface mining permit 136-79 should not

be suspended or revoked as the consequence of an alleged pattern of violations at the Rebel No. 2 mine, located in Logan County, West Virginia.[1] OSM issued the order pursuant to sec. 521(a)(4) of the Surface Mining Control and Reclamation Act of 1977 (Act) [2] and filed it with the Office of Hearings and Appeals, in accordance with 43 CFR 4.1190, to initiate a review proceeding.

On April 15, 1980, TVRC filed a petition to intervene in that proceeding under 43 CFR 4.1110(c)(2) or, alternatively, 43 CFR 4.1110(d).[3] TVRC is a nonprofit corporation, formed in 1977, whose purpose is

to provide emotional, physical, material, and spiritual assistance to the victims of the flood which occurred in the Tug Valley the week of April 4, 1977. To implement these general purposes, the corporation is specifically empowered to:

(a) Assist in the development of adequate housing facilities for the Tug Valley area,

(b) Engage in ecological and environmental research to discover the cause of the above-mentioned flood and to suggest and advocate for the implemention of systems and measures designed to prevent the future occurrence of such a flood,

(c) Act as a liaison between the victims of the flood and state and Federal agencies administering flood relief programs, informing said victims of all grants, loans, and other forms of assistance to which they are entitled. [4]

Consonant with petitioner's purpose, membership in TVRC is restricted to "all persons over the age of sixteen (16) years who reside in Mingo County, West Virginia, or the communities in Pike and Martin Counties, Kentucky, which border on or be near the Tug Fork River." [5] The mine in question, however, is located in Logan County, West Virginia. It "is in the watershed of the Trace Fork of the Guyandotte River, not in the watershed of the Tug River." [6]

In its petition for leave to intervene TVRC alleged only harm to its members as the basis for intervention:

The Tug Valley Recovery Center is a nonprofit corporation whose members reside in the vicinity, and downstream from the operation in question. The members of the Tug Valley Recovery Center utilize streams and rivers for recreation which are adversely affected by the contribution of pollutants from the said site to the waters of the area. Members of the

[1] The order is somewhat ambiguous regarding Island Creek. It is entitled: "In the Matter of: REBEL COAL COMPANY, INC. * * *, Successor in Interest to: ISLAND CREEK COAL COMPANY." The order is addressed to "you," and refers only to Rebel's existing permit. In it, however, OSM alleges that Island Creek held permit 66-75 "on the same Rebel No. 2 Mine from 1975 to November 9, 1979," owns all the coal mined at Rebel No. 2, processes all that coal and disposes of refuse at Rebel No. 2. Of the seven violations cited as constituting the pattern of violations, six of the notices were issued to Island Creek while it operated Rebel No. 2. All the parties, including Island Creek, and the Administrative Law Judge treat both companies as respondents.

[2] Act of Aug. 3, 1977, 91 Stat. 445, 506, 30 U.S.C. § 1271(a)(4) (Supp. II 1978).

[3] TVRC sought to intervene on the basis of 43 CFR 4.1110(c)(2) or (d), which provide:

"(c) The administrative law judge or the Board shall grant intervention where the petitioner—

* * * * *

"(2) Has an interest which is or may be adversely affected by the outcome of the proceeding.

"(d) If neither paragraph (c)(1) nor (c)(2) of this section apply [*sic*], the administrative law judge or the Board shall consider the following in determining whether intervention is appropriate—

"(1) The nature of the issues;

"(2) The adequacy of representation of petitioner's interest which is provided by the existing parties to the proceeding;

"(3) The ability of the petitioner to present relevant evidence and argument; and

"(4) The effect of intervention on the agency's implementation of its statutory mandate."

[4] Articles of Incorporation of TVRC, Attachment I to Stipulation filed with Administrative Law Judge Allen on Aug. 22, 1980.

[5] By-laws of TVRC, Attachment II to Stipulation, *supra* note 4.

[6] Stipulation No. 7, *supra* note 4.

Tug Valley Recovery Center live downstream from the site and could be affected by flooding problems caused or aggravated by the said operation. [7]

No harm to TVRC as a corporate entity was alleged.

The Administrative Law Judge held a hearing on the question of petitioner's standing to intervene. No evidence was proffered supporting petitioner's allegations regarding its members or their interests which might be affected by the outcome of the proceedings. Although petitioner agreed at the close of the hearing to submit the name and interest of at least one of its members, it later informed the Administrative Law Judge

that the issue of standing to intervene in this case should be decided solely on the status of the Tug Valley Recovery Center as adduced from the stipulations, exhibits, and briefs submitted in this matter. Thus, the movants for intervention in this matter intends to submit no affidavits or other evidentiary matter and propose to have this matter adjudicated on the evidence presently before you in regard to the issues of both permissive intervention and intervention of right. [8]

Following briefing and the submission of stipulations, the Administative Law Judge denied TVRC's petition on Oct. 2, 1980.

On Oct. 8, 1980, TVRC filed a notice of appeal from that decision with the Board under 43 CFR 4.1196 and 4.1271. The Board issued an order on Oct. 14, 1980, staying further proceedings below and ordering briefing.

Meanwhile, TVRC had sought certification of the decision as an interlocutory ruling under 43 CFR 4.1124. The Administrative Law Judge denied certification in an order dated Oct. 10, 1980. On Oct. 20, 1980, TVRC filed a petition for an interlocutory appeal with the Board under 43 CFR 4.1272. The Board consolidated the petition with the notice of appeal in an order dated October 24, 1980.

Discussion and Conclusions

I. Reviewability

[1] Initially, this appeal raises the question of the proper procedure for obtaining Board review of an Administrative Law Judge's denial of a petition for intervention. No provision in the procedural regulations in 43 CFR Part 4, Subpart L, addresses this issue directly; however, the general appeal regulation of 43 CFR 4.1271(a) provides that "[a]ny aggrieved party may file a notice of appeal from an order or decision of an administrative law judge disposing of a proceeding under this subpart * * *." The first question is whether there has been a "proceeding" in this case disposed of by order or decision, and, if so, whether TVRC was a "party" to that proceeding and aggrieved by the disposition.

TVRC, although not a party to the action in chief, is, by definition, a party to the attempt to intervene. It is the moving party. The hearing to determine whether or not TVRC should have intervenor status was disposed of by the order of the Administrative Law Judge denying TVRC such status. We conclude that the hearing on the petition to intervene pursuant to 43 CFR 4.1110 was a "proceeding" as the term is used in 43 CFR 4.1271, that TVRC was a party to the proceeding, and

[7] Petition for Leave to Intervene, Apr. 17, 1980, par. 3.
[8] Letter of Sept. 11, 1980, from Tobias J. Hirshman to Administrative Law Judge Allen.

that the denial of its petition was an order disposing of the proceeding. Consequently, we hold that the order is appealable under sec. 4.1271. Were we to rule otherwise, we would have to conclude either (1) that the denial of a petition to intervene is never appealable, or (2) that the appeal cannot be made until there is a final judgment in the case in chief, in which event the entire matter might have to be retried. Neither alternative is acceptable.[9]

II. Merits

The Department authorizes intervention in administrative proceedings under the Act in accordance with 43 CFR 4.1110. A petitioner may intervene in a proceeding as a matter of right where the petitioner either "[h]ad a statutory right to initiate the proceeding," or "[h]as an interest which is or may be adversely affected by the outcome of the proceeding." 43 CFR 4.1110(c). If neither of these circumstances pertain, intervenor status may be granted as an exercise of discretion by an Administrative Law Judge or the Board, in accordance with 43 CFR 4.1110(d).[10]

A. Intervention as a Matter of Right

[2] The Administrative Law Judge correctly held that TVRC had no statutory right to initiate the show cause proceeding;[11] thus, TVRC could not intervene under 43 CFR 4.1110(c)(1).[12] Nor, he held, did TVRC qualify for intervention as a matter of right under 43 CFR 4.1110(c)(2), because it "has no interest which is or may be affected by the outcome of this proceeding."[13] He based this holding on the decision by TVRC not to produce witnesses who might have been questioned by re-

[9] This accords with the more elightened judicial view, although stated in a slightly different context, that all orders denying petitions for intervention should be appealable:

"Under the traditional rule, an order denying intervention of right is unconditionally appealable, but an order denying permissive intervention is appealable only if the district court has abused its discretion. 3B J. Moore, Federal Practice ¶ 24.15 (2d ed. 1974). This distinction, which means that the court of appeals must consider the merits of the discretionary intervention to determine whether the order is appealable, has no practical significance. Its only effect is to require that, if we agree with the district court on the merits, we dismiss the appeal instead of affirming. The Second Circuit, in reviewing a denial of intervention of right, has taken the position that the distinction should be eliminated:

" 'Commentators seem to agree that requiring appealability of an order to turn on the merits serves no useful purpose. They would prefer to consider all denials of intervention final orders and therefore appealable, but would reverse only when a party is entitled to intervention as of right or the trial court abused its discretion in denying permissive intervention. See Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 720, 740-51 (1968); 3B J. W. Moore, Federal Practice ¶ 24.15 at 24-565 (1969).

* * * * * *

" 'Given the aim of the 1966 amendments to the Federal Rules which substituted "a practical rather than a conceptual emphasis in questions of intervention," [C. Wright, Handbook of the Law of Federal Courts 328 (2d ed. 1970)] the proper and sensible course is to assume that an order denying intervention is final for the purposes of appeal, and to go directly to the merits.' Ionian Shipping Co., v. British Law Insurance Co., 426 F.2d 186, 189 (2d Cir. 1970).

"* * * We agree with this analysis and proceed to consider the appeal from the order denying intervention on the assumption that we have jurisdiction to consider both the questions of intervention of right and permissive intervention. The standard of review of an order denying permissive intervention remains, of course, whether the district court abused its discretion."

Reedsburg Bank v. *Apollo*, 508 F.2d 995, 997 (7th Cir. 1975).

[10] Intervention as a matter of discretion is discussed, *infra* at 339-343.

[11] Under sec. 521(a)(4) of the Act, 30 U.S.C. § 1271(a)(4), and the corresponding initial program regulations, 30 CFR 722.16 and 43 CFR 4.1190-.1196, a permit suspension or revocation proceeding is to be initiated only in conjunction with OSM's issuance of a show cause order, and not independently by a citizen.

[12] TVRC and OSM concur.

[13] Order of Oct. 2, 1980, Docket No. CH 0-1-A, at 5.

spondents as to actual or potential adverse effects.

We addressed language identical to that of 43 CFR 4.1110(c)(2) in our order of Feb. 24, 1982, awarding standing to the Natural Resources Defense Council, Inc. (NRDC), in a permit application proceeding under the Federal lands program (*NRDC* v. *Office of Surface Mining Reclamation and Enforcement,* IBSMA 81-83, 4 IBSMA 4, 10 (1982)):

> This statutory language—"person with an interest which is or may be adversely affected"—is defined in regulations adopted by the Secretary as including "any person a) who uses any resource of economic, recreational, esthetic, or environmental value that may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Secretary or the State regulatory authority or b) whose property is or may be adversely affected" by these same activities or actions. * * * [Citing 30 CFR 700.5.] In devising this definition the legislative history referred to above,[14] as well as additional references, were relied on, as were various United States Supreme Court decisions. [Citing 44 FR 14912-13 (Mar. 13, 1979); *Sierra Club* v. *Morton,* 405 U.S. 727 (1972); *United States* v. *SCRAP,* 412 U.S. 669 (1973); and *Duke Power* v. *Carolina Environmental Study Group,* 438 U.S. 59 (1978).]

We pointed out that "the standards for standing before administrative tribunals are not congruent with those established for courts for either constitutional or prudential reasons," citing *Koniag, Inc., Village of Uyak* v. *Andrus,* 580 F.2d 601 (D.C. Cir. 1978).[15] In his concurring opinion in *Koniag,* however, describing the broader functional analysis that should be applied in evaluating standing before administrative tribunals, Judge Bazelon added this qualification:

> The fact that judicial and administrative standing are conceptually distinct does not, of course, mean that Congress could not require an administrative agency to apply judicial standing concepts in determining administrative standing. Nor does it mean that courts and agencies should never refer to judicial standing decisions, where helpful, by way of analogy. But absent a specific justification for invoking judicial standing decisions, I see no basis for interjecting the complex and restrictive law of judicial standing into the administrative process.

Id. at 613-14.[16]

Congress intended the standards enunciated by the Supreme Court in *Sierra Club* v. *Morton,* 405 U.S. 727 (1972), to govern judicial standing under the Act.[17] Although it need not have so limited itself, the Department adopted the statutory language, applied it to administrative intervention as a matter of right, and defined it in accordance with *Sierra Club.*[18] That language is essentially identical to the wording of 43 CFR 4.1110(c)(2), the intervention regulation at issue here.[19]

[14] Referring to H.R. Rep. No. 95-493, 95th Cong., 1st Sess. 106-07 (1977), and H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 66 (1977).

[15] 4 IBSMA at 9.

[16] Judge Bazelon also conceded that "a number of decisions [of the D.C. Circuit] * * * have applied judicial standing concepts in determining whether a party should have standing before an agency." 580 F.2d at 613.

[17] *Sierra Club* v. *Morton* is referred to as the source of the language, "any person having an interest which is or may be adversely affected," in sec. 520 of the Act, 30 U.S.C. § 1270 (Supp. II 1978), relating to citizen suits. 119 Cong. Rec. 33190 (Oct. 8, 1973); S. Rep. No. 94-28, 94th Cong., 1st Sess. 217 (1975); *see* H. Rep. No. 95-218, 95th Cong., 1st Sess. 90 (1977).

[18] The Department at 44 FR 14913 (Mar. 13, 1979) repeatedly referred to the legislative history and *Sierra Club* v. *Morton* as authority for the definition of the language in 30 CFR 700.5, "any person having an interest which is or may be adversely affected," stating, *e.g.*: "The proposed definition is consistent with the *Sierra Club* v. *Morton* holding. * * * Legislative history is overwhelmingly clear that Congress had *Sierra Club* v. *Morton* in mind."

[19] 43 CFR 4.1110(c)(2) refers to any person "who has an interest which is or may be adversely affected by the outcome of the proceeding."

Petitioner, however, after deciding not to pursue intervention in its representative capacity, departed from reliance upon *Sierra Club.*[20] Instead, it argued that the language of sec. 4.1110(c)(2) includes "TVRC's interest * * * in the significant legal determinations which may be reached and which might affect its ability to protect its interests in subsequent proceedings." [21] In support it cites the preamble to the intervention regulations wherein the Department, explaining its broadening of the standard in sec. 4.1110(c)(2) from "direct economic or personal stake" to "an interest which is or may be adversely affected," stated:

> While it is true that citizens may not commence two of the most important enforcement proceedings under the Act, i.e., civil penalty review and suspension or revocation proceedings, citizen participation is, nevertheless, of critical importance to such proceedings. The importance of such participation to suspension or revocation proceedings was expressly recognized in the legislative history. It was stated in S. Rep. No. 128, 95th Cong., 1st Sess. 96 (1977) that "[a]ny person who has an interest which is or may be adversely affected by a suspension or revocation of a permit shall be allowed to participate." The commenter also urged the inclusion of language in § 4.1110(c)(2) to allow intervention of right to persons or groups in cases where significant legal determinations may be reached which might affect the ability of such persons or groups to protect their interests in subsequent proceedings. Such language was not accepted. It is believed that the first change that was made is broad enough to encompass those persons for whom the commenter sought to provide by the additional suggested language.
>
> 43 FR 34378 (Aug. 3, 1978).

This interpretation, however, goes far beyond *Sierra Club,* and is at odds with the Department's subsequent explanation of the broadened definition. After explaining how deletion of one word, retention of another, and addition of a third conform to *Sierra Club,* the Department added:

> The West Virginia Supreme Court case [*McGrudy* v. *Callaghan,* 244 S.E.2d 793 (W.VA. 1978)] is clearly narrower on the standing question than *Sierra Club* v. *Morton* and would not be consistent with what Congress intended. Cases do not require a showing of adverse impacts upon personal or real property or require persons to live in the geographic area of influence *so long as use and injury in fact can be shown.*
>
> 44 FR 14913 (Mar. 13, 1979) (italics added).

To be consistent with the intent of the Department, we interpret the language of 43 CFR 4.1110(c)(2) in accord with the principles enunciated by the Supreme Court in *Sierra Club.*[22] To

[20] Nowhere in its pleadings after Sept. 11, 1980, when it communicated its decision to the Administrative Law Judge to rely solely upon standing on its own behalf (Letter of Sept. 8, 1980, *supra* note 8), does it invoke *Sierra Club.* OSM, on the other hand, continued to rely upon *Sierra Club* in supporting intervention (OSM Memorandum of Nov. 26, 1980, at 4).

[21] Brief of appellant Tug Valley Recovery Center in Support of Petition for Leave to Intervene, Nov. 3, 1980, at 6. In a footnote to the quoted language, TVRC stated:

> "In its Petition for Leave to Intervene, TVRC also alleged a direct interest in the Rebel No. 2 Mine operation as affecting TVRC members in its vicinity. TVRC decided, however, after the filing of its papers that it was necessary to protect the identity of its members. Therefore, TVRC did not pursue this aspect of its entitlement in the proceeding below."

[22] We pointed out in *NRDC,* 4 IBSMA at 11, that the Department believed references to later Supreme Court cases would leave the guidelines too confused, citing 44 FR 14913 (Mar. 13, 1979). Nevertheless, we have examined those decisions. While the Court's application of the principles enunciated in *Sierra Club* has been criticized as inconsistent (*e.g.,* Davis, *1980 Supplement to Administrative Law Treatise* §§ 22.00-3, 22.00-7, and 22.19-1; Tribe, *American Constitutional Law* § 3-21 (1978)), those principles have not changed. *Compare Havens Realty Corp.* v. *Coleman,* 102 S. Ct. 1114 (1982); *Gladstone Realtors* v. *Village of Bellwood,* 441 U.S. 91 (1979); and *Village of Arlington Heights* v. *Metropolitan Housing Corp.,* 429 U.S. 252 (1977) (all of which held a nonprofit corpora-

Continued

qualify for mandatory intervention under sec. 4.1110(c)(2), a "person" must allege (and later prove) injury in fact.[23] To hold otherwise would be inconsistent with the definition of the phrase "person having an interest which is or may be adversely affected" in 30 CFR 700.5 and would render the permissive intervention regulation, sec. 4.1110(d), largely redundant.

In *Sierra Club* the Supreme Court affirmed the Ninth Circuit's denial of standing to the plaintiff organization, holding that it had failed to allege injury to itself or to its members. The decision turned on the adequacy of the pleadings:

> The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members used Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.

405 U.S. at 735.

Were we faced with a motion to dismiss based only on the initial pleadings, we might be constrained to deny on the basis of *Sierra Club*, for petitioner did originally allege injury to its members.[24] However, TRVC submitted no evidence of such injury at the hearing and expressly abandoned its claim of standing based upon representation of its members.[25] We are thus left with petitioner's claim to standing on its own behalf.

TVRC's interest in this proceeding is undeniably sincere. It "has participated in many stages of the implementation of the Federal Surface Mining Control and Reclamation Act" [26] and on Jan. 7, 1980, filed a notice of intent to sue the Secretary of the Interior for failure to issue an order to Rebel/Island Creek to show cause why the permit for Rebel No. 2 mine should not be suspended or revoked.[27] It is concerned that the outcome of this proceeding may affect its members in Mingo County because Island Creek "owns or leases substantial acreage in the Mingo-Logan County

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tion had standing in its own behalf because it alleged injury to itself), *with Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 102 S. Ct. 752 (1982); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); and *Warth* v. *Seldin*, 422 U.S. 490 (1975) (in which the Court denied standing because no injury to the plaintiff organization had been alleged). All these decisions (and many more) cite *Sierra Club* with approval.

[23] The injury need not be to an economic interest, but may be to a variety of interests, such as aesthetic, recreational, spiritual, or environmental. *See Sierra Club, supra; Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp. supra* note 22; *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208 (1974); *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970). Nor must the injury be significant. Justice Stewart stated in *United States* v. *SCRAP*, 412 U.S. 669, 689 n.14 (1973):

> "We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of the action than a fraction of a vote, see *Baker* v. *Carr*, 369 U.S. 186; a $5 fine and costs, see *McGowan* v. *Maryland*, 366 U.S. 420; and a $1.50 poll tax, *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663. * * * [W]e see no reason to adopt a more restrictive interpretation of 'adversely affected' or 'aggrieved.'"

And the injury may be merely threatened and not yet realized. *See Gladstone Realtors, supra* note 22, at 99; *Schlesinger, supra at* 220.

[24] Text accompanying note 7, *supra*. This would be based primarily upon the allegation that TVRC's members use streams and rivers which are adversely affected by pollutants from respondents' mine operation. The remainder of the allegation, that TVRC's members could be affected by flooding because they reside downstream from the site, is inconsistent with TVRC's stipulation that its membership is restricted to residents of the Tug Valley watershed residing in Mingo County, West Virginia, and Pike and Martin Counties, Kentucky, whereas the minesite is located in the Guyandotte watershed in Logan County. Text at notes 5 and 6, *supra*.

[25] Letter of Sept. 11, 1980, *supra* note 8; Brief, *supra* note 21, at 6.

[26] Stipulation No. 5 *supra* note 4. Listed are 23 specific instances of participation, including many in West Virginia regarding Island Creek and Rebel.

[27] Petition for Leave to Intervene, Apr. 17, 1980, Attachment A.

area where its contractors currently operate and where it plans future operations." [28]

Nonetheless, TVRC alleges no actual or threatened injury to itself. Its "interest * * * in the significant legal determinations which may be reached and which might affect its ability to protect its interests in subsequent proceedings" [29] is not what is meant by "an interest which is or may be adversely affected by the outcome of the proceeding." [30] It is not the "use and injury in fact" [31] required by the Supreme Court in *Sierra Club* and by the Department. As stated by the Supreme Court:

> But a mere "interest in a problem," no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA. The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. * * *
>
> The requirement that a party seeking review must allege facts showing that he is himself adversely affected * * * does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. The goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process.

405 U.S. at 739–40.[32]

Because TVRC has alleged no injury to itself, it is not entitled to intervention as a matter of right under 43 CFR 4.1110(c)(2).[33]

B. Intervention as a Matter of Discretion

[3] Subsec. 4.1110(d) provides that, if neither of the mandatory intervention provisions applies,

> the administrative law judge or the Board shall consider the following in determining whether intervention is appropriate—
>
> (1) The nature of the issues;

[28] Stipulation No. 2, *supra* note 4.
[29] Brief, *supra* note 21, at 6.
[30] 43 CFR 4.1110(c)(2).
[31] 44 FR 14913 (Mar. 13, 1979).

[32] To the same effect is the language of the court in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, *supra* note 22, at 39–40:

> "We note at the outset that the five respondent organizations, which described themselves as dedicated to promoting access of the poor to health services, could not establish standing simply on the basis of that goal. Our decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III. *Sierra Club* v. *Morton*, *supra*; *see Warth* v. *Seldin*, *supra*. Insofar as these organizations seek standing based on their special interest in the health problems of the poor their complaint must fail. Since they allege no injury to themselves as organizations, and indeed could not in the context of this suit, they can establish standing only as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right."

In its 1982 decision, *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, *supra* note 22, at 761, the Court said:

> "Respondent Americans United has alleged no injury to itself as an organization, distinct from injury to its taxpayer members. As a result, its claim to standing can be no different from those of the members it seeks to represent. The question is whether 'its members, or any of them, are suffering immediate or threatened injury as a result of the challenged action * * *.' *Warth* v. *Seldin*, 422 U.S. at 511. *See Simon* v. *Eastern Ky. Welfare Rights Org.*, *supra* at 40; *Sierra Club* v. *Morton*, 405 U.S. 727, 739–41 (1972)."

[33] Without an allegation of injury, we do not reach the questions of causation and redressibility. *See, e.g., Gladstone Realtors*, *supra* note 22, at 100; *Simon*, *supra* note 22, at 41; *Warth*, *supra* note 22, at 504–05. Nor are we concerned with prudential limitations, such as the "zone of interests" test. *See, e.g., Sierra Club*, *supra* at 733; *Data Processing Service*, *supra* note 23, at 153 (1970).

(2) The adequacy of representation of petitioner's interest which is provided by the existing parties to the proceeding;

(3) The ability of the petitioner to present relevant evidence and argument; and

(4) The effect of intervention on the agency's implementation of its statutory mandate.

Thus, the Department has provided for intervention not strictly limited by the considerations based on Article III that restrict intervention as a matter of right. In the instant case, however, the Administrative Law Judge determined that it was not appropriate to permit TVRC to intervene in OSM's proceeding against the Rebel and Island Creek coal companies. Our examination of TVRC's petition to intervene, based on the considerations listed in 43 CFR 4.1110(d), has led us to conclude the Administrative Law Judge's decision was not an abuse of his discretion.

The first consideration, the nature of the issues in this case, evolves from sec. 521(a)(4) of the Act, 30 U.S.C. § 1271(a)(4) (Supp. II 1978), which reads in part:

(4) When * * * the Secretary or his authorized representative determines that a pattern of violations of any requirements of this Act or any permit conditions required by this Act exists or has existed, and if the Secretary or his authorized representative also find [*sic*] that such violations are caused by the unwarranted failure of the permittee to comply with any requirements of this Act or any permit conditions, or that such violations are willfully caused by the permittee, the Secretary or his authorized representative shall forthwith issue an order to the permittee to show cause as to why the permit should not be suspended or revoked and shall provide opportunity for a public hearing.

The regulations defining the key terms of this statutory mandate and describing the duties, obligations and authority of OSM are found at 30 CFR 722.16. These regulations grant broad discretion to OSM's Director, who even may decide not to issue an order to show cause where a pattern or violations exists, upon a determination that an order "would not further enforcement of the performance standards of the Act." 30 CFR 722.16(c)(3).[34]

In the instant case OSM's Director did issue an order to show cause, asserting that seven notices of violation previously issued to respondents reflected a pattern of violations that were willful or caused by unwarranted failure to comply with the Act and regulations. Under the order respondents must submit for OSM's approval a complete plan for the protection of the hydrologic balance in the area of their mining operations and must construct sediment ponds, ditches, and other control structures. The order concludes with the recommendation that respondents' permit be suspended until the aforementioned plan and construction are approved by OSM, but for not less than 10 days. The basic issues raised by OSM's order are (1) whether the violations de-

[34] A decision not to issue an order to show cause is reviewable only when the decision expressly provides for review. 43 CFR 4.1281. The importance of this discretionary authority is emphasized in the preamble to the procedural regulations:

"16. Several commenters sought a provision for review of the decision of the Director of OSM under 30 CFR 722.16(c)(3) not to issue a show cause order when he 'finds that it would not further enforcement of the performance standards of the Act.' The commenters would allow review to be initiated by any person who is or may be adversely affected by the decision. This comment was not accepted. *The Director of OSM must be able to exercise discretion in determining enforcement policy under the Act. However, if the Director determines that review of such decision would be desirable,* adequate review procedures have been established in §§ 4.1280-86 of these regulations." 43 FR 34383 (Aug. 3, 1978) (italics added).

scribed by OSM in its order to show cause demonstrate a pattern of violations that either were willful or were caused by unwarranted failure to comply with the Act and regulations, and, if so, (2) whether the required corrective measures and recommended permit suspension are justified by those violations.

TVRC is interested in the resolution of these issues because this is the Department's first permit suspension or revocation proceeding. Petitioner asserts that the proceeding therefore will embrace "numerous important issues of first impression concerning the scope and application of sec. 521(a)(4) of the Act," and that it is interested "in the significant legal determinations which might be reached and which might affect its ability to protect its interests in subsequent proceedings." [35] In line with this general interest, TVRC is more immediately concerned that "adequate enforcement action" be taken against the respondent coal companies in the subject suspension or revocation proceeding.[36] "Adequate enforcement action" apparently means permit revocation to TVRC, in contrast to the permit suspension contemplated by OSM.[37] Thus, by its participation TVRC would seek to open up the review proceeding to consideration of more severe enforcement action than that which OSM proposes. TVRC posits that it could justify permit revocation on the basis of OSM's evidence as supplemented by such evidence as it might obtain through discovery.[38]

Although it appears that TVRC's interest in the proceeding is not entirely coincidental with that of OSM, and that petitioner could contribute relevant evidence and argument in support of its interest,[39] we nonetheless conclude that TVRC's participation could interfere unduly with OSM's performance of its enforcement functions under sec. 521(a)(4). In arriving at this conclusion we are not unmindful of the potential value of citizen participation in permit suspension and revocation proceedings.[40] However, if its value is to be commensurate with its cost, such citizen participation must be

[35] Brief, *supra* note 21, at 3, 6. TVRC also states that "its participation [is] important to fulfill the objectives of policing the regulatory authority and promoting informed decision-making with respect to the Rebel No. 2 operation." *Id.* at 3.

[36] *Id.* at 14.

[37] *Id.* at 20; Petition for Leave to Intervene, Apr. 17, 1980, at par. 5.

[38] *See* Reply of the Tug Valley Recovery Center to the Response of Island Creek Coal Co., Inc., and Rebel Coal Co., Inc., to its Petition for Leave to Intervene, May 23, 1980, at 9-10, 13-14; Brief, *supra* note 21, at 16-17.

[39] The meaning of the consideration posed in 43 CFR 4.1110(d)(3), "ability to present relevant evidence and argument," is disputed by the parties. Petitioner premises its argument on its corporate purpose and the ability and experience of its lawyers, citing, *inter alia,* Stipulation No. 4 (Brief of TVRC in support of Petition for Leave to Intervene, Nov. 3, 1980, at 16-17). Respondent coal companies suggest the provision requires that petitioner be able to present direct, independent evidence and, in this regard, observe: "TVRC's brief fails to indicate that it intends to introduce any evidence of its own. * * * TVRC merely plans to utilize OSM's evidence and argue that evidence in a different manner or suggest different inferences which may be drawn therefrom" (Appellees' Brief in Opposition to Intervention by the Tug Valley Recovery Center, Inc., Nov. 28, 1980, at 24). Granting the accuracy of respondent's observation, we do not take so limited a view of the contribution of evidence and argument that may support intervention. Respondents refer only to direct evidence, not what may be adduced upon cross-examination by petitioner, and both cross-examination and different arguments might be helpful.

[40] "While it is true that citizens may not commence * * * suspension or revocation proceedings, citizen participation is, nevertheless, of critical importance to such proceedings. The importance of such participation to supervision or revocation proceedings was expressly recognized in the legislative history." 43 FR 34378 (Aug. 3, 1978).

motivated by more than concern about possible future events which can be addressed, if they transpire at all, in future proceedings. TVRC's expressed disagreement with OSM's position in the subject proceeding appears to rest on such a concern.[41]

The activity at issue in the sec. 521(a)(4) proceeding below has taken place in the watershed of the Trace Fork of the Guyandotte River, an area distinct from Tug Valley, which is the geographic area of corporate concern to TVRC.[42] If and when the respondent coal companies seek permission to mine in Tug Valley, TVRC and/or its members will have opportunities to influence whether such permission is granted and, if granted, the terms thereof.[43] Assuming a permit were granted and operations begun, TVRC and/or its members would have the opportunity to bring any violations by respondents and failures of the regulatory authority to enforce to the attention of the Secretary[44] and to compel compliance in Federal district court.[45] Moreover, the precedential effect of this proceeding upon future operations in Tug Valley is speculative. Absent affirmation by the Board, the Director of the Office of Hearings and Appeals, or the Secretary, a holding of the Hearings Division has no precedential effect. It is the law of the case only and is not binding upon future decisions of OSM, the Hearings Division, or the Board.

Contrasted with the remote and speculative effect this proceeding may have upon TVRC is the immediate and real burden that would be imposed by TVRC's intervention. Third party participation inevitably increases the time and costs of a proceeding. The amount of such increase would be largely within the control of petitioner, for it is the intervenor, not the Office of Hearings and Appeals, who determines the extent of participation once intervention is granted. 43 CFR 4.1110(e). Moreover, participation, full or limited, could well expose the Department to additional (and substantial) liability for legal fees. 43 CFR 4.1294.

In view of the broad discretion granted to OSM in the performance of its duties under sec. 521(a)(4) of the Act, and the consideration that the ultimate interest of petitioner may be asserted and protected in another, more appropriate proceeding, TVRC's disagreement with the enforcement posture adopted by OSM in the suspension or revocation proceeding below is not enough to compel the granting of intervention pursuant to 43 CFR

[41] In this regard we are not concerned with allegations of injuries to various members of TVRC said to result from the current operations of the respondent coal companies. As was discussed previously, TVRC now seeks intervention only on the basis of its interests as a corporation and not in a representative capacity.

[42] Contrasting the location of the mine with that of petitioner's corporate concern and membership, *see* text accompanying notes 4-6, *supra,* respondents argue that TVRC's intervention in this proceeding would be ultra vires, *i.e.,* beyond the authority conferred by its charter. Pursuant to the West Virginia Code, however, a challenge of ultra vires conduct may be made only by (1) a shareholder, member or director of the corporation, (2) the corporation itself against incumbent or former officers or directors, or (3) the state. W.Va. Code § 31-1-10. Moreover, a corporation generally possesses powers incidental to those expressly conferred. *See* cases collected at 19 Am. Jur. 2d *Corporations* § 953 (1965) at 431-32 nn.8-12. For these reasons we reject the challenge by respondents that TVRC's conduct herein is ultra vires.

[43] *See* 30 U.S.C. §§ 1260, 1263-1264 (Supp. II 1978).

[44] *See* 30 U.S.C. § 1267(h) (Supp. II 1978).

[45] *See* 30 U.S.C. § 1270 (Supp. II 1978).

4.1110(d).[46] Accordingly, we conclude that the Administrative Law Judge did not abuse his discretion by denying the petition of TVRC to intervene in that proceeding.

The order of the Administrative Law Judge denying intervention is affirmed, and the case is remanded to the Hearings Division for further proceedings.

NEWTON FRISHBERG
Administrative Judge

ADMINISTRATIVE JUDGE MIRKIN CONCURRING

As to appealability and intervention as a matter of right, I am fully in accord with the author of the principal opinion.[1] As to permissive intervention, my universe is much smaller and less complicated than is his.

The only interest TVRC asserts, a concern for the precedential effect, is the same one that it offered to the Hearings Division to obtain permission to intervene.[2] Is it a sufficient basis to grant intervention? Certainly. Does such sufficiency mean that intervention must be granted? Certainly not. The cases on permissive intervention in the courts are clear on that.

Although Rule 24(b) of the Federal Rules of Civil Procedure is not the source of our rule on permissive intervention, it is parallel procedure and cases construing it are not without instructive value. The following language is illustrative:

> It is common knowledge that, where a suit is of large public interest, the members of the public often desire to present their views to the court in support of the claim or the defense. To permit a multitude of such interventions may result in accumulating proofs and arguments without assisting the court. * * *
>
> * * * The exercise of discretion in a matter of this sort is not reviewable by an appellate court unless clear abuse is shown. [3]

> Permissive intervention is wholly discretionary with the trial court. * * * We have not found a single case in which a denial of permissive intervention under Rule 24(b) was reversed solely for an abuse of discretion. [4]

The ultimate test of whether any tribunal should permit intervention is whether that intervention will prove of assistance to it

[46] TVRC has pointed to no deficiencies in the recital of violations contained in OSM's order to show cause, but objects to the conclusions which might be drawn therefrom and the penalty proposed. In these circumstances, Judge Wyzanski's observations are apposite:

"It is easy enough to see what are the arguments against intervention where, as here, the intervenor merely underlines issues of law already raised by the primary parties. Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention."

Crosby Steam Gage & Value Co. v. *Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D. Mass. 1943) (petition to intervene granted).

[1] I would only add that when a legislative body wishes to confer standing on the general public, absent the violation of a particular, personal interest, it knows how to do so, *e.g.:*

"Nothing herein contained shall be taken as in limitation of the power * * * of any citizen * * * to enforce the provisions of this Act." Section 28, Act of June 20, 1910 [36 Stat. 557, 575], New Mexico and Arizona Enabling Act.

[2] I agree with my colleague that an unconfirmed holding of the Hearings Division is not a true precedent, but only the law of the case, and not binding on the Department or this Board in any other case. Principal opinion at 92.

[3] *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 141–42; *rehearing denied*, 322 U.S. 771 (1944).

[4] *United States Postal Service* v. *Brennan*, 579 F.2d 188, 191–92 (2d Cir. 1978).

in resolving the issues.[5] Normally, those who are going to hear the matter are in the best position to make that determination.[6]

The suggestion by my colleague that some kind of interest, although of lesser caliber than that required for mandatory intervention, is essential to the granting of permission to intervene is both more and less than the rules require. More, because it would appear to deny intervention if that interest could not be demonstrated. Less, because it would appear to mandate intervention if that interest was shown.

The Administrative Law Judge has not been shown to have abused his discretion and we have been presented with no compelling reason to interpose a contrary judgment.[7] I agree that the decision below should be affirmed.

MELVIN J. MIRKIN
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE IRWIN DISSENTING:

The Tug Valley Recovery Center, in my view, is entitled to intervene in this proceeding as a matter of right in accordance with 43 CFR 4.1110(c)(2). The comment accompanying the publication of that regulation stated:

> The commenter also urged the inclusion of language in § 4.110(c)(2) to allow intervention of right to persons or groups in cases where significant legal determinations may be reached which might affect the ability of such persons or groups to protect their interests in subsequent proceedings. Such language was not accepted. It is believed that the first change that was made is broad enough to encompass those persons for whom the commenter sought to provide by the additional suggested language.
>
> 43 FR 34378 (Aug. 3, 1978).

The "first change" referred to in the last sentence of this comment altered subsec. (c)(2) from its proposed form—"[h]as a direct economic or personal stake in the outcome of the proceedings"—to its present form—"[h]as an interest which is or may be adversely affected by the outcome of the proceeding." 43 FR 15446 (Apr. 13, 1978); 43 FR 34388 (Aug. 3, 1978). This change was explained as follows:

> [T]he standard for intervention of right was broadened. Subsection (c)(2) was changed to reflect the fact that there shall be a right of intervention for anyone with an interest which is or may be adversely affected by the outcome of the proceeding in which intervention is sought. This

[5] The regulations do require the tribunal to consider certain general factors. 43 CFR 4.1110(d). If a petitioner could establish that such was not done and that it was prejudiced thereby, that, conceivably, could constitute an abuse of discretion. Here, instead of demonstrating where and how the Administrative Law Judge abused his discretion in denying it permission to intervene, TVRC has attempted to reverse the roles and require finding of abuse unless it is shown that the Administrative Law Judge was justified in his denial.

[6] We are not in the same relationship to the Hearings Division as is a court of appeals to a trial court. Courts are independent of the agencies whose activities they review. Neither a trial court nor an appellate one has any nonjudicial interest in the application of agency policy. In contrast, this Board does have an interest in seeing that Departmental policy is applied; it is not a mere reviewer of the regularity of the conduct of any particular Administrative Law Judge. Consequently, were we independently to find some policy or management reason to overrule the Hearings Division on permissive intervention, we could do so. That, however, is an avenue to be cautiously and sparingly taken.

[7] That concern for precedent, even where some interests might eventually be affected, does not require intervention was recently demonstrated by the denial by the Supreme Court of Morton Halperin's petition for amicus status in *Nixon* v. *Fitzgerald,* 102 S. Ct. 83 (Oct. 1981) (*cert. granted,* 452 U.S. 959 (June 1981)). Halperin had previously been granted review in *Kissinger* v. *Halperin, cert. granted,* 452 U.S. 713 (1981), and the same principle would, conceivably, control the outcome of each case. *Halperin* was earlier on the docket, but *Fitzgerald* had been advanced. This precedent is all the more striking because it is concerned with a petition for merely amicus status, not for party status. Amicus participation in a court can be limited and it does not subject the Government to an award for the costs of intervention. Those factors, alone, are sufficient to justify caution in permitting intervention.

change comports with the intent of Congress. As stated in the comment response above, public participation in the daily workings of the Act was of primary interest to Congress. While it is true that citizens may not commence two of the most important enforcement proceedings under the Act, i.e., civil penalty review and suspension or revocation proceedings, citizen participation is, nevertheless, of critical importance to such proceedings. The importance of such participation to suspension or revocation proceedings was expressly recognized in the legislative history. It was stated in S. Rep. No. 128, 95th Cong., 1st Sess. 96 (1977) that "[a]ny person who has an interest which is or may be adversely affected by a suspension or revocation of a permit shall be allowed to participate."

43 FR 34378 (Aug. 3, 1978).

This comment makes clear that the intention was to broaden intervention of right under subsec. (c)(2). Even before this proposed regulation was revised to broaden it, the Office of Hearings and Appeals (OHA) contemplated "that intervention will be liberally granted" under 43 CFR 4.1110(c). 43 FR 15442 (Apr. 13, 1978).

TVRC's purposes give it an interest in several legal issues potentially to be determined in this first proceeding under sec. 521(a)(4). One of the specific powers stated in its articles of incorporation is to "advocate for the implementation of systems and measures designed to prevent the future occurrence of such a flood" as resulted in the formation of the group. One such system is the standards governing surface mining and reclamation and the legal mechanisms for enforcing those standards. Suspension or revocation under sec. 521(a)(4) is an important one of those mechanisms. How the provisions of sec. 521(a)(4) and 30 CFR 722.16 are interpreted and applied may well affect whether that is an effective enforcement mechanism for TVRC to pursue when unauthorized mining practices occur that might contribute to the recurrence of flooding in Tug Valley. So it is that this is a case "where significant legal determinations may be reached which might affect" TVRC's ability to protect its interests—indeed, to fulfill one of its central purposes—in subsequent proceedings.

Neither the discussion of standing in connection with the definition of a "*[p]erson having an interest which is or may be adversely affected*" at 44 FR 14912-13 (Mar. 13, 1979) (italics in original), nor our discussion of standing in the recent order in *NRDC* (4 IBSMA 4, Feb. 24, 1982), requires or even suggests any limitation on who may intervene in an administrative proceeding. The former discussion cannot—and does not even purport to—modify the intention of the intervention regulation expressed in the comment that accompanied it. The latter discussion is simply not relevant: whether one has standing to initiate a proceeding (*NRDC*) is different from whether one is entitled to intervene in a proceeding, and involves different considerations. Davis, *Administrative Law Treatise,* § 22.08 (1958).

The Administrative Law Judge was obligated by 43 CFR 4.1110(c)(2) to grant TVRC's petition to intervene. His failure to do so should be reversed. Since I believe this, I do not need to discuss

whether TVRC's petition should be granted under 43 CFR 4.1110(d). I will only say that in rationalizing its refusal to permit intervention the principal opinion exaggerates the potential cost of permitting it and improperly concerns itself with the Department's possible (I would even say speculative) liability for costs and expenses.

I dissent.

WILL A. IRWIN
Chief Administrative Judge

STATE OF ALASKA, DEPT. OF TRANSPORTATION AND PUBLIC FACILITIES (ON RECONSIDERATION)

7 ANCAB 188

Decided *June 24, 1982*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-14866-A, F-14866-A2 and AA-9368.

Motion for reconsideration granted: State of Alaska, Dept. of Transportation and Public Facilities, 5 ANCAB 307, 88 I.D. 629 (1981), and decision appealed from modified in part.

1. Alaska Native Claims Settlement Act: Administrative Procedures: Decision to Issue Conveyance—Alaska Native Claims Settlement Act: Administrative Procedure: Conveyances—Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where, in R.S. 2477, Congress made a grant of rights-of-way which became effective only upon valid acceptance of the grant, and where the Bureau of Land Management is prohibited from adjudicating the right-of-way to determine whether it is valid and has therefore "issued" within the meaning of § 14(g) of ANCSA, the holding in *Appeals of State of Alaska and Seldovia Native Association, Inc.*, 2 ANCAB 1, 84 I.D. 349 (1977) [VLS 75-14/75-15], requiring identification of valid existing rights in the conveyance document is not applicable to R.S. 2477 rights-of-way.

2. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance—Alaska Native Claims Settlement Act: Administrative Procedure: Conveyances—Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where the Bureau of Land Management seeks to reserve a § 17(b) public easement over an existing road constructed by the State of Alaska and claimed by the State as an R.S. 2477 right-of-way, the conveyance documents shall contain a provision specifying that the reserved public easement is subject to the claimed R.S. 2477 right-of-way, "if valid."

APPEARANCES: Susan Urig, Esq., for State of Alaska, Dept. of Transportation and Public Facilities; M. Francis Neville, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; Ken Norman, Esq., Cummings & Routh, for Sea Lion Corp.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat, 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR

Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

On June 26, 1981, the Board issued its decision in this appeal. The Board held therein that the existence of an alleged right-of-way granted pursuant to Revised Statutes Sec. 2477, 14 Stat. 253 (1866) (repealed 1976) (R.S. 2477), precludes neither conveyance of the subject land nor the reservation of a coincident public easement, but that where the Bureau of Land Management (BLM) is informed of the existence of the right-of-way, the decision to issue conveyance and the subsequent conveyance document must expressly declare that the conveyance and the public easement are each subject to the right-of-way. The Board's decision held:

1. Both the decision to convey lands and the subsequent conveyance document must specifically identify interests in the lands being conveyed which are protected under ANCSA as valid existing rights. Since rights-of-way granted by the United States are, if valid, protected under § 14(g) of ANCSA as valid existing rights, they must be specifically identified in both the BLM's decision to convey lands and the subsequent conveyance document.

2. The Nov. 20, 1979, amendment to Secretary's Order No. 3029, 43 FR 55287 (1978) (S.O. 3029) does not preclude identification of claimed R.S. 2477 rights-of-way.

3. Native-selected lands subject to rights-of-way are to be included in conveyances pursuant to ANCSA, but the conveyances are subject to the rights-of-way.

4. The State's acceptance of an R.S. 2477 right-of-way grant did not sever from the public domain the land underlying the right-of-way.

5. A right-of-way granted by R.S. 2477 is a less-than-fee interest in the nature of an easement.

6. Following the acceptance of an R.S. 2477 grant of right-of-way, the Federal Government retains its fee interest in the land, subject to the right-of-way, and may dispose of it pursuant to law. The Federal Government's control of the fee interest in the land affected by an R.S. 2477 right-of-way includes the authority to issue additional rights-of-way affecting the same land.

7. The reservation of an overlapping § 17(b) public easement, and the conveyance of the underlying fee, are each subject to, and do not affect, a previously existing R.S. 2477 right-of-way.

On Sept. 11, 1981, the BLM moved that the Board reconsider that portion of the June 26, 1981, decision which holds that BLM is required to specifically identify, in ANCSA decisions and conveyance documents, rights-of-way which are claimed under R.S. 2477. The motion was based on an alleged lack of adequate briefing of the issue prior to decision.

BLM argued that compliance with the Board's holding is not feasible and will adversely affect the parties to the appeal. The

BLM cited the administrative burden of discovering and listing R.S. 2477 rights-of-way. The BLM also declared that the listing of claimed but questionable R.S. 2477 rights-of-way in ANCSA conveyances, a listing made in neither non-ANCSA conveyances nor in prior ANCSA conveyances of 22 million acres of land, is likely to generate confusion and to adversely affect marketability of title.

Further, the BLM argued that the Nov. 20 1979, amendment to S.O. 3029 should be construed to preclude identification as well as adjudication of claimed R.S. 2477 rights-of-way. The memorandum amending S.O. 3029, written by the Solicitor and concurred in and adopted by the Secretary, referenced two Departmental cases "careful reading of [which] indicates that the Department has consistently refused to identify or list such claimed rights-of-way in its decisions and conveyance documents." (Motion for Reconsideration, page 5.) The BLM asserted that the memorandum should be construed to require a result consistent with that required by the cited cases.

The State of Alaska, Dept. of Transportation and Public Facilities (State) answered that the identification question was sufficiently briefed and was correctly decided by the Board, and that the Nov. 20, 1979, amendment to S.O. 3029 does not preclude identification of claimed R.S. 2477 rights-of-way. The State also argued that the identification requirement will not be an undue burden, and that identification is necessary to protect the State's interest and will benefit the other parties to the appeal by clarifying the nature and extent of the State's claim.

The BLM replied that the Department decided long ago that identification of claim R.S. 2477 rights-of-way in conveyance documents is not necessary to protect the right-of-way and should not be done. BLM declared that nothing in ANCSA suggests that Congress intended patents to Native corporations to be different from other patents in this respect. The BLM also asserted that identification of R.S. 2477 rights-of-way would adversely affect the Native corporations receiving fee title to the underlying land.

Further, the BLM disputed the State's assertion that accurate information concerning its claimed R.S. 2477 interests is readily available. BLM alleged that the State's proffered information was incomplete and did not allow determination of the exact location of the claimed rights-of-way, and that the State's listing included some obviously invalid claims.

Finally, BLM argued that while it does not adjudicate all third-party interests identified in ANCSA conveyances, no ANCSA conveyance is expressly made subject to an unadjudicated interest. In this context, BLM declared that all third-party interests which are "of record" have been adjudicated by a governmental entity.

Decision

The holding of the Board in its original decision in this appeal, that claimed R.S. 2477 rights-of-way must be identified in both the

decision to issue conveyance (DIC) and the subsequent conveyance document, was based on a holding in *Appeals of State of Alaska and Seldovia Native Association, Inc.*, 2 ANCAB 1, 84 I.D. 349 (1977) [VLS 75-14/75-15]. The referenced holding was that the DIC and the subsequent conveyance document must both specifically identify interests in the land being conveyed which are protected under ANCSA as valid existing rights. *State of Alaska/Seldovia Native Association, Inc.*, 84 I.D. 382; *State of Alaska, Dept. of Transportation and Public Facilities*, 5 ANCAB 307, 318, 88 I.D. 629, 633 (1981) [VLS 80-51].

On reconsideration, the Board holds that said holding is not applicable to R.S. 2477 rights-of-way.

In *State of Alaska/Seldovia Native Association, Inc., supra*, 84 I.D. 380, the Board also held that the BLM has the duty to ascertain whether a less-than-fee interest was issued to a third party, and must recite in the DIC that the conveyance is "subject to" the interest. Sec. 14(g) of ANCSA expressly requires such a recitation in the conveyance document.

The Nov. 20, 1979, amendment to Secretary's Order No. 3029 precludes BLM adjudication of claimed R.S. 2477 rights-of-way. In R.S. 2477, Congress made a grant of rights-of-way which became effective only upon a valid acceptance of the grant. Since BLM is prohibited from adjudicating R.S. 2477 rights-of-way, it is precluded also from determining whether unadjudicated R.S. 2477 rights-of-way have issued, within the meaning of § 14(g) of ANCSA.

[1] The Board modifies its holding in the original decision and holds that where, in R.S. 2477, Congress made a grant of rights-of-way which became effective only upon valid acceptance of the grant, and where the Bureau of Land Management is prohibited from adjudicating the right-of-way to determine whether it is valid and has therefore "issued" within the meaning of § 14(g) of ANCSA, the holding in *Appeals of State of Alaska and Seldovia Native Association, Inc., supra,* requiring identification of valid existing rights in the conveyance document, is not applicable to R.S. 2477 rights-of-way.

Accordingly, claimed R.S. 2477 rights-of-way need not be listed in a DIC or conveyance document in a provision specifying that the conveyance is subject to valid existing rights.

A different rule applies, however, where the BLM seeks to reserve a § 17(b) public easement over a road constructed by the State of Alaska and claimed under R.S. 2477.

As noted in the Board's original decision in this appeal, the existence of an R.S. 2477 right-of-way precludes neither the conveyance of the underlying fee nor the reservation of an overlapping § 17(b) public easement, but the conveyance and/or reservation is subject to the right-of-way. *State of Alaska, Dept. of Transportation and Public Facilities, supra,* 88 I.D. 635.

[2] Thus, it is not disputed that as a matter of law the public easement reserved by the BLM for the Hooper Bay Airport Road is subject to the State's R.S. 2477 right-of-way. Therefore, to avoid confusion and to reflect on the conveyance document the accurate legal relationship between the § 17(b) public easement and the R.S. 2477 right-of-way, the Board holds that where the BLM seeks to reserve a § 17(b) public easement over an existing road constructed by the State and claimed by the State as an R.S. 2477 right-of-way, the conveyance documents shall contain a provision specifying that the reserved public easement is subject to the claimed R.S. 2477 right-of-way "if valid."

The above requirement does not unduly burden the BLM in relation to the importance of rights claimed by the State. Compliance with such requirement is clearly feasible and will not adversely affect the other parties to this appeal. Since the above-mandated inquiry arises in the context of the reservation of § 17(b) public easements, any additional administrative burden on the BLM is minimal. Moreover, the required provision should neither generate confusion nor adversely affect marketability of title.

Order

The original decision of the Board in this appeal, *State of Alaska, Department of Transportation and Public Facilities,* 5 ANCAB 307, 88 I.D. 629 (1981) [VLS 80-51] is hereby amended to conform with the above holdings of the Board. The above-designated decision of the Bureau of Land Management is hereby amended so as to conform to this decision of the Board. Publication of an amended decision to issue conveyance is not required. The conveyance document issued pursuant to the above-designated decision of the Bureau of Land Management shall expressly state that the reservation of a public easement for the Hooper Bay Airport Road is subject to the State's R.S. 2477 right-of-way, if valid, for the Hooper Bay Airport Road.

JUDITH M. BRADY
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

APPEAL OF EYRING RESEARCH INSTITUTE

IBCA-1169-10-77

Decided *June 25, 1982*

Contract No. JO166201, Bureau of Mines.

Sustained in part.

1. Contracts: Formation and Validity: Cost-type Contracts

Where the Government entered into a sole source, cost-plus-fixed-fee contract with appellant for the purpose of conducting a research and analysis study to determine the toxicity of certain gases emanating from a citrate process used for flue gas desulfurization in the operation of mines, and appellant entered into a subcontract with a University to accomplish the major portion of the required research, the Board found that the Government was not involved in the formation or preparation of the subcontract, and that although they may have intended to enter into a firm, fixed-price contract, the contracting parties did, in fact, by the clear and unambi-

guous language employed, enter into a cost-reimbursement type contract.

2. Contracts: Construction and Operation: Allowable Costs

Where the Board found that the contracting officer had unreasonably disallowed certain costs in their entirety because of the difficulty of allocability, mainly resulting from subcontract work extending beyond the date of acceptance of the final report for the required research study, but also found that the contract work was timely performed, accepted as satisfactory, and was of considerable benefit to the Government; the Board held, by the jury verdict approach, that appellant was entitled to a portion of its claimed additional costs in the amount of $45,000.

APPEARANCES: Jean M. Galloway, Gilbert J. Ginsberg, P.C., Attorneys at Law, Washington, D.C., for Appellant; Ross W. Dembling, Department Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

Contract No. JO166201 was entered into between the Bureau of Mines (BOM) and Eyring Research Institute (ERI), the contractor/appellant of Provo, Utah. The work to be performed under the contract was to conform to the contractor's technical proposal dated Aug. 3, 1976, entitled "Toxicological Analysis of the Citrate Process for Flue Gas Desulfurization" and was to consist of a study to determine, through laboratory exposure of rats, the toxicity of the solutions provided by BOM's Metallurgy Research Center of Salt Lake City and used in the citrate process. The contract was a cost-plus-fixed-fee type contract at a total estimated amount of $83,850, including a fixed fee of $3,993. The effective date of the contract was Sept. 30, 1976, although Article X allowed precontract costs incurred from Aug. 9, 1976. The delivery date of the final report was 2 months and 15 days after the effective date, or Dec. 15, 1976.

The justification for the subject sole source (noncompetitive) procurement was explained in Tab C, Appeal File (AF) by the contracting officer (CO). He stated that the information which would be developed by the study was urgently needed by the Bureau of Mines in order to determine, if possible, what caused the incidences of fainting by workmen at the Bureau's citrate process pilot plant at Kellogg, Idaho. Since BOM had committed itself to the installation of a citrate process demonstration unit at the St. Joe Minerals Corp. power-plant in Monoca, Pennsylvania, it was important to determine whether the citrate process could be operated in a safe manner without exposing workmen to any adverse toxicological substances in citrate solutions. The design of the demonstration plant was scheduled for completion by Nov. 1, 1976; therefore, it was imperative that the contract be awarded and completed within a minimum timeframe. The CO pointed out that ERI was especially suited to undertake the study because: (1) it had unique

experience and expertise on the citrate process chemistry related to potential toxicological substances in process solutions; (2) it had access to the Flammability Research Center (FRC) of the University of Utah, where laboratory analytical equipment, professional staff, and specifically designed rat exposure chambers required for the proposed experiment were available; and (3) ERI and FRC were in close proximity to BOM's laboratory in Salt Lake City which was to furnish the citrate solutions to be tested, thus assuring the freshness of the solutions and avoiding chemical decomposition of the toxic substances in the solutions. On this basis, the CO considered ERI to be the only source capable of performing the required study within the allotted time, at a reasonable cost.

Appellant, ERI, entered into subcontract No. C543, effective Aug. 9, 1976, with the FRC to conduct the necessary research required under the prime contract (AF-F). The objective of the study was stated in the subcontract, "to determine, through laboratory exposure of rats, the toxicity of solutions in the Citrate Process." The statement of work involved "the design of a factorial experiment which subjects laboratory rats to various levels of exposure while simultaneously monitoring respirator, cardiovascular and neurological response and blood chemistry." The subcontract also provided that "if high toxicity appears in any of the process liquors, an attempt will be made to identify the particular compound resulting in toxicity." The subcontractor was required to complete the technical effort within 2 months after Aug. 9, 1976, and to submit a final report to ERI on or before Oct. 22, 1976. Without the knowledge or approval of the CO, the contract administrator for ERI, by letter dated Nov. 15, 1976, granted a no-cost time extension for completion of the subcontract to Dec. 31, 1976 (AF-G).

Regardless of the time extension, by letter dated Oct. 21, 1976, ERI submitted a "final report" to BOM entitled, "Toxicity Assessment and Chemical Analysis of Samples from the Citrate Process for Flue Gas Desulfurization." However, this submission was identified with another BOM contract, No. JO166178, so the CO requested that a corrected final report be submitted which pertained to the subject contract, No. JO166201. ERI did submit a corrected "final report" dated Oct. 15, 1976, by transmittal letter dated Dec. 1, 1976 (AF-J).

That report was considered satisfactory and was accepted by the Government as evidenced by a memorandum dated Jan. 4, 1977, and executed by the technical project officer for BOM (AF-L). On Dec. 21, 1977, close-out audits were requested for contract No. JO166201, including an assist audit on the subcontract between ERI and FRC, and contract No. JO166178 (AF-M).

On May 9, 1977, Carol Curtis, technical editor for ERI, transmitted a copy of a "supplemental report" to the final report under contract No. JO166201, stating, "We were requested to send this supplement to you." However, the letter did not explain by whom the request was made (AF-R). On

Sept. 7, 1977, the CO returned the supplemental report to ERI, stating in the letter of transmittal that the final report dated Oct. 15, 1976, was considered satisfactory and accepted by the Government and that the supplemental report was not requested (AF-V).

Prior to the letter of Sept. 7, 1977, on Aug. 19, 1977, the CO rendered his final decision in accordance with the disputes clause of the subject contract (AF-P). The pertinent parts thereof are as follows:

> Inasmuch as the language contained in the report issued against contract No. JO166178 and the final report identified with JO166201 was for the most part identical, a question was raised regarding the allocability of costs incurred subsequent to issuance of the final report.
>
> * * * The findings of audit reports No. 7231-02-7-0164 and revision 1 of April 8, 1977, and report No. 08-78058 of April 5, 1977, revealed costs deemed to be unallowable in the amount of $64,454.
>
> On June 6 and June 7, 1977, the contracting officer met with ERI officials for the purpose of discussing the contents of the audit reports. The discussion was limited to costs incurred subsequent to issuance of the final report, i.e. costs incurred subsequent to October 15, 1976. The position taken by ERI is that they issued a firm fixed price type contract to the subcontractor (University of Utah) in the amount of $65,047. However, the only evidence of a final contract between ERI and the University of Utah as such was in fact consummated on November 29, 1976, some forty-five days after the final report had been issued. ERI issued three purchase orders to the University of Utah in the aggregate not to exceed $65,047, from August 9, 1976 through November 9, 1976. However, the simplicity of the purchase orders failed to deal with fixed price language.
>
> * * * Contract JO166201 is a cost plus fixed fee contract and as such the contractor is obligated to control all costs to the extent of determining reasonableness and allocability. Eyring Research Institute failed to control costs by permitting the subcontractor to incur costs subsequent to issuance of final report. In view of the above, I consider $26,200 a fair and reasonable amount due Eyring Research Institute under the terms of the contract and definitions contained in Federal Procurement Regulation 1-15.2. This consideration is based on $64,454 being subtracted from recorded costs of $86,661 plus allowance of original fee of $3,993.

ERI appealed to the Board from the CO's decision and contends: that the subcontract between ERI and FRC of the University of Utah is a firm, fixed price contract and therefore, ERI is entitled to the full subcontract cost of $65,047 as intended by the subcontracting parties; or, in the alternative, in the event the Board rules the subcontract to be a cost-reimbursement type contract, the sum of $48,517.30 was improperly disallowed by the CO, was established by the evidence of record to have been reasonably incurred, and should, at a minimum, be awarded to the appellant.

On the other hand, the Government contends: that the subcontract was a cost-reimbursement type, as evidenced by its clear, unambiguous terms; that the parol evidence rule does not allow the consideration of prior tentative, expressions of intent to supersede the final, unambiguous expressions set forth in the contract document; that as cost reimbursement contracts, both the prime and subcontracts were governed by the principles and procedures for cost accounting as prescribed by the Federal Procurement Regulations (FPR); and that such procedures were not followed by ap-

pellant in connection with accounting for costs incurred under the subcontract resulting in unallocable costs and therefore, unallowable, particularly with respect to those incurred after submission of the corrected final report on Dec. 1, 1976. In summary, it is the position of the Government that it received no benefit from any costs incurred by appellant after submission of the final report, and that since the ERI did not control the costs of the subcontractor, the CO properly and reasonably disallowed the costs claimed by appellant in this appeal.

This appeal was submitted on the record without the benefit of an evidentiary hearing. The record consists of an appeal file, numerous depositions and affidavits of scientific personnel and contract administrators, audit reports, stipulations, and answers to interrogatories submitted in the course of discovery procedure.

Discussion

It is apparent that the dispute here was the inevitable result of a general lack of communication and coordination among the various scientists and contract administrators employed by both the prime and subcontractors. The otherwise good contract performance was denigrated by inattention to detail with respect to the administrative requirements of Government contracting.

For example, various deponents for both ERI and FRC related that the subcontracting parties desired and *intended* to enter into a firm fixed price subcontract requiring $65,047 to be paid to the University as subcontractor. But instead of hiring an experienced contract lawyer to draft the subcontract, that task was left to the contract administrator for ERI. He admitted copying cost-type provisions from the prime contract, a cost-type contract, and inserting them into the subcontract under the mistaken belief that costs should be itemized under both fixed price and cost reimbursement type contracts for audit purposes (Field Deposition at 78). Another example was the confusion generated over the mislabeled "final report" which Dr. Carlyle Harmon, Chairman of the Board of Directors of ERI, said "was intended to be a rough draft" (Harmon Deposition at 32–33). Another example was the extension of time granted by ERI to the subcontractor, without approval of the CO, for 15 days beyond the completion date for the prime contract (AF-G). Then again, after the final report had been accepted by the Government and the completion date of Dec. 15, 1976, for the prime contract had expired, without any previous notice to the CO of its existence, a supplemental report was submitted in May of 1977, and subsequently returned by the CO because it had not been requested. Although none of these administrative discrepancies vitally effected the success of the overall project, they did create problems for the CO who, on behalf of the Government, had the responsibility to keep contract costs at a minimum and within allowable bounds.

Nature of the Subcontract

[1] Department counsel effectively argues (Govt Brief at 4–11) that the subject subcontract was a cost-reimbursement type contract, as evidenced by its clear, unambiguous terms. For example, he points to Article VII of the subcontract, entitled "Pre-Contractual Costs," which provides: "*Costs incurred* on purchase order No. 984 from August 9, 1976 to the effective date of this contract as reflected on the cover page will be *allowed* to the same extent that they would have been had this contract been executed at that time." (Italics supplied.) We agree that allowance of incurred costs is of concern only in cost-type contracts and that if the subcontract were a fixed-price contract, Article VII would have no meaning or purpose.

Further, Article IV—Costs and Payments, states: "The cost of the work to be performed under this contract is not to exceed the *estimated cost* of $65,047.00. Progress payments will be made on a monthly basis. The total of the progress payment prior to final payment shall not exceed 85% of the *estimated total costs.*" (Italics supplied.) Again, if the above provision was part of a fixed price contract, if would have little meaning. The standard for providing progress payments under a fixed price contract would be a percentage measured against the "total fixed price" of the contract as opposed to "estimated total costs." *See FPR,* 41 CFR, 1–30.513(a), 1–30.510(b)(a)(4), and 1–30.509–7.

Also, Article I, Subparagraph F, of the subcontract provides:

> Because of the changes in the work statement from that in the University of Utah proposal, the Principal Investigators are hereby permitted to reallocate the budget items as they deem appropriate. This will in no way change the total dollar amount or diminish the accountability of the University of Utah.

And again, in a fixed price contract, the University would not need the permission of ERI to reallocate budget items.

Counsel for the Government points out other examples of cost-reimbursement type language contained in the subcontract and contends, under the circumstances here, that application of the parol evidence rule is appropriate. In support thereof, he cites *Brawley* v. *United States,* 96 U.S. 622, 624 (1878), wherein the Supreme Court stated:

> The written contract merged all previous negotiations, and is presumed in law, to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court cannot be governed by any such outside considerations. Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used.

See also Simpson v. *United States,* 199 U.S. 397 (1905), where, in an opinion by the Honorable Oliver Wendell Holmes, the *Brawley* case was cited with approval; the Court of Claims opinion in *Baggett Transportation Co.* v. *United States,* 162 Ct. Cl. 570, 577 (1963); and *Butz Engineering Corp.* v.

United States, 204 Ct. Cl. 561, 579 (1974).

In her brief at page 23, counsel for appellant argues that because of the inexperience with fixed price contracts on the part of ERI and the University of Utah contract administration personnel, cost-type contract language was inadvertently included in the subcontract; that the parties intended to enter into a firm, fixed price subcontract, and that such intention should control the interpretation thereof. She cites *Union Paving Co.* v. *United States,* 126 Ct. Cl. 478, 489 (1953), for the proposition that the conduct and interpretation of the parties to a contract exhibited during contract performance, prior to the dispute, is entitled to great weight. We agree that such proposition was alluded to, but, in our view, the holding of that case is better expressed by the following language, also found on page 489:

> The terms and conditions of the contract and not the preliminaries to its execution, must govern the rights of the parties. *Manufacturers' Casualty Insurance Co.* v. *United States,* 105 Ct. Cl. 342, 352. No basis has been shown for a reformation of the contract. If the bid and contract are contradictory, the contract, if not ambiguous, must control.

Furthermore, appellant's argument seems to overlook the following undisputed facts of this case: that the relationship of the subcontracting parties, during the bulk of the performance of the subcontract work, was controlled by the language of three purchase orders (AF–H) containing such terms as "not to exceed," "cost incurred," and "will be approved," clearly manifesting the contemplation of a cost-reimbursement type contract; and that the subcontract itself was not executed until Nov. 29, 1976, more than a month after the initial submission of the final report.

In the drafting of the subcontract, it would have been a simple matter to have included a provision such as, "This is a firm, fixed price subcontract for the sum of $65,047 which shall be paid to the University of Utah by installment payments for satisfactory progress in the performance of the work required herein." But such a provision, or one expressing the substance thereof, is conspicuously absent from the subcontract.

We concur with the view (Govt.'s Brief at 12) that the fundamental rule expressed in *G.L. Webster Co.* v. *Trinidad Bean & Elevator Co.,* 92 F.2d 177, at 179 (1937), is applicable to the facts in this case. There, the court said: "One cannot enter into a contract and, when called upon to abide by its conditions, say that he did not read it, when he signed it, or did not know what it contained."

Accordingly, we find:

1. That although Government personnel involved with the prime contract were aware that appellant intended to enter into a subcontract with the University of Utah for the required research work, they took no part in the negotiation, preparation, or execution of the subcontract; and

2. That although the subcontracting parties may have intended to enter into a firm, fixed price contract, they did, in fact, by its clear and unambiguous terms, enter into a cost-reimbursement type contract.

Allowable Costs

[2] Appellant concedes that if the Board should rule the subcontract to be a cost reimbursement contract, appellant has the burden of establishing its allowable costs in the record, and contends that it has done so in the amount of at least $48,517.30, over and above the $26,200 allowed by the CO. Appellant further avers that such amount was determined in accordance with generally accepted accounting procedures and not in violation of the costs limitations set forth in the FPR (Appellant's Brief at 27–29). Of this claimed amount, $39,063.85 is identified as subcontract costs allegedly incurred by the University of Utah, and $9,453.45 as ERI general and administrative expense.

In his decision, the CO refused to acknowledge any costs as allowable which were incurred by appellant after Oct. 15, 1976, the date of the final report. But is is not clear from the record whether the CO distinguished between when the claimed subcontract costs were actually incurred and when they were merely recorded into the accounting records of the University. He admits to adopting the total figure of $64,454 determined in the audit reports to be unallowable. But the audits were made in the spring of 1977, and were based on inadequate subcontract accounting records.[1]

Since that time, in the course of this appeal, appellant has managed to assemble a certain amount of additional proof of subcontract costs for the record which consists of vouchers, exhibits, stipulations, and affidavits and depositions of subcontract personnel who had personal knowledge of costs related to the research work. For example, Mr. Steven P. Houchens, manager of research accounting for the University, by his affidavit dated Mar. 28, 1980, and unrefuted by the Government, swears that in performing the toxicology study under subcontract No. C543, the University spent $3,014.56 for rats; $7,022.60 on supplies; $13,285 for salaries, wages, and employee benefits; and $32 for consultants. These figures total $23,354.23. The parties stipulated (Stipulation No. 17) that the following equipment was purchased, at the costs shown, by the University for use in performance of subcontract No. C543: Targas gas chromatograph, $10,449.80; Ken-Teck Laboratories permeation oven and source, $2,659.30; heat systems exhaust scrubber, $1,774.53; Omnitec Model FOIR coupler, $311.14; Hewlett-Packard ion source converter and sensitivity kit, $495; Grass Instrument Co. solid state

[1] That such accounting records were inadequate for a meaningful audit at that time, is confirmed by the following statements of Dr. William S. Partridge, Vice President for Research at the University of Utah, found in his deposition dated Sept. 26, 1979, at pages 18–21:

"The University keeps records on every contract, isolated records, so that we know what the cost should be—are associated with that contract. I should say that is our policy. *In this case that was not done, and we do not have accurate records.* Some of the costs on this project would be charged to other accounts. Professsor Einhorn has discretionary funds and development funds that he charged some of the costs to. He used equipment that was made from components already in existence in the laboratory, and of course these would not be charged to the individual contract. *So we have very poor records with respect to this particular contract.* * * * All I can say is that costs for this contract, *the true costs for this contract, are not auditable;* they are not as clearly defined as we would like it to be." (Italics supplied.)

square pulse stimulators, $787.28; and Hewlett-Packard analytical interference modulator, $1,995. These equipment purchases total $18,472.05. Also, the depositions of Dr. Carlyle Harmon of ERI and Dr. Irving N. Einhorn, Professor of Materials Science, Adjunct Professor of Chemical Engineering, and Director of FRC for the University, generally verfied that a large portion of the disallowed costs were, in fact, necesarily incurred in order to accomplish the toxicological study. In his deposition at pages 23-26, Dr. Einhorn discussed the laboratory equipment used and how it was used during the study and, among other things, explained that some of the equipment had to be purchased, some of it had to be built in the laboratory, and some of it was obtained on loan with a guarantee that it would be replaced with new equipment after completion of the project.

The parties also stipulated (Stipulation No. 16) that the subcontract costs allowed and paid by the Government did not include *any* costs for wages, equipment, animals, animal care, or consultants. We are in accord with counsel for appellant, that to disallow *all* such costs is clearly unreasonable. But on the other hand, we agree with the position of the Government (Govt Brief at 16-20), that it received no benefit from any work or incurrence of costs regarding the supplemental report received long after the final report had been accepted as satisfactory. However, we are reluctant to accept the CO's date of Oct. 15, 1976, as the appropriate cutoff date for the incurrence of allowable costs. We are satisfied, upon consideration of the entire record, that a considerable portion of the disallowed costs, not involved with the supplemental report, were legitimately incurred after that date and were directly related and allocable to the project work.

The major issue here concerns allocability of costs. FPR 41 CFR 1-15.201-4 includes the statement that, "a cost is allocable to a Government contract if it: * * * (b) Benefits both the contract and other work, or both Government work and other work, and *can* be distributed to them in reasonable proportion to the benefits received." (Italics supplied.) Sec. 1-15.201-2 of 41 CFR provides, in effect, that if a contractor discloses that his cost accounting practices are inconsistent with any of the provisions of Subpart 1-15.2, "costs resulting from such inconsistent practices shall not be allowed in excess of the amount that would have resulted from the use of practices consistent with Subpart 1-15.2."

Mindful of the foregoing FPR provisions, the cost allocation issue has been exacerbated by three aspects of the record: (1) Statements contained in the depositions of Dr. William S. Partridge (*see* note 1) and Steven P. Houchens, who is identified above, which militate against allowance of appellant's claims;[2] (2) the lack

[2] On page 21 of his deposition, dated Sept. 26, 1979, Mr. Houchens, among other things, stated: "*There were costs possibly incurred on here which benefitted other contracts.* There were costs incurred on other contracts which benefitted this contract, especially due to the rush to get this thing going." When asked his opinion of the overall veracity of the cost statement the University gave Eyring Institute, he responded at pages 21 and 22:

Continued

of any evidence segregating the costs incurred in connection with the rejected supplemental report; and (3) the failure of either party to provide for the ownership of the equipment acquired especially for this project or to properly apportion its cost.

Nevertheless, inarticulate, inadequate, and unsatisfactory as the record may be, from the standpoint of an evidentiary basis for allocation of costs, we must recognize that the contract work was timely performed, was accepted as satisfactory, and resulted in considerable benefit to the Government. Also, we cannot overlook the fact that on Sept. 30, 1976, in a memorandum to the file (AF-D, Stipulation No. 8), the CO stated that the cost proposal submitted by appellant indicated a subcontract with the University of Utah (FRC) in the amount of $65,047 and that he considered the total contract price of $83,850 to be fair and reasonable.

In this circumstance, where no precise mathematical computation is possible and being convinced that appellant is entitled to more than was allowed by the CO for its incurred costs, we believe the jury verdict approach for our decision is appropriate. *See G.T.S. Co., Inc.*, IBCA-1077-9-75 (Sept. 15, 1978), 85 I.D. 373, 78-2 BCA par. 13,424.

"Without having first hand knowledge of the actual work performed and the costs involved, it would be difficult for me to say. * * * If you were looking at this—obviously, on the basis of the audit, *the costs which were specifically recorded in this contact were not 100 percent accurate as far as costs that really pertained to it.* I feel that these costs were reasonable, justified, etc. They are an accurate reflection of costs. *However, I believe there is some equipment that did not pertain to this contract, at least based on the audit.*" [Italics added.]

Decision

Accordingly, based upon our consideration of the entire record and the discussion above, we hold appellant is entitled to be paid, as additional allowable costs, the sum of $45,000.

DAVID DOANE
Administrative Judge

WE CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

RUSSELL C. LYNCH
Administrative Judge

APPEALS OF PORTER MECHANICAL CONTRACTORS, INC. (ON RECONSIDERATION)

IBCA-1357-5-80 & IBCA-1366-6-80

Decided: *June 28, 1982*

Contract No. 63-03-6093, Environmental Protection Agency.

Denied.

Rules of Practice: Appeals: Motions—Rules of Practice: Appeals: Reconsideration

A motion for reconsideration is denied where appellant's assertions of error in the principal decision are not supported by arguments or by references to the record, and appellant admittedly seeks a rehearing in order to present the evidence in a more coherent sequence and logical order.

APPEARANCES: Marvin E. Porter, President, Porter Me-

chanical Contractors, Inc., Pensacola, Florida, for Appellant; Richard V. Anderson, Government Counsel, Environmental Protection Agency, Cincinnati, Ohio, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

Appellant has moved for reconsideration of the Board's decision of Feb. 1, 1982, 88 I.D. 53, in which we denied the appeals because appellant failed to sustain the burden of showing a causal connection between the costs claimed and the alleged Government actions, and failed to provide reliable cost data to refute Government computations of amounts payable for directed changes. Appellant requests reconsideration of the decision because the Administrative Judge hearing the case did not subsequently write the Board's opinion and for failure of the Board to evaluate correctly the evidence of record in the following instances:

1. concerning appellant's bookkeeping and accounting practices and the fact that appellant accounted for costs differently for tax purposes and for actual contract cost purposes,

2. concerning appellant's method of recording and allocating labor manhours and costs associated with labor inefficiency,

3. concerning appellant's efforts to ascertain the correct benchmark prior to commencing work and the impact of the benchmark problem on the work,

4. concerning appellant's work of connecting the sewer system and the buildings services and the resulting changes to the original contract drawings, and

5. concerning the Government's charge for work deleted by Change Order No. 1.

In support of the request for reconsideration, appellant submitted two lengthy documents prepared by its president. The documents contain numerous statements purporting to show errors in the principal decision in considering the evidence. However, specific references to the record are lacking, so that examination of appellant's claims of error would entail a complete reexamination of a large record. These unsupported assertions of error fail to make a showing of error that would warrant such a review. An example is the contention under No. 4 above that the "as built" drawings do reflect changes from the original drawings. There is no reference to specific differences that exist. This problem of assertions without corroboration by specific reference to the documentary evidence has persisted in this case. At the hearing, there was no attempt to compare the original contract drawings and the "as built" drawings to show that the numerous changes claimed by appellant had occurred.

Appellant claims that the Board failed to evaluate correctly the evidence concerning the two accounting systems used by appellant, which accounted for costs differently for tax purposes and for contract cost purposes. Although certain costs may be accorded different treatment for tax

purposes, appellant fails to explain the "intricacies of the accounting practices" that would cause direct contract labor to be recorded differently in the two accounting systems. Appellant admits in the preliminary brief that "[m]aterial presented to date to EPA and the Board of Appeals is relatively complete; however it resembles a suffeled [*sic*] deck of cards and is hard to follow chronologically." Asking for a new hearing, appellant promises new material to be presented would be rearranged in a coherent sequence and logical order. No explanation is given for the nature of the new material or why it could not have been presented at the hearing. The Government's brief in opposition to the Motion for Reconsideration correctly states our view that a motion for reconsideration is not a proper vehicle for correction of errors or omissions by a party in the presentation of its case. (*See COAC, Inc.*, IBCA No. 1004-9-73 (Feb. 19, 1975), 75-1 BCA 11,104).

Appellant asks reconsideration because Judge Packwood, the hearing official, did not write the Board's opinion. It is noted that Judge Packwood did participate in the decision which bears his concurrence. It is well settled that there is no right to a decision by the official presiding at the hearing, and appellant fails to provide any support for the implied contention that prejudice resulted. (*See Steenberg Construction Co.*, IBCA No. 520-10-65 (May 8, 1972), 79 I.D. 158, 72-1 BCA 9,459).

Appellant contends that he was denied a promised prehearing conference. Judge Packwood confirms that a prehearing conference was held immediately preceding the hearing. It is true that appellant was denied a prehearing conference in Pensacola, Florida, at an earlier date. This denial was prior to the appearance of counsel for appellant and was based on the fact that the expenditures required for such a conference did not appear justified in view of the state of the record at that time. Again, appellant fails to indicate how he may have been prejudiced by this denial.

In addition to reconsideration, appellant requests a reopening of negotiations with the Government or a new hearing. It is clear that appellant desires a second opportunity to present his claims, but he has failed to provide any valid reason for modification of the Board's decision of Feb. 1, 1982. Accordingly, that decision is confirmed.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:
G. HERBERT PACKWOOD
Administrative Judge

ESTATE OF THOMAS HALL, SR.

10 IBIA 17

Decided *June 28, 1982*

Appeal from order denying petition for rehearing and order to

amend. (Indian probate IP BI 316 D 80 and IP BI 145 D 81.)

Reversed.

1. Indian Probate: Wills: Option to Purchase Real Property

An Indian testator may create an option to purchase trust real property by will.

APPEARANCES: James C. Nelson, Esq., Werner, Nelson & Epstein, Cut Bank, Montana, for appellant Wallace W. Hall; appellees Eloise England, Mary Janice Hall Boggs, Marlene Hall, and Phyllis Buel, *pro sese*. *Counsel to the Board: Kathryn A. Lynn.*

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

Wallace W. Hall has filed a notice of appeal from a Mar. 17, 1981, order in which Administrative Law Judge Alexander H. Wilson denied a petition for rehearing and amended his Oct. 29, 1980, order approving will and decree of distribution. The appeal is opposed by four of the remaining eight legatees under the will of Thomas Hall, Sr.

Background

Thomas Hall, Sr. (testator), Blackfeet Allottee No. 18, was born on Feb. 16, 1901, and died in Pendroy, Montana, on Jan. 22, 1980. Testator was survived by nine children of his marriage to Mary LaFromboise Hall.[1] Testator's will, executed on May 13, 1977, was approved by the Administrative Law Judge on Oct. 29, 1980.

The will provided in clause 2 that all of testator's property should be placed in trust for the use of his wife. Upon the death of his wife, any remaining property was to be divided equally among his surviving children and the families of any deceased children. Clause 3 of the will gave decedent's son, Wallace W. Hall (appellant), a 1-year option to purchase any real property that might be part of testator's estate.

Because testator's wife predeceased him, the testamentary trust created in clause 2 lapsed. The Administrative Law Judge apparently interpreted the remainder of the will as passing all of testator's property to his nine children under clause 2, and giving appellant the right subsequently to buy the real property from the other devisees under clause 3.[2] Accordingly, the Administrative Law Judge regarded any subsequent purchase of this Indian trust property to be a separate matter of no further relevance to the probate proceeding.[3] (*See* 25 CFR 121.17-121.31 regarding authority of the Bureau of Indian Affairs to approve sales or other conveyances of trust property.) Although he upheld the validity of the option clause set forth in clause 3 of the will, the Administrative Law Judge held that appellant would have to secure the agreement of the remaining devisees and the Bureau of Indian Af-

[1] A tenth child died in infancy.

[2] The placement of clause 3 after the provisions in clause 2 dealing with the distribution of any property remaining after the death of testator's wife is perhaps responsible for such interpretation.

[3] *See, e.g.*, Order Approving Will dated Oct. 29, 1980, at page 3, paragraph 2.

fairs (BIA) in order to acquire real property under the option.

Based upon the probate decision, BIA required the agreement of all the devisees before approving appellant's purchase of their interests in testator's estate.[4] When appellees here were not amenable to the purchase, appellant sought reopening of the estate to secure his right to purchase the property. Judge Wilson denied reopening on Mar. 17, 1981.[5]

Appellant sought review by the Board of the order denying rehearing. Both appellant and appellees have presented arguments on appeal.

Discussion and Conclusions

From an examination of the will, it is apparent that testator was attempting to give appellant an option to buy the real property in his estate under clause 3 of the will. The principle is well established in general probate law that a person may create an option to purchase real property by will. *See, e.g., Hirlinger* v. *Hirlinger,* 267 S.W.2d 46 (Mo. 1954); *Watson* v. *Riley,* 101 Neb. 511, 164 N.W. 81 (1917). "An option [to purchase real property] is a continuing offer to sell," *Hirlinger, supra* at 49, provided that the optionee meets the terms specified in the will. *Thomas* v. *Kelly,* 3 S.C. 210 (1871). The testator's intent governs the construction of the terms of options and of the purchase price. *Nolan* v. *Easley,* 214 Miss. 190, 58 So.2d 491 (1952); *Hornaday* v. *Hornaday,* 229 N.C. 164, 47 S.E.2d 857 (1948); *In re Larson's Will,* 211 Wis. 237, 247 N.W. 880 (1933); *Watson, supra.* Title to the property remains in the estate until the optionee determines whether or not to exercise the option. *Watson, supra; Daly* v. *Daly,* 299 Ill. 268, 132 N.E. 495 (1921); *In re Ludwick's Estate,* 269 Pa. 365, 112 A. 543 (1921).

[1] The question before the Board is whether an option to purchase trust real property may be created in an Indian will. Indians are given a broad and unrestricted right to dispose of their trust property by will in 25 U.S.C. § 373 (1976): "Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust * * * shall have the right * * * to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior." The Secretary has promulgated regulations dealing with Indian wills and the probate of Indian estates in 43 CFR Part 4, Subpart D. These regulations impose only procedural restrictions on the testamentary disposition of trust property and do not mention the creation of an option to purchase trust real property. In the absence of substantive regulations prohibiting the testamentary creation of an option to purchase real property, there is no reason to deny an Indian the

[4] Letter from Assistant Area Director, Billings Area Office, Bureau of Indian Affairs, to James C. Nelson, dated Nov. 17, 1980.

[5] This order appeared to reverse the earlier order and to hold that appellees could be forced to sell. Administrative Law Judge Keith L. Burrowes, who took over this case when Administrative Law Judge Wilson retired, informed appellant by letter dated May 7, 1981, that the order should not be read to force the sale of the interests of unwilling appellees.

right, generally enjoyed by other individuals, to dispose of property in this manner.[6]

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Oct. 29, 1980, decision of the Administrative Law Judge is reversed. Appellant has the option under testator's will to purchase the real property of the estate[7] "for cash or upon reasonable terms at the going interest rate over a period of twenty (20) years with right of prepayment at any time." The purchase "price [shall be] based upon the value of the assets set forth in the Inventory and Appraisement of [testator's] estate." Clause 3 of the last will and testament of Thomas Hall, Sr.[8]

Because appellant timely attempted to exercise this option on Mar. 12, 1980, but was prevented from doing so by the misinterpretation of testator's will, he shall have 60 days from receipt of this decision in which to tender payment to the Bureau of Indian Affairs for the property in accordance with the provisions of the will. Such payment shall become part of the estate and shall be distributed to the nine legatees in equal shares.

This decision is final for the Department.

WM. PHILIP HORTON
Chief Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

JERRY MUSKRAT
Administrative Judge

[6] *See* and *compare Estate of Ronald Richard Saubel*, 9 IBIA 94, 100-01, 88 I.D. 993, 996-97 (1982).

This type of disposition may be particularly appropriate for Indian trust real property, especially when an estate is largely composed of such property. The option to purchase permits a testator to prevent the continued fractionation of interests in trust property, thus increasing the utility of the land. The testator then, too, has much greater flexibility in determining how to divide the cash value of the estate among the legatees.

[7] Because the real property remains in the estate until appellant either exercises his option or fails to do so within the time given, appellant can purchase even the interests of legatees opposed to the sale.

[8] In his order denying petition for rehearing, the Administrative Law Judge indicates that the purchase price must be the fair market value of the land. This finding is incorrect. The purchase price of land under a testamentary option to buy is the price established in the testator's will, even if that price does not reflect the actual fair market value of the property. *See* discussion, *supra*.

U.S. GOVERNMENT PRINTING OFFICE: 1982 O - 378-331 QL 3

APPEAL OF G. A. WESTERN CONSTRUCTION CO.

IBCA-1550-2-82

Decided *July 1, 1982*

Contract No. CX-1200-0-9005, National Park Service.

Government motions to dismiss denied.

1. Contracts: Construction and Operation: Labor Laws—Contracts: Construction and Operation: Subcontractors and Suppliers—Contracts: Contract Disputes Act of 1978: Jurisdiction—Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Dismissal

The Board denies a Government motion to dismiss an appeal predicated upon the ground, *inter alia,* that the Disputes Concerning Labor Standards clause gives the Department of Labor the authority to decide disputed questions arising out of the Davis-Bacon Act, where the record indicates that almost two-thirds of the amount withheld from a prime contractor by reason of Davis-Bacon Act violations by its subcontractor appears to represent amounts owed by the subcontractor to the Federal or to a state government and thus present questions for resolution by the Board incident to its authority to adjudicate disputes between the parties to the contract.

2. Contracts: Contract Disputes Act of 1978: Jurisdiction—Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Dismissal

A Government motion to dismiss an appeal on the grounds that the contracting officer had neither issued nor been requested to issue a final decision is denied, where the Board finds (i) that the appellant was warranted in treating a contracting officer's disclaimer of any responsibility for adjudicating a dispute as a final decision, and (ii) that no useful purpose would be served by remanding a case to the contracting officer for a decision when the Government's announced position is that the contracting officer has no authority to render a decision relating to wage determinations under the Davis-Bacon Act.

APPEARANCES: J. D. Snodgrass, Attorney at Law, Williams, Turner & Holmes, P.C., Grand Junction, Colorado, for Appellant; Gerald D. O'Nan, Department Counsel, Denver, Colorado, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss the instant appeal with prejudice on the grounds (i) that the contractor has neither requested nor been issued a final decision by the contracting officer; (ii) that the contracting officer has no authority to issue a final decision regarding Davis-Bacon Act, 40 U.S.C. §§ 276a through 276a-7 (1976), wage rates; (iii) that the Board lacks jurisdiction over cases involving Davis-Bacon Act violations; and (iv) that the appellant has failed to state a claim for which relief can be granted.

In its response the appellant requests that the Government's motion be denied on the grounds, *inter alia,* (i) that the Government's contention that there has not been a final decision by the contracting officer is without merit when the nature of the correspondence between the parties is considered; and (ii) that while

the matter arose initially out of a subcontractor's failure to comply with the Davis-Bacon Act, the questions before the Board for decision do not involve the wage matter itself, but rather concerns (a) the response by the National Park Service employees to the apparent failure by the subcontractor to comply with the provisions of the Davis-Bacon Act, and (b) the asserted fact that it was the Government's initial duty to investigate and to assure the proper enforcement of the Davis-Bacon Act (citing 29 CFR 5.6(a)(2) and 29 CFR 5.6(a)(3)).

Before undertaking to address these or other questions raised by the parties, it would appear to be desirable to briefly summarize some of the important points disclosed by the record.

Contract No. CX-1200-0-9005, dated May 16, 1980, called for the contractor to perform certain work involving facilities and site improvements at the Curecanti National Recreation Area, Gunnison County, Colorado. Prepared on standard forms for construction contracts the contract includes the General Provisions of Standard Form 23-A (Rev. 4-75) and the Labor Standard Provisions of Standard Form 19-A (Rev. 1-79) from which the following is quoted:

GENERAL PROVISIONS

32. SUBCONTRACTS

* * * * *

The settlement of any disputes between various subcontractors or between the Contractor and his subcontractors shall remain the sole responsibility of the Contractor. Nothing contained in the contract documents shall create any contractual relationship between any subcontractor and the Government.

LABOR STANDARD PROVISIONS

* * * * *

4. PAYROLLS AND BASIC RECORDS

* * * * *

(b) The Contractor shall submit weekly a copy of all payrolls to the Contracting Officer. The Government Prime Contractor shall be responsible for the submission of copies of payrolls of all subcontractors. The copy shall be accompanied by a statement signed by the Contractor indicating that the payrolls are correct and complete, that the wage rates contained therein are not less than those determined by the Secretary of Labor, and that the classifications set forth for each laborer or mechanic, including apprentices and trainees conform with the work he performed. Submission of the "Weekly Statement of Compliance" required under this contract and the Copeland Regulations of the Secretary of Labor (29 CFR Part 3) shall satisfy the requirement for submission of the above statement.* * *

* * * * *

6. WITHHOLDING OF FUNDS

(a) The Contracting Officer may withhold or cause to be withheld from the Government Prime Contractor so much of the accrued payments or advances as may be considered necessary (1) to pay laborers and mechanics, including apprentices, trainees, watchmen, and guards employed by the Contractor or any subcontractor on the work the full amount of wages required by the contract, and (2) to satisfy any liability of the Contractor and any subcontractor for liquidated damages under paragraph (b) of the clause entitled "Contract Work Hours and Safety Standards Act—Overtime Compensation."

(b) If the Contractor or any subcontractor fails to pay any laborer, mechanic, apprentice, trainee, watchman, or guard employed or working on the site of work, all or part of the wages required by the contract, the Contracting Officer may, after written notice to the Government Prime Contractor, take such action as may be necessary to cause suspension of any further payments or advances until such violations have ceased.

7. SUBCONTRACTS

The Contractor agrees to insert the clauses hereof entitled "Davis-Bacon Act," "Contract Work Hours and Safety Standards Act—Overtime Compensation," "Apprentices and Trainees," "Payrolls and Basic Records," "Compliance with Copeland Regulations," "Withholding of Funds," "Subcontracts," and "Contract Termination—Debarment" in all subcontracts. The term "Contractor" as used in such clauses in any subcontract shall be deemed to refer to the subcontractor except in the phrase "Government Prime Contractor."

* * * * *

9. DISPUTES CONCERNING LABOR STANDARDS

Disputes arising out of the labor standards provisions of this contract shall be subject to the Disputes clause except to the extent such disputes involve the meaning of classifications or wage rates contained in the wage determination decisions of the Secretary of Labor or the applicability of the labor provisions of this contract which questions shall be referred to the Secretary of Labor in accordance with the procedures of the Department of Labor.

(Appeal File (hereinafter AF) 1 and 13).

In the course of oral conversations on Feb. 10, 1981, two of the employees of the subcontractor (Swede Karlsson's Roofing Co.) advised the project supervisor that they were only being paid $7 and $5 per hour, respectively. They also informed him that the stated amounts were clear and that they did not know how much was being deducted for Federal taxes, Federal Insurance Contributions Act (FICA) taxes, or Colorado State tax as they never received any statement showing the deductions made from the wages they were being paid. Subsequently, when the project supervisor conducted labor interviews with the same two men, they quoted their rate as $10.60 per hour. The subcontractor's payroll records reflected an hourly rate of $10.85 per hour. Within less than a week of their discovery, the discrepancies were called to the attention of the prime contractor.[1]

By letter dated Feb. 16, 1981 (AF 4)[2] the contractor's attorney advised Swede Karlsson's Roofing Co., that it may have breached the terms of its subcontract by failing to pay the minimum wage required to be paid by the Davis-Bacon Act. After noting that the underpayment appears to have been confirmed by interviews with certain of the subcontractor's employees by the project inspector and by a representative of the contractor, the letter states: "[I]f all required withholding taxes and other required taxes or assessments, both state and federal have been paid, it appears that your employees may be owed the

[1] AF 5, Memorandum of Feb. 20, 1981, to the contracting officer. Concerning earlier actions of the inspector, the complaint states:

"6. Some time in late December, 1980, Karlsson submitted to Mr. Kelly who subsequently submitted the same to the government inspector on the project, O. F. Ulrich (the "Inspector"), weekly payroll forms. These original forms indicated that Karlsson was properly paid wages in accordance with Wage Decision No. CO 79-5119. Each of these forms were stamped with the following legend: 'This payroll has been checked against applicable wage rates. /s/ O. F. Ulrich Government Representative Dated: (Dated)'

"7. The original wage forms submitted by Karlsson were dated by the Inspector commencing January 5, 1981 and continuing through early February, 1981."

[2] The Denver Service Center appears to have been apprised of the suspected violation of the Davis-Bacon Act by the subcontractor on or before Feb. 20, 1981 (AF 5). The date when the Internal Revenue Service and the Department of Labor were first informed of possible violations of applicable laws by the subcontractor (Swede Karlsson's Roofing Co.) is not clear from the record. In a memorandum dated June 4, 1981, a special agent of the Office of the Inspector General states: "The allegations in the subject matter have been discussed with and copies of pertinent information furnished the Internal Revenue Service (IRS) and the Department of Labor (DOL). * * * This office will make no further inquiry into the matter because of the interest by the other Departments" (AF 8).

sum of $1,624.68 as of February 6, 1981."

In a letter to the contractor's attorney under date of Mar. 6, 1981, the firm of Anderson, Hunter & Associates, P.C. (Certified Public Accountants, Gunnison, Colorado), noted that in connection with the contract between G. A. Western Construction Co. (G. A. Western) and Swede Karlsson's Roofing Co., they had been asked to review the payroll calculations for the period of Nov. 28, 1980, through Feb. 22, 1981. Based upon such review and using hourly rates of $9.54 for a helper and $10.85 for a roofer, the letter included the following information as to the amount of wages and taxes owed by the subcontractor as of Feb. 27, 1981:

Fourth Quarter 1980 (11/28/80-12/31/80)

Additional wages due Employees	$1,033.58
Related Taxes—	
Federal Withholding	1,010.80
FICA—Employee	390.24
FICA—Employer	390.24
State Withholding	170.20
Federal Unemployment	44.58
State Unemployment	171.95
	$3,211.59

First Quarter 1981 (1/1/81-2/22/81)

Additional wages due Employees	$1,481.54
Related Taxes—	
Federal Withholding	1,129.30
FICA—Employee	517.14
FICA—Employer	517.14
State Withholding	219.10
Federal Unemployment	54.45
State Unemployment	210.01
	$4,128.68
Total	$7,340.27

(AF 13, Exh. I).

By letter dated Aug. 27, 1981 (AF 13), the contractor presented a claim in the amount of $16,569.20. Adding the figures given in the letter, the claim is in the amount of $15,663.10, computed as follows:

1. Wage claim by United States Department of Labor (contested by G. A. Western Construction Company)	$7,338.36[3]
2. Disputed Claim of Houston Lumber Company	4,638.04[4]
3. Estimated employer's responsibility for FICA taxes, unemployment taxes, workmen's compensation premiums	1,000.00
4. Attorney's fees and costs incurred by G. A. Western Construction to date with regard to this matter	2,686.70[5]
Total	$15,663.10[6]

[3]The letter from DOL to the contractor dated Sept. 15, 1981, states that its compliance officer had inadvertently computed holiday pay for the roofers who were employed by Swede Karlsson's Roofing Company on Contract CX-1200-0-9003. A revised summary of back wages properly due the employees was included with the letter showing gross amounts due to be $6,383.56 (AF 14).

[4]In the letter from which the instant appeal was taken, the contracting officer states: "[W]e do not intend to withhold the $4,638.04 claimed by Houston Lumber. As you point out, the matter is best handled by provisions of the Miller Act * * *" (AF 17).

[5]By letter of Nov. 9, 1981 (AF 18), the amount claimed for attorneys' fees and costs had been increased to $3,970.31. The letter also claims any future attorneys' fees, costs, and interest allowable by law.

[6]The letter of Nov. 1981 (AF 18), shows the total amount of the claim to be $15,991.91.

Jurisdiction Over Cases Involving Davis-Bacon Act Violations

Discussion

In its motion to dismiss with prejudice the Government asserts that the Board lacks jurisdiction over cases involving Davis-Bacon Act violations. Immediately, thereafter, at page 4 of its brief, the Government states:

> There is no question among the parties that the subject matter the Appellant is trying to present to the Board at this time arises out of Standard Form 19-A, LABOR STANDARDS PROVISIONS, 1. DAVIS-BACON ACT (40 USC 276a. through 276a.-7). Appellant has never argued that its subcontractor Karlsson had complied with the Davis-Bacon Act. To the contrary, Appellant's complaint and notice of appeal established that Karlsson in fact violated the Davis-Bacon Act by failing to properly pay its employees.

After quoting from paragraph (b) of Clause 4, Payrolls and Basic Records of Standard Form 19-A (text, *supra*), the Government asserts that this provision clearly places the responsibility on the prime contractor and not the Government to make certain that the Davis-Bacon Act is being complied with.[7] In addition, the Government states (i) that Clause 9 of Standard Form 19-A, Disputes Concerning Labor Standards, *supra*, gives DOL authority to decide disputed questions arising out of the Davis-Bacon Act and (ii) that the agency boards of contract appeals have consistently held that questions dealing with Davis-Bacon Act violations do not come under the jurisdiction of such boards. The case of *Allied Painting and Decorating Co.*, ASBCA No. 25099 (Sept. 17, 1980), 80-2 BCA par. 14,710, is cited in support of the proposition that once a decision has been reached by the Department of Labor that decision is final and not subject to review by an agency board of contract appeals (Govt Brief at 4-5).

In its response to the Government's motion to dismiss with prejudice, the appellant concedes that the question with which the parties are now concerned arose initially out of its subcontractor's failure to comply with the Davis-Bacon Act.[8] After making this concession, the appellant states at page 2 of its response:

> However, the matter before this Board involves not the wage matter itself, but rather the response by the National Park Service employees to the apparent failure by the subcontractor to comply with the Davis-Bacon Act. As alleged, the National Park Service improperly or negligently responded to the payroll forms submitted,

[7] In its response on page 2, the appellant assets that the Government prime contractor is only responsible for the submission of the payroll, not for the accuracy of the payroll. Similar contentions were rejected by the Armed Services Board of Contract Appeals (ASBCA) in *A. Geris, Inc.*, ASBCA No. 12180 (Mar. 22, 1967), 67-1 BCA par. 6,241. The prime contractor had been found responsible for subcontractors' failures in other Davis-Bacon Act cases. *See, e.g., National Construction Co.*, VACAB No. 775 (Mar. 23, 1970), 70-1 BCA par. 8,193, and *Acme Missiles & Construction Corp.*, ASBCA No. 11150 (Aug. 29, 1966), 66-2 BCA par. 5,826.

[8] AF 13, Exh. I. There is no evidence that the project inspector had any reason to doubt that Swede Karlsson's Roofing Co. was paying its employees at the rates shown in the certified payrolls submitted (*supra* note 1) until some time during the period Feb. 6 through 10, 1981. By Feb. 13, 1981, Mr. Joseph L. Kelly of G. A. Western Construction Co. knew of the possible violations of the Davis-Bacon Act (AF 13, Exh. E).

thus giving rise to the claims made by the Company.[9]

The position of the Government that the agency boards of contract appeals have consistently held that questions dealing with Davis-Bacon Act violations do not come under their jurisdiction is a broader generalization than is warranted by the decided cases. Almost a quarter of a century ago, in the case of *Smith Engineering & Construction Co.*, ASBCA No. 4750 (Apr. 27, 1959), 59-1 BCA par. 2,199, ASBCA had occasion to consider the propriety of a withholding made by a contracting officer for the violation of the Davis-Bacon Act in the light of a Government motion to dismiss alleging no jurisdiction. ASBCA accepted the ruling of the Secretary of Labor that the employees of Abbott (a subcontractor) were covered under the provisions of the Davis-Bacon Act and his decision fixing the hourly rates of pay for different types of work, noting that final determinations of those matters were the prerogative of the Secretary of Labor. Nevertheless, it denied the Government's motion to dismiss, stating at page 9,606:

[T]he exercise of judgment by the contracting officer, however, in applying such decisions and arriving at an amount to be withheld from the Air Force contractor, when contested, is a matter coming within the Disputes Clause * * * especially in this case where there was an absence of uncontrovertible evidence of the total amount involved and the actual amount withheld was definitized by the contracting officer by the use of his own formula.

Ventilation Cleaning Engineers, Inc., ASBCA No. 16704 (Aug. 3, 1973), 73-2 BCA par. 10,210, is another case in which ASBCA considered the question of the scope of its jurisdiction where there were alleged violations of various labor laws including the Davis-Bacon Act. In that case the contracting officer had refused to issue a decision because in his view DOL was responsible for deciding the dispute between parties. In the course of denying the Government's motion to dismiss and finding for the appellant on the alleged Davis-Bacon Act violations, ASBCA stated at page 48,143: "None of the arguments advanced by the Government is persuasive. Certainly the mere fact a controversy relates to a labor provision does not in itself preclude contractors from obtaining relief under the Disputes clauses." [10]

Following the decision in *Ventilation Cleaning Engineers, Inc., supra*, DOL requested the Comptroller General to rule that ASBCA was without jurisdiction over the dispute and, consequently, refuse to permit distribution of the funds to the contractor in accordance with the ASBCA's deci-

[9] In its notice of appeal at page 4, the appellant states: "[W]hile the Act may require the payment of wages by a general contractor to a defaulting subcontractor's employees, the Act could not require the Contractor to withhold and pay to the Internal Revenue Service withholding taxes and F.I.C.A. or to pay other[s] such taxes without being in conflict with the provisions of the Internal Revenue Code. As a result, the most that the Contractor could be liable for is the amount of net wages * * * or $2,515.12. Any other employment or withholding taxes are the unique obligation of Mr. Karlsson."

The $7,340.27 figure shown in the text, is comprised of (i) taxes and other assessments due the Federal Government of $4,053.89 (55¼ percent); (ii) taxes due the State of Colorado of $771.26 (10½ percent); and (iii) additional wages for subcontractor's employees of $2,515.12 (34¼ percent).

[10] The "Disputes Concerning Labor Standards" provision contained in the contract involved in *Ventilation Cleaning Engineers, Inc., supra*, is virtually identical to the clause bearing the same caption included among the labor standards provisions of the instant contract and quoted in the text, *supra*.

sion. In Dec. Comp. Gen. B–173766 (July 15, 1974), 54 Comp. Gen. 24, the Comptroller General noted that DOL's regulatory functions were based on its authority under Reorganization Plan No. 14 of 1950. After noting the limitations which had accompanied the grant of such authority, he stated (i) that neither the Davis-Bacon Act nor the Plan evidences any legislative intent to modify or restrict the established contract settlement procedures of Federal agencies or to so empower the Secretary of Labor; (ii) that in regard to Davis-Bacon Act violations arising from the contractor's employees working more hours than they were paid for, the Comptroller General was not required to comply with DOL's request that the General Accounting Office should disburse the withheld funds to the affected employees, rather than to the contractor; (iii) that in appropriate cases, the Office may follow the findings of the Board in regard to Davis-Bacon Act violations, as it had done in previous cases.

In the cited decision the Comptroller General specifically recognized limitations upon the authority of his office and of boards of contract appeals in regard to Davis-Bacon violations, stating:

> [O]f course, the Department of Labor does have authority to make authoritative rulings in connection with wage determinations and wage rates. 40 Comp. Gen., supra, and B–147602, January 23, 1963. See *United States* v. *Binghamton Construction Co., Inc.*, 347 U.S. 171 (1953) and *Nello L. Teer Co.* v. *United States*, 348 F. 2d 533 (1965). Also, see 40 U.S.C. 276a(a) concerning the Secretary of Labor's authority to determine minimum prevailing wages.[11]

54 Comp. Gen. at 25–26.

The line of demarcation between the jurisdiction exercised by the Department of Labor and that exercised by the agency boards of contract appeals with respect to alleged violations of the Davis-Bacon Act does not appear to have been altered by the enactment of the Contract Disputes Act of 1978 (41 U.S.C. §§ 601–613).

In *Allied Painting and Decorating Co., supra,* ASBCA granted the Government's motion to dismiss the appeal with respect to withholdings under the Davis-Bacon Act for want of jurisdiction where ASBCA found that the payments withheld involved a question of classification, *i.e.,* whether certain of appellant's employees must be classified as painters for each 8-hour working day, or whether an employee's classification may be split between "painter" and "laborer" during such period and paid accordingly. As to these questions, the decision states at pages 72,542–543: "[S]uch matters, previously reserved for determination by the Secretary of Labor are currently confirmed by the applicable provisions of section 6(a), Contract Disputes Act. These provisions, however, do not operate to extend such authority beyond that previously reserved to the Secretary." [12]

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[11] In the concluding paragraph, the Comptroller General states:

"For the above reasons our Transportation and Claims Division has been instructed today to disburse the contract withholdings in accordance with the findings of the ASBCA. See *S&E Contractors, Inc.* v. *United States,* 406 U.S. 1 (1972)." 54 Comp. Gen. at 27.

[12] Sec. 6(a) of the Act reads as follows:

Continued

Upon reconsideration of an earlier decision in the case of *Prime Roofing, Inc.*, ASBCA No. 25836 (Dec. 17, 1981), 82-1 BCA par. 15,667, however, ASBCA denied a Government motion to dismiss an appeal which challenged the propriety of the Government's withholding of contract payments pursuant to a DOL request. In that case the contracting officer had approved an additional labor classification of "roofer helper" at a wage rate less than that specified for roofers in the Davis-Bacon Act wage determination of the contract. Later, however, when DOL reviewed and disapproved the roofer helper classification, the contracting officer rescinded his approval, directed the contractor to pay its roofer helpers at the roofer rate, and pursuant to the Withholding of Funds clause withheld the back pay differential for disbursement to the affected workers.

Addressing the grounds advanced by the Government in its motion to dismiss, ASBCA found (i) that the withholding of funds from the contract price for direct payment to the third party beneficiaries of the wage obligations in the contract was not a "penalty" or "forfeiture" within the common meaning of those terms; (ii) that the legislative history of the Contract Disputes Act of 1978 indicates no intent to change the division of jurisdiction between DOL and the procuring agencies that is made by the Disputes Concerning Labor Standards clause, citing, *inter alia, Imperator Carpet & Interiors, Inc.*, GSBCA No. 6167 (July 31, 1981), 81-2 BCA par. 15,266 at 75,595;[13] (iii) that the Disputes Concerning Labor Standards clause has been a mandatory clause for contracts subject to labor standards since at least 1965 and in substantially the same form; and (iv) that neither before nor after adoption of the Contract Disputes Act of 1978 has the withholding of contract funds in a labor standards case by itself deprived ASBCA of jurisdiction where jurisdiction otherwise existed under that clause.[14]

Summarizing the basis for asserting or declining jurisdiction in disputes involving the labor standards included in Government contracts, ASBCA states at page 77,477:

> Pursuant to the Disputes Concerning Labor Standards clause of the contract, this Board has jurisdiction over all such disputes that are timely appealed except those that involve (1) the meaning of classification or wage rates contained in

"(a) All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulations which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud."

41 U.S.C. § 605(a) (Supp. IV 1980).

[13] Commenting upon the cited decision in a footnote at page 77,477, ASBCA states:

"2. We agree with the GSA board that the Act 'is largely a statutory restatement of former agency board practice' and that it 'is to be taken as intended to fit into the existing system and to be given a conforming effect unless a different purpose is plainly shown.' 81-2 BCA at 75,595. We disagree with the GSA board's conclusion that the existing system considered the withholding remedy to be a penalty or forfeiture."

[14] The three cases cited in support include *Ventilation Cleaning Engineers, Inc., supra,* and *Allied Painting and Decorating Co., supra,* both of which cases are discussed in the text, *supra.*

the wage determination of the Secretary of Labor, or (2) the applicability of the labor provisions of the contract. Limited to the question of whether the contracting officer's approval bound the Government to the proposed roofer helper classification, or at least barred it from retroactive disapproval, PRI's claim does not come within either of the two exemptions in the DISPUTE CONCERNING LABOR STANDARDS clause. *Nello L. Teer Co.* v. *United States,* 172 Ct. Cl. 255, 348 F.2d 533 (1965) cert. denied 383 U.S. 934 is inapposite because the contracting officer in that case never approved the proposed classification.

A question squarely raised by the appellant in the notice of appeal is whether the Davis-Bacon Act makes the general contractor responsible for withholding and paying to the Internal Revenue Service (IRS) or to others withholding taxes and FICA taxes, where a subcontractor fails to withhold and pay them as required by the Internal Revenue Code (IRC) (*supra* note 9). In the letter of Nov. 5, 1981, from which the instant appeal was taken, the contracting officer states at page 2:

> 5. We are advised by the U.S. Department of Labor that $6,364.00 to cover Davis-Bacon rates and associated violations is to be withheld from your contract. A breakdown has not been furnished the National Park Service to differentiate between withheld taxes, erroneous wage rates paid, or other findings. The request of other Government agencies, however, will be abided by. Should you feel that the Department of Labor and/or Internal Revenue Service is making requests beyond their authority, your attention is directed to that agency for relief to this finding.

(AF 19-2).

At page 2 of the brief filed in support of the motion to dismiss, the Government states that in accordance with 29 CFR Part 5 the National Park Service was requested to withhold the sum of $6,384 as a result of Davis-Bacon Act and related violations. Part 5 of 29 CFR does not appear to be any authority for withholding taxes or other sums due to the Federal Government or to a state government. The Government has not cited any other authority it may be relying upon for withholdings covering such items, assuming their inclusion in the amount of withholding involved in this case.

While the record contains no breakdown of the $6,384 requested to be withheld by DOL, it is deemed significant that the only breakdown we have shows that almost two-thirds of the amount initially withheld was for obligations owed by the subcontractor to IRS and to the State of Colorado (*supra* note 9).

An important case in this area is *Arthur Venneri Co.* v. *United States,* 169 Ct. Cl. 74 (1965). There the plaintiff sued for refund of the amount that it had paid for income tax withholdings, Federal insurance contributions taxes and Federal unemployment taxes assessed on the wages received by the employees of a subcontractor of Venneri. The Court stated that the sole issue for determination was whether Venneri was the employer,[15] as that term is defined in

[15] The current provision of the IRC reads as follows:
"§ 3401. Definitions
"(a) Wages.—For purposes of this chapter, the term 'wages' means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid—"
[none of exceptions given are present in instant appeal]
* * * * *

Continued

the taxing statutes during the period in question. While different tests were employed with respect to FICA taxes and Federal unemployment taxes on the one hand and Federal income tax withholdings on the other, the Court of Claims concluded that in neither case was the prime contractor liable for paying the taxes that the subcontractor had failed to pay.

Construing the provisions of 26 U.S.C. (I.R.C. 1939) (predecessor to sec. 3401(d) (*supra* note 15)), the Court stated:

> [I]t was Landers rather than Venneri who made up the payrolls, determined who was to be paid wages, and designated the amount to be paid in each instance. The fact that Venneri supplied the funds for the payroll is not sufficient to make it the employer. * * *
>
> * * * * *
>
> Venneri has no voice in the matter of who would be employed by Landers or at what wage. Venneri hired no one for Landers nor did Venneri fire any of Landers employees.
>
> Since it is altogether clear that Venneri did not have sole control over the payment of the wages, Venneri was not an employer within the meaning of section 1621(d).

(169 Ct. Cl. at 80–81).

Decision

[1] It is undisputed that the subcontractor, Swede Karlsson's Roofing Co., violated the provisions of the Davis-Bacon Act by failing to pay the prescribed wages to some of its employees. The record does not indicate that there is any dispute as to the meaning of classification or wage rates contained in the wage determinations by the Secretary of Labor. The Government has not alleged that there is any dispute between the parties respecting the applicability of the labor provisions of the contract.

The appellant's argument that the Government shall be held liable for losses attributed to the Government's delay in initiating and in concluding an investigation of the alleged Davis-Bacon Act violations by the subcontractor is sufficiently tenuous to raise a serious question as to whether standing alone it would constitute an adequate basis for denying the Government's motion to dismiss.

We need not decide the above-stated question, however, since, on the record before us, it is not possible to determine how much, if any, of the $6,384 figure involved in the present withholding is comprised of amounts owed by the subcontractor for Federal and State taxes and assessments. If, as the present record indicates, almost two-thirds of the sum withheld represents such taxes and assessments, then a serious question exists as to the liability of the appellant as prime contractor for any amounts withheld to cover such items.

Determination of the question does not appear to be in any way dependent upon the provisions of the Davis-Bacon Act or the regulations issued by DOL pertaining thereto. Resolution of a question such as who is an employer within the meaning of the IRC, appears to involve a determina-

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"(d) Employer.—For purposes of this chapter, the term 'employer' means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that—

(1) if the person for whom the individual performs or performed the service does not have control of the payment of the wages for such services, the term 'employer' (except for purposes of subsection (a)) means the person having control of the payment of such wages, and."

26 U.S.C. § 3401 (Supp. IV 1980).

tion we are empowered to make under the Disputes Concerning Labor Standards clause incident to our authority to adjudicate disputes between the parties.

The Government's motion to dismiss the appeal based upon the Board having no jurisdiction over disputes involving labor matters is therefore, denied.

Contracting Officer's Decision as a Prerequisite to Jurisdiction

Discussion

The Government has also moved to dismiss the instant appeal on the grounds (i) that a final decision by the contracting officer was never issued, and (ii) that a final decision was never demanded by the contractor, as required by the Contract Disputes Act of 1978.

A review of the record discloses that on Aug. 27, 1981, the contractor (by its attorney) addressed a letter to the attention of the contracting officer (AF 13) in which additional compensation was requested in the amount of $16,569.20. The letter was five pages long and included a number of exhibits, as well as a detailed chronology of eight pages. The letter requested a prompt review of the matter. A followup letter was written under date of Oct. 2, 1981 (AF 14).

In the contracting officer's response dated Nov. 5, 1981, the contractor was informed (i) that as a result of advice received from DOL $6,384 was to be withheld from the contract to cover Davis-Bacon rates and associated violations; (ii) that a breakdown had not been furnished the National Park Service to differentiate between withholding taxes, erroneous wage rates paid or other findings; and (iii) that the requests of other agencies would be abided by. Immediately thereafter the letter states: "[S]hould you feel that the Department of Labor and/or the Internal Revenue Service is making requests beyond their authority, your attention is directed to that agency for relief to this finding."

Apparently the contractor's attorney was unaware of the contracting officer's letter of Nov. 5, 1981, when in his letter of Nov. 9, 1981, he stated that the letter was being tendered as a formal claim pursuant to the claim made in the letters to the contracting officer of Aug. 27 and Oct. 2, 1981. In a letter addressed to the contractor and bearing the date of Nov. 18, 1981, the contracting officer acknowledged having received the letter from the contractor's attorney of Nov. 9, 1981, filing a formal claim for costs incurred due to nonpayment of laborers by a subcontractor, after which he stated:

> [W]e believe our letter of November 5, 1981 adequately answers your concerns. As soon as we receive the formal report from the Department of Labor we will be in a position to make a decision concerning any compensation. We again remind you that in accordance with CFR 1-15.205-31(d) legal fees are unallowable.

(AF 18).

By letter dated Jan. 25, 1982, the attorney for the contractor timely appealed from what was described as "a decision or find-

ings of fact dated November 5, 1981" by the contracting officer.

In its brief in support of the motion to dismiss, the Government states that the Board is without jurisdiction over the claims asserted because in this case a final decision was neither issued by the contracting officer nor demanded by the contractor. Cited in support of the proposition that agency boards of contract appeals do not have jurisdiction over matters which have not been the subject of a final decision by the contracting officer is the case of *Allied Materials & Equipment Co., Inc.,* ASBCA No. 24373 (Mar. 7, 1980), 80-1 BCA par. 14,340.

After taking note of the fact that the appellant had treated the contracting officer's letter of Nov. 5, 1981, as a final decision, counsel asserts that the position is without merit for three stated reasons, which are: (i) The contractor had at no time demanded a final decision in accordance with the Contract Disputes Act of 1978; (ii) the letter of the contracting officer from which the contractor appealed was written to provide information to the contractor regarding its "request for restitution"; and (iii) the contracting officer does not have any authority to issue a final decision regarding Davis-Bacon Act wage rates (Govt Brief at 2-4).

The decision in *Allied Materials & Equipment Co., Inc., supra,* is not regarded as dispositive of the questions presented. In that case it is clear that a large claim for breach of contracts.[16] had never been presented to the contracting officer for decision[17] and that no jurisdictional question had been raised as to the authority of the contracting officer upon remand to issue a decision on the merits of the dispute.

More germane to the questions before us is the very recent decision of ASBCA in the case of *Prime Roofing, Inc., supra,* which also involved a dispute relating to the application of the Davis-Bacon Act. In that case one of the grounds assigned in the Government's motion to dismiss was that there had been no contracting officer's decision on the claim which was a prerequisite to ASBCA jurisdiction under sections 6(a), 7, and 8(d) of the Contract Disputes Act of 1978. Addressing this aspect of the motion to dismiss, ASBCA states at page 77,477:

> The Government correctly states that a contracting officer's final decision is a procedural prerequisite to our jurisdiction. Although it is not formally designated a final decision, and does not include the required notice of the contractor's appeal rights, the contracting officer's letter of 5 December 1979 is an unequivocal denial of the claim at the issue here (R4-0239, tabs 8 and 13). The notice of rights in a final decision is for the benefit of the contractor, not the Government. No useful purpose would be served by remanding this case for compliance with that formality. The requirement for a contracting officer's decision has been met in substance.

[16] With respect to the claim not involving breach of contract, ASBCA stated at 80-1 BCA par. 14,340, at page 70,703: "[T]he Government either should have paid the amounts claimed or fully explained its basis for nonpayment; and, perhaps, issued a contracting officer's final decision. If the appeal involved only the relatively small amounts not paid, we would probably not consider it premature."

[17] For a case in which a claim presented for the first time in the notice of appeal was remanded to the contracting officer for decision, *see VTN Colorado, Inc.,* IBCA-1073-8-75 (Oct. 29, 1975), 82 I.D. 527, 75-2 BCA par. 11,542.

Decision

[2] It is clear that in this case the contractor never demanded that the contracting officer issue a decision. The question, therefore, is whether the appellant was warranted in treating the contracting officer's letter of Nov. 5, 1981, as a final decision. We think that it was.

All of the claims included in the notice of appeal and in the complaint were presented to the contracting officer in the letters of Aug. 27 and Oct. 2, 1981, and all of them were considered by the contracting officer in the letter of Nov. 5, 1981. In support of its position, the Government calls attention to the fact that the contracting officer's letter concluded by advising the contractor that if it had further information or should wish to discuss the matter further, it should not hesitate to call. Earlier in the letter, however, the contracting officer had not only made clear that he was going to abide by requests of other Government agencies, but in what he characterized as a finding, the contractor was also directed to seek relief from such agencies if it considered that the requests made by them were beyond their authority. The language employed in this paragraph of the letter shows that the contracting officer considered himself to be without authority to adjudicate the dispute under any clause contained in the contract or by reason of any power conferred upon him by the provisions of the Contract Disputes Act of 1978.

Where, as here, the contracting officer disclaims any responsibility for resolving the dispute on the merits and directs the contractor to others for resolution of the claims asserted, the Board finds that the contractor is warranted in treating the contracting officer's disclaimer of responsibility as a final decision from which an appeal may properly be taken. The Board further finds that no useful purpose would be served by remanding the appeal to the contracting officer for a so-called "final decision" where, as here, the Government's announced position is that the contracting officer is without authority to render a decision relating to wage rate determinations under the Davis-Bacon Act. So finding, the Government's motion to dismiss the instant appeal for failure of the contracting officer to issue a final decision is denied.

Summary

The Government's motions to dismiss the instant appeal with prejudice are both denied. Within 20 days from the date of receipt of this decision, a party desiring an oral hearing on the issues involved in this appeal shall so advise the Board in writing.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

AVANTI MINING CO., INC.

4 IBSMA 101

Decided *July 16, 1982*

Petition by the Office of Surface Mining Reclamation and Enforcement for review of the Apr. 7, 1981, decision of Administrative Law Judge Allen, in Docket No. CH 0-344-P, vacating a violation of 30 CFR 717.17(a)(1) (for failure to pass all surface drainage from disturbed area through a sedimentation pond) charged in Notice of Violation No. 80-I-58-12.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

The requirement of 30 CFR 717.17(a)(1) that all surface drainage from the disturbed area be passed through a sedimentation pond before it leaves the permit area is a preventative measure; a showing of the occurrence of the harm it is intended to prevent is not necessary to establish a violation of the regulation.

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

In a civil penalty proceeding to review an alleged violation of the requirement of 30 CFR 717.17(a)(1) that drainage be passed through a sedimentation pond, OSM bears the ultimate burden of persuasion as to three basic elements of proof: (1) The existence of surface drainage which came into contact with disturbed area; (2) that this drainage did not pass through a sedimentation pond; and (3) that this drainage flowed off the permit area.

3. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

Under 30 CFR 717.17(a) the regulatory authority may grant exemptions from the requirement that drainage from disturbed area be passed through a sedimentation pond, but only on the basis of a permittee's showings (1) that the disturbed drainage area within the total disturbed area is small and (2) that a sedimentation pond is not necessary to meet effluent limitations and to maintain water quality in downstream receiving waters.

4. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof—Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally

The burden of proving facts and circumstances to support an exemption from regulation by OSM rests with the party claiming the exemption.

5. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Disturbed Areas—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Disturbed area." The term "disturbed area," for the purposes of the provisions of 30 CFR 717.17(a) for hydrologic system protection, may refer to an area affected by the construction and use of a tool shed.

APPEARANCES: Susan A. Shands, Attorney, and Mark Squillace, Attorney, Division of Surface Mining, Office of the Solicitor, for the Office of Surface Mining Reclamation and Enforcement; G. W. Lavender III, Esq., McCuskey, Martin & Lavender, Bridgeport, West Virginia, for Avanti Mining Co., Inc.

OPINION BY INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) petitioned the Board to review the decision of the Hearings Division vacating a violation of 30 CFR 717.17(a)(1), a regulation promulgated under the authority of the Surface Mining Control and Reclamation Act of 1977 (Act),[1] charged by OSM against Avanti Mining Co., Inc. (Avanti), in Notice of Violation (NOV) No. 80-I-58-12. An OSM inspector determined that not all surface drainage on land disturbed by Avanti's operation of a deep mine passed through a sedimentation pond before leaving the permit area, as required under the cited regulation. The Administrative Law Judge who reviewed the alleged violation accepted OSM's factual determination but held, essentially, that the expectable adverse impacts from the drainage were too small to support the alleged violation. The Board granted OSM's petition for review and received briefs from both parties.

Factual and Procedural Background

On Feb. 21, 1980, an authorized representative of OSM inspected an underground coal mining operation permitted to Avanti in Randolph County, West Virginia (Tr. 6; Respondent's Exh. 9).[2] The inspector observed drainage on a "short haul road" connecting Avanti's minesite to a "main haul road," and took photographs and samples of this drainage (Tr. 10-19; Respondent's Exhs. 2-4). The inspector determined that the drainage on the short haul road flowed, in part, from an area in which there was a tool shed (Tr. 13; Respondent's Exh. 2), and that the drainage flowed off Avanti's permit area without passing through a sedimentation pond (Tr. 10-17). The inspector followed the path of the drainage from the mining area to its intersection with Salt Lick Run (Tr. 16-17).[3] He estimated the rate of flow of drainage on Avanti's haul road to be 1 to 2 gallons per minute (Tr. 10) and the rate of flow from the channel containing this drainage into Salt Lick Run to be 30 to 40 gallons per minute (Tr. 17).

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978). All citations to the Act are to Supplement II of the 1978 edition of the *United States Code*.

[2] The inspector explained the reason for his inspection: "I was proceeding in the general area to conduct inspections and noticed [that] the Left Fork of the Right Fork of [the] Buchannon River was slightly muddy. I followed the stream upstream to find the source of the muddy water and came upon the haulroad leading to the Avanti Mine" (Tr. 7).

[3] The inspector depicted the path of drainage on a sketch, introduced as respondent's exhibit 1, which also shows the approximate geographical relationships among Avanti's mine area, a mine area permitted to Gamble Coal Co., some abandoned mine workings, the haul road serving the active mine areas, and Salt Lick Run (Tr. 7-10).

During an earlier inspection of Avanti's mining operation, in Jan. 1980, the OSM inspector directed the company to install a diversion ditch at the top of the short haul road, to divert drainage away from the road and into a sedimentation pond (Tr. 32–33). According to the inspector, this ditch had become ineffective by the time of his February inspection as the result of coal trucks passing over it (Tr. 35–36). The vice president of Avanti testified that, "[t]o the best of [his] knowledge," the ditch was still in existence in February 1980 (Tr. 104); however, he did not expressly contradict the inspector's assertion that the ditch did not serve to prevent drainage from bypassing the sedimentation pond (Tr. 104–07).[4]

On Feb. 25, 1980, the OSM inspector returned to Avanti's mine-site and served NOV No. 80–I–58–12, charging Avanti with a violation of the requirement of 30 CFR 717.17(a)(1) that "[a]ll surface drainage from the disturbed area * * * shall be passed through a sedimentation pond or series of sedimentation ponds prior to leaving the permit area" (Tr. 25–26; Respondent's Exh. 9).[5] Avanti applied for review of this NOV, and a hearing was conducted on Jan. 22, 1981. In a decision issued on Apr. 7, 1981, the Administrative Law Judge vacated the alleged violation of 30 CFR 717.17(a)(1), reasoning that the Act does not mandate that absolutely all drainage, however minimal, must be passed through a sedimentation pond.[6]

Discussion and Conclusions

I. Fact of Violation

[1] The requirement of 30 CFR 717.17(a)(1) that "[a]ll surface drainage from the disturbed area * * * be passed through a sedimentation pond" follows Congress' determination, expressed in 30 U.S.C. § 1265(b)(10), that such control of surface drainage may be necessary to "minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation."[7] As the Board has previously described it, the requirement is a preventive measure; a showing of the occurrence of the harm it is intended to prevent is not necessary to establish a violation of the regulation. *Kaiser Steel Corp.*, 2 IBSMA 158, 87 I.D. 324 (1980); *see Black Fox Mining & Development Corp.*, 2 IBSMA 110, 87 I.D. 207 (1980),

[4] This witness also testified that Avanti constructed a "sump" at the bottom of the short haul road to collect drainage along one side of the road (Tr. 97–98), but that it was possible that drainage on the road could pass by this sump (Tr. 106–07).

[5] The inspector alleged two other violations in the NOV, and these also were vacated by the decision below. OSM did not seek review of the decision in this regard.

[6] In this regard the Administrative Law Judge stated:

"I cannot find that it is the intention of the Act to declare that every drop of precipitation exiting a permit must be channeled through a sedimentation pond owing to the absolute impossibility of achieving such a narrow definition.

"The Act was designed to *minimize* any disturbance of the hydrologic balance and to prevent, where possible, any further degradation of the waterways in the coal mining regions. To sustain the inspector's interpretation of the Act that *no* additional sedimentation can be allowed would amount to re-writing the Act * * * contrary to my authority.

"Using the best current technology available could conceivably require paving, curbing and guttering with proper storm sewers installed to channel all runoff into holding basins which, when mining was completed, would be removed and the land restored to its original contour." Decision of Apr. 7, 1981, Docket No. CH 0–344–P, at 7 (italics in original).

[7] 42 FR 62650 (Dec. 13, 1977) (explanatory note 8).

rev'd on other grounds, Black Fox Mining & Development Corp. v. *Andrus,* No. 80-913 (W.D. Pa. filed Jan. 16, 1981).

[2] In the proceeding below, OSM had the ultimate burden of persuasion as to the fact of the violation described in the NOV. 43 CFR 4.1155. The basic elements of the alleged violation to be proven by OSM were: (1) The existence of surface drainage which flowed from an area disturbed by Avanti's mining activity; (2) that this surface drainage did not pass through a sedimentation pond; and (3) that this drainage flowed off the permit area. *See Kaiser Steel Corp., supra; Black Fox Mining & Development Corp., supra.* We conclude that OSM met its burden of proof with the uncontradicted testimony of its inspector, supported by photographs, as to each of these elements.

[3] The decision below was, in effect, to exempt Avanti from the requirement of sec. 717.17(a)(1) that "[a]ll surface drainage from the disturbed area * * * shall be passed through a sedimentation pond" on the grounds that OSM did not prove that a significant amount of drainage left Avanti's permit area without passing through a sedimentation pond. *See* note 6, *supra.* The regulation does provide that the "regulatory authority may grant exemptions from this requirement" to pass drainage through a sedimentation pond, but an exemption is to be granted "only when the disturbed drainage area within the total disturbed area is small *and* if the permittee shows that sedimentation ponds are not necessary to meet effluent limitations * * * and to maintain water quality in downstream receiving waters." 30 CFR 717.17(a)(3) (italics added). Avanti did not show that it had been granted such an exemption from the state regulatory authority; certainly OSM did not approve an exemption for Avanti.[8] Nor did Avanti attempt to show its compliance with the effluent limitations and protection of downstream water quality in support of an exemption. Under these circumstances, and even assuming that an Administrative Law Judge can act properly as the "regulatory authority" under sec. 717.17(a)(3), we conclude that the record does not support the decision below to exempt Avanti from the general requirement of sec. 717.17(a)(1).

[4] The burden of proving facts and circumstances to support an exemption from regulation by OSM rests with the party claiming the exemption. *E.g., Daniel Brothers Coal Co.,* 2 IBSMA 45, 87 I.D. 138 (1980). Avanti neither showed nor attempted to make the necessary showings in support of an exemption, and while OSM's evidence may not have shown, conclusively, any noncompliance with the effluent limitations or

[8] Avanti's vice president testified that the haul road is indicated on its mine map as part of the disturbed area, and this is shown in Avanti's posthearing exhibits of mine maps (Tr. 99-102; Posthearing Exhs. A and B). No other portion of Avanti's permit package was introduced into evidence, however, and Avanti's testimony and exhibits do not prove that the West Virginia regulatory authority intended to grant an exemption from the requirement of 30 CFR 717.17(a), let alone that Avanti made the necessary showings to this authority in support of an exemption.

adverse impact on the stream which received drainage from Avanti's minesite, it did not, conversely, serve in some gratuitous manner to satisfy Avanti's burden of proof. The Administrative Law Judge could not properly exempt Avanti from regulation under sec. 717.17(a)(1) on this factual record.

[5] Avanti's support for the decision below is based on a different line of reasoning from that pursued by the Administrative Law Judge. Avanti asserts that OSM failed to show that the surface drainage observed by the inspector came into contact with "disturbed area," because the haul road over which the drainage flowed was not "disturbed area" as defined in sec. 717.17(a)(2).[9] We need not address this assertion because OSM's inspector testifed, without contradiction, that some drainage he observed on the haul road flowed from an area where there was a tool shed.[10] This was "disturbed area" within the meaning of the regulation;[11] consequently, drainage from this area was required to be passed through a sedimentation pond.

[9] Sec. 717.17(a)(2) provides:

"For purposes of this section only, disturbed areas shall include areas of surface operations but shall not include those areas in which only diversion ditches, sedimentation ponds, or roads are installed in accordance with this section and the upstream area is not otherwise disturbed by the permittee. Disturbed areas shall not include those surface areas overlying the underground working unless those areas are also disturbed by surface operations such as fill (disposal) areas, support facilities areas, or other major activities which create a risk of pollution."

[10] The inspector testified, concerning respondent's exhibit 2, that "[i]t shows the interior road into the mine, shows drainage starting up in the area of the small galvanized tool shed" (Tr. 13).

[11] Respondent's exhibit 2 shows a substantial, unvegetated area around the tool shed from which it appears that drainage could flow onto the haul road. Such is disturbed area within the meaning of sec. 717.17(a)(2). *See also Island Creek Coal Co., 3* IBSMA 383, 392-93 N.9, 88 I.D. 1122, 1126 n.9 (1981).

II. Civil Penalty

Neither party briefed the Board on the merits of the civil penalty assessed by OSM on the basis of Avanti's violation of 30 CFR 717.17(a)(1), and the decision below does not address the penalty assessment. We have reviewed the record in this regard and are satisfied that the assessment was based on a reasonable calculation pursuant to the point system set forth in 30 CFR 723.13. Accordingly, we do not disturb OSM's assessment.

For the foregoing reasons the decision below vacating the violation of 30 CFR 717.17(a)(1) alleged in NOV No. 80-I-58-12 and ordering the civil penalty assessment based on this violation to be refunded to Avanti is hereby reversed.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

DANIEL CONWAY *v.* ACTING AREA DIRECTOR, BILLINGS AREA OFFICE, BUREAU OF INDIAN AFFAIRS

10 IBIA 25

Decided *July 16, 1982*

Appeal from a Feb. 17, 1982, decision of the Acting Area Director, Billings Area Office, Bureau of Indian Affairs, that an Indian preference bid lease of a range unit should be canceled in favor of Indian allocation use pursuant to a Blackfeet tribal resolution.

July 16, 1982

Affirmed as modified.

1. Indian Lands: Leases and Permits: Grazing: Allocation

Under 25 CFR 151.10, the tribe establishes procedures and priorities for allocation of tribal, tribally controlled Government, and individual lands.

2. Indian Lands: Leases and Permits: Grazing: Allocation

Under Blackfeet Tribal Resolution 9-79, an Indian grazing her own livestock is a higher priority user of land than an Indian grazing non-Indian-owned livestock.

3. Indian Lands: Leases and Permits: Grazing: Allocation—Indian Lands: Leases and Permits: Grazing: Revocation or Cancellation

Under Blackfeet Tribal Resolution 9-79, an Indian grazing her own livestock is entitled to an allocation of land equal to the number of the herd plus 25 percent, up to a maximum of 500 head per year, and can cause the cancellation of all or part of a grazing lease which is not used for the grazing of Indian-owned livestock.

APPEARANCES: Daniel Conway, pro se; Patricia Compton, pro se; Richard Aldrich, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Indian Affairs. Counsel to the Board: Kathryn Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

Daniel Conway (appellant), a member of the Blackfeet Tribe, has sought review of a Feb. 17, 1982, decision of the Acting Area Director, Billings Area Office, Bureau of Indian Affairs (BIA), holding that his Indian preference bid lease on Range Unit #27 on the Blackfeet Reservation in Montana should be canceled in favor of an application for allocation for Indian-owned livestock pursuant to Blackfeet Tribal Resolution 9-79 and 25 CFR 151.10 and .15. Appellant filed an appeal with the Deputy Assistant Secretary—Indian Affairs (Operations) who referred the case to the Board of Indian Appeals on May 21, 1982, under 25 CFR 2.19(a)(2).

On May 24, 1982, the Board docketed the appeal and referred it to the Hearings Division of this Office for an expedited evidentiary hearing and recommended decision. Administrative Law Judge Garry V. Fisher held a hearing on June 9, 1982, and submitted a recommended decision which the Board received on July 7, 1982. Appellant's exceptions to the recommended decision were received on July 12, 1982. Appellee's statement that she would not file exceptions was received on July 14, 1982.

Background

Appellant has leased Range Unit #27 since at least Mar. 1, 1953 (Tr. 16). His present lease covers the period Jan. 1, 1979, through Dec. 31, 1983 (*see* Exh. 2).[1] Appellant has not owned cattle since approximately 1957 (Tr. 83), but has consistently run cattle for non-Indians on Range

[1] Exhibit references are to evidence adduced at the June 9, 1982, hearing.

Unit #27 (Tr. 83-84). Appellant believes that his use of the unit was common knowledge to both the tribe and BIA (Tr. 84). Appellant owns 160 acres of irrigated land in fee which is also leased (Tr. 84, 86). It appears that these lands provide appellant's income (*see* Exh.17).

On Oct. 15, 1981, Patricia Compton (appellee), also a member of the Blackfeet Tribe, applied for an allocation of grazing privileges on Range Unit #27 (*see* Exh. 3). This application was filed pursuant to the provisions of 25 CFR 151.10 and Blackfeet Tribal Resolution 9-79, both of which provide priority of use for Indian-owned livestock on tribally and individually owned trust lands.

Appellee's application was considered by the Blackfeet allocation committee and in its report of Nov. 10, 1981, the committee recommended that Range Unit #27 be left with appellant (*see* Exh. 13). The Superintendent of the Blackfeet Agency, based partly on this recommendation, denied appellee's application. The denial letter, dated Nov. 12, 1981, states "that Mr. Conway has been a satisfactory permittee on this Range Unit for a long time. And that loss of this unit could pose a financial hardship on him" (*see* Exh. 5). Appellee appealed this decision to the Acting Area Director, who, on Feb. 17, 1982, reversed the Superintendent's decision and held that appellee was entitled to allocation of Range Unit #27 (*see* Exh. 9).

Appellant seeks review of this decision.

Discussion and Conclusions

[1] Resolution 9-79, which is the governing law in this case,[2] establishes grazing priorities for the use of reservation land. These priorities are: (1) Indian allocation for Indian-owned livestock; (2) Indian preference bid leases; and (3) non-Indian bid leases. There are no exceptions to this scheme.

[2] Because of these priorities, appellant, although an Indian using Indian land to support himself, is a lower priority user than appellee because the cattle he grazes on Range Unit #27 are not Indian owned. Therefore, appellee, who would be grazing Indian-owned cattle, has priority to the use of Range Unit #27 over appellant.

[3] Paragraph B of the resolution sets forth the rule that allows cancellation of a grazing permit at any time if a claim is made that the range unit is not being grazed by Indian-owned livestock: "Allocations may be made on any unit not grazed by Indian owned livestock anytime during [the] 5-year permit period, for Indian owned cattle provided cattle are branded with enrolled adult member's brand" (*see* Exh. 1).

Appellant's grazing permit incorporates this limitation in the paragraph entitled "Termination and Modification" which states that "[i]t is understood and agreed that this permit is revocable in whole or in part pursuant to 25 CFR 151.15" (*see* Exh. 2). Sec. 151.15(c) permits the Superintendent to "revoke or withdraw all or

[2] *See* 25 CFR 151.10 which provides that eligibility requirements for allocation of grazing privileges shall be prescribed by the tribe.

any part of a grazing permit by cancellation or modification on 180 days' written notice for allocated Indian use." The Area Range Conservationalist for the Billings Area Office, BIA, testified that the combination of these rules meant, in his opinion, that a lease "could last anywhere from six months to five years if you are not an individual eligible for allocation" (Tr. 80).

Thus, appellee can force the cancellation of all or a part of appellant's lease if she is grazing her own cattle, branded with her brand.

There is no dispute that appellant owns cattle or that these cattle are branded with her brand. It appears from the testimony and the documentary evidence that appellee owned 228 head, including 220 cows and 8 bulls, on Oct. 21, 1981, the date her herd was counted to support her application for allocation (*see* Exh. 4, Tr. 25). Appellee testified that her herd now includes 180 heifers,[3] 55 yearlings, and 10 bulls, a total of 245 head.

Appellee admits that she holds allocations on Range Units #83 and #289 (Tr. 88, 93).[4] Under paragraph A of Resolution 9-79, she is entitled to additional allocations equal to the number of her herd plus 25 percent.[5] Because the grazing limitations for these range units given in oral testimony by appellee and by BIA were conflicting (*cf.* Tr. 27 with Tr. 88), and because the figures are subject to exact verification by reference to BIA documents, this case will be remanded to BIA for a determination of the precise number of animal units from Range Unit #27 to which appellee is entitled.

Only that part of appellant's lease that represents the additional animal units to which appellee is entitled may be canceled. If appellee is entitled to less than all of Range Unit #27, in determining the geographical configuration of the part of the unit that is to be taken by appellee, BIA shall consider any improvements placed upon the unit by appellant and shall maximize the benefit of those improvements to appellant, within the constraints of reasonable range management.

The BIA is instructed to return that part of appellant's advance rental payment on Range Unit #27 that is attributable to the part of the unit taken by appellee.

Therefore, the Feb. 17, 1982, decision of the Acting Area Director and the July 2, 1982, recommended decision of the Administrative Law Judge are affirmed and accepted as modified by this decision. Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the

[3]The transcript reads that appellee owns "180 pairs." The Board interprets this to mean "180 heifers." *See* Tr. 89.

[4]The testimony indicated that appellee also holds a lease on Range Unit #295 (Tr. 27, 88). Because Resolution 9-79 does not require leased units to be taken into consideration when an application for allocation is filed, this unit must be excluded from the calculation of the number of animal units, defined in paragraph E of the resolution, to which appellee is entitled.

[5]Paragraph L of Resolution 9-79 establishes a maximum allocation of 500 head per person per year. This limitation is not relevant in appellee's case.

Interior, 43 CFR 4.1, this decision is final for the Department.[6]

WM. PHILIP HORTON
Chief Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

JERRY MUSKRAT
Administrative Judge

TURNER C. SMITH, JR.
SIGNE D. SMITH

66 IBLA 1

Decided *July 23, 1982*

Appeal from decision of Montana State Office, Bureau of Land Management, rejecting application for competitive oil and gas lease. M 54149.

Reversed and remanded.

1. Oil and Gas Leases: Generally—Oil and Gas Leases: Competitive Leases

Oil and gas leases may be acquired and held only by citizens of the United States, associations of citizens (including partnerships), corporations, and municipalities. The Mineral Leasing Act does not prohibit the creation of joint tenancies when oil and gas leases are issued. Where the two offerors are designated on a competitive oil and gas lease bid as "Turner C. Smith, Jr. and Signe D. Smith, husband and wife, as Joint Tenants, DBA Turner Smith & Associates" and the bid is signed by each person individually, the bid is acceptable in that form since it is possible to determine the full names of the offerors.

2. Oil and Gas Leases: Generally—Oil and Gas Leases: Applications: Sole Party in Interest—Oil and Gas Leases: Competitive Leases

Although, under the Departmental regulations in effect at the time of the sale, a competitive bidder in an oil and gas lease sale, where there are other parties in interest, was required to submit the signed statements required by 43 CFR 3102.2-7 (1981), failure to comply with the regulation does not require rejection of the bid. Whereas, in noncompetitive offerings, the critical element is determining the first qualified offeror, in competitive bidding, the amount of the bid replaces priority of filing as the dominant factor.

Solicitor's Opinion, M-36434 (Sept. 12, 1958), overruled to extent inconsistent.

APPEARANCES: James S. Holmberg, Esq., Denver, Colorado, for appellant; David C. Knowlton, Esq., Denver, Colorado, for Koch Industries, Inc.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF LAND APPEALS

Turner C. Smith, Jr., and Signe D. Smith have appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated Feb. 4, 1982, which rejected appellants' high competitive oil and gas lease bid for parcel 17, serial number M 54149. BLM rejected the bid because appellants filed their application as joint tenants, which BLM states is not authorized by the Mineral Leasing Act of Feb. 25, 1920 (the "Act"), 30 U.S.C.A. § 181 (West Supp. 1982). BLM asserts that it may issue leases to two persons only in equal proportions with no right of survivor-

[6] This decision does not preclude the parties from reaching any other mutually acceptable agreement as to the use of Range Unit #27 as long as that agreement is permissible under Resolution 9-79.

ship. The decision states that the offerors also did not comply with 43 CFR 3102.2–7 because the bid was accompanied by a statement signed only by Turner C. Smith, Jr., setting forth other parties in interest in the bid. The other parties submitted citizenship and acreage holding statements but failed to sign the statement detailing their interests in the bid.

Appellants' bid was submitted in connection with the competitive lease sale held by BLM on Jan. 13, 1982. Examination of the form submitted by appellants reveals that on the line designated "Signature of Bidder," both Turner C. Smith, Jr., and Signe D. Smith signed individually. Above the line designated for the typed or printed name of the bidder they had typed, "Turner C. Smith, Jr. and Signe D. Smith, husband and wife, as Joint Tenants, DBA Turner Smith & Associates." A cover letter signed by Turner Smith listed the parties in interest in the bid as Samuel Gary; Turner C. Smith, Jr., and Signe D. Smith, HWJT, d.b.a. Turner Smith & Associates; and Ronald W. Williams. It also showed percentages of ownership. In addition to the bid itself, two additional copies of the competitive oil and gas lease bid form were attached, containing the signatures of Gary and Williams, in order to indicate their compliance with the mandatory age, citizenship, and maximum acreage requirements.

In their statement of reasons, appellants argue that they are citizens of the United States and that the "Mineral Leasing Act authorizes the issuance of leases to citizens of the United States and associations of citizens. Appellants cite *Edward Lee,* 51 I.D. 299 (1925), the headnote of which states that "An application for a permit or lease by two or more persons jointly under the act * * * is *prima facie* an application by an 'association' within the meaning of section 27." Thus, they contend that if they are disqualified as individuals, they should be considered as an association. Appellants further contend that the application and statement setting out parties in interest were submitted together as one document and that the regulations do not require that the statement of interest be executed on a separate document.

On May 3, 1982, Koch Industries, Inc., the second highest bidder, filed an answer to appellants' statement of reasons. Koch urges that appellants are attempting to undermine *Solicitor's Opinion,* M–36434 (Sept. 12, 1958), which states that issuance of the lease to joint tenants is prohibited, and that the Secretary is without authority to issue leases to persons or parties other than to those parties which the Mineral Leasing Act specifically mentions. Koch further states that even if appellants were considered an association under *Edward Lee, supra,* they failed to submit the instruments required by 43 CFR 3102.2–4, an omission which would still require rejection of their bid.

[1] Under the Mineral Leasing Act, oil and gas leases may be

issued only to citizens of the United States, associations of such citizens, corporations, or municipalities. 30 U.S.C.A. § 181 (West Supp. 1982). Departmental regulation 43 CFR 3102.1 [1] provided:

> § 3102.1 Who may hold interests.
> (a) *General.* Leases may be acquired and held only by citizens of the United States; associations (including partnerships) of such citizens, corporations organized under the laws of the United States or of any State or territory, thereof, or municipalities.

Thus, the initial question is whether appellants, who submitted their high bid in their individual names, but as joint tenants, d.b.a. Turner Smith and Associates, fall within one of the acceptable classes of lessees.

If appellants had submitted the bid either individually or in their own names, including a "d.b.a. Turner Smith and Associates" designation without further qualification, they could have been considered an informal association of citizens, and BLM could have issued the lease, all else being regular. *See* 43 CFR 3102.3-1(b). *See also McClain Hall,* 61 IBLA 202 (1982), and *Edward Lee, supra.*

Our focus, therefore, must be upon the effect of their use of the term "joint tenants."

A joint tenancy is defined as "[a]n estate in fee-simple, fee-tail, for life, for years, or at will, arising by purchase or grant to two or more persons." It is a "[t]ype of ownership of real or personal property by two or more persons in which each owns an undivided interest in the whole and attached to which is the right of survivorship"; a "[s]ingle estate in property owned by two or more persons under one instrument or act." *Black's Law Dictionary* 1313 (5th ed. 1979). A joint tenancy, then, is clearly not a citizen, corporation, or municipality. Is it an association of citizens to which an oil and gas lease may be issued in the name of the joint tenancy as such? Is it a sufficient legal entity to make the required certifications and enter into a contract?

By definition, a joint tenancy does not have a separate legal identity apart from the property granted.[2] As recognized by *Solicitor's Opinion,* M-36434, it is a type of ownership created by purchase or grant. The distinction, though a fine one, is that an estate is not transferred to an entity called a joint tenancy; rather, joint tenancy is the *form* in which an estate is transferred to two or more individuals. Those individuals become joint tenants as a result of the conveyance specifying that form of holding. They do not become a new entity but remain an association for the purposes of Federal oil and gas lease law.

The real issue that appellants' bid raises is whether the Secretary of the Interior can utilize the joint tenancy form in issuing an oil and gas lease. The problem, as BLM has noted, is the 1958 opinion by the Acting Solicitor that the Act "does not provide for the issuance of leases to tenancies as such" and that, therefore, the Secretary is without authority to

[1] On Feb. 26, 1982, 43 CFR Subpart 3102—Qualifications of Lessees—was revised. 47 FR 8544 (Feb. 26, 1982). This revision did not redefine who may hold leases, a matter defined by statute.

[2] A tenancy is the relationship of the tenant to the property he holds. 31 C.J.S. *Estates* § 1 (1964).

issue a lease to two or more persons as joint tenants. *Solicitor's Opinion,* M–36434 (Sept. 12, 1958).

We are certainly in agreement with the Acting Solicitor that the Act authorizes the issuance of Federal oil and gas leases to only three categories of private persons: citizens, associations of citizens, and domestic corporations. No other private *entity* is authorized to hold such leases. However, we find it difficult to conclude that there is therefore no authority in the Secretary to issue leases either to two or more citizens or to an association of citizens in more than one form. As the appellants have pointed out in their statement of reasons:

> The Mineral Leasing Act authorizes the issuance of leases to citizens of the United States and associations of citizens. Appellants are citizens of the United States. Nowhere in the Act is joint tenancy mentioned, either to be proscribed or permitted. The decision cites a 1958 memorandum opinion of the Acting Solicitor * * * which concludes, upon dubious and strained reasoning but no authority, that the Congress did not intend that leases be issued to "tenancies". These appellants are individual citizens of the United States doing business under a particular legal form of ownership. *Anyone* who holds an interest in land in any form is a tenant. *Black's Law Dictionary.* No leases would ever be issued if not issued to some form of tenancy.

The adverse party, in its answer to appellants' statement of reasons, also recognizes that "the Solicitor's Opinion does not conclude that Federal oil and gas leases cannot be issued to generic, black letter law 'tenancies,' for as both the appellants and Solicitor's Opinion point out, any holding of an interest in land in any form is technically a 'tenancy.' "

We believe, on balance, that appellants should be allowed to take the lease as joint tenants since, as recognized by both parties, there is nothing inconsistent with the Act in permitting citizens or associations of citizens to hold property in one form of tenancy rather than another.[3] If particular forms of holdings were actually contrary to the Act, as the Acting Solicitor's discussion seems to suggest, then there would be no authority for the Department to allow such longstanding variations as guardians and trustees holding leases on behalf of minor children, as permitted by 43 CFR 3102.2–3, or executors and administrators holding leases on behalf of estates of deceased offerors, as permitted by 43 CFR 3102.2–8.[4] Such limitations are clearly not contained in the Act or in its legislative history, and we see no reason to read them into the law with respect to joint tenancies alone.

[2] While 43 CFR 3120.1–4 specifically requires bidders for competitive leases to comply with the regulations in subpart 3102, this Board has repeatedly held that failure to comply fully with such requirements does not necessarily require rejection of a competitive high bid. In competitive lease offers, price is the primary criterion, rather than priority of filing as in noncompetitive lease offers.

[3] We note that in at least one case a court has concluded that interests created after issuance of a Federal lease may be held in joint tenancy. *See Chevron Oil Co.* v. *Clark,* 432 F. 2d 280, 286–87 (5th Cir. 1970).

[4] *See also* 43 CFR 3102.3 and 3106.1–3 (47 FR 8544 (Feb. 26, 1982)).

See, e.g., Ballard E. Spencer Trust, Inc., 18 IBLA 25 (1974), *aff'd, B.E.S.T., Inc.* v. *Morton*, 544 F. 2d 1067 (10th Cir. 1976). The Board has consistently held that some deviations from mandatory regulatory requirements, such as the failure to certify citizenship or acreage holdings or to submit statements of interest or corporate qualifications, are curable defects in competitive bidding situations. *Eurafrep, Inc.*, 55 IBLA 275 (1981); *Black Hawk Resources Corp.*, 50 IBLA 399, 87 I.D. 497 (1980). The criterion used to decide whether a requirement can be cured has essentially been whether the defect gives one bidder an advantage over another, or is destructive to the orderly conduct of lease sales. *Eurafrep, Inc., supra* at 276. The failure of all the parties in interest to sign the statement of interest in this case is not such a defeat. Thus it was improper for BLM to reject appellants' bid based on a failure to comply with 43 CFR 3102.2–7. BLM should have afforded appellants an opportunity to cure the deficient filings.[5]

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case is remanded to BLM.

BERNARD V. PARRETTE
Chief Administrative Judge

[5] Contrary to the argument of Koch Industries, Inc., a similar result would pertain even if appellants had been treated as an association of citizens from the outset with respect to compliance with 43 CFR 3102.2–4 or 43 CFR 3102.2–7, whichever was applicable. *See* 43 CFR 3102.3–1(b).

I CONCUR:

C. RANDALL GRANT, JR.
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI DISSENTING IN PART AND CONCURRING IN PART:

The majority decision authorizes the issuance of oil and gas leases to individuals as joint tenants. In doing so, it not only overrules a Solicitor's Opinion of more than 20 years vintage, but overturns, as well, a position which, as the *Solicitor's Opinion* notes, has been a consistent view of the Department since the inception of the Mineral Leasing Act, 30 U.S.C. § 181 (1976). *See Solicitor's Opinion*, M–36434 (Sept. 12, 1958). This action is clearly not occasioned by a ground swell of protests and agitation over the rule. Indeed, from the date of the *Solicitor's Opinion* to the present not a single appeal has reached the Departmental level contesting the prohibition against issuance of leases to joint tenancies.[1] Considering the incredible amount of litigation that has surrounded virtually every other aspect of oil and gas leasing this silent acquiesence is eloquent testimony to the broad acceptance of the rule.

Nor is the action of the majority needed to enable it to award the lease to the appellants. As the appellants point out, if their offer cannot be accepted as joint ten-

[1] In fact, with the exception of a single decision by the Land Office Manager of the Colorado Land Office in 1961, *Elmer M. Novak*, C–020722 (Aug. 10, 1961), which denied an assignment of record title interest to two individuals as joint tenants, it appears that there is not a single decision, reported by any source, on this question at any level of the Department.

ants they are willing to accept the lease as members of an association. Since, as I understand the *Solicitor's Opinion, supra,* this was exactly the result which the prohibition on issuing leases to individuals as joint tenants was designed to effectuate, I would grant their request. It seems relatively clear that appellants are indifferent to the form in which they acquire the lease, so long as they acquire it. It is unfortunate that the majority nevertheless proceeds to overrule the prohibition because, though there has been a paucity of applications for leases by individuals who wish to hold as joint tenants in the past, I am sure that the Board will discover, once having abrogated the rule, that many more individuals will avail themselves of this method of holding a lease. As they do, the question of apportionment of chargeable acreage becomes increasingly difficult.

Assuming that a husband and wife filed for a parcel as joint tenants, under 43 CFR 3101.1–5(d), the chargeable acreage is each party's proportional share of the total lease acreage, or 50 percent. If, however, the husband dies during the lease term the chargeable acreage to the wife increases to 100 percent, via the right of survivorship, but there exists no regulation which would necessitate informing the Government of this fact. While a regulation requires that an heir or devisee file information as to its acreage holdings (43 CFR 3106.1–6) before the right to hold interest in the lease acquired by death can be recognized, this regulation would not, by its terms, apply to a joint tenant who acquires the entire interest through the death of the other joint tenant. Of course, regulations could be drafted to cover this contingency, but the majority never explains why we should go to this trouble. This rule does not limit *who* may file but merely establishes *how* they may file.

Part of the problem rests with the *Solicitor's Opinion* itself. Though recognizing that the past practice of the Department had been to refuse to issue leases to individuals in joint tenancy form, the Acting Solicitor apparently felt obligated to rest the rule, at least in part, on the statutory language. I agree with the majority that on this ground it is hard to sustain the result. I do not believe, however, that it was necessary to base this prohibition on the express language of the Act. Rather, as the *Solicitor's Opinion* implicitly recognized, it could be based on the general authority of the Secretary to issue rules controlling the manner of leasing.[2]

This rule is not an attempt to limit, contrary to the statute, the entities who may hold oil and gas leases. Rather, it merely prohibits a type of holding. I think the Department clearly has the authority to do this, just as courts have recognized its authority to issue

[2] Thus, the Acting Solicitor noted: "It is for the United States acting through Congress and its nominee, the Secretary, to specify the terms and conditions subject to which a lease will be issued and the manner which the estate will be held."

the 640-acre rule, which also has no express statutory basis. *See Boesche* v. *Udall,* 373 U.S. 472 (1963).

I recognize that, to the extent the prohibition is based on policy rather than statutory interpretation, the *Solicitor's Opinion* is subject to the complaint that it was not "published" as provided by 5 U.S.C. § 552(a)(2) (1976), and thus, by itself, may not be utilized to deprive appellants of a statutory preference right. But, as was pointed out above, appellants would not be adversely affected by applying this rule since they could still obtain the lease, being treated as an association. Moreover, since the Board's decisions are published and made available for purchase, our affirmation herein would serve to establish the rule and notify the public at large. *See, e.g., McDonald* v. *Watt,* 653 F.2d 1035 (5th Cir. 1981); *Runnells* v. *Andrus,* 484 F. Supp. 1234 (D. Utah 1980).

It may well be that the changes effectuated by the majority will have minimal adverse effects. But a great deal of the history of changes in policy surrounding mineral leasing have involved the making of "minor" changes which have ultimately led to unforeseen "major" problems. I think we are well advised to follow the old saw, "If it ain't broke, don't fix it." In any event, to the extent that this rule is a matter of policy, I believe it is properly a matter of revision by those in the Department who are vested with policymaking responsibility. Insofar as the majority authorizes issuance of leases to individuals holding as joint tenants, I dissent.

JAMES L. BURSKI,
Administrative Judge

DELAWARE TRIBE OF WESTERN OKLAHOMA

v.

ACTING DEPUTY ASSISTANT SECRETARY—INDIAN AFFAIRS (OPERATIONS)

10 IBIA 40

Decided *July 30, 1982*

Appeal from decision by Acting Deputy Assistant Secretary—Indian Affairs (Operations) apportioning income from restored lands among three Indian tribes.

Reversed.

1. Indian Lands: Ceded Lands: Restoration

Restoration of ceded lands to tribal ownership under sec. 3 of the Indian Reorganization Act of June 18, 1934, held not to require apportionment of income from restored lands on the basis of populations at the time of cession.

APPEARANCES: Jap W. Blankenship, Esq., and Margaret McMorrow-Lowe, Esq., for appellant; Anne Crichton, Esq., Office of the Solicitor of the Department of the Interior, for appellee; Patricia L. Brown, Esq., for intervenor Wichita and Affiliated Tribes; Rodney J. Edwards, Esq., for intervenor Caddo Tribe of Oklahoma. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

Factual and Procedural Background

On Sept. 17, 1963, an order issued by Assistant Secretary John A. Carver, Jr., restored 2,306.08 acres of ceded lands to appellant Delaware Tribe of Western Oklahoma (Delaware Tribe) and intervenors, Wichita and Affiliated Tribes (Wichita Tribe) and Caddo Tribe of Oklahoma (Caddo Tribe).[1] The order provides, in pertinent part:

Whereas, under an agreement of June 4, 1891, ratified by the Act of March 2, 1895 (2[8] Stat. 876, 894-898), the Wichita and affiliated Bands of Indians ceded certain lands to the United States, and in return received allotments and other considerations, and;

Whereas, certain of the lands have been reserved and set aside for use of the Bureau of Indian Affairs for school, agency, cemetery and other administrative purposes, and;

Whereas, the Indians, through their tribal council, and the Commissioner of Indian Affairs, have recommended that certain lands in such reserves be restored to tribal ownership, and;

Whereas, such lands, hereinafter described, are surplus to the needs of the Bureau of Indian Affairs for administrative purposes:

Now, therefore, by virtue of the authority contained in Section 3 of the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 463), I hereby find that restoration to tribal ownership of the following-described ceded lands is in the public interest, and the said lands are hereby restored to tribal ownership for the use and benefit of the Wichita and Affiliated Bands of Indians (Caddo Tribe and the Absentee Band of Delaware Indians of Caddo County, Oklahoma), and are added to and made a part of the existing reservation, subject to any valid existing rights: [real property description omitted.]

Prior to issuance of the restoration order, in correspondence dated May 31, 1963, the Assistant Secretary explained the meaning and intended effect of the order of Sept. 17, 1963:

In response to your teletype of April 3 the order which would restore 2,306.08 acres of land to the Wichita and Affiliated Bands of Indians (Caddo Tribe and the Absentee Band of Delaware Indians of Caddo County, Oklahoma,) is still in the process of preparation by the Bureau of Land Management.

The lands to be restored were conveyed to the United States by the Wichita and Affiliated Bands of Indians, acting as one entity, under the agreement of June 4, 1891, ratified by the Act of March 2, 1895, (28 Stat. 876, 894-898). Under Article II of that agreement the individual members of these Bands were recognized and allotted as if they belonged to one tribal group.

The authorization for restoration, dated January 25, 1963, contemplated that the lands would be restored to the Wichita Band and Affiliated Bands as one group so that each member of the Wichita Band, Caddo Tribe and Absentee Band of Delaware Indians will share equally in the benefits to be derived therefrom.

In order to effectively manage this property, it is expected that the three groups will jointly form an entity acceptable to the Secretary of the Interior, and legally capable under the state law of holding, managing and disposing of real property.

The Director, Bureau of Land Management is being instructed, by copy of this letter, to prepare the restoration order in such a manner as to clearly indicate that the land is being restored to the Wichita and Affiliated Bands as one group. [2]

[1] 28 FR 10157 (Sept. 17, 1963). A subsequent order, substantially identical in language, restored an additional 50.93 acres to the three tribes on June 13, 1973. 38 FR 16065 (June 13, 1973).

[2] Letter to Will J. Petner from John A. Carver, Jr., dated May 31, 1963.

On Sept. 10, 1970, the Department commented on the administration of the restored lands when the Anadarko Field Solicitor furnished an opinion concerning the effect of the 1963 order restoring the ceded lands to tribal ownership.

[A] controversy has developed between the Caddos, Wichitas and Absentee Band of Delaware Indians over the degree of participation of each of the three tribal groups in the management of the restored lands and the income which it produces, it being the position of the Caddo Tribe that both the management and shares in the income should be based upon an individual tribal membership basis rather than upon a tribal basis. Under the present arrangement each tribe provides equal representation to the intertribal land management committee which administers the restored lands, and each of the tribes share equally in the income derived therefrom, one-third thereof being credited to each tribe. It is the position of the Caddo Tribe, you state, that based upon the membership of each tribe the tribes should participate in the membership of and share in the income derived from the restored lands upon the basis of 63 percent Caddo, 22 percent Wichita, and 15 percent Delaware, such percentages reflecting the proportion of each tribe's membership to the total membership of the three tribes, such being the basis contemplated by the language of the paragraph in Secretary Carver's letter quoted above. [3]

The Field Solicitor offered the following opinion:

My interpretation of the language of Secretary Carver's letter is that it was the intention of the restoration action that the three tribes which comprise the Wichita and Affiliated Bands are to be considered as one group for purposes of administration of the land and the division of the proceeds derived therefrom rather than as three separate tribal groups. Under that interpretation, which appears to me to be the only one possible, it was contemplated that the responsibility of management and the sharing of benefits would be upon the basis of the individual members of the three tribal groups and not upon a basis of tribal equality, so that for such purposes the fact that there are three tribal groups involved would be disregarded and all tribal members considered as members of one group rather than of their particular tribes. [4]

The matter then came before the Commissioner of Indian Affairs [5] for review. In a memorandum decision dated Oct. 4, 1972, Commissioner Louis R. Bruce adopted the 1970 Field Solicitor's opinion for the Department, concluding:

To elaborate further, the management of the land can only be effected by a joint entity of the three groups. We do not believe there can be an equal division of the proceeds as three separate tribal groups unless this is mutually agreeable to the group. As the Field Solicitor has pointed out, for the purposes of administration and distribution of proceeds the fact that there are three tribal groups must be disregarded and all tribal members considered as members of one group.[6]

From 1970 until 1977 the three tribes affected by the land restoration agreed by joint resolutions, which were approved by the Department, to divide the income from the lands equally. Funds for the operating expenses of the management agency established to administer the funds were also derived from the income of the restored land.[7]

On Apr. 23, 1980, the Acting Deputy Commissioner notified the three tribes that the matter of apportionment of income from the

[3] Letter opinion to Andrew Dunlap from Lyle R. Griffis dated Sept. 10, 1970.

[4] *Id.* at 2.

[5] Appellee is the successor to the Commissioner.

[6] Memorandum decision dated Oct. 4, 1972, "Subject: Administration of Land Restored to the Wichita and Affiliated Bands of Indians (Caddo Tribe and the Absentee Band of Delaware Indians of Caddo County, Oklahoma)."

[7] Exhs. D-1 through D-11, Notice of Appeal. Appellant's Reply Brief at page 2 asserts that the entire period from 1963 to 1979 was administered in this fashion.

restored lands had again come under Departmental review. Because of dissatisfaction with the equal distribution system which had been adopted by the tribes, comments were solicited from them concerning a Solicitor's Opinion dated Sept. 7, 1979, which proposed to divide the income among the three tribes according to a formula derived from the estimated population of the tribes' predecessor organizations in 1891. On Aug. 5, 1981, appellee Acting Deputy Assistant Secretary—Indian Affairs (Operations), devised a new apportionment plan as follows:

Accordingly, I hereby determine that the income derived from the restored lands shall be apportioned among the three Tribes on the basis of their population stated on page 352 of the Report of the Commissioner of Indian Affairs dated October 1, 1891. The figures from such report show that the three Tribes had a population of 1,066 persons, broken down as follows:

		No.	Percent
Wichita and Affiliated Tribes			
Wichitas	175		
Towaconies	150		
Wacoes	35		
Keechies	66		
Total for Wichita	426	426	39.96
Caddo		545	51.13
Delaware		95	8.91
Total		1,066	100.00

The income derived from the restored lands is to be divided among the three successor Tribes according to the percentages shown in the above chart. Such division is to be retroactive to the date of restoration in 1963 and will include income from land restored to the three Tribes since that date. Separate accounts for each Tribe are to be created and all income from the jointly held land is to be deposited to such accounts as it is received.

In that funds from the joint account have been advanced to each of the three Tribes during the past several years, it will be necessary to make adjustments in order to conform to this memorandum. I am asking the Trust Fund Branch in the Central Office to establish the three accounts and make necessary adjustments to implement this decision. In computing the adjustments, the Trust Fund Branch will contact your office to assure there is agreement on what each Tribe is to receive.[8]

It is from this decision that relief is sought by appellant.

Oral Argument Denied

Each of the tribes affected by the decision of Aug. 5, 1981, has appeared through briefs filed by counsel, as has appellee. Intervenor Wichita Tribe requests oral argument. Appellant opposes this application on the grounds that oral argument would unnecessarily delay decision of a matter of law already adequately presented by the briefs filed on appeal. The Board finds the record, as constituted, adequate to permit decision without further argument by counsel. Accordingly, the application for oral argument is denied.

Expedited Consideration Allowed

The Wichita Tribe has also moved for expedited consideration of this appeal because distribution of income from the restored lands

[8] Memorandum decision of Acting Deputy Assistant Secretary—Indian Affairs (Operations) dated Aug. 5, 1981, Subject: Wichita, Caddo and Delaware—division of jointly held funds.

has been halted since 1979 pending a final Departmental decision. This appeal has been before the Board since Oct. 1981. The administrative record on appeal was not received until Dec. 10, 1981. The case has been ripe for decision since June 7, 1982. The tribe states that the restored lands provide its only source of income. Appellant also represents the lands to be a primary source of operating revenue which is now withheld pending decision on this appeal. Based upon these unchallenged representations, the Board grants expedited consideration.

Issues on Appeal

Although the parties all characterize it differently, the issue on appeal is clearly whether the Aug. 5, 1981, decision to apportion income from restored lands on the basis of the 1891 population of the three tribes was correct. Ancillary to this main issue is the question whether it is proper to compel repayment by two of the tribes of payments earlier obtained.

Parties' Contentions

Appellant Delaware Tribe contends that income on hand and to accrue in the future from the restored lands should be apportioned among the three tribes on the basis of their respective current memberships. Appellee's position is that 1891 populations should be used as the basis for apportionment of the fund. Citing a 1979 Associate Solicitor, Indian Affairs, opinion appellee concludes: "The lands in question were restored rather than conveyed to the tribes in 1963. Therefore, the present interest the tribes have can only be the *same as they had in the lands prior to cession.*"[9] (Italics in original.) Intervenors generally support appellee's position.[10]

As to past payments to the tribes which were made in equal shares without regard to tribal numbers, appellant argues equal division was proper and any overpayment which would be due if a division based upon populations were ordered should not require reimbursement of excess payments. Appellant reasons that since equal division of funds was mutually agreed upon by the tribes and approved by the Department without limitation, a decision to proceed based upon tribal populations should be made to apply only prospectively. Appellee argues by analogy to principles of trust law that the trust responsibility requires retroactive application of the apportionment formula. Intervenor Caddo Tribe supports this position.

Discussion and Decision

[1] The restoration order of Sept. 17, 1963, is expressly made under the authority of sec. 3 of the Indian Reorganization Act of June 18, 1934 (Act or IRA), 48 Stat. 984, *as amended*, 25 U.S.C.

[9] Appellee's Brief at 6. The Associate Solicitor's opinion relied upon is dated Sept. 7, 1979. It appears the author of that opinion may not have seen either the 1963 Carver letter or the 1972 Bruce decision before rendering advice, since neither document is discussed.

[10] Caddo Brief at 8, 13; Wichita Brief at 2, 16; *but see* Wichita Brief at 22 where the tribe offers in the alternative to agree to an equal division of moneys on a tribal basis as being "more workable and supportable in IRA language and precedent" than the current populations basis sought for by appellant. The Wichita Tribe also argues that Court of Claims and Indian Claims Commission cases should be relied upon as precedent to justify an historical approach to apportionment using 1891 populations as a base.

§ 463 (1976), which provides, in pertinent part:

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

The legislative history of the IRA makes it clear that the statute was intended to address current problems of existing tribes. The committee report accompanying the Act when it came before Congress, explained that the IRA sought:

(1) [t]o stop the alienation, through action by the Government or the Indian, of such lands, belonging to ward Indians, as are needed for the present and future support to these Indians.

* * * * *

(3) To stablize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations.

(4) To permit Indian tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations.[11]

Commenting upon sec. 3 of the Act, the report states:

When allotment was carried out on various reservations, tracts of surplus or ceded land remained unallotted and were placed with the Land Office of the Department of the Interior for sale, the proceeds to be paid to the Indians. Some of these tracts remain unsold and by section 3 of the bill they are restored to tribal use.[12]

The administration's support for this purpose is evidenced in a letter from President Roosevelt to Senator Wheeler, the sponsor of the bill: "The continued application of the allotment laws, under which Indian wards have lost more than two thirds of their reservation lands, while the costs of Federal administration of these lands have steadily mounted, must be terminated." [13]

The legislative history reveals that the purpose of the IRA was not to return tribes of Indians to the position in which they found themselves at the end of the 19th century while the allotment Acts were being actively implemented by the Department. To the contrary, the declared purpose of the IRA was to end the individual allotment of tribal lands and to invigorate existing tribal governments. Sec. 3 of the Act does not, therefore, require restoration to an historical status existing at or prior to the time of the creation of the reservation of the three tribes involved in the dispute.[14]

[11] S. Rep. No. 1080, 73d Cong., 2d Sess. 1 (1934).
[12] *ID.* at 2.
[13] *Id.* at 4.
[14] Appellant urges this construction as follows:
"It was not the intent or purpose of the IRA to look to the last century and dwell upon technical aspects of real property law which might have applied to events of that bygone era. Instead, it was prospective legislation aimed at improving the lives and destinies of Indian people.
"The intent of the IRA was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.' *Mescalero Apache Tribe vs. Jones,* 411 U.S. 145, 152 (1973), quoting H.R. Rep. No. 1804, 73rd Cong. 2d Sess. 6 (1934). And in *Morton vs. Mancari,* 417 U.S. 535, 542 (1974), the Supreme Court said:
" 'The overriding purpose of that particular Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.'
"In attempting to address the existing needs of Indian people, several provisions of the IRA were expressly designed to develop Indian lands and resources and to augument Tribal land bases. Section 3 of that Act is one of the provisions enacted in the furtherance of such purposes. There is nothing in the IRA or its legislative history, and particularly in the language 'to restore to tribal ownership' appearing in Section 3 of the Act, which even remotely suggests that the Secretary was limited to restoring lands in the narrow and literalistic fashion sug-

Continued

As does the IRA, the order of Sept. 17, 1963, also seeks to address the current problems of three existing tribes. The Assistant Secretary's 1963 letter of explanation speaks of the tribes as constituted in 1963, the date of the writing, when it describes a plan to "form an entity" to manage the land and to distribute income from the property "so that each member [of the three present-day tribes] will share equally in the benefits." Clearly, the Assistant Secretary neither contemplated a division of funds to the original allottees of the reservation nor proposed to exclude tribal organizations from participation in the plan. He intended rather that a tribal management scheme be designed, to be managed by the tribes, which would equalize individual benefits of living tribal members.[15]

The obvious meaning of the Sept. 17, 1963, order was recognized again in the Anadarko Field Solicitor's opinion which was adopted by Commissioner Bruce as the Departmental position in 1972. Commissioner Bruce's decision reiterated the 1963 explanation made by Assistant Secretary Carver in holding that the three existing tribes were to share in income from restored lands in proportion to tribal enrollments of members and for the benefit of living tribal members.[16]

The 1963 and 1972 interpretations of the 1963 order restoring the surplus lands to the three tribes are consistent with one another and with the language of the order. They are also consistent with the declared intent and the apparent effect of sec. 3 of the IRA, because the decision to restore these former school lands to the tribes to share proportionately according to population is consistent with the Act's purpose to foster tribal organizations surviving in 1934 and to encourage

gested in the Solicitor's Memorandum. To the contrary, when other pertinent sections of the IRA are read in conjunction with the language of Section 3, it becoms obvious that the Secretary, or his designate, was vested with broad discretion in determining the manner and for whose benefit the subject lands were to be held.

"Thus, Section 5 of the IRA (25 U.S.C. § 465) authorizes the Secretary, in his discretion, to *acquire* any interest in lands, within or without existing reservations, for the purpose of providing land for Indians. Section 5 then continues that:

" 'Title to any lands or rights acquired pursuant to sections 1, 2, *3*, 4, 5, 6–10, * * * of this title shall be taken in the name of the United States in trust for the Indian tribe * * * *for which the land is acquired* * * * (Italics supplied)'

"And Section 7 of the IRA (25 U.S. § 467 provides the following:

" 'The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands *acquired* pursuant to any authority conferred by sections 1, 2, *3*, 4, 5, 6–10, * * * of this title, or to add such lands to existing reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations. (Italics supplied)'

"Because of the references in Sections 5 and 7 to Section 3 of that Act, these three sections of the IRA are *pari materia* and must be construed together. When this is done, it is very clear that Section 3 is but one of several means by which the Secretary may 'acquire' lands for the use and benefit of present-day Indian tribes; and, regardless of the manner of acquisition of such lands, that the Secretary is vested with broad discretion in declaring for whose benefit and in what manner the lands are held. Indeed, if such facts should be present in a given matter, it appears that the language of the above cited sections of the IRA are sufficiently broad whereby the remaining surplus lands of a reservation previously occupied by a tribe which was later terminated or is otherwise extinct could be 'restored to tribal ownership' by the Secretary proclaiming such surplus lands to be held in trust for a modern-day tribe having *no* historical relationship or connection with the aboriginal group which previously occupied the reservation." (Appellant's Opening Brief at 9–11). *See also* Appellant's Reply Brief at 13–18.

[15] As appellant points out at pages 12 and 18 of its reply brief, it is by no means clear from the record on appeal that the 1891 or 1895 tribal populations were allotted on the reservation created for the three tribes, nor is it certain that the three present day tribes are the hereditary successors to all the bands of Indians who were present in 1891 on what later became the reservation. This common error is shared both by appellee's arguments seeking to find an historical basis for concluding that apportionment of current incomes may rationally be based upon 1891 population estimates, and Intervenor Wichita Tribe's references to Court of Claims and Indian Claims Commission decisions for the same conclusion.

[16] *See* note 6.

tribal independence and continued tribal existence. Therefore, the Aug. 5, 1981, decision to apportion income upon historical instead of current tribal memberships erroneously reversed the prior consistent position of the Department. Division of current and future funds should be based upon the current relative populations of each tribe at the time the funds accrue.[17]

The second issue is whether the tribes may be required to redistribute funds that have already been disbursed. The Aug. 5, 1981, decision ordered that the new division based upon 1891 populations be given effect from 1963. The decision also ordered appropriate "adjustments" to be made to the accounts of the three tribes.

From 1970 through 1977, the three tribes enacted joint resolutions governing the division of income from the restored lands.[18] Under the terms of these resolutions, the tribes shared equally in the income to be divided among them. Thus, the 1981 order apparently requires reimbursement to the Caddo Tribe of those amounts "overpaid" to the other two tribes by use of an equal one-third distribution.

During the period from 1971 to 1979, during which the tribes received equal distributions, all three tribes were, of course, aware of the terms of the 1963 order and of the Departmental position that the order required distribution of funds according to relative populations of the three tribes "as one group." [19] Each tribe was aware of the relative position of its membership to the memberships of the other two tribes. Despite unequal tribal populations, each tribe agreed to an equal division of funds.

The Department also knew the population status of the three tribes. The Departmental position concerning division of the income fund during this period directed that division of the fund should be made on the basis of population, and that "management of the land can only be effected by a joint entity of the three groups." [20] Despite this policy statement, the Department permitted an equal division of the fund because it was "mutually agreeable to the group." [21]

The record on appeal establishes that equal payments to the three tribes were made from 1971 to 1979 with the written consent of the tribes affected and approval of the Department. There was no mistake in fact or law, for all parties knew that the Department had ordered division of the funds based upon relative populations of

[17] Since the populations and the determination of tribal membership have not been constant, a number of variants are suggested by the record: (1) The population in 1891 as determined by Departmental estimate; (2) the population in 1901 when allotments of the reservation were made; (3) the population in 1963, the date of restoration or; (4) the current population of the three tribes. The parties have presented material concerning constitutional membership provisions and enrollment practices peculiar to each tribe. While 43 CFR 4.1(b)(2) (the delegation of Secretarial authority to this Board) places resolution of disputes concerning tribal enrollment beyond the competence of the Board, disposition of this appeal is not dependent upon analysis of tribal enrollment matters. It is assumed the three tribes have authority to determine their own memberships. *See Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978); 25 CFR 41.2.

[18] Exhs. D-1 through D-9, Notice of Appeal.

[19] *See* note 6.

[20] *Id.*

[21] *Id.*

each tribe. The Department's position concerning this basic premise has been consistent with only the manner of applying the principle subject to variation. The Board holds that the 1963 order requires division of the fund based upon current populations, without exception, to funds on hand and accruing. Funds previously obtained by the tribes under joint agreements must go undisturbed.[22]

Appellant has asked the Board to fashion a plan for ascertaining the exact populations of each tribe, and to schedule periodic reviews of the plan for division of funds. It is not a proper function of this Board to devise and direct a detailed plan for administration of the income fund. The jurisdiction of this Board is limited to decision of legal disputes within the Board's competence as defined by Departmental regulation. Matters of policy and administration are, for practical as well as legal reasons, outside the area in which the Board is designed to function.[23]

Accordingly, the record is remanded to appellee for appropriate action consistent with this opinion. Appellee is instructed to apportion income from restored lands between the three tribes on the basis of current populations of the three tribes, as ascertained by the Bureau of Indian Affairs.[24]

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[22] Appellant's reply brief at pages 37–39 refutes the legal arguments advanced in support of the decission to compel repayment:

"A mutual mistake is deemed to be one which is common to all parties to a contract, that is, that each party was laboring under the same misconception. *Anderson Brothers Corporation v. O'Meara,* 306 F. 2d 672 (5 Cir. 1962). The Delaware Tribe was not laboring under any misconception as to the position of the Government that the division was to be on the basis of population absent an agreement otherwise among the Tribes. Likewise, the Delaware were not mistaken as to its ability to mutually agree with the others to a 1/3 apportionment of the income from the land. Indeed, the memorandum of Louis R. Bruce dated October 4, 1972, to the Area Director, Anadarko Area, specifically sets forth the ability of the parties to mutually agree to a 1/3 distribution of the income.

"The party attempting to reform or rescind a written contract by oral evidence of mutual mistake bears the burden of establishing by the clearest and strongest possible proof the true terms of the agreement. [*Otto*] *v. Cities Service Co.,* 415 F. Supp. 837 (W. D. La. 1976).

* * * * *

"The court in *Hoffa v. Fitzsimmons,* 499 F. Supp. 357 (D.C. 1980), addressed the question of mistakes of fact or law in situations where one party controls access to or knowledge of the facts with respect to the second party. Acknowledging that a contract can be cancelled or modified only if the mistake was mutual or attributable to both parties, the court held that where one party is the source of the other's knowledge of the relevant facts, there cannot be a mutual mistake. Here, according to the brief of the Wichita, the Department was the underlying source of any mistake that occurred. The Department being the sole source of the mistake, a mutual mistake cannot occur. Likewise, it is horn book law that a unilateral mistake of law or fact does not entitle the person in error to the relief requested. *Eastman v. United States,* 257 F. Supp. 315 (S.D. Ind. 1966); *E. F. Hutton and Company, Inc. V Schank,* 456 F. Supp. 507 (D. Utah 1976). Thus, even if the Wichitas were laboring under some misapprehension, there is no allegation that the Delaware Tribe was in any way responsible for any mistake, either unilateral or mutual or of law or of fact, that may have arisen. Cancellation or reformation of a contract may not be decreed against parties whose conduct did not contribute to or induce the mistake and who will obtain no unconscionable advantage from any mistake. [*Centex*] *Construction Co. v. James,* 374 F. 2d 921 (8 Cir. 1967).

* * * * *

"The Wichita also argue that the apportionment agreements are invalid because they were not a voluntary and knowing relinquishment of rights, citing *Shoshone Tribe v. United States,* 299 U.S. 476 (1937). The factual background in the *Shoshone Tribe* case is clearly distinguishable. That case dealt with the rights of the Northern Arapaho Tribe to an interest in the Wind River Reservation previously granted to the Shoshone Tribe. It was particularly pertinent to the decision of that court that the Shoshone Tribe had always vigorously protested the presence of the Northern Arapaho on the reservation and that the government had acted unilaterally in placing the Northern Arapahoes on the reservation without the consent of the Shoshone and in direct violation of the language of the treaties. That case is wholly distinguishable from the instant facts where the Wichita voluntarily entered into the apportionment agreements while possessing all of the same knowledge and facts as were possessed by the other two Tribes. The Wichita Tribe was free to enter into such arrangements and now cannot be heard to contend that its acts were not 'voluntary.' "

[23] 43 CFR 4.1; 25 CFR 2.19; and *see St. Pierre* v. *Commissioner,* 9 IBIA 203, 89 I.D. 132 (1982); and *Aleutian/Pribilof Islands Association, Inc.* v. *Acting Deputy Assistant Secretary,* 9 IBIA 254, 89 I.D. 196 (1982).

[24] Appellant advances an alternative argument to the effect that, absent tribal agreement concerning division of the fund, the Department lacks authority to disburse moneys to the tribes owing to the limitation imposed by the Act of Mar. 3, 1883, 22 Stat. 590, *as amended,* 25 U.S.C. § 155 (1976). The annual Departmental appropriations act (as appellee points out) customarily empowers the Department to authorize the advance of tribal funds for approved uses.

The Order of Aug. 5, 1981, is reversed.

This decision is final for the Department.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

JERRY MUSKRAT
Administrative Judge

415-259 O - 83 - 26

May 7, 1982

PROPOSED PAIUTE RESTORATION PLAN*

M—36944

May 7, 1982

Act of April 3, 1980—Indian Tribes: Reservation Boundary—Public Lands: Generally—Public Lands: Disposals of: Generally

Sec. 7(c) of the Paiute Indian Tribe of Utah Restoration Act of 1980, 25 U.S.C. § 761 *et seq.* (Supp. IV 1980), contains the phrase "available public . . . lands" which much be construed as those lands administered by the BLM which are available for disposal; that is, lands which are not withdrawn, appropriated or reserved.

Act of April 3, 1980—Public Lands: Generally

National Forest lands are not "available public . . . lands." As such, they are not intended by Congress to be included within the Paiute's proposed reservation enlargement plan under the Paiute Restoration Act.

OPINION BY OFFICE OF THE SOLICITOR

To: SECRETARY
From: SOLICITOR
Subject: PROPOSED PAIUTE RESTORATION PLAN

This opinion addressed whether, under the Paiute Indian Tribe of Utah Restoration Act of 1980 (P.L. 96-227; 94 Stat. 317, 25 U.S.C. 761 *et seq.*), National Forest Service lands may be included in the proposed reservation enlargement plan. After extensive analysis of the issue, I must conclude that the statutory language indicates that National Forest lands were not intended by Congress to be included within the proposed plan. This Opinion is consistent with the legal interpretation of the Act by the Office of the General Counsel, Department of Agriculture.

I. Background

The Paiute Indian Tribe of Utah Restoration Act ("Act") was enacted to restore a group of some 500 Paiute Indians to tribal status. Pursuant to the Act, the Paiutes have been reinstated to trustee status and have become eligible for certain federal services and benefits to tribes. In addition to reinstatement, the Act calls for the Secretary to submit a proposed plan for enlargement of the Paiute reservation. Specifically, Section 7(c) requires that the Secretary recommend a plan in the form of proposed legislation for the enlargement of the reservation. That Section also directs the Secretary as to the size and approximate geographic location of the proposed reservation:

> The plan shall include acquisition of not to exceed a total of 15,000 acres of land to be selected from *available public, state, or private lands* within the Beaver, Iron, Millard, Sevier, or Washington counties, Utah. (Italics added)

The Bureau of Indian Affairs, together with tribal representatives, has developed a proposed plan which includes some 9,500 acres of Forest Service lands, the remainder being lands administered by the BLM. ("Proposed Paiute Indian Tribe of Utah Restoration Reservation Plan," dated January 24, 1982.)

* Not in chronological order.

II. Construction of the Phrase "Available Public . . . Lands"

The primary legal issue is whether the phrase in Section 7(c) "available public . . . lands" should be construed to mean any lands within federal ownership or whether it should be read more restrictively. Initially, it should be noted that the Act does not define the phrase "available public . . . lands" nor is that phrase found in other public land or Indian statutes.

Nonetheless, "public lands" has a long history of usage. Indeed, the term "public lands," often used synonymously with "public domain," generally refers to lands which are open and available for various forms of disposition or disposal to the general public and state or local governments. Such lands are administered by the Bureau of Land Management. This use of "public lands" has been embraced by many courts including the United States Supreme Court:

> 'Public domain' is equivalent to 'public lands,' and these words have acquired a settled meaning in the legislation of this country. 'The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.' *Newhall v. Sanger,* 92 U.S. 761, 763, 23 L. ed. 769. 'The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws.' (cited cases omitted)
>
> So long and firmly has this been settled and so generally is it recognized throughout the public land states and territories, that when mention is there made of entries in the land offices it is immediately understood, if nothing be said to the contrary, that they relate to lands which are subject to disposition in some form under the public land laws, and not to those which are set apart and used for some special purpose. *Sterns v. United States,* 152 F. 900, 903 (1907).
>
> The true rule respecting the term 'public lands' was stated by Judge Van Devanter, sitting in the Court of Appeals, in *Northern Lumber Co. v. O'Brien,* 139 F. 614–616, 71 C.C.A. 598, 600, in the following language: 'The words "public lands" have long had a settled meaning in the legislation of Congress and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made.' (cited cases omitted) These decisions do not conflict with the settled doctrine that, where it clearly appears from the statute that the term 'public lands' is intended to include lands which have theretofore been reserved by Congress for a specific purpose, such intention will prevail, as it is a fundamental rule of construction that a legislative act is to be interpreted according to the plain intention of the legislative body. *Union Pac. Ry. Co. v. Karges, et al.,* 169 F. 459, 462 (1909).
>
> In the instant case the project is to occupy lands which come within the term 'reservations,' as distinguished from 'public lands.' In the Federal Power Act, each has its established meaning. 'Public lands' are lands subject to private appropriation and disposal under public land laws. 'Reservations' are not so subject. *Federal Power Commission v. State of Oregon,* 349 U.S. 435, 443 (1955).

This passage is representative of courts' understanding and application of the "public lands" terminology. This usage is also consistent with the definition of "public lands" in recent legislation, most notably the Federal Land Management Policy Act of 1976, Section 103(e) ("FLPMA") (Pub. L. 94-579, 90 Stat. 49). See also, National Forest Lands Management Act of 1976 (Pub. L. 94-588, 90 Stat. 2949).

Notwithstanding this, there has been some inexact usage of "public lands" over the years which has lead to confusion. On occasion, some have used the term

to specify the totality of federal holdings. *E.g.,* 28 OAG 587, 592. Most of this expansive usage occurred soon after the turn of the century. Since that period, however, usage of "public lands" has been, with some limited exceptions, more restrictive. As a result, much of the ambiguity over the terms which may have existed in the first half of this century has been clarified by recent statutory pronouncements. The Paiute Restoration Act, enacted in 1980, was passed well after Congress had demonstrated that it was using "public lands" to mean something very different, and much more restrictive, than federal lands. Moreover, the courts have uniformly construed "public lands" narrowly when the statute involved the disposition of the public domain. *Basher v. Harney,* 181 U.S. 481 (1901); *Newhall v. Sanger,* 92 U.S. 761 (1875). The Act is such legislation and I have found nothing in the legislative history which suggests that Congress intended anything other than this narrow interpretation of "public lands."

In contrast to the restrictive interpretation of "public lands," "federal lands" is often used so as to include all lands within federal ownership, whether they are administered by the Department of Defense as military installations, the General Services Administration as government office buildings, or otherwise withdrawn from appropriation under the public land laws. For example, Section 701(4) of the Surface Mining Control and Reclamation Act (Pub. L. 95-87, 91 Stat. 445) provides:

> Federal lands means any land including mineral interest, owned by the United States without regard to how the United States acquired ownership of the land and without regard to the agency having responsibility for management thereof, except Indian lands; . . .

Federal lands, which may have been dedicated to a particular use deemed the most important use, are excluded from "public lands" or "public domain." Some obvious examples are National Parks and Monuments, military reservations, Wildlife Refuges, Wilderness Areas, Wild and Scenic Rivers and National Forest System lands. These reserved and withdrawn federal lands are not subject to sale, exchange, appropriation under the mining laws, or other disposition.

There is little question that both Congress and the courts have distinguished between "public lands" and "federal lands" and that distinction must not be ignored.

In addition to the distinction between "public lands" and "federal lands," there are other compelling reasons to restrict the lands which may be proposed under Section 7(c). Any construction which would permit the proposed selection of Forest Service lands would effectively read out of the statute the word "available." That is, if Forest Sevice lands may be included in the proposed plan, all other federal lands, regardless of their present status, use or classification, would also be includable. Since that would be all lands in federal ownership, the word

"available" would have absolutely no effect. It is a cardinal rule of statutory construction that the statute is to be read so that all words are given meaning. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1978); *Sutherland Statutory Construction*, § 46.04 (4th ed. 1975). The word "available" must be read as restricting the lands which may be included within a proposed plan. The use of the qualifier "available" confirms the intent of Congress to limit the lands which could be proposed for selection. Even if "public lands" could be read as meaning all lands in federal ownership, "available" modifies that phrase to restrict the lands which may be proposed. In short, "available public . . . lands" must be construed as those lands administered by the BLM which are available for disposal; that is, lands which are not withdrawn, appropriated or reserved.

In reaching the above conclusion, I am also aware of the general rule of statutory construction that if an ambiguity exists in the public land law, it is to be resolved in favor of the Government. *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604 (1978). However, since I must conclude this statute is not susceptible to two reasonable interpretations, I find it unnecessary to rely upon the rules of statutory construction to infer Congressional intent.

I have also reviewed the possibility that the statutory purpose of the Paiute Restoration Act might be furthered by a construction which allowed the selection of Forest Service lands. After a detailed examination of the legislative history of the Act, I can find neither an express nor implied intention to include Forest Service lands in the proposed plan. Nor have I found any other compelling evidence to suggest that Forest Service lands must be included to fulfill the Congressional purposes and directives. Moreover, administrative officials should not second guess the wisdom of the Congressional action since Congress has chosen to use language which limits the lands which may be incorporated into a proposed plan.

Finally, I have considered that the proposed plan must be acted upon by Congress. Since Congress must pass legislation, it will then have the opportunity to reject any proposed plan which contains unacceptable lands. While I do not dispute that Congress ultimately may dispose of any federal lands to the Paiutes, this argument ignores the specific statutory directives in Section 7(c). On the occasions that Congress directs a governmental official to make a report or recommendation (*See e.g.*, Federal Land Policy and Management Act of 1976, 43 U.S.C. § 603) that governmental official cannot simply disregard the Congressional directions. The Act simply does not sanction the Secretary's submission of a plan based upon *any* federal lands. Rather Congress chose to restrict those lands which would be acceptable. Therefore, the Secretary has a duty to propose a plan which is in conformity with the provisions of the Act.

III. Conclusion

For the foregoing reasons, I must conclude that the proposed plan is fatally deficient and should not be sent to Congress. It is my further opinion that any new proposed plan should only contain lands administered by the BLM which are available for disposal.

WILLIAM H. COLDIRON
Solicitor

MARY I. ARATA

66 IBLA 160

Decided *August 11, 1982*

Appeal from decision of the Montana State Office, Bureau of Land Management, rejecting oil and gas lease application M 52741(SD).

Affirmed.

1. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Filing—Oil and Gas Leases: Noncompetitive Leases

Under 43 CFR 3112.4-1(a), a prospective lessee (*i.e.*, one whose simultaneous noncompetitive application has been selected and approved by BLM) must either affix a "personal handwritten signature" on the offer to lease form and stipulations, or the prospective lessee's agent must do so. A rubber-stamped facsimile signature is not a "personal handwritten signature," and, where the prospective lessee affixes such a facsimile signature, the application is properly rejected under 43 CFR 3112.6-1(d).

APPEARANCES: John H. Heiney, Esq., Ft. Wayne, Indiana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

INTERIOR BOARD OF LAND APPEALS

Mary I. Arata has appealed the decision of the Montana State Office, Bureau of Land Management (BLM), dated May 17, 1982, and corrected by notice dated June 16, 1982, rejecting her simultaneous noncompetitive oil and gas lease application (M 52741(SD)).

Arata's application for parcel MT 164 was drawn with first priority in BLM's July 1981 drawing. The application card bore her holographic signature in ink and met all other pertinent requirements. Accordingly, on Mar. 24, 1982, BLM sent her the material necessary to perfect her lease, including an "offer to lease and lease for oil and gas" form (Form 3110-2) and a stipulation form (Form MT-3109-1).[1] BLM notified Arata that these forms must be signed and dated in ink by her or her attorney-in-fact and returned to BLM along with advance first-year rental within 30 days of her receipt of the notice.

On Apr. 5, 1982, Arata filed the forms, neither of which bore her or her attorney-in-fact's handwritten signatures. Instead, they each had been "signed" by affixing a rubber-stamped facsimile of Arata's signature on the signature line.

[1] BLM also enclosed other forms, but Forms 3110-2 and MT-3109-1 were the only two requiring signatures.

On May 17, 1982, BLM rejected Arata's application because she had failed to personally sign the lease as required by 43 CFR 3112.4-1(a). BLM concluded that rejection was mandated in these circumstances, incorrectly citing 43 CFR 3112.6-1(b). On June 16, 1982, BLM corrected this error noting that rejection is mandated by 43 CFR 3112.6-1(d). Arata appealed.

[1] The pertinent regulation, 43 CFR 3112.4-1(a), leaves no doubt that offer to lease and stipulation forms must be personally signed with the *handwritten* signature of either the applicant or his or her attorney-in-fact:

> (a) The lease agreement, consisting of a *lease form* approved by the Director, Bureau of Land Management, and *stipulations* included on the posted list or later determined to be necessary, shall be forward to the first qualified applicant for signing, together with a request for payment of the first year's rental. *Only the personal handwritten signature of the prospective lessee, of his/her attorney-in-fact as described in paragraph (b) of this section, in ink shall be accepted.* [Italics supplied.]

It is equally clear under 43 CFR 3112.6-1(d) that BLM must reject the application where the applicant fails to comply with this requirement. Accordingly, BLM properly rejected appellant's application.

Appellant cites our previous decision in *Mary I. Arata,* 4 IBLA 201, 78 I.D. 397 (1971), for the proposition that a rubber-stamped facsimile signature has the same effect as though the person's name was written in the person's own handwriting. *Mary I. Arata, supra,* concerned a previous regulation, not in effect at the time she filed the forms in the present case. This previous regulation, 43 CFR 3112.2-1(a) (1971), required only that the offer be "signed and fully executed" by the applicant or his agent. We held in *Arata* that this language was broad enough to encompass facsimile signatures.

The present regulation, quoted above, was adopted effective June 16, 1980, expressly to supercede the rule in *Arata.* Its language is abundantly clear that *only* the personal *handwritten* signature of the applicant, or his or her attorney-in-fact, will suffice. The comments published along with the final rulemaking, 45 FR 35156 (May 23, 1980), left no shred of doubt that facsimile signatures were not sufficient, either for simultaneous applications or lease offers:

> *Statements of Qualifications—General Requirements*—Some comments suggested that the requirement in the proposed rulemaking [44 FR 56176 (Sept. 28, 1979)], that qualification statements, applications *and offers* be "manually signed" did not exclude the use of rubber stamped signatures. *In order to make it clear that only personal, handwritten signatures, will be permissible,* language has been added to the final rulemaking requiring "holographically (manually) signed" statements, applications *and offers.*
>
> As one comment pointed out, *this change will overturn the rule established by the Interior Board of Land Appeals (IBLA) in Mary I. Arata, 4 IBLA 201 (1971).* [Italics supplied.]

45 FR 35157 (May 23, 1980).

Appellant alleges that she was physically unable to sign her name when she affixed the facsimiles of her signature on the offer to lease and stipulation forms. We note, however, that appellant was able to holographically sign her application card, and that the dates on the lease forms in ques-

tion appear to have been entered holographically. In any event, the regulation makes ample allowance for the handicapped by allowing agents to holographically sign qualification statements, applications, and offers, on behalf of any person unable to sign holographically. The comments to the final rulemaking explained this as well:

> A few comments recommended that provisions be made in the final rulemaking for those applicants who are physically unable to write their own name so that they can participate in the leasing system. No change has been made in this section because persons who are physically incapacitated may use an agent.
>
> 45 FR 35159 (May 23, 1980).

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

DOUGLAS E. HENRIQUES
Administration Judge

WE CONCUR:

EDWARD W. STUEBING
Administrative Judge

WILL A. IRWIN
Administrative Judge

D AND D MINING CO.

4 IBSMA 113

Decided *August 24, 1982*

Petition by the D and D Mining Co. for review of the Apr. 23, 1981, decision of Administrative Law Judge Sheldon L. Shepherd (Docket No. IN 0-5-P) upholding a violation of an effluent limitation, in 30 CFR 715.17(a), charged by the Office of Surface Mining Reclamation and Enforcement in Notice of Violation No. 79-III-19-15.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Generally

An alleged violation of the effluent limitation for iron set forth in 30 CFR 715.17(a) is properly upheld on the basis of a Hach test showing total iron in discharges from a sedimentation pond to be in excess of 10 milligrams per liter, in the absence of evidence that the Hach test was not properly administered.

APPEARANCES: Lawrence W. Stacey, Esq., Columbiana, Ohio, for D and D Mining Co.; Glenda R. Hudson, Attorney, and Marcus P. McGraw, Assistant Solicitor, Branch of Litigation and Enforcement, Division of Surface Mining, Office of the Solicitor, U.S. Department of the Interior, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MIRKIN

INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

D and D Mining Co. (D and D) has appealed the decision of the Hearings Division upholding the violation of the effluent limitation

for iron in 30 CFR 715.17(a) charged by the Office of Surface Mining Reclamation and Enforcement (OSM) in Notice of Violation (NOV) No. 79-III-19-15.[1] D and D contends that the evidence introduced by OSM in support of the alleged violation did not satisfy OSM's burden of proof in the proceeding below.

Factual and Procedural Background

On July 11, 1979, an authorized representative of OSM conducted a routine inspection of a surface coal mining operation permitted to D and D in Mahoning County, Ohio (Tr. 10; Respondent's Exh. 7). The inspector took samples of water discharged from a sedimentation pond (Tr. 10-12). While at the minesite the inspector tested a water sample for total iron content, using a device known as a Hach Kit (Tr. 34-35). This test indicated a total iron content in the sample of greater than 10 milligrams per liter (Tr. 46-47). On the basis of this test result, the inspector charged D and D with a violation of 30 CFR 715.17(a), which prohibits discharges of drainage from areas disturbed by mining operations containing total iron in excess of 7 milligrams per liter (Respondent's Exh. 7). The inspector specified in the NOV that D and D treat discharges from its sedimentation pond to meet the effluent limitation for iron, and set the time limit for abatement as July 13, 1979 (*id.*).

On July 18, 1979, a second OSM inspector visited D and D's mining operation to check for compliance with the NOV (Tr. 89). This inspector tested discharges from the sedimentation pond for total iron, using a Hach kit, and found that the iron content was in excess of 10 milligrams per liter (Tr. 90). As a result of this finding the inspector issued a cessation order for D and D's failure to abate the violation of the iron effluent limitation, as alleged in the NOV, and required D and D to cease pumping drainage into the sedimentation pond until discharges from the pond met the effluent limitation for iron (Tr. 91). On the following day the inspector again tested the iron effluent in discharges from D and D's sedimentation pond with a Hach kit and found that the total iron content remained in excess of 10 milligrams per liter (Tr. 91-92). The first OSM inspector returned to the minesite on Aug. 7 and Sept. 6, 1979, and on both occasions found that discharges from the sedimentation pond contained 10 milligrams per liter or more of iron on the basis of Hach tests (Tr. 51, 53-54). On Oct. 31 the inspector again tested discharges from the sedimentation pond at D and D's minesite and found compliance with the effluent limitation for iron (Tr. 56-57). OSM then terminated the NOV and cessation order.

A hearing to review the NOV and associated civil penalty assessment was conducted on Jan. 15, 1981. During the hearing D

[1] OSM's enforcement action was taken pursuant to sec. 521 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271 (Supp. II 1978). The regulation allegedly violated by D and D, 30 CFR 715.17(a), provides in pertinent part that "[d]ischarges from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and State laws and regulations and, at a minimum, the following numerical effluent limitations: [including a limitation on total iron of 7 milligrams per liter based on representative sampling]."

and D objected to the admission of testimony by OSM concerning its use of the Hach kit to test discharges from the sedimentation pond, but the Administrative Law Judge allowed such testimony (Tr. 44–46).[2] D and D's testimony indicated that the company had monitored discharges from its sedimentation pond during the period between the issuance and termination of the NOV and the laboratory analysis of at least one sample taken showed total iron content in excess of 10 milligrams per liter (Tr. 146–47).

The Administrative Law Judge determined that the results of OSM's test with a Hach kit were sufficiently reliable to establish a prima facie case in support of the violation charged, and that D and D failed to controvert this evidence (Decision of Apr. 23, 1981, at 2–3). Accordingly, the Administrative Law Judge concluded that OSM had met its burden of proof and upheld the contested violation.[3] D and D petitioned the Board to review the decision, and both parties filed briefs in the matter.

Discussion and Conclusions

The issue before us is whether OSM's use of a Hach kit to determine the iron content in discharges from D and D's sedimentation pond was an adequate basis for the notice of violation of the effluent limitation for iron.

[1] In support of its appeal, D and D relies on testimony of the OSM inspector who issued the notice to the effect that an inspector's color perception, the sampling location and sampling method may each influence the Hach test result, and that "variations of more than two or three milligrams per liter" in the results of field and laboratory testing of a sample have been observed.[4] In the proceeding below, however, D and D offered no evidence that the Hach test results obtained by OSM's inspector were improperly affected by any of

[2] During the hearing OSM Inspector Luehrs explained that, in the Hach test procedure to determine total iron content, certain chemicals provided as part of the Hach kit are added to a test tube filled with a water sample and the resulting water color is compared with a color chart which indicates the level of total iron in the sample, as measured in milligrams per liter on a scale of 0 to 10 (Tr. 35, 37–41).

[3] 43 CFR 4.1155 provides: "In civil penalty proceedings OSM shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the fact of violation and as to the amount of the penalty."

[4] In its brief D and D characterizes this evidence in the following manner:

"The only evidence introduced by the Respondent regarding iron on July 11, 1979, was the testimony of Max Luehrs concerning his observations that date and his interpretation of the results shown by a so called field test known as a 'Hach Test.' (TH 35)

"Mr. Luehrs testified in response to a question by Judge Shepherd that 'I don't know the exact margin of error. There is some error, and this is why you generally take a laboratory analysis to go with these field tests. We found that it's a pretty good indication of ball park figures, give or take a milligram or two.' (TH 36)

"Upon Voir Dire Examination by Petitioner's Counsel we further learned that a person's perception of colors could effect [*sic*] the result of the field test, (TH 39); that the place from which the sample is taken is important, (TH 39); that the field test employed makes chemical changes of the materials being tested, (TH 40); that inclusion of sediment in any sample taken would effect [*sic*] the test result, (TH 41); and that variations between field tests and laboratory tests of more than two (2) of [*sic*] three (3) milligrams per litre have been observed, (TH 44).

"Considering the testimony of Mr. Luehrs that the Hach Test was utilized basically to obtain a ball park figure, to, in effect, guide the field personnel as to whether or not to take a sample for laboratory testing. We submit such test should not be the basis of a finding that a violation was committed on July 11, 1979." (Brief for D and D at 4–5).

We note that OSM proffered evidence of the results of laboratory analysis of water samples collected on July 11, 1979, but this evidence was not received because the Administrative Law Judge determined that OSM failed to establish the chain of custody of the water samples submitted to the laboratory (Tr. 13–23, 26–31). OSM did not appeal this ruling.

these factors; to the contrary, OSM showed that its inspector was trained and had extensive experience in the taking of water samples and in the use of a Hach kit.[5] Moreover, the inspector testified that while he has observed variability between results obtained from field testing and laboratory testing of particular water samples, in his experience when a Hach test has indicated greater than 10 milligrams per liter of iron then laboratory analysis also has indicated greater than 10 milligrams per liter.[6] Given this testimony and the absence of evidence of inaccuracy in the Hach test result upon which the alleged violation of 30 CFR 715.17(a) was based, we agree with the decision below that OSM met its burden of proof in support of the alleged violation.

The decision below upholding the violation of 30 CFR 715.17(a) charged in Notice of Violation No. 79-III-19-15 is affirmed.[7]

MELVIN J. MIRKIN
Administrative Judge

WE CONCUR:

NEWTON FRISHBERG
Acting Chief Administrative Judge

BERNARD V. PARRETTE
Administrative Judge

[5] Tr. 35-36:
"Judge Shepherd: What is your training in the use of [a Hach kit]? How did you learn how to use it?
"[Inspector Luehrs]: I learned how to use this when I was still with the State of Ohio as a reclamation inspector.
"Judge Shepherd: Does the State of Ohio use this?
"[Inspector Luehrs]: Yes.
"Judge Shepherd: How many tests have you made?
"[Inspector Luehrs]: Hundreds."
See Tr. 103-06 (concerning water sample collection).

[6] *Compare* Tr. 36, 44 *with* Tr. 73.

[7] Because D and D did not contest the amount of the civil penalty assessment, as determined in the proceeding below, we do not review that in our decision.

NAVAJO RESOURCES, INC. *v.* ACTING DEPUTY ASSISTANT SECRETARY—INDIAN AFFAIRS (OPERATIONS)

10 IBIA 72

Decided *August 25, 1982*

Appeal from disapproval of oil lease of Navajo tribal trust lands.

Affirmed.

1. Indian Lands: Leases and Permits: Oil and Gas—Indian Lands: Tribal Lands

Sec. 2 of the 1938 Tribal Mineral Leasing Act, codified at 25 U.S.C. § 396b (1976), requires advertisement for competitive bids prior to leasing of unallotted tribal lands for oil and gas development where the leasing tribe is not organized under the provisions of the Indian Reorganization Act of June 18, 1934.

APPEARANCES: Lawrence A. Ruzow, Esq., for appellant; Chedville L. Martin, Esq., Office of the Solicitor, for appellee.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

On Oct. 8, 1980, the Navajo Area Director, Bureau of Indian Affairs (Area Director, Bureau) refused to approve a negotiated oil and gas lease on Navajo tribal land. The proposed lessee, an Indian owned corporation, appeals from a May 29, 1981, decision issued subsequently by the Acting Deputy Assistant Secretary—

Indian Affairs (Operations) Assistant Secretary) which affirmed the Area Director.[1] The basis for the decision appealed is stated thus:

1. One of the basic provisions of the 1938 Tribal Mineral Leasing Act (25 U.S.C. 396b) is the requirement that oil and gas leases on tribal land shall be advertised for competitive bid prior to leasing by another method.

Since the leases concerned here are almost sixty (60) years old and have recently been terminated for lack of production, any new leases on the land involved must be advertised according to this requirement.

2. The regulations which implement statutory authorizations, contained in Title 25, Code of Federal Regulations, can be waived by the Secretary pursuant to satisfactory justification and where permitted by law. However, a statutory requirement for advertising is concerned here, which only Congress has the authority to change.

3. One of the primary requirements in justifying a Secretarial waiver of regulations is that such an action must be determined to be in the best interest of the Indians involved. Even if the advertising requirements were not statutory, it would be very difficult, if not impossible, given the current market conditions in the oil and gas industry, to make a determination that a negotiated lease in the subject case was in the best interest of the Navajo Tribe as a whole.

(Decision dated May 29, 1981, at 1).

[1] In appellee's brief, filed Dec. 4, 1981, the Bureau raises for the first time a challenge to the timeliness of this appeal. The record does not show, however, when the decision of May 29, 1981, was received by appellant. In the absence of a showing that the appeal is not timely made, untimeliness cannot be inferred by the Board under Departmental regulations governing appeals. *See* 25 CFR 2.10(a). In this connection, it is parenthetically noted that the Bureau now also seeks to bolster its position on appeal by arguing that it has consistently applied the rule announced in the Assistant Secretary's May 29, 1981, decision to all tribes engaged in mineral leasing. Since appellant had earlier sought to discover this identical information and was denied access to Bureau records showing administration of tribal mineral leasing generally, the Board has disregarded these arguments as being without foundation in the record on appeal.

Appellant contends that reliance upon the provisions of the Tribal Mineral Leasing Act of May 11, 1938 (Leasing Act), 52 Stat. 347, 25 U.S.C. § 396b (1976), was error in this case because the statute does not clearly require advertisement for bids.

Further, appellant reasons that the proviso contained in 25 U.S.C. § 396b permitting tribes organized under the Indian Reorganization Act of June 18, 1934 (IRA), 48 Stat. 985, 25 U.S.C. §§ 464–479 (1976), to escape the statutory advertisement requirement denies appellant due process and is contrary to more recent enactments of Congress, citing the Indian Civil Rights Act of Apr. 11, 1968, 82 Stat. 77, 25 U.S.C. §§ 3101–1341 (1976), and the Indian Self-Determination Act of Jan. 4, 1975, 88 Stat. 2203, 25 U.S.C. § 450 (1976). Finally, appellant argues that execution of the lease negotiated with the tribe is in the best interests of the tribe. Thus, appellant points out that the lease proposed to be approved in this instance is of an old field which the Bureau canceled in 1978 for lack of oil production in paying quantities. It is argued that it is unreasonable given such circumstances to require advertisement for lease of a fully explored field, and that 25 U.S.C. § 396b does not provide the exclusive basis for lease of tribal oil lands.

[1] The Leasing Act is the statutory authority for the leasing for mining purposes of unallotted lands within an Indian reservation, or lands owned by any tribe, group, or band of Indians under

Federal jurisdiction. Sec. 1 of the Leasing Act provides that such lands, with the approval of the Secretary of the Interior, may be leased for mining purposes by the tribal council. Sec. 2 of the Leasing Act provides these procedures for leasing of tribal lands for oil and gas development:

> Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations:

(25 U.S.C. § 396b).

The Department has previously interpreted this statutory provision to mean that a lease for development of oil and gas may be made only after advertisement for bids.[2] An exception to the requirement for advertisement appears in the proviso to sec. 2 of the Leasing Act:

> *Provided,* That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided, and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title.

(25 U.S.C. § 396b). The apparent meaning of the Leasing Act, and the construction which it has been given in prior decisions of the Department, is that the advertisement requirement imposed as a prior condition to oil and gas leasing is absolute except in the case of tribes organized under the IRA—and then it does not apply provided those tribes have enacted alternative methods for oil and gas leasing in their charters.[3] Should an IRA tribe fail to establish alternative methods for mineral leasing in its organizational documents, it will remain subject to the provision of the Leasing Act requiring advertisement for bids prior to lease.

Since the Navajo Tribe is not an IRA tribe, it is not entitled, as a matter of law, to claim to be excluded from the provisions of sec. 2 of the Leasing Act requiring advertisement prior to leasing. Appellant's arguments that the Leasing Act should not be applied to the lease negotiated with the Navajo tribe on the theory the Leasing Act violates later announced congressional policy or because the refusal to apply an exception to the Leasing Act to the negotiated lease in this instance results in a constitutional due process violation raise questions beyond the competence of this Board to address.[4] It is the

[2] *Solicitor's Opinion,* M-36007, 60 I.D. 331, 332 (1949).

[3] *See Petition of Cobb,* 58 I.D. 637, 646-48 (1944), an early Board of Appeals decision which analyzed in detail the application of the Leasing Act in an appeal involving oil and gas leasing on the Blackfeet Reservation by an IRA tribe under tribal organizational documents providing an alternative method for oil and gas leasing.

[4] *See,* for example, the discussion in *United States* v. *Aberdeen Acting Area Director,* 9 IBIA 151, 156, 89 I.D. 49 (1982), concerning the scope of Board review. The Board is without authority to declare acts of Congress invalid. *Estate of Jackson,* 6 IBIA 52 (1977).

opinion of the Board that the Assistant Secretary's decision correctly applied the Leasing Act as implemented by current Departmental regulations to the proposed lease to find a requirement for advertisements for bids prior to leasing in this case.[5]

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals, by the Secretary of the Interior, 43 CFR 4.1, the decision of the Acting Deputy Assistant Secretary—Indian Affairs (Operations) is affirmed.

This decision is final for the Department.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

JERRY F. MUSKRAT
Administrative Judge

RALPH F. ROSENBAUM *ET AL.*

66 IBLA 374

Decided *August 30, 1982*

Appeals from decisions of Montana State Office, Bureau of Land Management, authorizing noncompetitive sales of public lands. M 45059 (SD).

Set aside and remanded.

1. Accretion—Boundaries—Navigable Waters—Public Lands: Riparian Rights

Where riparian public land has been eroded away entirely by the actions of a navigable river and the river subsequently returns to its original banks, restoring the eroded land through accretion, title to the accreted land is deemed to be in the remote riparian owner to whose land the accretion attaches, rather than the United States.

Towl v. *Kelly*, 54 I.D. 455 (1934), overrule.

APPEARANCES: Everett A. Bogue, Esq., Vermillion, South Dakota, for appellant Ralph F. Rosenbaum; Wayne D. Groe, Esq., Elk Point, South Dakota, for appellants Sylvia E. Rosenbaum and Mary Jane Rosenbaum; Martin Weeks, Esq., Vermillion, South Dakota, for appellant Earl Hummel.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

Ralph F. Rosenbaum and others have appealed from decisions of the Montana State Office, Bureau of Land Management (BLM), dated Aug. 15, 1980, authorizing the noncompetitive sale to appellants of public lands situated in secs. 32 and 33, T. 90 N., R. 49 W., fifth principal meridian, Union County, South Dakota, pursuant

[5] The Department has published rules at 25 CFR Part 171 to implement the Act. 25 CFR 171.2 requires the superintendent concerned to advertise prior to leasing of tribal land for oil and gas leasing. The advertisement procedure is prescribed at 25 CFR 171.3. The Board notes that Congress is close to broadening the means by which mineral exploration and production may be effected on tribal land. On June 30, 1982, the Senate passed S. 1894 (the Melcher bill), proposed legislation which permits Indian tribes to enter into alternative agreements other than simple leases following competitive bidding to develop mineral resources. The bill passed the House with amendments on Aug. 17, 1982.

to sec. 203 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1713 (1976), subject to payment of the appraised value of the land.[1]

Although the appeals address the question of the appraised value, they also raise a threshold question which has not heretofore received adequate consideration, *i.e.*, whether the United States has title to the lands which it now seeks to sell to appellants. After a careful review of the record and consideration of the law in this area, we must conclude that the record does not support a finding that the United States has title to the lands.

On Dec. 28, 1861, the Surveyor General approved a plat of survey of T. 90 N., R. 49 W., fifth principal meridian, Union County, South Dakota. The 1861 survey indicated that lots 1, 2, and 3 in sec. 32 and lots 2 and 3 in sec. 33 were riparian, bordering on the Missouri River. These lands, together with the N½ SW¼ of sec. 33 adjacent thereto, occupied approximately the same location as the lands identified in the BLM decisions under appeal and the 1979 dependent resurvey approved Mar. 5, 1981. *See* Appendix A.[2] These lands were not patented.

By memorandum dated Aug. 25, 1976, the District Manager, Miles City, Montana, BLM, requested a cadastral survey in part of the lands involved herein, in order "[t]o determine the extent of Federal ownership of lands along the Missouri River in Union County, South Dakota." By memorandum dated May 6, 1977, the Chief, Division of Technical Services, BLM, responded to the District Manager's request for a cadastral survey. In so doing, he outlined the history of the Missouri River's location in this area:

> The area requested for resurvey by the Miles City District Manager was originally surveyed in 1861. At this time, the land was riparian to and situated along the left bank of the Missouri River. Subsequent to this survey in 1861, the Missouri River began an erosive action against this left bank, moving in a east-northeasterly direction, until 1892 when the left bank terminated its movement at the position depicted on the Missouri River Commission Survey of 1895. This approximate position being along the N-S center line of the E½ E½ of sec. 33, approximately one mile East of its original position. A 1930 Missouri River Aerial Photographic Survey shows the Missouri River had reversed its movement beginning an accretive process of restoring land along this left bank. The position of the left bank as shown on the 1930 map is approximately one quarter of a mile west of its 1892 position.
>
> A 1946-47 Missouri River Map prepared by the Corps of Engineers indicates the left bank has continued its accretive process to a position nearly the same as the left bank as originally surveyed in 1861.

Id. at 1.

In June and July 1959, various homestead and color-of-title applications were filed covering a substantial portion of the lands involved herein and additional land. In Sept. 1959, Karl Esplin, BLM land examiner, examined all of the lands involved herein. In a report dated Dec. 16, 1959, he stated:

> A field investigation and study of aerial photos over a period of 20 years indicate

[1] Appendix A is a list of the appellants, the lands offered for sale, the acreage involved and the appraised values.

[2] It would appear from the 1861 survey and the dependent resurvey that the lands offered for sale to appellant Ralph F. Rosenbaum were situated in 1861 in the bed of the Missouri River. Title to these lands raises a distinct issue which will be dealt with subsequently in this decision.

that the River has washed away the east bank of the Missiouri River until all of the public domain was lost. The east bank had gradually and imperceptibly moved back to the original 1861 survey in 1941. At the present time, the east bank is about ¼th mile west of the original survey.

It is quite evident that the land where the public domain was located is now accretion land. The entire vegetative growth is less than 30 years old. The 1941 photographs show new vegetative growth and several small river channels crossing the land.

By memorandum dated Jan. 7, 1960, the office of the Cadastral Engineer, Billings, Montana, BLM, agreed with Esplin's analysis that "the subject public domain was completely washed away and reappeared as accretion to the remote tracts." Relying on that assessment, the State Supervisor, BLM, by memorandum dated Jan. 8, 1960, told the Land Office Manager, BLM, to reject the homestead and color-of-title applications because "the lands are riparian with all riparian rights and the United States no longer has any claim to them." By decision dated Jan. 18, 1960, the Chief, Land Adjudication, Billings, Montana, BLM, rejected the applications "because the United States has no claim or jurisdiction over the lands involved." The decision explained:

> Since the lands in question, as shown by the plat of 1861, were washed away by the Missouri River and the present lands were formed subsequently by accretion, the United States has no claim to the present lands. The present lands are subject to the riparian rights of the owners of the uplands to which they are riparian.

BLM, however, subsequently reversed its position with respect to the United States claim to the lands involved herein. By memorandum dated Sept. 28, 1961, the State Director, Montana State Office, BLM was informed by the Acting Chief, Division of Appeals, BLM, that title to the restored land is in the United States under the principle enunciated in *Towl* v. *Kelly,* 54 I.D. 455 (1934):

> Where surveyed public lands of the United States bordering upon a navigable stream, and to which the United States has not parted with title, are eroded in their entirety by the action of the stream, and later restored by accretion, title to the lands so restored is in the United States, and not in the owners of the remote nonriparian lands, which for a time were the shore lands.

In a letter to Wayne D. Groe, Esq., attorney for appellants Sylvia E. Rosenbaum and Mary Jane Rosenbaum, the District Manager, Miles City, Montana, BLM, specifically stated: "The Bureau of Land Management does not hold to the decision of January 18, 1960. Our present position is that title to lands eroded away in their entirety and later restored by accretion, is restored to the original riparian owners." The District Manager cited *Towl* v. *Kelly, supra.*

A subsequent color-of-title application (M 41224(SD)) filed by appellant Earl Hummel was rejected by BLM decision of Jan. 23, 1979, on the ground that appellant had not been in good faith adverse possession of the land for the requisite statutory period of 20 years. This finding was based on appellant's having filed a homestead application in 1959, thus acknowledging title in the United States, only 4 years after the date of a

deed from a private party purporting to convey the land to appellant. This earlier decision was appealed to the Board, which affirmed the BLM decision. *Earl Hummel,* 44 IBLA 110 (1979). However, in a concurring opinion, Administrative Judge Stuebing noted the changed BLM position on the question of title to the accreted land and his doubt as to whether proper application of the law of accretion supported that position.

[1] There is little doubt based on the record that the lands involved herein were eroded away in their entirety by the actions of the Missouri River and that new land was formed in the same general location through the process of accretion, *i.e.,* the gradual and imperceptible addition to adjacent riparian land by the deposit of alluvial soil. The question of title hinges on the legal interpretation which is given to this factual context.

The generally accepted rule governing accretions holds that title to the accreted land belongs to the riparian owner. *California ex rel. State Lands Commission* v. *United States,* 50 U.S.L.W. 4672 (U.S. June 18, 1982); *Jefferis* v. *East Omaha Land Co.,* 134 U.S. 178 (1890); *David A. Provinse,* 35 IBLA 221, 85 I.D. 154 (1978). The Supreme Court in *Jefferis* v. *East Omaha Land Co., supra,* at 189, 191, found that the rule is supported on two grounds: (1) that such owners should be entitled to accretions because they must bear without compensation the losses of encroachment by the water, and (2) that as a matter of public policy all lands ought to have an owner, and it is most convenient that insensible additions to the shore should follow title to the shore.

Courts, however, are divided on the question of title where land in a riparian lot has eroded away to such an extent that a formerly remote lot becomes riparian and then by the process of accretion the land is restored, *i.e.,* as to whether title to the restored land is in the remote riparian owner or the original riparian owner. 78 Am. Jur. 2d *Waters* § 421 (1975). The question of title to the unpatented tract of land is governed by Federal common law. *California ex rel. State Lands Commission* v. *United States, supra; Wilcox* v. *Jackson,* 38 U.S. (13 Pet.) 266, 276 (1839); *David A. Provinse, supra,* at 227-30, 85 I.D. at 157-58; *cf. Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977) (state law held applicable where land at issue in riparian rights case had long been in private ownership). The Department, in *Towl* v. *Kelly, supra,* adopted the view that title is in the *original* riparian owner. Because we believe that the better rule is that title is in the remote riparian owner, we adopt that rule and, accordingly, expressly overrule *Towl* v. *Kelly, supra.*

We believe that there is substantial support for this view not only in the view of "many of the courts which have considered the matter," 4 *Tiffany, Real Property* § 1224 (3d ed. 1975), but in legal interpretations of closely analogous situations.

In cases where land accretes to a riparian lot to such an extent that it reaches across a former

riverbed and restores land on the opposite shore which had eroded away, title to the accretion is deemed to be in the riparian owner to whose land the accretion attaches and not in the original owner of the eroded land. *Matthews* v. *McGee,* 358 F. 2d 516 (8th Cir. 1966); *Beaver* v. *United States,* 350 F. 2d 4 (9th Cir. 1965), *cert. denied,* 383 U.S. 937 (1966); *Edwin J. Keyser,* 61 I.D. 327 (1954), and cases cited therein.

Similarly, where land accretes to a riparian lot to such an extent that it reaches across a former riverbed and restores an *island* which has eroded away, title to the accretion is deemed to be in the riparian owner to whose land the accretion attaches and not in the original owner of the eroded island. *United States.* v. *2,134.46 Acres of Land,* 257 F. Supp. 723 (D.N.D. 1966), *aff'd sub nom. Peterson* v. *United States,* 384 F. 2d 664 (8th Cir. 1967). In *J. M. Jones Lumber Co.,* 74 I.D. 417 (1967), the Department applied the rule of accretion enunciated in *Keyser* in the case of an island, formerly in United States ownership, which had eroded away and then reappeared through accretion to riparian land:

> The only complicating, and to some extent confusing variation, is that the physical site of the reappearing land was once an island instead of the opposite bank. But there does not seem to be any reason why accretion invading the site of a former island should be governed by a rule different from that applicable to the opposite bank of a river.

Id. at 423. The Department held that title to the accretion is in the riparian owner, rather than the original owner of the eroded island.

We believe that the rule of accretion as set forth in cases where an accretion restores land, whether the opposite bank of a river or an island, which has eroded away, is *equally* applicable in cases where land, once eroded away, has reappeared, on the same side of the river, through accretion. In all such cases, the original owner of the eroded land loses title to the land when it erodes away entirely and does not regain it when the new land reappears through accretion. Rather, the riparian owner to whose land the accretion attaches takes title.[3]

We believe that such a rule takes into account not only the practical but the equitable considerations in this matter. Once land has eroded away and becomes part of the bed of a navigable river, the original owner is *divested* of title to the land and the state generally takes title. Furthermore, once new land has been created by accretion the new riparian owner acquires all of the riparian rights. As Administrative Judge Stuebing said in his concurring opinion in *Earl Hummel, supra,* at 119: "The right to accretion is just one of the bundle of riparian rights." As the new ripar-

[3] Were this a case where the eroded land had reappeared through an accretion to the *opposite* bank, rather than to its own side of the river, we would have held, in line with *J. M. Jones Lumber Co., supra,* that title was clearly in the riparian owner, rather than the original owner of the eroded land. *See Margaret C. More,* 5 IBLA 252 (1972), *aff'd sub nom. United States* v. *More,* Civ. No. T-5331 (D. Kan. Jan. 17, 1980) (citing with approval Judge Stuebing's concurring opinion on the law of accretion in *Earl Hummel, supra*). We, therefore, view *Towl* as inconsistent with that line of cases. It is an aberration from the general rule of accretion.

ian owner bears the risk of loss of his property by further erosion, he should not be denied the benefit of any accretion. In addition, the new riparian owner has acquired a right of access to water "which is often the most valuable feature" of such property. *Hughes* v. *Washington,* 389 U.S. 290, 293 (1967).

It is said in *Towl* v. *Kelly, supra,* at 461, that the equities are with the original riparian owner whose land has eroded away, rather than the remote riparian owner who acquired riparian rights through a "fortuitous event." The fact of the matter is that the remote riparian owner has acquired those rights. Should he be deprived of those rights through an equally fortuitous event, *i.e.,* a return by the river to its original banks?

Similarly, it is said in *Towl* v. *Kelly, supra,* at 461, that one of the reasons for permitting a riparian owner to take accretions was "because the watercourse was by intent one of his boundaries." Presumably, this does not apply to an originally landlocked *remote* riparian owner. It should be noted, though, that the shift in a river's course may result in a change in legal position, especially where the river stabilizes in its new location for any period of time. The new riparian owner may himself, by conveying the riparian lot, establish the river as a boundary of his lot "by intent." Our holding is only applicable in cases of erosion and accretion, a process which usually takes a long period of time. In that time period, the remote riparian owner establishes his riparian rights. When the river shifts back to its original course, the original riparian owner may well have died or he and/or his heirs may be unlocatable. In such circumstances, there would be no original owner or even successors in interest to whom to award title to the land. In view of this, we find that the equities have shifted to the remote riparian owner with the change in the course of a river through erosion and accretion.

The only Federal case which the Department cites in *Towl* v. *Kelly, supra,* in support of its holding therein is *Stockley* v. *Cissna,* 119 F. 812 (6th Cir. 1902). In that case, the court held that an original riparian owner regains title to land, which was "washed off," where "by reliction or accretion the water disappears and the land emerges." *Id.* at 831. The principle is more accurately described as "re-emergence" which rests upon the easy identification of riparian land lost and then found again by re-emergence from the stream. *Beaver* v. *United States, supra,* at 11.

That doctrine holds that, where riparian land has been submerged and then subsequently re-emerges through a subsidence of the water such that the *same land* is exposed, title is in the original riparian owner, rather than the remote riparian owner. *Arkansas* v. *Tennessee,* 246 U.S. 158 (1918). The doctrine is an exception to the rule of accretion. It rests on the easy identification of the land which has re-emerged. In any event, the doctrine of "re-emergence" is not applicable where land has eroded away and then been restored through the process

of accretion. *Arkansas* v. *Tennessee, supra,* at 174–75. Cases applying that doctrine are properly distinguished from this case.[4]

The record, therefore, fails to indicate that title to the land which BLM offers to sell to appellants is in the United States. If title is not in the United States, then sale of the land to appellants for the appraised fair market value is not proper.[5]

We turn next to the question of title with respect to the land which BLM seeks to sell to appellant Ralph F. Rosenbaum. The land is situated in sec. 32, T. 90 N., R. 49 W., fifth principal meridian, Union County, South Dakota. Counsel for appellant asserts that the land which he is claiming is part of Cottonwood Island which formed in the river south and west of lots 1, 2, and 3 in the 1861 survey and which is not an accretion to the upland. Counsel notes that title to the island was the subject of litigation in State court which resulted in a judgment in 1949 that the State of South Dakota was the owner of the island.

Appellant contends that he is the record title owner of the 12.25 acres of land by virtue of a patent, No. 19936, from the State of South Dakota, dated Jan. 11, 1963, and that the United States does not have title to the land. Appellant argues that at the time of the admission of South Dakota to the Union in 1864, the land was in the bed of the Missouri River.

The 1861 survey indicates that lot 1, comprised of 21.70 acres, was situated in the southeastern corner of sec. 32. The lot was bounded on the south and west by the Missouri River. Thereafter, lot 1 was eroded away by the eastward shift of the Missouri River. It reappeared when the river returned to its approximate original location.

By memorandum dated May 6, 1977, the Chief, Division of Technical Services, BLM, in responding to a request by the District Manager, Miles City, Montana, BLM, for a cadastral survey in part of sec. 32, T. 90 N., R. 49 W., fifth principal meridian, South Dakota, stated that the "limit of the Federal government's claim to the land" is what is "believed to be an abandoned channel of the river."

On July 5, 1978, appellant filed a color-of-title application, M 41127 (SD), pursuant to the Color of Title Act, *as amended,* 43 U.S.C. § 1068 (1976), in part for land described as an accretion to lot 1, sec. 32, T. 90 N., R. 49 W., fifth principal meridian, Union

[4] We also note that the Department in *Towl* recognized that the case therein could equally be decided on the basis of the rule of avulsion, enunciated in *St. Louis* v. *Rutz,* 138 U.S. 226 (1891), *i.e,* sudden and perceptible changes in the course of a river do not deprive riparian owners of their land. *See Towl* v. *Kelly, supra,* at 461–62. This is also distinguishable from the law of accretion.

[5] We note the presence in the files of letters dated Sept. 12, 1980, and Sept. 19, 1980, to appellants Mary Jane Rosenbaum, Sylvia Rosenbaum, and Earl Hummel indicating the intent of BLM to bill appellants for use of the land in growing crops. These letters were obviously written pursuant to the decisions to sell the land, subject to payment of the appraised value, which decisions are the subject of these appeals. Pursuant to regulation, a decision is not effective during the time in which a person adversely affected may file a timely notice of appeal and pending resolution of any appeal timely filed. 43 CFR 4.21(a). Since appeals were timely filed by these applicants from the decision to sell the land, the collection of rent in the interim is likewise suspended. Our decision herein negates the obligation to pay rental.

County, South Dakota. By decision dated Jan. 23, 1979, BLM rejected the application because the land was not claimed by the United States. BLM reiterated that the United States only claimed land on the mainland side of the abandoned channel of the river and "not lands that arose from the bed of the river that are cut off from the mainland by a channel of the river." *Id.* at 3.

Also, by letter dated Jan. 23, 1979, BLM informed appellant's attorney that it was working on a "proposal" to sell appellant certain land sought in his color-of-title application (presumably on the theory that the tract had accreted to the upland) pursuant to sec. 203 of FLPMA, 43 U.S.C. § 1713 (1976), giving him a "preference right." Pending a resurvey, the acreage was identified as 12.25 acres of land south and west of lot 1, as originally designated in the 1861 survey.

By letter dated Apr. 3, 1980, BLM had informed appellant's attorney that appellant had been identified as a preference right claimant as to the 12.25 acres and that he "may elect to receive an offer to purchase the land * * * by completing and returning" an enclosed form. On May 13, 1980, BLM received a "Notice of Intention to Exercise Right to Receive Offer of Direct Sale" signed by appellant. The "Notice" identified the land sought by appellant as "12.25 acres in Lot 6 of the resurvey of Section 32 which is southwest of the location of original Lot 1." [6] In its Aug. 1980 decision, BLM authorized the sale to appellant of the 12.25 acres of land.

It is a well settled principle of law that upon the admission of a state to the Union, the ownership of the bed of a navigable river passes from the United States to that state. *Scott* v. *Lattig,* 227 U.S. 229 (1913). It is apparent in the present case that the 12.25 acres of land sought by appellant was, at the time of the 1861 survey, in the bed of the Missouri River. The land was south and west of the line of the river, as originally designated in that survey. The record is not altogether clear, however, as to whether the 12.25 acres of land subsequently emerged through the process of accretion to the upland or emergence of an island in the riverbed. In accordance with our prior analysis, it is clear that regardless of whether lot 7 is an island which emerged from the riverbed or an accretion to the upland, title to the land which BLM offered to sell to appellant would not be in the United States.

Accordingly, the decisions appealed from offering to sell the land for fair market value must be set aside.

BLM has expressed a willingness throughout the record to recognize the equities of those using and occupying the lands involved herein and to convey title to them. In view of such willingness and the lack of evidence of title in the United States, BLM may wish to explore issuance of recordable disclaimers of interest to appel-

[6] The tract sought by Ralph Rosenbaum was described as lot 7 in the plat of resurvey as finally approved. *See* Appendix A.

lants, pursuant to sec. 315 of FLPMA, 43 U.S.C. § 1745 (1976). That section authorizes issuance of such instruments "where the disclaimer will help remove a cloud on the title of such lands and where [the Secretary] * * * determines * * * (3) accreted, relicted, or avulsed lands are not lands of the United States." 43 U.S.C. § 1745(a) (1976). The disclaimer of interest is in effect a quitclaim deed from the United States. 43 U.S.C. § 1745(c) (1976). Adjudication by BLM of any application for recordable disclaimer of interest which is filed should await promulgation of the regulations implementing this statutory term, or provision of implementing authority by policy directive. *City of San Antonio, Texas,* 65 IBLA 326 (1982).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases are remanded to BLM.

C. RANDALL GRANT, JR.
Administrative Judge

WE CONCUR:

EDWARD W. STUEBING
Administrative Judge

GAIL M. FRAZIER
Administrative Judge

APPENDIX A

IBLA Nos.	Names of appellants	Lands offered for sale*	Acreage*	Appraised value
80-953	Ralph F. Rosenbaum.	Western portion of lot 6, sec. 32	12.25	$9,500
81-117	Sylvia E. Rosenbaum.	Eastern portion of lot 6, sec. 32	20.04	18,000
81-118	Mary Jane Rosenbaum.	NE¼SW¼, lots 4, and 5, sec. 33	94.89	98,600
81-136	Earl Hummel	NW¼SW¼, lot 4, sec. 33	57.91	49,900

* The lands offered for sale were described with reference to the unapproved plat of the dependent resurvey executed in 1979 by Cadastral Survey, BLM. The plat as approved by the Chief, Cadastral Survey, BLM, on Mar. 5, 1981, after the appeals were filed from the decisions of BLM in these cases, identified the tract of land offered for sale to appellant Ralph F. Rosenbaum as lot 7 containing 13.91 acres instead of 12.25 acres. The approved plat of resurvey identified the tract offered for sale to Sylvia E. Rosenbaum as lot 8 with the same acreage as described in the BLM decision. The conflict in the lands offered for sale to Mary Jane Rosenbaum and Earl Hummel involving lot 4, sec. 33, was left by decision of BLM to be resolved by agreement between the two parties.

NAVAJO TRIBE *v.* COMMISSIONER OF INDIAN AFFAIRS

10 IBIA 78

Decided *August 30, 1982*

Appeal from decision by Commissioner of Indian Affairs finding a social services corporation doing business within an area designated "near" the Navajo Reservation to be ineligible for a monetary grant under Title II of the Indian Child Welfare Act of 1978.

Affirmed.

1. Indian Child Welfare Act of 1978: Financial Grant Applications: Funding

Under Departmental regulations, areas officially designated to be on or near an Indian reservation are considered part of the reservation for purposes of funding social services programs. Departmental regulations implementing the Indian Child Welfare Act of 1978 do not permit an Indian tribe to combine with a social services corporation within an area designated "near reservation" for social services funding purposes.

APPEARANCES: Lynn Tetterington, Esq., for appellant tribe; Penny Coleman, Esq., Office of the Solicitor of the Department of the Interior, for appellee Commissioner.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

On Jan. 26, 1981, the Navajo Tribe (tribe), acting through a tribal committee, authorized a joint application for grant funding under Title II of the Indian Child Welfare Act of Nov. 8, 1978, 92 Stat. 3077, 25 U.S.C. §§ 1931-1934 (Supp. II 1978) (Act) by the tribe acting in combination with the Farmington Inter-Tribal Organization (center), a social services corporation described by appellant as a "multi-service Indian Center incorporated under the laws of the state of New Mexico and situated within the community of Farmington." [1] The center, among other activities at Farmington, operates a temporary child care center for children between the ages of 6 and 12 and another facility for juveniles.[2] The tribe, under contract with the Bureau of Indian Affairs (Bureau), provides social services to appproximately 150,000 tribal members living within a reservation having an area of 25,000 square miles.[3] Farmington is located in New Mexico across the San Juan River from the Navajo reservation, but is not directly upon reservation land.[4] Over 90 percent of all Indians in the Farmington area are of Navajo descent, but other tribes are also represented among the clients of the center.[5]

On Mar. 13, 1981, the Bureau's Navajo Area Director forwarded for decision to the Commissioner of Indian Affairs a joint application for grant funding under the Act by the tribe and the center together with a memorandum outlining alternative dispositions of the application. On Apr. 10, 1981, the Commissioner decided that only one construction could be given to the application presented

[1] Appellant's brief at 7.
[2] *Id.*, Exh. "P."
[3] *Id.*, at 10.
[4] *Id.*, at 8; *Id.*, Exh. "O."
[5] *Id.*, Exh. "P."

by the tribe and the center. In the decision from which the tribe appeals, he stated, based upon analysis of the Act and implementing regulations:

> First, 25 CFR 23.26 states that the Bureau shall only make a grant for an on or "near" reservation program when officially requested to do so by a tribal governing body. "On or near reservation" is defined in 25 CFR 20.1 which is referenced in 25 CFR 23.2(n), as being an applicable definition for the purpose of implementing the Indian Child Welfare Act. Farmington is included in the Navajo's "on or near reservation" designation as published in the Federal Register, and as such the Navajo Nation is eligible to apply for a Title II grant for their designated "on or near reservation" area, part of which may include a subgrant to Farmington.
>
> Second, since Farmington is not an eligible grant applicant the possibility of a consortium is a moot issue. A consortium application as defined in the December 28, 1979 P.L. 95-668 Title II implementation memorandum from my office was "a compilation or coordination of several possible grant applications." This definition is basically the definition of consortium from Webster's dictionary "an agreement or association of the banking interests of two or more nations." Since Farmington is within the Navajo Tribe's jurisdiction they are not an eligible applicant and in turn cannot form a consortium.[6]

The Act, which provides for grants to Indian tribes and organizations with the stated objective to prevent the breakup of Indian families, is funded through the Snyder Act of Nov. 2, 1921, 42 Stat. 208, *as amended,* 25 U.S.C. § 13 (1976). Under Departmental rule in effect at the time of the joint application for funding by appellant and the center, an eligible applicant was entitled to a minimum grant of $25,000.[7] The tribe received a grant of $250,000 following the Apr. 10 decision, which found the tribe alone to be an eligible applicant for funding of a grant for child welfare social services under the Act.[8] This was the maximum allowable grant permitted an individual grant applicant; a "consortium" of grant applicants could, however, receive as much as $500,000.[9]

While finding the Farmington center to be ineligible to receive grant funding under the Act, the Bureau, in unrelated applications for funding under the Act, found that Flagstaff, and Phoenix, Arizona (both classified, as was Farmington, to be on or near an Indian reservation for purposes of social services funding), were eli-

[6] Apr. 10, 1981, decision of Acting Deputy Commissioner of Indian Affairs.

[7] *Notice,* 46 FR 1355 (Jan. 6, 1981).

[8] Federal Brief at 2.

[9] The rule, noticed at 46 FR 1355 (Jan. 6, 1981) provides in pertinent part:

> "In order to ensure insofar as possible that all applicants preliminarily approved in a competitive process, under the provisions of 25 CFR Part 23 application and selection criteria established by the Bureau of Indian Affairs, and thereafter approved for funding, receive a proportionate share of available grant funds, the distribution of these funds will be accomplished in accordance with the following formula: Each grant award not to exceed (a) a base amount of $25,000; and (b) an additional amount equal to the product resulting when the estimated unduplicated clientele percentage of the total unduplicated Indian client population to be served by the grant applicant is multiplied by the total amount of grant funds remaining after (a) above is accomplished for all grant applicants approved for funding. In this computation, the total unduplicated Indian client population figure will be based upon the best information available from all grant applications submitted to the Bureau of Indian Affairs and approved for funding, and other identifiable statistical resources when an applicant's client population is questioned.
>
> "The maximum allowable grant award to an individual applicant cannot exceed $250,000.
>
> "The maximum allowable grant award to a consortium cannot exceed $500,000. A consortium is eligible for an amount equal to the amount which the individual members of the consortium could receive if they applied individually, as long as that amount does not exceed the maximum allowable grant award to a consortium listed above."

gible to receive grant funding under the Act.[10]

On appeal the tribe contends the decision of the Commissioner denying the joint funding application violated substantive and procedural due process and denied the tribe the equal protection of the laws. More specifically the tribe argues, relying on arguments based upon the holding in *Morton* v. *Ruiz*,[11] that (1) use of the term "consortium" by the Bureau in rulemaking denied appellant notice of the requirements demanded of a successful grant applicant and prevented the tribe from adequately preparing a joint application with the center; (2) the center is a qualified applicant and should be allowed to join with the tribe as an equal supplier of social services because the center is an independent organization which serves other Indian groups not members of the Navajo tribe; and (3) payment of grant funds to other "near" reservation communities is unfair to both the tribe and the center since it deprives them of funding which otherwise they should receive. Finally, (4) the tribe contends that the result of the Bureau decision is to inequitably lower funding for social services to the tribe in violation of the Snyder Act. The Board finds the contentions of the tribe to be without merit and affirms the decision of the Commissioner for the following reasons.

[1] In *Morton* v. *Ruiz*, cited above, a case relied upon in arguments advanced by both parties, the Court characterizes the question presented as:

> a narrow but important issue in the administration of the federal general assistance program for needy Indians:
>
> "Are general assistance benefits available only to those Indians living *on* reservations in the United States (or in areas regulated by the Bureau of Indian Affairs in Alaska and Oklahoma), and are they thus unavailable to Indians (outside Alaska and Oklahoma) living *off*, although near, a reservation?" [12 Italics in original.]

The Court then goes on to hold Ruiz entitled to benefits although not a resident of an Indian reservation, based upon analysis of Departmental representations to Congress and a consequentially inferred intention of Congress to provide general assistance benefits to a certain class of Indian through appropriations under the Snyder Act. Ruiz was found to represent a class of Indians who live "near" Indian reservations based upon circumstances described thus by the Court:

> The respondents, Ramon Ruiz and his wife, Anita, are Papago Indians and United States citizens. In 1940 they left the Papago Reservation in Arizona to seek employment 15 miles away at the Phelps-Dodge copper mines at Ajo. Mr. Ruiz found work there, and they settled in a community at Ajo called the "Indian Village" and populated almost entirely by Papagos. Practically all the land and most of the homes in the Village are owned or rented by Phelps-Dodge. The Ruizes have lived in Ajo continuously since 1940 and have been in their present residence since 1947. A minor daughter lives with them. They speak and understand the Papago language but only limited English. Apart from Mr. Ruiz' employment with Phelps-Dodge, they have not been assimilated into the dominant culture, and they appear to have maintained a close tie with the nearby reservation. [13 Footnotes omitted.]

[10] Farmington, Flagstaff, and Phoenix are established to be "near" reservations by Departmental rule published at 44 FR 2693 (Jan. 12, 1979). Farmington and Flagstaff are both "near" the Navajo reservation.

[11] 415 U.S. 199 (1974).

[12] *Id.* at 201.

[13] *Id.* at 202-03.

Prior to the Court's decision, the Department had excluded Indian persons similarly situated to Ruiz from general assistance benefits based upon an internal, unpublicized policy. The holding of the Court that Ruiz was entitled to claim benefits was based in part upon a finding that his exclusion from such privilege without prior notice by the Department was a violation of the provisions of the Act of Sept. 6, 1966, 80 Stat. 384, *as amended,* 5 U.S.C. § 554 (1976). The Court summarized the case holding, concluding:

> The appropriation, as we see it, was for Indians "on or near" the reservation. This is broad enough, we hold, to include the Ruizes who live where they found employment in an Indian community only a few miles from their reservation, who maintain their close economic and social ties with that reservation, and who are unassimilated. [14]

Following the decision in *Ruiz,* the Department adopted the policy of recognizing "near" reservation areas by publishing lists in the *Federal Register;* this policy is expressed in 25 CFR 20.1(r) which provides:

> (r) "Near reservation" means those areas or communities adjacent or contiguous to reservations which are designated by the Commissioner upon recommendation of the local Bureau Superintendent, which recommendation shall be based upon consultation with the tribal governing body of those reservations, as locales appropriate for the extension of financial assistance and/or social services, on the basis of such general criteria as: (1) Number of Indian people native to the reservation residing in the area, (2) a written designation by the tribal governing body that members of their tribe and family members who are Indian residing in the area, are socially, culturally and economically affiliated with their tribe and reservation, (3) geographical proximity of the area to the reservation, and (4) administrative feasibility of providing an adequate level of services to the area. The Commissioner shall designate each area and publish the designations in the FEDERAL REGISTER.

Thus, the Department by regulation provides for extension of social services to persons within the definition of the class of persons found in *Ruiz* to be entitled to receive benefits funded by the Snyder Act. This class of eligibles is referred to as "near reservation" clientele. The definition of the class is clear. The manner by which the class is to be determined is also clearly defined by the rule.

In this case, the consultation required by the regulation was done with the Navajo Tribe, with whom the Bureau had contracted for social services to be funded under the Snyder Act within the reservation area.[15] The tribe recommended that Farmington and Flagstaff be included within the tribal service area as "near" to the tribe's reservation.[16] On Jan. 12, 1979, the tribal recommendation was adopted by notice published in the *Federal Register* designating Farmington and Flagstaff to be "near reservation" locales appropriate for the extension of BIA financial assistance and/or social services.[17]

It is in the context of this factual and legal background that the

[14] *Id.* at 238.

[15] *See* Memorandum dated Feb. 11, 1977, Acting Deputy Commissioner of Indian Affairs, subject: 25 CFR 20—Financial Assistance and Social Services Program.

[16] Navajo Resolution CAP-28-78 dated Apr. 25, 1978.

[17] 44 FR 2693 (Jan. 12, 1979).

tribe, on Jan. 26, 1981, reciting: "[a]ny recognition of the Farmington Inter-Tribal Indian Organization as a 'on or near' reservation organization would result in the depletion of funds available to the Navajo Tribe" resolved that "[t]he Navajo Tribe makes an agreement to form a Indian Child Welfare Act consortium with an off-reservation Indian Organization, the Farmington Inter-Tribal Indian Organization." [18]

The tribe now argues that the Bureau misled the tribe and the center into making a joint application for funding under the grant provisions of the Indian Child Welfare Act by use of the word "consortium" to define a combination of applications. According to this rationale, both applicants were led by this use of alleged inartful language to believe they could form a combination or "consortium" in order to supply social services under the Act to Farmington. This belief was also based in part upon the fact that the center is independent from the tribe and is an otherwise qualified social services organization. This argument misconstrues the foundation of the *Ruiz* holding and the subsequent adoption of the case doctrine by Departmental rule for the delivery of social services to Indians near reservations. It is the character of the client population to be served, rather than the composition of the servicing organization, that is crucial to a determination under the Act regarding funding of Indian social services.

In this case, Farmington was previously declared by *Federal Register* notice dated Jan. 12, 1979, to be "near" the Navajo reservation. The tribe, in consultation with the Bureau had, prior to publication of the notice, declared its ability and desire to include the Farmington community within the tribal social services area in order to obtain Bureau social services funding. However, part of the client population served by the tribe in Farmington is also served by the center. While it is true the center serves others who are not members of the tribe, it is apparent that in Farmington the tribe and the center serve the same Navajo client population. The funding of more than one social services agency for any area designated to be "near" a reservation is specifically prohibited by Departmental regulation in effect at the time the tribe resolved to join with the center in an application for funding:

> Selection for grants under this part for on or "near" reservation programs shall be limited to the governing body of the tribe to be served by the grant. However, the governing body of the tribe may make a subgrant or subcontract with another organization entity including but not limited to an Indian organization, subject to the provisions of § 23.36. [19]

As explained in a later *Federal Register* notice, the Department desires to avoid duplication of services to a single client population.[20] This later notice emphasizes the earlier declared policy of the Department to discourage the duplication of services to a single

[18] Resolution of Navajo Tribal Council Committee dated Jan. 26, 1981.

[19] 25 CFR 23.25(b).

[20] *See* note 9, *supra.*

client population as declared at 25 CFR 23.25:

> (a) The Commissioner or designated representative shall select for grants under this part those proposals which will in his or her judgment best promote the purposes of title II of the Act taking into consideration insofar as practicable the following factors:
>
> * * * * *
>
> (3) The extent to which the proposed program would duplicate any existing child and family service program emphasizing prevention of Indian family breakup.

Thus, the regulations in effect when the joint funding application was made provide that in "near" reservation areas the designated responsible tribe is to supply qualified clients benefits under the Act. The tribe may, where appropriate, subcontract the supply of social services to an organization such as the center; however, the principal responsibility for the "near" area remains with the tribe concerned. Thus, the Bureau will only deal with a tribe, in cases involving the funding of social services for "near" reservation Indian populations served by a tribe.

While appellee acknowleges the Bureau granted funding to nontribal community services in Phoenix and Flagstaff in violation of this policy,[21] such error does not entitle the tribe to similar error in violation of Departmental regulation—the Department is bound by law to follow Departmental regulations.[22]

Finally, appellant's complaint that the result of the Commissioner's decision in this case is to reduce grant funding to the tribe is without foundation in fact. The tribe received $250,000 from the Department for funding of Indian Child Welfare services by way of grant. Had the center been found to be a qualified applicant entitled to a grant in its own right, a combined grant to both applicants might have exceeded this amount. However, since the center is located within the tribe's service area it is not qualified to be an independent recipient of funding since it does not serve a client population in an area that is not served by a tribe. The failure of the center to qualify for grant funding under these circumstances does not reduce the funding capability of the tribe in any way.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Commissioner, dated Apr. 10, 1981, is affirmed.

This decision is final for the Department.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

JERRY MUSKRAT
Administrative Judge

[21] Appellee's brief at 9.

[22] *Aleutian/Pribilof Islands Association, Inc.* v. *Acting Deputy Assistant Secretary*, 9 IBIA 254, 260, 89 I.D. 196, 199 (1982).

SHELL OIL CO.

66 IBLA 397

Decided *August 31, 1982*

Appeal from decision of the Director of the Geological Survey denying request to participate in certain continental offshore stratigraphic test wells without penalty as an original participant.

Affirmed.

1. Outer Continental Shelf Lands Act: Geological and Geophysical Exploration: Generally

Under 30 CFR 251.6-3(d), the Director of Geological Survey will require republication of an exploratory test drilling application and a period for other persons to join in a venture as original participants without penalty where the applicant proposes changes to the original application and the Director determines that those changes are significant. Proposed changes to the Department of the Interior's announced Outer Continental Shelf leasing schedule or proposed changes to regulations governing test drilling are not significant changes within the meaning of 30 CFR 251.6-3(d).

APPEARANCES: Dan A. Bruce, Esq., Houston, Texas, for Shell Oil Co.; Risher M. Thornton, Esq., Anchorage, Alaska, for ARCO Alaska, Inc.; L. Poe Leggette, Esq., Department counsel for Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

On Feb. 9, 1981, ARCO Alaska, Inc. (ARCO), announced its proposal to drill three continental offshore stratigraphic test (C.O.S.T.) wells off the western coast of Alaska and invited interested parties to participate in one or more of the wells. The announcement required that in order to participate without paying any late penalty an interested party had to commit itself in writing to ARCO by Mar. 15, 1981. Participating parties would bear a proportionate share of the cost risk and expense of drilling and share the data obtained from the wells. Seventeen companies joined ARCO as original parties. Shell Oil Co. (Shell) did not. By letter dated Oct. 31, 1981, Shell requested the Director of the Geological Survey (Survey) [1] to provide an additional opportunity for interested parties to participate in all three wells as an original member without penalty.[2] The Director declined and Shell has appealed that decision to this Board.

Sec. 11 of the Outer Continental Shelf Lands Act, *as amended,* 43 U.S.C. § 1340 (Supp. II 1978), permits the Secretary of the Interior to authorize geological and geophysical exploration in the Outer Continental Shelf (OCS) that does not interfere with or endanger

[1] By Secretarial Order No. 3071, dated Jan. 19, 1982, the Secretary of the Interior established the Minerals Management Service (MMS) and, transferred to MMS the minerals-related functions of the Conservation Division of the Geological Survey. *See* 47 FR 4751 (Feb. 2, 1982). References in 30 CFR Part 251 and other Departmental regulations to Survey were changed to MMS by final rule on June 30, 1982. 47 FR 28368. Since Survey existed at the time that the decision on appeal was issued, we will refer to Survey in this opinion.

[2] The initial cost estimates for the three wells were $98 million. Thus each of the 18 original participants were obligated to contribute approximately $5.5 million assuming each had joined in all three wells. On that basis, late participation cost nearly $11 million, a share of the cost plus 100 percent of that share (Department counsel's brief at 2). Shell reports, however, that Mar. 1982 cost estimates were $218.7 million total or approximately $12 million for each participant making the late participation cost approximately $24 million for all three wells (Appellant's response brief at 5 n.16).

actual operations under any OCS lease and that is not unduly harmful to aquatic life in the area. The Department permits deep stratigraphic testing on the basis of sec. 11. *See Solicitor's Opinion,* M-36922, 87 I.D. 517 (1980). Permit requirements for C.O.S.T. wells are set forth in 30 CFR Part 251, generally, and 30 CFR 251.6-2, specifically. In order to minimize duplicative exploration activities involving penetration of the seabed of the OCS, the Secretary requires that a party proposing to drill a C.O.S.T. well afford all other interested parties, in a signed agreement, an opportunity to participate in the drilling on a cost-sharing basis. 30 CFR 251.6-3(a). Departmental regulations provide that the agreement "may include a penalty for late participants of not more than 100 percent of the cost to each original participants in addition to the original share cost." *Id.*

The ARCO notice announced that it was proposing to drill three C.O.S.T. wells: St. George Basin C.O.S.T. No. 2, North Aleutian Shelf C.O.S.T. No. 1, and Navarin Basin C.O.S.T. No. 1. ARCO's drilling plan, dated Feb. 23, 1981, estimated that each well would take 111 days to drill and that drilling would begin in Apr. 1982, Aug. 1982, and July 1983, respectively.

Under 30 CFR 251.6-5,[3] if a C.O.S.T. well is drilled within 50 geographic miles of any OCS tract tentatively identified for a lease sale, as listed on the currently approved OCS leasing schedule, the driller must complete the well "at least 3 months prior to the first day of the month in which the Proposed Notice of Sale is listed." The Survey Director may extend a permit's expiration date, however, if it is determined to be in the national interest. All three of ARCO's wells were subject to this rule when it announced its proposal to drill.

At the time ARCO filed its permit applications and published its notice to interested parties, the June 1980 5-year OCS Oil and Gas Leasing Schedule was in effect. Under this schedule, the St. George Basin was scheduled to be leased in Dec. 1982 (sale No. 70), the North Aleutian Shelf in Oct. 1983 (sale No. 75), and the Navarin Basin in Dec. 1984 (sale No. 83). The proposed notice of sale for each was to be issued 5 months prior to the sale date. Therefore, under 30 CFR 251.6-5, the required completion dates for the ARCO wells were Mar. 31, 1982, Jan. 31, 1983, and Mar. 31, 1984. Consequently, ARCO's announced drilling plans for the St. George Basin well would not meet the well completion requirements of 30 CFR 251.6-5 unless the Survey Director extended the permit.

In a letter to the Survey Director, dated Oct. 31, 1981, Shell requested that the Director require republication of ARCO's well proposal allowing additional parties to join as original participants in

[3] 30 CFR 251.6-5 was revised by final rule effective May 13, 1982. 47 FR 15781 (Apr. 13, 1982). References in this opinion are to the unrevised version (*see* 30 CFR 251.6-5 (1981)) since that provision was in effect at the time this case arose.

accordance with 30 CFR 251.6-3(d) or, alternatively, extend the time for joining without penalty because of "many significant changes" affecting ARCO's plans. The changes identified by Shell were:

1. A draft proposed OCS leasing schedule issued in Apr. 1981 that advanced the sale dates for the North Aleutian Shelf [4] to Apr. 1983 and the Navarin Basin to Dec. 1983 with the notice of proposed sale issued 4 months earlier so that ARCO's drilling plans in those areas could not meet the completion requirements of 30 CFR 251.6-5.

2. A proposed OCS leasing schedule issued in July 1981 which delayed the St. George Basin and Navarin Basin sales until Feb. 1983 and Mar. 1984 which would accommodate ARCO's plans in the St. George Basin and the Navarin Basin.

3. A proposed amendment to 30 CFR 251.6-5, published on Sept. 9, 1981 (46 FR 44994 to 44995), which would change the required completion date to "at least 60 days prior to the first day of the month in which the lease sale is scheduled to be held."

4. Indications in the press that the St. George Basin and North Aleutian Shelf lease sales might be deferred until completion of certain onshore studies in the Bristol Bay area.

Shell argued that the ARCO proposal had been announced at a time when the Department was reviewing the June 1980 schedule with the announced aim of accelerating OCS leasing. It explained that it was not originally supportive of the ARCO wells because "we favored prompt execution of the OCS schedule, however revised, and anticipated that demands would arise, as they did, for further delays to accommodate the C.O.S.T. program [and] * * * the timing was such that the St. George C.O.S.T. well would not produce significant information in view of the time limitation provisions of 251.6-5." Shell urges that changes in the lease sale schedule and regulations severely impact the planning processes of offshore operators and therefore should be considered significant changes for the purposes of 30 CFR 251.6-3(d).

The cited regulation reads: "(d) If the applicant proposes changes to the original application and the Director determines that such changes are significant, the Director shall require a republication of the changes and an additional 30 days for other persons to join as original participants."

By letter dated Nov. 19, 1981, the Survey Director informed Shell that he had concluded that the proposed 5-year OCS Oil and Gas Leasing Schedule and proposed revision to 30 CFR 251.6-5, both of which were beyond the control of ARCO, were not significant changes within the meaning of 30 CFR 251.6-3(d).

In its statement of reasons for appeal, Shell makes two arguments. First, Shell urges that ARCO's announcement amounted to notice of intention to perform an impossibility in that the St. George Basin well could not be timely drilled and such notice does not constitute notice at all. Second, Shell contends that the

[4] The Apr. and July 1981 schedules referred to this sale as the North Aleutian Basin.

effect of the proposed regulatory change was no different than if ARCO had proposed to accelerate its drilling plans and, in that case, the Director would surely have found the acceleration a significant change and required republication.[5]

Counsel for Survey responds first that the timely drilling of the St. George Basin well was not an impossibility because the Survey Director could approve an extension and that, at the time the ARCO plans were announced, it was simply a matter of whether the interested parties chose to take the risk that the Director would do so. Counsel suggests that if Shell were not so inclined it could have participated in the other two wells that were scheduled for timely completion. Second, counsel argues that 30 CFR 251.6–3(d) applies where significant changes are proposed by the applicant, and the proposed regulatory change was made by Survey, not ARCO. Counsel contends that originally Shell evaluated the ARCO proposals and chose not to participate but now having reevaluated the risk with the advantage of the passage of time wants to participate without having to pay the penalty. Counsel also contends that if Shell prevails, it will encourage other companies to delay in joining a test well group and hinder the Department's ability to obtain data to evaluate OCS tracts for leasing.

ARCO urges that Shell's appeal be denied because Shell's arguments on appeal are spurious. ARCO responds with arguments similar to those expressed by counsel for Survey and also suggests that if Shell is now allowed to join as an original participant, it will reap the benefits of the drilling without having assumed the risks. Future C.O.S.T. well programs will be imperiled because the incentive to join as an original participant and incur substantial risk would be reduced.

[1] The geological and geophysical exploration activities authorized by sec. 11 of the Outer Continental Shelf Lands Act are intended to produce information on OCS mineral resources including data directed to possible exploration and development activity for the benefit of the participants and the Federal Government. The regulatory scheme is intended to promote maximum participation in test wells by all interested parties to avoid duplicative activities on the OCS and to ensure that the risk of a venture is equally shared since participating parties share the resulting information. The penalty provisions encourage early commitment to the drilling projects and protect those who are willing to assume the risk of the venture at the outset.[6]

[5] By letter dated June 14, 1982, Shell exercised its right to join in the St. George Basin C.O.S.T. well No. 2 as a late participant to avoid an increased penalty should drilling result in a significant hydrocarbon occurrence. *See* 30 CFR 251.6–3(a). Shell has also requested that if it prevails on appeal, the Board order ARCO to return the penalty payment or apply it to participation in one of the other wells.

[6] In discussing comments to proposed revisions to 30 CFR 251, the Department addressed the penalty provisions as follows:

"We have decided not to change the maximum penalty (i.e., 100 percent of the cost to each original participant in addition to the original share cost) for late entry into a deep stratigraphic test. We feel that this amount is sufficient

Continued

The regulation upon which Shell bases its argument that it be allowed to join the ARCO wells as an original participant, 30 CFR 251.6–3(d), requires republication and an additional opportunity to participate without penalty when the Director of Survey finds that the applicant proposes significant changes to its original application. It thus furthers the regulatory goal of encouraging group ventures by permitting a new opportunity for interested persons to participate when the nature of the venture is significantly changed by the applicant. The regulation does not apply in the manner suggested by Shell. It is not sufficient for Shell to identify changed circumstances which impact in a manner similar to changes that an applicant might propose, and the Survey Director might find to be significant; the changes must be made to the original application at the initiative of the applicant.

The proposed changes in the OCS leasing schedule and the proposed change to 30 CFR 251.6–5 result from the ongoing evaluation and administration of the OCS leasing program. At the time that ARCO proposed its C.O.S.T. wells, the effects of program changes, whether beneficial or adverse, were part of the risk evaluated and assumed by the parties joining the venture. Although at the time that Shell entered its request to join without penalty neither the schedule changes nor the revision of the regulation had been finalized, the enhanced potential for benefit from the drilling as a result of the proposed changes lessened the risk of joining in ARCO's wells. The penalty provisions are directed to just such a case so that the difference in risk assumed may be equalized among participating parties.

Finally, we suggest that the impact of the changes identified by Shell go to the question of permit issuance since, presumably, the Department would not issue a permit for a well which could not be drilled in a manner consistent with the regulation. In making application for a well that could not be drilled timely under existing OCS leasing scheduling, ARCO was speculating that the Federal Government would modify the schedule in its favor or grant it an extension.[7] The Government might well be motivated to do so because of the informa-

ficient to encourage the early participation of most interested parties, but is not overly burdensome to others, such as smaller companies, which may take longer to acquire sufficient funds in order to enter the group. We have, however, raised the maximum penalty for late participants who wait until after the Director announces a hydrocarbon occurrence to enter the group to 300 percent of the cost to each original participant in addition to the original share cost. We feel that this provision will protect those involved in the initial drilling consortium from companies that want to buy into the consortium only after hydrocarbon occurrences are detected in a test and will encourage early participation in such a consortium.

"The comment was also made that the penalties should be assessed by the participants and shared by all parties who participated as of the time the hydrocarbon occurrence is announced. We believe that the amount and distribution of monetary penalties should be spelled out in the initial agreement between the participants as a further stimulus for early participation." 45 FR 6342 (Jan. 25, 1980).

[7] The permits for all three ARCO wells were issued Jan. 21, 1982, requiring completion 6 months prior to the first day of the month in which the appropriate lease sale is scheduled. At that time, the July 1981 proposed schedule was the last published schedule. Under that schedule and the permit terms, the St. George Basin and Navarin Basin wells could be timely completed under ARCO's announced plans, the North Aleutian Shelf well could not be timely completed without an extension granted by the Survey Director. However, a tentative proposed final OCS leasing schedule was announced Mar. 19, 1982, which eliminates the North Aleutian Shelf sale altogether. *See* 47 FR 11980 to 11983 (Mar. 19, 1982). The final schedule announced July 21, 1982, did not further change the status of these sales.

tion it would receive from the drilling project. Interested parties had the option to not participate in the St. George Basin well as proposed. Shell chose not to participate in any of the wells because it did not want the lease sales to be delayed to allow for test well drilling (Appellant's response brief at 4). If Shell now wants to participate, it must pay the penalty.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Director of the Geological Survey is affirmed.

WILL A. IRWIN

ADMINISTRATIVE JUDGE

WE CONCUR:

BRUCE R. HARRIS
Administrative Judge

DOUGLAS E. HENRIQUES
Administrative Judge

APPEAL OF W. D. HYLAND & HYLAND/ASSOCIATES

IBCA-1332-2-80

Decided *August 31, 1982*

Contract No. None, Bureau of Indian Affairs.

Denied.

1. Contracts: Formation and Validity: Implied and Constructive Contracts

The Board found that there was no implied contract with the Government where a management consultant submitted a second proposal for 50 man-days of service to a private corporation established by the Blackfeet Indian Tribe after the consultant's initial proposal concealed the extent of the service contemplated and did not indicate that any additional service would be required. Payment for the service in the initial proposal by a Government grant to the tribe did not give rise to an obligation to pay for the service in the second proposal since there was no Government acceptance of the second proposal and all assurances that the consultant would continue to be paid came from persons outside the Government.

APPEARANCES: Wallis S. Stromberg, Attorney at Law, Denver, Colorado, for Appellant; Gerald R. Moore, Department Counsel, Billings, Montana, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

This is a timely appeal from a decision of the contracting officer which denied the claim of W. D. Hyland and Hyland/Associates for furnishing management assistance to the Blackfeet Indian Developers, Inc., for the reason that there was no contractural relationship between the Bureau of Indian Affairs and W. D. Hyland and Hyland/Associates.

Findings of Fact

Blackfeet Indian Developers, Inc. (BIDI) was a business established by the Blackfeet Tribe to develop housing on the Blackfeet Reservation. In 1977 BIDI borrowed $350,000 from the Browning Bank of Montana, N.A.

Ninety percent of the loan was guaranteed by the Bureau of Indian Affairs (BIA) pursuant to the Indian Finance Act, P.L. 93-262 (Tr. 5).

The Browning Bank submitted two specific requests to the BIA for management assistance in connection with the loan guarantee, as provided for in 25 CFR 93.4, on Sept. 26, 1977, and Dec. 12, 1977 (Tr. 6).

Hyland began providing management services for BIDI on the first of Sept. 1977, with the understanding that the Blackfeet Tribe would pay for the services until such time as the BIA funding could be obtained (Tr. 39).

Although both Hyland and Daniel Doxtater, Financial Advisor to the Blackfeet Tribe and Chairman of the Board of BIDI, knew from the first of Sept. 1977, that approximately 100 man-days of management assistance would be required at a cost of $40,000 to $50,000, Doxtater advised Hyland that a $50,000 grant was not appropriate but that if it was submitted in two separate requests, it would go through and there would not be any problems (Tr. 34; App. Exh. 7: Doxtater Deposition Tr. 38, 39).

Hyland's proposal dated Sept. 15, 1977, in accordance with Doxtater's suggestion, was for 50 man-days of management assistance for BIDI at a cost of approximately $20,000. The proposal contained no indication that there would be any requirement for additional management assistance at the conclusion of the work outlined in the proposal (Tr. 83).

Daniel Doxtater's letter of Sept. 16, 1977, forwarded Hyland's proposal to the bank. The letter did not give any indication that Hyland expected to perform work in excess of that set forth in Hyland's initial proposal of Sept. 15, 1977. Doxtater stated that he did not intend to indicate to the bank that he anticipated more work from Hyland than the proposal specified (App. Exh. 7: Doxtater Deposition Tr. 37-41, Deposition Exh. 1).

Lorne W. Neill, area contracts and grants officer for the BIA in Billings, Montana, from 1974 to 1980, received a memorandum dated Sept. 30, 1977, from the Area Credit Officer, approving the Hyland proposal of Sept. 15, 1977, which had been forwarded to the BIA Office in Billings by the bank. The memorandum requested that a contract be executed with Hyland in accordance with Hyland's proposal (Tr. 125-26; Appeal File Tab 1).

Neill put the proposal of Sept. 15 into a contract format and forwarded the proposed contract to Hyland by letter of Nov. 17, 1977, for review, approval, and signature. The letter also requested that Hyland complete blocks 23, 24, and 25 of Standard Form 26 and return all copies of the contract to the Billings Office of BIA (Tr. 126-27).

Shortly after sending the proposed contract to Hyland, Neill learned that much of the work had already been performed. Since his office did not have authority to approve contract costs incurred prior to the execution of a contract, he determined that a direct grant to the tribe would be needed for the tribe to cover the expenses of the management serv-

ices provided by Hyland. The parties differ as to whether the contract was signed by Hyland prior to being returned or whether it was returned unsigned (Tr. 41, 130, 131). The parties stipulated that no written contract was executed between Hyland and the BIA (Tr. 6–7).

Neill signed a grant in the amount of $21,000 to the Blackfeet Tribe on Dec. 20, 1977, to cover the management services contained by Hyland's proposal of Sept. 15, 1977. The financial status report for the grant, submitted by the tribe, showed receipt of $21,000 by the tribe and payment of $21,000 as of Jan. 31, 1978 (Tr. 149, 150; Appeal File Tab 3).

On Nov. 15, 1977, Hyland submitted to BIDI a second proposal covering an additional 50 mandays of management services since it was anticipated that the funds provided for the initial 50 hours of services would be depleted by the week of Dec. 12, 1977 (Tr. 43, 44, 91, 92). Mr. Hyland assumed that the second proposal was forwarded by BIDI to the bank and that the bank sent it on to BIA, but he had no direct knowledge as to the procedure that was followed (Tr. 92). Mr. Hyland was assured by Dan Doxtater and Stewart Miller of the bank that funds for the additional work would be sorted out one way or the other (Tr. 92), but Mr. Hyland did not speak with anyone in BIA at the time of the submission concerning payment for work done after Dec. 12, 1977 (Tr. 93).

Near the end of Dec. 1977, Mr. Hyland was advised by Jack Shumate, area credit officer who had approved the original proposal of Sept. 15, that there was serious doubt and question as to whether BIA was going to continue funding any technical assistance to BIDI (Tr. 99).

At a meeting held on Jan. 25, 1978, to discuss the future of BIDI, Hyland was advised by Jack Shumate that BIA was not going to provide any more funds for technical assistance (Tr. 99). At the same meeting, Dan Doxtater inquired how Hyland would be paid for the work it had done. Warren Hyland testified that Anson Baker, Superintendent of the Blackfeet Indian Reservation for BIA, responded "I will take care of it" (Tr. 101). Jim Baker, acting chairman of the tribal council, agreed that he would assist Anson Baker in making sure Hyland was paid (Tr. 101, 102). Anson Baker testified that the only statement he could remember making was that he would look into some possible funding (Tr. 175).

In Feb. 1978, Mr. Hyland submitted an invoice for his expenses to Dan Doxtater. Mr. Hyland testified that he was, in essence, working for Doxtater, so he gave Doxtater the bills (Tr. 103).

Dan Doxtater stated that he recommended at the meeting on Jan. 25 that it would take $1,250,000 for BIDI to pay its bills and continue to operate. The tribal council decided not to give any further support, so the bank called its loan and seized all of

the assets of BIDI. The company ceased to exist sometime in Feb. or early Mar. 1978 (App. Exh. 7: Doxtater Deposition Tr. 37, 38).

Decision

Appellant asserts that in the light of the circumstances surrounding the two requests for management assistance submitted by the bank to BIA, an implied contract can be inferred to the effect that BIA had agreed it would pay for the management assistance and that it would be obligated to pay the balance owed the appellant. A further argument has been advanced, citing *United States* v. *Georgia Pacific Co.*, 421 F.2d 92 (9th Cir. 1970), to the effect that the Government should be estopped from denying a commitment to pay for the management assistance furnished by Hyland to BIDI.

In *Georgia Pacific, supra,* at page 96, the court described the following four elements which must be present in order to establish an estoppel:

> (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the other party has a right to believe it is so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

In the present case, it was Hyland who knew the true facts regarding the amount of management assistance that would eventually be requested. It is not a matter of record why Dan Doxtater considered that a request for the full 100 days of assistance was inappropriate, but Hyland readily acquiesced to Doxtater's recommendation that the request be split into two parts. Hyland's initial proposal for 50 days of management assistance effectively concealed from BIA that any assistance beyond 50 hours would be required or requested. Since the Government was ignorant of the true facts and Hyland knew the facts but concealed them from the Government, there can be no estoppel running against the Government.

Appellant's assertion that an implied contract can be inferred from the circumstances relates only to the work performed pursuant to the second proposal. The testimony of Mr. Hyland establishes that Hyland was paid $21,000 for the management assistance set forth in the initial proposal. Hyland's invoice dated Oct. 3, 1977, was paid directly by the tribe, as it had promised. Later, when the tribe received the grant of $21,000 for the services in Hyland's proposal, it paid the balance of $12,444.35 to Hyland on Jan. 15, 1978 (Tr. 40, 67).

The Court of Claims laid down the requirements for an implied in fact contract in *Russell Corp.* v. *United States,* 210 Ct. Cl. 596 (1976), *cert. denied,* 429 U.S. 1073 (1977), and reiterated them in *Tree Farm Development Corp.* v. *United States,* 218 Ct. Cl. 308 (1978), as follows:

> A contract implied in fact requires a showing of the same mutual intent to contract as that required for an express contract. The fact that an instrument was not executed is not essential to consummation of the agreement. It is essential, however, that the acceptance of the offer be manifested by conduct that indicates assent to the proposed bargain. The requirements of mutuality of intent and the lack of ambiguity in offer and acceptance are the same for an implied-in-fact contract as for an ex-

press contract; only the nature of the evidence differs. [Footnotes omitted.]

The testimony of Warren Hyland discloses that there was no mutuality of intent between Hyland and BIA regarding performance and payment for the services outlined in Hyland's second proposal. On direct examination, Warren Hyland was asked if he had discussed funds for the second proposal with BIA. Without identifying to whom he talked, Mr. Hyland stated that he had discussed the matter and that he was left with the impression that there was some question as to whether BIA was going to continue pouring money down the drain of BIDI (Tr. 54, 55). When asked why he continued working on the job, he responded that he had two reasons. He did not feel that he could leave a company that was floundering to sink, and secondly he was assured by Doxtater that they would find some means of funding or that the tribe would pick up the tab if funding could not be arranged through a grant or technical assistance (Tr. 55, 56).

On cross-examination, Mr. Hyland amplified the previous testimony by stating that he was personally and directly assured by Dan Doxtater and Stewart Miller of the bank that the funds would be sorted out one way or another (Tr. 92). Mr. Hyland further testified that he was, in essence, working for Doxtater and so he gave the bills to Doxtater (Tr. 103).

The only reasonable conclusion to be drawn from the testimony of Mr. Hyland is that assurances of payment for the second proposal came from Dan Doxtater, an employee of the tribe, and Stewart Miller of the bank, neither of whom were employed by BIA. The Board finds that there was no contract between Hyland Associates and BIA due to a lack of mutuality of intent.

The appeal is denied.

G. HERBERT PACKWOOD

ADMINISTRATIVE JUDGE

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

SENECA-CAYUGA TRIBE OF OKLAHOMA v. DEPUTY ASSISTANT SECRETARY—INDIAN AFFAIRS

10 IBIA 90

Decided *September 2, 1982*

Appeal from decision of the Deputy Assistant Secretary—Indian Affairs restoring 189 acres of former trust lands to the Wyandotte Tribe.

Affirmed.

1. Indian Lands: Ceded Lands: Restoration

The Seneca-Cayuga Tribe ceded lands to the United States by treaty which provided for creation of a reservation for Wyandotte Tribe. Where the Wyandotte Tribe later ceded the lands to the United States for use as school lands, the subsequent restoration of those lands by the United States to the Wyandotte Tribe, under 40 U.S.C. § 483(a)(2), was held proper.

APPEARANCES: Glenn M. Feldman, Esq., for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

On June 8, 1981, appellee Deputy Assistant Secretary—Indian Affairs Roy H. Sampsel approved a decision by the Muskogee Area Director, Bureau of Indian Affairs (Area Director, Bureau), to restore to tribal ownership 189 acres of land which had been used for the Seneca Indian Boarding School operated by the Bureau within the former Wyandotte Reservation in Oklahoma. The Seneca school was closed on June 15, 1980, and the lands used for the school, including the school buildings, were declared excess to needs of the Bureau. Earlier, on Nov. 29, 1979, the Wyandotte Tribe of Oklahoma had applied to the Bureau for return of the lands, formerly held in trust for the tribe, to tribal ownership pursuant to provision of the Act of Jan. 2, 1975 (1975 Act), 88 Stat. 1954, 40 U.S.C. § 483(a)(2) (1976).

On May 15, 1980, the chief of the appellant Seneca-Cayuga Tribe disputed the Wyandotte claim, asserted that appellant had a prior claim to obtain return of the ceded school lands, and claimed the right to obtain the return of the school lands under the 1975 Act. On June 27, 1980, the Area Director gave notice that pursuant to the 1975 Act, the lands had been returned to the Wyandotte Tribe. The Area Director's decision was timely appealed to appellee who affirmed the Area Director in an opinion based upon a legal analysis of the 1975 Act and prior Departmental decisions which thus generally summarized the case presented on appeal:

> The Seneca Indian School was established in 1868 within the boundaries of the former Wyandotte Reservation. The school was initially placed on a tract reserved for school purposes, which was later enlarged by property purchased from individual landowners. Sometime before creation and allotment of the Wyandotte Reservation, the school's site was also within the former Seneca Reservation. The Seneca Tribe states that the school's location within the prior established Seneca Reservation, Treaty of February 28, 1831 (7 Stat. 348), and the Reservation of the Seneca-

Shawnee Mixed Band, Treaty of December 29, 1832 (7 Stat. 411), operates to create a superior claim to the property in the Seneca Tribe, due to that group having an interest in the site first-in-time. However, under Article I of the Treaty of February 23, 1867 (15 Stat. 513), the Seneca and other interested tribes relinquished and ceded their then existing interests in the site of the Seneca School to the United States. By virtue of Article 13 of the Treaty, these tribes' interests were then reconveyed to the Wyandotte Tribe, thus establishing the Wyandotte Tribe as the last and only beneficial owner of the former school lands.

(Deputy Assistant Secretary Roy H. Sampsel's Decision dated Jan. 8, 1981). To determine the validity of the decision to return to the Wyandotte Tribe the former trust lands it is necessary to consider the history of the land ownership of the school tract.

By Article 2 of the Treaty of Feb. 28, 1831 (7 Stat. 348), with the Seneca, the Federal Government established a reservation in Indian territory for the Seneca Indians. It is within this reservation area that the Seneca School lands are located. In that same year, a reservation was established for the Seneca-Shawnee Mixed Band which was contiguous to the previously established Seneca Reservation. This reservation, of approximately 60,000 acres, was established by Article 2 of the Treaty of July 20, 1831 (7 Stat. 351).

By the end of 1832, the Senecas and the Seneca-Shawnee Mixed Band had decided to confederate at the United Tribe of Seneca and Shawnee Indians. By Articles 1 and 2 of the Treaty of Dec. 29, 1832 (7 Stat. 411), with the Seneca and Shawnee, these tribes ceded back to the United States Government all of the Seneca-Shawnee Mixed Band Reservation and all Seneca Reservation lands lying west of the Neosho River. In return, the tribes were granted 60,000 acres of land to the north of what remained of the Seneca Reservation. While the two groups were to occupy the lands in common, the treaty required two letters patent to issue: the north half of the reservation to the former Seneca-Shawnee Mixed Band and the south half to the Senecas, which later became the Seneca-Cayuga Tribe of Oklahoma. Located within this southern half of the Seneca Reservation are the former Seneca School lands.

By Article 13 of the Treaty of Feb. 23, 1867, with the Seneca, Mixed Seneca and Shawnee, Quapaw, and others (15 Stat. 513, 516), 20,000 acres of land ceded by the Seneca-Cayuga Tribe to the United States by the treaty, including the Seneca School site, were conveyed to establish a reservation for the Wyandotte Tribe. The Seneca Indian School was established in 1868 by a Quaker mission. One hundred and sixty acres of Wyandotte land were withheld from allotment and reserved for school purposes. The Wyandotte Tribe was paid $10,000 for this 160-acre tract under the Act of June 21, 1934 (48 Stat. 1184). Additional purchases of private lands for use for school purposes, and subsequent dispositions of excess lands, have occurred during the intervening years.

The property transferred to the Wyandotte Tribe under the 1975 Act consists of the remaining Seneca School lands, approximately 189 acres. Although the property conveyed in trust was all

Seneca School land at the time the school closed, and was all former trust land, not all of the lands has been acquired by the Federal Government at the same time or in the same manner. Schedule A attached to this decision is a map of the 189-acre tract which indicates the manner of acquisition for the various identifiable parts of the tract. Of the total 189 acres, only that portion designated as "A," or approximately 89 acres, remains from the original 160-acre parcel withheld from allotment by the Wyandottes and subsequently purchased by the United States in 1934. The remaining 71 acres of the original 160-acre tract, designated parcel "E," were declared excess and conveyed as part of a 114-acre parcel to the Inter-Tribal Council, Inc., which includes both the Wyandotte and Seneca-Cayuga Tribes.[1]

The remainder of the 189-acre tract to be transferred, approximately 100 acres, was acquired by purchase from private landowners during the 1940's. Parcel "B," approximately 43 acres, was acquired by purchase in 1946. Parcel "C," approximately 40 acres, was acquired by purchase in 1940. Parcel "D," approximately 17 acres, was also acquired by the United States as part of a purchase in 1940. Thus, the 189-acre tract is divisible into two distinct parts: an 89-acre tract (upon which the school buildings are situated) which was purchased by the United States from the Wyandotte Tribe in 1934 and a 100-acre tract purchased from private owners during the 1940's.

Appellant contends that, in view of the ownership history of the school lands, appellee erred when he found the Wyandotte Tribe eligible to receive the school land under the provisions of the 1975 Act. Appellant contends that only the Seneca-Cayuga Tribe meets the statutory transfer criteria of the 1975 Act as to the entire 189-acre tract. Appellant also argues that, although both the Wyandotte and Seneca-Cayuga Tribes meet the transfer criteria of the 1975 Act in the case of the 89-acre tract, the claim of the Seneca-Cayuga Tribe to the 89-acre parcel is superior to that of the Wyandotte Tribe.

The 1975 Act amends the Federal Property and Administrative Services Act of 1949, Act of June 30, 1949, 63 Stat. 377, 378, 40 U.S.C. §§ 471–544 (1976). The purpose of the 1975 amendment was to provide a means by which excess real property held by the United States could be transferred without compensation to the Secretary of the Interior to be held in trust for Indian tribes within whose reservation excess Federal property was located. Because of the unique situation in Oklahoma, with regard to Indian reservations, a separate provision was included to permit transfers to Oklahoma tribes. This provision, under which the transfer to the Wyandotte Tribe was made in this case, recites:

[1]The land was acquired by the Act of Jan. 2, 1975, 88 Stat. 1920, in trust for the Seneca-Cayuga Tribe, Quapaw Tribe, Eastern Shawnee Tribe, Miami Tribe, Peoria Tribe, Ottawa Tribe, Wyandotte Tribe, and Modoc Tribe, all of Oklahoma.

Provided, That such transfers of real property within the State of Oklahoma shall be made to the Secretary of the Interior to be held in trust for Oklahoma Indian tribes recognized by the Secretary of the Interior when such real property (1) is located within boundaries of former reservations in Oklahoma as defined by the Secretary of the Interior and when such real property was held in trust by the United States for an Indian tribe at the time of acquisition by the United States, or (2) is contiguous to real property presently held in trust by the United States for an Oklahoma Indian tribe and was at any time held in trust by the United States for an Indian tribe.

40 U.S.C. § 483(a)(2). Examination of the legislative history of the 1975 Act reveals that the provision of the statute to be applied by the Department in this case was added by the Senate committee to which the legislation, originating in the House as H.R. 8958, had been referred. The Senate report, S. Rep. No. 93-1324, 93d Cong., 2d Sess. 1, 2 (1974), explains the amendment:

The Committee amendment to H.R. 8958 adds a provision that will extend the same disposal authority for excess land in Oklahoma that is provided by the bill for the rest of the United States. This provision is necessitated by the fact that there are no reservations in Oklahoma.[2] Without the proviso added by this amendment the authority granted by H.R. 8958 would have no applicability to Oklahoma. The amendment provides for transfers of excess public land to Oklahoma tribes if such land is located within the boundaries of former reservations in Oklahoma as defined by the Secretary of the Interior if such land was held in trust by the United States for a recognized Indian tribe at the time of its acquisition, or if the land is contiguous to land held in trust for an Oklahoma tribe and at any time in its history was held in trust by the United States for an Indian tribe.

[2] *But see Chyenne-Arapaho Tribes* v. *Oklahoma,* 618 F. 2d 665 (10th Cir. 1980).

The meaning of the classification of land to "excess" is explained at H.R. Rep. No. 93-1339, 93d Cong., 2d Sess. 2-4 (1974):

Surplus real property, in contrast to excess real property, is Federal property which, after being screened by every Federal agency, has been found to be without further need by any Federal agency. Its disposal thereafter may be by one of several routes, including donation to a State or local public agency for health, education, or conservation purposes, or sale to a State or local public body, generally for a continued public use. Property acquired in neither of the above ways may be purchased by other sources through competitive or negotiated sale.

Such property can represent fairly large acreage and can be located in widely distributed parts of the United States and territories, generally without any relationship to the location of an Indian reservation.* * *

* * * Under existing law, government-owned land within an Indian reservation may become excess to the needs of the Federal agency using such land. The property is reported excess to the General Services Administration, which, in turn, "screens" the property through other agencies of the Federal government to see if they have a need for it. If not, the property becomes surplus and can be sold to non-Federal users.

Under present law, the Indian tribe within whose reservation the property is located has no preferential rights in obtaining the property. If the Indian tribe wishes to obtain the land, a request must be processed by the Department of the Interior, as trustee for the tribe. Interior has discretion to make a request for the land. GSA, in turn, weighs the request of Interior against those of other Federal agencies. If it determines that Interior's priority is greatest, it will transfer the property to Interior if OMB agrees. If, however, GSA decides upon a different priority, or if Interior does not make a request in behalf of the Indian tribe, or if OMB does not approve the transfer, the tribe will not obtain the land or facilities. Such a case was, in fact, testified to at the Subcommittee hearings wherein a tribe requested the use of excess Federal property situated within its reservation to support job training and health

programs, but was turned down by GSA because OMB objected.

In earlier debate, the general purpose and anticipated effect of the legislation are described by the proponents of the bill in the House at 120 Cong. Rec. H10710, H10711 (daily ed. Nov. 18, 1974):

Mr. JAMES V. STANTON. Mr. Speaker, this bill provides that when Federal Government property located within the boundaries of an Indian reservation is no longer needed by the Federal Agency using it, the property would pass to the Department of the Interior to hold in trust for the benefit of the Indian tribe on the reservation.

Under present law, an Indian tribe has no preferential rights to excess or surplus property located within the boundaries of its reservation. Instead, when Federal property becomes excess or surplus, it may be passed on to third parties who may use the property for purposes inconsistent with the activities of the Indian tribe.

In most cases, these properties were originally taken from the reservation by the Federal Government for defense uses, for fire protection facilities, or for use by the Bureau of Indian Affairs. The tribes never intended that the land be passed on to other uses at the time the Department of Defense, the Department of Agriculture, or the Bureau of Indian Affairs no longer maintained them for their original purposes. It is only fair that once the use to which they were originally dedicated is fulfilled and the properties abandoned, that they then pass back to the Indian tribe to again become a part of the tribal reservation lands.

The amount of property expected to be covered by this legislation is not significant in terms of acreage, but it is significant in terms of what it means to the Indian tribes whose reservations would be affected by the intrusion of unrelated activities.

Mr. Speaker, the original legislation that was introduced was much more extensive and would have authorized the conveyance of surplus Government properties located outside Indian reservations to Indian tribes. The Government Operations Committee amended the bill to delete that provision because we were concerned about extending special treatment to any particular group of people. The committee amended the bill to cover only lands located within the boundaries of the reservations.

This bill, as amended, passed the Government Operations Committee unanimously. It will not result in any additional cost to the United States. In fact, the properties affected will remain in Federal Government ownership. They will simply be dedicated to the uses for which they were originally intended when they were incorporated into the Indian reservations many years age.

* * * * *

Mr. MEEDS. Mr. Speaker, I would like to express my appreciation to Mr. Holifield, chairman of the Government Operations Committee, and to Mr. Brooks, chairman of the Government Activities Subcommittee, for their consideration in bringing my bill to the floor for action.

The bill, as reported by the committee, provides that the Administrator of the General Services Administration shall transfer Federal lands which are within an Indian reservation and which have been declared excess to the needs of the administering agencies to the Secretary of the Interior to be held in trust for the particular Indian tribes involved. As amended by the committee, the bill provides that such transfers shall be without compensation.

Most of the lands which would be involved in such transfers are lands which have either been reserved or acquired by the Federal Government for use by the Bureau of Indian Affairs or the Indian Health Service in carrying out programs for the benefit of the Indians. The tracts are generally small in size and would be of benefit only to the Indian tribe.

In many cases, particularly with respect to Indian tribes with a small or nonexistent land base, these lands are needed for industrial development purposes, for housing projects, for tribal administrative purposes, or for land consolidation. Without this legislation, transfer of such lands must be accomplished by special legislation in every case.

In addition, this bill, if enacted, would relieve the Interior and Insular Affairs Committee from the time-consuming burden of routinely considering and passing the many land tansfer bills which are presented to us each Congress. Conferring this rather narrow authority on the Secretary of the Interior and the Administrator will free up more of the time of the committee and my subcommittee on Indian Affairs to address the more substantive problems of Indians and Indian tribes.

The ultimate effect of the statute is summarized at S. Rep. No. 93-1324 93d Cong., 2d Sess. 2 (1974): "H.R. 8958 makes it mandatory that GSA convey excess land located within a reservation to the Secretary of the Interior to be held in trust for such use as the Indian tribe located on the reservation believes best." The effect of the provision of the 1975 Act dealing with Oklahoma Indian lands therefore is to extend the provisions of the Act to Oklahoma and to make mandatory the conveyance of excess lands of the character of the Seneca School land to an eligible tribe which has applied for return of former trust lands.

[1] In his June 8, 1981, decision appellee relies upon prior Departmental authority concerning the application of similar legislation to those instances where there has been conflict over which of several tribes is the proper recipient of former trust lands about to be restored to tribal jurisdiction. Thus, in an analogous situation, sec. 3 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 463(a) (1976), a statute which provides for the restoration to tribal ownership of remaining surplus lands of any Indian reservation, was construed by the Solicitor of the Department in opinion M-29616 reported at I Op. Sol. 806 (1938). In this reported 1938 case considered by Solicitor Margold, he held that where a tribe ceded a portion of its reservation to the United States for the benefit of another tribe, it could not later claim to be entitled to restoration of the lands which has subsequently been taken by the United States.[3] According to the analysis by the Solicitor, a cession by one tribe to the United State for the benefit of another tribe bars a later claim for restoration of the lands to the ceding tribe, absent consent of the tribe to which the land was ceded. Appellee correctly applied the Solicitor's reasoning to this appeal. Although restoration is here sought under a different authority, as between the two tribes, the Wyandotte has a superior claim to the former school lands by virtue of the cession of the land to the United States for use as an Indian reservation by the Wyandotte Tribe.[4]

To avoid this result, appellant seeks to distinguish two types of property within the 189-acre tract: The 89-acre portion shown at A is conceded to be within the original reservation ceded by the Seneca to the Wyandotte Tribe; and the 100-acre portion shown at B, C, and D, acquired by purchase by the United States from private owners is claimed to be transferable only to appellant, however, because the land, though also former reservation land, was not

[3] *Accord United States* v. *Choctaw Nation*, 179 U.S. 494 (1900); *see also* Federal Indian Law 715 (1958).

[4] *See* Cohen, Handbook of Federal Indian Law (1942) at page 335 for the proposition that the last beneficial owner of ceded lands should be entitled to the proceeds therefrom.

held in trust for an Indian tribe at the time it was acquired by the United States.

This approach ignores the language of the 1975 Act which (as appellant points out) is divisible into two distinct provisions governing restoration: The first provision permits restoration to a tribe if the land is within the boundaries of a former reservation, provided the land was held in trust for an Indian tribe at the time it was taken by the United States; alternatively the second provision permits restoration provided the land to be restored is located contiguous to present trust property held for a tribe and is former trust property. In this case, the 100-acre tract fits into the second statutory category while the 89-acre tract fits into both categories. The entire 189-acre tract is therefore properly transferable under the 1975 Act. The fact that the entire 189 acres was not acquired simultaneously by the United States in a single transaction does not either logically or legally affect the resulting decision as to which tribe should receive the land.[5] As between the two tribes, the Wyandotte Tribe has priority for purposes of transfer by virtue of the cession to it for use as a reservation of the former Seneca-Cayuga Reservation. The land, which was formerly Wyandotte Reservation trust land, is a contiguous unit, which adjoins lands held in trust for the Wyandotte Tribe. Thus, the land is located within the former Wyandotte Reservation, in the statutory meaning of that phrase. Since the Wyandotte Tribe is the tribe within whose former reservation the lands are found, and since it was the last beneficial owner of the lands, it has the first claim to the property under the 1975 Act.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Deputy Assistant Secretary—Indian Affairs transferring 189 acres of former school lands to the Wyandotte Tribe is affirmed.

This decision is final for the Department.

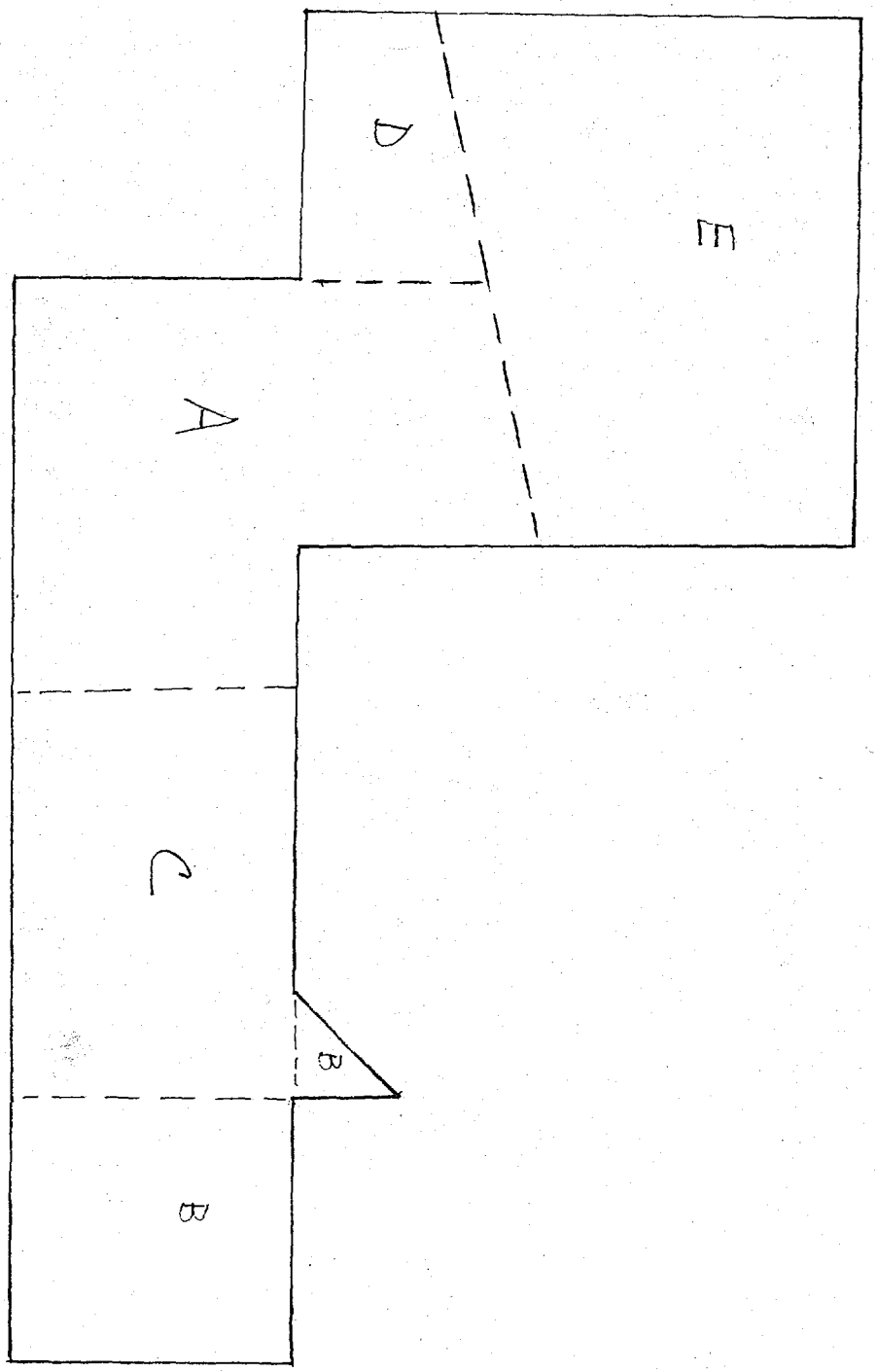
FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

JERRY MUSKRAT
Administrative Judge

[5] Appellant has suggested that a compromise solution is offered by transferring one tract to appellant and the other to the Wyandotte Tribe. The difficulty with this solution is that, although the two tracts have a slightly different chain of title, both tracts are properly transferable under the 1975 Act to the Wyandotte Tribe. While the Wyandotte Tribe could waive its prior claim in favor of the Seneca-Cayuga Tribe, it has not done so.



Schedule A

APPEAL OF BERGEN EXPO SYSTEMS, INC.

IBCA-1348-4-80

Decided *September 9, 1982*

Contract No. 14-08-0001-17109, Geological Survey.

Granted.

Contracts: Construction and Operation: Contract Clauses—Contracts: Construction and Operation: Warranties—Rules of Practice: Appeals: Burden of Proof

A claim for breach of warranty is not established under a contract calling for the furnishing of an audiovisual system where the Government asserts that the system was defective at the time of acceptance and the Board finds that the nonlatent preexisting defects forming the basis of the warranty claim were not excluded from the coverage of the standard Inspection clause making acceptance conclusive, except as regards latent defects, fraud, or such gross mistakes as amount to fraud.

APPEARANCES: Sam Zalman Gdanski, Attorney at Law, New City, New York, for Appellant; William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

In this warranty case, the Government is claiming $15,673.33 from the contractor on the ground that the audiovisual system called for by the instant contract was defective at the time of acceptance.

Background

The above-captioned contract was entered into between the Geological Survey (Survey) and Bergen Expo Systems, Inc., (Bergen) under date of July 19, 1977 (Appeal File 2).[1] The nature and scope of the work called for by the contract was stated in the following terms:

> The Contractor shall provide all materials, personnel, and equipment unless othewise set forth herein to furnish all required items/components, configure, install and demonstrate satisfactory operation of said items/components as a complete audio-visual conference room system at the U.S. Geological Survey, OCS Training Facility in Metairie, Louisiana in accordance with the terms, conditions, specifications and drawings set forth in request for proposal No. 36-77 dated April 22, 1977 and the contractor's proposal dated May 23, 1977 as amended by letter dated May 24, 1977.[2]

The contract work was scheduled to be completed within a period of 90 days or by Oct. 17, 1977 (AF 2). Installation of the audiovisual system was completed during Oct. 1977. The contractor's invoice in the amount of $26,630 was approved for payment on Nov. 11, 1977 (AF 6 and 29).

Prepared on Standard Form 26 (July 1966), the contract included the provisions of Standard Form 33A (Mar. 1969), as amended.[3] It

[1] Hereafter appeal file exhibits will be identified by AF followed by reference to a particular exhibit number.

[2] As to the effect of referencing the contractor's proposal in this context, the independent consultant retained by the Government states:

"[T]he contract * * * placed the specifications of the Government and those provided by the contractor in direct conflict with one another on several key sub-systems * * *. It is unfortunate that these inconsistencies were not discovered through a review of the contractor's submission prior to contract award, for some of the ensuing operational problems certainly could have been avoided."

(AF 34 at 2-3).

[3] One of the amendments involved the substitution of an "Order of Precedence" clause reading as follows:

Continued

was apparently contemplated that the work performed would be governed by the General Provisions of Standard Form 32 (Apr. 1975)[4] including Clause 5, Inspection, from which the following is quoted: "(d) * * * Except as otherwise provided in this contract, acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud."

In a letter under date of Nov. 1, 1977 (AF 3), the contractor was advised that work remaining to be done included (i) replacement and installation of the rear projection screens; (ii) demonstration of satisfactory operation; and (iii) 1 day training for Government personnel. The contractor's response of Nov. 7, 1977 (AF 4), referred to a statement by Mr. Rainey (responsible for technical direction) in which he had noted that the radio control needed readjustment. The letter also stated that the contractor's New Orleans representative was available on call for these and other warranty items and that he would make a monthly inspection call during the warranty period.

By mid-February of 1978 the Government had become concerned about some of the problems that had surfaced in attempting to operate the audiovisual system. In a memorandum dated Feb. 17, 1978 (AF 6), the technical officer for the contract noted (i) that when the contractor completed the installation of the system, it had seemed operational except for minor items; (ii) that problems of a more serious nature had arisen the first time the equipment was required for a Survey function; (iii) that the Government's frustration had increased when it was learned that Mr. Glaser (retained to represent the contractor in the New Orleans area) was authorized to spend only 4 hours per month at the Metairie facility for completion of the original installation, as well as for repairs and maintenance; (iv) that a new issue and a major problem involved two cassette recorders that would not record; [5] and (v) that one of the original unsolved matters related to spots on both of the rear projection screens.

In a memorandum to the contracting officer dated May 23, 1978 (AF 11), the contract technical officer expressed the opinion that the contractor did not intend to bring the system up to the contractually specified performance level, noting that the contractor had been unresponsive to the re-

"In the event of any inconsistency between provisions of this solicitation or any resultant contract, the inconsistency shall be resolved by giving precedence in the following order:

"a) SF 26 Award Contract; b) The contract schedule; c) The Specifications; d) Drawing attached; e) Attachment 1; f) Other provisions of the contract, whether incorporated by reference or otherwise; g) the Solicitation document in its entirety and any amendments thereto and, h) the Offeror's Technical proposal."

(AF 2).

[4] The contract included five pages of Alterations to General Provisions, Standard Form 32 (Apr. 1975). The Inspection clause quoted from in the text is prescribed as a required clause for fixed-price supply contracts. *See* FPR 1-7.102 and FPR 1-7.102-5.

[5] In a memoradum dated June 26, 1978 (AF 16), the contract technical officer stated that Bergen's local representative, Custom Audio, seemed to have solved the problem of cassette recorders not being able to record. Over a year later NAVCO (a firm retained by the Government as a consultant) found that one of the cassette recorders could not function in the record mode because an "output" circuit jack was plugged into the "input part of the machine (AF 34, attachment 4, photographs 1-4).

quests of the Metairie office for effective corrective action. In a followup memorandum dated June 26, 1978 (AF 16), the technical officer provided details of the problems encountered in attempting to use the audiovisual system,[6] among which were (i) the absence of mounting or positioners for two of the cassette recorders; (ii) the fact that the radio control function for the system was designed to be operable by remote control but could not be so operated;[7] and (iii) problems involving the projectors.[8] The memorandum expressed the hope that the rear projection screens would be replaced. This was done in accordance with the terms of the contractor's warranty (AF 12-16). The replacement screens were inspected and accepted by the Government.

Citing the contract's warranty provisions, the contracting officer wrote the contractor on July 26, 1978, to say that the following corrective actions would have to be taken by Aug. 18, 1978:

a. Mount two cassette recorders to the rack to avoid having them slide back at the touch of a hand.

b. Supply drawings or specifications for the radio control system.

c. Case the front projection screens.

d. Implement procedures for repair of system failures within 48 hours.

e. Provide sufficient custom positioners to properly align the projectors in Room A.

f. Eliminate interference in the remote control system from outside radio signals as required by paragraph 8.8.1 of the specifications.

(AF 17).

By Aug. 22, 1978, the deadline established for the completion of the corrective work had not been met. On that date (AF 21), the contracting officer notified the contractor that if action were not initiated and the Survey contract office informed by Aug. 29, 1978, the Government would have the work performed by a third party. Subsequently, the contractor took a number of actions. It wrote to Cardinal Sound Co.[9] on Oct. 4, 1978 (AF 24), to say it had instructed the transportation company to invoice Bergen for the freight involved in the returned of the Remcon wireless remote controls and to request Cardinal Sound Co. to return the units as soon as they had been repaired.[10] In a letter under date of Oct. 17, 1978 (AF 26), the contractor advised Custom Audio that it had written to another company which specializes in projection systems to take care of optical problems but that it was requesting that Custom Audio continue to service the audio and wireless remote control system. Geological

[6] One of the specification provisions considered not to have been met was paragraph 9.1 reading as follows:

"At the time of delivery, the contractor shall provide a wiring diagram of the system and a complete bound instruction book, including complete schematics and servicing information, and other technical data for each and every piece of equipment utilized in the system as well as diagrams covering his own wiring."

(AF 2 at S-12).

[7] After noting that Bergen had not provided drawings or specifications for the radio control system and asserting that this was a violation of paragraph 9.1 of the specifications, the technical officer states: "Custom Audio reports that they have tried for over three weeks to reach someone at Bergen to ask for these specs and that their calls were not returned" (AF 16 at 2).

[8] "Bergen's bid identified their responsibilities in installing three projector stands (page 1 of Technical Proposal), custom positioners for all five projectors, and for proper alignment of these projectors. In room A, proper alignment of projectors by the contractor has not yet been achieved. 'Custom positioners' are at such a minimum for all projectors as to be useless. As an example, to achieve better alignment of one 35 mm projector, Bergen left it propped up on one leg with a pack of sandpaper."

(AF 16 at 3).

[9] Elsewhere in the record the company is also referred to as Cardinal Systems Corp. (AF 38), or Cardinal Systems, Inc. (AF 35).

[10] The radio control units were still not functioning satisfactorily on Mar. 8, 1979 (AF 30).

Survey was notified of the arrangements that Bergen had made (AF 28).

In a memorandum dated May 10, 1979 (AF 33), the conservation manager in Metairie, Louisiana, noted (i) that despite continued requests from that office and from the branch of contracts in Denver, the contractor had not brought the audiovisual installation up to contractual specifications and required performance level. Cited as examples of the contractor's failures were the nonfunctioning remote control system, misalignment of projectors, and some cosmetic features that were not finished by the contractor. The memorandum requested that arrangements be made to have the necessary modifications and repairs to the audiovisual system performed, upon the understanding that the costs of these services would be backcharged against the contractor.

The Government subsequently retained NAVCO as a consultant to evaluate the cause of the problem encountered by the Government in attempting to effectively use the audiovisual system installed by the contractor. In a report to the Survey dated July 6, 1979 (AF 34), NAVCO undertook to show that not only had the contractor failed to meet the Government's original specification but that in a number of instances it had also failed to satisfy the requirement of the technical specifications in its own proposal.

According to a memorandum from Division Headquarters of Survey dated Feb. 27, 1980 (AF 35), repair of the audiovisual system was completed by Cardinal Systems, Inc., on Nov. 20, 1979, at a total cost of $7,500. The same memorandum states that in order to assure proper supervision of the repair in accordance with the original specifications, as well as to acquire complete system operation and maintenance documentation required, but not delivered by Bergen, a contract to provide these services was entered into with NAVCO. This work was performed as required with final delivery of all products occurring on Dec. 18, 1979, at a total cost to the Government of $8,173.66. The memorandum requested the contracting officer to effect a charge-back action against Bergen to recover the sum of $15,673.66,[11] which was said to equal the sum of costs for services performed by Cardinal Systems, Inc., and NAVCO necessary for the successful repair and operation of the Metairie facility.

Demand for payment to the Government of the sum of $15,673.66 was made in the contracting officer's letter of Mar. 26, 1980 (AF 36), from which the instant appeal was taken. In the letter, the contracting officer noted that after completion of the project numerous deficiencies had

[11] Even as supplemented, the appeal file includes no payment vouchers or other evidence showing the actual amounts paid to Cardinal Systems Corporation or to NAVCO. Under decisions of this Board, the absence of such evidence would be fatal to the Government's claim for excess costs if a termination for default were involved. *See White Plains Electrical Supply Co. Inc.*, IBCA 984-2-73 (Nov. 12, 1974), 81 I.D. 647, 651, 74-2 BCA par. 10,932 at 52,017 ("[T]he failure of the Government to introduce into evidence any vouchers or canceled checks under the reprocurement contract is fatal to its attempt to establish entitlement to excess costs"), affirmed on reconsideration, 75-1 BCA par. 11,128.

developed which were related to the contractor by various letters; that the contractor had been given numerous opportunities to correct the deficiencies but had chosen to leave many of them uncorrected; that because of the contractor's unresponsiveness, the Government had brought in an independent consultant to perform an in-depth study of the system which had shown that the system was defective at the time of acceptance; and that based upon the finding of the study, the Government had obtained the services of two firms to correct defects in the system for which the total charge for the services of the firms was in the amount of $15,673.66.

Neither party having requested an oral hearing, the case will be decided on the basis of the written record. In response to the order settling record, the Government submitted additional appeal file exhibits numbered 37 through 41 and the substitution of photographs for the xeroxed copies of the same numbered photographs in the appeal file. Both parties filed briefs. In addition to its initial brief, the appellant has filed a supplemental reply brief and what it has termed a "second supplemental analysis." The Government has objected to the submission of the second supplemental analysis as untimely and as involving the use of a brief as a vehicle for the submission of evidence. Citing authority [12] it has moved to strike the second supplemental analysis from the record. For the reasons stated in the authorities cited (note 12 *supra*), the Government's motion to strike is granted. None of the additional material encompassed in the second supplemental analysis will be considered in reaching our decision on the issues involved in this appeal.

Position of the Parties

The parties agree that this is a warranty case. The record shows that acceptance had occurred and payment had been made before the Government first notified the contractor of deficiencies in the audiovisual system by letter dated Mar. 23, 1978 (AF 7). According to the Government, the principal issue in this case involves its rights under warranty. The Government brief states: (i) That the warranty makes the contractor responsible for repairing defects or failures which occur in the system within one year after acceptance; (ii) that the defects and failures did occur within the 1-year warranty period; (iii) that the contractor was given notice of such defects and failures within such period; (iv) that it is not disputed that the contract obligated the contractor to make the system operational; (v) that acceptance of the system by the Government was not conclusive as to either patent or latent defects; and (vi) that the Government's rights under the warranty survive inspection and acceptance [13] (Govt. Brief at 2–3).

[12] The authorities cited are *Sunset Construction, Inc.*, IBCA-494-9-64 (Oct. 29, 1965), 72 I.D. 440, 65-2 BCA par. 5,188; *Oshiro Gumi*, ASBCA No. 15678 (Mar. 22, 1972), 72-1 BCA par. 9,393; and *K. Square Corp.*, IBCA-95-3-72 (July 19, 1973), 73-2 BCA par. 10,146 at 47,712 ("[T]he inclusion of a separate document evidentiary in nature in a brief is inappropriate * * *.)

[13] *R. H. Fulton, Contractor*, IBCA-769-3-69 (Feb. 2, 1971), 71-1 BCA par. 8,674, is cited as authority. In

Continued

The warranty relied upon by the Government, as set forth in Sec. 5.0 of the specifications, is quoted below:

> All equipment shall be new and unused and the system warranty to be extended the U.S. Geological Survey shall be one year parts and labor. All equipment shall be subject to manufacturer's warranty with the exception that only equipment modified by the contractor shall be subject to the system warranty.
>
> In case of system failure or malfunctions the contractor shall repair and put the system or equipment into proper operation within forty-eight (48) hours (except weekends or legal holidays) from the time of notification by the contracting officer or his authorized technical representative.

(AF 2).

In addition to the warranty contained in the specifications, the contractor's proposal included a somewhat similar warranty reading as follows:

> All materials installed except GFE, will be warranted for one (1) year for parts and labor. Bergen's New Orleans based service technicians will respond to all calls within 24 hours (except weekends or legal holidays) and will restore system to proper operation within 48 hours.
>
> Bergen further warrantees that all wiring, cabling and installation will be done in a neat and workmanlike manner. All work performed will be in accordance with the highest standards of the audio-visual and broadcast industry.

(AF 1, technical proposal, at 10).

It is the Government's position that the contractor breached both of the above-quoted warranty provisions by failure to comply with individual provisions of the specifications; and that where it failed to correct the deficiencies called to its attention within the warranty period, the Government was entitled to correct the deficient system and recover the costs incurred from the contractor.[14]

Relying upon the findings of NAVCO, the Government asserts that the system's failure was caused by the appellant's poor workmanship in its installation of the system. The failure of the system to perform its specified functions are attributed by the Government to the equipment having been improperly wired (AF 34 at 12). The NAVCO report (AF 34) states at page 5: "Circuit connections are a maze of confusing, unlabeled wires. Some components are not connected at all, while others have bare, untaped, unshielded connections * * *."

The specification provisions concerned with wiring considered not to have been met include para-

Fulton the Government asserted a claim of warranty after all work on the contract had been completed and accepted. After referring to the fact that it is the Government which had the burden of establishing that a warranty has been breached and quoting the language from the Inspection clause pertaining to final acceptance, the Board states at page 40,280: "Under such language, the fact of acceptance must be accorded some significance and the burden of establishing facts sufficient to vitiate final and conclusive acceptance is on the Government, notwithstanding that the record at this point does not reflect the extent of the Bureau's inspection of the tanks." (Footnotes omitted.)

[14] The Government cites *Satterfield Electric Construction Co., Inc.*, ASBCA No. 17881 (Dec. 16, 1974), 75-1 BCA Par. 10,985, and *Universal Ecsco Corp.*, POD BCA No. 102 (Apr. 18, 1969), 69-1 BCA par. 7,612. The Government characterizes *Universal Ecsco* as involving facts similar to those present in the instant case.

The Board notes that the case upon which the Government relies principally was decided prior to the decision in *Instruments for Industry, Inc.* v. *United States*, 496 F.2d 1157 (2nd Cir. 1974), discussed in the text, *infra*, and that there is no discussion of or citation to *Instruments for Industry* in *Satterfield*.

graphs 4.1,[15] 9.1,[16] 9.2,[17] and 9.3.[18] Commenting upon the contractor's failure to adhere to the requirement of paragraph 9.2, the consultant states in his report (AF 34) at page 7:

No effort was made by the contractor to comply with this specification by identifying individual wires in the circuit. Wiring was in fact so tangled and confusing that "input" wires were found plugged into "output" sockets. The individual elements of the circuits would be terribly difficult and time consuming to trace * * *

(Govt. Brief at 7–9).

As to wiring, the Government consultant also found that the contractor failed to adhere to the requirements of its own proposal. Set forth below are excerpts from the contractor's proposal giving page references and comments from the NAVCO report:

Contractor's Proposal:

The control racks (Bergen drawing #P7–143–02) will house audio and control equipment. * * *

Items on the rack requiring operator access are located at appropriate heights from the floor.

The rack mounted items which need service on inspection will be provided with cables long enough to permit their removal to a workbench while still connected to the system.

(AF 1 at 5).

Comment:

The installation was not as specified here. In fact, remote control units are stuffed into the bottom of the cabinet on the floor. It was necessary to unplug these units completely before removal was possible. Also, removal was made more difficult by the maze of unlabeled wires interfering with component movement. * * *

(AF 34 at 10).

Contractor's Proposal:

All inputs and outputs will enter and leave the racks on terminal boards. The change-over switch from separate rooms to the combined rooms will be relay-operated.

All wiring will be done in the best commercial standard method.

(AF 1 at 9).

Comment:

The rack wiring was not installed as per contractor specifications. Only one terminal board was used, and wiring was not supplied "in the best commercial standards" by any stretch of the imagination. * * *

(AF 34 at 10–11).

To support its position, the Government relies heavily upon the report of its consultant (NAVCO) from which we have quoted above. Summarizing its findings, NAVCO states that the contractor did not adhere to the Government-supplied specifications and did not fully conform to the specifications set forth in its own proposal (AF 34 at 1). In its report (pages 3–5) NAVCO found conflict between the Government-supplied specifications and the contractor's technical proposal.[19] The consult-

[15] All wiring and cabling shall be accomplished in a neat and workman like manner" (AF 2, Functional Specifications for Audio-Visual System, par. 4.1).

[16] Note 6, *supra*. Commenting upon the extent to which the contractor adhered to this requirement, the NAVCO report states:

"The only schematics delivered were wiring diagrams from manufacturers of equipment. The copies of other diagrams of facility wiring were xerox copies of the contractor's proposal, which do not conform to the actual circuit wiring installed. There are not instruction booklets for system operation, nor instructions posted anywhere in the control room, or near the equipment console, to explain to user personnel how the system should be operated. This is a direct violation of Government-furnished specifications."

(AF 34 at 7).

[17] "All cabling used throughout the system shall be appropriately numbered and tagged such that it shall be possible by reference to the tags and other identifying information to circuit trace the system" (note 15, *supra*, AF 2 at par. 9.2).

[18] "These numbers and other identifying data on cables and equipment shall be noted on the wiring schematic so that it shall be easy to follow the operation of the system" (note 15, *supra*, AF 2 at par. 9.3).

[19] "[I]t is apparent that the simple system originally specified for the room was redesigned, making it unduly complex and therefore impossible for semi-skilled personnel to operate and maintain."

(AF 34 at 1).

ing firm also found that in some instances the failures encountered were attributable to the contractor not having adhered to the Government's original specifications.[20] It is clear from the NAVCO report that improper wiring was considered to be the primary cause of failure of the system. This is illustrated by the following excerpts from the report:

> Specifically, the bulk of the problem lies in the complex and incorrect wiring, not in the equipment components per se. * * *
>
> * * * * *
>
> * * * [T]his equipment was, however, incorrectly wired together as a system and thus will not perform stated functions. * * *
>
> * * * * *
>
> * * * [C]lear cases of bad wiring practices, loose connections, and improper connection and utilization of equipment, have created a situation that is totally inadequate; * * *
>
> * * * * *
>
> * * * [T]his activity should include a complete rewiring of equipment and wire runs (both FM-radio equipment command and audio circuits) * * *

(AF 34 at 12–14).

Position of Appellant

The appellant vigorously denies that it is liable for the excess costs claimed by the Government by reason of breach of warranty. In support of its position, the appellant raises questions related primarily to the reprocurement contracts used as a basis for the excess costs claimed by the Government, as well as questions pertaining to the nature of the contract awarded to the appellant and performance under such contract.

Respecting the reprocurement contract, the appellant states (i) that the amount claimed by the Government for the reprocurement costs incurred in obtaining the services of NAVCO and Cardinal Systems, Inc., were improper since NAVCO was an interested party in the proceeding having bid previously on this particular contract and Cardinal Systems, Inc., was the sole source subcontractor; (ii) that absent any type of default proceeding, the dividing up of purchase orders to remain under the $10,000 limitation was improper procurement; (iii) that no showing has been made that the Government properly mitigated damages because in effecting the reprocurement the Government did not solicit offers from any concerns other than NAVCO and Cardinal Systems, Inc., (iv) that the dollar amount involved in the procurement in comparison to the original contract price is itself prima facie evidence of the absurdity of claiming that the amount was reasonable; and (v) that the reprocurement contract with NAVCO and Cardinal Systems, Inc., call for providing services outside the scope of the items identified by the Government as covered by the warranty within the specified period of 1 year.

[20] After quoting paragraph 1.2.4 of the Government's original specifications ("The audio system shall not permit both microphone pick-up and voice playback simultaneously.") and noting that page 7 of the contractor's proposal alludes to elimination of feedback levels (indicating that speakers and microphones will be allowed to operate simultaneously), the report states: "The audio system is largely inoperable because of feed-back problems" (AF 34 at 3).

Concerning the formation of the contract here in issue, the nature of performance thereunder and a possible cause of some of the post-acceptance problems, the appellant states (i) that the Government cannot ignore the fact that it had accepted the contractor's technical proposal containing exception to the Government-furnished specifications; [21] (ii) that the Government conclusively accepted the installation of the system called for by the contract; and (iii) one of the reasons for the failure experienced following acceptance may have been the lack of qualified personnel to run a complicated system. In his unsigned statement, Mr. Bill Merrill of Bergen Expo Systems, Inc., states:

> 5. When we were installing the system, the user's staff repeatedly claimed that the system that we were installing as per our contract was not what they had wanted and was more complicated than they felt they could support. Furthermore, they had no dedicated operator at the time of installation and we were given secretaries with shorthand notebooks to train.
>
> * * * * *
>
> 7. We left with two fears: (a) that there were no qualified operation personnel and therefore, no one to run a complicated system.

(Appellant's Brief, Merrill statement, at 2).

Earlier in his unsigned statement, Mr. Merrill had offered the following comments on the items the contractor considered remained open under the terms of the contract warranty.

> 1. Government's letter of August 22 (Exhibit 23) is the last request before their threat of action. It states only items 1-3 and 5 and 6 of Exhibit 17 remain open. There is no reference to any unfinished, not working, improperly installed system—merely a few warrantee items.

(Appellant's Brief, Merrill statement, at 1).[22]

Discussion

Except for only one item, the allegations made by the appellant with respect to the reprocurement contracts are conclusory statements unsupported by the evidence of record. As to item (v), however, the documents in the appeal file indicate that except for the Government's claim involving the Cardinal Systems, Inc., wireless control, a serious question exists as to whether the contractor was apprised of the claim now asserted by the Government within 1 year of acceptance, as required by the warranty clause. Giving effect to an admission made in the Government's brief at page 11, acceptance is presumed to have occurred in October of 1977. It does not appear that the appellant was apprised of the claim predicated upon having the "entire system * * * reworked in accordance with the intent of original specifications" (AF 34 at 14) until the contracting officer's decision was issued on Mar. 26, 1980 (*i.e.*, approximately 29 months after acceptance).

[21] The Government may have ignored the differences between some of the requirements of its specifications and those set out in the contractor's technical proposal in reliance upon the Order of Precedence clause (note 3, *supra*). If so, the reliance is misplaced. The inclusion of such a clause in the request for proposal could not alter the legal principles governing offer and acceptance; nor should it be interpreted so as to deprive the standard clauses of the General Provisions of their ordinary coverage. *See, for example, Morrison-Knudsen Co., Inc.* v. *United States*, 184 Ct. Cl. 661, 688-89 (1968).

[22] In its reply brief at page 2, the appellant states that the contracting officer's letter of Mar. 8, 1979 (AF 30), left open only two issues to be covered within the scope of the warranty, *i.e.*, the two rear projection screens and the radio control units.

We now turn to the question raised by the appellant concerning the formation of the contract. The appellant is correct in stating that the Government cannot ignor the fact that it had accepted the contractor's proposal containing exceptions to the Government-furnished specifications. The Government's consultant was of the same view and found the differences between the Government-furnished specifications and the contractor's proposal involved several key subsystems of the contract specifications (note 2, *supra*). Since the reprocurement contracts appear to involve having had the entire system reworked in accordance with the intent of the original specifications, it is at least doubtful that the reprocurement contract can properly form the basis for measuring excess costs to the Government in a breach of warranty case. We need not decide the several questions involved in the above discussion, however, since our decision rests upon other grounds.

The Government has shown that the work performed by the contractor was unsatisfactory in a number of material respects. In an apparent effort to meet the Government's criticism, the appellant has attempted to show that a number of the problems experienced in the use of the system was due to the fact that there were no operation personnel at the Government facility in Metairie, Louisiana, who were qualified to run a complicated system. Assuming, *arguendo,* that there were no such qualified personnel available at Metairie for much of the time in question, this condition (if it existed) would have had no bearing on the failure of the contractor (i) to number and tag cabling; (ii) to provide a complete wiring diagram of the system; (iii) to furnish a book of instructions including complete schematics for each and every piece of equipment; and (iv) to complete the training of Government personnel before tendering the audiovisual system for acceptance (notes 15-19, *supra,* and accompanying text). The failure of the contractor to furnish these contractually required items may have had a great deal to do with the difficulties experienced by the Government personnel in Metairie who were assigned to operate the system.

Based upon the record made in this proceeding, the Board finds that the contractor's performance of the contract was deficient in a number of important respects. In our view, however, the crux of the case, is whether in the circumstances present here the Government may recover for breach of warranty after final acceptance has occurred.

The case of *Instruments for Industry* v. *United States* (note 14, *supra),* involved a claim asserted by the Government under a guaranty provision contained in a Navy contract for electronic countermeasure equipment. In its decision the court noted (i) that under the contract terms inspection was made and acceptance finalized at the contractor's plant and (ii) that within 1 year of delivery the con-

tracting officer had notified the contractor that the equipment had been defective upon delivery and acceptance. The Court of Appeals took cognizance of the fact that the case involved another instance of the frequent tension in Federal procurement between two form clauses, both bearing on the same general subject and both inserted into the same Government contract without explicit reconciliation. It also noted: (i) That at no time had the Government contended that the defects it claimed to have discovered were latent; (ii) that any fraud or gross mistake amounting to fraud were in any way involved; and (iii) that there was no assertion that the defects in question had surfaced or come into being after delivery. The only issue was said to be whether the Navy's rights under the Guaranty clause, with respect to preexisting nonlatent defects, survive acceptance under the Inspection clause.

Addressing the suggestion that full reconciliation of the provisions of the Inspection clause and those of the Guaranty clause could be attained through the prefatory phrase of the Inspection clause ("Except as otherwise provided in this contact"),[23] and by assuming that the Guaranty provision "provides otherwise," the court observed that the obvious vice of the suggested adjustment is that it subverts the clear import of the most important aspect of subpart (d) of the Inspection clause ("Acceptance shall be conclusive except as regards latent defects, fraud or such gross mistakes as amount to fraud") which affirmatively gives significant rights to the contractor in the absence of stated exceptions.

The rationale for the decision cited is stated in the following terms:

> [C]ontractors could not be expected to anticipate that this camouflaged and unusual reversal of the normal role of subpart (d) of the "Inspection" clause would follow from the bland generality of "[e]xcept as otherwise provided in this contract," especially since there is no reference to any particular clause which 'provides otherwise' and no indication in the "Guaranty" article that it has any impact on the "Inspection" provision. A more direct and specific caveat would be necessary, and has in fact been used in other form of federal contracts to show that acceptance does not have the effect the language of the "Inspection" provision, if read alone, plainly gives it.
>
> * * * * *
>
> There can be no doubt that the interpretation favoring the contractor is "reasonable and practical." See *United States* v. *Seckinger, supra,* 397 U.S. at 210–211. The express terms of the "Inspection" clause are given full effect as to non-latent defects, and, absent an acceptance expressly and reasonably conditioned upon the Government's later inspection of the supplies and equipment, the one-year—after-delivery portion of the "Guaranty" article is confined to latent defects. [Footnotes omitted.]

(496 F.2d at 1160–61).

In essential respects the conditions present in the instant appeal are very similar to those involved in *Instruments for Industry, supra.* The language of the inspection article quoted in the decision is identical with the provision of the Inspection clause with which we are here concerned. In this case there is no "notwithstanding" type provision[24] in the

[23] Cited as involving a reconciliation so accomplished (496 F. 2d 1160–61) is the decision of this Board in *Federal Pacific Electric Co.,* IBCA–334 (Oct. 23, 1964), 71 I.D. 384, 388–89) 1964 BCA par. 4494 at 21,585.

[24] The Guarantee clause involved in *Federal Pacific Electric Co.,* note 23, *supra,* provides in especially perti-

Continued

warranty clause; nor was there such a provision in the Guaranty article contained in the *Instruments for Industry* case. In both cases the Government concedes that final acceptance had occurred and in both cases the Government contends that the defects on which the warranty or guaranty claims are based were present at the time of final acceptance. In neither case has the Government shown or even specifically alleged that the defects in the accepted equipment were latent.

Based upon the record made in these proceedings, the Board finds that the primary case of the failure in the audiovisual system on which the warranty claim is based was improper wiring. The Board further finds that even a cursory inspection of the system at the time of acceptance would have shown whether the contractor had (i) numbered and labeled the cabling; (ii) furnished diagrams to assist in the tracing of the circuitry; (iii) supplied required schematics and instruction books; (iv) performed the wiring in a workmanlike manner; (v) connected wires or cables; or (vi) aligned one 35 mm projector by having it propped up on one leg with a pack of sandpaper.

The Department counsel attempts to avoid the consequences of the inadequacy of the Government's inspection prior to acceptance by asserting that "[a]cceptance of the system by the Government was not conclusive as to either patent or latent defects" (Govt. Brief at 3). A similar argument was rejected in *Instruments for Industry, supra,* however, and we reject it here on the authority principally of that decision.

Decision

For the reasons stated and on the basis of the authorities cited, the Government is not entitled to collect the sum of $15,673.66 or any other amount under the authority of the warranty provisions contained in this contract.[25] The appeal is granted.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

nent part: "[T]he contractor hereby agrees to repair or replace any equipment or part thereof which fails in operation during normal and proper use within one year from date of completion of installation due to defects in design, material or workmanship, notwithstanding that final acceptance and payment may have been consummated * * *." 71 I.D. at 385, 1964 BCA at 21,583.

Federal Pacific Electric was among the cases cited in *Instruments for Industry* (note 14, *supra*) as involving more explicit terms of reference in the area in question than were contained in the contract the court was construing (496 F.2d 1161 n.12).

[25] The record does not disclose what portion, if any, of the excess costs claimed may have been withheld from the contractor under other contracts with the Government.

RHONDA COAL CO., INC.

4 IBSMA 124

Decided *September 21, 1982*

Appeal by Rhonda Coal Co., Inc., from the Apr. 17, 1981, decision of Administrative Law Judge Tom M. Allen, sustaining Office of Surface Mining Reclamation and Enforcement jurisdiction and the validity of Notice of Vio-

lation No. 80-I-87-17 (Docket No. CH 1-1-R).

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof—Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

A prima facie case is made where sufficient evidence is presented to establish the essential facts. It is evidence that will justify but not compel a finding in favor of the one presenting it, unless it is contradicted and overcome by other evidence. How much evidence is required may vary with the nature of the case and with the relative availability of the evidence to the person charged with the burden of establishing the prima facie case.

2. Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

The area of an access and haul road used by more than one coal mine operator is properly attributed, at least in part, to each operator in calculating the extent of the surface area affected by that operator for the purpose of determining whether the operator qualifies for the 2-acre exemption of sec. 528(2) of the Act and 30 CFR 700.11(b).

APPEARANCES: Dennis E. Jones, Esq., Jones and Godfrey, Lebanon, Virginia, for Rhonda Coal Co., Inc.; Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia, James M. McElfish, Attorney, and Marcus P. McGraw, Esq., Assistant Solicitor for Litigation and Enforcement, Office of the Solicitor, Washington, D.C. for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Rhonda Coal Co., Inc. (Rhonda), has appealed from the Apr. 17, 1981, decision of Administrative Law Judge Tom M. Allen, Docket No. CH 1-1-R, which held, pursuant to an application for review, that the Office of Surface Mining Reclamation and Enforcement (OSM) had jurisdiction under the Surface Mining Control and Reclamation Act of 1977, P.L. 95-87, Aug. 3, 1977, 30 U.S.C. §§ 1201-1328 (Supp. II 1978) (the Act), and its implementing regulations, 30 CFR Chapter VII (the regulations), to issue Notice of Violation No. 80-I-87-17 charging Rhonda with two violations of the Act.

Prior to the hearing the parties stipulated to the fact of the violations and that, if OSM had jurisdiction, the notice of violation was validly issued. Thus, the only issue to be decided by the Administrative Law Judge was whether OSM had jurisdiction over the Rhonda mine. The mine was stipulated to consist of a surface area of 1.67 acres. In addition to this acreage, which was utilized exclusively by Rhonda, another 1.2 acres of unpermitted haul road was jointly utilized by Rhonda and an adjacent operator. Rhonda nevertheless maintained that the mining site was exempt from Federal regulation because the Virginia Surface Mining Control and Reclamation Act of 1979 exempts parcels of 2 acres or less from State regulation.

The Administrative Law Judge found the evidence sufficient to hold Rhonda subject to the Act for disturbing in excess of 2 acres, not because of its joint use of the haul road with two other companies, but because the evidence was sufficient to warrant a conclusion that such a degree of economic integration existed between the companies involved that, for the purposes of the Act, liability could not be escaped by defending on the ground of an independent contractor relationship. The Administrative Law Judge therefore regarded the surface areas disturbed by all of the companies to be disturbed by each of them (for the purpose of inclusion under the Act) and sustained OSM's jurisdiction. We affirm the decision, as modified herein.

Facts

Pursuant to an inspection on Sept. 17, 1980, OSM inspector Dewey K. Brock issued Notice of Violation No. 80-I-87-17 to Rhonda, alleging two violations of the Act for (1) failure to pass all surface drainage from the disturbed area through a sedimentation pond prior to its leaving the disturbed area, in violation of 30 CFR 717.17(a), and for (2) failure to display a proper mine identification sign, in violation of 30 CFR 717.12(b). Rhonda admitted the facts but sought a hearing on the issue of Federal jurisdiction.

Rhonda operates an unpermitted deep mine located on the North Branch of Garden Creek off State Route 624 in Buchanan County, Virginia. Rhonda admitted disturbing 1.67 acres of surface area at the site. Near Rhonda's mine is another deep mine operated by Dominion Coal Corp. (Dominion). The two mines are in the same hollow, and both companies mine the same seam of coal (the Widow Kennedy seam). There are no other mines in the hollow. All of the coal on both sites is owned by Jewell Smokeless Coal Corp. (Jewell), which leases it to Rhonda and Dominion for extraction operations. Jewell purchases the entire production of the two lessees.

Rhonda and Dominion are separated by a haul road, constructed by Jewell, which is used jointly by the two companies. Although Jewell has deeded the road to Buchanan County, there are no occupied homes along the road, and Jewell continues to maintain it. In addition, Jewell performed the corrective work to abate Rhonda's drainage violation. The lower portion of the haul road, used by both Rhonda and Dominion, which commences about 300 feet from Route 624 and runs to the Dominion mine, is unpermitted and disturbs an additional area of about 1.2 acres. The middle portion is permitted to Dominion. The upper portion, which is also unpermitted and runs from Dominion's site to Rhonda's site, is used primarily by Rhonda and was included in the 1.67-acre area survey of the Rhonda site. Rhonda is licensed by the State of Virginia as an underground mine but claims exemption from the State's surface mining laws because its

actual mining site does not exceed 2 surface acres.

In abating Rhonda's drainage violation, Jewell constructed a culvert to drain Rhonda's site into Dominion's sedimentation pond. In addition, Jewell's employees handled all of the permit and license applications for Jewell, Rhonda, and Dominion. Jewell also paid the reclamation fees for Rhonda from 1977 through the third quarter of 1980, and filed the required reports on its behalf. A holding company, Elk River Resources, owns stock in both Jewell and Dominion.

Arguments

As a consequence of this relationship, OSM argued at the hearing and upon appeal that companies such as Jewell should not be permitted to evade their responsibilities under the Act by contracting with two or more smaller operators to exploit their reserves if the smaller companies are then required to sell all of their coal back to the lessor. Here, according to OSM's brief:

> Rhonda clearly benefitted from the arrangement adopted between it, Dominion, and Jewell Smokeless. It was able to use a haulroad, which would have, if used by Rhonda alone, clearly put it over the two-acre limit, to use a sedimentation pond permitted to another company (Dominion), to obtain maintenance and construction services from Jewell Smokeless, and in short, to enjoy the advantages of a large operation while attempting to assert the privileges of a small one. The legislative history of the two-acre exemption reveals that it was not intended to be used by interconnected, economically integrated mining entities. The two-acre exemption was included in each version of the Act considered by Congress. The express purpose for this exemption was to eliminate the need to regulate small operations which cause "very little environmental damage" and whose regulation would be burdensome to the regulatory authority. S. Rep. 95-128, 95th Cong., 1st Sess. 98 (1977). Certainly those policies are not served by recognizing such an exemption under the facts of this case.
>
> The complex series of separate permits and contractual agreements employed by Jewell Smokeless, Dominion Coal, and Rhonda Coal in this case reflects just another effort to evade the provisions of the Act. Although subtler than the familiar ploy of deeding haulroads to local governments, the present approach is a product of the same tendency to conceal the actual effect of a mining operation behind a mere technical facade. By exalting form over substance, these companies would have this Board treat them as separate operations for the purpose of jurisdiction. OSM submits that to honor an organizational facade such as presented by the facts in this case would severely undercut the policies contained in the Act and regulations.

Rhonda, on the other hand, urges upon appeal that the issues in this case are simply the following: "(1) Whether the Office of Surface Mining proved by a prima facie case that the appellant was subject to the Act[; and] (2) whether the Administrative Law Judge's factual determination for holding Jewell Smokeless Coal Company, Dominion Coal Company, and the appellant, Rhonda Coal Company, as a person as defined within the Act is supported by the record."

As to the first issue, Rhonda relies on *James Moore,* 1 IBSMA 216, 86 I.D. 369 (1979), arguing that if it is not shown that its operation meets the threshold test of being subject to State regulation (in *Moore,* under Kentucky law, the removal of more than 250 tons of coal within 12 months), that operation cannot be subject to OSM jurisdiction. In Rhonda's case, "Section 45.1-200.1 [of the

Code of Virginia, 1950, *as amended*] states that the provisions of Chapter 17 (§ 45.1-198, et seq.) of Title 45.1 shall not, as of March 20, 1979, apply to the extraction of coal for commercial purposes where the surface mining operation affects two (2) acres or less." Rhonda's brief goes on to say:

> It is clear from the statutory interpretations as well as from the evidence presented in the instant case that Rhonda Coal Company, Inc., was exempt pursuant to 45.1-200.1 of the Code of Virginia, 1950, as amended, from regulation by the Virginia Regulatory authority. The only requirement for the appellant in operating its underground mine was that it obtain an underground mine license. The record indicates that no surface mining permit had been secured by the Appellant nor that one was required. Indeed, by way of stipulation, OSM stipulates that the total surface disturbed by the Appellant, Rhonda Coal Company, Inc., was 1.67 acres (Tr. at 6).
>
> This tribunal and the agents for the Secretary of the Interior need only review 30 U.S.C., § 1278 (2) which states the extraction of coal for commercial purposes [where] the surface mining operation affects two (2) acres or less is exempt from the provisions of the Act. Indeed, the Director in implementing its regulations in the interim program at 30 C.F.R. § 700.11(b) complied with the authority given to him under 30 U.S.C. § 1278 which states the extraction of coal for commercial purposes [where] the surface coal mining and reclamation operations affects two (2) acres or less, but not any such operations conducted by a person who affects or intends to affect more than two (2) acres in physically related sites, shall be exempt from the operation of the Act.

As to the second issue, Rhonda recognizes that the ultimate burden of persuasion rests with it, but it argues that OSM failed to establish a prima facie case and that the decision of the Administrative Law Judge, finding that Rhonda had disturbed in excess of 2 acres because of its association with Dominion and Jewell, was contrary to the evidence.

Rhonda therefore moved at the hearing for a dismissal of the case on the ground that there was insufficient evidence of an economic connection between Dominion or Jewell and Rhonda; and when that motion was denied by the Administrative Law Judge, it rested its case. Thus, no evidence was presented by Rhonda to rebut OSM's evidence of interrelated ownership of the three companies.

Discussion

[1] We cannot agree with Rhonda's statement of the issues in this case. As we noted in *Moore, supra,* a prima facie case is made where sufficient evidence is presented to establish the essential facts. It is evidence that will justify but not compel a finding in favor of the one presenting it, unless it is contradicted and overcome by other evidence. How much evidence is required may, of course, vary with the nature of the case and with the relative availability of the evidence to the person charged with the burden of establishing the prima facie case.

Moore was a case in which the Board decided that the burden was on the operator to prove that he was exempt from regulation under Kentucky law because he did not remove or intend to remove more than 250 tons of coal in a 12-month period. Since the record did not support his contention that he mined less than that

amount, the Board held Moore subject to OSM jurisdiction.

The decision in *Moore* relied upon *Dennis R. Patrick,* 1 IBSMA 158, 86 I.D. 266 (1979), in which the Board accepted a determination by the Director of the Division of Permits, Kentucky Department of Natural Resources and Environmental Protection, that Patrick's proposed excavation of coal incident to a housing development project would not constitute strip mining under Kentucky law and that Patrick would not be required to obtain a strip mining permit. Patrick also introduced into evidence a copy of a policy memorandum issued by the Secretary of Kentucky's Department of Natural Resources and Environmental Protection, upon which the Permit Director's decision was based, holding that coal extraction that was incidental to a construction project was not subject to the State's strip mining law. Thus, Patrick's mining of coal was not subject to regulation within the scope of any of the initial performance standards.

Here, the situation is quite different. Rhonda is in the business of coal mining as such, a business clearly regulated by the State of Virginia (*see* secs. 45.1-1 to 45.1-380, Code of Virginia, 1950, *as amended*), and thus is obviously subject to the Act unless the State exempts it. No evidence of exemption as such was presented to the Administrative Law Judge, as was done in *Patrick.* Instead, Rhonda relies on the mere existence of the Virginia 2-acre exemption provision, sec. 45.1-200.1 Code of Virginia, 1950, *as amended,* assuming that it could be charged with only the 1.67 acres it held exclusively.

We do not accept that proposition, nor do we agree with Rhonda's apparent assumption (in its postulation of the issues) that the burden was on OSM to prove that Rhonda's mining site was not exempt under Virginia law once Rhonda's 1.67-acre site survey had been put into evidence. The Virginia Surface Mining Control and Reclamation Act of 1979, secs. 45.1-226—270.7, Code of Virginia, 1950, *as amended,* defines "Coal Surface Mining Operations" to include "[a]ctivities conducted on the surface of lands in connection with a surface coal mine or * * * surface operations and surface impacts incident to an underground coal mine." This definition is the same as the one in 30 CFR 700.5 and, as the Board has previously noted, the authorities are in agreement that one seeking an exception from the coverage of a statute must affirmatively establish it. *See Daniel Brothers Coal Co.,* 2 IBSMA 45, 87 I.D. 138 (1980), and cases cited at 51. That Rhonda was engaged in a surface coal mining operation and failed to meet Federal performance standards is all OSM was required to prove. It was for Rhonda to assert and prove that it was entitled to an exemption from those standards.

In summary, we agree with the statement of the Administrative Law Judge that: "The sole issue [is] whether or not [Rhonda] is subject to the Act, (1) by virtue of the inclusion of the haul road in the disturbed area, and/or (2) by virtue of its association with Do-

minion Coal Company and Jewell Smokeless Coal Company."

[2] We will discuss the haul road issue first, since we believe, contrary to the Administrative Law Judge's holding, that it is determinative of the case. In this context, we note that the Virginia definition of surface coal mining continues to parallel the Federal definition in regard to haul and access roads:

> Such areas shall also include any adjacent land, the use of which is incidental to any such activities, *all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage,* and excavations, workings, impoundments. [Sec. 45.1-229 L., italics added.]

Thus, the question is whether Rhonda can reasonably be charged with affecting the 1.2 acres which constitutes the unpermitted haul road from Route 624 to the edge of the Dominion mine. Even assuming Rhonda, as only one user among as many as three companies, should not be charged with more than one-third of the acreage involved, the one-third still amounts to approximately 0.4 acres which, when added to Rhonda's admitted 1.67-acre site, equals more than 2 acres.

Accordingly, the Administrative Law Judge was incorrect in stating that the relationship of the users to each other in this case materially affects the issue regarding the haul road. In our view, if Rhonda makes substantial use of a common haul road, sufficient to attribute more than an additional 0.33 acres to Rhonda's 1.67-acre site, for a total of more than 2 acres, then the degree of economic integration among the three companies can be immaterial. The issue of economic intergration becomes essential in the context of a haul road only if a single or combined site, including its attributed portion of a common haul road, aggregates only 2 acres or less. That is not the case here. The 2-acre exemption is therefore not applicable, and Rhonda is clearly subject to the Act on this basis alone.[1]

OSM presented substanital evidence to the effect that Jewell, Dominion, and Rhonda were an economically integrated operation and that, therefore, as the Administrative Law Judge found, the disturbance of the surface area caused by one should be attributed to all. However, we do not find it necessary to reach that issue in order to affirm the decision below.

Accordingly, the decision of the Administrative Law Judge is affirmed as modified.

BERNARD V. PARRETTE
Administrative Judge

ADMINISTRATIVE JUDGE MIRKIN CONCURRING SPECIALLY:

Although Rhonda and the Hearings Division have generated a plethora of "issues," there is only one that needs be addressed to dispose of this matter: Was

[1] We note that the Department's recently published regulations dealing with the attribution of haul roads (47 FR 33424, 33432, Aug. 2, 1982) take an even stricter view. According to 30 CFR 700.11(b)(1), as revised, "[w]here a segement of a road is used for access or coal haulage by more than one surface coal mining operation, the entire segment shall be included in the affected area of each of those operations * * *."

Rhonda engaged in a surface mining operation of more than 2 acres?

The following type of surface mining operation is not subject to regulation: "the extraction of coal for commercial purposes where the surface mining operation affects 2 acres or less." 30 U.S.C. § 1278(2) (Supp. II 1978); Va. Code § 45.1-200.1 (1950), *as amended.* A surface coal mining operation consists of all activities conducted on the surface of lands in connection with a surface coal mine, and surface operations and impacts incident to an underground mine, and includes "all lands affected by * * * the use of existing roads to gain access to the site of such activities and for haulage." 30 U.S.C. § 1291(28) (Supp. II 1978); Va. Code § 45.1-229L (1950), *as amended.* The Federal and State statutes are identical in both instances.

Disregarding its use of a haul road, Rhonda is mining less than 2 acres. If that were the end of it, Rhonda would be exempt. But that is not the end of it. The evidence clearly shows, and the principal opinion has found, that the unpermitted haul road that was being utilized by Rhonda along with Dominion (and possibly Jewell), contained more than three times the additional acreage required, which, when added to the 1.67 acres Rhonda's operation has admittedly affected, totaled more than the 2 acres which would submit Rhonda to regulation. This is the only basis upon which we have found Rhonda *qua* Rhonda subject to OSM's regulatory authority.[1] It is a sufficient basis and for that reason I concur in the result.

MELVIN J. MIRKIN
Administrative Judge

ACTING CHIEF JUDGE FRISHBERG CONCURRING:

While I concur in Judge Parrette's decision and agree that disturbance of less than 2 acres is an affirmative defense, I am constrained to point out that the "prima facie" issue is a specious one for a more basic reason. Here the parties stipulated that the mine disturbed 1.67 acres of surface area. OSM also presented uncontradicted testimony that Rhonda was a user with two others of an unpermitted haul road which disturbed an additional 1.2 acres. In view of the Board's conclusion that at least one-third of that area, or 0.4 acres, is properly attributed to Rhonda, OSM proved in its case in chief that Rhonda had disturbed more than 2 acres. Thus, the question of who had the burden of proving or disproving a 2-acre disturbance was obviated at the outset.

NEWTON FRISHBERG
Acting Chief Administrative Judge

JEFFCO SALES & MINING CO., INC.

4 IBSMA 140

Decided *September 21, 1982*

Appeal by Office of Surface Mining Reclamation and Enforcement from the June 11, 1981, decision of Administrative

[1] Only Rhonda has been cited for the violation.

Law Judge Joseph E. McGuire vacating Notice of Violation No. 81-3-22-5 (Docket No. IN 1-30-R).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas

The general rule is that all discharges from a sedimentation pond which receives surface drainage from areas disturbed by ongoing surface coal mining and reclamation operations must meet the effluent limitations expressed in 30 CFR 715.17(a), even when part of the drainage received by a particular sedimentation pond emanates from areas not disturbed by current operations.

2. Surface Mining Control and Reclamation Act of 1977: Evidence: General—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Generally

In a proceeding to review an alleged violation of the effluent limitations for iron and pH expressed in 30 CFR 715.17(a), OSM met its burden of establishing a prima facie case by its evidence that tests of water samples taken at the point of discharge of drainage from the sedimentation pond which received surface drainage from the areas disturbed by the surface coal mining and reclamation operations showed iron and pH levels outside the applicable limits.

3. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof—Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas

An applicant for review claiming that effluent limitations set forth in 30 CFR 715.17(a) are not applicable to discharges from its sedimentation pond bears the burden of proving the facts upon which the claim of inapplicability is based.

APPEARANCES: Robert C. Hargrave, Esq., Kinsey, Allebaugh, & King, Steubenville, Ohio, for Jeffco Sales & Mining Co., Inc.; Barbara S. Webber, Esq., Office of the Field Solicitor, Indianapolis, Indiana, Glenda R. Hudson, Esq., and Walton D. Morris, Jr., Esq., Acting Assistant Solicitor for Litigation and Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MIRKIN

INTERIOR BOARD OF SURFACING MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from the June 11, 1981, decision of Administrative Law Judge Joseph E. McGuire, Docket No. IN 1-30-R, which held, in a combined application for review and temporary relief proceeding, that OSM improperly issued Notice of Violation (NOV) No. 81-3-22-5 to Jeffco Sales & Mining Co., Inc., (Jeffco), pursuant to the Surface

Mining Control and Reclamation Act of 1977, P.L. 95-87 (Aug. 3, 1977), 30 U.S.C. §§ 1201-1328 (Supp. II 1978), and its implementing regulations, 30 CFR Chapter VII. The Administrative Law Judge ordered vacation of the NOV, which charged Jeffco with violating 30 CFR 715.17(a) by failing to meet effluent limitations relating to discharges from sedimentation ponds. The request for temporary relief was, consequently, granted. On appeal OSM contends that the Administrative Law Judge wrongly construed both the substantive and procedural law applicable to this case.[1]

Factual and Procedural Background

On Apr. 21, 1981, an OSM inspector, following a routine inspection of Jeffco's surface coal mine (permit C-1142, Columbiana County, Ohio), served NOV No. 81-3-22-5 on one of Jeffco's principals. The NOV charged a violation of 30 CFR 715.17(a) for the failure to meet the numerical effluent limitations for pH and iron in discharges from the company's sedimentation pond. The remedial action required was to meet the effluent limitations by May 21, 1981 (OSM Exh. 1). The abatement date was subsequently extended to June 21, 1981 (OSM Exh. 2).

Jeffco applied for a formal review and temporary relief. A combined hearing on the applications for review and for temporary relief was held on May 21, 1981. Jeffco and OSM each presented a single witness. OSM's witness was the inspector who issued the NOV and Jeffco's was one of its principals (other than the one upon whom the NOV was served).

At the outset of the hearing, the Administrative Law Judge stated to counsel for Jeffco:

> You will bear the burden of putting on sufficient evidence to show it is in fact a violation. Had there been a subsequent civil penalty in the case, you would have been entitled to another hearing on the fact of violation and also on the appropriateness of the civil penalty assessed. In that event, the burden of proof would be on [OSM] to show the act and/or the interim regulations were violated, and the penalty assessed was appropriate for that or those violations.[2]

The attorney for Jeffco responded, "I understand the Court" (Tr. 12). The Administrative Law Judge then told Jeffco to present its evidence (Tr. 15).

Jeffco's testimony was that it is a family operation and that the business in question was strip mining coal on a 14.3-acre permitted area near Wellsville, Ohio. On May 17, 1979, Jeffco filed a permit package containing a map dated Mar. 22, 1979. The map was prepared for Jeffco by a registered engineer who noted on the map: "There are no known deep mines, oil or gas wells within 500 ft. of the proposed area" (Jeffco Exh. C). The permit was issued and a sedimentation pond (No. 001) was constructed in the summer of 1980 (Tr. 26, 27). Strip mining began in Sept. 1980. The witness

[1] Although OSM filed a brief on appeal, Jeffco stated it would no longer be represented by counsel and chose to stand "on the record established at the hearing before the Administrative Law Judge on May 21, 1981" (Jeffco's letter of Sept. 18, 1981).

[2] Tr. 12. The first sentence is either transcribed improperly or, if not, is clearly erroneous. The burden of establishing a violation is upon OSM, not the operator. As for the civil penalty, OSM stated at the beginning of the hearing that no civil penalty had been proposed (Tr. 11).

had not been involved in the construction of the pond and he was not aware at the time operations commenced of any previous deep mining in the area. He also asserted that no other member of the firm was so aware, and none became so until a State inspector's report of Apr. 7, 1981. That one page document consists of a series of check marks representing categories investigated and spaces for the listing of violations and comments. Nothing is entered under "violations." Under "comments," there is the following:

> Pond 001-pH 4.5; Q; clear; seepage from old deep mine entry at head of pond is acid and causing discharge from pond to be acid; water coming from permit's disturbed area and pit has a pH of 7-7.5; operator has treated the water and should continue to do so.

(Jeffco Exh. A). The State inspector was not called to testify and Jeffco's witness had not accompanied her on the inspection (Tr. 21). The witness opined that the seepage might have been due to underground mining which may have occurred more than 40 years previously. The witness also testified that Jeffco had placed upstream from the pond a barrel containing soda ash and lime, through which all drainage passed before entering the pond (Tr. 23, 24; Jeffco Exh. B). On cross-examination, the witness modified his statement to specify that the barrel was about 20 feet upstream and that "it didn't take all of it but it takes the majority of the water coming down the creek into the barrel" (Tr. 41).

At the conclusion of Jeffco's witness' testimony and after ascertaining there was nothing further on cross or redirect, the Administrative Law Judge inquired whether Jeffco rested. Upon an affirmative response, he then addressed counsel for OSM: "Very well. Are you prepared to present your case in chief?" (Tr. 42). Counsel responded in the affirmative and called the inspector, her first and only witness.

The inspector testified that he conducted a routine inspection of the Jeffco site on Apr. 21, 1981, and issued the NOV in question after taking water samples at the discharge pipe of the pond. His field test revealed a pH of 5.0 and total iron content greater than 10 milligrams per liter (mg/1) (OSM Exh. 3). The same sampling was found by independent laboratory analysis to have a pH factor of 3.8 and total iron content of 33.1 mg/1 (OSM Exh. 4).[3] The inspector stated that he had no knowledge of how long any underground mine might have been in the area or how long it had been seeping (Tr. 57, 58). He did say that an earlier inspection had revealed there was deep mine seepage downstream of the pond.[4] The inspector also addressed a piece of evidence identified as "a partial copy of the first annual map" (Tr. 54; OSM Exh. 5). It was of the

[3] The allowable pH range is between 6.0 and 9.0, and the maximum allowable amount of iron is 7.0 mg/l. 30 CFR 715.17(a).

[4] The exact language is somewhat puzzling: "On our initial inspection, I believe it was about October, 1971 [*sic*] Dan Shum made an inspection up there and he noted that there was deep mine seepage but it was below pond 001. It was not entering in pond 001 at that time" (Tr. 58). Obviously, the 1971 date is incorrect. The pond did not exist until summer 1980. The inspection out of which the NOV issued was in Apr. 1981. The only October that fits is Oct. 1980

Jeffco site and contains this legend: "Deep Mine On Area Limits Unknown." [5] The witness was asked to designate on OSM Exhibit 5 the area disturbed by Jeffco's operation. That designation did not include all of the permit area, and one portion of it extended off the permit area. Upon completion of the direct and cross-examination, the inspector was excused (Tr. 59).

On June 11, 1981, the Administrative Law Judge issued his decision granting the petition for temporary relief and vacating the NOV. In doing so he distinguished our holdings in *Thunderbird Coal Corp.*, 1 IBSMA 85, 86 I.D. 38 (1979); *Cravat Coal Co., Inc.*, 2 IBSMA 249, 87 I.D. 416 (1980); and *Central Oil and Gas, Inc.*, 2 IBSMA 308, 87 I.D. 494 (1980). Our decision in *Island Creek Coal Co.*, 3 IBSMA 383, 88 I.D. 1122 (1981), had not yet been issued. The Administrative Law Judge determined that it is proper to relieve the permittee from responsibility for meeting the effluent limitations at the point of discharge from a sedimentation pond where the phenomenon responsible for the offensive discharge is beyond the permittee's control and actual or putative knowledge. He said:

> [O]nly if the evidence herein had demonstrated that Jeffco knew or, in the exercise of ordinary care, should have known of the presence of the seepages * * * on [the permitted land], that the offending discharges originated in areas disturbed by [Jeffco] in the course of its strip mining and reclamation activities, and/or that the source of the violative discharges was clearly located on the area(s) permitted to the person or firm charged with the effluent limitations violation [could Jeffco be found responsible].

(Decision at 6). He then held that no showing had been made that any of those conditions obtained, and that OSM had, consequently, improperly issued the NOV.

Discussion

As the statement of facts indicates, this case was placed in an odd posture at the very beginning when Jeffco made its defense before OSM had the opportunity to present a case in chief.[6] We will address the significance of that feature later. The initial inquiry, though, is whether Jeffco violated 30 CFR 715.17(a) by tolerating a discharge from its sedimentation pond which exceeded the iron and pH limitations set forth in that regulation. Although there was no question that samples from the pond at the point of discharge tested excessively in each regard, Jeffco maintains that the fault for such excess was due to seepage from an old underground mine, the existence of which Jeffco was not aware at the time its mining operations commenced. Jeffco asserted that the underground mine was beyond the permit boundaries and that the evidence showed that its water was of adequate quality before it reached the pond and commingled with the deleterious seepage water (Jeffco Exh. A).

[5] Although it is undated and we do not know whether the anniversary in question is that of the permit application (May 17, 1979), of the issuance of the permit (July 26, 1979, per Jeffco Exh. A), or of the commencement of operations in the summer of 1980. As the hearing was in May 1981, and the map was then in existence, the anniversary date had to be in either mid-May or late July 1980.

[6] We have had previous occasion to comment on the difficulties created by alteration of the normal hearing procedure under 43 CFR 4.1171(a). *Alabama By-Products Corp.*, 1 IBSMA 239, 86 I.D. 446 (1979).

[1] The Board has had a number of occasions to construe 30 CFR 715.17(a). In *Thunderbird, supra,* we held that a functioning sedimentation pond was in itself a "disturbed area" and that the operator was responsible for the quality of discharges from the pond even though there was inflow into the pond from areas previously mined by persons other than the operator and not redisturbed by the operator. In *Cravat, supra,* we pointed out that water quality is to be a major consideration by an operator both in preparing for an conducting the operations. In *Central, supra,* we again said that mining on previously mined lands does not relieve an operator of the duty to comply with 30 CFR 715.17(a) and that it was not part of OSM's burden to show who had initially created the problem that resulted in the violation. In *Island Creek, supra,* we stated that "the point of discharge at which numerical effluent limitations are to be applied is the point at which drainage from the disturbed area leaves the last sedimentation pond through which it is passed." 3 IBSMA 399, 88 I.D. at 1130 (1981).[7]

The Administrative Law Judge distinguished *Thunderbird, Cravat,* and *Central* because the operators in those cases knew of the previous mining. Moreover, he found that Jeffco had no reason to believe there had been previous mining, that pollutants did not originate in areas disturbed by Jeffco, and that the discharges were not shown to have emanated from a source "clearly located" on Jeffco's permit area (Decision at 6). Thus, he recognized a defense based upon reasonable lack of knowledge of the operator when considered with the location of the source of the pollutant.[8]

Assuming, *arguendo,* that such a defense is available, we are still left with determining whether such a defense was properly made. The Administrative Law Judge held that it was. We believe not.

[2] Under the applicable procedural regulation, OSM bears the burden of establishing a prima facie case as to the validity of a notice of violation. 43 CFR 4.1171. This regulation further provides that the ultimate burden of persuasion shall remain with the operator. The Board has held this to require merely a presentation by OSM of sufficient evidence to establish essential facts which, if uncontradicted, would permit, if not compel, a finding for OSM. *Burgess Mining and Construction Corp.,* 1 IBSMA 293, 86 I.D. 656 (1979); *Dean Trucking Co., Inc.,* 1 IBSMA 229, 86 I.D. 437 (1979); *James Moore,* 1 IBSMA 216, 86 I.D. 369 (1979). OSM, although it was required here to await the presentation of Jeffco's defense, did establish a prima facie case by

[7] Also, in *Island Creek* (issued after the decision below in this matter), we observed that the courts had imposed some exceptions to the effluent limitations of 30 CFR 715.17; however, none of those exceptions is applicable here. *See In re Surface Mining Regulation Litigation,* 627 F.2d 1346 (D.C. Cir. 1980); *In re Surface Mining Regulation Litigation,* No. 78-0162 (D.D.C. filed May 13, 1981).

[8] In *Island Creek,* in addition to the judicially recognized exemptions, we also discussed the exemption provided in 30 CFR 715.17(a)(1) for a catastrophic precipitation event. So there are both court-supplied and agency-supplied defenses. Unknowingly mining in a previously mined area is not among those defenses.

showing that water was taken from the pond's point of discharge and that tests of the water showed iron and pH contents beyond the allowable limits.[9] Upon such a showing, the burden was shifted to Jeffco to show that OSM's evidence was faulty (which Jeffco did not do) or that it was somehow excepted from the requirement that was being imposed. In this latter alternative it, indeed, bore a heavy burden.

[3] In *Daniel Brothers Coal Co.*, 2 ISBMA 45, 87 I.D. 138 (1980), we held that the operator must affirmatively demonstrate its entitlement to an exception. Correspondingly, we concluded that it was upon Jeffco, not OSM, to establish those facts and present that evidence that would show the inapplicability of the effluent limitations in 30 CFR 715.17(a) to discharges from its sedimentation pond.

Jeffco's evidence that the offensive discharge was not its fault was the State inspector's report of Apr. 7, 1981, 2 weeks previous to the OSM inspection, which stated that water coming from the disturbed area and pit had an acceptable pH. As she did not testify, nor did anyone who might have accompanied her, we do not know how many samples were taken, where they were taken, whether they were on or off the permit boundaries, or whether they were upstream or downstream of the pond. We also do not know what the State inspector found as to iron content, as that is not in her report.[10] These "do not knows" do not establish the defense that Jeffco offers and that the Administrative Law Judge accepted. Moreover, the placement by Jeffco of the soda ash and lime barrel 20 feet upstream of the pond does not square with its interpretation of the State inspector's report to mean that its water was acceptable until it reached the pond and then commingled with the underground mine seepage.

Jeffco's establishment of the location of the offending underground mine is not impressive, either. In fact, in his opening statement, counsel for Jeffco stated that he could not say the discharge occurred "entirely outside of the permitted area," but only that it was unrelated to Jeffco's operations (Tr. 14). No witness placed the specific source(s) of the seepage.

As for lack of knowledge of the existence of underground mines in the area, the only firm basis Jeffco would have to assert that is the permit application map (Jeffco Exh. C) which contains the legend that there are no deep mines within 500 feet of the proposed area. This map was prepared by an engineer of Jeffco's choosing. We do not know what he relied upon in making that statement. Were we to recognize lack of knowledge solely upon the basis of this kind of map notation, we would be encouraging operators to engage the least resourceful or capable engineers available in order

[9] Perhaps the Administrative Law Judge felt that 43 CFR 4.1171 did not apply because this was a temporary relief hearing, also, and the evidentiary burdens for temporary relief are not specified. Be that as it may, where a consolidated hearing is held, and the petiton for temporary reliefs can be mooted by a vacation of the notice of violation (as was done here), no good purpose is served by treating the matters as not subject to 43 CFR 4.1171.

[10] The iron content, regardless of pH, tested to be of such a magnitude as to constitute a violation by itself.

to disclose not what the geological realities are but, instead, to provide an excuse for not knowing what they are. Nevertheless, even were this map an adequate basis for lack of knowledge, the anniversary map set forth that there were deep mines in the area.[11] Moreover, the OSM inspector's testimony indicated that the initial inspection of the minesite revealed there was seepage in the general area (although below the pond). That should have raised the possibility that there could be similar seepage in the area for which Jeffco was responsible. Additionally, had Jeffco conducted the periodic water testing set forth in 30 CFR 715.17(b)(V), it would have become aware of changes in water quality at the time those changes occurred and could then have made timely adjustments in its practices and/or would have been made aware of the seepage.

Upon the record presented, we cannot find any basis for the Administrative Law Judge's conclusion that Jeffco was not in violation of 30 CFR 715.17(a). OSM made a prima facie case and Jeffco failed to carry its burden of persuasion.

The decision below is reversed.

MELVIN J. MIRKIN
Administrative Judge

I CONCUR:

NEWTON FRISHBERG
Acting Chief Administrative Judge

[11] As we have previously stated, we do not know when that map was made available to Jeffco. That, too, is part of the burden it failed to carry.

ADMINISTRATIVE JUDGE PARRETTE DISSENTING:

I would distinguish *Thunderbird* on the facts of the case and affirm the disposition of the case by the Administrative Law Judge.

Thunderbird involved a situation in which the permittee was conducting a surface coal mining operation under a State permit on an area encompassing 100 acres, which had been mined 15 to 20 years before. The area had not been reclaimed, and the surface water drainage was known to be highly acidic prior to the commencement of Thunderbird's operations. The company intended to mine all but 10 to 12 acres of the permitted area and, at the time of the issuance of the NOV, had already disturbed 26 acres. It maintained a low-lying sedimentation pond to collect surface water from the disturbed portion of the site but argued that it should not be held responsible for the pH level of all discharges from the pond, since most of the drainage was from areas that it had not yet disturbed. The Board held that a NOV based on the acidic discharge from the pond was properly issued, since it was clear that part of the acidic drainage into the pond came from the disturbed area. The Board decided, in effect, that OSM should not be expected to prorate responsibility for the discharge from the pond between the disturbed and the undisturbed areas inasmuch as all of the drainage came from the permitted area, and some was clearly from the newly disturbed portion.

In the present case, as Judge McGuire points out, Jeffco presented evidence in the form of an official report resulting from a State inspection made only 2 weeks before the OSM inspection, to the effect that drainage coming from the disturbed area had an acceptable pH reading of 7.0 to 7.5. However, the report notes that seepage from an old deep mine entry located at the head of the sedimentation pond was acid and was causing an acid condition in the discharge from the pond. The testimony of the OSM inspector made clear that no mines were within the disturbed area or had been affected by Jeffco's 10-acre mining operation. There was also at least some indication that no underground mines were located within Jeffco's 14.3-acre permitted area. OSM made no effort to rebut Jeffco's evidence that the drainage from the disturbed area met the discharge standards; its tests were made exclusively at the point of discharge from the pond. Thus, as an affirmative defense, Jeffco made a prima facie case that it had contributed in no way to the fact that the discharge from the sedimentation pond exceeded the effluent limitation of the regulations. Obviously, OSM was free to rebut this exculpatory evidence if it chose, but it did not do so. Therefore, the Administrative Law Judge was justified in accepting the evidence contained in the State report as determinative on the issue of causality.

In summary, I would hold that, while the burden of proof that it did not contribute to the acidity of a sedimentation pond's discharge must rest with the permittee, once the permittee has made a prima facie case that it was not at fault, the burden shifts to OSM to rebut the permittee's showing. If OSM fails to do so, then a notice of violation based upon the acidity level of the discharge from the pond should not be allowed to stand.

BERNARD V. PARRETTE
Administrative Judge

MULLINS AND BOLLING CONTRACTORS

4 IBSMA 156

Decided *September 21, 1982*

Appeal by Mullins and Bolling Contractors from the June 4, 1981, decision of Administrative Law Judge Tom M. Allen, sustaining the Office of Surface Mining Reclamation and Enforcement's jurisdiction and the validity of Notice of Violation No. 80-I-66-20 and Cessation Order No. 80-I-66-5 (Docket No. CH 1-31-R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally—Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

A coal mine operator cannot avoid coverage under the Act by simply contracting to mine two less-than 2-acre sites for different owners, where the sites are adjacent, the operator treats them as related, and where, taken together, they encompass more than 2 acres.

2. Administrative Procedure: Burden of Proof—Surface

Mining Control and Reclamation Act of 1977: Applicability: Generally—Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

The purpose of the 2-acre exemption was to avoid the heavy burden on both the miner and the regulatory authority that would result from regulating small operations that cause very little environmental damage. The burden of proving entitlement to such an exemption is upon the person claiming it.

APPEARANCES: Lewey K. Lee, Esq., Wise, Virginia, for Mullins and Bolling Contractors; Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia, John Pendergrass, Esq., Attorney, and Marcus P. McGraw, Esq., Assistant Solicitor for Litigation and Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Mullins and Bolling Contractors (Mullins) has appealed from the June 4, 1981, decision of Administrative Law Judge Tom M. Allen, Docket No. CH 1-31-R, which found, pursuant to an application for review, that the Office of Surface Mining Reclamation and Enforcement (OSM) had jurisdiction under the Surface Mining Control and Reclamation Act of 1977, P.L. 95-87 (Aug. 3, 1977), 30 U.S.C. §§ 1201-1328 (Supp. II 1978) (the Act), and its implementing regulations, 30 CFR Chapter VII (the regulations), to issue Notice of Violation (NOV) No. 80-I-66-20 and Cessation Order (CO) No. 80-I-66-5, charging Mullins with two violations of the Act for failure to install adequate sedimentation ponds prior to disturbing an area by mining activity and for failure to obtain a State permit.

Prior to the hearing the Administrative Law Judge determine that neither the facts nor the failure to abate was contested, and that the only issue to be decided was whether OSM had jurisdiction over the two sites involved,[1] which Mullins contended were unrelated, involved different ownership, and consisted of less than 2 acres each, including haul roads. Thus, according to Mullins, both mining sites were exempt from Federal regulation, inasmuch as sec. 528(2) of the Act exempts parcels of 2 acres or less.

The Administrative Law Judge found that the evidence was sufficient to hold Mullins, as the admitted operator on both sites, subject to the Act by disturbing in excess of 2 acres, since the lapse of 5 to 6 weeks between the mining of the two areas did not alter its responsibility to comply with the performance standards of the Act, especially in light of the fact that work was performed to cover an open pit on the first site while coal was being extracted on the second site. We affirm the decision.

[1] The NOV, as modified, charged violations at both of the sites.

Facts

After conducting inspections on Sept. 10, 11, 15, and 16, 1980, OSM inspector Daniel Pollock issued NOV No. 80-I-66-20 to Mullins, alleging two violations of the Act for (1) failure to install adequate sedimentation ponds and other structures to control sedimentation prior to disturbance of an area by mining activity, in violation of 30 CFR 715.17(a), and (2) failure to obtain a permit from the State for conducting coal mining operations, in violation of 30 CFR 710.11(a)(2)(i).

Mullins admitted the facts but argued that OSM lacked jurisdiction over the operation on the ground that the mines each qualified for 2-acre exemptions under sec. 528(2) of the Act.

For convenience, we will adopt the statement of facts set forth by counsel for OSM, which we find to be essentially accurate:

Inspector Pollock first inspected the Mullins and Bolling operation on September 10, 1980, and found two adjacent sites disturbed. The first site, identified at the administrative hearing as site 1, consisted of an open pit, an exposed coal seam, and a bench area (Tr. 43, 44; 90, 91). The coal seam was approximately two feet thick and thirty to fifty feet long. After pacing the area, Mr. Pollock roughly estimated the size of site 1 to be less than one acre. The second site, identified at the hearing as site 2, was actively being mined by Mullins and Bolling (Tr. 49). Mr. Pollock's rough measurements revealed an estimated disturbance of 1.75 acres at site 2 (Tr. 45). Mr. Pollock also observed that sites 1 and 2 were related in the following ways:

1. both disturbed areas were mining the same seam of coal (i.e., the Clintwood Seam) (Tr. 46);

2. the same company disturbed both sites (Tr. 46);

3. the sites were adjacent to one another (Tr. 46);

4. the site were connected by a dozer track approximately sixty to one hundred feet in length (Tr. 33, 46);

5. some of the equipment seen by Inspector Pollock on site 2 was used to reclaim site 1 (Tr. 73, 90-92); and

6. operations on both sites were conducted contemporaneously (Tr. 73; 75; 90-92).

Mr. Pollock re-inspected the Mullins and Bolling operation the day after his first inspection. The only significant change was that the open pit at site 1 had been backfilled and the exposed coal seam covered with spoil material (Tr. 49). Photographs taken by Inspector Pollock during this inspection show the backfilled area (Resp. Exs. 4, 5, 7). In addition, "Strip Number 1 which had been previously connected with just a dozer track was now connected by a dozer cut." (Tr. 49). Additional photographs also show active mining at site 2 (Resp. Ex. 3).

On September 15, 1980, Inspector Pollock along with OSM Inspector Ronnie Vicars returned to the site and performed a survey of the disturbed area using a Brunton compass. This survey reveals that site 1 was .64 acres (Tr. 48) and that site 2, including the haulroad, was 2.06 acres (Tr. 48). On September 16, 1980, Mr. Bolling was informed of the results of the survey and Mullins and Bolling was issued Notice of Violation 80-I-66-20 (Tr. 51).

Inspectors Vicars and Pollock returned to the site on October 31, 1980. The site was essentially unchanged except for some spoil material which had been spread along the bench at site 2 (Tr. 64). A gate had also been constructed across the road (Tr. 64). At this time Inspector Pollock issued Cessation Order 80-I-66-5 for failure to abate the violations in his original notice (Tr. 65).

Inspector Vicars accompanied a licensed surveyor to the site on December 8, 1980, in order to conduct another survey of the disturbed areas. He advised the surveyor which areas had been disturbed by Mullins and Bolling and otherwise participated in the survey. He testified that the disturbed area was essentially unchanged in size from the time of his first visit on September 15, 1980, until his visit with the surveyor on December 8, 1980 (Tr. 99). The survey showed the following calculations for disturbed areas:

Disturbed area	Acreage
Site No. 1	1.44
Site No. 2	2.52
Bulldozer path connecting Site No. 1 to Site No. 2	.02
Haulroad from Site No. 2	.14
Total	4.12

(Resp. Ex. 1)

Arguments

Counsel for OSM then goes on to argue strongly that since the Act is a remedial statute for the protection of society and the environment from the adverse effects of surface coal mining operations, its exemptions must be narrowly construed so as not to frustrate the congressional purpose. Thus, the implementing regulations specifically deny exemption to surface mining operations affecting 2 acres or less conducted by a person who affects or intends to affect more than 2 acres at physically related sites. 30 CFR 700.11(b) (1980). Here, counsel argues, Mullins mined the same seam of coal at both sites; they used the same equipment at both sites; the sites were only 60 feet apart; and the sites were connected by a dozer track.

Counsel for Mullins argues, equally strongly, that the OSM inspectors themselves originally determined that the two sites were under 1 acre and approximately 1.75 acres, respectively; that the engineering survey was made "many months" after operations on the sites had terminated; that the survey apparently included an area disturbed by prior, unrelated mining operations; that the sites had unrelated owners; that the State inspector was satisfied that each of the sites was under 2 acres; that there was a lapse of nearly 6 weeks between actual mining operations on the two sites; that a large portion of the area in question was disturbed for the purposes of land development rather than for the extraction of coal; and that to hold that physically related sites cannot qualify for the 2-acre exemption effectively deprives adjacent owners of the benefit of the exemption. Counsel for Mullins particularly objects to applying the related site regulation to separate owner situations, since there is no objective standard to determine when two sites are related and when they are not. He also objects to the Administrative Law Judge's disregard of the time lapse between the two operations on the same ground; that is, that it potentially deprives operators involved in entirely separate operations of their 2-acre statutory exemption whenever the sites are physically related, regardless of the passage of time.

Discussion

As we have just decided in a companion case to this one, *Rhonda Coal Company, Inc.*, 4 IBSMA 124, 89 I.D. 460 (1982), a coal mine operator cannot escape responsibility for compliance with the performance standards and reclamation requirements of the Act by simply limiting its surface site to an area of less than 2 acres and then using

an unpermitted haul road in common with another operator, any more than it can do so by dumping part of its spoil on a 2-acre site located in an adjacent state. *See Blackwood Fuel Co., Inc.*, 2 IBSMA 359, 87 I.D. 579 (1980). There is comparable reason for holding likewise in this situation. The portion of 30 CFR 700.11 (1980) applicable at the time the NOV was issued to Mullins provided an exemption to operators on sites of 2 acres or less, but not "by a person who affects or intends to affect more than two acres at physically related sites" (30 CFR 700.11(b)).[2] Mullins is obviously conducting such an operation.

[1] Therefore, in the present case, we are deciding that a coal mine operator cannot escape liability by simply contracting to mine two adjacent 2-acre sites for different owners, at least where the sites clearly are physically related. In this case, as the Administrative Law Judge decided and as we affirm, the sites were shown to be related physically because the operator treated them as related, using fill from the second site to cover an open pit on the first site, in a situation where he conducted mining operations on both sites, where the two sites were no more than 60 feet apart, and where the sites, taken together, obviously encompassed more than 2 acres.

[2] The precedential effect of this case is limited by its facts. We will not speculate, in response to the arguments raised by counsel for Mullins, on what time, distance, and ownership factors may control future Board decisions relating to the 2-acre exemption.[3] Such a consideration is not material to this case. It is clear, however, as counsel for OSM points out, that the Congress was thinking in terms of "pick and shovel" rather than commercial operations when it included the 2-acre exemption in the Act (*see* 119 Cong. Rec. 1357, 1368 (1973), dealing with then sec. 203 exemptions), since such operations "cause very little environmental damage," and their regulation "would place a heavy burden on both the miner and the regulatory authority." S. Rep. 95-128, 95th Cong., 1st Sess 98 (1977).

In this context, we note that Mullins apparently uses a standard lease contract when it deals formally with property owners, and that one clause of that lease reads as follows: "It is expressly understood by the parties hereto that the Lessees will mine the leased area in sections of two (2) acre tracts so as to come under the two (2) acre exemption allowed by Federal and State law" (Petitioner's Exh. A-4).

One might well question whether such a systematic and calculated approach to the commercial utilization of the noncommercial 2-acre exemption contained in sec. 528(2) of the Act was precisely what the Congress had in mind in providing such an exemption. In

[2] This regulation was recently elaborated to make it even more certain that Mullins' operation is subject to regulation. *See* 47 FR 33431 (Aug. 2, 1982).

[3] We note, however, that the Department has now published an amendment to the regulation dealing with the 2-acre exemption, which deems surface coal mining operations to be related if they occur within 12 months of each other, flow into the same watershed within 5 miles of each other, and have common ownership or control. 47 FR 33424-32 (Aug. 2, 1982) (to be codified in 30 CFR 700.11(b)(2)).

any event, as we have held in the past, the burden of proving entitlement to the exemptions of the Act is upon those seeking to claim them (*Daniel Brothers Coal Co.*, 2 IBSMA 45, 87 I.D. 138 (1980); *James Moore*, 1 IBSMA 216, 86 I.D. 369 (1979)); and in this case, we have no hesitancy in concluding that Mullins has failed to meet its burden of proof.

Accordingly, the decision of the Administrative Law Judge is affirmed.

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

NEWTON FRISHBERG
Acting Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

YATES PETROLEUM CORP. ET AL.

67 IBLA 246

Decided *September 24, 1982*

Appeal from decision of Wyoming State Office, Bureau of Land Management, holding noncompetitive oil and gas lease to have terminated by operation of law. W-28314.

Set aside and remanded.

1. Oil and Gas Leases: Termination—Oil and Gas Leases: Unit and Cooperative Agreements—Oil and Gas Leases: Well Capable of Production—Words and Phrases

"Paying quantities." For the purposes of the extension provision of 30 U.S.C. § 226(j) (1976) relating to leases committed to a unit plan of development, "paying quantities" requires production sufficient to recover the costs of operation and marketing but does not include recovery of drilling expenditures.

APPEARANCES: David R. Vandiver, Esq., Artesia, New Mexico, for appellants.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

Yates Petroleum Corp. (Yates), Aminoil USA, Inc., and the Estate of William J. Helis have appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated May 28, 1981, holding appellants' noncompetitive oil and gas lease, W-28314, to have expired at the end of its primary term because no drilling operations were being conducted over the expiration date of the lease, and the lease was deemed "not eligible for extension" under 43 CFR 3107.2-3.

Oil and gas lease W-28314, consisting of sec. 29 and lots 1, 2, 3, E½, E½W½ sec. 30, T. 26 N., R. 95 W., sixth principal meridian, was issued to Jack J. Grynberg, effective May 1, 1971, for a term of 10 years. Appellants are the current record titleholders of the lease as a result of several mesne assignements. On Feb. 8, 1979, appellants agreed to commit the lease to the Osborne Draw Unit Agreement (No. 14-08-0001-18076), which was approved July 26, 1979, effec-

tive that date, for an initial term of 5 years.

On July 25, 1979, Yates, the unit operator, commenced drilling the Osborne Draw Federal Unit No. 1 (Unit No. 1) well in the NE¼NW¼ sec. 4, T. 25 N., R. 95 W., sixth principal meridian, to a total depth of 15,004 feet. On Sept. 20, 1980, the well was completed in the Lewis formation, and flowed 280,000 cubic feet of gas per day. Reserves were estimated to be 4.1 billion cubic feet of gas.

By letter dated Feb. 9, 1981, Yates submitted information obtained from its drilling activities and requested that the Area Oil and Gas Supervisor,[1] designate the Unit No. 1 well a "commercial well." In response to a subsequent request by the Geological Survey (Survey) for additional test flow data, Yates submitted information by letter dated May 29, 1981, which indicated that an estimated 4.558 billion cubic feet of gas was producible from the Unit No. 1 well.

At the same time these actions were occurring, however, the District Supervisor, Geological Survey, Rock Springs, Wyoming, by memorandum dated May 4, 1981, advised BLM that there were "[n]o drilling operations" which would qualify the lease for an extension. On the basis of this memorandum, BLM held the lease to have terminated in its May 28, 1981, decision, which decision was received by appellants on June 1, 1981.

In their statement of reasons for appeal, appellants contended that, as of July 16, 1981, Survey had not acted on Yates' request for a commercial determination regarding the Unit No. 1 well. They argued that the well "although completed and physically capable of producing, is still shut-in due to * * * Yates' inability to obtain a pipeline connection." They requested that all action be stayed until Survey determines whether the Unit No. 1 well is a well capable of producing in paying quantities and, if Survey determined that it was not, they requested that we refer this matter for a fact-finding hearing so that they might submit evidence to establish that it was a well capable of production in paying quantities.

Sec. 17(j) of the Mineral Leasing Act, *as amended,* 30 U.S.C. § 226(j) (1976), provides, *inter alia,* that a noncompetitive oil and gas lease with a primary term of 10 years, which has been committed to a unit agreement, shall continue in force as long as the lease remains committed, provided that production is had in paying quantities prior to the expiration date of the lease.[2] *See* 43 CFR 3107.4-2. Accordingly, as long as production is had in paying quantities on any lease committed to a unit agreement, that production will be credited to all of the leases so

[1] The Conservation Division, Geological Survey, was reorganized effective June 30, 1982, and is now known as the Minerals Management Service (MMS), and the officials now bear different titles. Secretarial Order No. 3071 (Jan. 19, 1982), 47 FR 4751 (Feb. 2, 1982). However, for simplicity we shall refer to Survey and its officials as they were known at the time of their actions.

[2] Sec. 17(e) of the Mineral Leasing Act, *as amended,* 30 U.S.C. § 226(e) (1976), provides that a lease may also be extended for 2 years where actual drilling operations were commenced under the unit agreement prior to the expiration date of the lease and are being diligently prosecuted at that time. *See* 43 CFR 3107.2-3. Appellants, however, do not argue that sec. 17(e) applies herein.

committed. Even in the absence of actual production, the presence of a well capable of producing oil or gas in paying quantities completed anywhere in the unit, subsequent to the effective date of the unit agreement but prior to the expiration date of a unitized lease, will continue that lease beyond its primary term. *Burton/Hawks, Inc.,* 47 IBLA 125 (1980); *Corrine Grace,* 30 IBLA 296 (1977).

The question, therefore, is whether the Unit No. 1 well was a "well capable of producing oil or gas in paying quantities." According to documents provided by the Mineral Management Service (MMS), Survey, by letter dated July 31, 1981, determined that the Unit No. 1 well was not capable of producing in paying quantities, and so informed appellants. As noted above, appellants have requested a hearing on the question of the well's capacity to produce oil or gas in paying quantities if a determination were subsequently made that the well was not capable. It is, indeed, the policy of the Board to afford an appellant in such circumstances the option of requesting a hearing. *See Burton/Hawks, Inc., supra.*

We note, however, that included with the documents provided by MMS was a copy of a request for termination of the Osborne Draw Unit, dated July 27, 1981, and signed by more than 75 percent of the owners of the working interests as required by sec. 20 of the unit agreement. The signatories include all three of the appellants before us. In their request, appellants stated: "The Osborne Draw Federal Unit Well No. 1 located in Unit C of Section 4, Township 25 North, Range 95 West, Sweetwater County, Wyoming, was drilled to a total depth of *15,004* feet, and *completed as a non-commercial well* in the Lewis Formation." (Italics supplied.) On July 3, 1981, the Acting Deputy Conservation Manager approved their request and terminated the unit agreement effective that date.

It seems reasonably clear that, at least as of July 27, 1981, appellants were convinced that the Unit Well No. 1 was not a commercial completion. This, however, does not end the matter. The question which remains to be examined is whether the admission that the well was completed "as a noncommercial well" is inconsistent with appellants' assertions that the lease W-28314 was subject to extension pursuant to the provisions of sec. 17(j) of the Mineral Leasing Act of 1920, *as amended,* 30 U.S.C. § 226(j) (1976). We hold that these two statements are not necessarily inconsistent.

[1] The term "commercial well," just like the term "paying quantities," is amenable to differing interpretations dependent upon the context of its usage. Thus, the term "commercial well" has been defined as "a well capable of production in paying quantities, which in this sense usually means a well that will make a profit over the costs of drilling, equipping, completing and operating it." Williams and Meyers, *Manual of Oil and Gas Terms* (3d ed. 1971), at

69. But, when terms such as "commercial well" of "commercial quantity" appear in the habendum clause of an oil or gas lease, they are normally defined as including costs of production and marketing but excluding recapture of the costs of drilling. *See, e.g., Texaco, Inc.* v. *Fox,* 618 P.2d 844, 847-48 (Kan. 1980). In this regard, therefore, the term "commercial well" is synonymous with "a well capable of producing in paying quantities," since it has long been recognized that where that latter phrase is found in the habendum clause, it, too, encompasses recovery only of the costs of production and marketing and excludes drilling costs. *See Benedum-Trees Oil Co.* v. *Davis,* 107 F.2d 981, 985 (6th Cir.), *cert. denied,* 310 U.S. 634 (1939); *Fick* v. *Wilson,* 349 S.W.2d 622, 625 (Tex. Civ. App. 1961); *John G. Swanson,* 66 IBLA 200, 202 (1982); *Amoco Production Co.,* 41 IBLA 348, 351 (1979).

Notwithstanding the foregoing, however, it must be recognized that where the term "production in paying quantities" appears in contexts other than the habendum clause it might well partake of a more restricted meaning. This is clearly the case of its use in sec. 9 of the unit agreement herein. In relevant part, that section provides:

> DRILLING TO DISCOVERY. Within 6 months after the effective date hereof, the Unit Operator shall begin to drill an adequate test well at a location approved by the Supervisor, unless on such effective date a well is being drilled conformably with the terms hereof, and thereafter continue such drilling diligently until *the upper 300 feet of the Lance* formation has been tested or until at a lesser depth unitized substances shall be discovered which can be produced in paying quanties (*to-wit: quantities sufficient to repay the costs of drilling, completing, and producing operations, with a reasonable profit)* or the Unit Operator shall at any time establish to the satisfaction of the Supervisor that further drilling of said well would be unwarranted or impracticable, provided, however, that Unit Operator shall not in any event be required to drill said well to a depth in excess of *7,800* feet. Until the discovery of a deposit of unitized substances capable of being produced in paying quantities, the Unit Operator shall continue drilling one well at a time, allowing not more than 6 months between the completion of one well and the beginning of the next well, until a well capable of producing unitized substances in paying quantities is completed to the satisfaction of said Supervisor or until it is reasonably proved that the unitized land is inacapable of producting unitized substances in paying quantities in the formation drilled hereunder. [Italics supplied.]

Clearly, as used in this context, "paying quantities" incorporates a requirement that the costs of drilling must be recouped. Based on this provision, which also appears in the standard form unit agreement (*see* 30 CFR 226.12), Survey has taken the position that:

> [T]o be initially considered a unit well, a well must be capable of production in such quantity as will pay a profit to the lessee over and above the normal costs of drilling, completing and equipping the well, maintaining the lease, operating the well, and marketing the product.* * *
>
> Once a well has been determined to be a unit well, all leases committed to the unit are eligible for extension (in accordance with Section 20 of the Standard Form of Unit Agreement for Unproved Areas) so long as the unit contains a well capable of producing oil or gas in sufficient quantities to pay the cost of production, *i.e.,* the cost of maintaining the unitized leases and operating the well, including normal marketing costs. This is the same criteria used for individual lease extension.

Conservation Division Manual at 645.6.3D.

Contrary to the last sentence of the *Conservation Division Manual* quoted above, the criteria established by the manual for extension of leases committed to a unit is *not* the same as that applied for an individual lease. Thus, under the Manual, if an initial well is drilled in a unit with production merely sufficient to allow a profit over continuing operating and marketing expenses, but insufficient to cover the costs of drilling, such well will not serve to extend leases committed to the unit. Such a well would, however, extend an individual lease if in existence at the end of its primary term. For reasons which we set forth, even giving due deference to Survey's long experience, we cannot agree to its interpretation that, in order to extend a lease committed to a unit beyond its expiration date, the well must be able to recover the costs of drilling as well as the costs of operating and marketing.

First, it is not in accord with the statutory language of sec. 17(j), 30 U.S.C § 226(j) (1976). Thus, sec. 17(j) states, in relevant part:

> Any * * * lease [other than a 20-year lease] issued under any section of this chapter which has heretofore or may hereafter be committed to any such [unit] plan that contains a general provision for allocation of oil or gas shall continue in force and effect as to the land committed so long as the lease remains subject to the plan: *Provided,* That production is had in paying quantities under the plan prior to the expiration date of the term of such lease.

It is to be noted that the above-quoted proviso is in the nature of a habendum clause and, further, that the reference to production in "paying quantities" replicates the provision found at 30 U.S.C. § 226(e) (1976), which establishes the respective primary terms for competitive and noncompetitive leases and provides that "each such lease shall continue so long after its primary term as oil or gas is produced in paying quantities." Since it has long been settled that "paying quantities," as used for individual lease extension, only contemplates recovery of operating and marketing costs (*see* cases cited, *infra*), it is difficult to ascertain why the same phrase, used in the same context (for the purpose of extending the lease), should have a dissimilar meaning in sec. 17(j).[3]

Second, Survey's position ignores the different purposes behind the extension provision of the statute and the drilling requirement of sec. 9 of the unit agreement. The extension provisions, both in sec. 226(e) and in sec. 226(j) are, in effect, an award to the lessee who has developed his lease. Moreover, it serves to aid the conservation of the resource, since without it a lessee who was approaching the end of a fixed lease term might increase

[3] Indeed, the distinction between the meaning of the term production in "paying quantities" for purposes of the habendum clause regarding lease extension where only production sufficient to recover operating and marketing expenses is required and the meaning of the same term for purposes of defining the lessee's drilling obligations under a lease is well recognized. *Transport Oil Co. v. Exeter Oil Co.*, 84 Cal. App. 2d 616, 191 P.2d 129 (Cal. App. 1948); 2 Summers, Oil and Gas § 306 (Perm. ed. 1927). We believe that the definition for purposes of sec. 17(j) must be the same as the definition for purposes of the general habendum clause. This is properly distinguished from the definition embodied in sec. 9 of the operating agreement defining the operator's drilling obligations.

production in the short run without regard for total recovery since such recovery would not benefit him.[4]

It would, of course, make no economic sense to terminate a lease where a well had been drilled and could be profitably produced, even where it was apparent that total recovery would never equal total expenditures. From the point of view of the lessee, a prudent operator would produce the well and thereby lessen his total loss from the drilling venture. From the point of view of the lessor, it clearly was in his economic self-interest to have the original lessee produce since it would be unlikely, should the lease be terminated, that anyone else would be willing to drill another well into the same formation where the original lessee had shown it was not economically feasible to drill. This latter rationale has an even stronger impact in Government leasing since, not only is the leasing aimed at the generation of revenues, but it is also designed to maximize domestic production of oil. Termination of leases which, while ultimately unprofitable to the lessee, could nevertheless be profitably produced, would run counter to both these purposes.

Sec. 9 of the unit agreement is aimed at totally different goals and, thus, the proper definition of "paying quantities" as used in sec. 9, necessarily involves different considerations. Unit agreements were originally authorized for Federal lands by the Act of July 3, 1930, 46 Stat. 1007, and the Act of Mar. 4, 1931, 46 Stat. 1523. The impetus for these Acts was a combination of then depressed oil prices and the development of recovery techniques which could not be utilized on an individual permit basis. A unit agreement allowed various permittees and other holders of oil and gas rights to explore and develop the lands committed to a unit in a systematic method which minimized expenses by avoiding needless offsets, and contributed to maximum recovery from any reservoir. Insofar as unproven areas were concerned, unitization served the additional purpose of spreading out the risks inherent in the drilling of wildcat wells.

Thus, the drilling requirements of sec. 9 of the unit agreement are an integral part of the unit agreement. Since the first goal of a unit agreement for an unproved area is to establish the existence or nonexistence of commercially recoverable deposits, the unit operator's obligation to drill both the initial well and subsequent wells is fulfilled only where a well is completed which is, indeed, commercial. Under sec. 9, the drilling of a well which might produce in paying quantities, but which would never recover drilling costs, simply would not establish the existence of a reservoir which was amenable to unit production. Therefore, for the purposes of sec. 9 defining paying quantities as including the costs

[4] It should also be noted that at the time the language of the statutory habendum provision was originally adopted, in 1935, there was a substantial glut of oil on the market, and that producers were adjusting production accordingly. In reference to this economic fact of life, it was argued that "it seems only reasonable that the term of the lease should be for the productive life of the wells thereon, thus avoiding the necessity of producing all oil possible within a prescribed term regardless of conditions in the industry." S. Rep. No. 1158, 74th Cong., 1st Sess. (1935), at 4.

of drilling is eminently reasonable. But the question whether a well is producing in paying quantities for the purpose of sec. 9 of the unit agreement (and for the purposes of sec. 20 of the unit agreement, as we shall show below) is functionally discrete from the question whether the well is producing in paying quantities for the purposes of sec. 17(j), 30 U.S.C. § 226(j) (1976).

The Department has long recognized that all lands committed to an approved unit are treated as a single lease for the purposes of production, and, therefore, actual production on any lease committed to the unit is constructive production on all other leases within the unit. *See Automatic Termination of Unitized Leases for Failure to Pay Rentals,* M-36629, 69 I.D. 110 (1962). Moreover, insofar as individual lease extensions are concerned, actual diligent drilling operations over the expiration date of any lease committed to the unit, *occurring anywhere within the unit,* are sufficient to obtain the 2-year extension mandated by 30 U.S.C. § 226(e) (1976). *See Integrity Oil and Gas Co.,* 42 IBLA 222 (1979). There seems to be no logical reason to establish, for the purpose of lease extension under 30 U.S.C. § 226(j) (1976), a higher threshold showing than would be required for a nonunitized lease. Indeed, the opposite could be more easily defended.

By committing his lease to a unit plan of development, the individual lessee surrenders his exclusive right to drill on his own lease in favor of the coordinated drilling plan authorized under the unit agreement. The possibility of obtaining an extension by drilling over the expiration date might thus be unavailable to a lessee where the unit agreement does not contemplate or require drilling during the critical period. It is totally inconsistent with the Government's general policy of fostering unit plans of development to at the same time establish a requirement for extension by production which is greater under a unit plan than would be for an individual lessee. In fact, carried to its logical extreme, it could be argued that even if appellant's lease contained Unit No. 1 well, there could be no extension under 30 U.S.C. § 226(j) (1976) since this was not production under the unit agreement. We reject the premise of the argument, viz., that the existence of a commercial well under sec. 9 of the unit plan determines the applicability of the extension provision of 30 U.S.C. § 226(j) (1976).

Finally, we note the Survey Manual based its analysis, in part, on the provisions of sec. 20 of the Standard Unit Agreement. Thus, the manual states that once a unit well under sec. 9 is determined to exist all leases committed to the unit are eligible for extension "in accordance with Sec. 20 of the Standard Form of Unit Agreement for Unproved Areas." This statement is simply wrong. Sec. 20 has absolutely noting to do with the extension of leases committed to a unit. Sec. 20 relates to the extension *of the unit* itself. Once again, it is logical that the

paying quantities test of sec. 9, rather than the paying quantities standard of 30 U.S.C. § 226(j) (1976) should apply in this circumstance, since production from wells incapable of recovering drilling costs would not serve to show that development under a unit plan was possible. Thus, a unit plan may only be *automatically* extended where a commercial well exists, since only such a well clearly establishes that unit development is viable.

In summation, we hold that, for the purposes of the extension provisions of 30 U.S.C. § 226(j) (1976), production in paying quantities requires that the well drilled be able to produce sufficient hydrocarbons to recover the costs of operating and marketing but need not recoup the costs of drilling. This being the case, the fact that the unit agreement subsequently terminated at the request of the parties is not dispositive of the question whether lease W–28314 was extended beyond its expiration date. Rather, the question is whether Unit No. 1 well was capable of production in paying quantities within the definition of 30 U.S.C. § 226(j) (1976).

It seems clear to us that both BLM and Survey proceeded below on the assumption that unless the well was commercial within the meaning of sec. 9 of the unit agreement, the instant lease could not be extended pursuant to 30 U.S.C. § 226(j) (1976). This we have held to be erroneous. While we note that in a letter, dated July 31, 1981, to appellant Yates the Acting Deputy Conservation Manager stated that "production from this well [Unit No. 1 well] shall be handled and reported on a lease basis," thus implicitly agreeing that the well was capable of producing in paying quantities under the definition which we have held properly applicable herein, we feel that it would be more appropriate to permit BLM and MMS an opportunity to initially review the question. Should a determination be made that the well was capable of producing in paying quantities, the lease would have been extended by reason of production under 30 U.S.C. § 226(j) (1976), and thus would have been *in esse* when the unit agreement terminated. Therefore, under 30 U.S.C. § 226(j) (1976), it would be eligible for a 2-year extension provided for leases where the unit plan of development has terminated. *See* 43 CFR 3107.5. On the other hand, if the Unit No. 1 well was not capable of producing in paying quantities, lease W–28314 terminated on its expiration date and, thus, would not be extended under 43 CFR 3107.5.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case files are remanded for further action consistent herewith.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

GAIL M. FRAZIER
Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

LOIS JEAN BREWER v. ACTING DEPUTY ASSISTANT SECRETARY—INDIAN AFFAIRS (OPERATIONS)

10 IBIA 110

Decided *September 30, 1982*

Appeal from decision by Acting Deputy Assistant Secretary—Indian Affairs (Operations) canceling assignment to appellant of 79 acres of Indian trust land.

Affirmed in part and reversed in part.

1. Indian Lands: Assignments

While portions of assigned Indian trust land might be properly canceled for nonuse by appellant assignee, where it appeared she had leased nonresidential portions of the assigned lands despite provisions of her assignment which required the lands be devoted entirely to her exclusive personal use and that of her heirs, cancellation of the assignment, even if found to be a legally proper response to the leasing, may not be ordered without giving prior notice of the proposed action, including the reasons therefor, and an opportunity to respond.

APPEARANCES: Larry Leventhal, Esq., and Mitchell R. Hadler, Esq., for appellant; Mariana R. Shulstad, Esq., Office of the Field Solicitor, for appellee.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

Procedural Background

On Sept. 25, 1981, appellee Acting Deputy Assistant Secretary—Indian Affairs (Operations) affirmed an earlier decision by the Minneapolis Area Director, Bureau of Indian Affairs (Area Director, Bureau), canceling an assignment of 80 acres of trust lands to appellant Lois Jean Brewer. The decision of the Area Director explains the action taken:

> [Y]ou have been leasing a portion of your assignment to J. Kenneth Rutt & Sons, of Shakopee, Minnesota, for farming purposes. We have copies of canceled checks indicating payment to you of $1,730.00 in 1979 from the Rutt family.
>
> You have been verbally advised in the past of the prohibition of leasing your assignment without the proper approval from the Area Director.
>
> It is stated in the certificate granting you the assignment that, "any sale, lease, transfer, or incumbrance of said land, or any part thereof to any person or persons whomsoever, except it be to the United States, and as herein provided, is and will continue to be utterly void and of no effect."
>
> Because the $1,730.00 was obtained from 1886 Land, you must remit that amount to the Bureau of Indian Affairs so that it may be placed in an account for the credit of the Mdewakanton Sioux Tribe of Minnesota.
>
> It is the decision of this office, and concurred with the Shakopee Community Council, that since you have repeatedly leased this assignment invalidly, your assignment for it, except for a one (1) acre parcel where your home is located, will be canceled.

(Area Director's Decision dated Sept. 16, 1980, at 1.)

The documentary evidence of appellant's interest in the 80-acre tract which is the subject of this appeal is entitled "Indian Land Certificate," which recites:

> TO ALL WHOM IT MAY CONCERN:
>
> It is hereby certified that Mrs. Lois (Pendleton) Brewer, a member of the Mdewa-

kanton band of Sioux Indians residing in Minnesota, has been assigned the following-described tract of land, viz: South Half of the Northwest Quarter (S½NW¼) of Section 22, Township 115 North, Range 22 West. This description is the North Half of Tracts 55, 56, 57, 58, 59, 60, 61, 62 and 63, in Scott County, Minnesota, containing 80 acres, more or less.

It is also certified that the said Lois (Pendleton) Brewer and her heirs are entitled to immediate possession of said land, which is to be held in trust, by the Secretary of the Interior, for the exclusive use and benefit of the said Indian, so long as said allottee or his or her heirs occupy and use said land. If said land should be abandoned for 2 years by the allottee, then said land will be subject to assignment by the Secretary of the Interior to some other Indian who was a resident of Minnesota May 20, 1886, or a legal descendant of such resident Indian.

It is also declared that this certificate is not transferable and that any sale, lease, transfer or incumbrance of said land, or any part thereof to any person or persons whomsoever, except it be to the United States, and as herein provided, is and will continue to be utterly void and of no effect. It is further declared that said land is exempt from levy, taxation, sale, or forfeiture, until otherwise provided by Congress.

IN TESTIMONY WHEREOF, I, W. W. Palmer, Superintendent, Minnesota Agency, Bureau of Indian Affairs, have hereunto set my hand and caused the seal of this office to be hereto attached at the City of Bemidji, Minnesota, this 4th day of September 1958.

Since the decision by appellee adopted both the Area Director's decision and the stated basis for that decision, it is in the context of the original notice of cancellation that the issues on appeal are framed. Appellant contends on appeal that: (1) She is an allottee of the land, not a mere assignee, therefore her interest in the land is not subject to cancellation; (2) the Area Director was deprived of any power to cancel assignments to Shakopee Mdewakanton lands by the Act of Dec. 19, 1980, 94 Stat. 3262; (3) the Area Director's action was without basis in fact or law; and (4) the cancellation of appellant's interest was not made in good faith. These contentions, denied by appellee, are discussed in the order listed.

Factual and Legal Background

In support of her first two contentions, appellant relies upon Sioux treaties and the historical background of the Mdewakanton Sioux and the lands described in her certificate. As relates to this appeal, that background is as follows.

By treaty with the Sioux of June 19, 1858, 12 Stat. 1031, a reservation was established along the Minnesota River in south-central Minnesota. Following a Sioux uprising in 1862, the Minnesota Sioux were relocated to what is now southern South Dakota and northern Nebraska, and Congress passed the Act of Feb. 16, 1863, 12 Stat. 652, which provides in part:

> That all treaties heretofore made and entered into by the Sisseton, Wahpaton, Medawakanton, and Wahpakoota bands of Sioux or Dakota Indians, or any of them, with the United States, are hereby declared to be abrogated and annulled, so far as said treaties or any of them purport to impose any future obligation on the United States, and all lands and rights of occupancy within the State of Minnesota, and all annuities and claims heretofore accorded to said Indians, or any of them, to be forfeited to the United States.

The territory which comprised the Mdewakanton Sioux Reservation before the outbreak thus ceased to be a reservation in 1863. The Mdewakanton band itself was relocated outside Minnesota.

While, as appellant points out, an intention to abrogate or modify a treaty is not to be lightly imputed to Congress, the authority to abrogate treaty provisions does exist. *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903). So far as pertinent in this case, Congress expressly abrogated its treaty obligations with certain Sioux Indians by the Act of Feb. 16, 1863, and, proceeded to declare in the same Act that "all lands and rights of occupancy within the State of Minnesota * * * heretofore accorded to said Indians * * * be forfeited to the United States." Accordingly, the Mdewakanton band ceased to exercise any jurisdiction or control over the former reservation in Minnesota. The trust status of the reservation in Minnesota was terminated in 1863.[1]

After the Sioux uprising, it appeared some members of the band were permitted to remain in Minnesota. Congress recognized the existence of these Indians in sec. 9 of the Feb. 16, 1863 Act, *supra,* which provides:

> That the Secretary of the Interior is hereby authorized to set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians. The land so set apart shall not be subject to any tax, forfeiture, or sale, by process of law, and shall not be aliened or devised, except by the consent of the President of the United States, but shall be an inheritance to said Indians and their heirs forever.

Apparently, the authority of the Secretary of the Interior to set aside these lands was never exercised. However, additional funds for the benefit of these Indians were appropriated by the Act of Aug. 19, 1890, 26 Stat. 336, 349, for

> Indians in Minnesota heretofore belonging to the Mdewakanton band of Sioux Indians, who have resided in said State since the twentieth day of May, eighteen hundred and eighty-six, or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations * * *

The funds provided were apparently used in part by the Secretary of the Interior to purchase lands at several locations in southern Minnesota. One such location, in Scott County and now a part of the Shakopee Mdewakanton Sioux Reservation, included the lands which were ultimately assigned to appellant.[2]

Inasmuch as appellant claims her assignment of land is tantamount to a formal allotment, it is necessary to briefly examine the Indian allotment process. The general scheme of allotment is described in the Indian General Allotment Act of Feb. 8, 1887, 24 Stat. 388, 25 U.S.C. §§ 331-354 (1976). With some exceptions, allotments on most Indian reservations were made pursuant to this Act. Thus, the word "allotment"

[1] Appellant erroneously relies upon *Menominee Tribe of Indians* v. *United States,* 391 U.S. 404 (1968), for the proposition that treaty rights survived the 1863 Act and subsequent events. *Menominee* construed two 1954 Acts which terminated Federal supervision over the Menominee Tribe. The Court ruled that the Acts did not terminate or abrogate treaty rights, noting:

> "The provision of the Termination Act * * * that 'all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to members of the tribe' plainly refers to the termination of federal supervision. The use of the word 'statutes' is potent evidence that no *treaty* was in mind,"

391 U.S. at 412 (citations omitted, italics in original).

[2] Appellee's Brief on Appeal (Exhs. 1, 2, and 5).

refers both to the process of land administration created by this, or similar Acts, and to a trust estate in real property created by the legislation. Sec. 5 of the General Allotment Act provides that the Secretary of the Interior issue patents to allottees, specifically describing the lands selected. The Act provides that the United States hold fee title to the land in trust for allottees for a period of 25 years from the date of the patent, and, at the expiration of the 25-year trust period, convey fee title in the lands to the allottee or his heirs, free of encumbrance. The trust period could, however, be extended. The beneficial interest in allotments vests in the allottee, is inheritable, devisable, and can be conveyed with the approval of the Secretary. For a detailed review of the allotment system, *see* F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at pages 127–143.

The allotment process described by the General Allotment Act and its progeny was not followed with respect to the land now assigned to appellant. A 1915 letter from Assistant Commissioner E. B. Meritt to the Secretary outlines instead, with regard to this land, a practice of assigning to individual Indians the right to use and occupy these lands on a conditional basis:

> The Indian occupants of these tracts hold under a form of certificate signed by the Commissioner of Indian Affairs. This form was approved by the Department November 21, 1904 and similar certificates are now held by eighty-nine of these Mdewakanton Sioux. No attempt has been made by the Department or this Office to transfer any title to these eighty-nine Indians, other than the conditional occupancy and use mentioned in the certificate.[3]

The letter continues by discussing arguments similar to those put forth by appellant:

> The points are advanced by Mr. Pollock that deeds were taken running to a number of these Mdewakanton Sioux; that the law contemplated the purchase of lands for individual Indians; and that the form of certificate above referred to was unauthorized by law; that the individual assignees have therefore a vested interested susceptible to inheritance, and the reassignment of which cannot be made at the discretion of the Department. He suggested that the matter of making further reassignments be therefore held up until legislation can be procured subjecting these tracts to the provisions of the General Allotment Act and amendments.[4]

The letter notes the absence of legislation to authorize issuance of patents in fee or in trust to the lands. It concludes:

> [T]he Office believes it was the result of the legislation authorizing these purchases, that the land be disposed of in a manner which was deemed best by the Secretary of the Interior, and that he deemed it best not to dispose of any permanent interest in these lands pending further legislation which has not yet been enacted. The Department is respectfully advised that the Office has in mind presenting a draft of legislation to the Department for submission to the next Congress which will make it possible to allot these assignments under the provisions of the General Allotment Act and its amendments.[5]

It appears the legislation contemplated above was not adopted. The next act of Congress relevant to these lands, the Act of Dec. 19, 1980, 94 Stat. 3262, provides in pertinent part:

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[3] Letter from E. B. Meritt to the Secretary of the Interior dated Sept. 30, 1915 (Appellee's Exh. 4), at 1.

[4] *Id.* at 2–3.

[5] *Id.* at 6–7.

That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); the act of March 2, 1889 (25 Stat. 980); and the act of August 19, 1890 (26 Stat. 336), are hereby declared to hereafter be held by the United States—

(1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

The Departmental report of Under Secretary James A. Joseph, dated Dec. 10, 1980, commenting upon the Act, states:

The effect of * * * [the proposed bill] would be to change the legal status of the ownership of the lands involved, which are now held by the United States under the Acts described above for the use of those Mdewakanton Sioux Indian individuals who reside in (or were enroute to) the State of Minnesota on May 20, 1886, and for their descendants. Under the enrolled bill, as noted above, all right, title, and interest in such lands would be declared instead to be held by the United States in trust for three Minnesota Sioux tribal communities.

Discussion and Decision

The Department's position concerning these lands has, as shown above, consistently been that they were not made available by Congress for allotment, were never allotted, and were therefore available in 1980 to become tribal lands held by the Department in trust. Congress approved this position when it adopted the 1980 Act. This position is consistent also with the language of the document of title held by appellant, which contains no language similar to that found either in a trust patent nor in conveyances of a restricted fee.[6] While the word "allottee" appears in the certificate, the estate conveyed to the certificate holder is apparently neither a trust patent nor a restricted fee, but a tenancy personal to the assignment holder and her heirs conditioned upon personal occupancy and personal use.[7] Since appellant's assigned lands were never personally allotted to her, appellant is not, in this case, the beneficial owner of an interest in allotted Indian trust lands.[8]

Prior to passage of the Act of Dec. 19, 1980, appellant's lands were held by the United States for the use and benefit of a class of Mdewakanton Sioux, of which appellant was a member when the certificate dated Sept. 4, 1958, was issued to her. That class is apparently somewhat different from the tribe for which title is held in trust since Dec. 19, 1980, inasmuch as the Shakopee Mdewa-

[6] The various types of allotment are discussed and described in Cohen, *Handbook of Federal Indian Law* (1941) at pages 108–10.

[7] The record establishes that the 80-acre tract assigned to appellant was never allotted. It also establishes that other Mdewakanton Sioux, apparently unrelated to appellant, were her predecessors on the tract, and that their tenancy was on the same terms and conditions as that enjoyed by appellant (Appellee's Brief, Exhs. 7–10).

[8] The certificate cannot be characterized as an allotment certificate, since that term is applied to the trust patent, the issuance of which conveys a vested interest to an allottee. *See Monson* v. *Simonson,* 231, U.S. 341, 345–47 (1913), and Cohen, cited *supra* note 5.

It is also noted, the Acting Associate Solicitor for Indian Affairs, Department of the Interior, in a memorandum opinion of Mar. 19, 1974 (*see* Appellee's Brief, Exh. 13), discussed the nature of title to these lands and concluded, at page 5 of the memorandum, they were not individually owned lands in the nature of allotments: "The lands are held in trust by the United States with the Secretary possessing a special power of appointment among members of a definite class. The interest the Secretary may grant by such appointments (called assignments) is either a tenancy at will or a defeasible interest."

kanton Sioux Community is a federally recognized Indian community organized under the Indian Reorganization Act of June 18, 1934, with membership defined in a written constitution. With passage of the Act of Dec. 19, 1980, title was held in trust for the community to be managed by it for the benefit of the community and its members. While appellant may also be a member of the Shakopee community, her membership by no means bestows upon her any individual ownership of tribal trust lands or elevates her existing assignment of trust land to the status of an individual allotment.

Although appellant is not an allottee, she clearly has a property interest in the 80-acre tract assigned to her. In this regard, sec. 3 of the Act of Dec. 19, 1980, 94 Stat. 3262, does provide, as pointed out by appellant, that:

> Nothing in this Act shall (1) alter, or require the alteration, of any rights under any contract, lease, or assignment, entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

In her reply brief appellant argues that she "does not admit * * * she has leased any of the land" and that the record on appeal is devoid of any showing there was an inconsistent use made of the land by appellant. She denies that she received adequate notice that any of her actions, whether admitted or not, might result in loss of the assigned tract. In this connection, she demands a hearing, apparently to enable her to cross-examine J. Kenneth Rutt & Sons and the drawers of the checks totaling $1,730 (previously shown to her) ostensibly given for the rental of her assigned land.

Arguably, the administrative record is sufficient as constituted to support the finding that appellant leased a portion of her lands to J. Kenneth Rutt & Sons for $1,730 in the 1979 farming season. Appellant does not directly deny giving the lease, but as appellee points out, her affidavit in support of her petition on appeal is most reasonably construed to admit that the lease took place, although the consequences of such action may not have been understood or foreseen by appellant. Appellant has offered two affidavits, in addition to other evidence, neither of which directly controverts the finding by the Bureau that the unauthorized lease for the stated amount was made. The Board finds that there is some evidence of a lease. It is unnecessary, however, to find, given the Board's holding here, that a lease was, in fact, executed. Further, while lease of the assigned lands may possibly support cancellation of the misused portion of the assignment,[9] there is no showing of record that appellant was ever notified that lease of the assigned lands would result in cancellation of her assignment. Nor does her

[9]The authority of the Bureau of Indian Affairs to cancel a similar land assignment was reviewed and approved in *United States* v. *Vig*, Civ. No. 3-71-207 (D.C. Minn. 1972) (Appellee's Exh. 24). In that case, however, the court found, "By the terms of her certificate, failure to use and occupy the land for a period of one year would be considered abandonment and the certificate would be cancellable by the Superintendent of the Minnesota Agency." It does not appear from the record as now constituted whether appellant has abandoned her assigned tract nor that the Bureau has concluded her use of the land can be equated to an abandonment. These questions are not presented on appeal and are not decided in this opinion.

"Indian Land Certificate" provide that lease of the land will result in cancellation of the assignment.

[1] Although the Area Director's opinion indicates appellant was previously notified that leasing of the assigned lands was improper, no assertion is made that she was informed that her assignment would be canceled as a result.[10] While the Department has not promulgated special regulations governing cancellations of assignments of lands to the Mdewakanton Sioux, it has regulations dealing generally with cancellations of interests in Indian trust lands which amount to less than a fee interest. These regulations require that prior notice of cancellation be given to persons whose interests are to be terminated and that the notice provide reasons for the cancellation and an opportunity to respond to the notice or otherwise correct the condition which is the basis for cancellation.[11] Such procedure is required in any instance where property rights of individuals in Indian trust lands are to be affected by Bureau decisionmaking.[12] Considerations of due process require such a notice in this case, with opportunity to respond, before appellant's assignment of the 80-acre tract may be canceled. *See Coomes* v. *Adkinson,* 414 F. Supp. 975, 995 (D.S.D. 1976).[13]

Appellant also claims the Bureau canceled her assignment for reasons unconnected with her use or nonuse of the land. Since this appeal is decided on other grounds as described in this opinion, this contention is not reached. No opinion, therefore, is expressed concerning appellant's contentions that the Bureau acted in bad faith when it attempted to cancel her assignment.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision approving cancellation of appellant's assignment is reversed; this matter is remanded to the Bureau with instructions to provide appellant with written notice of conduct deemed inconsistent with the terms of her assignment, including an opportunity to respond thereto. *See,* as a guideline, procedural regulations found at 25 CFR Part 131 and remand instructions to the Bureau in *Coomes* v. *Adkinson, supra.*

This decision is final for the Department.

FRANKLIN D. ARNESS
Administrative Judge

I CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

[10] Appellant was obviously on notice, however, through plain wording of the certificate, that any lease of the land would be voidable.

[11] *See, e.g.,* 25 CFR 131.14. *See also* 25 CFR 131.12 concerning subleases and assignments.

[12] *See* the discussion in *Kuykendall* v. *Phoenix Area Director,* 8 IBIA 76, 87, 87 I.D. 189 (1980), *rev'd on other grounds sub nom. Yavapai-Prescott Indian Tribe* v. *Watt,* Civ. No. 80-464 (D.C. Ariz. 1981) (appeal filed No. 82-5405 (9th Cir. 1982)).

[13] As noted previously (note 9), the Board makes no finding that the leasing of an assignment provides legal grounds for cancellation of the assignment.

ADMINISTRATIVE JUDGE MUSKRAT CONCURRING:

In my judgment, the holding in this case is of sufficient importance to justify emphasis, in a separate opinion. As trustee for Indian tribes and individuals, the United States and its agent, the Bureau of Indian Affairs (BIA, Bureau), are bound by principles of guardianship and pertinent constitutional restrictions (especially due process considerations). *St. Pierre* v. *Commissioner of Indian Affairs,* 9 IBIA 203, 89 I.D. 132 (1982). Accordingly, cancellation by the Bureau of an assignment of Indian trust lands must comport with principles of due process including prior notice of the proposed action, with the reasons and authority therefor, and an opportunity to respond. In the case before us, the BIA failed to fulfill these requirements and, therefore, the Board has quite properly remanded this case for further proceedings consistent with the majority opinion. By separate concurrence, I wish to emphasize some additional factors and considerations in reaching this same result.

Appellant, as the majority correctly concludes, holds an assignment rather than an allotment of Indian trust lands. Nevertheless, she has a protected property interest in the 80-acre tract assigned to her. According to sec. 3 of the Act of Dec. 19, 1980, 94 Stat. 3262,[1] appellant's assignment rights are preserved as is the Secretary of the Interior's authority vis-a-vis that assignment. The question that finally emerges before the Board then, is did the Secretary, through his agent, the BIA, properly exercise his authority in canceling the appellant's assignment?

The historical analysis involving the land in question clearly demonstrates that appellant holds assignment rights rather than an allotment and, consequently, her assignment is subject to cancellation or revocation procedures by the BIA.[2] However, in issuing its decision to cancel the appellant's 80-acre assignment, save for a 1-acre homesite, the Bureau failed to cite any authority or state any reasons for its actions.[3] Furthermore, the administrative record of this case is inadequate to determine the exact character of the

[1] Sec. 3 provides:

"Nothing in this Act shall (1) alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment."

[2] Several alternative courses of action with regard to appellant's assignment appear available to the Bureau. Whichever procedure the Bureau undertakes, however, it must have authority for doing so. Assuming the Bureau's authority exists, cancellation or revocation procedures appear the most likely choice. Thus, should the Bureau believe the assignee has violated the express or implied terms of the "assignment," then cancellation would be a proper procedure. Cancellation "[o]ccurs when either party puts an end to the contract for breach by the other and its effect is the same as that of 'termination' except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance." Black's Law Dictionary 187 (5th ed. 1979).

On the other hand, if the Bureau wishes to act on its own initiative, absent a breach of the "assignment" by the assignee, then revocation would be a proper course of action. Revocation is defined in Black's Law Dictionary 1187 (5th ed. 1979) as: "The recall of some power, authority, or thing granted, or a destroying or making void of some deed that had existence until the act of revocation made it void."

If the Bureau wishes merely to void the alleged "lease" of the appellant, then it may do so based on the terms of the assignment certificate.

Regardless of which approach is utilized, the Bureau's actions must comport with the requirements of due process. However, *see* caveat in note 3, *infra.*

[3] I wish clearly to register that I express no opinion as to the authority of the Bureau to pursue either cancellation or revocation procedures or, assuming such authority does exist, the correctness of the application of either procedure in this instance. I would hold only that due process requires at a minimum that the appellant be informed as to the action undertaken and be provided with a statement of reasons and authority therefor.

appellant's relationship with third persons concerning the land, and, in my opinion, the Bureau in its submissions to the Board, has failed to offer sufficient evidence to establish the existence of a "lease" [4] and its true nature.[5] In addition, assuming the existence of a true lease, the Bureau failed to cite its authority to cancel the entire assignment because of a lease involving only a portion of the assigned lands.[6] Finally, the Bureau cites no authority or rationale for its decision requiring appellant to remit to the Bureau the purported $1,730 in lease revenue.

I believe that in the present case, due process requires the Bureau to inform the appellant of its intention and authority for canceling or revoking her assignment; to conduct a thorough fact-finding procedure in order to ascertain the relevant facts *(e.g.,* the existence, nature, and revenue of the purported lease); and to issue reasons justifying its conclusions as to cancellation or revocation and remittitur. This case, therefore, as my colleagues correctly conclude, should be remanded; and I concur.

JERRY MUSKRAT
Administrative Judge

[4] The only evidence of a "lease" offered by the Bureau and included in the administrative record consists of three cancelled checks in the amounts of $10, $20, and $300 issued by Shirley M. Rutt, J. Kenneth Rutt, and David Rutt respectively and made payable to "Mrs. W. Brewer," "Walt Brewer," and "Walter Brewer and Lois Brewer." These checks, made out by persons other than the appellant, indicate they are for "rent." They do not, however, indicate specifically they are "lease" payments or involve the lands in question. The Bureau also asserts that a reasonable interpretation of paragraph 38 of appellant's affidavit dated Nov. 24, 1981, would conclude that appellant admits to the existence of a lease. Appellant denies any such admission and I agree that the statement in paragraph 38 does not justify a factual finding that a "lease" is admitted or exists.

Paragraph 38 reads:

"Your affiant has at all times maintained a relationship with the entire acreage within her allotment. The farming of a portion of the allotment on behalf of your affiant was made necessary because your affiant's husband, who has previously tilled the soil, has suffered a severe back injury, making him unable to perform such work. His physical condition has further deteriorated due to a hernia problem."

[5] As to the critical importance of the nature of the appellant's agreement, if any, with third persons, *see Santa Clara Pueblo Land Assignment,* I Op. Sol. 888 (1939); *see also Tips* v. *United States,* 70 F.2d 525 (5th Cir. 1934), where mere permission to use land with no interest in land conveyed was held to be a license and not a lease.

The exact nature of the appellant's legal relationship with third persons must first be ascertained in order to determine if it constitutes an encumbrance on the land in violation of the assignment.

[6] The certificate of assignment issued to appellant, and quoted by the majority, indicates that the existence of a lease renders the lease void. On its face, however, the certificate does not indicate that the entire assignment is subject to cancellation. *Compare United States* v. *Vig,* Civ. No. 3-71-207 (D.C. Minn. Feb. 3, 1972) cited by majority at note 9.

RENEWABLE ENERGY, INC.

67 IBLA 304

Decided *September 30, 1982*

Appeal from decision of Oregon State Office, Bureau of Land Management, rejecting noncompetitive geothermal resources lease application. OR 26182.

Affirmed.

1. Administrative Practice—Appeals—Board of Land Appeals—Rules of Practice: Appeals: Generally—Rules of Practice: Appeals: Answers—Rules of Practice: Appeals: Statement of Reasons

The regulations governing procedures before the Board of Land Appeals provide for the filing of a statement of reasons for appeal by appellant and an answer by an adverse party within certain time limits (subject to extension). Proper practice requires that all issues deemed relevant by

the parties be briefed at that time because, as a general rule, the Board does not issue interlocutory decisions on issues which are not dispositive of the appeal.

2. Geothermal Leases: Lands Subject to—Geothermal Leases: Patented or Entered Lands—Mineral Lands: Mineral Reservation—Patents of Public Lands: Reservations—Taylor Grazing Act: Generally

A reservation of "all minerals" in a patent of public lands pursuant to sec. 8 of the Taylor Grazing Act of June 28, 1934, *as amended,* 43 U.S.C.A. § 315g (repealed 1976), reserves to the United States geothermal resources underlying the patented lands. The reserved geothermal resources are subject to leasing only under the Geothermal Steam Act, 30 U.S.C. §§ 1001–1025 (1976).

3. Estoppel—Public Records

Estoppel will not lie against the United States where there is no evidence of an affirmative misrepresentation or an affirmative concealment of a material fact by the Government and the party asserting the estoppel cannot claim ignorance of the true facts because the facts are a matter of public record.

4. Geothermal Leases: Known Geothermal Resources Area—Geothermal Leases: Noncompetitive Leases

An application for a noncompetitive geothermal resources lease must be rejected if the land sought is within a known geothermal resources area and no evidence has been presented that the KGRA determination was in error.

APPEARANCES: Kathleen M. Kulasza, Esq., and Ted P. Stockmar, Esq., Denver, Colorado, for the appellant; Eugene A. Briggs, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

Renewable Energy, Inc. (Renewable), has appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated May 28, 1981, rejecting its noncompetitive geothermal resources lease application, OR 26182, for 316.28 acres of land situated in secs. 28 and 33, T. 18 S., R. 45 E., Willamette meridian, Malheur County, Oregon. BLM based its decision on the fact that the land had been determined by the Geological Survey [1] to be within the Vale Hot Springs known geothermal resources area (KGRA), which is subject to leasing only under the competitive leasing system.

Appellant's lease application was filed on Mar. 26, 1981. Effective Dec. 24, 1970, the land in question was determined to be within the Vale Hot Springs KGRA. 36 FR 5626, 5627 (Mar. 25, 1971).

In its statement of reasons for appeal, appellant disputes the title of the Federal Government to the geothermal resources of the land in question. Appellant contends that the geothermal resources were conveyed in a patent (No. 1227691), dated July 10, 1962, issued pursuant to sec. 8 of the Taylor Grazing Act of June 28, 1934, *as amended,* 43 U.S.C.A.

[1] By Secretarial Order No. 3071, dated Jan. 19, 1982, the Secretary of the Interior established the Minerals Management Service (MMS) and transferred to MMS the minerals-related functions of the Conservation Division of the Geological Survey. 47 FR 4751 (Feb. 2, 1982).

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§ 315g (repealed 1976),[2] and subsequently leased by a successor of the patentee to Vale Geothermal Co., Inc. (Vale), a wholly owned subsidiary of Renewable, on Feb. 1, 1977. The patent reserved to the United States "all minerals" in the patented lands (Statement of Reasons at 2). Nevertheless, appellant argues that, in the absence of an authoritative judicial determination, the mineral reservation does not include geothermal resources.

Appellant recognizes that the court in *United States* v. *Union Oil Co. of California,* 549 F.2d 1271 (9th Cir. 1977), *cert. denied,* 434 U.S. 930 (1978), held that a mineral reservation in a patent issued pursuant to the Stock-Raising Homestead Act, *as amended,* 43 U.S.C.A. §§ 291–301 (repealed 1976),[3] included geothermal resources. Appellant, however, argues that *Union Oil* was "limited solely to issues involving that statute" and that it "did not involve title to geothermal resources in the Lands involved herein" (Statement of Reasons at 5, 9). Further, appellant alleges the United States is estopped from claiming title to the geothermal resources and from requiring that a Federal lease be obtained for development of the resources in the lands at issue in this case.

Counsel for BLM, the Regional Solicitor, argues that appellant's contention on appeal is inconsistent with the filing of a geothermal lease application with BLM. Counsel has declined to answer the statement of reasons for appeal on the merits of the issue of ownership of the geothermal resources and the claim of estoppel. The Solicitor contends that these issues are not relevant. However, in the event that the Board deems them relevant, counsel requests further time to answer the allegations on the merits.

[1] The regulations governing rules of practice before the Board, 43 CFR Part 4, make no provision for interlocutory or piecemeal decisions limited only to the resolution of certain issues which are not dispositive of the case. The regulations provide 30 days from service of the notice of appeal or the statement of reasons within which a party served with the notice who wishes to participate may file an answer to the statement of reasons for appeal. 43 CFR 4.414. An extension of time in which to file an answer may be granted. 43 CFR 4.22(f). There is no provision for extending the time to file an answer conditioned upon whether the Board finds counsel's initial answer to represent an adequate discussion of the issues. All arguments deemed relevant by counsel on appeal should be presented at the time of briefing in order that the Board may have the benefit thereof when it decides the case.[4] Regrettably, in

[2] Sec. 8 of the Taylor Grazing Act was repealed, effective Oct. 21, 1976, by the Federal Land Policy and Management Act of 1976, P.L. 94-579, sec. 705(a), 90 Stat. 2743, 2792.

[3] The Stock-Raising Homestead Act was repealed, except as to secs. 9 and 11, by the Federal Land Policy and Management Act of 1976, P.L. 94-579, secs. 702 and 704, 90 Stat. 2743, 2787, and 2792.

[4] This applies as well to those cases where respondent on appeal files a motion to dismiss the appeal. Apart

Continued

the present case the Board is deprived of the benefit of the Solicitor's brief on the merits of the issues raised by appellant. However, failure to file an answer will not result in a default. 43 CFR 4.414.

We do not share the view of the Solicitor that the issue of title to the geothermal resources is irrelevant to disposition of this appeal. If appellant's arguments with respect to the issue of title are upheld, the statutory basis for the BLM decision is eliminated.

Sec. 21(b) of the Geothermal Steam Act of 1970, 30 U.S.C. § 1020(b) (1976), provides, rather broadly, that "[g]eothermal resources in lands the surface of which has passed from Federal ownership but in which the minerals have been reserved to the United States shall not be developed or produced *except* under geothermal leases made pursuant to this chapter." (Italics added.) Sec. 1020(b) further provides:

> If the Secretary of the Interior finds that such development is imminent, or that production from a well heretofore drilled on such lands is imminent, he shall so report to the Attorney General, and the Attorney General is authorized and directed to institute an appropriate proceeding in the United States district court of the district in which such lands are located, to quiet the title of the United States in such resources, and if the court determines that the reservation of minerals to the United States in the lands involved included the geothermal resources, to enjoin their production otherwise than under the terms of this chapter: *Provided,* That upon an authoritative judicial determination that Federal mineral reservation does not include geothermal steam and associated geothermal resources the duties of the Secretary of the Interior to report and of the Attorney General to institute proceedings, as hereinbefore set forth, shall cease. [Italics in original.]

It is, essentially, appellant's argument that a quiet title action must be instituted in *every* case where land has been patented with a reservation of minerals to the United States, in order to properly resolve the question of ownership of the geothermal resources. We disagree. The legislative history of sec. 21(b) of the Geothermal Steam Act of 1970 indicates that Congress contemplated a test case:

> In order to obtain an authoritative judicial determination of the ownership of geothermal resources in lands the surface of which has passed from Federal ownership with a reservation of minerals to the United States, a new section 20(b) was adopted by the committee. This directs the Attorney General to initiate an appropriate proceeding to quiet the title of the United States to such resources if and when development of such resources occurs or is imminent. The committee is aware that the Department of the Interior has expressed the view that geothermal steam is not subject to the mineral reservation of the Stockraising Homestead Act of December 29, [1916]. The committee is also aware that a contrary view has been expressed. As the opinion of the Department is not a conclusive determination of the legal question, it was the sense of the committee that an early judicial determination of this question (upon which the committee takes no position) is necessary. At issue is the ownership of geothermal steam on more than 35 million acres of land, the surface of which has passed from Federal ownership but with a reservation of minerals to the United States. The bulk of this acreage was patented under provisions of the Stockraising Homestead Act, and the reserved minerals therein are subject to disposition under appropriate mineral laws. It is not the intent of the committee that this direction to initiate a pro-

from dismissals where the Board has no jurisdiction, dismissals for procedural deficiencies are generally avoided except where to do so would prejudice an innocent party or cause great problems with efficient operation of the appeals procedures. When the Board declines to dismiss an appeal, it generally does so in the context of a decision on the merits rather than in a separate interlocutory order.

ceeding in a U.S. district court shall constitute a continuing obligation upon the Attorney General but merely that an authoritative judicial determination be obtained that the mineral reservation of the Stockraising Homestead Act, *and similar acts,* does or does not reserve to the United States the geothermal steam. The development of geothermal resources in these lands will be retarded until the question of ownership is determined. [Italics added.]

H.R. Rep. No. 91-1544, 91st Cong., 2d Sess. 3, *reprinted in* 1970, U.S. Code Cong. & Ad. News 5113, 5119-20.

The initial issue raised is whether the reservation of "all minerals" in a patent under sec. 8 of the Taylor Grazing Act embraces geothermal resources. Inherent in this issue is the question of whether the reservation is sufficiently similar to the reservation of minerals under sec. 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1976), to be governed by the judicial determination in *Union Oil Co. of California,* 549 F.2d at 1271, that the reservation under the latter act embraces geothermal resources. We believe that *Union Oil,* is the judicial determination Congress contemplated and is dispositive of the question of ownership of geothermal resources where land has been patented under sec. 8 of the Taylor Grazing Act with a reservation of all minerals to the United States. *Cf. Energy Partners,* 21 IBLA 352 (1975) (adjudication of geothermal resources lease applications deferred where the land had been patented both under the Stock-Raising Homestead Act and sec. 8 of the Taylor Grazing Act, pending a final determination in *Union Oil* as to ownership of the geothermal resources).

[2] Sec. 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1976), provides that patents issued under the Act are "subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same." In addition, any person who has acquired the right to mine and remove reserved minerals "may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals," subject to the duty to provide for compensation of the patentee for "damages to crops or other tangible improvements." *Id.* Similarly, sec. 8 of the Taylor Grazing Act provides for patent of lands with a reservation of minerals to the United States. In addition, the latter statute provides:

Where reservations are made in lands conveyed either to or by the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary. 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.A. § 315(g)(d) (repealed 1976).

As the Ninth Circuit Court of Appeals recognized in its decision in *Union Oil,* starting in 1909, Congress instituted a policy of separating the surface estate from the right to the underlying minerals in statutes providing for patents of public lands in order to allow development of the surface estate while preserving control of the United States over minerals. *Union Oil Co. of California,* 549 F.2d at 1275. Both sec. 9 of the Stock-Raising Homestead Act (1916) and sec. 8 of the Taylor Grazing Act (1934) follow in that tradition. 1 American Law of Mining §§ 3.24F, 3.24K, at 541, 544 (1981). As is evident from reading the language of the two Acts, the patentee, as owner of the *surface* estate, is distinguished from the person who has the right to mine and remove minerals under the mineral reservation. The former is protected in both instances by a requirement that he be compensated for any damage to the land or improvements thereon. It would appear from the language of sec. 8 that Congress authorized exchanges of public lands for private lands in the belief that such exchanges would in some cases serve both the public and the private interests and that provision for reservation of the mineral estate was made to preclude concern over loss of mineral values from inhibiting such exchanges.

The concept that the surface and mineral estates are intended to be separate in patents of public lands with a mineral reservation to the United States has given rise to a rule of construction in interpreting the scope of a mineral reservation, *i.e.,* a "reservation of minerals should be considered to sever from the surface all mineral substances which can be taken from the soil and which have separate value." 1 American Law of Mining § 3.26 at 552 (1981). There is no doubt that geothermal resources are mineral substances which can be taken from the soil and which have separate value. *See Union Oil Co. of California,* 549 F.2d at 1279; Olpin, *The Law of Geothermal Resources,* 14 Rocky Mountain Mineral Law Institute 123, 140–41 (1968). Accordingly, such resources are included in a mineral reservation under sec. 8 of the Taylor Grazing Act. This holding is consistent with the position taken by the Solicitor that geothermal resources are not locatable under the General Mining Law or leasable under the Mineral Lands Leasing Act of 1920. *Geothermal Leasing in Designated Wilderness Areas, Solicitor's Opinion,* M–36937, 88 I.D. 813 (1981). This memorandum recognized that the court in *Union Oil Co. of California* found geothermal resources to be included in the reservation of "all the coal and other minerals" under the Stock-Raising Homestead Act patents.

[3] Appellant's second argument is that the United States is estopped "from claiming title to the geothermal resources in the Lands and from requiring that a federal lease be obtained for development of the resources" (Statement of Reasons at 6). Appellant relies on the four elements necessary for an estoppel,

outlined in *United States* v. *Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970):

> (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Appellant explains that since 1977, it has conducted exploration and development operations pursuant to the private lease. These operations have included the land in question. In addition, appellant has begun development of an industrial park, to be used in conjunction with the production of geothermal resources. Total expenditures have amounted to $277,413. There is no indication of the extent of expenditures for operations on the land subject to the Federal mineral reservation as opposed to the other acreage embraced in the private lease. In the spring of 1977, appellant informed BLM officials at the Vale District Office of its operations on and proposed development of the land in question. *See* Affidavit of Stephen M. Munson, President, Renewable, dated July 30, 1981. Finally, appellant has obtained a United States Department of Energy grant for development of the industrial park.

Appellant argues that estoppel can be based on a failure to act where the party to be estopped has "duty to speak." *United States* v. *Georgia-Pacific Co., supra* at 97. Appellant contends that sec. 21(b) of the Geothermal Steam Act imposes a duty on the Secretary to request an action to quiet title to geothermal resources in lands patented with a mineral reservation to the United States, where development is "imminent." Appellant points out that development of the land in question is, indeed, imminent. Appellant contends that despite all of appellant's actions, and with knowledge thereof, the Secretary has failed either to request a quiet title action or to bring suit for trespass. Appellant alleges reliance on the Secretary's conduct to its detriment.

Several factors preclude a finding of estoppel in the present situation. First, we can find no duty of the Secretary under sec. 21(b) of the Geothermal Steam Act to request an action to quiet title to the geothermal resources involved herein. The case of *Union Oil Co. of California*, 549 F.2d at 1271, resolved the question of title to such resources where land had been patented with a reservation of all minerals to the United States as under sec. 8 of the Taylor Grazing Act. Further, appellant has presented no evidence of any representation by BLM employees that the United States did not have title to the geothermal resources of the land in question or that appellant need not seek a Federal lease if it sought to develop those resources. We can find neither an "affirmative misrepresentation" nor an "affirmative concealment of a material fact" required to establish estoppel. *United States* v. *Ruby Co.*, 588 F.2d 697, 703-04 (9th Cir. 1978); *see Schweiker* v. *Hansen*, 450 U.S. 785 (1981).

Futhermore, appellant was not "ignorant of the true facts," *i.e.*, that title to the geothermal resources is in the United States, at the time it undertook its program of exploration and development (1977). As noted above, the Department published notice that the land was determined to be within the Vale Hot Springs KGRA in the *Federal Register* (36 FR 5626, 5627 (Mar. 25, 1971)), effective Dec. 24, 1970. Accordingly, appellant is deemed to have had notice that the United States asserted title to the geothermal resources at least as of the date of publication in the *Federal Register*. *See* 44 U.S.C. § 1507 (1976). Further, the BLM land status plat, a matter of public record available for inspection, clearly shows the land to be patented with a reservation of minerals to the United States. Accordingly, there could be no reasonable reliance by appellant upon the fact that BLM failed to file an action of trespass or ejectment to quiet title. Therefore, any exploration or development activities undertaken by appellant were done at its own risk. *See Gary Willis,* 56 IBLA 217, 223 (1981).

Finally, appellant argues that equity dictates that it be declared the holder of a "preference right," similar to the rights provided for by sec. 4 of the Geothermal Steam Act, 30 U.S.C. § 1003 (1976). Sec. 4 provides that certain persons will be permitted to convert their mineral leases, permits or mining claims under certain circumstances to competitive geothermal leases upon "payment of an amount equal to the highest bona fide bid[s]" for the leases, within 30 days after notification of the bids. 30 U.S.C. § 1003(f) (1976). However, such a right was limited to the holders of valid mineral leases or permits or mining claims as of Sept. 7, 1965, or their successors-in-interest and had to be exercised within 180 days of Dec. 24, 1970. 30 U.S.C. § 1003(a) (1976). There is no question that appellant does not qualify under sec. 4 of the Geothermal Steam Act for a preference right. Moreover, we can discern no statutory authority which would permit us to invoke a preference right in favor of appellant.

[4] Having determined that the United States has title to the geothermal resources of the land in question, such resources must be developed or produced under Federal geothermal leases. 30 U.S.C. § 1020(b) (1976). It is well established that lands within a KGRA may only be leased by competitive bidding. 30 U.S.C. § 1003 (1976); 43 CFR 3210.4, 3220.1. Therefore, an application for a noncompetitive geothermal lease must be rejected if the land is within a KGRA. *Marvin L. McGahey,* 50 IBLA 4 (1980). Appellant has presented no evidence that the Vale Hot

Springs KGRA determination was in error.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. RANDALL GRANT, JR.
Administrative Judge

WE CONCUR:

WILL A. IRWIN
Administrative Judge

GAIL M. FRAZIER
Administrative Judge

SAHARA COAL CO., INC.

4 IBSMA 166

Decided *October 12, 1982*

Petition by Sahara Coal Co., Inc., for discretionary review of the Sept. 9, 1981, decision of Administrative Law Judge Frederick A. Miller in Docket No. IN 1-2-P, which sustained the validity of Notice of Violation No. 80-III-005-18 and reduced the amount of the civil penalty.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure

The provision of 30 CFR 723.17(b), that OSM shall serve notice of a civil penalty assessment within 30 days of the issuance of the underlying enforcement document, is directory, not mandatory; and OSM's failure to comply with this provision is not a bar to an assessment in the absence of a showing of prejudice resulting from the noncompliance.

2. Surface Mining Control and Reclamation Act of 1977: Revegetation: Generally

A violation of 30 CFR 715.20(c) is proven when it is demonstrated that an operator's initial revegetation efforts did not prevent serious erosion and that the operator failed to take such additional timely measures as were necessary to control erosion.

3. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure—Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Where OSM erroneously includes a violation that has previously been vacated in assessing and pleading the amount of a civil penalty prior to the hearing in a review proceeding, but then discovers its error and substitutes a different violation in its point computation at the time of the hearing, such substitution is proper under 43 CFR 4.1157(b)(1) unless the petitioner can demonstrate prejudice.

APPEARANCES: Donald V. Ferrell, Esq., Jelliffe and Ferrell, Harrisburg, Illinois, for Sahara Coal Co., Inc.; Myra P. Spicker, Esq., Office of the Field Solicitor, Indianapolis, Indiana, John C. Martin, Esq., Attorney, and Judy Dugger, Esq., Acting Assistant Solicitor for Litigation and Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Board granted a petition submitted by Sahara Coal Co., Inc. (Sahara), for discretionary review of a Sept. 9, 1981, decision of Administrative Law Judge Frederick A. Miller sustaining the validity of a notice of violation (NOV) issued by the Office of Surface Mining Reclamation and Enforcement (OSM) that charged two violations of the regulations for failure to regrade and stabilize rills and gullies deeper than 9 inches and for failure to keep adequate blasting records. The Administrative Law Judge reduced the civil penalty from $1,500 to $1,100 because of rapid compliance with the abatement order.

The Board granted review on the three issues of whether: (1)

the fact that OSM did not serve Sahara with a proposed assessment until 60 days after issuance of the NOV should lead to a different result from that in *Badger Coal Co.*, 2 IBSMA 147, 87 I.D. 319 (1980); (2) the delay by Sahara in repairing rills and gullies, which allegedly resulted from a heavy rainfall, was reasonable; and (3) OSM was under an obligation to plead at the hearing the existence of the correct cessation order in order to assess points based on a history of previous violations. Having reviewed the record and the subsequent pleadings of the parties, we affirm.

Facts

On July 24, 1980, OSM Inspector Marvin Utsinger issued Notice of Violation No. 80-III-005-18 to Sahara for two alleged violations at its surface coal mine, Sahara No. 6, located in Saline County, Illinois. The NOV alleged that Sahara had failed (1) to regrade and stabilize rills and gullies deeper than 9 inches in violation of 30 CFR 715.20(c), and (2) to keep blasting records for methods of firing and type of circuit for the period Feb. 1, 1980, to Apr. 25, 1980, in violation of 30 CFR 715.19(e)(4)(xiii). No penalty was assessed in connection with the second violation. The first violation was terminated on Aug. 5, 1980. On Sept. 22, 1980, 60 days after the NOV was issued, OSM issued a notice of proposed civil penalty assessment of $1,500 for the first violation. Sahara filed a petition for review of the proposed penalty assessment with the Hearings Division. At the hearing on Jan. 7, 1981, Sahara moved for dismissal of the NOV on grounds that OSM had not complied with 30 CFR 723.16(b), which requires that a copy of the proposed assessment be served within 30 days of the issuance of the NOV. The motion was overruled.

The rills and gullies violation occurred in a relatively flat area within the Sahara minesite, encompassing approximately 4 acres (Tr. 18), which was intended for postmining use as pasture land (Tr. 34). At the time the NOV was issued, some gullies were 12 to 15 inches deep and 2 to 3 feet wide, extending in length up to 90 feet (Tr. 19). Without regrading, the gullies would have prevented the postmining use of the farm equipment necessary to care for the pasture land (Tr. 40-41). At the hearing, Sahara presented evidence that the erosion in the area may have been the product of two heavy rains that preceded the NOV by 3 weeks' time (Tr. 88-89). The OSM inspector testified, however, that the gullies had existed for several months (Tr. 52).

OSM introduced, over Sahara's objection, evidence of Cessation Order (CO) No. 78-3-005-4, which was not mentioned in the assessment notice, although another cessation order, which had been vacated, was erroneously cited in support of a history of previous violations. The Administrative Law Judge relied on the newly introduced CO as the basis for the history points ultimately assessed against Sahara.

Discussion

[1] As to the issue of the belated notice of assessment, counsel for Sahara has failed to distinguish

the present case from the situation in *Sahara Coal Co.*, 3 IBSMA 371, 88 I.D. 1025 (1981). There, the Board decided that the provisions of 30 CFR 723.16(b) (now contained in 30 CFR 723.17(b)), like those of sec. 723.18(b), are directory and not mandatory, and that in the absence of prejudice a failure by OSM to comply with them would not constitute a bar to an assessment. We adhere to that position here. We find no claim or showing of prejudice in the record before us.

[2] As to Sahara's failure to repair the rills and gullies, counsel for Sahara seems to argue that since the heavy July 2 rainfall fell on soil highly susceptible to erosion, the rainfall must be considered the cause of all of the observed erosion. Accordingly, he argues, it would be unreasonable to require Sahara to regrade and reseed the ground either while it was still wet from the rain or while the summer dry season was still predominant. The Administrative Law Judge expressly rejected that argument, stating:

> Assuming *arguendo* that the rainfall was of such magnitude and duration as to have caused or significantly contributed to the erosion, it is nonetheless noted that more than 3 weeks had elapsed since the last rainfall and the date of issuance of the notice of violation. While the petitioner suggests that 3 weeks is a span of insignificant time, I disagree and find that more prompt and appropriate action should have been taken to stabilize the area in question.

Although we might have difficulty accepting the Administrative Law Judge's conclusion as stated, we do not find it necessary to reach that issue under the facts of this case. The testimony of the OSM inspector at the hearing, and the photographs of the vegetation in the gullies that accompanied it, make clear that the rills and gullies in question were not caused solely by the July 2 rain but that they had pre-existed it for some period of time. Sahara's own witness did not testify otherwise. Rather, the witness for Sahara carefully limited his testimony to the fact that 3.7 inches of rain falling on the type of soil involved would cause erosion. He did not go into the condition of the area prior to the rainfall or make any effort to rebut OSM's testimony on that subject. Neither did he testify as to what Sahara's intentions might have been had the heavy rainfall not occurred, nor when, in the absence of an NOV, corrective action would have been taken after the rainfall occurred.

While, under 43 CFR 4.1155, OSM had the burden of proof in this matter, we find it sustained that burden. As counsel for OSM points out, 30 CFR 715.20(c) imparts an ongoing obligation upon mining operators to preserve topsoil by protecting it against erosion. We concluded in *Renfro Construction Co.*, 2 IBSMA 372, 87 I.D. 584 (1980), that OSM proves a violation of 30 CFR 715.20(c) when it shows that an operator's initial revegetation efforts did not prevent serious erosion and that the operator failed to take such additional measures as were necessary. The record before us in this case amply supports the Administrative Law Judge's determina-

tion that Sahara failed to act in a timely manner to control the erosion occurring in the areas under reclamation.

[3] The only issue remaining is whether the Administrative Law Judge correctly assessed penalty points against Sahara for its history of previous violations. Counsel for Sahara argues eloquently that it would be a violation of due process and the fundamental tenets of justice and fair play to admit evidence of a violation not pleaded, in lieu of the one mistakenly pleaded. However, counsel for OSM correctly points out that the Administrative Law Judge is responsible for determining the facts de novo, and that he is bound by 43 CFR 4.1157(b)(1) to adhere to the point system and conversion table contained in 30 CFR 723.12 and 723.13. Had actual prejudice been involved, counsel for Sahara could certainly have requested a continuance or sought additional information concerning the violation being relied upon. It did not do so. The Administrative Law Judge therefore concluded that this argument was without merit, noting that the information as to the history of the violation was within Sahara's own knowledge. We concur.

Accordingly, the decision of the Administrative Law Judge is affirmed.

BERNARD V. PARRETTE
Administrative Judge

I CONCUR:

NEWTON FRISHBERG
Acting Chief Administrative Judge

MATTHEW ALLEN *v.* AREA DIRECTOR, NAVAJO AREA OFFICE, BUREAU OF INDIAN AFFAIRS

10 IBIA 146

Decided *October 15, 1982*

Appeal from a decision of the Navajo Area Director, Bureau of Indian Affairs, terminating financial assistance to appellant.

Reversed.

1. Board of Indian Appeals: Jurisdiction

Under 25 CFR 2.19 (a) and (b), when the Commissioner of Indian Affairs, or the official of the BIA exercising the Commissioner's review authority under 25 CFR Part 2, does not issue a decision within 30 days of the filing of all pleadings, the Board of Indian Appeals acquires jurisdiction over the case.

2. Administrative Procedure: Rulemaking—Indians: Welfare—Regulations: Publication

Under 5 U.S.C. § 552(a)(1) (1976) and the Supreme Court's holding in *Morton* v. *Ruiz*, 415 U.S. 199 (1974), an individual may not be deprived of benefits solely on the basis of an eligibility standard published only in the BIA manual.

3. Indians: Welfare

Under the system established in the BIA manual, custodial care is part of the general assistance program, and an individual must first be found eligible for general assistance before he or she can be considered for custodial care assistance.

4. Indians: Welfare

Under the provisions of the BIA manual, an individual is eligible for custodial care assistance even though the necessary care may be provided in the individual's home.

5. Indians: Welfare

When, due to age, infirmity, or physical or mental impairment, an individual requires any type or amount of assistance in daily

living, that person qualifies for custodial care under the provisions of 66 BIAM 5.10A.

6. Indians: Welfare

Under 66 BIAM 5.10D(2), any continuing care arrangements necessary for an individual who has been in a custodial care institution must be prepared before that individual is discharged from the institution.

7. Indians: Welfare

The decision to terminate custodial care for an individual must be documented as based upon physical or mental improvement, or upon an initial erroneous determination of the individual's condition.

8. Rules of Practice: Appeals: Effect of

Under 25 CFR 2.3(b) and 43 CFR 4.21(a), a decision which is subject to review by a higher Departmental official is not effective during the appeal period or during the pendency of an appeal, unless the BIA official to whom an appeal is made, the Board, or the Director of the Office of Hearings and Appeals determines that the public interest requires the decision to be made effective immediately.

APPEARANCES: Stephen T. LeCuyer, Esq., DNA-People's Legal Service, Inc., Chinle, Arizona, for appellant; Penny Coleman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

Appellant Matthew Allen, a Navajo Indian residing at the Fort Defiance Agency, Fort Defiance, Arizona (C #123,159), has sought review of a July 24, 1981, decision of the Navajo Area Director, Bureau of Indian Affairs (BIA) (appellee), terminating his financial assistance. This appeal was filed jointly with 19 other appeals from Navajo residents of the Fort Defiance and Chinle Agencies, Navajo Area Office.[1] Appellant had been receiving care and training[2] at Toyei Industries (Toyei), Toyei, Arizona. The decision affirmed that appellant was not eligible for custodial care under the provisions of 66 BIAM (Bureau of Indian Affairs Manual) 5.10A because he did not require "care from others in his or her daily living" "due to age, infirmity, physical or mental impairment" (66 BIAM 5.10A).[3]

History of BIA Involvement With Toyei Industries

The following facts are adduced from appellant's undisputed background statement concerning Toyei Industries.[4] The institution is located in Toyei, Arizona, within the Navajo Nation. It was established in Oct. 1976 under the administration of the Navajo Tribal Council and the Navajo Division of Education, Department

[1] One appeal was dismissed at the request of the appellant. *Phillip Begay* v. *Area Director, Navajo Area Office, Bureau of Indian Affairs*, 9 IBIA 280 (1982). Decisions relating to the remaining 18 appellants are being separately issued today.

[2] Although appellant notes that both BIA and he use the terms "adult institutional care" and "custodial care" interchangeably to describe the type of assistance he was receiving, *see* appellant's opening brief of legal issues (hereinafter "opening brief"), the Board does not agree that the terms are synonymous. *See* text, *infra* at 10 IBIA 167–68, 89 I.D. 519.

[3] According to appellant, and not denied by appellee, every BIA social services client at Toyei from the Fort Defiance and Chinle Agencies was also found by the BIA to be ineligible for custodial care (Opening brief at 37–38).

[4] *See* opening brief at 1–5, including exhibits cited in that discussion.

of Navajo Vocational Rehabilitation. Toyei was charted as a nonprofit organization by the Navajo Tribal Council in Aug. 1976.

Toyei's institutional objectives were to provide comprehensive residential maintenance, work activities, and other support services to mentally and/or physically handicapped adults. These services were intended to help the individual toward semi-independent or independent living by providing training in job and living skills.

It is not apparent from the record when and under what circumstances the BIA Branch of Social Services for Navajo area first became involved with Toyei.[5] It appear, however, that at least during fiscal year 1980 the branch was providing funds to Toyei under a contract in accordance with P.L. 93-638, 88 Stat. 2203, 25 U.S.C. §§ 450-450n (1976),[6] the Indian Self-Determination and Education Assistance Act.[7]

In the summer of 1980, the branch learned that its fiscal year 1981 appropriation would be reduced and that it would be unable to continue its existing level of funding. After some discussion of how this budgetary problem might be resolved, it was finally determined that the funding for Toyei should be cut entirely. This determination was made on the grounds that Toyei's clients were at the institution primarily for vocational training rather than for residential care. Vocational training was thought not to be part of the functional responsibilities of the Branch of Social Services. As the decision was explained in a memorandum to social services files from the Area Social Worker:

> On September 17, 1980, the plan to discontinue funding Toyei industries was decided as the only alternative. The basis for this decision is that Toyei Industries, Inc., operates a Vocational Training Program for handicapped adults. The fact that people reside there is secondary. It was argued that these clients can function at home and do not need custodial care. The revised plan assumed that the proposed recommendation would take effect October 1, 1980.[8]

Following the decision to discontinue funding to Toyei, the Branch of Social Services began the procedure of informing appellant and other individuals at Toyei of the termination of funding for their care and training at the institution.

Background of Appellant's Case

The following facts are presented from the record as constituted.[9] Appellant was born on Sept. 21, 1958. The record does not show when or for what reason appellant was first referred to Toyei. There is no dispute, however, that while at Toyei appellant was receiving care and training under the contract with the BIA Branch of Social Services.

Appellant was examined by a clinical psychologist for Cibola Medical Foundation, Gallup, New Mexico, on June 30, 1980. As a result of this examination and tests administered at that time,

[5] Although it is clear from the statements of both parties that the BIA Navajo Area Office Branch of Social Services had a contract with Toyei, no copy of that contract is included, or was sought to be included, in the administrative record.

[6] All further citations to U.S.C. are to the 1976 edition.

[7] *See* Exh. A to opening brief at 2.

[8] *See* Exh. C to opening brief at 1-2.

[9] As to the composition of the record, *see* discussion of appellee's motion to reconsider the Board's order of June 28, 1982, *infra* at 10 IBIA 156-57, 89 I.D. 513-14.

the psychologist concluded that appellant had a "[s]pecific [l]earning [d]isability affecting [his] verbal processing and verbal memory abilities," but that he was "capable of learning a vocational skill of a manual nature." Furthermore, the psychologist felt that appellant's "daily living skills will need extensive development and work. Matthew needs further evaluation and training to help him learn to tell time, make change, handle his finances, increase his mobility (such as learning to drive), shop and cook." Many of appellant's problems were apparently related to low self-esteem and self-confidence. *See* Exh. A to *Allen* opening factual brief at 1, 5, 6.

According to a Sept. 19, 1980, casework form, appellant has difficulty "functioning independently" because he lacks education and social skills, and is a slow learner. The long-term plan for appellant was stated to be "semi-independent living." *See* Exh. B to *Allen* opening factual brief.

On Oct. 20, 1980, appellant was sent a letter from the Navajo Area Director informing him that:

> [F]inancial assistance to Toyei Industries for your residential care is being terminated because the contract for Fiscal Year 1981 with Branch of Social Services has been declined by the Bureau of Indian Affairs. The reason for declination is that the vocational rehabilitation service at Toyei Industries is not a functional responsibility of the Branch of Social Services. However, Toyei Industries' application for a contract will be considered by the Bureau of Indian Affairs, Public Law 93-638 Committee, for possible funding by BIA Career Development.
>
> You are further informed that all financial assistance for you from BIA Social Services will cease on November 6, 1980. In accordance with 25 CFR 20.30, you have a right to appeal this decision on your assistance. You have until November 6, 1980 to request a hearing on your case.

See Exh. E to opening brief.

Appellant requested a hearing on Nov. 3, 1980. On Nov. 24, 1980, the Area Director rescinded the Oct. 20, 1980, termination notice. The second letter sent to appellant stated: "It has been administratively determined that services will continue for you until a complete evaluation can be made of your situation by the Branch of Social Services, Bureau of Indian Affairs." *See* Exh. I to opening brief.

In mid-Nov. 1980, appellant was evaluated by Dr. Catherine Cauthorne, a clinical psychologist with the Indian Health Service. After her meeting with appellant, the psychologist reported that appellant appeared to be functioning at a higher level than his recent psychological evaluation indicated. She recommended that Matthew needed vocational and social counseling "and eventually a group home placement with other Navajos, whereby he can learn socially acceptable ways of interacting with his own people. By offering these activities and/or programs to Matthew, Matthew would appear to be able to become moderately self-sufficient." *See* Exh. C to *Allen* opening factual brief at 1.

On Dec. 15, 1980, following an evaluation by a BIA social worker, appellant was certified not eligible for custodial care. The

evaluation concludes: "Although Matthew may need some supervision, we feel he can function quite independently." This conclusion was reached after the observations that appellant had "medium" self-care potential, that his family was "quite capable of caring for" him, and that all his "needs can be met at home except a job." *See* Exhs. D and E to *Allen* opening factual brief.

Appellant received a letter dated Jan. 28, 1981, from a BIA Agency Social Worker informing him that his "Adult Institutional Care" would be terminated effective Feb. 17, 1981. The letter advised: "The reason for this closure is because you do not meet the eligibility requirements as defined in 66 BIAM 5.10 in that you do not require care from others in daily living due to age, infirmity, physical or mental impairment." The letter further informed appellant that he might still be eligible for other forms of assistance and that he had a right to appeal the decision to the Agency Superintendent. *See* Exh. K to opening brief.

Appellant requested a hearing on his termination on Feb. 6, 1981. A hearing for appellant and other similarly situated individuals was held on Feb. 18, 1981. Testimony at the hearing indicated that appellant needed help in maintaining a proper diet, in money management, and especially in work supervision. The social worker who evaluated appellant based his decision on a 45-minute discussion with appellant and a review of his case file. He did not discuss appellant with any Toyei employee. *See* transcript of Fort Defiance hearing, Feb. 18, 1981, at 79–81.[10] Following the hearing, the hearing officer, as the designee of the Superintendent, sustained the termination of appellant's custodial care.

On Mar. 26, 1981, appellant appealed the hearing officer's decision to the Navajo Area Director. The Area Director affirmed the decision on July 24, 1981. This affirmance rejected all of appellant's legal arguments and found that the facts proved that appellant did not require custodial care.

Appellant appealed this decision to the Assistant Secretary for Indian Affairs on Aug. 25, 1981. The appeal was referred to the Deputy Assistant Secretary—Indian Affairs (Operations). When a decision had not been issued within 30 days from the time briefing to the Deputy Assistant Secretary was concluded, appellant filed a notice of appeal with the Board of Indian Appeals on Feb. 10, 1982. This appeal asked the Board to assume jurisdiction over the appeal pursuant to provisions of 25 CFR 2.19. By order dated Feb. 10, 1982, the Board requested BIA to forward the administrative record. On Mar. 16, 1982, the Board issued an order formally docketing the appeal and expediting consideration of the case.

Submissions to the Board include appellant's opening brief (Apr. 28, 1982); appellee's motion to remand this case to Navajo

[10] The Board feels constrained to comment on the almost unintelligible nature of the transcript of this hearing. It is impossible to determine who is speaking in many cases, much of the testimony is marked "inaudible," the hearing examiner exercised no control over those attending and testifying, and very little actual evidence concerning the appellant was elicited.

Social Services (May 24, 1982); appellant's motion to exclude certain documents filed by appellee after the time established by the Board for supplementation of the record (June 7, 1982) (*see* Board's order of Mar. 16, 1982); appellant's reply to the motion to remand (June 14, 1982); appellant's reply to the motion to exclude documents (June 15, 1982); appellee's response to appellant's reply to motion to remand (July 6, 1982); appellee's motion for reconsideration of the Board's order excluding documents (July 6, 1982) (*see* Board's order of June 28, 1982); and appellant's response to appellee's motion for reconsideration (July 23, 1982).

Jurisdiction

[1] Appellant argued in his Feb. 10, 1982, notice of appeal to the Board that, because the Deputy Assistant Secretary had not issued a decision in this case within 30 days from the date briefing was concluded, as is required by 25 CFR 2.19(a), sec. 2.19(b) vested the Board with jurisdiction. Sec. 2.19 (a) and (b) states:

> (a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [now Deputy Assistant Secretary—Indian Afairs (Operations)] shall:
>
> (1) Render a written decision on the appeal, or
>
> (2) Refer the appeal to the Board of Indian Appeals for decision.
>
> (b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision.

In an order dated Feb. 10, 1982, the Board agreed that it had jurisdiction over the case, assuming the facts stated by appellant were true (Order at 2 n.2). The Board noted that appellant's interpretation of 25 CFR 2.19(b) "comports with what the regulation clearly states and was intended to state. *See* 40 FR 20625 (May 12, 1975)" (Order of Feb. 10, 1982, at 2 n.2). There has been no challenge to the Board's assumption of jurisdiction. The Board holds it has jurisdiction to decide this appeal.

Appellee's Motion for Reconsideration of the Board's June 28, 1982, Order Excluding Certain Documents

On June 28, 1982, the Board granted appellant's motion to exclude certain documents from the record. In its notice of docketing, issued on Mar. 16, 1982, the Board noted that there were obvious omissions from the record. Therefore, the Board granted permission to supplement the record until Mar. 31, 1982. Appellant responded to this order on Mar. 29, 1982. Appellee furnished additional documents on May 20, 1982, 7 weeks after the deadline for record supplementation. The explanation given for this late submission was that although the Solicitor's Office had received formal notice of the docketing of this appeal in Mar. 1982, counsel for appellee was not designated until May 6, 1982, and, further, that the documents offered had not been sent to the Deputy Assistant Secretary by the Area Director when the appeal was filed with his office.

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The Board held that appellee's failure to include the offered documents in the administrative record within the extended time allowed for record supplementation could not be excused. Both the Solicitor's Office and BIA had a responsibility to ensure that administrative review by the Deputy Assistant Secretary and by the Board was conducted with full knowledge of the facts upon which the initial decisions were based. The failure to inform appellant of these documents and to properly include them in the record was regarded by the Board as an impermissible threat to the integrity of the administrative review process.

Appellee raises no new arguments in the motion for reconsideration that show how the Board's order was in error or an abuse of discretion. Instead, appellee merely restates considerations that were before the Board when it issued the order and attempts to include the information in the excluded documents by incorporating such material in the memorandum supporting its motion.

Because of appellee's failure to show how the Board's order may have been in error, reconsideration of the June 28, 1982, order excluding documents submitted by appellee on May 20, 1982, is denied.

Appellee's Motion To Remand

On May 24, 1982, appellee moved the Board to remand this case to Navajo Social Services. The motion, which consists entirely of conclusory statements not supported by either factual assertions or legal argumentation, is apparently based on BIA's determination that its Branch of Social Services was improperly or illegally paying for custodial care for appellant at Toyei.

Appellee's conclusion appears to be based on two findings. One, because the vocational rehabilitation program at Toyei was not a functional part of BIA's social services program, the Branch of Social Services was illegally paying for services rendered appellant out of a congressional appropriation not made for that purpose.[11] Second, appellant should have been evaluated first for eligibility for general assistance, then for custodial care, because custodial care is part of BIA's general assistance program. Appellee seeks a remand to Navajo Social Services, which is now responsible for implementing the BIA social services program, so that appellant can be properly evaluated for eligibility for BIA assistance.

Appellant opposed a remand on June 14, 1982.

In its brief, which the Board received on July 6, 1982, appellee states at page 2: "The Bureau does not object to Appellants' unwillingness to remand the cases to Navajo Social Services. Eligibility determination undoubtedly should be a coordinated effort by the Bureau and Navajo Social Services."

Both of appellee's positions demonstrate a basic misunderstanding of the nature and purpose of remand. "Remand," according to *Black's Law Dictionary*

[11] Presumably appellee does not seek a remand if the Board accepts this argument. The Board declines to consider the argument, however, because appellee has offered no support for it.

(Rev. 4th ed. 1968) at page 1457 means "[t]o send back," "[t]he sending the cause back to the same court out of which it came, for purpose of having some action on it there." According to both parties, the Navajo Tribe did not assume responsibility for administering the BIA social services program until Oct. 1, 1981.[12] The tribe, therefore, never previously considered this case, which was decided by the Navajo Area Director, BIA, on July 24, 1981. Although the tribe may be the appropriate entity to determine appellant's current eligibility for BIA social services or financial assistance, the present case cannot be "remanded" to it or any of its instrumentalities.

Furthermore, remanding the issue of eligibility determination to BIA, rather than to the tribe, would serve only to delay the issuance of a decision which BIA has already reached. Appellee seeks a remand to make a determination of whether appellant was eligible for general assistance so that he can be considered for custodial care. Whether or not appellant is found eligible for general assistance, BIA has already decided that he is not eligible for custodial care. The possibility that he would be found eligible for both general assistance and custodial care on remand is extremely remote. Under the circumstances of this case, the Board holds that BIA's failure to determine whether appellant was eligible for general assistance before determining whether he was eligible for custodial care is harmless error.

Appellee's motion for remand is denied.

Issues on Appeal

The remainder of this case raises three major issues:

1. Whether appellant was properly receiving assistance before his termination;

2. Whether the assistance appellant was receiving was properly terminated; and

3. Whether BIA must continue assistance to appellant pending a determination of this case by the Board.

Discussion and Conclusions Relating to the Termination of BIA Assistance to Appellant

A. Appellant was Properly Receiving Assistance Under the Contract with Toyei Industries.

Appellant began receiving BIA assistance when he was referred to and accepted by Toyei Industries for training in vocational and living skills. Appellee apparently argues that appellant was improperly or illegally receiving this assistance because he was not evaluated for eligibility for BIA general and custodial care assistance when he was referred to Toyei.[13] This argument assumes that in order to receive assistance under a contract with Toyei, an individual must be eligible to re-

[12] *See* appellee's motion for remand at 3; appellant's consolidated reply brief at 3-4.

[13] Although the circumstances of this case do not require a decision on this question, the Board notes that appellee's argument essentially seeks a legal conclusion that appellant can be denied assistance because BIA did not properly determine his eligibility.

ceive both BIA general assistance and custodial care.

The Board finds that this assumption is a legal conclusion for which there is no evidence in the record. The terms, conditions, and purposes of the BIA contract with Toyei govern determinations of eligibility for receipt of services under it.[14] Appellee nowhere states that appellant was receiving services at Toyei in violation of the BIA contract.[15] Furthermore, appellee has neither introduced a copy of the contract to show what eligibility criteria it establishes,[16] nor presented arguments tending to show that the custodial care provisions of 66 BIAM Part 5 were to be used to determine eligibility.

In the absence of any evidence that appellant was not eligible to receive assistance under the BIA contract with Toyei Industries, the Board holds that he was properly receiving such assistance.

B. Appellant's Custodial Care Assistance Was Improperly Terminated.

1. Appellant was Receiving Custodial Care Following The Expiration of the Contract with Toyei Industries.

Following his receipt of BIA's letter of Oct. 20, 1980, informing him that the contract with Toyei would not be renewed,[17] appellant exercised his appeal rights and requested a hearing on the termination of his assistance. The BIA then rescinded the October letter and determined to provide assistance to appellant pending a complete evaluation of his circumstances. *See* Exh. I to opening brief; text, *supra* at 10 IBIA 152, 89 I.D. 511. Although BID did not indicate the source of this assistance, it is apparent from the way BIA has approached this case that the assistance was from its general assistance and/or custodial care funds.

The question whether BIA was legally required to provide assistance to appellant from its custodial care funds after the expiration of the contract with Toyei and pending a determination of his eligibility for custodial care is not before the Board. However, once BIA undertook to provide such assistance by informing appellant that it would be available to him pending a complete evaluation of his situation, appellant acquired certain rights. These rights are discussed in the following sections.

2. Appellant Had a Right to Proper Publication of the Basis for Custodial Care Eligibility Determinations.

Appellee maintains that appellant was not eligible for custodial care under 66 BIAM 5.10A. That section states in part:

> Custodial care for adults is that non-medical care and protection provided to an eligible client when, due to age, infirmity, physical or mental impairment, that client

[14] *See, e.g.*, 17A C.J.S. *Contracts* §§ 295-296 (1963), and cases cited therein; 17 Am. Jur. 2d *Contracts* §§ 244-246 (1964), and cases cited therein.

[15] Indeed, appellee's presentation to the Board ignores the fact that appellant was initially receiving assistance under this contract, except to argue that the contract was improperly entered into by the Branch of Social Services.

[16] There is no suggestion that this contract was included among the documents affected by the Board's order of June 28, 1982, excluding certain documents.

[17] The question whether the nonrenewal of the contract is a valid reason for terminating assistance to those individuals participating in the program established under the contract is not before the Board. However, the Board has held that the nonavailabilty of appropriated funds relieves BIA from the responsibility of providing funds. *See Aleutian/Pribilof Islands Association, Inc.* v. *Acting Deputy Assistant Secretary—Indian Affairs (Operations)*, 9 IBIA 254, 89 I.D. 196, and 10 IBIA 23 (1982).

requires care from others in his or her daily living. This may be provided in the most appropriate non-medical setting, including the client's home, an institution or other group care setting. This care encompasses protection and personal services in addition to food, shelter, laundry, and related costs. This type of care ordinarily includes services of a non-professional nature where medical supervision is not required on a continuing basis.

Appellant argues that 66 BIAM 5.10A sets forth either a substantive rule of general applicability or a statement of general policy or interpretation of general applicability within the meaning of 5 U.S.C. § 552(a)(1)(D),[18] and that this provision should, therefore, have been published in the *Federal Register.* Because the BIA manual provision was not so published, appellant reasons that 5 U.S.C. § 552(a)(1) [19] prevents its application to him.

The BIA responds that the manual provision is merely an interpretation of the regulations in 25 CFR Part 20 and, as such, is not required to be published. The provision need only be available for public inspection and copying under 5 U.S.C. § 552(a)(2)(B).[20] Since the provision was available to appellant, BIA argues that it has fulfilled its public notice requirements and can apply the standard.

[2] The BIA's position is quite similar to that which it presented to the Supreme Court in *Morton* v. *Ruiz,* 415 U.S. 199 (1974). Although BIA promulgated 25 CFR Part 20 after the *Ruiz* decision, it has failed to understand the Court's clear holding in that case: An individual may not be denied benefits on the basis of an eligibility standard provided only in the BIA manual.

Like the Supreme Court in *Ruiz,* the Board cannot accept BIA's argument. The BIA manual remains "solely an internal-operations brochure" (415 U.S. at 235), which does not "let the standard [of eligibility] be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries." 415 U.S. at 231. Despite the guidance provided in *Ruiz,* BIA has chosen to publish only the broadest and most general eligibility requirements for assistance in the *Federal Register* or in 25 CFR Part 20. Only the BIA manual contains provisions of the necessary specificity to permit the actual operation of these programs. Indeed, from reading Part 20, it is not even apparent that BIA provides custodial care.[21]

[18] Sec. 552 states in paetinent part:

"(a) Each agency shall make available to the public information as follows:

* * * * *

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

"(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency."

[19] Sec. 552(a)(1) states in pertinent part: "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."

[20] Sec. 552(a) states: "(2) Each agency, in accordance with published rules, shall make available for public inspection and copying: * * * (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register."

[21] This fact is emphasized by the disagreement between the parties over what section of Part 20 is "interpreted" by sec. 5.10A. Appellant, while noting the Area Director's failure to clarify which section of the regulations is

Continued

Contrary to BIA's arguments, the manual provisions do not merely interpret the CFR regulations; rather the manual provides the only usable standards of eligibility for custodial care. Because of this finding, the standard set forth in 66 BIAM 5.10A is a rule within the meaning of 5 U.S.C. § 5.1(4).[22]

Furthermore, as was also true in *Ruiz*, the rule set forth in sec. 5.10A is of general applicability. This provision potentially applies to every Native American. There can be no question but that such a rule significantly impacts upon a segment of the public.[23]

Therefore, 66 BIAM 5.10A sets forth a substantive rule of general applicability within the meaning of 5 U.S.C. §§ 551(4) and 552(a)(1)(D). This rule was required to be published in the *Federal Register* and should have been incorporated into 25 CFR Part 20. The failure to so publish this rule precludes BIA from using it to deprive appellant of benefits. 5 U.S.C. § 552(a)(1); *Shoshone and Arapahoe Tribes* v. *Commissioner of Indian Affairs*, 9 IBIA 263, 267–69, 89 I.D. 200, 202–03 (1982). As the Supreme Court stated in *Ruiz*: "The conscious choice * * * not to treat this extremely significant eligibility requirement, affecting rights of needy Indians, as a legislative-type rule, renders it ineffective so far as extinguishing rights of those otherwise within the class of beneficiaries." 415 U.S. at 236.[24]

3. Appellant Had a Right to a Legally Correct Determination of Eligibility.

Assuming that 66 BIAM 5.10A and other provisions of 66 BIAM Part 5 could properly be applied in determining appellant's eligibility for BIA financial assistance,[25] appellee argues that a finding of eligibility for general assistance must precede a finding of eligibility for custodial care. This argument is based on appellee's observation that custodial care is listed under the general assistance section in the BIA manual.

[3] From its review of 66 BIAM Part 5, the Board finds that the manual makes custodial care a form of general assistance. Sec. 5.2A states in pertinent part: "The general assistance program is intended to meet certain specified unmet financial needs of otherwise eligible Indians. This program includes * * * payment of certain costs directly related to custodial care." Similarly, sec. 5.10B(1) states: "Payment of custodial care shall be provided from general assistance funds following

interpreted by the manual provision, suggests that it can only be 25 CFR 20.24(b), relating to family and community services. *See* opening brief at 20; consolidated reply brief at 9–11. Appellee, with the assistance of the manual, contends that custodial care is a form of general assistance. *See* appellee's memorandum in support of motion for remand at 2; appellee's reply brief to appellants' memorandum in opposition to appellee's motion for remand at 2–3. The general assistance provisions are found in 25 CFR 20.21.

[22] Sec. 551(4) states in pertinent part: "[R]ule means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."

[23] The significant impact test was stated in *Lewis* v. *Weinberger*, 415 F. Supp. 652 (D.N.M. 1976), in the context of a discussion of whether a policy statement was of "general applicability." Even if the Board had agreed with appellee that 66 BIAM 5.10A is only an interpretation of 25 CFR Part 20, the fact that it is of general applicability would require its publication in the *Federal Register*. *See* 5 U.S.C. § 552(a)(1)(D).

[24] A critical review of the BIA manual is set forth in the *Final Report, American Indian Policy Review Commission*, submitted to Congress on May 17, 1977. *See* Vol. 1 at 278–79 under the heading "Hidden Regulations."

[25] This decision does not reach the question of what other sections of 66 BIAM Part 5 may be required to be published under 5 U.S.C. § 552(a)(1)(D).

a determination that 25 CFR 20 eligibility criteria have been met." Thus, under the manual provisions, a determination that an individual is eligible for general assistance must precede a determination that he or she is eligible for custodial care.

Appellee is therefore also correct that the BIA social worker should have been instructed to determine appellant's eligibility for both forms of BIA assistance. In this case, however, the Board has held that BIA's failure to determine appellant's eligibility for general assistance constitutes harmless error. *See* text, *supra* at 10 IBIA 159, 89 I.D. 515.

Appellant contends that BIA incorrectly interpreted other provisions of 66 BIAM Part 5 in finding him ineligible for custodial care. First, appellant argues that 66 BIAM 5.10A establishes a two-part inquiry. The initial question is whether an individual requires custodial care. The second question is where that care can most appropriately be provided. Appellant therefore argues that a finding that an individual's care needs can be fulfilled by his or her family does not mean that the individual is ineligible for custodial care.

[4] As appellant notes, 66 BIAM 5.10A establishes a program of financial assistance for individuals requiring "non-medical care and protection" in their daily living without regard to the setting in which that care is provided. Examples of possible settings clearly stated in sec. 5.10A are "the client's home, an institution or other group care setting." Significantly, sec. 5.10A(2) states: "In-home care means arrangements made in accordance with a plan approved by the Bureau for the care and supervision of an adult in his or her own home. Casework services should be directed toward providing care and services to the adult in his or her home." In addition, sec. 5.10A(3) "recognizes the importance of developing plans with clients that will preserve dignity and self-worth and enable the elderly and disabled to remain in their home and community." Thus, a finding that an individual who requires care can receive that care from a family member or members does not disqualify that person from participating in the custodial care program established in the BIA manual. The question which BIA must ask under the procedures it has adopted is whether an individual is capable of living by him- or herself or whether the individual requires care from others in daily living. *See* Chinle Agency Superintendent's Mar. 20, 1981, decision, Exh. EE to opening brief.

Appellant further contends that the term "care" as used in the text of sec. 5.10A must be liberally construed to mean "attention" as well as "maintenance." *See Black's Law Dictionary* (Rev. 4th ed. 1968) at 267-68. The BIA maintains that whatever meaning "care" may have has been modified by the qualifying term "custodial."

[5] The Board finds that care can encompass a wide range of services, and that some people

may require more care than others. When, however, due to age, infirmity, or physical or mental impairment, an individual requires any type or amount of care in daily living, that person qualifies for custodial care under the provisions of 66 BIAM 5.10A.[26]

Appellant also argues that when an individual has been in a custodial care institution, sec. 5.10D(2) requires that such care not be terminated until a feasible plan has been developed for providing any continuing custodial care that the individual may require. Sec. 5.10D(2) states that "[o]ccasionally, an individual may not require continued custodial care because of physical improvement. When this occurs, services should be rendered to help him/her leave the care establishment provided an outside plan for care is available and is feasible." Appellant concedes that an improvement in mental condition may also be the reason for a decision that an individual no longer requires institutional custodial care. *See* opening brief at 29 n.28.

[6] The Board agrees with appellant. Under 66 BIAM 5.10D(2) any continuing care arrangements necessary to provide for an individual who has been in a custodial care institution must be prepared before that individual is discharged from the institution.

Finally, appellant argues that when sec. 5.10D(2) is read in conjunction with sec. 5.10B(5), an individual's improvement must be documented in his or her case file. Sec. 5.10B(5) states: "The case record shall document medical evidence attesting to the physical or mental condition of the individual, and his or her need for custodial care." Appellant contends that, because an individual's mental and physical condition is made the test for whether or not custodial care is required, the termination of such care must be set forth with the same degree of attention to that mental or physical condition.

[7] The Board again agrees with appellant's interpretation of these manual provisions. Under the procedures established in the BIA manual, the decision to terminate custodial care for an individual must be documented as based upon physical or mental improvement, or upon an initial erroneous determination of the individual's condition. Any lesser requirement would permit and encourage ad hoc and arbitrary decisionmaking. *See Ruiz, supra.*

Based on these findings, the Board holds that BIA erroneously interpreted the discussed provisions of 66 BIAM Part 5. The Board declines, however, to decide whether appellant should have been found eligible for custodial care under these provisions, which are not "endowed with the force of law" (*See Ruiz, supra* at 235), because such a finding is not necessary to the disposition of this case.

C. Appellant's Custodial Care was Improperly Terminated Before a Final Departmental Decision on Eligibility was Rendered.

Appellee argues that BIA is required to continue custodial care payments to appellant only pend-

[26] The extent and type of care that a person requires would influence the amount of financial assistance made available to that individual.

ing a determination of eligibility by the Superintendent. In support of this position, appellee cites 25 CFR 20.30(b), which states: "Upon request for a hearing by a recipient dissatisfied by a proposed decision the recipient's financial assistance will be continued or reinstated to provide no break in financial assistance until the date of decision by the Superintendent or his designated representative in accordance with § 20.30(f) [dealing with the issuance of a written decision following a hearing on the proposed change in assistance]."

Appellant contends that 25 CFR 20.30(f) does not exhaust BIA's responsibilities to continue financial assistance. Instead, appellant argues any decision which is subject to further administrative review within BIA or by the Board is:

> [N]ot * * * effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. However, when the public interest requires, * * * a decision or any part of it shall be in full force and effect immediately.

43 CFR 4.21(a); *see also* 25 CFR 2.3(b). These two sections give the authority to declare a decision immediately effective to the Departmental officer to whom the appeal is made, the Board, or the Director of the Office of Hearings and Appeals.

[8] When he filed his appeals, appellant provided both the Area Director and the Deputy Assistant Secretary with forms on which to indicate whether the decision to terminate his care was being made immediately effective. *See* Exh. R to consolidated reply brief and *Allen* individual file. Neither officer completed the form or otherwise notified appellant that the termination was immediately effective. Thus, there was no proper determination that the termination was to take effect prior to the completion of Departmental review procedures.

In the absence of such a determination, appellant's custodial care assistance, which was to be provided to him pending a complete evaluation of his situation and throughout the administrative appeals process, was improperly terminated before the completion of either.[27]

Summary of Conclusions

Based on the foregoing discussion, the Board holds that it has jurisdiction in this case; that appellant was improperly determined ineligible to receive custodial care on the basis of 66 BIAM 5.10A, an unpublished substantive rule; that BIA incorrectly interpreted other provisions of 66 BIAM Part 5; and that appellant's custodial care assistance was improperly terminated prior to completion of his evaluation.[28]

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[27] The procedural regulation of the BIA that defers the effectiveness of appealable decisions until completion of the appeal period, unless otherwise directed by an appropriate officer, was viewed with favor in *Coomes* v. *Adkinson*, 414 F. Supp. 975 (D.S.D. 1976). The court stated that the provisions of 25 CFR 2.3 serve, among other things, to "protect the interests of parties * * *, allow the agency to develop a record, exercise its discretion, apply its expertise, and, possibly, discover and correct its own errors." *Id.* at 987.

[28] Because of this disposition, the Board does not reach appellant's other arguments.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the July 24, 1981, decision of the Navajo Area Director, Bureau of Indian Affairs, is reversed. The Board realizes that there may be several ways to remedy the errors noted. Accordingly, BIA is ordered to develop a plan effectuating the Board's holdings in this case. This plan will be filed with the Board within 30 days from the date of this decision.

WM. PHILIP HORTON
Chief Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

JERRY MUSKRAT
Administrative Judge

APPEAL OF ENVIROMARINE SYSTEMS, INC.

IBCA-1386-8-80

Decided *October 19, 1982*

Contract No. 79-ABC-0224, Department of Commerce.

Denied.

Contracts: Disputes and Remedies: Termination for Default: Generally

Where the contractor partially delivered electronic timer units which failed to substantially conform with the contract specifications, and the contractor fails to show that the specifications were otherwise deficient or that its failure to timely deliver acceptable units within the contract performance period was the result of excusable cause of delay, the Government's termination for default was proper.

APPEARANCES: J. Michael Lehane, Attorney at Law, Baltimore, Maryland, for Appellant; Jerry A. Walz, Government Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

This appeal was filed from a final decision of the contracting officer terminating for default appellant's contract for the purchase and assembly of 64 electronic timer units. As relief from the contracting officer's decision, appellant requests the Board to award it the full contract price of $26,333.88, or in the alternative, declare the contract terminated for convenience of the Government in accordance with the Federal Procurement Regulations (FPR), 41 CFR 1-8.701.

Background

Contract No. 79-ABC-0224 was awarded by respondent's National Oceanic and Atmospheric Administration (NOAA) to Environmarine Systems, Inc. (Appellant), on Sept. 6, 1979, for a stated fixed price of $26,333.88. The purpose of the contract was to manufacture, test, and deliver 62 electronic timers for Analog to Digital Recorder (ADR) tide gauges in accordance with the ADR Timer Specification (AF 2-1.1, AF 2-1.15; Tr. 129).[1] A report dated Feb. 26,

[1] References to the record are abbreviated typically as follows: Appeal File (AF), with reference to the particular exhibit numbers; Government Exhibit K (GX-K); Appellant's Exhibit 1 (AX-1); and Hearing Transcript page 5 (Tr. 5).

1980, from the project engineer to the contracting officer stressed the urgent need by the Government for delivery of the timer units (AF 5-5.4). At the time of award appellant was required to deliver 40 units by Dec. 31, 1979, and 22 units by Jan. 28, 1980 (AF 2-1.8; Tr. 5). Subsequent modifications to the contract adjusted the quantity to 64 units (AF 2-2, AF 2-5).

The ADR timers were purchased as part of a program to upgrade the reliability of NOAA tide gauges, deployed at some 500 to 600 sites across the nation's coasts, by replacing mechanical timers with electronic timers (AF 5-5.1; Tr. 129-30). The ADR timers relating to the instant contract were the end result of this update program (Tr. 218).

Initially, three prototype timers were built and preliminary field tests conducted in early 1978. Upon the success of these field tests, NOAA had an additional 25 timers manufactured. These timers were assembled by appellant in 1978 using Government-furnished printed circuit board (PCB) designs and components. The PCB artwork supplied to appellant for the instant contract was the same artwork that was used to manufacture the PCB's for the three prototype timers and the 25 timers assembled by appellant in 1978 (Tr. 131-33).

In early 1979, NOAA prepared a specification for the ADR timers in anticipation of further procurement action. Paragraph 3.1, Fabrication of the ADR Timer Specification required that: "Manufacturing processes and workmanship shall conform to standards specified in MIL-STD-275D as applicable to printed circuit board production" (AF 2-1.17). MIL-STD-275D was contained in the solicitation package (AF 2-1.10, AF 2-1.37), and incorporated into the ADR Timer Specification (Tr. 134-35, 148; AF 2-1.16).

In May 1979, NOAA solicited quotes against the ADR Timer Specification for the purpose of procuring additional timer units (Tr. 8). Appellant received a copy of the specifications on or about June 14, 1979, and submitted a quote to NOAA for a quantity of up to 50 units (Tr. 8, 86; GX-D). Prior to submitting its quote, appellant made inquiries on the price and availability of the needed components (Tr. 86-87). On Aug. 3, 1979, as additional funds became available, NOAA issued a solicitation for 62 timers which resulted in the instant contract (Tr. 148-49; AF 2-1.1).

By letter dated Jan. 4, 1980, the contracting officer notified appellant that it was in default for failing to meet the Dec. 31, 1979, delivery date, but withheld invoking the Government's rights under the Default Clause (AF 3-1). Instead, she extended the delivery date for all units until Mar. 7, 1980. The contracting officer also agreed to loan appellant various Government parts in an attempt to facilitate delivery (AF 2-4.1, AF 3-4.1). Appellant delivered only 20 timers on Mar. 7, 1980. However, in consideration for a $2,000 reduction in the contract price, the contracting officer again extended the de-

livery schedule for partial deliveries on Mar. 7, Mar. 17, and Mar. 27, 1980 (AF 2-5; 3-5).

The units delivered by appellant on Mar. 7 and Mar. 17, 1980, were rejected by the Government for failing to meet the specification requirements. Thereafter, the contracting officer established a new delivery date for all units, corrected and in conformance with the specifications, as of Apr. 7, 1980 (Tr. 64, 164-65; AF 3-6; AF 3-7; AF 5-6; AF 5-7). Appellant subsequently delivered only a partial shipment on Apr. 7, 1980, which the Government refused to accept (AF 3-8; Tr. 166).

On Apr. 11, 1980, the contracting officer allowed appellant to resubmit the units originally delivered on Apr. 7, 1980. The Government performed a 100 percent inspection of the resubmitted units and rejected them for failure to meet the specifications (Tr. 166-67; GX-N). After determining through two independent inspections by outside facilities that the Government's workmanship rejections were supportable, the contracting officer on July 25, 1980, issued a formal termination for default (Tr. 168-69, 171; GX-O; AF 1-2.1) pursuant to General Provision No. 11, Default, of the contract.[2] The termination decision was based on appellant's failure to: (1) deliver the timers by Apr. 11, 1980, the latest delivery date extension authorized by the Government; and (2) produce the required set of timers in accordance with contract specifications.

Discussion

Appellant presents three arguments in support of its position that the default termination of Contract No. 79-ABC-0224 be converted to a termination for convenience of the Government: (1) the Government did not allow enough time for the initial procurement of the units; (2) the Government-furnished artwork for printed circuit boards did not conform to the specifications set forth in the contract; and (3) any delay by appellant in delivery of the contract items was due either to the fault of the Government or to subcontractor delays beyond the control or without the fault or negligence of the appellant and thus excusable within the mean-

[2] The contract incorporates by reference the General Provisions of Standard Form 32, Rev. 4-75; FPR 41 CFR 1.8.707 (AF 2-1.11). Clause 11 of Standard Form 32 provides in pertinent part:

DEFAULT

"(a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

"(i) If the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

"(ii) If the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

* * * * *

"(e) If, after notice of termination of this contract under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the default was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the Government, be the same as if the notice of termination had been issued pursuant to such clause. If, after notice of termination of this contract under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, and if this contract does not contain a clause providing for termination for convenience of the Government, the contract shall be equitably adjusted to compensate for such termination and the contract modified accordingly; failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled 'Disputes.'"

ing of the contract (Appellant's Posthearing Brief at 2-4).[3]

It is the Government's position that although appellant has alleged defective Government-furnished film work, no such defects have been proven, nor does appellant establish a nexus between the alleged defects and its inability to comply with the specifications. It argues: (1) that the workmanship of the delivered units did not meet the standards of customary commercial practice, and that the units were not fit for their intended use; and (2) that any difficulties that appellant may have had in completing the contract were the direct result of its failure to apply due diligence to its efforts and in supervising its subcontracts (Government Posthearing Brief at 4-5).

At issue, therefore, is whether the units provided by appellant were in compliance with the contract specifications, and if so, whether appellant's failure to deliver acceptable units within the extended contract performance period was the result of excusable cause for delay.

Appellant's first argument that the Government did not allow enough time for the initial procurement of the timer units, along with the inference that its failure to do so was responsible for "the delays initially experienced by the contractor" (Appellant's Posthearing Brief at 8) is clearly without merit. The assertion ignores the critical fact that the default termination was issued not for the initial delays of appellant, but for its failure to deliver the units by Apr. 11, 1980, the latest delivery date extension authorized by the Government. Moreover, appellant seeks to support its argument by alleging that the Government encouraged it to proceed on the stated delivery schedule "despite known deficiencies" in the specifications (Appellant's Posthearing Brief at 2). Appellant fails, however, to substantiate this contention with any credible evidence.

Where the record developed by appellant consists primarily of pleadings, and it offers no documentary or testimentary evidence in support of its allegations, appellant will be held to have failed to sustain its burden of proof. Disputed allegations do not constitute evidence and cannot be accepted as proof of facts. *Appeal of E. H. White & Co.*, IBCA No. 1216-9-78 (July 19, 1982), 82-2 BCA par. 15,920, citing *Appeal of C.I.C. Construction Co., Inc.*, IBCA No. 1190-4-78 (Sept. 25, 1979), 86 I.D. 475, 79-2 BCA par. 14,057; and *Wickes Engineering and Construction Co.*, IBCA No. 191 (Nov. 30, 1960), 68 I.D. 30, 61-1 BCA par. 2,872.

Second, appellant states that during the initial testing of the contract items numerous deficiencies were discovered which subsequent investigation revealed were the result of inadequate photowork which rendered impossible the production of circuit boards

[3]The facts show unequivocally that appellant was in default at the time the contract was terminated and as such it has the burden of proving that its failure to perform arose out of causes beyond its control and without its fault or negligence. *Appeal of CSP, Inc.*, IBCA-1137-12-6 (Nov. 10, 1977), 84 I.D. 917, 77-2 BCA par. 12,845; *Omnicraft Corp.*, ASBCA No. 10869 (Mar. 30, 1966), 66-1 BCA par. 5,495; *San Antonio Construction Co. Inc.*, ASBCA No. 8110 (Sept. 29, 1964), 1964 BCA par. 4,479.

that would conform to MIL-STD-275D. Appellant bases this conclusion on the testimony of its witness, Edward Gisin, who prepared the original artwork for the Government. Mr. Gisin testified that he had reviewed the photowork supplied by NOAA to appellant which he determined to be poor quality, second generation photowork, showing signs of alteration, leaving spurs, and other matter inconsistent with the production of good quality circuit boards (Tr. 121). He further testified that at the time he did the original taping for NOAA, the work was done to good commercial practice—not to MIL-STD-275D (Tr. 120).

Appellant introduced as exhibits during the hearing three pieces of film marked as AX 1-A, AX 1-B, and AX 1-C (Tr. 19). A review of the evidence, however, established that the film comprising AX-1 was not used to manufacture the printed circuit boards for this contract, but was simply the positive filmwork which was only a portion of the artwork provided by the Government to appellant. The diazo's, filmwork which have an orangish color rather than the black and white positives, and are used to actually transfer the circuit to the board, were still in the possession of appellant's subcontractor at the time of the hearing (Tr. 19, 67-68). Appellant's witness Gisin admitted that AX-1 was not a diazo and that his opinions as to the quality of the filmwork supplied to appellant were limited to his analysis of AX-1; (Tr. 124, 126). Appellant's argument is further refuted by the testimony of its president, Ross T. Gardner, who testified that it had not been established that AX-1 was used for the manufacture of the boards (Tr. 24). The evidence shows also that some 300 units manufactured with the same design had subsequently been delivered to the Government at the time of the hearing in this matter (Tr. 226-27) and that Gisin had never heard of any problems associated with the previously manufactured boards (Tr. 125).

Contrary to appellants' contention, there was no representation by the Government that the photowork supplied by the Government met the design requirements of MIL-STD-275D (Tr. 131). Rather, the ADR timer specification in the fabrication section of the specification required that only the "manufacturing processes and workmanship" conform to the MIL-STD (AF 2-1.17).

In conjuction with its second argument, appellant seeks to prove that the Government's specification was deficient which resulted in an extra hole being drilled during the manufacture of the circuit boards (Tr. 39). The extra hole was the result of appellant's subcontractor drilling the boards from the solder side rather than from the component side as required by the drill drawing provided to appellant as part of the specification package. Drawing No. 99-022-D, entitled "ADR Timer Drill Drawing," introduced as GX-C, and the drill template photograph supplied by the Government, GX-K, clearly showed the component side of the board as the side to be drilled (Tr. 39, 141, 153-58; GX-I-1).

Appellant's attempt to establish that it is standard trade practice to drill from the solder side of the board (AF 3-11.4; Posthearing Brief at 5), fails for lack of proper foundation as appellant offered insufficient evidence at the hearing to support such a practice. The evidence further reveals that appellant did not supply its subcontractor with the drill drawing (GX-C), at the time of manufacture of the boards (Tr. 212) and did not question the subcontractor regarding the existence of the extra hole after manufacture (Tr. 73-74). In light of this evidence, and the subcontractor's testimony that he was unaware of a standard practice relating to the drilling of circuit boards and would have drilled from the component side shown on GX-C had he received the drill drawing (Tr. 212), appellant's second argument must fail for lack of sufficient proof.

Equally important to the disposition of this appeal is the fact that the timers delivered by appellant were not in substantial compliance or conformity with contract specifications and were so defective as to amount to a default justifying termination of the contract. *Radiation Technology, Inc.* v. *United States,* 177 Ct. Cl. 227 (1966). Numerous examples of deficiencies in the units delivered to and tested by the Government appear throughout the record in this case.

For instance, a major concern of the Government centered on appellant's failure to finish its printed circuit boards with an "infrared reflow process," as specified on drawing No. 99-022-D, introduced as GX-C and part of the ADR Timer Specification (AF 2-1.20). The reflow process protects the board from contamination and provides an opportunity to discover potential solderability problems before components are soldered to the board (Tr. 272). Appellant admitted that the required reflow process was not done for the timer boards furnished under this contract (Tr. 68), and its subcontractor testified it never received from appellant GX-C which specified the reflow process (Tr. 212). The Government's expert witness testified that failure to apply the reflow process *inter alia,* could result in the short circuiting of the boards (Tr. 270-74).

Additionally many of the units delivered by appellant were rejected by the Government because appellant had used excess solder on the solder joints during the assembly process (Tr. 175; GX-A-4). Paragraph 6.1.4 of MIL-STD-275D required that "[t]he end of the straight-through lead is not required to be covered with solder, but shall be discernible" (AF 2-1.50). The Government's two expert witnesses testified that the presence of excess solder suggests that the component lead cannot be seen, and renders uncertain whether there is a good electrical and mechanical connection, and is thereby detrimental to the reliability of the solder joint (Tr. 257, 263).

Similarly, paragraph 6.3.2 of MIL-STD-275D required that printed wire assemblies be cleaned of flux and other contami-

nants before applying a conformal coating to the circuit boards (AF 2-1.51). The record indicates that the Government complained to appellant that numerous boards were not adequately cleaned of flux and that debris had been found on the boards under the conformal coating (Tr. 41, 114). Appellant asserts that items such as foreign matter in the conformal coating excess flux etc., were by all accounts cosmetic deficiencies and were the result of rework necessitated by poor board quality (Posthearing Brief at 9). This argument, however, is clearly specious. The expert witnesses of the Government in unrebutted testimony indicated that the consequences of excessive flux residue could be long term degradation of the board and therefore raised reliability concerns (Tr. 258-59; 265-66).

For the foregoing reasons, there was no assurance that the timer units delivered to the Government would be corrected within a reasonable time, and otherwise would have required extensive repairs to bring them to a condition of substantial compliance (Tr. 108, 276). Nor is there any evidence that appellant made any effort to correct the workmanship defects for the units delivered and rejected on Mar. 17, 1980 (Tr. 168). Under these circumstances, the Government was not compelled to continue its forebearance or accept the timers as delivered. *Accutherm, Inc.*, ASBCA No. 24140 (Aug. 19, 1980), 80-2 BCA par. 14,748.

In this regard, the Board considers this case analagous to the situation in *Franklin Instrument Co., Inc.*, IBCA No. 1270-6-79 (Feb. 26, 1981) 88 I.D. 326, 81-1 BCA par. 14,970.[4] In *Franklin*, the contractor entered into a contract with the Geological Survey to supply timers for use in digital recorders to collect hydrological data. The contractor's allegation that the Government had improperly defaulted the contract after accepting the units delivered was denied on the basis that the contractor failed to show that the units substantially conformed to the specifications. The evidence indicated and the Board found that: (1) the timers were "unusable" because of the defects and unreliability; (2) that extensive readjustment was necessary in order to produce fully operable timers; and (3) that the Government "urgently needed" the timers (*supra* at 74,084). Given the similarity of these facts we find the rationale in *Franklin* dispositive of the issue in the instant case.

In so holding, we find no merit in appellant's final contention, *i.e.*, that its default termination was improper by reason of excusable delay. Despite the fact that several Government specified parts were allegedly unavailable, requiring selection of substitute components, the evidence of record reveals that appellant failed properly to ensure subcontractor compliance with delivery schedules or manufacturing requirements and did not notify the contracting officer of possible late delivery as required by General Provision No. 45 of the contract

[4] The Board's decision in *Franklin* has recently been upheld by order of the United States Court of Claims. *See, Franklin Instrument Co.* v. *United States*, Ct. Cl. No. 398-81 C (June 18, 1982).

(AF 2-1.12; AF 3-4.1). Appellant, therefore, has not shown that its default was excusable within the meaning of the Default clause. The Board also denies appellant's alternative request that it be awarded the full contract price of $26,333.88.

Findings of Fact

Based upon the foregoing discussion, examination of the appeal file, and the testimony and documentary evidence produced at the hearing, the Board makes the following findings of fact:

1. That appellant failed to deliver the timer units within the delivery schedule required by the contract as extended by the contracting officer (AF 3-1; AF 3-7; Tr. 64, 164, 166-67).

2. That there were no proven material deficiencies in the Government's specifications or in the photowork furnished by the Government to the appellant (AX-1; GX-C; GX-K; AF 2-1.17; Tr. 19, 24, 67, 68, 125, 212).

3. That the timer units delivered by appellant did not substantially conform to the contract specifications and were so defective as to amount to a default justifying termination of the contract (GX-C; GX-A-4; AF 2-120; AF 2-1.50; AF 2-1.51; Tr. 41, 68, 108, 114, 175, 212, 258-59, 265-66, 270-74, 276).

4. That the contracting officer's termination for default was proper as appellant failed to establish that its failure to timely deliver acceptable units was the result of excusable cause of delay (AF 2-1.12; AF 3-4.1).

Decision

Accordingly, for the above-stated reasons, the appeal is denied.

G. HERBERT PACKWOOD
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

APPEAL OF WALDEN GENERAL, INC.

IBCA-1475-6-81

Decided *October 19, 1982*

Contract No. NA81RAM00001, National Oceanic & Atmospheric Administration (Department of Commerce).

Denied.

1. Contracts: Disputes and Remedies: Burden of Proof—Contracts: Performance or Default: Excusable Delays

A default termination of a contract for failure to make progress so as to endanger performance is sustained where at the time of termination the contractor was far behind the monthly schedule and the principal grounds relied upon by the appellant as an excusable cause of delay was the failure by the Government to conform to an industry practice for which, however, no proof was offered and which would not constitute an excusable cause of delay even if shown to exist, where, as here, the Government either (i) denies the contentions advanced by the appellant relying upon evidence of record in support of the denial or (ii) shows the contentions to be irrelevant to the question of excusable cause of delay.

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(AF 2-1.12; AF 3-4.1). Appellant, therefore, has not shown that its default was excusable within the meaning of the Default clause. The Board also denies appellant's alternative request that it be awarded the full contract price of $26,333.88.

Findings of Fact

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Decision

Accordingly, for the above-stated reasons, the appeal is denied.

G. HERBERT PACKWOOD
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I CONCUR:

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2. Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Burden of Proof—Rules of Practice: Appeals: Burden of Proof

A claim for the cost of preparing a technical inventory of field tapes and other data furnished by the Government is denied where the appellant alleges that some of the field tapes were missing and some of the data was received in a deplorable condition, but the Board finds that the concurrence of a Government representative in the taking of the inventory did not provide a predicate for the claim asserted where the preparation of the inventory was considered to be simply an exercise of a management prerogative, irrespective of whether such action was to be viewed as a means of facilitating contract performance or satisfying a contract requirement for the furnishing of demultiplexing documentation.

APPEARANCES: Robert W. Carter, President, Walden General, Inc., Webster, Texas, for Appellant; Jerry A. Walz, Neil D. Friedman, Government Counsel, Department of Commerce, Washington, D.C., for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The contractor has timely appealed the actions of the contracting officer in terminating its contract for default and in denying its claim in the amount of $7,500 [1] for the cost of preparing an inventory of field data tapes (Appeal File 1.1 and 1.2).[2] As neither party has requested a hearing, our decision has been reached on the basis of the written record.[3]

Background

Contract No. NA81RAM00001 was awarded to Walden General, Inc. (hereinafter sometimes referred to as WGI or Walden), on Mar. 3, 1981.[4] Characterized as a requirements contacts [5] and issued by the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce with a not to exceed contract price of $400,000, the contract obligated WGI (i) to prepare reformatted master tapes (input tapes) in a standard format using NOAA-furnished field data tapes (field tapes) and (ii) to make copies of the reformatted tapes available to other parties as directed by NOAA. Describing its contractual obligation in its complaint, the appellant states: "The exact job to be done was to demultiplex, or change, tapes from field format to a shop format and dis-

[1] Designated as Claim No. 1 (cost of technical inventory) in appellant's complaint; two other claims—Claim No. 2 (cost of WSP-O computing system) in the amount of $59,950 and Claim No. 4 (unpaid processing invoices) in the amount of $5,307—were dismissed without prejudice because they had not been presented to the contracting officer for decision. Another claim (Claim No. 3) was dismissed as seeking a declaratory judgment which the Board has no authority to issue (*see* order dated Sept. 18, 1981).

[2] Hereafter appeal file exhibits will be designated by AF followed by reference to the particular exhibit number being cited.

[3] Pursuant to our order settling record, the Government supplemented the record by filing an affidavit executed by David Clark (contract officer's technical representative for tape reformatting and copying contracts including the instant contract) and a memorandum from Mr. Clark to Mr. Henry Yekel (contract officer) dated June 23, 1981. The Government also filed a brief. The appellant neither supplemented the record nor filed a brief. It did file a rebuttal, however, to the Government's brief.

[4] The contract incorporated by reference the General Provisions of Standard Form 32 (Rev. 4-75) and a number of clauses from the Federal Procurement Regulations.

[5] The contract was not for all of the Government's requirements. During the period of contract performance, two other concerns (Omni Tape Company and Oil Data Processing Company) had contracts for precisely the same type of work (AF 2.6 at 2-3).

tribute copies to clients paying large sums for correct information * * *."

Solicitation No. NOAA 18-81 was issued under date of Jan. 26, 1981, as a 100 Percent Set-Aside For Small Business. The following provisions, *inter alia,* were included in the solicitation.

BID SCHEDULE

Provide tape-to-tape reformatting and duplication for the period from the date of award through December 31, 1981. (Note: Bid prices shall include all costs of blank magnetic tape, services, copying of documentation, packaging and transportation f.o.b. Houston, TX.)

* * * * *

REQUIREMENTS

1. *General*

* * * * *

b. The Contractor shall prepare reformatted master tapes (input tapes) using field data tapes (field tapes) presently held in archive facilities located in the Houston, TX metropolitan area; * * *.

c. Generally, field tapes to be reformatted and copied by the bidder/contractor will be furnished in complete data sets although less than complete sets (subsets) may be furnished upon occasion. A complete data set may contain from 10 to 600 or more individual tapes in the same density and format and will be accompanied by appropriate and applicable documentation. Individual field tapes will be either standard 9-track (½ inch wide) or 21-track tapes, both of various lengths. The number of reformatted master tapes which will be required will be dependent upon the recording structure, data format and recording density of both the field and master tapes. Documentation for each data set or subset will consist of such things as field notes, listing of file numbers for each tape, etc. The documentation consists of computer printouts, microfiche and written notes and, provided the accuracy and legibility of the copy is assured, may be reproduced by any method which is convenient to the bidder/contractor. The reformatting of a series of field tapes shall be such as to permit cascading of master tapes in a way which will fill each 2400 foot reel of tape (excluding the last tape). However, approximately 5% of each 2400 foot tape shall be left blank to facilitate copying of output tapes.

d. * * * [T]he tape format will often be in SEG–Y, SEG–A or other SEG formats. * * *

e. All output tapes are expected to be in SEG–Y format. Output tapes (copies of the input tapes) will be required as orders are received and transmitted by the NGSDC and the number and format of the required copies will be determined by these orders. Orders are frequently for only a designated portion of a specific data set.

f. Except for the limitation on the number of copies the Contractor will be required to produce in any given month, all quantities shown in the schedule and in the paragraphs above are estimates * * *

2. *Scope of Work*

a. The bidder/contractor shall provide and furnish the plant, facilities, equipment, labor, packing, packaging and materials (including reels of blank magnetic tape) necessary to produce and deliver the output tapes and documentation copies required by this solicitation/contract.

* * * * *

3. *Government Responsibilities*

a. The field data tapes to be copied shall be furnished and delivered to the Contractor * * *.

b. The Government will provide the Contractor with orders for tape copies as order are received.

* * * * *

d. The Government will designate a project monitor for NGSDC and this individual will make occasional visits to the Contractor's facility.* * *

4. *Allowance for Mobilization*

a. It is recognized that every bidder/contractor may not be prepared to begin performance of the work upon the date of contract award. Accordingly, and if his bid is accompanied by a written request therefor, the Government will give the successful bidder/contractor time to mobilize and prepare for performance of the contract. If mobilization time is requested, up to 30

days will be allowed for the effort and, to accomplish this purpose, shipment of orders submitted to the bidder/contractor during the first 30 days after contract award will not be required until the second month following the month in which the order was received by the Contractor.

b. Request for time to accomplish mobilization will not be considered if received after the time set for bid opening unless the request was timely mailed in accordance with the provision entitled: "Late Bids and Modifications * * *."

5. *Delivery*

a. The Contractor shall ship tape copies, together with copies of appropriate documentation, to each designated NGSDC customer. Routine shipments shall be made within thirty (30) calendar days from the date the Contractor receives the order.

b. Unless its bid specifies a different quantity, the Contractor will not be required to make deliveries in excess of the following rate:

1) Reformatted data: 1200 master tapes per month

2) Copies of master tapes: 2000 output tapes per month

* * * * *

7. *Terms of Contract*

* * * [A]ny contract arising out of this solicitation for bids will become effective on the date of award and will expire at midnight on December 31, 1981.

* * * * *

12. *Payment*

a. Once each month, or at less frequent intervals, at the option of the Contractor, the Contractor may submit an invoice or public voucher for services rendered and accepted by the Government. Each invoice or public voucher shall itemize the services for which payment is claimed and, as a minimum, shall identify the contract line item number under which services were performed, the quantity and unit price for the services and the NGSDC order which authorized the work. In addition, charges for reformatting of data shall be supported by a detailed inventory of master tapes created, the tape numbers, line numbers and shot points. Upon approval by the Contracting Officer, the Government will make payment thereon.

* * * * *

B. TERMS AND CONDITIONS

1. *Notice of Small Business Set-Aside*

a. *Restriction.* Bids under this procurement are solicited from small business concerns only and this procurement is to be awarded only to one or more small business concerns.

* * * * *

2. *Notice of Award*

Notice of award may be made by transmitting a contract number by telephone, telegram, personal contact or by written notice. The notice will be confirmed by execution of the contract. For the purpose of calculating delivery requirements, the successful bidder will deemed to have received the order when he has received notice of award.

3. *Government Property*

The master tapes produced as a result of the reformatting of the field data tapes shall become the property of the Government and, when so produced, shall be subject to the "Government Property" clause made a part hereof by reference.

(AF 3.0, the contract).

In support of its appeal, the appellant asserts (i) that its contract was terminated prematurely [6] in favor of more costly competitors; (ii) that before any work is started industry practice in this area requires (a) a detailed correct shotpoint map for each line of seismic data, (b) correct logs from the observer and surveyor of each seismic line [7] and (c) correct reels of

[6] In its response to NOAA's 10-day cure notice, the appellant had stated: "[R]egarding the schedule, our feeling is that we are about 60 days ahead of the implied *60 day* figure mentioned in the contract" (Italics in original.) (AF 1.6, Walden's letter to Mr. Henry E. Yekel (May 20, 1981) at 1).

[7] While acknowledging that the support data (observer logs and surveyor notes) had been a countinuing problem for all involved on the project, Mr. Clark states:

"[T]hese support data are not required to demultiplex and copy the field data. The observer logs can facilitate the demuliplexing process; but, Walden indicated by telephone that the microfilm of this information was acceptable. The surveyor notes are only used in the final processing by data users. Microfilm copies of the surveyor notes were sent to Walden only as informational copies and the microfilm of this data is known to be poor. Microfilm copies of all support data (the same as sent to Walden) were sent by NGSDC to all data customers. During a phone conversation Walden was told that they

Continued

field data; (iii) that WGI received only one of the three elements stated above as the minimum industry requirements to start any work; (iv) that because of the deplorable condition of the set of master field tapes when received, WGI did a technical inventory (with NOAA approval) [8] of the tape reels including computer runs to determine the exact nature of the data involved; (v) that in the course of doing the inventory the contractor found that about 50 percent of the data was not in any SEG format; and (vi) that a large volume of business was promised to WGI but was not delivered by NOAA.

With respect to item (vi), *supra*, the respondent acknowledges that in a letter dated Mar. 3, 1981, NGSDC had estimated 5,000 tapes would be necessary for the first 90 days of the project. Mr. Clark noted, however, that Walden had only produced 367 output tapes by demuliplexing [9] from approximately 900 input field tapes delivered to the contractor; that there was no mention of the number of output tapes copies to be made; that Walden's master reformatted tapes were completely full even though the contract specifies that they shall be 95 percent full; and that since pricing depends only on output tapes, Walden should have benefitted if it had conformed to the contract (*i.e.*, more output tapes would have been generated).

Citing the provision of the contract pertaining to the failure to make progess so as to endanger performance (paragraph (a)(ii) of Clause 11, Default of the General Provisions), the contracting officer confirmed the notice of termination for default for failure to make acceptable progress contained in the letter of June 3, 1981 (hand-delivered to WGI and effective on that date). Addressing the contentions advanced by WGI in its response of May 20, 1981 (AF 1.6) to NOAA's 10-Day cure notice of May 13, 1981 (AF 1.7), the contracting officer found that none of such contentions had been shown to constitute a showing of exclusable delay. In support of this conclusion, the contracting officer made the following findings:

1. The fact that the tape sets were incomplete does not constitute a reason for delay because reformatting and copying of the missing tapes was not required.[10]

2. The requirement to reformat vibroseis data is not a justification for excusable delay since, while

did not have to send observer log and survey note documentation to customers because NGSDC was providing this documentation to customers" (Clark memorandum at 2, *supra* note 3).

[8] With respect to NOAA's approval, Mr. Clark states: "Walden never asked for permission to do an inventory; during a phone conversation they made a statement that they were doing an inventory and NCSDC [*sic*] concurred. No mention of fees was made * * *" (Clark memorandum at 1, *supra* note 3).

[9] In his memorandum of June 23, 1981 (note 3 *supra*), Mr. Clark states at page 2: "Personal conversations with Robert Carter indicate *all demuliplexing* of data was performed under subcontract. NGSDC has been billed for (and paid for) only 13 tape copies. * * *" (Italics in original.)

[10] Earlier in the decision, the contracting officer had stated:

"At the time the field data tapes were provided to WGI, it was informed that some tapes were missing and a copy of an inventory of the tapes was furnished to you. The tapes were packed in special boxes which were keyed to a master inventory and contained slots for each individual tape. Thus, any missing tapes were easily identified by vacant slots within the boxes. WGI had the responsibility to reformat and copy the tapes for which instructions were provided but it was not responsible for locating and collecting tapes which were obviously missing. * * *" (AF 1.1 at 1; *see also* Clark affidavit at 1-2, *supra* note 3).

the contract does state that "the tape format will often be in SEG-Y, SEG-A, or the SEG formats," it does not preclude the furnishing of other formats.[11]

3. The legibility of the microfilm was not relevant to the claim of delay since reproduction or duplication of the microfilm was not included in the orders placed with WGI.[12]

4. The contention of WGI that it was about 60 days ahead of the implied 60-day figure mentioned in the contract was not supported by either the contract terms or the record.[13]

The contracting officer also denied the claim of WGI in the amount of $7,500 for preparing an inventory of the field tapes, stating:

> [P]reparation of an inventory of Government furnished property is considered to be a normal function of the receiving and inspection process and, in addition, the "Government property" clause included in the contract by reference requires the Contractor to prepare an inventory of all Government property not consumed during performance of the contract. The clause also requires the inventory to be furnished with the property when it is returned to the Government. For these reasons, and because the field data tapes are not consumable items, it is my decision that the work was within the scope of the contract and the claim therefor is not for payment by the Goverment.[14]

(AF 1.1).

In the affidavit executed by Mr. Clark under date of Jan. 11, 1982 (note 3 *supra*), Mr. Clark provided information similar to that furnished at an earlier time in his memorandum of June 23, 1981 (note 3 *supra*). Quoted below are excerpts from the Clark affidavit.

> 2. In order to generate demultiplexed (reformatted) master field tapes (from which customer copies were made), the government provided all documentation that was necessary for demultiplexing the raw field tapes. This consisted of the tape inventory (which listed the shotpoint range of the field tape), the physical label on the tape (which provided the format, file numbers, etc.) and a header at the beginning of each tape (which is an industry standard describing the data on the tape). In addition, a preliminary tape dump of the data can be made by the contractor to verify initial parameters. Since the government did not require editing of the data, the demultiplexing process was essentially a file to file reordering of the data. Additional data documentation provided to WGI by the government consisted of the observer logs and surveyor notes (on microfilm) and was provided to help facilitate the contractor's work. The observer logs essentially summarize all parameters of the field data tapes and offer the contractors additional (but mostly redundant) information. This portion of the additional documentation was furnished to WGI in a legible format. The surveyor notes are the result of the topographic and geographic

[11] Based upon statistics compiled from the run sheets submitted by Walden, Mr. Clark states: "83% of the data are in a SEG format, 13% is in a TI format (note: this format applies only to 21 track non-1979 data: similar data has been successfully processed by the other contractors) and 4% is not listed" (Clark memorandum at 2, *supra* note 3).

[12] Amplifying upon this finding, the contracting officer states: "[T]he only documentation which was required was the demultiplexing documentation which was to be produced during, and as a part of, the reformatting process" (AF 1.1 at 2).

[13] In support of this finding, the contracting officer noted that WGI had been allowed 60 days for delivery of the initial orders even though it had not requested additional time for mobilization as required by the terms of the solicitation (text, *supra*) and that compared to the contract requirements for reproduction of up to 1,200 master tapes and the delivery of up to 2,000 output tapes in the initial month deliveries were due (May 1981), the contractor had admitted producing only 400 reformatted tapes and delivering only 20 tapes copies through June 2, 1981 (AF 1.1 at 2).

[14] Concerning the question of when the inventory for which claim has been made was received by the respondent, Mr. Clark states:

> "[O]n June 19, 1981, NGSDC received what must be assumed to be the 'inventory.' * * * It appears to be a normal run sheet, similar to ones used by other NOAA contractors * * * A run sheet is necessary for orderly and efficient demultiplexing. The other two NOAA contractors have routinely supplied these run sheets to NGSDC as demultiplexing documentation. Such documentation is specifically required under the contract (page 13, paragraph 12a)" (Clark memorandum at 1, *supra* note 3).

surveying of the seismic line and are only used by the final data customer to produce a paper seismic section. This portion of the microfilm was generally illegible on WGI's copy. NGSDC relieved WGI (and the other contractors) from the reproduction and dissemination of this documentation to the data tape customers which was required by the contract. *WGI did not require surveyor notes to reformat and copy the data.* Tetra Tech (USGS contractor) also provided WGI a 1:500,000 shotpoint map of the NPRA which showed all the lines through 1980.[15]

* * * * *

4. WGI's "technical inventory" appears to be a typical computer worksheet that is accepted as an industry standard. * * *

5. All tape contractors were provided exactly the same documentation as described in the above paragraphs. No compensation was made to any contractor for preparation of any type of inventory in any form. Any additional work was considered to be normal and standard procedures for the orderly and efficient processing of the data. During the period of WGI contract (Mar. 3-June 3, 1981) the other two contractors (Omni Tape Co. and Oil Data Processing Co.) processed (e.g., reformatted and copied) more than 7,000 tapes using the same information provided WGI. [16] [Italics in original.]

Discussion

According to the appellant's rebuttal, the central issue of this appeal is the compensation to which WGI is entitled for the work done in trying to handle the seismic data given to WGI. All of the allegations made by appellant have been denied by the Government or characterized by it as irrelevant to the issues involved in the appeal.

The appellant says that its contract was terminated prematurely in favor of more costly contractors.[17] The record shows, however, that at the time the contract was terminated for default on June 3, 1981, the contractor should have reproduced up to 1,200 master tapes and delivered up to 2,000 output tapes as compared to the admission by the appellant that as of June 2, 1981 (*i.e.*, the day before the contract was terminated for default) it had produced 400 reformatted taped and copied only 20 tapes.[18]

The appellant asserts that industry practice requires that before any work is started there be furnished (i) a detailed correct shotpoint map for each line of seismic data; (ii) correct logs from the observer and surveyor of each seismic line; and (iii) correct reels of field data. Except for the appel-

[15] When Mr. Carter visited NGSDC on Mar. 27, 1981, he was optimistic about being in full production in April. One system was expected to arrive the following week and to be running in another week. Mr. Carter estimated their other system should be operational in 3 to 4 weeks and that their maximum production rate of 13,000 tapes per month should be achieved by the end of April (AF 2.5).

[16] The insignificant production achieved by WGI in comparison with the other two contractors may be partially attributable to the fact that at the time the contract was awarded WGI did not have the facilities and equipment required for performance of the contract. In early March of 1981, WGI was said to be in the process of buying a computer system and building a tape copying system, as well as seeking to acquire office space and computer rooms. WGI was still negotiating for office space on Mar. 27, 1981, but expected to be in their permanent quarters in 2 weeks. By May of 1981, WGI was in its new office in Webster, Texas (AF 2.3, 2.5, 2.6).

[17] The record before us does not contain copies of the contracts awarded to the other two contractors (note 5 *supra*); nor does it otherwise reveal what prices may have been paid to them. It is not known when such contracts were awarded, the circumstances obtaining at the time the awards were made or the procurement authority relied upon in awarding them. In the absence of any evidence indicating otherwise, it is presumed that the Government officials concerned did not abuse the discretion vested in them.

[18] In a telephone conversation on June 2, 1981, Mr. Carter advised NOAA's Mr. Henry Yekel that WGI could not make additional copies because it had exhausted the tape supply and could not obtain any more until it received payment from the Government. In the handwritten memorandum of that conversation, Mr. Yekel also notes parenthetically that the contractor's banker would not advance any more money and that apparently the tape supplier would not ship on credit (AF 1.4).

lant's assertions, however, the record is entirely devoid of evidence showing the existence of the industry practice claimed. The unsupported allegations of a party to an appeal are not sufficient to establish the existence of an industry practice.[19] Even if such an industry practice had been shown to exist, however, it would have been of no avail to the appellant where, as here, the evidence of record shows (i) that the appellant did receive a shotpoint map showing all lines through 1980 (Clark affidavit, text, *supra*) and (ii) that the appellant was told that it did not have to furnish observer logs and surveyor note documentation to the tape customers because NGSDC was providing such documentation to them (note 7 *supra*).

Another contention made by the appellant is that a large volume of business was promised to WGI but was not delivered by NOAA. The essential weakness in this argument is that the volume of business given to WGI was far in excess of its capacity to perform within the contract schedule. With respect to master tapes, the record shows that prior to the time the termination for default notice was issued on June 3, 1981, the Government could have called for the reproduction of up to 1,200 master tapes. Prior to the issuance of the termination notice, it had delivered 900 field tapes to Walden to be reformatted of which only 367 had been reproduced by June 3, 1981. In regard to the tapes to be copied, the variance was even more marked. The contract called for the reproduction of up to 2,000 copies of output tapes from reformatted master tapes. Although as of June 2, 1981, WGI had reproduced 367 master tapes, it appears to have only copied 13 tapes prior to the termination. On the same date, it informed the Government that it was not in a position to make additional copies because it had exhausted its tape supply and could not obtain any more tapes until payments from the Government were received.

As to the Claim No. 1 (cost of technical inventory), Mr. Clark acknowledges that he was informed in a telephone conversation that Walden was taking an inventory of the field tapes and other data received. He noted, however, that Walden never asked for permission to do an inventory; that no mention of fees were made; that the inventory taken by the contractor involved the use of normal run sheets very similar to run sheets used by the other two contractors performing the same type of work; that such other contractor had routinely supplied the run sheets to NGSDC as demultiplexing documentation; and that such documentation is specifically required by the contract (notes 8 and 14 *supra*).

Decision

[1] In support of its claim that the default termination was improper, the appellant relies principally upon the existence of an alleged industry practice as an excusable cause of delay. No proof has been offered to show the existence of such an industry practice. Even if such an industry practice

[19] *See Eder Electric Co.* v. *United States*, 205 F. Supp 305 (1962), in which the court defined a trade custom as one established by evidence "so clear, uncontradictory, and distinct so as to leave no doubt as to its nature."

had been shown to exist, however, it would not have availed the appellant where, as in this case, the Government has either disputed the allegations of the appellant (*e.g.*, a shotpoint map was furnished; affidavit of David Clark, text, *supra*), or has shown them to be irrelevant to the performance required by the Government (*e.g.*, the condition of the microfilm of the surveyor's notes, note 7 *supra* and accompanying text). Mere allegations do not constitute proof of material facts which are disputed.[20]

The Board finds that as of the date of the termination of the instant contract for default for the failure to make acceptable progress, the contractor was grossly behind the contract's performance schedule and that no excusable cause for delay had been shown to exist. So finding, the Board concludes that the right of the contractor to proceed with performance of the instant contract was properly terminated for default for failure to make progress so as to endanger delivery.

[2] In support of its $7,500 claim for the costs involved in preparing a technical inventory, the appellant asserts: (i) That the inventory was necessary because of the deplorable condition of the master field tapes when received, and (ii) that the inventory was taken with the concurrence of NOAA. The Government explains its concurrence on the ground that the taking of the inventory was viewed as a measure taken by the contractor to facilitate performance of the contract. It points out that no mention of compensation was made and that the other contractors concerned had submitted very similar inventories to satisfy a contractual requirement for demultiplexing documentation.

In this case the appellant has not shown nor even alleged that the Government ordered or directed it to take the inventory for which claim is being made. In these circumstances, the action of the appellant in taking the inventory is regarded as an exercise of a prerogative of management. This is so whether the preparation of the inventory is viewed as a means of facilitating performance of the contract or satisfying a contract requirement for the furnishing of demultiplexing documentation. The fact that the Government acquiesced in the taking of the technical inventory in these circumstances is not considered to be a predicate for allowing the claim asserted.

Accordingly, Claim No. 1 (cost of technical inventory) in the amount of $7,500 is hereby denied.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

[20] *Western States Construction Co., Inc.*, IBCA-1466-6-81 (Sept. 21, 1982), 82-2 BCA par. ——.

UNITED STATES *v.* WEBER OIL CO. ET AL.

68 IBLA 37

Decided *October 21, 1982*

Consolidated cross appeals from decision of Administrative Law Judge John R. Rampton, Jr., dismissing contests against 203 oil shale placer mining claims and declaring portions of three oil shale placer mining claims null and void. Colorado Contests 193, 260, 685 through 688.

Affirmed in part; reversed in part.

1. Administrative Procedure: Burden of Proof—Contests and Protests: Generally—Evidence: Prima Facie Case—Mining Claims: Contests—Oil Shale: Mining Claims—Rules of Practice: Appeals: Burden of Proof—Rules of Practice: Government Contests

In an oil shale mining claim contest, the Government bears only the burden of going forward with sufficient evidence to establish a prima facie case of invalidity, and the burden then shifts to the claimant to overcome this showing by a preponderance of the evidence. However, since abandonment and lack of good faith are questions of intent, the Government bears the ultimate burden of proving these charges.

2. Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally—Mining Claims: Discovery: Geologic Inference—Oil Shale: Mining Claims

Any exposure of the rich oil shale formation known as the Parachute Creek member can be geologically inferred to embrace sufficient quantity of high grade oil shale and, therefore, to constitute a valuable mineral deposit on an oil shale placer mining claim. However, exposure of a surface deposit of lean oil shale is inadequate to demonstrate the existence of rich deposits at depth in the absence of evidence showing that it is part of a deposit that can be followed to depth within the lateral limits of the claim.

3. Mineral Leasing Act: Generally—Mining Claims: Assessment Work

The holder of an oil shale placer mining claim is required to perform $100 of annual assessment work each year for the benefit of such claim. Where there has not been "substantial compliance" with this requirement, such claim is forfeited to the United States. Resumption of work following a substantial breach of compliance does not bar the Government from asserting a forfeiture.

4. Mining Claims: Discovery: Geologic Inference—Oil Shale: Generally—Oil Shale: Mining Claims—Words and Phrases

"Oil shale." Rock containing less than 3 gallons per ton of kerogen is not distinguishable from average shale or limestone in the earth's crust and is therefore not "oil shale." Discovery of such shale on a mining claim, without more, does not provide any basis for inferring the presence of oil shale at depth.

5. Mining Claims: Location

Failure to comply with state and local regulations requiring oil shale placer mining claims to be marked on the ground does not invalidate the claims when the claims were located before Feb. 25, 1920, in compliance with contemporary Departmental regulations.

6. Administrative Procedure: Burden of Proof—Contests and Protests: Generally—Evidence: Prima Facie Case—Mining Claims: Contests—Oil Shale: Mining Claims—Rules of Practice: Appeals: Burden of Proof—Rules of Practice: Government Contests

Where evidence creates only inferences of lack of good faith in the location and hold-

ing of mining claims and fails to show clearly that these claims were abandoned, these charges are not sustained.

7. Equitable Adjudication: Generally—Mining Claims: Determination of Validity—Oil Shale: Mining Claims

The Department is not barred by the equitable doctrines of laches or waiver from declaring oil shale placer mining claims null and void, since, until patent issues, it has the power and duty to invalidate adverse interests in public lands as required by governing laws.

8. Mineral Lands: Determination of Character of—Mining Claims: Mineral Lands

Where 10-acre portions of oil shale placer mining claims cover lands from which erosion has removed the Parachute Creek member (the principal body of rich oil shale), there is no geological basis to infer the presence of rich oil shale, and such portions of the claims are properly determined to be nonmineral in character.

APPEARANCES: Marla E. Mansfield, Esq., Lowell L. Madsen, Esq., and Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management; John W. Savage, Jr., Esq., Rifle, Colorado; James Clark, Esq., William D. Maer, Esq., Bruce Pringle, Esq., Richard H. Shaw, Esq., H. Michael Spence, Esq., and Don H. Sherwood, Esq., Denver, Colorado; Richard W. Hulbert, Esq., New York, New York; and Donald L. Morgan, Esq., and Henry J. Plog, Jr., Esq., Washington, D.C., for the various contestees.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

INTERIOR BOARD OF LAND APPEALS

The Bureau of Land Management (BLM), Department of the Interior, has appealed the July 16, 1982, decision of Administrative Law Judge John R. Rampton, Jr., insofar as it dismissed contests against 199 oil shale placer mining claims. The holders of interests in these claims have filed answers to this appeal. The holders of three oil shale placer mining claims have appealed Judge Rampton's decision declaring portions of them null and void because they are nonmineral in character. BLM has answered this cross appeal.

At various times in May 1981, the Colorado State Office, BLM, filed six complaints or amended complaints against six different groups of oil shale placer mining claims. The six groups comprised 203 mining claims in all.[1] Answers were filed in each contest and, on June 18, 1981, the matter was referred to the Hearings Division, Office of Hearings and Appeals, for appointment of an Administrative Law Judge to convene a factfinding hearing. Judge Rampton did so and issued his decision on July 16, 1982, dismissing the contests as to all but three of the mining claims, which, as noted above, he declared null and void in part. These appeals followed.

[1] *See* Appendix.

Judge Rampton's decision fully addressed the lengthy history of litigation concerning questions bearing on the validity of oil shale placer mining claims, as do our previous decisions concerning such claims cited below, and we will not burden this decision with another recitation of this history. We shall address each issue relevant to the validity of these claims and apply each holding to the question of the claims' validity. In view of judicial concern voiced in earlier oil shale litigation that all relevant issues be addressed, we have endeavored not to regard any issue as moot.

Burden of Proof

[1] In *United States* v. *Strauss,* 59 I.D. 129 (1945), the Department held that once the government makes a prima facie case of no discovery, the burden shifts to the claimant, as the proponent of his claim's validity, to overcome this showing. This procedure subsequently received judicial approval as being in accord with the Administrative Procedure Act in *Foster* v. *Seaton,* 271 F.2d 836 (D.C. Cir. 1959). It has been followed ever since. *See, e.g., United States* v. *Haskins,* 59 IBLA 1, 88 I.D. 925 (1981); *United States* v. *Hooker,* 48 IBLA 22 (1980). *See also United States* v. *Bohme,* 48 IBLA 267, 300, 87 I.D. 248, 264-65 (1980) (*Bohme I*).

We also observed in *Bohme I,* by way of dictum, that "[a]bandonment, being essentially a question of intent, is difficult of proof, and perhaps should impose a heavy evidentiary burden on the one who asserts it." *Id.* at 303, 87 I.D. at 266. Judge Rampton, following *Bohme I,* ruled that, in all issues except abandonment, the Department need only present a prima facie case on any specific charge in the contest complaint and that the ultimate burden of proof then devolves to the mining claimants on that issue. We agree with this holding, except that the Government has the ultimate burden as to charges of lack of good faith, as well as to charges of abandonment.

Judge Rampton's decision contains findings of fact on all issues except the minimum standard for kerogen content of oil shale, and the parties have not generally challenged these findings on appeal.[2] Thus, the only issues to which we must apply the burden of proof tests are (1) whether these claims contain minerals meeting the minimum standard for kerogen content of oil shale, (2) abandonment, and (3) lack of good faith.

Discovery

Under the Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. § 22 (1976), "all valuable mineral deposits in lands belonging to the United States" are, under specified conditions, open to exploration and

[2]BLM disputed Judge Rampton's finding that the Hoffman Nos. 20 and 46 claims (Contest No. Colorado 685) have exposures of the Parachute Creek member on them. The record supports BLM. This finding of fact is vacated. Claimants argue that there was insufficient evidence to establish failures to perform assessment work, and that the Department cannot rely on the absence of recorded assessment work affidavits to prove such failure. We disagree. Colorado law provides only that a mining claimant may record proof of this work. Colo. Rev. Stat. § 33.43.114 (1973). His failure to present record copies of such proof from relevant periods, or to explain why they are unavailable, creates a strong inference that the work was not accomplished. This inference could have been overcome by evidence showing that assessment work had been performed. The claimants, however, failed to convinced Judge Rampton that such work was actually performed.

purchase. Ordinarily, in order for a mining claim to go to patent or to withstand a contest of its validity, there must be a "mineral deposit" on the claim, and this deposit must be presently "valuable," under time-honored tests developed by the Department and the Courts. *United States* v. *Coleman,* 390 U.S. 599 (1968); *Chrisman* v. *Miller,* 197 U.S. 313 (1905).

However, by virtue of *Freeman* v. *Summers,* 52 L.D. 201 (1927), as interpreted by the Supreme Court in *Andrus* v. *Shell Oil Co.,* 446 U.S. 657 (1980), the holder of an *oil shale* placer claim need not show that any oil shale on his claim is presently valuable, since the requirement of "present value" does not apply to oil shale claims, and since the prospective value of oil shale as a resource may be presumed. But, the claimant is not entitled to benefit from this presumption unless he has made a "discovery" of deposits of oil shale.

The *sine qua non* of any cognizable "discovery" of minerals on a mining claim is an exposure of those minerals. Either surface exposure or drill core samples will suffice. Where, as here, oil shale had been withdrawn from mineral location by the Act of Feb. 25, 1920, 30 U.S.C. § 181 (1976), the exposure of oil shale must have been made prior to the date of the withdrawal. The presence of valuable minerals may not be inferred from geological data showing the presence of similar minerals in the vicinity of the claim. *United States* v. *Jackson,* 53 IBLA 289, 296 (1981); *United States* v. *Henault Mining Co.,* 73 I.D. 184 (1966), *aff'd, Henault Mining Co.* v. *Tysk,* 419 F.2d 766 (9th Cir. 1969). The extent of a discovery may be inferred from such data, but absent actual exposure of minerals no "discovery" exists. *United States* v. *Edeline,* 39 IBLA 236, 241 (1979). Any "discovery" must also be shown to have survived to the present. *United States* v. *Kincanon,* 54 IBLA 95 (1981).

[2] The decision in *Freeman* v. *Summers, supra* at 204–05, contains the relevant test for determining whether there has been a "discovery" of oil shale:

> [T]he law requires as a prerequisite to a valid location that mineral be discovered within the limits of the claim located; that the mineral indications shall be such as to warrant a prudent man in the further expenditure of time and money, with a reasonable prospect of success. In order to warrant that proceeding, he must have discovered mineral in such situation and such formation that he can follow the vein or the deposit to depth, with a reasonable assurance that paying minerals be found. In other words, *the discovery of an isolated bit of mineral, not connected with or leading to substantial prospective values, is not a sufficient discovery;* but a mining locator is not expected to find at the surface or in a shallow working a body of mineral which can be immediately mined and reduced at a profit. It is sufficient, as already stated, if he finds mineral in a mass so located that he can follow the vein or the mineral-bearing body, with reasonable hope and assurance that he will ultimately develop a paying mine. [Italics added.]

We recently reaffirmed this test in *United States* v. *Bohme (Supp.),* 51 IBLA 97, 87 I.D. 535 (1980) (*Bohme II*), noting as follows:

> As we read *Freeman* v. *Summers,* an exposure of the Parachute Creek member, even though of limited extent, can be geologically inferred to embrace sufficient

quantity of high grade oil shale so as to constitute a valuable mineral deposit. We thus perceive one of the issues before this Board is whether contestees' claims contain an exposure of the Parachute Creek member that can be followed to depth with a reasonable assurance that paying minerals will be found.

Id. at 106, 87 I.D. at 540. Under *Freeman* v. *Summers, supra,* exposure of a lean surface formation is inadequate evidence from which to infer the existence of rich deposits beneath. What is required is evidence showing that the exposure can be followed to such rich deposits at depth within the limits of the claim.

The general area in which these claims are situated is known as the Piceance Creek basin. There are two relevant independent geologic formations in this area, the Green River formation and the Uinta formation. The Parachute Creek member, which contains rich oil shale, is part of the Green River formation. The Uinta formation (formerly called the Evacuation Creek member and formerly believed to be part of the Green River formation) is a thick layer of generally oil-barren sandstone. It is as much as 1,400 feet thick and overlies the Green River formation. Thus, in this area, the Parachute Creek member is generally covered by a vast amount of oil-barren sandstone.

The Parachute Creek member does outcrop, totally uncovered by the barren Uinta formation, at places where erosion has cut through the Uinta formation, such as along streams and drainages, thereby exposing the rich oil shale of the Parachute Creek member. As discussed below, some of the present claims contain such outcrops, and there is no question that there has been "discovery" on these claims.

However, the principal surface deposits of oil shale found in the Uinta formation are not outcroppings of the rich Parachute Creek member, but are instead "tongues" of marlstone of inferior quality. Although these tongues of lean marlstone are thought to meet the Parachute Creek member at depth, they do so at great lateral distance from the surface outcroppings, on the order of tens of miles. Thus, these tongues of marlstone cannot be followed to depth to the rich deposits of the Parachute Creek member within the limits of any mining claim. Inasmuch as these claims are placer rather than lode, no extralateral rights appertain to them, and the existence of the marlstone outcrops affords no rights to deposits outside the limits of the claim. Accordingly, they do not meet the requirement of *Freeman* v. *Summers/Bohme II.*

Claimants argue that *Freeman* v. *Summers, supra,* stands for the proposition that any surface deposit, however lean, justifies by itself the geological inference of rich beds of oil shale at depth.[3]

[3] Claimants cite the comments of Assistant Secretary Albert Finney in testimony before Congress in 1931, 4 years after *Freeman* v. *Summers, supra,* as proof of their contention:

"The 'Green River Formation' is a term used to describe the entire mass of the earth's surface in this particular area, whether interspersed with barren or lean areas. It unquestionably carries valuable shale beds. They undoubtedly pass into and under the land in question. When the decision states that the miner could, with confidence, follow *the formation,* it means he could dig down through this formation, and whether he encountered lean or absolutely barren strata, could nevertheless proceed with assurance at reasonable depth that he would intersect the several rich shale-bearing beds therein." (Italics added.)

However, Finney was simply wrong—*Freeman* v. *Summers, supra,* does *not* require that the miner be able to follow "the [Green River] *formation*"; it requires that he

Continued

The test announced in *Freeman* v. *Summers,* quoted above and adopted in *Bohme II,* is at odds with this interpretation, since it states that "the discovery of an isolated bit of mineral, not connected with or leading to substantial prospective values, is not a sufficient discovery." Clearly, it must be shown that a lean bit of material connects with or leads to substantial mineral values. The record does not so demonstrate.

Reference to *Oregon Basin Oil and Gas Co.,* 50 L.D. 244 (1923), the principal case cited in *Freeman* v. *Summers, supra,* supports the conclusion that more than lean surface deposits were required to establish "discovery" of oil shale. In *Oregon Basin Oil,* involving oil placer claims, "slight discoveries" of oil and gas "near the surface" were found *not* to establish the presence of oil and gas at depth. We adhere to the rule announced in *Bohme II, supra.*[4]

Applying this test to the specific facts, we hold that there were "discoveries" of rich deposits of oil shale on the following claims, on which there are prominent exposures of the rich Parachute Creek member, due to the presence of deep gulches formed by drainages and streams: Sunset Nos. 1, 5, 7 through 20, 22 through 24, and 26 through 29 (Contest No. Colorado 193); Greeley Nos. 1 through 6, and 8 (Contest No. Colorado 686); and Jackpot Nos. 1 through 11 (Contest No. Colorado 687). We reject BLM's contention that some of these claims are invalid because the points designated as "discovery points" prior to 1920 are not within the Parachute Creek member. It is enough that the Parachute Creek member is now exposed somewhere on the claims, and also was exposed on Feb. 25, 1920. Judge Rampton's decision is affirmed insofar as it dismissed the contest against these claims.

The remaining claims contain, at best,[5] lean outcroppings of marlstone tongues that do not lead to the Parachute Creek member at depth within the limits of the claims. Judge Rampton conceded that the mineralization on these claims is inadequate to satisfy the discovery test of *Bohme II.* These claims are as follows: Sunset Nos. 2 through 4, 6, 21, 25, 30, and 31 (Contest No. Colorado 193); Liberty Bell Nos. 1

be able to follow a "*vein* or *deposit* of oil shale." (Since oil shale does not occur in veins, a better description would have been an "exposure or deposit.") As is evident from Finney's accurate description of the Green River formation as "the entire mass of the earth's surface in this particular area," the two requirements are vastly different. Finney's posthoc comment notwithstanding, we adhere to the requirement as stated in *Freeman* v. *Summers,* since it was this language, not Finney's comments, which received judicial approval in *Andrus* v. *Shell Oil Co., supra.*

[4] The question remains (in view of the apparent absence of proof in *Freeman* v. *Summers, supra,* that the lean surface deposits evident on the claims could be followed to depth), why did the Department not follow its own rule and reject the claims? The answer must be, as BLM argues, that the lean surface deposits were regarded as the top of a "homogeneous mass" which, it was thought under geologic theory prevailing in 1927, could be followed with reliability to richer deposits at depth. Claimants dispute that the decision was based on the "homogeneous mass" theory, pointing to a statement to this effect made by Assistant Secretary Finney to Congress in 1931. Nevertheless, the decision itself, noting that contestants had advanced the "homogeneous mass" theory, described it at length without stating that it was erroneous. To the contrary, the decision concluded (albeit erroneously), that contemporary Geological Survey publications contained data *supporting* "the allegations of contestant," including, presumably, the homogeneous mass concept. Of course, we are not bound to ignore current geological data disproving the theory (*see* discussion under "10-Acre Rule," *infra.*)

[5] *See* discussion under *Minimum Kerogen Content of Oil Shale, infra.*

through 12, Tomboy Nos. 1 through 12, Bute Nos. 20 and 29, Atlas Nos. 4 through 6, 8, 11, and 13 through 16 (Contest No. Colorado 260); Hoffman Nos. 20 and 46 (Contest No. Colorado 685); Greeley No. 7 (Contest No. Colorado 686); Lucy Agnes Nos. 1 and 2, Patricia Nos. 1 through 8, Madge Nos. 1 through 8, Edna Nos. 1 through 8, Grace Nos. 1 through 8, Louise Nos. 1 through 6, Betty Nos. 1 through 8, Goldbug Nos. 1 through 4, Florence Nos. 1 through 8, Hazel Nos. 1 through 8, Fay Nos. 1 through 8, Mary Ann Nos. 1 through 40 (Contest No. Colorado 688). Accordingly, these claims are null and void. Insofar as it is inconsistent with this holding, Judge Rampton's decision is reversed.

Annual Assessment Work

[3] In *Hickel* v. *Oil Shale Corp.* (TOSCO), 400 U.S. 48 (1970), the Supreme Court ruled that holders of oil shale placer mining claims were required by the General Mining Act of 1872, 30 U.S.C. § 28 (1976), as applied by sec. 37 of the Mineral Leasing Act of 1920, 30 U.S.C. § 193 (1976), to perform annual assessment work during each year, except when excused by act of Congress. The Supreme Court ruled at the same time that such claims were invalid unless there had been "substantial compliance" with this annual assessment work requirement. Although it noted in *TOSCO* that claimants had argued that the opposite rule had been in effect for 35 years prior to 1970 and could not be changed retroactively, the Supreme Court remanded the matter as to this and other issues, since they had not been addressed in previous proceedings below.

The matter ultimately returned to the Board in 1980, *sub nom. United States* v. *Bohme.* In *Bohme I, supra,* we applied the annual assessment work rule announced in *TOSCO* retroactively, ruling that there had not been substantial compliance with the $100 annual assessment work requirement, and affirmed the Administrative Law Judge's conclusion that estoppel did not bar the retroactive application of this rule. We also ruled that laches did not bar contesting the claims on this issue. We accordingly declared the claims in question null and void.

In the present contests, Judge Rampton found that there had not been substantial compliance with the assessment work requirements for any of the 203 mining claims under challenge:

The abstracts in evidence show that the owners of the claims in issue in these contests failed or chose not to perform assessment work over substantial periods of time. Contestant has compiled from the abstracts a summary of assessment work (Contestant's opening brief, p. 133). This chart, modified to exclude statements made where controversy exists as to the facts, is accepted as findings of fact.

FAILURES TO PERFORM REVEALED IN ABSTRACT

Contest	Claim name	1920–1935[a] (16 years)	1936–1969 (34 years)	1970–1981 (12 years)
193	Sunsets (31)	Total	32 years	10 years.
260	Tomboys, Butes, Liberty Bells, Atlases (35)	Total	26 or 28 years. [b]	0
685	Hoffmans (2)	Total	Total [c]	11 years.
686	Greeleys [(8)]	Total	23 years. [d]	
687	Jackpots 1–3	3 years. [e]	29 years	10 years.
	Jackpots 4–11	5 years		
688	Mary Anns (40)	12 years	33 years	1 year.[f]
	Florences, Fays, Hazels (24)	8 years	33 years	1 year.[f]
	Lucy Agnes (2)	10 years	32 years	1 year.[f]
	Grace, Louise, Patricia, Edna, Betty, Goldbug, Madge (50)	Total	33 years	1 year. [f]

[a] Assessment work was excused in 1932. In computing lapses other than "total", this year was not counted.
[b] Includes additional information provided by TOSCO. Work was performed on a block of 110 claims.
[c] Evidence exists to show work in one year.
[d] Final certificates issued 1959.
[e] Evidence shows work performed in one additonal year, namely, 1931.
[f] Final certificate was issued in 1978.

By any standard of measurement applicable, the defaults in performance of assessment work must be and are found to be substantial. Although it is possible that assessment work was done but no affidavits filed, the probability is remote and would be the exception rather than the rule. No serious contention is made by the mining claimants that substantial compliance was made by the original locators. [Italics supplied.]

(Decision at 80–82). Despite these findings, Judge Rampton declined to apply the rule in *TOSCO/ Bohme I,* ruling that the Department was estopped from doing so.

Even putting aside our substantial doubts that equitable estoppel may be applied against the Government under governing administrative standards (43 CFR 1810.3(c)), we note that it clearly is not apt here, since claimants' failure to do and record evidence of assessment work, or file a notice of intention to hold when Congress had suspended the assessment work requirements, did not result from any misconduct by the Department's officials. At a minimum, "affirmative misconduct" by Government officials has been found to be an essential prerequisite to the judicial application of equitable estoppel and it is unclear that estoppel would lie even if there were affirmative misconduct. *See Schweiker* v. *Hansen,* 450 U.S. 785, 788–89 (1981); *United States* v. *Wharton,* 514 F.2d 406 (9th Cir. 1975). Any statements made by the Department in the years prior to *TOSCO* to the effect that failure to do assessment work would not result in forfeiture of mining claims to the Government, on which claimants evidently allege they relied, were apparently legally accurate in view of the dicta to this effect in *Ickes* v. *Virginia-Colorado Development Corp.,* 295 U.S. 639 (1934) and *Wilbur* v. *United States ex rel. Krushnic,* 280 U.S. 306 (1930). Numerous other courts have insisted that the official making the misstatement must know the facts and have been able to recognize it as such. *United States* v. *Georgia-*

Pacific Co., 421 F.2d 92 (9th Cir. 1970) and cases cited. Clearly, those Departmental officials who misinformed claimants (or their predecessors) had no way to predict that the Supreme Court would rule as it did in *TOSCO*.

We addressed the applicability of estoppel in *Bohme I:*

> The simple fact is that contestees can point to no decision of any Federal court, or any formal decision or Instruction issued by the Department of the Interior that ever purported to hold that a mining claimant was not required under 30 U.S.C. § 28 (1976) to perform annual assessment work. The decisions in *Krushnic* and *Virginia-Colorado* dealt not with the question whether oil shale claimants were required to comply with the provisions of section 28, but whether the United States would be a beneficiary of a failure to perform the assessment work. Indeed, both *Krushnic* and *Virginia-Colorado* expressly noted that a mining claimant was required to perform labor of $100 annually for each claim. *See* 280 U.S. at 317; 295 U.S. at 645. The Departmental decisions and pronouncements to which contestees advert were of similar import.
>
> Thus, contestees, in effect, are arguing that an equitable estoppel should lie because they knowingly violated an affirmative obligation under the law in reliance on the fact that they were immune from punishment. They are attempting to resort to equity to absolve themselves from the consequences of their willful violations of the mining law. Among the cardinal principles of equity, however, are the maxims that equity may be invoked only to do equity, and that one who seeks equitable relief must do so "with clean hands." Appellants can show no equitable basis for the invocation of an estoppel to excuse their past failures to perform the annual assessment work mandated by 30 U.S.C. § 28 (1976).

48 IBLA at 324-25, 87 I.D. at 277-78. We adhere to that ruling. In the absence of any action by a Federal District Court to reverse this ruling, it represents the established Departmental interpretation of the law, and, as such, was binding on the Administrative Law Judge.

The strong language of *TOSCO* leaves no doubt that the Government retained an interest in these claims by virtue of the terms of the Mineral Leasing Act. The failure to meet the "command" of the annual assessment work provision of the 1872 Act should return these lands to Federal stewardship so that their mineral wealth may be exploited by leasing to the public benefit or the lands be put to other public uses. *TOSCO, supra,* at 54. This public statutory interest outweighs any equitable considerations that might be deemed to exist.

Independent of the above, we stress that there could be no basis whatsoever to ignore substantial defaults in the performance of annual assessment work occurring *after* the Supreme Court's ruling in *TOSCO* in 1970 (or, at the latest in 1972, when the Department amended its regulations to reflect the ruling). The record shows that there were substantial lapses in performance of annual assessment work after 1970 on the following claims: Sunset Nos. 1 through 31 (10 years) (Contest No. Colorado 193); Hoffman Nos. 1 and 2 (11 years) (Contest No. Colorado 685); and Jackpot Nos. 1 through 11 (10 years) (Contest No. Colorado 687).[6]

Contestants argue that charges of failure to perform assessment work must be brought during default and that resumption of work bars a challenge on these grounds.

[6] There would be substantial lapses even were we to regard the amendment of the Departmental regulations in 1972 as the controlling date for reviewing compliance.

Contestants' argument relies on language to this effect from *Wilbur* v. *Krushnic, supra.* This language was superseded by the ruling in *TOSCO, supra.*

TOSCO is on all fours with the instant case. In *TOSCO,* the Supreme Court considered mining claims which the district court had held had been "'maintained' * * * by a resumption of the assessment work before a challenge of the claim by the United States had intervened." 400 U.S. at 52. Nevertheless, it concluded that substantial failure to perform annual assessment work *did* invalidate these claims, the intervening resumption of work notwithstanding. It disclaimed the "dicta" of *Krushnic* and reversed the District Court's holding applying it. Following *TOSCO,* we reject contestants' argument.

Judge Rampton's decision is reversed insofar as it failed to declare all of these claims null and void because of substantial defaults in performance of annual assessment work on them.

Minimum Kerogen Content of Oil Shale

[4] Judge Rampton declined to make findings on the amounts of oil yields, or to consider whether to apply any "quantum standard." BLM asserts that there is a minimum kerogen content for "oil shale" of 3 gallons per ton. That is, rock containing less than 3 gallons per ton is not distinguishable from average shale or limestone in the earth's crust. We agree. Thus, samples of shale bearing less than 3 gallons per ton of kerogen are not "oil shale," and discoveries of such shale do not provide any basis for inferring the presence of oil shale at depth.

As many as three mineral samples were taken by BLM on each claim. A prima facie case that no "oil shale" was present on a particular claim is made only where no sample contained at least 3 gallons per ton of kerogen. Where any one of claimants' samples from any such claim was found to contain at least 3 gallons per ton of kerogen, claimants have successfully rebutted the prima facie showing that no "oil shale" was present there.

We hold that BLM successfully made a prima facie showing that no "oil shale" was present, and that claimants failed to rebut this showing, on the following claims: Sunset Nos. 2 through 4, 6, 21, 25, 30, and 31 (Contest No. Colorado 193); Tom Boy No. 1 (Contest No. Colorado 260); Hoffman Nos. 20 and 46 (Contest No. Colorado 685); Betty Nos. 4 through 6, Edna Nos. 3 through 8, Fay Nos. 1, 2, and 4 through 8, Florence No. 2, Goldbug No. 4, Grace Nos. 2, 4, and 7, Hazel No. 8, Louise No. 6, Lucy Agnes No. 1. Madge Nos. 1, 2, 4, and 6 through 8, Mary Ann Nos. 1, 5 through 7, 15 through 18, 20, 22, 24 through 26, 33, 34, 39, and 40, and Patricia Nos. 2 through 6, and 8 (Contest No. Colorado 688).

Alleged Failure To Post on the Ground

[5] The Government has contested all but two of these claims on the ground that the locators did not comply with Colorado State

posting requirements, and that the claims are invalid because they were not marked on the ground. The Department does require that mining claimants comply with state and local regulations regarding marking of mining claims on the ground, *per* 43 CFR 3831.1, and this regulation has been judicially interpreted as imposing a Federal requirement that state and local posting requirements be met. *Roberts* v. *Morton,* 549 F.2d 158, 161–62 (10th Cir. 1977), *aff'g United States* v. *Zweifel,* 11 IBLA 53, 80 I.D. 323 (1973).

However, this requirement of compliance with local posting laws long postdated the location of the present claims. As we held in *United States* v. *Zweifel, supra,* location of these placer claims was governed by the rules announced in *Reins* v. *Murray,* 22 L.D. 409 (1896), that *no* markings were required for placer claims located on surveyed lands, and in *Hughes* v. *Ochsner,* 27 L.D. 396 (1898), that breach of laws requiring marking did not justify cancellation. Accordingly, Judge Rampton properly dismissed the contests insofar as they were based on failure to mark the claims on the ground and his decision is affirmed on this issue.

Abandonment, Absence of Good Faith in Locating and Holding Claims

[6] We noted in *Bohme I, supra* at 303, that whether a mining claim is abandoned is essentially a question of the intent of the party charged with abandonment. As noted above, we also observed by way of dictum that asserting abandonment as a grounds for invalidating a mining claim "perhaps should impose a heavy evidentiary burden on the one who asserts it." We now hold that the Government has the ultimate burden of proving abandonment.

Similarly, whether a claimant lacks good faith in locating and holding mining claims is a question of his intent. Accordingly, the Department must meet the same ultimate burden of proving these allegations.

Judge Rampton has dealt with the history of oil shale claims, pointing out why there are inherent suspicions about whether they were located or held in good faith. We agree with his holding that, although the evidence is adequate to create inferences of impropriety by the previous owners of these claims, it falls short of what is necessary to prove those charges. While we do not accept his conclusion that laches can act to bar the Department from enforcing governing laws and principles (see below), we recognize that the longer the Department delays in contesting claims, the more difficult it becomes to present convincing evidence about individuals' intentions. Thus, the unavailability of clear proof of the type of impropriety which the evidence suggests may, without injustice, work to the detriment of the Government. Judge Rampton's decision is affirmed on this point.

Effect of Previous Administrative Determinations Invalidating Claims

BLM contested these claims on the ground that previous decisions

had invalidated them. Judge Rampton noted that, from 1928 to 1933, "[e]xcept for the Jackpot claims, all of the claims involved in the present proceedings were declared invalid in all contests for failure of the contestees to appear and file answers. In all instances, the sole charge was assessment work default" (Decision at 70). He made no specific holding on whether these decisions operated to bar the claimants from asserting the validity of their claims under the doctrine of administrative finality. Further, although he noted that claimant had challenged the adequacy of the notice of these previous contests given to claimants, Judge Rampton made no findings of fact on this point.

Normally, we would remand the matter for further consideration of this question. However, the certainty of judicial review here obviates the need to do so, since the parties may address this issue then. The question of whether unappealed adverse previous decisions in oil shale contests bind the present claim owners is apparently still before the courts in the *TOSCO/Bohme I* dispute. *See Bohme I, supra* at 323-24, 87 I.D. at 276.

Laches, Waiver, Bona Fides of Present Claimholders

[7] The Department is not barred by the equitable doctrine of laches from enforcing the pertinent public land laws and legal principles to invalidate certain of these mining claims. Justice Douglas made it crystal clear in *TOSCO* that the Department was not barred from further pursuing the question of validity of oil shale claims when he ordered it to do so:

> [W]e are of the view that § 37 of the 1920 Act makes the United States the beneficiary of all claims invalid for lack of assessment work or otherwise. It follows that the Department of the Interior had, *and has,* subject matter jurisdiction over contests involving the performance of assessment work. [Italics supplied.]

400 U.S. at 57.

Further, it is established that "so long as the legal title remains in the Government [the Department] does have power, after proper notice and upon adequate hearing, to determine whether [a mining] claim is valid and, if it be invalid, to declare it null and void." *Cameron* v. *United States,* 252 U.S. 450, 460 (1920). This authority has been more recently expressly applied to recognize IBLA's power *and duty* to reconsider and, if necessary, reverse previous administrative decisions incorrectly recognizing adverse interests in public land, at any time up until the issuance of patent. *Ideal Basic Industries, Inc.* v. *Morton,* 542 F.2d 1364, 1368 (9th Cir. 1976).

With respect to appellant's attempted invocation of the doctrine of laches, we reiterate what we held in *Bohme I:*

> Regarding the defense of laches, Judge Sweitzer found that in the first instance the defense of laches is not available against the Government in cases involving public lands, citing *United States* v. *California,* 332 U.S. 19, 40 (1947), and secondly, that even were laches determined to be an available defense, it would clearly be circumscribed by the same limitations sur-

rounding the doctrine of estoppel (Dec., pp. 53–54). We agree.

Id. at 325, 87 I.D. at 278. In the absence of any contrary guidance from the district court, we reaffirm this holding.

While not described as such by Judge Rampton or the parties, there is also the question of whether the Department has waived its right to enforce public land laws and legal principles by failing to do so in similar cases in the past in which it patented similar oil shale mining claims. The doctrine of waiver does not apply to bar the Department from enforcing the public land laws, since, as discussed above, it retains its authority to determine the validity of adverse claims up until the issuance of patent. *Cameron* v. *United States, supra.* In *United States* v. *California, supra,* the Supreme Court ruled that the United States was not barred from asserting legal title to lands which it owned, even though it had putatively recognize adverse rights to similar lands in the State of California by needlessly "purchasing" these lands from the State, even though it actually owned them. In sum, prior action taken by the Department in derogation of the rights of the United States in lands does not bind the Department to repeat the derogation in the future.

Where, as here, mining claimants have not complied with the requirements of the mining laws, and no patent has issued, the Department is not barred from voiding the claims because of any previous determinations that the claims were not invalid,[7] or because of previous failure to void claims in similar cases. Accordingly, we reverse Judge Rampton's holding that the Department is barred from challenging these decisions at this time.

Finally, we stress, as Judge Rampton held, that there is no basis to recognize the rights of the present claimants as bona fide purchasers, even assuming, *arguendo,* they have such status. The only statutory situation in which bona fide innocent purchasers may be protected is in oil and gas leasing. 30 U.S.C. § 184(h)(2) (1976). The fact that it was necessary to enact legislation to do so is a strong indication that Congress has not given this power to the Department in other situations. To the contrary, mining claims are interests in real property, and a purchaser can gain no greater rights than those held by his predecessor in interest.

Ten-Acre Parcels of Claimed Land Which Are Nonmineral in Character

[8] Judge Rampton held that certain 10-acre parcels within the Jackpot claims (Contest No. Colorado 687) were nonmineral in character because erosion has removed all of the Parachute Creek member from them, leaving only lower members of the Green

[7] Of course, the Department has never made any determination that any of these claims is *valid. See United States* v. *Taylor,* 19 IBLA 9, 82 I.D. 68 (1975). To the contrary, as Judge Rampton noted, the Department previously determined that they were *invalid.* Even assuming *arguendo* that these determinations were set aside, a matter still under judicial review in *TOSCO* (*See* discussion under "Effect of Previous Administrative Determinations Invalidating Claims"), the most that can be said is that, by setting aside these determinations, the claims were held not invalid.

River formation generally barren of oil shale. We affirm.

Unlike "discovery," which requires an exposure of mineral before any geological inference may operate to establish the extent of that discovery, the "mineral character" of lands may be inferred from geological data alone. Thus, the presence of the Parachute Creek member throughout the vicinity of most of these claims is enough, per se, to support a finding that they are mineral in character, as the parties stipulated, but not to establish that there has been a discovery on any of these claims.

However, Judge Rampton found that erosion has removed the Parachute Creek member from portions of these claims, and claimants have not disputed this finding. Thus, there is no basis for inferring the presence of rich oil shale in these portions. The grab samples taken by claimants on the parcels are insufficient to establish that they are mineral in character.

Contestants argue that the critical date for determination of the mineral character of these lands is Feb. 25, 1920, the date the lands were withdrawn from mineral location. They assert that the circumstances at that time were such as to engender a belief that the lands were both prospectively valuable for minerals and mineral in character. Claimants are only half right: A claimant must show, to gain patent or prevail in a contest, (1) that the claimed lands were mineral in character (and that he had made a discovery) as of the date of the withdrawal, *see Cameron* v. *United States, supra* at 456; and (2) that the lands are presently mineral in character (and that the discovery persists) as of the date of the contest hearing or patent application. *United States* v. *Noyce,* 59 IBLA 268 (1981); *United States* v. *Porter,* 37 IBLA 313 (1978).

The nature of the geology of the area where the claims are situated is a question of fact. In answering it, we must examine all relevant geological data available to us at the time of our decision. We are not bound to use outdated geological information. The record supports Judge Rampton's finding that these parcels are nonmineral in character. His decision is affirmed on this point.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and reversed in part as described above.

DOUGLAS E. HENRIQUES
Administrative Judge

WE CONCUR:

ANNE POINDEXTER LEWIS
Administrative Judge

JAMES L. BURSKI
Administrative Judge

APPENDIX

Claim name	Land description
CONTEST No. 193	
	T. 3 S., R. 99 W., 6th P.M.
Sunset No. 1	Sec. 20: S½S½.
Sunset No. 2	Sec. 20: N½S½.

APPENDIX—Continued

Claim name	Land description
Sunset No. 3	Sec. 20: S½N½.
Sunset No. 4	Sec. 20: N½N½.
Sunset No. 5	Sec. 17: SE¼.
Sunset No. 6	Sec. 17: SW¼.
Sunset No. 7	Sec. 18: SE¼.
Sunset No. 8	Sec. 18: Lots 3, 4, E½SW¼ (SW¼).
Sunset No. 9	Sec. 19: Lot 1, NE¼NW¼, N½NE¼ (N½N½).
Sunset No. 10	Sec. 19: Lot 2, SE¼NW¼, S½NE¼ (S½N½).
Sunset No. 11	Sec. 19: SE¼.
Sunset No. 12	Sec. 18: Lots 1 and 2, E½NW¼ (NW¼).
Sunset No. 13	Sec. 18: NE¼.
Sunset No. 14	Sec. 17: NW¼.
Sunset No. 15	Sec. 17: NE¼.
Sunset No. 16	Sec. 8: SE¼.
Sunset No. 17	Sec. 8: SW¼.
Sunset No. 18	Sec. 7: SE¼.
Sunset No. 19	Sec. 7: Lots 3 and 4, E½SW¼ (SW¼).
Sunset No. 20	Sec. 7: Lots 1 and 2, E½NW¼ (NW¼).
Sunset No. 21	Sec. 7: NE¼.
Sunset No. 22	Sec. 8: NW¼.
Sunset No. 23	Sec. 8: NE¼.
Sunset No. 24	Sec. 5: SE¼.
Sunset No. 25	Sec. 5: SW¼.
Sunset No. 26	Sec. 6: SE¼.
Sunset No. 27	Sec. 6: Lots 6 and 7, E½SW¼ (SW¼).
Sunset No. 28	Sec. 6: Lots 3, 4, and 5, SE¼NW¼ (NW¼).
Sunset No. 29	Sec. 6: Lots 1 and 2, S½NE¼ (NE¼).
Sunset No. 30	Sec. 5: Lots 3 and 4, S½NW¼ (NW¼).
Sunset No. 31	Sec. 5: Lots 1 and 2, S½NE¼ (NE¼).

CONTEST No. 260

T. 4 S., R. 95 W., 6th P.M.

Liberty Bell No. 1	Sec. 5: Lots 1 and 2, S½NE¼ (NE¼).
Liberty Bell No. 2	Sec. 5: Lots 3 and 4, S½NW¼ (NW¼).
Liberty Bell No. 3	Sec. 5: SE¼.
Liberty Bell No. 4	Sec. 5: SW¼.
Liberty Bell No. 5	Sec. 8: NE¼.
Liberty Bell No. 6	Sec. 8: NW¼.
Liberty Bell No. 7	Sec. 8: SE¼.
Liberty Bell No. 8	Sec. 8: SW¼.
Liberty Bell No. 9	Sec. 17: NE¼.
Liberty Bell No. 10	Sec. 17: NW¼.
Liberty Bell No. 11	Sec. 17: SW¼.
Liberty Bell No. 12	Sec. 18: SE¼.
Atlas No. 4	Sec. 11: NE¼.
Atlas No. 5	Sec. 11: SE¼.
Atlas No. 6	Sec. 11: SW¼.
Atlas No. 8	Sec. 14: NW¼.
Atlas No. 11	Sec. 10: NE¼.
Atlas No. 13	Sec. 10: SE¼.
Atlas No. 14	Sec. 10: SW¼.
Atlas No. 15	Sec. 15: NE¼.
Atlas No. 16	Sec. 15: NW¼.
Tom Boy No. 1	Sec. 18: Lots 5 and 6, E½SW¼ (SW¼).

APPENDIX—Continued

Claim name	Land description
Tom Boy No. 2	Sec. 18: Lots 3 and 4, E½NW¼ (NW¼).
Tom Boy No. 3	Sec. 18: NE¼.
Tom Boy No. 4	Sec. 7: SE¼.
Tom Boy No. 5	Sec. 7: NE¼.
Tom Boy No. 6	Sec. 7: Lots 1 and 2, E½NW¼ (NW¼).
Tom Boy No. 7	Sec. 7: Lots 3 and 4, E½SW¼ (SW¼).
Tom Boy No. 8	Sec. 6: Lots 1 and 2, S½NE¼ (NE¼).
Tom Boy No. 9	Sec. 6: Lots 3, 4, and 5, SE¼NW¼ (NW¼).
Tom Boy No. 10	Sec. 6: Lots 6 and 7, E½SW¼ (SW¼).
Tom Boy No. 11	Sec. 6: SE¼.
	T. 4 S., R. 96 W., 6th P.M.
Tom Boy No. 12	Sec. 1: NE¼, Lots 1 and 2, S½NE¼ (NE¼).
Bute No. 20	Sec. 10: SW¼.
Bute No. 29	Sec. 16: NE¼.

CONTEST No. 685

T. 5 S., R. 95 W., 6th P.M.

Hoffman No. 20	Sec. 5: Lots 1 and 5.
Hoffman No. 20 (Amended).	
Hoffman No. 20 (Amended).	
Hoffman No. 46	Sec. 3: Lots 4 and 6.
Hoffman No. 46 (Amended).	
Hoffman No. 46 (Amended).	

CONTEST No. 686

T. 4 S., R. 99 W., 6th P.M.

Greeley No. 1	Sec. 27: NE¼.
Greeley No. 1 (Amended).	Sec. 27: W½NE¼, W½E½NE¼.
Greeley No. 2	Sec. 27: NE¼.
Greeley No. 3	Sec. 27: SW¼.
Greeley No. 4	Sec. 27: SE¼.
Greeley No. 4 (Amended).	Sec. 27: W½SE¼, W½E½SE¼.
Greeley No. 5	Sec. 34: NE¼.
Greeley No. 5 (Amended).	Sec. 34: W½NE¼, SE¼NE¼, W½NE¼NE¼.
Greeley No. 6	Sec. 34: NW¼.
Greeley No. 7	Sec. 34: SW¼.
Greeley No. 7 (Amended).	Sec. 34: N½N½SW¼, N½N½ S½N½SW¼.
Greeley No. 8	Sec. 34: SE¼.
Greeley No. 8 (Amended).	Sec. 34: N½NW¼SE¼, N½N½ S½NW¼SE¼, NW¼NE¼SE¼, N½N½SW¼NE¼SE¼.

CONTEST No. 687

T. 6 S., R. 99 W., 6th P.M.

Jack Pot No. 1	Sec. 18: W½SE¼.
Jack Pot No. 2	Sec. 18: E½SW¼; Sec. 19: E½NW¼.
Jack Pot No. 3	Sec. 18: W½SW¼; Sec. 19: W½NW¼.

APPENDIX—Continued

Claim name	Land description
	T. 6 S., R. 100 W., 6th P.M.
Jack Pot No. 4	Sec. 13: SE¼SE¼; Sec 24: E½NE¼, NE¼SE¼.
Jack Pot No. 5	Sec. 13: SW¼SE¼; Sec. 24: W½NE¼, NW¼SE¼.
Jack Pot No. 6	Sec. 13: SE¼SW¼; Sec. 24: E½NW¼, NE¼SW¼.
Jack Pot No. 7	Sec. 13: SW¼SW¼; Sec. 24: W½NW¼, NW¼SW¼.
Jack Pot No. 8	Sec. 14: SE¼SE¼; Sec. 23: E½NE¼, NE¼SE¼.
Jack Pot No. 9	Sec. 14: SW¼SE¼; Sec. 23: W½NE¼, NW¼SE¼.
Jack Pot No. 10	Sec. 14: SE¼SW¼; Sec. 23: E½NW¼, NE¼SW¼.
Jack Pot No. 11	Sec. 14: SW¼SW¼; Sec. 23: W½NW¼, NW¼SW¼.
	CONTEST No. 688
	T. 4 S., R. 95 W., 6th P.M.
Betty No. 1	Sec. 21: NW¼.
Betty No. 2	Sec. 21: SW¼.
Betty No. 3	Sec. 21: NE¼.
Betty No. 4	Sec. 21: SE¼.
Betty No. 5	Sec. 22: NW¼.
Betty No. 6	Sec. 22: SW¼.
Betty No. 7	Sec. 22: NE¼.
Betty No. 8	Sec. 22: SE¼.
Grace No. 1	Sec. 25: NW¼.
Grace No. 2	Sec. 25: SW¼.
Grace No. 3	Sec. 25: NE¼.
Grace No. 4	Sec. 25: SE¼.
Grace No. 5	Sec. 26: NW¼.
Grace No. 6	Sec. 26: SW¼.
Grace No. 7	Sec. 26: NE¼.
Grace No. 8	Sec. 26: SE¼.
Louise No. 1	Sec. 23: NE¼.
Louise No. 2	Sec. 23: SE¼.
Louise No. 3	Sec. 24: NW¼.
Louise No. 4	Sec. 24: SW¼.
Louise No. 5	Sec. 24: NE¼.
Louise No. 6	Sec. 24: SE¼.
Patricia No. 1	Sec. 35: NW¼.
Patricia No. 2	Sec. 35: SW¼.
Patricia No. 3	Sec. 35: NE¼.
Patricia No. 4	Sec. 35: SE¼.
Patricia No. 5	Sec. 36: NW¼.
Patricia No. 6	Sec. 36: SW¼.
Patricia No. 7	Sec. 36: NE¼.
Patricia No. 8	Sec. 36: SE¼.
	T. 5 S., R. 95 W., 6th P.M.
Lucy Agnes No. 1	Sec. 4: Lot 1, S½ of Lot 2, S½ of Lot 3, Lot 4; 70.07 acres.
Lucy Agnes No. 1 (Amended).	
Lucy Agnes No. 2	Sec. 4: S½N½.
	T. 4 S., R. 95 W., 6th P.M.
Madge No. 1	Sec. 33: NW¼.
Madge No. 2	Sec. 33: SW¼.
Madge No. 3	Sec. 33: NE¼.
Madge No. 4	Sec. 33: SE¼.
Madge No. 5	Sec. 34: NW¼.
Madge No. 6	Sec. 34: SW¼.
Madge No. 7	Sec. 34: NE¼.
Madge No. 8	Sec. 34: SE¼.

APPENDIX—Continued

Claim name	Land description
Florence No. 1	Sec. 31: Lots 3 and 4, E½NW¼ (NW¼).
Florence No. 2	Sec. 31: Lots 5 and 6, E½SW¼ (SW¼).
Florence No. 3	Sec. 31: NE¼.
Florence No. 4	Sec. 31: SE¼.
Florence No. 5	Sec. 32: NW¼.
Florence No. 6	Sec. 32: SW¼.
Florence No. 7	Sec. 32: NE¼.
Florence No. 8	Sec. 32: SE¼.
Fay No. 1	Sec. 29: NW¼.
Fay No. 2	Sec. 29: SW¼.
Fay No. 3	Sec. 29: NE¼.
Fay No. 4	Sec. 29: SE¼.
Fay No. 5	Sec. 30: Lots 1 and 2, E½NW¼ (NW¼).
Fay No. 6	Sec. 30: Lots 3 and 4, E½SW¼ (SW¼).
Fay No. 7	Sec. 30: NE¼.
Fay No. 8	Sec. 30: SE¼.
Hazel No. 1	Sec. 19: Lots 1 and 2, E½NW¼ (NW¼).
Hazel No. 2	Sec. 19: Lots 3 and 4, E½SW¼.
Hazel No. 3	Sec. 19: NE¼.
Hazel No. 4	Sec. 19: SE¼.
Hazel No. 5	Sec. 20: NW¼.
Hazel No. 6	Sec. 20: SW¼.
Hazel No. 7	Sec. 20: Lots 1, 2, 3, and 4, (NE¼).
Hazel No. 8	Sec. 20: SE¼.
Edna No. 1	Sec. 27: NW¼.
Edna No. 2	Sec. 27: SW¼.
Edna No. 3	Sec. 27: NE¼.
Edna No. 4	Sec. 27: SE¼.
Edna No. 5	Sec. 28: Lots 1, 2, and 3, NE¼NW¼ (NW¼).
Edna No. 6	Sec. 28: SW¼.
Edna No. 7	Sec. 28: NE¼.
Edna No. 8	Sec. 28: SE¼.
	T. 4 S., R. 96 W., 6th P.M.
Gold Bug No. 1	Sec. 36: Lots 3 and 4, S½NW¼ (NW¼).
Gold Bug No. 2	Sec. 36: Lots 1 and 2, S½NE¼ (NE¼).
Gold Bug No. 3	Sec. 36: SE¼.
Gold Bug No. 4	Sec. 36: Lots 5 and 6, N½SW¼ (SW¼).
Mary Ann No. 1	Sec. 25: S½S½.
Mary Ann No. 2	Sec. 25: N½S½.
Mary Ann No. 3	Sec. 25: S½N½.
Mary Ann No. 4	Sec. 25: N½N½.
Mary Ann No. 5	Sec. 24: S½S½.
Mary Ann No. 6	Sec. 24: N½S½.
Mary Ann No. 7	Sec. 24: S½N½.
Mary Ann No. 8	Sec. 24: Lots 1, 2, 3, and 4, (N½N½).
Mary Ann No. 9	Sec. 23: Lot 1, NW¼NW¼, N½NE¼ (N½N½).
Mary Ann No. 10	Sec. 23: Lot 2, SW¼NW¼, S½NE¼ (S½N½).
Mary Ann No. 11	Sec. 23: Lots 3, 4, 5, and 6 (N½S½).
Mary Ann No. 12	Sec. 23: S½S½.
Mary Ann No. 13	Sec. 26: N½N½.
Mary Ann No. 14	Sec. 26: S½N½.
Mary Ann No. 15	Sec. 26: N½S½.
Mary Ann No. 16	Sec. 26: S½S½.

APPENDIX—Continued

Claim name	Land description
Mary Ann No. 17	Sec. 35: N½N½.
Mary Ann No. 18	Sec. 35: S½N½.
Mary Ann No. 19	Sec. 35: N½S½.
Mary Ann No. 20	Sec. 35: Lots 1, 2, 3, and 4 (S½S½).
Mary Ann No. 21	Sec. 34: Lots 1, 2, 3, and 4, (S½S½).
Mary Ann No. 22	Sec. 34: N½S½.
Mary Ann No. 23	Sec. 34: S½N½.
Mary Ann No. 24	Sec. 34: N½N½.
Mary Ann No. 25	Sec. 27: S½S½.
Mary Ann No. 26	Sec. 27: N½S½.
Mary Ann No. 27	Sec. 27: S½N½.
Mary Ann No. 28	Sec. 27: N½N½.
Mary Ann No. 29	Sec. 22: S½S½.
Mary Ann No. 30	Sec. 22: Lots 3, 4, 5, and 6, (N½S½).
Mary Ann No. 31	Sec. 22: Lot 2, S½NW¼, SE¼NE¼ (S½N½).
Mary Ann No. 32	Sec. 22: Lot 1, N½NW¼, NE¼NE¼ (N½N½).
Mary Ann No. 33	Sec. 28: N½N½.
Mary Ann No. 34	Sec. 28: S½N½.
Mary Ann No. 35	Sec. 28: N½S½.
Mary Ann No. 36	Sec. 28: S½S½.
Mary Ann No. 37	Sec. 33: N½N½.
Mary Ann No. 38	Sec. 33: S½N½.
Mary Ann No. 39	Sec. 33: N½S½.
Mary Ann No. 40	Sec. 33: S½S½.

APPEAL OF METAMETRICS, INC.

IBCA-1552-2-82

Decided *October 27, 1982*

Contract No. 14-34-0001-0452, Office of Water Research & Technology.

Sustained.

Contracts: Formation and Validity: Cost-Type Contracts

A claim for an overrun of a cost-plus-fixed-fee contract is sustained where the overrun resulted from increased overhead rates during appellant's fiscal year after completion of contract performance, and failure to give advance notice in accordance with the Limitation of Cost Clause is excused where through no fault or inadequacy of appellant's accounting or business acquisition procedures, he had no reason to believe, during performance, that an overrun would occur.

APPEARANCES: Leo T. Surla, Jr., President, Metametrics, Inc., Washington, D.C., for Appellant; E. Edward Wiles, Department Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

This appeal is from a contracting officer's decision to deny funding of an overrun of $14,447.22 under a cost-plus-fixed-fee (CPFF) contract. The appeal is submitted on the record without a hearing.

Background

Appellant was awarded a CPFF contract in the amount of $126,000 (including fee), on Sept. 30, 1980, for a feasibility study and environmental impact assessment for a desalting technology demonstration plant. The contract was to be completed by Feb. 24, 1981, but no-cost extensions of performance time were granted to extend the completion to Mar. 31, 1981. Appellant's fiscal year begins Oct. 1 and ends Sept. 30. The overrun consists entirely of postperformance indirect costs claimed in a letter dated Nov. 9, 1981. Appellant contends that the increase in indirect rates was unforeseeable and that the notice requirements of the Limitation of Cost Clause should be excused pursuant to *General Electric Co.* v. *United States,* 194 Ct. Cl. 678 (Apr. 16, 1971). The Government contends that appellant should

have foreseen the lowered input of direct labor as the result of not having secured replacement contracts, with the attendant increased ratio of indirect expenses versus direct labor. The Government argues that the overrun request was properly denied because of the failure to give timely notice so that the Government could have elected not to have the project completed. Alternatively, appellant should have taken timely action to control postperformance indirect costs which are said to be unreasonable within the meaning of FPR Subpart 1-15.201-3.

When the contract was completed on Mar. 31, 1981, the first half of appellant's fiscal year was over, and the contract was underrun by $461.75. By letters dated June 15 and July 10, 1981, appellant claimed an overrun of $4,977.85, attributing this amount to increased direct labor which was only partially offset by reductions in other direct costs. It was only after the close of appellant's fiscal year that the overrun request was attributed solely to unforeseen increases in overhead and General and Admininstrative (G&A) rates. A summary submitted with the overrun request on Nov. 9, 1981, shows that increases in direct labor were, in fact, offset by reductions in other direct costs. However, the overhead had increased from the provisional rate of 82.7 percent to an actual rate of 104.7 percent for a total of $10,760.86, and the G&A rate had increased from 13.9 percent to 16.3 percent for a total of $4,148.11. In a summary attached to appellant's complaint of Mar. 5, 1982, the actual rates for the first half of the fiscal year are shown to be 79.8 percent for overhead and 13.1 percent for G&A. The actual rates for the second half of appellant's fiscal year are shown as 199.9 percent and 20.7 percent, respectively. In a presubmission conference held on Sept. 2, 1982, the parties agreed on the adequacy of appellant's accounting system.

The contract contains the following Limitation of Cost Clause (LOCC) and Negotiated Overhead Rates Clause:

2. LIMITATION OF COST (January 1974)

(a) It is estimated that the total cost to the Government for the performance of this contract, exclusive of any fee, will not exceed the estimated cost set forth in the Schedule, and the Contractor agrees to use his best efforts to perform the work specified in the Schedule and all obligations under this contract within such estimated cost. If, at any time, the Contractor has reason to believe that the costs which he expects to incur in the performance of this contract in the next succeeding 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost then set forth in the Schedule, or if, at any time the Contractor has reason to believe that the total cost to the Government for the performance of this contract, exclusive of any fee, will be greater or substantially less than the estimated cost hereof, the Contractor shall notify the Contracting Officer in writing to that effect, giving the revised estimate of such total cost for the performance of this contract.

(b) Except as required by other provisions of this contract specifically citing and stated to be an exception from this clause, the Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the estimated cost set forth in the Schedule, and the Contractor shall not be obligated to continue perform-

ance under the contract (including actions under the Termination clause) or otherwise to incur costs in excess of the estimated cost set forth in the Schedule, unless and until the Contracting Officer shall have notified the Contractor in writing that such estimated cost has been increased and shall have specified in such notice a revised estimated cost which shall thereupon constitute the estimated cost of performance of this contract. No notice, communication, or representation in any other form or from any person other than the Contracting Officer shall affect the estimated cost of this contract. In the absence of the specified notice, the Government shall not be obligated to reimburse the Contractor for any costs in excess of the estimated cost set forth in the Schedule, whether those excess costs were incurred during the course of the contract or as a result of termination. When and to the extent that the estimated cost set forth in the Schedule has been increased, any costs incurred by the Contractor in excess of the estimated cost prior to such increase shall be allowable to the same extent as if such costs had been incurred after the increase; unless the Contracting Officer issues a termination or other notice and directs that the increase is solely for the purpose of covering termination or other specified expenses.

(c) Change orders issued pursuant to the Changes clause of this contract shall not be considered an authorization to the Contractor to exceed the estimated cost set forth in the Schedule in the absence of a statement in the change order, or other contract modification, increasing the estimated cost.

(d) In the event that this contract is terminated or the estimated cost not increased, the Government and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract based upon the share of costs incurred by each.

39. NEGOTIATED OVERHEAD RATES (December 1966)

(a) Notwithstanding the provisions of the clause of this contract entitled "Allowable Cost, Fixed Fee, and Payment," the allowable indirect costs under this contract shall be obtained by applying negotiated overhead rates to bases agreed upon by the parties, as specified below.

(b) The Contractor, as soon as possible but not later than ninety (90) days after the expiration of his fiscal year, or such other period as may be specified in the contract, shall submit to the Contracting Officer, with a copy to the cognizant audit activity, a proposed final overhead rate or rates for that period based on the Contractor's actual cost experience during that period, together with supporting cost data. Negotiation of overhead rates by the Contractor and the Contracting Officer shall be undertaken as promptly as practicable after receipt of the Contractor's proposal.

(c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with Subpart 1-15.2 of the Federal Procurement Regulations (41 CFR 1-15.2) as in effect on the date of this contract.

(d) Pending establishment of final overhead rates for any period, the Contractor shall be reimbursed either at negotiated provisional rates as provided in the contract, or at billing rates acceptable to the Contracting Officer, subject to appropriate adjustment when the final rates for that period are established. To prevent substantial over or under payment, and to apply either retroactively or prospectively: (1) Provisional rates may at the request of either party, be revised by mutual agreement, and (2) billing rates may be adjusted at any time by the Contracting Officer. Any such revision of negotiated provisional rates provided in the contract shall be set forth in a modification to this contract.

(e) Any failure by the parties to agree on any final rates under this clause shall be considered a dispute concerning a question of fact for decision by the Contracting Officer within the meaning of the "Disputes clause of this contract."

The clause entitled "Allowable Cost, Fixed Fee, and Payment" provides in pertinent part:

(a) For the performance of this contract, the Government shall pay to the Contractor:

(1) The cost thereof (hereinafter referred to as "allowable cost") determined by the Contracting Officer to be allowable in accordance with:

(i) Subpart 1-15.2 of the Federal Procurement Regulations (41 CFR 1-15.2), as in effect on the date of this contract;

Discussion and Findings

It is noted that the Negotiated Overhead Rates Clause provides that allowable indirect costs shall be determined on the basis of overhead rates, computed after expiration of appellant's fiscal year, based on the contractor's actual cost experience. Consequently, unless the overhead rates can be accurately forecast for the entire year, only the direct costs can be determined with certainty for a contract completed during the fiscal year. Should the overhead rates be finally determined to be less than the provisional rates used for billing purposes, the Government's obligation is to pay the lower amount for indirect expenses. Higher final overhead rates would warrant billing the Government for indirect expenses that exceeded the provisional rates, subject to the total estimated cost of the contract. Therefore, the Government's agreement to pay "the cost thereof" for the performance of the contract in the Allowable Cost, Fixed Fee, and Payment clause is to pay the direct costs determined to be allowable and the indirect costs based on rates determined only after the actual cost experience for appellant's fiscal year is known.

The LOCC limits the Government's obligation to pay for any costs in excess of the estimated cost unless timely notice is given and the contracting officer notifies the contractor in writing the estimated cost has been increased. Given the timely notice, the Government may elect to discontinue performance rather than to fund the overrun. Here, the Government argues that the failure of appellant to give notice denied the Government the opportunity to make such an election, even though appellant was repeatedly reminded that there were no additional funds for the contract. Appellant urges that its actual indirect expenses during contract performance were lower than the provisional billing rates and that the postcontractual impact of increased indirect costs in relation to direct labor was not foreseeable to enable timely notice to be given to the Government. In the *General Electric* case, the court found that the contracting officer abused his discretion in refusing to fund an overrun of postperformance indirect costs due to increased overhead rates "where the contractor, through no fault or inadequacy on its part, has no reason to believe, during performance, that a cost overrun will occur and the sole ground for the contracting officer's refusal is the contractor's failure to give proper notice of the overrun." The Armed Services Board of Contract Appeals (ASBCA) sustained an appeal for an overrun caused by postperformance adjustment in overhead rates (without timely notice) in *Arinc Research Corp.*, ASBCA No. 15861 (Oct. 13, 1972), 72-2 BCA 9721. In a discussion of the *General Electric* case, and subsequent appeals before that Board, the ASBCA questioned the "abuse of discretion doctrine" as the basis for sustaining the appeal, but accepted the court's

ruling that the Government's right to refuse funding of such overruns was dependent on the contractor's ability to comply with the LOCC notice requirements. Finding that timely notice in compliance with the LOCC requirements was an impossibility, the Board sustained the appeal.

Here, the appellant is a small business firm with its accounting needs accommodated by the use of a consultant service on an as needed basis. The parties agree on the adequacy of the accounting system, but differ as to whether the postperformance increase in overhead rates could have been foreseen. The rule currently followed is that the burden is on the appellant to establish that the overrun was not reasonably foreseeable, with the attendant duty to maintain an accounting and financial reporting system adequate to secure timely knowledge or probable overruns before the costs are incurred. *See Stanwick Corp.*, ASBCA No. 14905 (Oct. 7, 1971), 71-2 BCA 9115, on reconsideration. The realities confronting a contractor by application of this rule are that his accounting system must accurately forecast both the fixed and variable costs in his overhead and the marketing or financial element of the firm must accurately predict the volume and timing of direct labor resulting from anticipated contracts. Here, appellant had 10 projects at the commencement of work on this contract, and 9 projects upon completion of the contract in Mar. 1981. By May there were only 7 projects, in August only 3, and only 2 when his fiscal year ended on Sept. 30, 1981. The Government argues that he should have known in January that its contacts were expiring with no replacement business, and that direct labor personnel were reassigned to overhead as contract work went down. Our view of Exhibit 20 (appellant's ledgers) does not confirm this. Instead, the 16 people shown for Oct. 1980 were reduced to 9 in Apr. 1981, and 4 by Sept. 1981. It is apparent that appellant did take action to reduce overhead expenses from $86,245.75 in the first half year to $63,095.33 in the last half, which could not have resulted if direct labor was reassigned to overhead. Direct labor expenditures for the first half were $108,045.47 versus $31,566.90 in the last half. Appellant had contractual obligations to fulfill on his remaining projects. The suggestion of the Government that he was obligated to reduce overhead costs consistent with his reduced business must be tempered by the obvious necessity that he continue in business to meet these commitments. The Government relies on *The Stanwick Corp.*, ASBCA No. 18083 (Sept. 24, 1976), 76-2 BCA 12114, in support of the unreasonableness of costs of maintaining a performance capability beyond normal expectation of need. However, appellant's cost records do not show that any excess staff was retained as its business declined.

A postperformance overrun caused by overhead adjustments was granted in *Cosmic, Inc.*, ASBCA No. 15078 (Jan. 12, 1972) 72-1 BCA 9278. The Board found that the contract funds had been expended by the time an overrun could have been determined and

that, in these circumstances, the Government was not prejudiced by the lack of timely notice. The overrun was allowed despite lack of timely notice in *The Bissett-Berman Corp.,* NASA BCA No. 1270-19 (Nov. 10, 1973), 73-2 BCA 10,346, upon a finding that the appellant could not reasonably foresee a cost overrun during contract performance. There, the temporary retention of skilled workers at the expense of overhead increases was considered a reasonable exercise of management prerogatives. The Board discusses the *Arinc* case and quotes the following: "An accurate forecast of actual overhead rates nine months in advance would only be attributable to just plain luck or to the possession of clairvoyance of a magnitude which we are unwilling to say Arinc should have possessed." A similar overrun claim resulted in a denial by the Department of Transportation Board where the lack of timely notice was not excused because of the inadequacy of the contractor's accounting system. *See Samuel Ewer Eastman Associates,* DOT CAB No. 75-9 (Apr. 1, 1976), 76-2 BCA 12,015. In *Messer Associates,* ASBCA No. 22365 (Feb. 27, 1978), 78-1 BCA 13059, the overrun was denied with the statement:

> Appellant knew additional contracts were needed to continue to support the overhead burden then being experienced. Absent any award, appellant knew its overhead costs would increase. The record before us furnishes no basis for concluding that the new contracts were a certainty. We have in similar situations concluded that the hope for new business does not excuse the need to give notice.

The following language appears in *Forge Aerospace, Inc.,* ASBCA No. 22157 (Mar. 13, 1979), 79-1 BCA 13746:

> We do not believe that Forge's situation comes within the exception [the General Electric case], since its own vouchers and its own in-house overhead calculations evidence the fact that it had ample data from which to calculate a reasonably accurate and timely prediction of its final burden rates. Nor can we give much weight to Forge's argument that a number of promising proposals failed to develop into contracts during the period in question, thereby increasing the final overhead figures. Forge (and its President) are experienced in contracting and appear to be well versed in the risks of doing business with the Government. No promise of follow-on or new contracts were made, and the fact that prospective contracts might not materialize should have been anticipated.

It is obvious that the reliability of overhead rate projections is dependent upon the timely acquisition of expected new business. An adequate accounting system is necessary to accurately project the effect that future business will have on the overhead rates. In fact, the *General Electric* holding is bottomed on the necessity of maintaining an adequate accounting system, and the failure to have an adequate system places fault on the contractor for the failure to give timely notice of overruns. The more difficult problem involved in these cases is the lack of any standards by which to measure the adequacy of the contractor's new business projections. Including the *General Electric* case, the cause of the postperformance overruns is rooted in the failure to secure new business equal to projections on which the provisional overhead rates are

based. The court did not discuss or impute fault to General Electric for failure to secure new business in accordance with its overhead rate projections. However, subsequent Board of Contract Appeals' decisions denying the overruns have indicated a great degree of contractor responsibility to foresee that hoped for new business will not materialize. We consider that the *General Electric* holding must necessarily embrace the contractor's new business acquisition system as well as his accounting system. Otherwise, the court's ruling is nullified by a finding that the contractor should have anticipated that he would not secure the business on which his overhead rates were projected. After the expected business has been lost with the resultant increase in overhead rates and a postperformance overrun, the conclusion is easily reached that the contractor should have known business would be lost many months before, when it was time to give notice of an overrun. Procurement and award procedures do not support this conclusion. These procedures often stretch over many months or years. Lengthy interfaces between the Government and contractors often precede the actual bidding or proposal effort. Evaluation and award after receipt of bids or proposals may involve extended periods. In actual practice, contractors rarely discontinue marketing efforts and expenditures until the expected business is awarded to another or a decision not to procure is announced. Under such circumstances, the placement of an unreasonable burden on the contractor to foresee the failure to secure expected business many months before the opportunity is actually lost results in reestablishing the total risk on the contractor to foresee and give notice of postperformance overhead induced overruns.

In this view of the rule of the *General Electric* case, the postperformance overhead induced overrun should be funded where the contractor, through no fault or inadequacy in its accounting or business acquisition procedures, has no reason to foresee that a cost overrun will occur and the sole reason for refusal to pay the overrun is the contractor's failure to give proper notice. In the case before us, the parties agree on the adequacy of appellant's accounting system. The record discloses no basis on which appellant should have known, at the time that a notice of overrun should have been provided, that he would be markedly unsuccessful in acquiring new business. Exhibit 20 shows a sustained marketing effort throughout the year, even though at a reduced rate in the last half when it became necessary to reduce all overhead expenditures. We find no fault or inadequacy in appellant's accounting or business acquisition procedures and that it was not possible for appellant to comply with the notice requirement of the LOCC because the contract funds were adequate to complete contract performance. Therefore, the appeal is sustained in the amount of $14,447.22, plus interest to be computed in accordance with the

requirements of the Contract Disputes Act of 1978.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

CHAMPLIN PETROLEUM CO.

68 IBLA 142

Decided *October 29, 1982*

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, rejecting oil and gas lease application W-72946 for certain lands within a railroad right-of-way.

Reversed and remanded.

1. Act of May 21, 1930—Mineral Leasing Act: Lands Subject to—Oil and Gas Leases: Rights-of-Way Leases—Rights-of-Way: Generally

Lands under a railroad right-of-way issued pursuant to the Act of Mar. 3, 1875, 18 Stat. 482, are not properly leased under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1976), but instead must be leased under the exclusive authority of the Act of May 21, 1930, 30 U.S.C. §§ 301-306 (1976), and 43 CFR 3100.0-3(d)(1).

2. Act of May 21, 1930—Oil and Gas Leases: Applications: Descripton—Oil and Gas Leases: Rights-of-Way Leases

An oil and gas lease issued under the mineral Leasing Act of 1920 does not include the oil and gas deposits underlying a railroad right-of-way, which crosses the leased tract, even though the lease does not expressly except such deposits from its coverage.

3. Administrative Authority: Generally—Administrative Practice—Bureau of Land Management

Established and longstanding Departmental interpretations relating to issuance of oil and gas leases are binding on all Departmental employees until such time as they are changed by competent authority.

APPEARANCES: Lawrence P. Terrell, Esq., Denver, Colorado, for appellant; Lyle K. Rising, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

Champlin Petroleum Co. (Champlin) has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated Oct. 24, 1980, which rejected its oil and gas lease application under the Right-of-Way Leasing Act of May 21, 1930, 30 U.S.C. §§ 301-306 (1976), for lands underlying rights-of-way W-0200642 and W-0200644. The application was rejected for the reason that the applied for lands were not available for leasing because they were included in existing oil and gas leases W-36324 and W-40091.

The record shows that on Oct. 8, 1980, Champlin applied to lease certain lands within sec. 24, T. 20 N., R. 93 W., sixth principal meridian, Wyoming, which were originally granted to the Union Pacific Railroad Co. (Union Pacific) under the Act of Mar. 3, 1875,

18 Stat. 482, 43 U.S.C. §§ 934-939 (1970) (repealed in 1976). Champlin had acquired Union Pacific's rights to obtain oil and gas leases under the Act of May 21, 1930, *supra,* by an assignment executed July 18, 1980. BLM rejected the lease application stating that "[t]he lands under the above-referenced rights-of-way are presently leased under oil and gas leases W 36324 and W 40091 which issued under the Mineral Leasing Act of 1920." BLM indicated that the leasing of these lands under the Mineral Leasing Act of 1920 had been recently supported by a memorandum from the Regional Solicitor in which he concluded that there is concurrent or overlapping authority for a leasing of all rights-of-way lands with the exception of those granted pursuant to railroad land grants made before 1871. Oil and gas deposits under those rights-of-way may be leased only under the 1930 Act. He stated all other oil and gas deposits underlying rights-of-way may be leased under either the 1930 Act or the Mineral Leasing Act of 1920. Memorandum from Regional Solicitor, Rocky Mountain Region, to BLM State Directors, Colorado and Wyoming, dated May 16, 1980.

Champlin has appealed this rejection of its application requesting that the BLM decision be reversed because the outstanding leases covering right-of-way lands had improperly been issued under the 1920 Act. Appellant cites numerous Departmental cases as well as 43 CFR 3100.0-3(d)(1) for the proposition that oil and gas under right-of-way lands may be leased only under the Act of May 21, 1930, *supra,* and asserts, therefore, that BLM lacked the authority to take action to lease the lands under the 1920 Act.

Counsel for BLM has responded on behalf of BLM urging the Board of Land Appeals to reexamine the applicability of the Mineral Leasing Act of 1920 as a vehicle for leasing right-of-way lands. He requests the Board to overlook prior decisions on this matter and to accept his view that, under the clear language of these Acts, the Secretary has full discretionary authority to lease oil and gas deposits beneath rights-of-way under either law. We reverse.

[1] First of all, we will examine the theoretical basis for the view by the Regional Solicitor that oil and gas deposits underlying railroad right-of-ways issued under the 1875 Act, are leasable pursuant to the general provisions of the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1976). A short historical framework is necessary to place the Regional Solicitor's argument in perspective.

Commencing in 1850 with the grant to the Illinois Central Railroad, Act of Sept. 20, 1850, 9 Stat. 466, and continuing for a period of approximately 20 years, concluding with a grant to the Oregon Central Railroad, Act of May 4, 1870, 16 Stat. 94, Congress sought to stimulate and foster the construction of railroads, particularly in the then uninhabited territories of the West. As an inducement to the construction of the railroads Congress granted both a right-of-way through the public lands as well as additionnal grants of the public domain. In

particular, the railroad grants to the Union Pacific in 1862 and to both the Union Pacific and Northern Pacific Railroad Co. (Northern Pacific) in 1864 involved vast amounts of public land. Indeed, the 1864 grant to the Northern Pacific, Act of July 2, 1864, 13 Stat. 365, aggregated an estimated 40,000,000 acres of land.[1]

With the completion of the transcontinental railroads in 1869, however, public sentiment turned rapidly against continuing this practice of granting large tracts of the public domain to railroad companies. A series of individual authorizations for railroad rights-of-way over the public lands were enacted between 1871 and 1875. No land grants accompanied these authorizations. *See, e.g.,* Act of June 8, 1872, 17 Stat. 339.

Finally in 1875, in order to obviate the need for individual Congressional authorization, Congress adopted the General Railroad Right-of-Way Act of 1875, Act of Mar. 3, 1875, 43 U.S.C. § 934 (1970).[2] This granted the right-of-way through public lands to the extent of 100 feet on each side of the central line of the road, but granted no public lands as an inducement for construction of the railroad. Moreover, sec. 4 of the Act, 43 U.S.C. § 937 (1970), provided that all such lands over which the right-of-way passed would be disposed of "subject to such right of way."

In construing the nature of the pre-1871 grants, the Supreme Court recognized early that more than a mere easement was granted insofar as the right-of-way was concerned. Thus, in *New Mexico* v. *United States Trust Co.,* 172 U.S. 171, 184–85 (1898), the Supreme Court referred to the interest granted as "real estate of corporeal quality." In *Northern Pacific Ry.* v. *Townsend,* 190 U.S. 267 (1903), it was stated that the grant "was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." *Id.* at 271.[3]

Departmental adjudications, however, both before and after these pronouncements, construed both the specific grants after 1871 and the General Railroad Right-of-Way Act of 1875, *supra,* as granting merely an easement. *See, e.g., Grand Canyon Ry.* v. *Cameron,* 35 L.D. 495 (1907); *John W. Wehn,* 32 L.D. 33 (1903); *Pensacola and Louisville R.R.,* 19 L.D. 386 (1894). Thus, unlike the pre-1871 grants whereby the land within the right-of-way ceased to be public land, the land embraced in the post-1871 grants was deemed to be public land, though subject to the right-of-way. *Compare Melder* v. *White,* 28 L.D. 412, 419

[1] While these grants could well be characterized as "lavish," as indeed they were by the Supreme Court in *Great Northern Ry.* v. *United States,* 315 U.S. 262, 273 (1942), they were, for the most part, products both of a concern that without adequate transportation facilities the vast territories of the West would remain unpeopled and undeveloped as well as a fear, expecially during the Civil War, that the Pacific Coast settlements might be subject to foreign depredations. *See generally United States* v. *Union Pacific R.R.,* 91 U.S. 72, 79–80 (1875).

[2] This Act was repealed by sec. 706(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2793.

[3] This limited fee has also been referred to as a "base" fee. *See e.g., A. Otis Birch (On Rehearing),* 53 I.D. 340, 342 (1931); *Regulations for Rights of Ways Over Public Lands and Reservations,* 36 L.D. 567, 568 (1908).

(1899), *with* Circular of May 21, 1909, 37 L.D. 787, 788.

In 1915, however, the Supreme Court stated, in a case involving the 1875 Act, that:

> The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee.

Rio Grande Western Ry. v. *Stringham,* 239 U.S. 44, 47 (1915). In light of this pronouncement, though it was arguably dictum, the Department reversed its position as to the nature of rights granted by the post-1871 rights-of-way. *See Instructions,* 46 L.D. 429 (1918).

In 1920, Congress enacted the Mineral Leasing Act, Act of Feb. 25, 1920, 41 Stat. 437, 30 U.S.C. § 181 (1976). Insofar as the instant appeal is concerned, this Act provided for the leasing of certain minerals, including oil, in lands, "owned by the United States." In *Windsor Reservoir and Canal Co.* v. *Miller,* 51 L.D. 27 (1925), the Department examined the question as to the applicability of the Mineral Leasing Act to reservoir sites granted under the Act of Mar. 3, 1891, 26 Stat. 1095, 43 U.S.C. § 950 (1970).[4] The 1891 Reservoir Act had long been construed as similar in scope to the 1875 General Right-of-Way Act. *See Kern River Co.* v. *United States,* 257 U.S. 147, 152 (1921).

In *Windsor,* one Frank C. Miller had applied for a prospecting permit for oil pursuant to the Mineral Leasing Act of 1920. In affirming the rejection of his prospecting permit application on the ground that the land was not subject to disposition under the leasing laws so long as the grant under the 1891 Reservoir Act subsisted, First Assistant Secretary Finney expressly referenced the Supreme Court decision in *Rio Grande Western Ry.* v. *Stringham, supra,* and concluded:

> From a careful consideration of the acts of Congress involved and the numerous decisions of the Department and the courts construing these acts, the Department is convinced that such title has passed under the grant of right of way that a permit to prospect for oil and gas upon land situate in a reservoir site can not properly be granted.

51 L.D. at 32.

It is important to note that the Department did not imply that the right-of-way holder held title to any oil or gas underlying the right-of-way. On the contrary, the decision in *Windsor,* noting that the canal company had apparently issued leases for the land beneath the right-of-way, directed the land officer to notify the company "that the Department denies the right of the reservoir and canal company to lease any lands of the United States covered by its reservoir grant for the extraction of oil or gas therefrom." *Id.* at 34. Thus, the decision stated:

> A grant under said act passes no right, title, or interest in or to any mineral deposits underlying the land, or any right to prospect for, mine, and remove oil or gas deposits, either directly by the grantee or any lessee thereof. The title to such deposits remains in the United States, subject only to such disposition as may be authorized by law.

[4] This Act was also repealed by sec. 706(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2793.

Id. Accord, Use of Railroad Right of Way for Extracting Oil, 56 I.D. 206, 211 (1937). In this holding, the *Windsor* decision reaffirmed the traditional view of the Department with respect to the pre-1871 rights-of-way. *See Missouri, Kansas and Texas Ry.,* 33 L.D. 470 (1905).[5]

The result of the *Windsor* decision, therefore, was to create an hiatus in the ability of the Government to lease its mineral deposits underlying rights-of-ways. To remedy this situation, the Department sought legislation expressly authorizing it to lease such lands. Pursuant to the request of Secretary Wilbur, Congress enacted the Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. § 301 (1976). Sec. 1 of that Act provides:

> Whenever the Secretary of the Interior shall deem it to be consistent with the public interest he is authorized to lease deposits of oil and gas in or under lands embraced in railroad or other rights of way acquired under any law of the United States, *whether the same be a base fee or mere easement: Provided,* That, except as hereinafter authorized no lease shall be executed hereunder except to the municipality, corporation, firm, association, or individual by whom such right of way was acquired, or to the lawful successor, assignee, or transferee of such municipality, corporation, firm, association, or individual. [Italics supplied.]

It should also be noted that, while sec. 1 of the Act limited the issuance of leases to the holder of the right-of-way or its assigns, sec. 3 of the Act, 30 U.S.C. § 303 (1976), established a system by which the owner or lessee of adjoining lands could offer a bid of money or compensatory royalty for the right to extract the oil and gas underlying the right-of-way, through wells located on the adjoining land.

The following year, the Department had occasion to examine the scope of this Act in two different contexts. First, in *Charles A. Son,* 53 I.D. 270 (1931), Secretary Wilbur rejected the claim of appellants that the oil and gas deposits beneath a right-of-way granted under the 1875 Act were not subject to leasing under the 1930 Act because they were already subject to a lease issued under the 1920 Act. In that case the Department expressly held that even though the lease issued to appellants described the entire section of land, it granted no rights to the oil and gas deposits underlying the right-of-way.

In *A. Otis Birch (On Rehearing), supra,* Assistant Secretary Edwards rejected the protest of the appellants therein that the oil and gas deposits lying beneath certain lands crossed by a railroad right-of-way issued under the 1875 Act were owned by appellants, as the adjacent landowners, and thus, not subject to leasing under the 1930 Act. Appellants held title to the adjacent lands by virtue of a patented oil placer claim. After reviewing the various judicial pronouncements on the topic, the Department concluded:

> In the light of these expressions of the Supreme Court, no other conclusion seems possible than that, upon the grant of the

[5] While this was the consistent view of the Department and, indeed, was a necessary precondition to the 1930 Right-of-Way Leasing Act since it purported to authorize the issuance of leases for lands under rights-of-way whether deemed a base fee or an easement, it was not until 1957 that the courts agreed that title to the mineral estate in pre-1871, rights-of-way remained in the United States. *See United States* v. *Union Pacific R.R.,* 353 U.S. 112 (1957).

right of way, the land therein ceases to be public land and becomes private property, and any attempted appropriation thereof under the mineral or other public land laws would be void and ineffective, and that any patent issued pursuant to such an appropriation must be deemed inoperative as to the land in the right of way, the same as if it had been expressly eliminated therein by description.

Id. at 344.[6]

In 1942, however, the Supreme Court reexamined the dictum in *Rio Grande Western Ry.* v. *Stringham, supra,* and rejected it. In *Great Northern Ry.* v. *United States, supra,* Justice Murphy contrasted the nature of the pre-1871 grants with those authorized after that time, specifically adverting to the change in public and Congressional sentiment as to the large public land grants to railroads. Referring to the dictum in *Stringham,* analogizing the 1875 Act to the pre-1871 grants, the Court noted:

The conclusion that the railroad was the owner of a "limited fee" was based on cases arising under the land-grant acts passed prior to 1871, and it does not appear that Congress' change of policy after 1871 was brought to the Court's attention. That conclusion is inconsistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation. We therefore do not regard it as controlling. [Footnote omitted.]

Id. at 279. Thus, the Court held that the right-of-way granted by the 1875 Act was "but an easement" granting "no right to the underlying oil and minerals." The decision went on to note: "This result does not freeze the oil and minerals in place. Petitioner is free to develop them *under a lease executed pursuant to the Act of May 21, 1930,* 46 Stat. 373." *Id.* (Italics supplied.)

In *E. A. Wright,* A-24101 (Nov. 5, 1945) Assistant Secretary Chapman took note of the Supreme Court's decision in *Great Northern Ry.* v. *United States, supra,* and stated "based upon the reasoning in that case * * * grants of rights-of-way for canals and ditches under the 1891 Act should be deemed easements, and previous decisions of the Department, based upon a repudiated contrary construction should no longer be followed." Nevertheless, the Assistant Secretary affirmed rejection of an oil and gas lease application on the ground that it was not in accord with the provisions of the 1930 Act, expressly stating, "This Act prescribes the exclusive method of leasing oil and gas under rights-of-way acquired under the public land laws of the United States."

Subsequently, in *Phillips Petroleum Co.,* 61 I.D. 93 (1953), Solicitor White examined precisely the contention pressed herein by the Regional Solicitor, viz., that in light of the decision in *Great Northern Ry.* v. *United States, supra,* deposits lying beneath rights-of-way granted under the 1875 Act were subject to leasing pursuant to the provisions of the Mineral Leasing Act of 1920. That case involved a right-of-way held by the Chicago and North Western Railroad Co., acquired in 1886 under the provisions of the 1875 Act. On May 1, 1945, Phillips Petroleum obtained an oil and gas lease for the lands surrounding part of the right-of-way pursuant

[6] The holding in *A. Otis Birch (On Rehearing), supra,* is no longer good law. *See Amerada Hess Corp.,* 24 IBLA 360, 83 I.D. 194 (1976).

to sec. 17 of the Mineral Leasing Act of 1920. No reference to the right-of-way was made in the lease.

In 1951, the railroad company applied for a lease of the deposits underlying its right-of-way pursuant to sec. 1 of the Act of May 21, 1930. Phillips Petroleum Co. (Phillips), as lessor of the adjoining lands, was duly notified of its opportunity to submit a bid in accordance with sec. 3 of the 1930 Act. Instead, on Mar. 5, 1952, Phillips protested the actions of BLM on the ground that the oil and gas deposits were already included in its outstanding lease. When its appeal was dismissed by the Assistant Director, BLM, Phillips appealed to the Secretary.

In *Phillips Petroleum Co., supra,* the Solicitor conducted an extensive review of the history of Departmental and judicial adjudication relating to rights-of-way under the 1875 Act, which we have set forth above. Noting that the 1930 Act was adopted pursuant to the request of the Department, the decision stated that "[i]t is clear, therefore, that the 1930 act was proposed and enacted, not with the intent to supplement or to supplant the Secretary's authority under the Mineral Leasing Act of 1920, but with the intent of supplying authority that was deemed to be previously nonexistent." *Id.* at 97. Turning to the effect of the subsequent decision in *Great Northern Ry.* v. *United States, supra,* on the leasability of the deposits underlying 1875 rights-of-way, the Solicitor squarely held:

> I do not believe that the *Great Northern* decision served to make the Mineral Leasing Act applicable, along with the 1930 act, to oil and gas deposits underlying the rights-of-way granted by the 1875 act. As we have seen, the 1930 act had been enacted some 12 years previously to provide an authority which had herefore been deemed not to exist. The legislative history of the 1930 act shows that its enactment constituted an acceptance and confirmation by Congress of the Department's construction of the Mineral Leasing Act as inapplicable to oil and gas deposits underlying railroad rights-of-way granted under the 1875 act. The Department could not now overthrow this legislatively approved construction of the scope of the Mineral Leasing Act, merely upon the basis of the Supreme Court's change of view respecting the nature of the right enjoyed by the holder of a railroad right-of-way acquired under the 1875 act.

Id. at 98–99. Accordingly, Solicitor White held that Phillips had acquired no rights to the oil and gas deposit underlying the right-of-way by virtue of a lease issued pursuant to sec. 17 of the Mineral Leasing Act of 1920.

Phillips subsequently sought review of this decision in the United States District Court for the District of Columbia. In a decision styled *Phillips Petroleum Co.* v. *McKay,* No. 5024–53 (June 17, 1955), Judge Schweinhart affirmed the Department on all questions. He noted that Phillips contended

> that after the decision in the Great Northern case, *supra,* the whole reason for the 1930 Act vanished. The Court does not believe this is so for the reason that the 1930 Act applies whether the right is a mere easement or a base fee, and also for the reason that the [Supreme Court] in its opinion stated that the minerals under rights of way were not frozen in place but were left free for development under the 1930 Act.

(Memorandum Opinion at 6).

Judge Schweinhart also examined the same argument advanced herein by the Regional Solicitor's Office that the oil and gas deposits beneath rights-of-ways were leasable under either the 1930 or 1920 Acts:

> The plaintiff contends also that the Act of May 21, 1930 did not repeal the 1920 Act and states that repeals by implication are not favored. The Court does not find that the question of repeal is involved. The Act of 1920 did not apply to gas and oil deposits underlying railroad rights of way and the Act of 1930 gave that authority to the Secretary of the Interior, which authority he did not have under the 1920 Act. The 1930 Act is specific legislation applying to that one subject, that is, mineral deposits under rights of way. Prettyman, J. in *Shelton* v. *U.S.*, 165 F. (2d) 241, 83 U.S. App. D.C. 32, states that "generally, absent extraordinary results of such construction, a specific later statute rather than an earlier general one, applies to a given transaction described by both, i.e., generally by the earlier and specifically by the later."

(Memorandum Opinion at 6).

The last development of any real import occurred in 1960. After the Supreme Court decision in *United States* v. *Union Pacific R.R., supra,* which had affirmed the Department's consistent position that minerals underlying the pre-1871 rights-of-way were owned by the United States, the Acting Solicitor examined the question of the applicability of the Mineral Leasing Act of 1920 and the 1930 Rights-of-Way Leasing Act to the leasing of mineral deposits lying beneath rights-of-way. *See Applicability of the Mineral Leasing Act to Minerals in Rights-of-Way,* M-36597, 67 I.D. 225 (1960). In reviewing the judicial and Departmental changes which had occurred over the years, specific reference was made to the decision in *Phillips Petroleum Co., supra.* In particular, the statement that the enactment by Congress of the 1930 Act constituted Congressional acceptance and confirmation of the Department's view that the Mineral Leasing Act of 1920 was not applicable to lands underlying rights-of-way was reexamined.

The problem with such a position was that the 1930 Act applied only to oil and gas leasing. If, indeed, the Mineral Leasing Act of 1920 was generally inapplicable to rights-of-way, there would be no statutory authority by which the Department could issue leases for minerals other than oil and gas lands underlying rights-of-ways. The Acting Solicitor rejected this rationale as it applied to the general applicability of the Mineral Leasing Act. However, with reference to oil and gas leasing, the opinion clearly affirmed the *Phillips Petroleum Co.* decision:

> In a word all that was meant was that the Congress that enacted the 1930 act did so in acceptance of the Department's view that the 1920 act did not apply to rights-of-way and consequently the 1930 act was intended by that Congress to be and it must be deemed to be the only law authorizing the issuance of leases for oil and gas deposits under rights-of-way. I believe that there can be no quarrel with that reasoning. It is the general rule that special legislation will be deemed to supersede prior general legislation especially where there is reasonable evidence of that intent.

Id. at 227.

The adjudicative rules which have guided the Department since the 1960 Solicitor's Opinion may be succinctly stated: Oil and gas deposits underlying rights-of-way

(be they pre-1871 or post-1871) are subject to leasing only pursuant to the 1930 Act; other leasable minerals underlying such rights-of-way are subject to leasing pursuant to the Mineral Leasing Act of 1920.[7] A consistent and considerable line of cases have religiously adhered to this approach. *See, e.g., R. C. Beveridge,* 50 IBLA 173 (1980); *Alice Hays,* 36 IBLA 313 (1978); *Amerada Hess Corp.,* 24 IBLA 360, 83 I.D. 194 (1976); *George W. Zarak,* 4 IBLA 82 (1971), *aff'd sub nom. Rice* v. *United States,* 479 F.2d 58 (8th Cir.), *cert. denied,* 414 U.S. 858 (1973).

The counsel for BLM attacks this entire line of adjudication as based in neither law nor logic. We emphatically disagree. There can be no gainsaying that a number of statements made and rationales employed over the years have, indeed, been repudiated by subsequent decisions. In no small measure, of course, these inconsistencies and reversals were occasioned by the initial Supreme Court decision in *Stringham* and its subsequent repudiation in *Northern Pacific.* What the Regional Solicitor's memorandum clearly fails to come to grips with, however, is the exact language of the 1930 Act. Thus, it provides that the Secretary is authorized to lease deposits of oil and gas "in or under lands embraced in railroad or other rights of way acquired under any law of the United States, *whether the same be a base fee or mere easement.*" The inclusion of the phrase "or mere easement" undercuts the essential assumption of the Regional Solicitor's view, for if a right-of-way was a "mere easement" the deposits beneath it would have been subject to leasing under the Mineral Leasing Act of 1920, even under the view of the law prevailing in 1930. No purpose would be served by including the alternative "or mere easement" unless it is assumed that Congress meant the 1930 Act to supersede the 1920 Act as it applied to oil and gas deposits.

The exact reason for the inclusion of this language is not clear. In *Phillips Petroleum Co., supra,* the Solicitor noted that the only reference to this phrase came in a letter from Secretary Wilbur to Representative Cramton in which he referred to rights-of-way granted under the 1891 Reservoir Act, and similar such acts as "more nearly in the nature of easements." *Id.* at 98 n.3. As the Solicitor pointed out, this reference was puzzling since the 1925 decision in *Windsor Reservoir* had clearly held that rights-of-way under the 1891 Act were limited fees.

Then, too, it might have been designed to cover various grants of a right-of-way which had been specifically held to be mere easements. *See, e.g., Smith* v. *Townsend,* 148 U.S. 490, 498 (1893) (Act of July 4, 1884, granted "an easement not a fee in the land"); *Rail-*

[7] Technically, it could be argued that insofar as pre-1871 rights-of-way are concerned, only "reserved" minerals are subject to leasing under the 1920 Act. Practically, however, in light of the Supreme Court decision in *United States* v. *Union Pacific R.R., supra,* wherein the court treated the general exception of mineral lands in the grants to railroads as reserving minerals underlying the right-of-way in a pre-1871 grant, this distinction is of little import.

way Co. v. *Alling*, 99 U.S. 463, 475 (1878) (Act of June 8, 1872, granted "a present beneficial easement."). The actual causation of the phrase's inclusion in the statute, however, is irrelevant. What is relevant is the fact that since Congress was acting on the assumption that the Department could not lease lands underlying rights-of-way where a base fee had been granted, the inclusion of the alternative "or mere easement" must be taken to include something else. Since lands beneath "a mere easement" would have been subject to leasing under the 1920 Act, even under the theories of law operative at the time the 1930 Act was adopted, it is clear that Congress intended to grant a separate, specific authorization for leasing lands beneath rights-of-ways. To the extent that the 1930 Act differs from the 1920 Act, it must be seen as the exclusive method of leasing oil and gas deposits underlying rights-of-way, howsoever characterized and whensoever granted.[8]

The Regional Solicitor's memorandum at page 10 states:

> We do not mean to say that the 1930 Act has no application whatsoever. It does. It applies, exactly as Congress intended, to railroad rights-of-way that removed the lands they cross from the category of public lands. Those rights-of-way were all granted prior to a Congressional change of policy in 1871.

This analysis cannot be supported. Clearly, Congress did not intend, in 1930, to establish one system of leasing for pre-1871 rights-of-way and another for those issued after 1871. At the time Congress enacted the 1930 Act, the state of the law was that both pre-1871 grants, and grants issued under the 1875 and 1891 Acts were considered to grant "limited fees." It was not until 12 years later that the Supreme Court determined that the 1875 and 1891 grants were in the nature of easements rather than limited fees. The Regional Solicitor's memorandum presupposes a prescience in the 1930 Congress which is totally unsupported by its actions. Congress simply could not have known that the *Stringham* decision which served as the impetus for its actions would, itself, be reversed in *Northern Pacific*. Moreover, even were we to assume Congress was aware that the *Stringham* decision was vulnerable to subsequent Supreme Court repudiation, its inclusion of the phrase "or mere easement" totally belies the Regional Solicitor's argument that Congress intended to bifurcate treatment of rights-of-way.

We expressly hold that the Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. § 301 (1976), is the *exclusive* authority for issuance of oil and gas leases for lands underlying railroad rights-of-way issued under the 1875 Act.

[2] The State Office, in its decision, stated that the oil and gas deposits underlying the two rights-of-way involved herein were already included in leases W-36324 and W-40091. This is demonstrably false.

[8] In the second reply brief of appellee, counsel for BLM suggests that the debates in the 71st Congress show that the terms "easements" and "limited fee" were used almost interchangeably. But in this regard it must be remembered that the bill was drafted by the Department. It is thus the *Department's* contemporaneous construction which should be accorded great weight.

In the first place, as the State Office was well aware,[9] leases embracing rights-of-way other than reservoir sites, station grounds, or material sites, are issued for the entire area, without excluding the right-of-way. This has been the traditional and consistent view of the Department and was codified in the old BLM Manual. Thus, it was stated:

> The area of the lands in the reservoir or station grounds should be substracted from the total area of the lands to be leased. *While land embraced in other rights of way will not be excluded by description from the land covered by the lease, the lease will confer no right to either the land or oil and gas within the right of way.* [Italics supplied]

VI BLM Manual 2.1.22 (Release 16, dated Oct. 4, 1954). In this regard, we would point out that the Manual statement merely reflected long-standing decisional authority. *See, e.g., Phillips Petroleum Co., supra* at 99; *Charles A. Son, supra.*

Second, it seems clear beyond peradventure that both the lessor and the lessees did not consider these rights-of-way to be under lease. Thus, on July 23, 1980, the respective lessees of leases W-36324 and W-40091 submitted a communitization agreement for sec. 24, T. 20 N., R. 93 W., to the Area Oil and Gas Supervisor for his approval. Exhibit A which was attached to this agreement was a plat showing the communitized area. This plat shows the rights-of-way at issue herein with the notation "That No. 3—unleased." This communitization was approved by the Acting Area Oil and Gas Supervisor on July 30, 1980. In transmitting the approved unitization agreement the Acting Deputy Conservation Manager stated: "Until such times as a Tract 3 lease is issued (Grant of Easement W-0200642 and W-0200644 to Union Pacific Railroad Co.), all monies attributable to this interest for production proceeds is to be placed in an interest bearing escrow account."

In light of the above, we find it incredible that the State Office would declare that the lands underlying the rights-of-way were presently under lease. At most, the memorandum of the Regional Solicitor merely indicated that insofar as 1875 easements were concerned, either the 1920 or the 1930 Act *could* be used to lease the underlying oil or gas deposits. Nothing in that opinion argued for the conclusion that all past leases of adjoining lands automatically included the deposits beneath the rights-of-way.

An oil and gas lease is, first of all, contract. As such, its scope is determined by the intent of the parties signatory thereto. It is true, of course, that much litigation is engendered by different perceptions among parties to a lease concerning what was the nature of their agreement. But where, as here, all parties signatory to a lease are clearly in agreement as to its scope, we find it passing strange that the Government should subsequently take the position that the lease gave

[9] In its submission of Apr. 26, 1979, the State Director, Colorado, BLM, made specific reference to the BLM Manual provision set forth in the text, *infra*. Thus, BLM's decision on this point can only be said to be directly contrary to the facts as it knew them to be.

the lessee more rights than either the Government originally intended or the lessee expected.

Moreover, the position of the State Office could prove wildly disruptive of existing leases. If the mere fact of issuance of a lease adjoining a post-1871 right-of-way, in the absence of a specific exclusion of the lands underlying the right-of-way, was sufficient to give the lessee a lease of the right-of-way minerals, any lease subsequently issued under the 1930 Act would be void. As a practical matter, leases under the 1930 Act were normally issued after the adjoining lands were leased. Thus, the overwhelming majority of 1930 Act leases issued for lands underlying post-1871 rights-of-ways would have been improperly issued. Without a doubt, acceptance of such an approach would engender endless and needless litigation. In any event, inasmuch as we have held that the 1930 Act is the exclusive authority for leasing oil and gas deposits underlying rights-of-way, the State Office holding is clearly without merit.

[3] Finally, we will address an issue extensively briefed by appellant, as well as by counsel for BLM, namely the authority and propriety of the Regional Solicitor to, in effect, direct the State Office to ignore clearly controlling Departmental precedents. Appellant argues:

> The Regional Solicitor's May 16, 1980 memorandum to the BLM states that he presonally disagrees with the merits of an acknowledged Department policy which restricts oil and gas right-of-way leasing to the 1930 Act. *Regional Solicitor's Memorandum* at 1. But, instead of attempting to work a change through appropriate administrative procedures, the Regional Solicitor has unilaterally instructed local BLM officials in Colorado and Wyoming to deliberately disregard and override this binding, national policy. The resulting denial of Champlin's rights under the 1930 Act, as recognized by longstanding decisions issued at the Department's highest level and by regulations, is both improper in itself and unfairly prejudicial to Champlin.

(Statement of Reasons at 5). We find that the objections of appellant to the procedures utilized herein are well taken.

It seems elementary that an essential predicate of adjudicative practice is that subordinate officials follow and comport themselves to the directives of higher authority. Thus, this Board has expressly ruled that "when the appellant Boards of OHA interpret regulations, statutes and Departmental policies as requiring or prohibiting certain actions, such interpretation establishes *Departmental* policy which is fully binding upon the Bureau until such time as it is altered by competent authority." *Milton D. Feinberg (On Reconsideration),* 40 IBLA 222, 228, 86 I.D. 234, 237 (1979). We might add that, inasmuch as the Board's authority is coextensive with that of the Secretary, its decisions in adjudications are equally binding on the Solicitor's Office. *See Mantle Ranch Corp.,* 47 IBLA 17, 87 I.D. 143 (1980).

The instant situation involves a rule of law which has been repeatly affirmed by entities as varied as this Board, Assistant Secretaries, and the Solicitor. It is, indeed, codified in the present regulations. *See* 43 CFR 3100.0-3(d)(1). It seems clear to us that this rule, until altered by competent authority, is entitled to full deference and adherence by both the

State Office and the Regional Solicitor.

We recognize, of course, that situations can occur in which past Departmental precedents may be deprived of their controlling weight. Subsequent Congressional enactments or judicial reversals might well necessitate that prior Departmental practice be ignored. The instant case presents neither situation.

Nor does the mere fact that a subordinate official considers prior precedent to be in error justify that official in refusing to follow the precedent. Decisions of this Board are as effective and final as if the Secretary personally issued the decision. The Secretary, however, retains full supervisory authority to alter, modify or reverse any decision of this Board, or its predecessors, which he or she believes to be in error. *See* 43 CFR 4.5. Thus, if a decision in a specific case be deemed erroneous, the Secretary always retains the authority to assume jurisdiction and reverse the Board's original determination. If, on the other hand, longstanding precedent can no longer be supported, the Secretary, without waiting for a specific case, can cause such regulations to be issued as would effect the changes he deems proper. Certainly, a Regional Solicitor or a State Director would be well within the scope of his authority and responsibility in bringing to the Secretary's attention situations in which he believes that prior Departmental precedent should be overturned.

What cannot be accepted, however, is the implicit argument presented herein that every time a State Director or Regional Solicitor determines that past precedent is not in accord with the way the law ought to be interpreted the Regional Solicitor or State Director is invested with authority to ignore those precedents. Such a rule would lead to adjudicative chaos, with each State Director or Regional Solicitor determining for himself what shall be the law within their jurisdictions. We cannot assent to such a proposition. Departmental precedent, until changed or altered by competent authority, is fully binding on all Departmental employees.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and remanded for further action consistent herewith.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

BRUCE R. HARRIS
Administrative Judge

GAIL M. FRAZIER.
Administrative Judge

APPEAL OF CROW CREEK SIOUX TRIBE

IBCA-1431-2-81

Decided *November 10, 1982*

Contract No. A00C14206618, Bureau of Indian Affairs.

Appellant's claims denied; Government's claims sustained.

Contracts: Formation and Validity: Cost-type Contracts

A contractor's claim for crediting the value of equipment returned to the Government against disallowed costs under a cost reimbursement contract is denied because the cost of the equipment was allowed against contract expenditures and title to the equipment was in the Government. A second claim that the contract was converted to a fixed price type or that the Government had approved a markup on a subcontract of the entire project to a wholly owned subsidiary was denied for lack of credible evidence that the markup provision was presented to the contracting officer for approval.

APPEARANCES: Max A. Gors, Attorney at Law, Pierre, South Dakota, for Appellant; Wallace G. Dunker, Department Counsel, Aberdeen, South Dakota, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

Appellant claims that the Government improperly disallowed $179,730.66 in costs under a cost reimbursement contract, which appellant seeks to have reformed to change it to a fixed price contract. The amount disallowed was $222,312.66, and was reduced by $42,000 for fencing allowed by the contracting officer during the hearing (Tr. 151). Appellant contends that the Government improperly disallowed a markup of 10 percent on purchases made by its subcontractor amounting to a total of $131,569. Appellant claims that although it concedes that $38,319.67 in costs were unallowable, it had transferred equipment to the Government exceeding this value and therefore owes the Government nothing. Inasmuch as appellant received advance payments of the entire contract value of $1,700,600, any disallowances result in overpayments, which the Government claims to be refundable.

Background

Appellant, the Crow Creek Sioux Tribe (CCST), applied for $1,500,633 in funding for an irrigation project on tribal lands pursuant to P.L. 95-18, 91 Stat. 36, enacted on Apr. 7, 1977. The funding was approved and the CCST was awarded contract No. A00C14206618 on Sept. 27, 1977, in an amount not to exceed $1,500,600. By letter dated Sept. 19, 1977, Ambrose McBride, acting chairperson of the CCST requested an additional $200,000 of Mr. Charles Corke in the Bureau of Indian Affairs in Washington, D.C. The addition was needed to provide for administrative expense, which had been left out of the initial request because funding from the Economic Development Administration was thought to be available for this purpose.

The additional request was approved and the estimated cost was increased to $1,700,600 by modification 1 dated Sept. 30, 1977, by Earl Lingor, the contracting officer at Aberdeen, South Dakota.

The CCST subcontracted the entire irrigation project to the Crow Creek Reservation Development Corp. (CCRDC) under an agreement dated Oct. 1, 1977. (Attachment to appellant's counsel's letter of Apr. 5, 1982.) An invitation for bids (IFB) for construction of the irrigation project was issued by the CCST with bids to be due on Oct. 29, 1977. On Oct. 17, 1977, the CCST entered into a contract with Sandhill Implement, Inc. (Sandhill), to construct the irrigation system for a total price of $918,924.40 plus $182,673.60 each for alternate corner systems. Apparently two corner systems were purchased, resulting in a total contract value of $1,284,725. The IFB and Sandhill's proposal are incorporated by reference. On Oct. 18, 1977, the CCST assigned to the CCRDC the Sandhill contract and the assignment was accepted by the CCRDC. On Oct. 31, 1977, Sandhill entered into an agreement with the CCRDC naming the latter a "Dealer" for the irrigation equipment manufactured by Sandhill for the period Nov. 1, 1977, to Mar. 1, 1978. By modification 3 to appellant's contract, dated June 5, 1978, the completion date was extended from Jan. 31, to June 30, 1978. This modification also approved and incorporated by reference the subcontract between the CCST and CCRDC dated Oct, 1, 1977, and the subcontract between the CCST and Sandhill with change orders 1, 2, 3, and 4 and the assignment of the contract to CCRDC.

The subcontract between the CCST and the CCRDC was not contained in the original appeal file. It was referred to by witnesses at the hearing in regard to a provision therein stating:

> Award of this contract is hereby made to sub-contractor subject to the understanding that the contractor shall pay for all costs incurred by sub-contractor for materials and equipment including a 10% mark-up on all materials and equipment purchased from other subcontractors for construction of the Irrigation System.

The subcontract was furnished for the record by appellant's counsel in response to our Order dated Mar. 19, 1982. The subcontract consists of two pages with signatures on the second page. It referred to attached papers for the contract plans and specifications and work statement. Attached to the subcontract is the terms for receipt and opening of bids and an undated page containing the above statement entitled: "Attachment to Sub-contract to Build Irrigation System." The subcontract was signed on behalf of the CCST by Ambrose McBride. Mr. McBride testified that there was a written modification to the subcontract relating to the 10 percent markup (Tr. 59). He did not state when the modification was made, so that the record does not reveal whether the markup provision was attached to the contract at the time it was approved by the contracting officer under modification 3. We must presume that the markup modification was not a part of the subcontract at the time of approval because the changes and assignment of the

subcontract between Sandhill and the CCST were specifically mentioned as included in the approval. It is probable that any modifications to the subcontract between CCRDC and the CCST would have been similarly considered and stated to be approved or disapproved. By its terms, the subcontract between the CCRDC and the CCST is a cost reimbursement type. Sec. 3(c) provided:

> (c) The contractor [the CCST] shall pay for all costs incurred by subcontractors including all labor, materials and equipment: including tools, construction equipment, machinery, transportation, and all other facilities and services necessary for the proper completion of work on the project in accordance with this sub-contract, the specification and plans.

According to an affidavit dated Apr. 2, 1981, Charles P. Corke was Chief of Indian Irrigation for the Bureau of Indian Affairs in Washington, D.C., responsible for administering the emergency irrigation drought program. He received, reviewed, and processed the CCST application for funds. He advises that funding for irrigation development could properly include the cost of fencing to prevent livestock encroachment and the establishment of a growing crop. He refers to a meeting in his office on Oct. 26, 1977, to consider amendment of the Government's contract with the CCST. Joel Schneider, employed by the CCST as Director of Tribal Office of Management and Planning, had prepared the application for funds and was present. Also present was Frank Gravatt, the Economic Development Officer for the Bureau of Indian Affairs and the contracting officer's representative. At the conclusion of the meeting, Mr. Corke prepared a memorandum urging the contracting officer to change the contract from a cost reimbursement type to a fixed price type contract. He recognized that he lacked the authority to direct the actions of the contracting officer, and upon learning that the contract was not changed, considered that it was understandable that the tribe could and did conclude that his memorandum was ample authority to consider that the contract was changed.

Mr. Corke's memorandum was hand carried to Mr. Lingor by Messrs. Schneider and Gravatt. Mr. Lingor did not agree to the change of type of contract. Instead, he sent a letter dated Nov. 2, 1977, to the CCST confirming the meeting and advising that Mr. Corke's memorandum should be considered as his own personal opinion, and that the contract would not be changed to fixed price.

Mr. Gravatt testified that the CCRDC was a subagency of the CCST (Tr. 83) and that billings from Sandhill resulted in the addition of the 10 percent markup, which was then billed to the tribe (Tr. 81). He also testified that the money obtained from the markup was used to buy machinery and for the actual operation of the irrigation project (Tr. 76). Mr. Schneider confirmed that the money was used to buy seed, fuel, and things needed for operation of the irrigation system.

The audit report dated Mar. 15, 1979, included a review of the costs reported by the CCRDC. Of total costs claimed amounting to $1,700,600, the audit questioned $279,273 and classified $132,028 as unsupported. Discussions between the parties resulted in the unsupported costs being reduced to a disallowance of $131,569, the amount of the markup by CCRDC of purchases from Sandhill. A bill for collection dated Jan. 6, 1981, was sent to bill appellant for this overpayment. The questioned items were reduced by additional allowances to $90,743.66, and a bill for collection in this amount was sent on Jan. 6, 1981, asking a refund of this overpayment. The questioned costs were further reduced at the hearing by the allowance of $42,000 for fencing costs, leaving a balance of $48,743.66 as the Government's claim for refund for overpayment due to questioned costs. Appellant concedes that $38,219.67 of its claimed costs are unallowable, consisting of unsupported legal fees ($4,710.67), duplicate billing to this contract and another ($22,634), consultant and development fees ($10,600), and several minor amounts. However, appellant claims that it transferred to the Government equipment valued at $166,000 in settlement of the remaining questioned costs (Appellant's Exhs. 1 and 2).

Regarding the transfer of equipment in discharge of overpayments, appellant claims that the transfer was made to settle questioned equipment costs of $114,014 and that the balance of the equipment value ($51,986) should be credited against the $38,774.66 of unallowable costs leaving a balance owing to appellant. In its brief, appellant makes no claim for the balance, but seeks a ruling that neither party owes the other any amount. The Government contends that the cost of the equipment was charged to the contract, and that it belonged to the Government pursuant to the Government property clause. The Government position is that it did not accept property belonging to it in settlement of any part of the overpayments and that it cannot be compelled to do so. By resolution dated Mar. 21, 1980, the CCST resolved that the equipment be turned over to the Bureau of Indian Affairs, and then transferred to the Crow Creek Sioux conservation service and maintained on the CCST Reservation. At the hearing, Mr. Lingor testified that this was done (Tr. 142–43). The audit report notes that much of the equipment, consisting of a backhoe, tractors, cultivators, plows, planters, discs, and trucks, was purchased late in the contract period (May 1, 1978), and was used for the fencing and farming operation.

Regarding the 10 percent markup provision in the subcontract between the CCST and the CCRDC, appellant contends that Mr. Lingor approved the markup in conferences and by the approval of the subcontract by his office. The Government argues that the contract was a cost reimbursement type, without provision for profit, and that the 10 percent markup is unallowable as a profit. By letter dated July 30, 1979, Robert Philbrick, chairman of the CCST forwarded explanations of

disputed amounts, including copies of deposit slips for CCRDC's checking and savings account and the following comment.

> Exhibit 1 shows deposits made to savings which account for this money. Deposits to savings total $204,149.10. Apparently, some monies were redeposited which accounts for the extra $72,553.10. However, it is clear that these savings deposits were then redeposited into the CCRD checking account in Chamberlain. The money did not get into the Tribal Treasury or into any other account. At least I find no indication of that.

The audit report states that "Income of $122,800 from the markup was invested in a savings account and certificate of deposit. We were told the CCRD no longer has the investments, that the money is being used for farming operations."

Discussion and Findings

(1) Questioned costs disallowed by the contracting officer initially totalled $279,273. Discussions and reviews between the parties after audit and prior to the contracting officer's final decision of Nov. 20, 1980, resulted in many additional allowances. In his final decision, the contracting officer allowed all or part of the costs claimed in most categories of questioned costs, referring to exhibit 23 of the appeal file for a summary of the cost impact of his decision. After deducting the $42,000 allowed by the contracting officer at the hearing, there remains only $48,743.66 as the Government's claim of overpayment. The principal items comprising this balance are $38,219.67 in costs conceded by appellant to be unallowable and $9,942 in an overpayment to CCRDC by the CCST. By letter dated July 23, 1981, to the CCST, the contracting officer reduced the demand for refund of questioned and disallowed costs to the sum of these two amounts, *i.e.*, $48,161.67.

Appellant argues that the value of equipment turned over to the Government exceeded the disputed amounts previous compromised, and that this surplus should wipe out the remaining amounts of unallowed costs. No other basis is given to allow the balance of $48,161.67, and none can be found in the record. Appellant does not mention, and apparently chooses to disregard the provisions of the Government property clause of the contract (General Provision 300.28) stating in part: "Title to all property purchased by the Contractor, for the cost of which the Contractor is entitled to be reimbursed as a direct item of cost under this contract shall pass to and vest in the Government upon delivery of such property by the vendor." Instead, it interprets the contracting officer's allowance of the questioned equipment costs as agreement that the equipment is accepted by the Government in lieu of a refund of overpayments. The allowance of the questioned equipment costs simply reinforces the fact that equipment purchased with funds provided under a cost reimbursable contract belongs to the Government. The equipment did not belong to appellant, and therefore could not be given to its true owner, the Government, to satisfy

a claim against appellant. Having been allowed the cost of the equipment against the claimed expenditures under the contract, appellant had no interest in the equipment that could be used to compel further allowances of costs largely conceded to be unallowable. Apart from the lack of authority in this Board to order the acceptance by the Government of the equipment in payment of sums owing by appellant, we can find no merit in appellant's suggestion that the Government should agree to do so. We find that appellant is indebted to the Government for the balance of the disallowed questioned costs in the amount of $48,161.67.

(2) Unsupported costs in the amount of $131,569 were disallowed by the contracting officer because such costs were deemed to be profit charged in a markup of Sandhill's invoices by the CCRDC. The contract between the Government and the CCST was a cost reimbursable type with no provision for any fixed fee to be paid. Similarly, the subcontract between CCST and CCRDC was a cost reimbursable type, and contained no provision for a fee or markup until the undated modification was added to the contract. The CCRDC was a wholly owned subsidiary of the CCST, so that the provision for a markup in the subcontract was, in essence, a provision for profit to accrue to the CCST. The testimony of witnesses that they understood in conferences that there was agreement to change the contract to a fixed price must be disregarded in view of Mr. Lingor's prompt written denial of the request for such a change. The authority of Mr. Lingor, as contracting officer, is a matter of record and is stated in the changes clause of the contract. The reliance on suggestions by Mr. Corke that it should be a fixed price contract was misplaced. The actions of the parties to take Mr. Corke's memorandum direct to Mr. Lingor on the day it was written shows that there was no doubt that Mr. Lingor was the only person with authority to change the contract. Mr. Lingor refused to make the change, and the contract remained a cost reimbursable type.

Appellant argues that the approval by the contracting officer of the CCST to CCRDC subcontract and the incorporation of it by reference into the prime contract by modification 3, was a recognition of the markup provision. Mr. McBride testified that the markup provision was added to the subcontract by a modification, and neither his testimony nor the instrument reveals the date of the modification. We cannot make the assumption that the markup modification was included with the subcontract when it was submitted for approval. The record does not disclose any discussions of the 10 percent markup provision prior to the approval of the subcontract. Also, the markup provides for 10 percent to be added by CCRDC to all materials and equipment purchased from other subcontractors. This does not provide a fixed fee or profit to be paid to CCRDC for management of the irrigation project, but rather for it to receive reimbursement of its costs plus a percentage of 10 percent. This is in conflict

with the prohibition in the Federal Property and Administrative Services Act of 1949 (63 Stat. 377, par. 304 (1949)), which states: "Sec. 304. (b) The cost-plus-a-percentage-of-cost system of contracting shall not be used * * *." In the implementation of this provision, the Federal Procurement Regulations, 41 CFR 1-3.401(b) (1981) states: "The cost-plus-a-percentage-of-cost system of contracting shall not be used. In furtherance of this policy, all prime contracts (including letter contracts) on other than a firm fixed-price basis, shall be [*sic*] an appropriate clause prohibit cost-plus-a-percentage-of-cost subcontracts." The statutory prohibition of a cost-plus-a-percentage-of-cost system of contracting was deemed to require that subcontracts could not be placed on terms that increased the fee or profit as expenditures increased. The placement of such a contract by CCST to CCRDC (a wholly owned subsidiary) would be a violation of the statutory prohibition, inasmuch as the benefits to CCRDC accrued to the CCST. Had the subcontract from CCST to CCRDC contained the markup modification at the time it was submitted for approval, the contracting officer would have lacked the authority to approve it. Absent any evidence that the markup modification was included with the subcontract at the time of approval, we find that it was not included nor approved by the contracting officer. The addition of the markup modification after June 5, 1978 (modification 3 to prime contract), or after contract expiration on June 30, 1978, did not permit it to become effective and thereby invalidate the entire subcontract.

The record shows that the monies resulting from the CCRDC adding the markup were placed in savings accounts and certificates of deposit. The advance payments clause (300.40) and the method of payment clause (200.13) requires that all funds not used in accordance with the terms of this contract shall be returned to the Bureau of Indian Affairs, and that interest earned on the advanced payments be used in the performance of the contract and to liquidate advance payments. The audit of expenditures under the CCST and CCRDC contracts indicate that the amounts withheld as markup were recorded as costs, and no other audit information shows how the markup monies were expended. Testimony of Messrs. Gravatt and Schneider indicates that the money was used for the purchase of seed, fuel, machinery, and for actual operation of the irrigation system. In his response to the audit report, Mr. Philbrick indicated that the money was transferred from CCRDC's savings account to its checking account. The auditors report being told the money was expended for farm operations. Much of the debate over disallowed costs centered on the position of the Government that the contract purpose to develop an irrigation system did not include the costs of operating the system. The resolution of many of the disallowed costs resulted from com-

promises of this position, *i.e.,* the cost of fertilizer pumps and farming machinery were finally allowed, despite that fact that they were not necessary to the development of an irrigation system. We find nothing in the record that would warrant a further extension of the contract purpose to include the costs of fuel, seed, and farming costs. Therefore, we find that the 10 percent markup was a properly disallowed cost in the amount of $131,569.

(3) Interest clause 300.27 entitled "Interest," provides in pertinent part:

> Notwithstanding any other provision of this contract, unless paid within 30 days, all amounts that become payable by the Contractor to the Government under this contract * * * shall bear interest at the rate determined by the Secretary of the Treasury pursuant to Public Law 92-11, 85 Stat. 97. Amounts shall be due upon the earliest (a) the date fixed pursuant to this contract; (b) the date of the first written demand for payment, consistent with this contract.

We have found that the amount of $48,161.67 of questioned costs was properly disallowed, resulting in an overpayment and refund due the Government. However, since the parties continued to negotiate and to reduce the amount of questioned costs to the time of the hearing, the amount of the refund due the Government could not be certain. By letter dated July 23, 1981, the contracting officer made a written demand on appellant for repayment of an adjusted amount of $48,161.67. Therefore, interest shall accrue on the sum of $48,161.67 at the rates prescribed in the interest clause from the date of appellant's receipt of that demand. The certified receipt bears no date of receipt and we select Aug. 1, 1981, as the date for interest to accrue. *See Hydro Fitting & Manufacturing Corp.,* ASBCA 11768 (Mar. 13, 1970), 70-11 BCA par. 8211.

We have found that the amount of $131,569 of unsupported costs was properly disallowed, resulting in an overpayment and refund due the Government. A bill for collection for that amount was sent to appellant on Jan. 6, 1981. The certified mailing receipt shows that the bill for collection was received by the Superintendent (Bureau of Indian Affairs) for the Crow Creek Agency on Jan. 21, 1981. The date received by the CCST cannot be ascertained with certainty, but the fact of receipt in not disputed. Therefore, we select Feb. 1, 1981, as the date for interest to accrue in accordance with the interest clause of the contract.

We make no finding regarding the interest earned by CCST or CCRDC on monies deposited from advance payments on the contract or the markup withheld by CCRDC. No evidence was presented that would permit a determination of the amount of such earned interest and the contracting officer has made no decision respecting whether such earned interest was properly used in the performance of the contract.

Conclusion and Summary

Having found that appellant received payment of the entire contract amount, and that the amounts of $48,161.67 and $131,569 were properly disallowed costs, we find that appellant owes refunds to the government of $48,161.67 to bear interest from

Aug. 1, 1981, and $131,569 to bear interest from Feb. 1, 1981, with interest to be determined pursuant to P.L. 92-11. 85 Stat. 97.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

APPEAL OF RIVERSIDE GENERAL CONSTRUCTION CO., INC.

IBCA-1603-7-82

Decided *November 12, 1982*

Contract No. M00C14202925, Bureau of Indian Affairs.

Government motion to dismiss denied.

Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Extensions of Time—Rules of Practice: Appeals: Motions—Rules of Practice: Appeals: Timely Filing

A Government motion to dismiss an appeal as untimely filed under the Contract Disputes Act of 1978 is denied where the Board finds that the Act does not deprive the contracting officer of authority he had prior to the passage of the Act to reconsider a final decision after it is issued and prior to the expiration of the appeal period and that the available evidence indicates that the actions of the contracting officer may have contributed to the contractor's failure to initiate an appeal to the Board at an earlier time.

APPEARANCES: Charles E. Barnhart, Attorney at Law, Barnhart & Associates, P.A., Albuquerque, New Mexico, for Appellant; Thomas O'Hare, Department Counsel, Albuquerque, New Mexico, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss the instant appeal on the ground that the appellant had failed to file its notice of appeal within the time prescribed by the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613). In support of its motion, the Government asserts (i) that the appellant was apprised of its appeal rights in the contracting officer's decision of June 19, 1981; (ii) that since the decision was a final decision, the contractor must appeal to preserve its rights; (iii) that no clause in the Contract Disputes Act gives the contracting officer the power to reconsider his final decision; and (iv) that prior to the issuance of the final decision, the contracting officer had advised appellant's counsel that he did not have the power or the right to reconsider his decision.

In the reply to the Government's motion to dismiss the appeal as untimely, appellant's counsel calls attention to the fact that a response to the final decision here in issue had been made by a letter from appellant's counsel under date of July 23, 1981, in which it had been stated: "my clients do not acknowledge any of the offsets which you claim in

your final decision, nor the unit cost which you set forth in Item 4B, nor for any final quantities which your final decision sets forth" (Exh. 2 to Complaint). The reply also calls attention to appellant's counsel's letter to the contracting officer of July 29, 1981, purporting to confirm a conversation between the parties on the previous day in which, according to the letter, the contracting officer was going to "respond in writing as to the possibility of an informal conference and further exchange of information between the parties on this matter and as to the possibility of your reconsideration herein" (Exh. 3 to Complaint).

Asserting that the contracting officer has the power to reconsider a "final decision" and to extend the time for an appeal if he so desires, the reply states that the appellant either perfected its appeal by the letter of July 23, 1981, in which the contracting officer's decision was rejected, or that the time for taking an appeal was extended as a result of the contracting officer agreeing to convene an informal conference and have a further exchange of information. Elaborating upon this view of the matter, the reply to the motion states:

> 7. If the letter to the Contracting Officer over the signature of Brian Willette dated July 29, 1981 (Exibit C to the Complaint) did not accurately reflect the conversation of the parties, and if the Contracting Officer was not going to respond in writing to the possibility of an informal conference and further exchange of information, then the Contracting Officer was under an affirmative duty at that time to correct the impression of counsel for the Appellant. The Contracting Officer does not deny in his Affidavit that he made such verbal agreement, as is reflected by the Appellant's letter of July 29, 1981, but merely recites that he has no recollection of such a conversation.

In the affidavit which accompanied the Government's motion to dismiss, the contracting officer (Mr. Robert L. Garcia) makes the following statements:

> Your affiant has no recollection of any conversation in July of 1981, with appellant's attorneys concerning reconsideration of a final decision. However, your affiant did advise the attorney's [*sic*] for the appellant prior to the issuance of the Final Decision dated June 19, 1981, that final decisions on a contractor's claims could not be reconsidered.
>
> Your affiant is of the opinion and was of the opinion at all times material and relevant to the claim and the Final Decision that final decisions on contractor's claim could not be reconsidered.

Neither counsel has cited any case authority in support of their respective positions. It is clear that prior to the enactment of the Contract Disputes Act, the contracting officer had authority to extend the time for taking an appeal before the appeal time had elapsed, *Refer Construction Co.*, IBCA-209 (Oct. 20, 1960), 67 I.D. 457, 60-2 BCA par. 2831. It is also clear that his authority to settle disputes did not cease when he rendered a final decision. *See Venneri Co.* v. *United States,* 180 Ct. Cl. 920 (1967).

Commenting upon the effect of the passage of the Contract Disputes Act upon former Board practice in *Imperator Carpet & Interiors, Inc.,* GSBCA No. 6167 (July 31, 1981), 81-2 BCA par. 15266 at 75595, the General Service Board stated:

> The Contract Disputes Act of 1978 is largely a statutory restatement of former agency board practice and procedure

under the contractual 'Disputes' clause. * * * That Act, therefore, is to be taken as intended to fit into the existing system and to be given a conforming effect unless a different purpose is plainly shown. *Pacific Far East Line, Inc.* v. *United States,* 211 Ct. Cl. 71, 91, 544 F. 2d 478, 489 (1976).

In accord: *Prime Roofing, Inc.,* ASBCA No. 25836 (Dec. 17, 1981), 82-1 BCA par. 15667 at 77477; *G. A. Western Construction Co.,* IBCA 1550-2-82 (July 1, 1982), 89 I.D. 365, 82-2 BCA par. 15895, n. 13, and accompanying text.

The Department Counsel has not called our attention to any language in the statute or in its legislative history indicating that the Congress intended the contracting officer should have less authority to reconsider a final decision under the Contract Disputes Act than he had to consider a final decision under the Disputes Clause, assuming, in both cases, the timeliness of the appeal. Addressing this question in *Space Age Engineering, Inc.,* ASBCA No. 26028 (Apr. 22, 1982), 82-1 BCA par. 15766 (a Contract Disputes Act case), the Armed Services Board stated at page 78033: "In our judgment the contracting officer not only is permitted to correct an erroneous 'final decision' but has an obligation to do so."

Based upon the authorities cited, the Board finds that the contracting officer did have the authority to reconsider his final decision if he were disposed to do so.

Remaining for consideration is the question of whether and, if so, to what extent the contracting officer may have contributed by his actions or inactions to the contractor's delay in initiating its appeal to this Board. At the outset we note that the question is not what the contracting officer told the appellant's counsel prior to the issuance of the final decision of June 19, 1981, but is rather what he may have caused appellant's counsel to believe after the issuance of that decision.

The record clearly shows that on July 29, 1981, appellant's counsel wrote the contracting officer to confirm a conversation between the parties on the previous day in which the contracting officer is said to have agreed to respond in writing concerning the possibility of an informal conference and further exchange of information between the parties, and also concerning the possibility of reconsideration of his decision. The contracting officer has not denied that he received the letter of July 29, 1981, but he has no recollection of any conversation with appellant's counsel in July of 1981, concerning reconsideration of a final decision. There is no evidence in the record that the contracting officer ever did make a written response to the July 29, 1981, letter. The Board notes that the letter was written to the contracting officer the day after the contracting officer purportedly agreed to respond in writing to the possibility of reconsidering his decision as well as the possibility of an informal conference between the parties and the further exchange of information. Since the July 29, 1981, letter contains a contemporaneous description of a

conversation between the contracting officer and appellant's counsel on the previous day and since the contracting officer has no independent recollection of what occurred in any conversation with appellant's counsel in July concerning reconsideration of the final decision, the Board accepts the July 29, 1981, letter as establishing that a conversation between the contracting officer and appellant's counsel did take place on July 28, 1981, and that the conversation which occurred is as described in the July 29, 1981, letter. So finding, we further find that on July 28, 1981, the contracting officer did hold out the prospect to the appellant's counsel that what was described as a "final decision" would be subject to further discussion and possibly reconsideration.

If the contracting officer was of the view that a final decision on contractor's claims could not be reconsidered, a natural question arises as to (i) why he did not so advise appellant's counsel as soon as the letter of July 29, 1981, was received, or, alternatively, (ii) why he did not promptly process the letter of July 23, 1981, as an appeal since the language employed in the letter indicates that the contractor was contesting specific determinations the contracting office had made in the final decision. The contracting officer failed to take either course of action, however, and the Government has now moved to have the appeal dismissed as untimely.

The Board does not consider that an appeal should be dismissed as untimely where the evidence available indicates that the contracting officer's actions or inactions may have contributed to the delay of the appellant in filing an appeal with this Board. The Government's motion to dismiss the appeal as untimely is therefore denied.

Within 20 days from the date of receipt of this decision, either party desiring an oral hearing shall so advise the Board in writing.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

UNITED STATES *v.* PITTSBURGH PACIFIC CO.

68 IBLA 342

Decided *November 22, 1982*

Interlocutory appeal and cross-appeal from prehearing conference order of Administrative Law Judge John R. Rampton, Jr., limiting issues, assigning burden of proof, and rejecting Government's interrogatories in contest against mineral patent application.

Affirmed in part, reversed in part, and remanded.

1. Mining Claims: Contests—Mining Claims: Determination of Validity—Mining Claims: Patent

An Administrative Law Judge in a mining contest may properly preclude testimony at a hearing on remand on issues of geology, quality, quantity, and continuity of ore, and technology of a proposed beneficiation process where findings on such issues have

been made by the Judge at an earlier hearing and approved by the Board on appeal, and no offer of proof is submitted to the Board that would compel an altered finding.

2. Evidence: Burden of Proof—Mining Claims: Contests—Mining Claims: Determination of Validity

Where the Board remands a Government contest for additional evidence needed to ascertain whether a mineral patent applicant has made a discovery, the burden of establishing a prima facie case is properly assigned to the Government.

3. Administrative Procedure: Administrative Law Judges—Administrative Procedure: Hearings—Mining Claims: Contests—Rules of Practice: Hearings

An Administrative Law Judge has the authority to permit the use of interrogatories and requests for production of documents in a Government mining contest.

APPEARANCES: Charles B. Lennahan, Esq., and Michael J. Gippert, Esq., Denver, Colorado, for the U.S. Forest Service; Roxanne Giedd, Esq., and Curtis G. Wilson, Esq., Pierre, South Dakota, for the State of South Dakota, intervenor; Horace R. Jackson, Esq., Rapid City, South Dakota, for Contestee.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

INTERIOR BOARD OF LAND APPEALS

The U.S. Forest Service (contestant) has taken an interlocutory appeal pursuant to 43 CFR 4.28 from a prehearing conference order by Administrative Law Judge John R. Rampton, Jr. This appeal is joined by the State of South Dakota, intervenor, and the contestee, Pittsburgh Pacific Co. (Pittsburgh), has filed a cross-appeal. The order was issued on Dec. 23, 1980, pursuant to our decision in *United States* v. *Pittsburgh Pacific Co.*, 30 IBLA 388, 84 I.D. 282 (1977), in which we set aside a decision dismissing the Government's contest against Pittsburgh's mining claims and remanded the case for development of further evidence on certain issues. The 3½-year delay between the issuance of our opinion and the Administrative Law Judge's prehearing order was occasioned by the intervenor's unsuccessful attempt to over turn our determination that an environmental impact statement is not necessary in a mineral patent application proceeding. *South Dakota* v. *Andrus*, 614 F.2d 1190 (8th Cir.), *cert. denied*, 449 U.S. 822 (1980).

The contestant and the intervenor have appealed from Judge Rampton's prehearing order because they believe that it improperly limits the issues to be considered in the hearing on remand. They further contend that the Judge has improperly assigned them the burden of making a prima facie case on these issues when they already made a prima facie case against the claims in the earlier hearing. The contestant and intervenor also appeal the Judge's rejection of their interrogatories to the contestee, and his requirement that the Government delineate its new evidence on certain issues. In its cross-

appeal, the contestee challenges the Administrative Law Judge's authority to permit the use of interrogatories by the Government or to order that they be answered.

Before reviewing the particular provisions of Judge Rampton's order, it may be helpful to cite those portions of the Board's opinion that affect the scope of the proceedings on remand. After the previous hearing in this case, Judge Rampton dismissed contest proceedings against Pittsburgh's 12 iron ore lode mining claims located in the Black Hills National Forest, and held that Pittsburgh's mineral patent application for these claims should be granted. On appeal, the Board set aside the decision of Judge Rampton and remanded the case, but also held that Judge Rampton's decision "is well reasoned, and except as modified herein, the findings and conclusions are accepted." *United States* v. *Pittsburgh Pacific Co.*, 30 IBLA at 392, 84 I.D. at 284. The Board explained why further hearing in the case was necessary, as follows:

> While Pittsburgh has submitted considerable evidence which indicates that a discovery has been obtained, there remain factors—some of which may be beyond the control of Pittsburgh—which could stand in the way of a profitable mining operation. After evaluating the evidence, we conclude that substantial questions exist with respect to adequacy and cost of water supply, additional land, financing, labor costs, and expense of compliance with environmental protection laws.

30 IBLA at 393, 84 I.D. at 285. The Board's decision concluded:

> Any formal request to consider new evidence as to ore values, energy availability and costs, environmental matters, or other items of expense should be presented to the Administrative Law Judge for his ruling, prior to the rehearing, in connection with the stipulation at Tr. 865 and the problems discussed in *United States* v. *Estate of Alvis F. Denison*, 76 I.D. 233, 251-54 (1969).
>
> On remand, the Administrative Law Judge will have discretion to entertain any other issues which he deems proper, in order to formulate the required findings and conclusions. [Footnote omitted.]

30 IBLA at 414-15, 84 I.D. at 295.

[1] We will first review Judge Rampton's order concerning the scope of the proceedings on remand. This order precludes the introduction of testimony on (1) the geology of the area on which the contested claims are located; (2) the quality, quantity, and continuity of the iron-bearing material on the claims involved; and (3) the technology of the proposed beneficiation process, including the amenability of the ore to reduction roasting. We agree with Judge Rampton that further testimony on these subjects is unnecessary; the Judge's findings on these subjects have been set forth in detail in his Mar. 12, 1974, decision and subsequently approved by the Board. Although 11 years have now passed since the contest hearing, there is no suggestion in the record that the geology of the area or the quality, quantity, and continuity of the iron-bearing material have changed. The technology of the proposed beneficiation process, if altered at all, has presumably been improved, and hence the Judge's finding that the ore from the claims is amenable to the proposed beneficiation process, including reduction roasting, remains valid.

In affirming Judge Rampton's refusal to allow further evidence on the three aforementioned

issues, we acknowledge the holding of *Ideal Basic Industries, Inc.* v. *Morton,* 542 F. 2d 1364 (9th Cir. 1976), that the Secretary has a continuing jurisdiction of the public lands until a patent issues; neither principles of res judicata nor administrative finality will estop him from correcting or reversing an erroneous decision by his subordinates or predecessors in interest. *Id.* at 1367–68. Had the Forest Service or intervenor submitted on appeal an offer of proof that, if established, would have compelled a reversal of Judge Rampton's findings on any of three aforementioned issues, our decision would be different. The two affidavits submitted by the Forest Service on appeal do not meet this burden.[1] Judge Rampton's refusal to allow testimony on these issues is an exercise of the discretion vested in an Administrative Law Judge to conduct a hearing in an orderly and judicial manner. 43 CFR 4.433. In light of the prior hearing, reflected in 1,200 pages of testimony, and the Board decision approving Judge Rampton's findings, further evidence on these issues is unnecessary.

[2] In Judge Rampton's prehearing conference order, the Forest Service and intervenor were assigned the burden of establishing at a minimum a prima facie case on all issues presented at the hearing on remand. Pittsburgh was assigned the ultimate burden of persuasion by a preponderance of the evidence. In addition to the five issues set forth in the Board's decision at 30 IBLA 393, 84 I.D. 285, *i.e.,* water supply, additional land, financing, labor costs, and environmental costs, the order addressed the possibility that evidence on other issues would be received. The order specified that if the Forest Service or intervenor satisfied the Judge that new facts not then in the record and unavailable at the 1971 hearing or changed economic factors existed, evidence could be received on four additional issues: The economic feasibility of the reduction roasting process; the direct cost of mining and beneficiation of ore;[2] the availability and economic feasibility of transporting the processed ore to market; and the existence of an expanding and viable market for the processed ore.

The Forest Service and the intervenor now appeal that provision of Judge Rampton's order assigning them the responsibility of establishing a prima facie case on all issues on which evidence is presented. They argue that they should not be required to make another prima facie case, having done so at the earlier hearing. They further contend that this Board's decision setting aside Judge Rampton's Mar. 12, 1974, decision indicates that the Board found that Pittsburgh had not overcome the Government's prima facie case. In this they err. If Pittsburgh had not overcome the Government's prima facie case, no further hearing would be re-

[1] We refer specifically to the affidavits of Jack A. Redden and Robert L. Bennett.

[2] Such costs should take into consideration the amount, availability, and cost of electric power and natural gas.

quired; instead, the claims would have been declared null and void. *See United States* v. *Taylor,* 19 IBLA 9, 82 I.D. 68 (1975).

Judge Rampton is correct in assigning to contestee the ultimate burden of persuasion by a preponderance of the evidence for all issues offered into evidence. *United States* v. *Taylor, supra* at 23, 82 I.D. at 73. Further, as to the five issues set forth in the Board's decision at 30 IBLA 393, 84 I.D. at 285, the Judge properly assigned to the Forest Service and intervenor the burden of establishing a prima facie case. *United States* v. *Hooker,* 48 IBLA 22, 27 (1980). Where an application for a patent has been filed, it is essential for this Department to determine whether all the requisites of the law have been met before a patent may issue. If evidence has not been presented on an essential issue, or issues, dismissal of the contest will not fulfill this Department's obligation to act "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." *Cameron* v. *United States,* 252 U.S. 450, 460 (1920). This is why a further hearing has been necessary in this patent proceeding. *United States* v. *Taylor, supra* at 25–26, 82 I.D. at 73–74.

Judge Rampton properly assigned to the Government the burden of establishing a prima facie case on those four additional issues set forth above in the first paragraph under [2], which the Government seeks to reopen.[3] Because these issues deal with factors subject to considerable change over the past 11 years as, *e.g.,* the cost of mining and beneficiation, these issues are properly subject to reopening. *See Ideal Basic Industries, Inc.* v. *Morton, supra.*

[3] The final issue on appeal is whether Judge Rampton properly held that the use of interrogatories and requests for production of documents was authorized in a Government contest proceeding. Having concluded that such use was authorized, Judge Rampton held that the interrogatories and requests for production submitted by the Government were "either immaterial in the light of the rulings made or so broad in scope as to the areas of inquiry on which evidence may be received as to constitute little more than a fishing expedition" (Prehearing Conference Order at 4). Rulings on interrogatories involving new or additional evidence not in the record were withheld pending submissions of more specific allegations by the Government and intervenor. While we agree with Judge Rampton that the use of interrogatories and requests for production is authorized in a Government contest proceeding, we reverse his conclusion that the Government's interrogatories and requests were, as a whole, immaterial and overly broad in scope; we further reverse his decision that rulings on interrogatories involving new or additional evidence not in the record be withheld pending submissions of more

[3] For the sake of clarity, these four issues are repeated: The economic feasibility of the reduction roasting process; the direct cost of mining and beneficiation of the ore; the availability and economic feasibility of transporting the processed ore to market; and the existence of an expanding and viable market for the processed ore.

specific allegations. Our reasons follow.

Judge Rampton thus set forth his authority to permit discovery in Government contests at pages 3–4 of the prehearing conference order:

> In my view, discovery proceedings are one of the necessary aids in the conduct of an orderly and judicious hearing. Proper use of discovery techniques enables the parties to properly present their respective evidence and arguments and ensures against the elements of surprise and consequent delay. Within certain limits imposed by statute or regulation, discovery proceedings are to be encouraged wherever the ends of justice would be served.
>
> I have authority to permit discovery under my "general authority to conduct the hearing in an orderly and judicious manner." 43 CFR 4.433. I can also make orders on such matters as may aid in the disposition of the proceedings. 43 CFR 4.452-1(a).
>
> While I do not have authority to issue subpoenas for discovery purposes under 43 CFR 4.452-4, contestant's interrogatories do not require subpoenas. They elicit information from parties to the proceedings and this form of discovery is distinguishable from depositions and interrogatories requested of persons who are not parties to the proceedings and for which subpoenas might be required.
>
> I also have the power to hold prehearing conferences and obtain among other things, admissions of fact. 43 CFR 4.452-1. This authority can reasonably be construed to authorize interrogatories and documents production in lieu of a prehearing conference where subpoenas are not required.
>
> Rulings of the Interior Board of Land Appeals in the case of *United States* v. *Robinson,* 21 IBLA 363, 388 (1975), are in point and are consistent with the above conclusions.

Contestee argues, however, that the applicable regulations preclude the use of discovery techniques such as interrogatories. Regulation 43 CFR 4.452–4 is cited by contestee as setting forth the authority of the Administrative Law Judge in mining claim contests:

> § 4.452–4 Authority of administrative law judge.
>
> The administrative law judge is vested with general authority to conduct the hearing in an orderly and judicial manner, including authority to subpoena witnesses and to take and cause depositions to be taken for the purpose of taking testimony *but not for discovery* in accordance with the act of January 31, 1903 (43 U.S.C. 102–106), to administer oaths, to call and question witnesses, and to make a decision. The issuance of subpoenas, the attendance of witnesses and the taking of depositions shall be governed by §§ 4.423 and 4.26 * * *. [Italics added.]

Contestee points to the complete absence of statutes or regulations authorizing the use of discovery in Government contests and maintains that 43 CFR 4.452–4 should not be viewed as a limitation on an otherwise unbridled use of discovery. Counsel carefully sets forth the authority of other Boards within the Office of Hearings and Appeals to permit discovery and to order sanctions; citations to the applicable regulations are provided. The express grant of such authority to these Boards, counsel maintains, leaves no room for the inference of similar authority in the Administrative Law Judge.

Use of discovery is uncommon in mining contests and is only infrequently litigated before the Board. In *United States* v. *Robinson,* 21 IBLA 363, 82 I.D. 414 (1975), this Board held that an Administrative Law Judge could properly issue orders providing for discovery in lieu of a prehear-

ing conference. *Robinson* approved the use of interrogatories not requiring the issuance of subpoenas and held that the issuance of orders in furtherance of such interrogatories was within the statutory and regulatory authority of the Administrative Law Judge. The Board acknowledged, however, that an Administrative Law Judge lacked the authority to issue a subpoena *duces tecum* or to issue a subpoena directing the attendance of witnesses at the taking of depositions for purposes of discovery.

Interrogatories were employed and their answers admitted into evidence in *United States* v. *Kaycee Bentonite Corp.*, 64 IBLA 183, 89 I.D. 262 (1982). Use of this discovery tool was unchallenged in *Kaycee* and provided the parties with a useful device to narrow and clarify issues and to ascertain information relevant to the subject matter of complex litigation.

Prior case law of the Federal courts supports Judge Rampton's view that the use of interrogatories and requests for production is authorized in an administrative hearing, despite the absence of express statutory or regulatory authority. In *NLRB* v. *Rex Disposables, Division of DHJ Industries, Inc.*, 494 F.2d 588, 591-92 (5th Cir. 1974), the court held that the National Labor Relations Board (NLRB) should permit discovery when good cause is shown to the Board in order that the rights of all parties may be properly protected. The NLRB has no statute or regulation expressly authorizing discovery. *NLRB* v. *Interboro Contractors, Inc.*, 432 F.2d 854, 858 (2d Cir. 1970); *Electromec Design and Development Co.* v. *NLRB*, 409 F.2d 631, 635 (9th Cir. 1969). Similarly, in *Trojan Freight Lines, Inc.* v. *NLRB*, 356 F.2d 947, 948 (6th Cir. 1966), the court held that the denial of an application to take a deposition for discovery purposes was within the discretion of the NLRB. *See also NLRB* v. *Wichita Television Corp.*, 277 F.2d 579 (10th Cir.), *cert. denied*, 364 U.S. 871 (1960); *NLRB* v. *Gala-Mo Arts, Inc.*, 232 F.2d 102 (8th Cir. 1956). This same policy of entrusting the use of discovery to the discretion of the Administrative Law Judge is found in *Artrip* v. *Califano*, 569 F.2d 1298, 1299 (4th Cir. 1978). There, a claimant for "black lung" benefits was denied his request that interrogatories be submitted to a treating physician. The court set forth its policy toward discovery succinctly: "The Act and regulations providing for the administration of 'black lung' claims do not provide specifically for the granting of interrogatories. Therefore, the determination of when to approve such requests was within the discretion of the Administrative Law Judge, and we perceive no abuse of discretion in his ruling." Judge Bazelon writes in *Smith* v. *Schlesinger*, 513 F.2d 462, 475 n.46 (D.C. Cir. 1975), that Professor Davis' view in favor of discovery in administrative proceedings was followed by the Administrative Conference of the United States and distinguished commentators. Finally, in *McClelland* v. *Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979), the circuit court held that discovery must be granted if in the particular situation a refusal

to do so would so prejudice a party as to deny him due process.

We hold that the above cited case demonstrate that Judge Rampton had ample authority to permit the use of interrogatories and requests for production of documents in the instant case. Because neither the request for answers to interrogatories nor the request for production is backed by the Department's subpoena power, 43 U.S.C. §§ 102–106 (1976), Judge Rampton's sanctions for a party's failure to obey an order compelling discovery may be guided by Rule 37(b)(2)(A)–(C) of the Federal Rules of Civil Procedure.

While we openly acknowledge that the Federal Rules of Civil Procedure are not expressly applicable to administrative hearings, *McClelland* v. *Andrus, supra* at 1285, we believe that the rules and the case law derived therefrom provide helpful guidance in regulating the use of discovery. Rule 26(b) limits the scope of discovery to matters, not privileged, which are relevant to the subject matter involved in the pending action. A very similar rule was before the United States Supreme Court in *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947), occasioning Justice Murphy to remark, "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." (Footnote omitted.) We note that Judge Rampton found the Government interrogatories and requests for production immaterial and so broad in light of his rulings as to constitute little more than a fishing expenditure. We believe the standard applied by Judge Rampton in rejecting the Government's discovery requests was incorrect. While we do not intend to rule on the propriety of each of the Government's requests, we fail to see how its inquiry into contestee's water supply, land availability, financing, labor needs, and environmental costs can be described as immaterial or broad. These are the very issues for which this Board remanded this case for hearing.

Any use of discovery to ascertain the economic feasibility of the reduction roasting process, the direct costs of mining and beneficiation, the availability and economic feasibility of transportation, and the existence of a market for processed ore should precede the submission of more specific allegations on these topics to the Judge. Such discovery should aid the Government's formulation of these allegations. Rulings on any objections to such requests must necessarily precede such submissions, contrary to the prehearing conference order.

We intentionally abstain from ruling on the propriety of any individual interrogatory or request for production. Contestee's objections and Judge Rampton's rulings lack the specificity necessary to make an informed review.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the prehearing order is affirmed in part,

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reversed in part, and the case remanded for further action consistent with this opinion.

ANNE POINDEXTER LEWIS
Administrative Judge

WE CONCUR:

BRUCE R. HARRIS
Administrative Judge

GAIL M. FRAZIER
Administrative Judge

CAPITAL COAL CORP.

4 IBSMA 179

Decided *November 23, 1982*

Appeal by Capital Coal Corp., from the Mar. 16, 1982, decision of Administrative Law Judge Tom M. Allen, finding OSM jurisdiction and thus sustaining the validity of Notice of Violation No. 81-I-25-20 as to violation No. 1 but vacating it as to violation No. 2 (Docket No. CH 1-157-R).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally—Surface Mining Control and Reclamation Act of 1977: Hearings: Generally

Knowledge possessed by an Administrative Law Judge but not appearing of record in the case before the Board is not a sufficient basis for upholding a decision in a formal proceeding under the Administrative Procedure Act.

APPEARANCES: Eugene K. Street, Esq., Street, Street, Street, Scott, and Bowman, Grundy, Virginia, for Capital Coal Corp.; Phillip J. North, Esq., Office of the Field Solicitor, Charleston, West Virginia, John Pendergrass, Esq., and Walton D. Morris, Jr., Esq., Assistant Solicitor for Litigation and Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY
ADMINISTRATIVE JUDGE
PARRETTE

INTERIOR BOARD OF
SURFACE MINING AND
RECLAMATION APPEALS

Capital Coal Corp., (Capital) has appealed from the Mar. 16, 1982, decision of Administrative Law Judge Tom M. Allen, Docket No. CH 1-157-R, holding that the Office of Surface Mining Reclamation and Enforcement (OSM) had jurisdiction under the Surface Mining Control and Reclamation Act of 1977 (the Act), P.L. 95-87, Aug. 3, 1977, 30 U.S.C. §§ 1201-1328 (Supp. IV 1980), and its implementing regulations, 30 CFR Chapter VII (the regulations), to issue Notice of Violation (NOV) No. 81-I-25-20, charging Capital with two violations of the Act. The Administrative Law Judge found the evidence insufficient to hold Capital liable for one of the violations, but affirmed the second violation as validly issued, even though Capital alleged that the total area it had disturbed to facilitate its coal mining activity was less than 2 acres. We reverse the decision of the Administrative Law Judge, for the reasons set forth.

Facts

On July 28, 1981, OSM Inspector Carroll Blevins conducted an inspection of an underground mining site in Steer Hollow of Buchanan County, Virginia. The mine was being operated by Capital under contract with Wellmore Coal Corp. (Wellmore), which held the rights to the mine and purchased all of Capital's output (Tr. 35). As a result of the inspection, Blevins issued NOV No. 81-I-25-20 on July 30, 1981, charging Capital with (1) failure to install adequate sedimentation ponds and other structures to control sedimentation prior to the disturbance of an area by mining activity, in violation of 30 CFR 717.17(a), and with (2) failure to display signs identifying the mine area at all points of access, in violation of 30 CFR 717.12(b).

During the course of the inspection, Blevins was informed by Hank Matney, who identified himself as the owner and operator of Capital, that the area affected by the mining operation did not exceed 2 acres and that it was exempt from the Act (Tr. 15). Blevins therefore visited the engineering department of Wellmore to determine the acreage involved and was told that the site occupied 1.35 acres, excluding the haul road, which Wellmore's engineer assumed had been deeded to Buchanan County (Tr. 17-18).

At the hearing, OSM introduced a copy of the map that accompanied the deed to Buchanan County, which indicated that the area of approximately half of the haul road used by Capital, based upon a 40-foot right-of-way, was 2.94 acres (OSM Exh. 1). Inspector Blevins estimated that the distance from Capital's mine site to Route 656 was in excess of 2 miles (Tr. 22). However, he did not measure it (Tr. 13), and counsel for Capital objected strenuously to the use of any maps accompanying deeds as a basis for determining acreage. The Administrative Law Judge sustained the objection (Tr. 19-29), indicating that he would not accept any evidence as to acreage without a survey (Tr. 28) and that, in any event, he was not concerned with how much acreage was in the road, since he intended to decide the case on the ground that any contract miner doing business with Wellmore was intergrated with it economically (Tr. 29-30). Capital nevertheless subsequently introduced testimony by a certified land surveyor that its site, excluding the haul road, was only 0.768 acres (Tr. 54-55), and that the haul road averaged 16 feet in width (Tr. 57). That evidence was not rebutted by OSM.

The second half of the hearing was devoted mainly to the issue of whether there was an operational integration between Capital and Wellmore, as the Administrative Law Judge had concluded was true between Wellmore and its contract miners in a previous case. However, Capital continued to assert that it was an independent contractor, not accountable to Wellmore except in being required to sell coal to it (Tr. 37-38, 42-44).

In his written opinion, the Administrative Law Judge found that although OSM has failed to establish that the mine exceeded 2 acres, "the testimony was sufficient to subject applicant to the Act because of its being a contract miner with Wellmore Coal Corporation." He went on to say, "The reasoning for this finding has been well substantiated in previous decisions from the undersigned, and it is unnecessary to repeat them again" (Decision at 2). In the absence of any rebuttal by OSM to Capital's testimony that no surface drainage left the disturbed area, and in light of the fact that the area has previously been disturbed but had never had a sedimentation pond (Tr. 58–60), the Administrative Law Judge was unable to find that Capital had failed to install *adequate* sedimentation controls, and he vacated that violation. However, he affirmed the other violation as validly issued (Decision at 3).

Discussion

There is no point in reviewing the Administrative Law Judge's decision with respect to the need for a sedimentation pond since that issue is not before us. As counsel for Capital states in its brief, the primary issue in this case is one of jurisdiction. He notes that OSM was unable to introduce admissible evidence as to the size of the disturbed area; whereas, Capital introduced evidence by a certified surveyor to show that the actual disturbed area was only 0.768 acres. The rest of Capital's brief deals principally with the Administrative Law Judge's contention that the operations of Capital and Wellmore are sufficiently related so that the operations of one must be attributed to the other.

[1] Although it is entirely possible that the Administrative Law Judge had sufficient knowledge, on the basis of general information or evidence presented in other cases, to justify his personal conclusion that the activities of Wellmore's contract miners could not be separated from Wellmore's own activities, the necessary evidence did not find its way into the record before us. All we know from this record about the economic integration of the two companies is that Wellmore had the mineral lease, Capital mined for it under contract, and Capital sold the coal it mined back to Wellmore at a fixed contract price (Tr. 35–39, 42–45). That is not a sufficient basis for upholding an administrative determination of economic integration in a formal proceeding under the Administrative Procedure Act, where the evidence relied upon is required to be of record. 30 U.S.C. § 1275(a)(2) (Supp. IV 1980).

Normally, such substantial procedural errors by the Administrative Law Judge would prompt us to vacate the decision and remand the case for a new hearing. However, we note that the judge who conducted the previous hearing is now retired, that the remedial actions required by the NOV had already been accomplished as of the date of the hearing (Tr. 60, 62), and that no useful purpose would be served by putting the Government and the appellant to the expense of another hearing to present the evidence that should have

been the basis for the decision in the record before us. In such circumstances, fair play requires that the applicant (appellant) be given the benefit of the doubt.

Accordingly, the decision of the Administrative Law Judge sustaining the validity of violation No. 1 of NOV No. 81-I-25-20 is reversed.

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

APPEAL OF TUCKER & ASSOCIATES CONTRACTING, INC.

IBCA-1468-6-81

Decided *November 30, 1982*

Contract No. 14-16-0009-79-631, Fish and Wildlife Service.

Sustained in part.

1. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Drawings and Specifications—Contracts: Construction and Operation: Duty to Inquire

A contractor's claim for the added cost of furnishing concrete bases for lighting fixtures is denied where the contract required the furnishing of an operational lighting system and there were other contract references to requirements for mounting and bases. The omission of the referenced detail for the bases on the applicable drawing was an obvious omission that placed on the contractor a duty to inquire.

2. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Drawings and Specifications—Contracts: Construction and Operation: Duty to Inquire

A claim for added work to create a swale in roadways is allowed where the drawing shows the existing subbase to contain the required swale.

3. Contracts: Performance or Default: Inspection

A claim for the costs of rejected concrete for failure to meet the air content requirement of the contract is sustained where the test instrument indicating nonspecification results was not an approved standard for measurement and testing with an approved instrument was not timely made.

4. Contracts: Performance or Default: Acceptance of Performance

A claim by the Government for a credit due to the deletion of a specification requirement for calcium chloride in a roadway base course is denied where the purported deletion was made by an unauthorized person and the nonspecification base course was accepted by the Government with knowledge of the omission of calcium chloride.

APPEARANCES: Richard M. Sullivan, Esq., Attorney at Law, Carroll, Chauvin, Miller, & Conliffe, Louisville, Kentucky, for the Appellant; Gerald D. O'Nan, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

Appellant was awarded a fixed price construction contract in the amount of $593,671 on Aug. 13, 1979, for the construction of raceways at Wolf Creek National Fish Hatchery at Jamestown, Kentucky. Appellant claims that the contracting officer erred in refusing to allow equitable adjustments claimed for (1) the addition of concrete bases for light standards, (2) removal of crushed stone between the raceways, (3) rejection of concrete, and (4) the deletion of calcium chloride in the base course of dense grade aggregate. The parties have stipulated that appellant should recover the amounts claimed under claims 1, 2, and 3 if the Government is found to be liable. The claims will be considered separately below.

Discussion and Findings

Claim 1—Concrete bases for light standards. Appellant contends that the contract drawings failed to show any concrete bases for the lights, and that in reliance upon the drawing, the bid did not include the cost of concrete bases. The Government required that the bases be furnished and denied appellant's claim for $1,435.14. Appellant urges that the failure to include the detail for the concrete bases on the drawing gives rise to an ambiguity, and that its reasonable interpretation that the bases were not included should be accepted under the rule of contra proferentem. The Government agrees that the drawing omitted the detail for the concrete bases, but claims that the bases were required by the note on the drawing stating: "Mount pole on concrete base—See detail" and by references in the specifications to the inclusion of the mounting devices, method of support, or concrete bases. The Government contends that the obvious omission of a detail on the drawing placed a duty on the bidder to seek clarification, if needed, and that proceeding without seeking clarification was at appellant's risk.

A summary of the work required under the contract is contained in five numbered paragraphs at the beginning of Division 1—General Requirements of the specifications. Paragraph 4 states: "Installation of overhead lighting." Division 16, I *GENERAL* states: "B. Fixtures shall be delivered to the premises complete, including mounting devices and components necessary for the proper installation and operation. C. Complete description of all fixtures, including method of support, name of manufacturer, distribution curves, photometric data and tables of coefficients of utilization shall be submitted for approval." Division 17, MEASUREMENTS AND PAYMENTS, provides as follows:

IV Schedule IV

A. OVERHEAD LIGHTING—Item 1 of the Bidding Schedule IV.

1. Payment will be made at the lump sum price bid therefor in the Bidding Schedule and shall include the cost of all labor, materials, and equipment required to furnish and install, complete and operational, the overhead lighting at the Wolf Creek National Fish Hatchery site.

2. The work shall include concrete bases, anchor bolts, standards, fixtures, excavation and backfill for conduit, conduit, pull boxes, wiring, switches and appurtenant work as shown on the drawings and specified.

Drawing 13 of 13 is entitled "Electrical Plan" and contains the following notation opposite a symbol indicating the various locations on the drawing where lighting fixtures are to be installed: "Pole mounted lighting fixture—GE #C724G53 W/Nema Type III Distribution and 400 W high pressure sodium lamp. Mount on 30' pole w/6' Arm—GE #C690H19X. Mount pole on concrete bases—see detail."

[1] There is no question that the referenced detail of the concrete bases for the lighting standards was omitted from the drawings. However, the specifications make several references to the lighting fixtures being complete with the mounting or the base. The summary of the work specifically requires the installation of overhead lighting. Division 1, paragraph K provides: "The Government will not furnish any materials, supplies or equipment." Appellant's president, Mr. Donnie E. Tucker, admitted in his testimony that the light standards would not stand up without a base (Tr. 42). In view of the various references to the installation of a complete lighting system, and the inclusion of the mounting or base for the light standards, the question unanswered by appellant is how an operational lighting system could be furnished without the concrete bases.

Appellant does not explain how it could fulfill its task of installing an overhead lighting system without providing a base required for erecting the standards. The various references to the mounting or base being included with the fixture and the fact that appellant is specifically advised that the Government is not furnishing any material or supplies indicates that appellant must consider the means of mounting the light fixtures. The omission of the detail for the concrete bases cannot be considered as creating an ambiguity as to whether the bases were required or not. The other references to the overhead lighting and the fixtures are all consistent with the requirement that the bases be furnished by appellant. At most, the omission of the concrete base detail alerts the appellant at the bidding stage that he must inquire as to the specifications for the base to be supplied, not as to whether a base is required. We agree with the Government's reliance on *George E. Newsom, Contractor,* VACAB No. 1500 (June 3, 1980), 80-2 BCA 14,490 for the proposition that the bidder is required to seek clarification where there is an obvious omission of a detail, and proceeding without seeking clarification is at appellant's own risk. We find that the concrete bases were clearly required by the specifications regardless of the obvious omission of the detail drawing.

Claim 2—Removal of crushed rock between the raceways. Appellant contends that sheet 2 of 13 of the contract drawings indicates

that the existing crushed rock base had a 2 inch fall from the edge of the raceway to the center of the road, when, in fact, the existing crushed rock base was level thereby requiring additional removal of rock to bring the grade to its proper level. Appellant claims $2,673.83 for additional work to create the required swale. The Government agrees that no swale was present in the existing actual conditions, but argues that the only reasonable interpretation of the drawing shows the contours across the existing subbase to be flat with the new contours for the finished product showing a swale. The legend on the drawing indicates that hashed lines represent the existing contours, and the Government contends that such hashed lines crossing the roadways between the raceways are basically flat. In testimony, Mr. Tucker agreed that they appeared to be basically flat (Tr. 46, 47). The contracting officer testified that a swale of two-tenths of a foot would be physically visible at the centerline of a 16-foot (Tr. 72). Appellant claims that the contour lines across the roadways could hardly depict a variance of two-tenths of a foot on a drawing of a 16-foot roadway drawn to the scale of 1 inch to 40 foot. Additionally, the detail for the roadway section on the drawing, which the Government argues is representative of the completed work, does show the swale in both the finished paving and base course and in the subbase as well. In the detail, an arrow to the swaled subbase follows the legend: "Existing crushed rock subbase."

[2] Apart from the contracting officer's testimony regarding his observations on a site visit, there is nothing to support the conclusion that the presence of an existing swale would be visible to one viewing the site. There is no evidence that appellant relied on a site visit. He contends that he relied on the plans which show the swale in the existing crushed rock subbase in preparing his bid. Beside the notation of the scale of 1 inch equals 40 feet is a graphic scale with markings from 0 to 120 feet measuring 1 7/16 inch. This would indicate that the depiction of the roadway was actually on a scale of 1 inch equalling more than 80 feet. The 16-foot roadway measures only three-sixteenths of an inch on the drawing. Thus, the two-tenths of 1 foot variation over 16 feet represented by line only three-sixteenths of an inch long would hardly be discernible. We note that the scale for the detail of the roadway section is on a different scale of one-eighth-inch equals 1 foot. In the latter illustration, the actual measurements appear to be to the indicated scale. In view of the inability to show the swale or the lack of it in the contour line only three-sixteenths of an inch long, the only indication on the drawing of the existing condition of the subbase is on the detail which clearly shows the existing subbase to have the swale. We find the drawing was defective in showing the subbase to contain a swale, and appellant was required to do added work to create the swale that did not actually exist.

Claim 3—Rejection of concrete. Appellant was required to place

concrete for the raceway structures pursuant to Section 03300 of the contract, with the concrete having an air content equal to 5 percent, plus or minus 1 percent by volume. Section 01400 of the contract specifications made it the contractor's responsibility to secure the services of an independent testing laboratory to test the concrete. After warning the contractor on several occasions that the concrete was not meeting the air content requirement, the Government warned on May 31, 1980, that the next placement of concrete not meeting the specifications would be rejected. The contractor was advised by the project inspector of the method by which air content would be measured and that he may elect to have someone on site to provide an acceptable test for air content (GX B). The following workday, June 2, 1980, the Government rejected two loads of concrete on the basis of tests of the air content with an alcohol gauge. Appellant claims added costs of $824.

Appellant had no testing personnel on site. However, the concrete supplier came to the site with an approved gauge after the Government test with the alcohol gauge. The Government test of the first truck showed 2.2 percent air content. A second test shortly thereafter read 3.1 percent. The concrete supplier arrived approximately 50 minutes later and his test showed 3.2 percent. On truck number two the Government test read 2.0 percent and a second test read 2.5 percent. The test by the concrete supplier was 3.1 percent. Appellant contends that the concrete was wrongfully rejected according to tests made with an unauthorized gauge. The Government does not dispute that its gauge was not a contractually authorized ASTM testing method, but rather that appellant had adopted its test gauge by failing to have a representative there with a proper gauge. Appellant contends that a testing laboratory advises that the concrete will lose entrained air at a rate of one-half percent per half hour.

The issue here is whether the Government could properly reject the concrete based on measurements with a device not meeting the contract testing requirements. Government Exhibit D is a document on air-entrained concrete by the Portland Cement Association. This document discusses the use of the alcohol gauge to determine the "approximate air content" of the concrete, concluding with the statement:

> The test can be performed in only a few minutes. It may be especially useful in checking air contents in small areas near the surface that may have suffered reductions in air content because of faulty finishing procedure. It is not a substitute, however, for the more accurate pressure and volumetric methods.

[3] The same document recommends acceptance tests for air content "immediately after discharge from the mixer" with either of two ASTM approved tests practical for field testing, *i.e.*, pressure method or volumetric method. The contractor was responsible for securing and placing concrete in compliance with the specifications. However, the

contract did not require appellant to test each truckload of concrete to show compliance. The parties had agreed to use ASTM standard testing methods to determine acceptability of the concrete. The failure of appellant to have an approved gauge at the site did not constitute acceptance of a gauge not meeting this standard. In fact, appellant disputed the readings on the nonapproved gauge by having the concrete supplier test later with an approved gauge. These later tests showed a higher percentage of air content than the alcohol gauge, but less than the specification requirement of 4 to 6 percent. There are no tests according to the manufacturer's recommendation immediately after discharge from the mixer with an approved gauge. Therefore, we cannot presume that a prompt test with an approved gauge would have shown an improper air content. If the Government agrees to a standard for acceptance or rejection, it must subject the supplies to that test before rejecting. *See Weston Instruments, Inc.*, ASBCA 10779 (May 18, 1966) 66-1 BCA 5593. We find that the Government improperly rejected the two truckloads of concrete.

Claim 4—Deletion of Calcium Chloride. Division 2 of the contract, Section 02600-1, I. GENERAL, B. 2, provides the contractor furnish:

> Dense graded aggregate base course (with calcium chloride admixture). The provisions of Section 208.1.0, 208.2.0, and 208.3.0 inclusive of the above-mentioned highway specifications shall pertain to the placement of dense graded aggregate base course and shoulder material as indicated on the drawings. (Note: Sections 208.1.0, 208.2.0 and 208.3.0 refer to the State of Kentucky highway specifications).

By letter dated May 23, 1980, the Chief, Denver Engineering Center, Mr. James Lundeen, confirmed the deletion of the requirement for calcium chloride in the dense-graded aggregate base course, and advised that the cost of this item is considered minor and considered to be a no-cost change without the requirement for a formal change order (AX 20). By letter dated June 5, 1980, Mr. Lundeen confirmed the deletion of the requirement, but asked for a price proposal for the change, stating that 19,800 pounds of the material would have been required for the project. Appellant offered a reduction of $119 by letter dated Dec. 8, 1980, but argued that calcium chloride had not been included in its bid because Kentucky specifications no longer required it and because it had negotiated to its detriment with the asphalt supplier in reliance on the May 23, 1980, letter. No agreement was reached on the amount of the reduction, and the final decision of the contracting officer, Mr. Winston Jacobson (dated May 18, 1981), was that the contract requirement was deleted and that the Government was entitled to a deductive change order in the amount of $1,344.

In a memorandum to the file dated May 18, 1981, concurrent with the final decision, the contracting officer discusses the basis for his decision. He states that the direction to delete the calcium chloride at no cost in the May 23, 1980, letter exceeded the authority of Mr. Lundeen, who was also the contracting officer's authorized representative (COAR). He states that the direction was re-

vised by the COAR's letter of June 5, 1980, affirming the deletion, but asking for a price proposal. He refers to the contractor's awareness of the COAR's authority by reason of acknowledging receipt of the COAR designation letter (AF 1). Both the May 23 and June 5 letters indicate that a copy was sent to the contracting officer. The COAR designation letter is dated Aug. 16, 1979, and states in part: "Approval of monthly payment estimates and changes in the work resulting in adjustments in cost to the Government and/or in contract time is reserved for the Contracting Officer."

[4] The position of the Government that the COAR lacked the authority to issue the May 23 directive deleting calcium chloride must necessarily apply to the June 5 directive. If the deletion were to be made at no change in the contract price, then the May 23 directive would appear to be within the authority of the COAR. However, the June 5 directive is clearly outside the authority of the COAR because it purports to authorize a deletion which would result in an adjustment in cost to the Government. This was a matter expressly reserved for the contracting officer. With knowledge that the work was proceeding without the addition of the calcium chloride to the aggregate base course, there is no indication in the record that the contracting officer took any action to authorize the change until his letter to the appellant dated Mar. 12, 1981, claiming a credit of $1,344 (AF 28). This was over 3 months after the work had been accepted as substantially complete on Nov. 25, 1980 (AF 28). We consider that the contracting officer's action to authorize the deletion and claim a credit came too late. He had already accepted the work with knowledge that it did not comply with the specifications in regard to the omission of calcium chloride from the aggregate base course. Having accepted the work with knowledge of the unauthorized deviation from the specification, the acceptance must be accorded the finality and conclusiveness provided in Clause 10(f) Inspection and Acceptance. We find no merit to the Government's claim for a credit because of the omission of calcium chloride because the unauthorized specification deviation had already been accepted.

Summary

In accordance with the above findings and the stipulated agreement of the parties respecting quantum, we find that appellant is entitled to recover $2,673.83 for added work to create a swale in the roadways and $824 for improperly rejected concrete for a total amount of $3,497.83 plus interest to be computed in accordance with the provisions of the Contract Disputes Act of 1978. Appellant's claim for furnishing concrete bases for lighting fixtures is denied and the Government's claim for a credit for omission of

calcium chloride in the aggregate base course is denied.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

VIRGINIA FUELS, INC.

4 IBSMA 185

Decided *November 30, 1982*

Appeal by Virginia Fuels, Inc., and Mole Coal Co., Inc., from the Mar. 17, 1982, decision of Administrative Law Judge Tom M. Allen, upholding OSM jurisdiction and thus sustaining the validity of Notice of Violation No. 81-I-73-12 and Cessation Order No. 81-I-73-3 as to Virginia Fuels, Inc., but vacating them as to Mole Coal Co., Inc. (Docket Nos. CH 2-21-R and CH 2-33-R).

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

The area of an access and haul road used by more than one coal mine operator is properly attributed, at least in part, to each operator in calculating the extent of the surface area affected by that operator for the purpose of determining whether the operator qualifies for the 2-acre exemption of sec. 528(2) of the Act and 30 CFR 700.11(b).

2. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally—Surface Mining Control and Reclamation Act of 1977: Roads: Generally

A road used in surface coal mining and reclamation operations is subject to regulation by OSM, unless it is shown to be maintained with public funds.

APPEARANCES: Dennis E. Jones, Esq., Jones and Godfrey, Lebanon, Virginia, for Mole Coal Co., Inc., and Virginia Fuels, Inc.; Mimi Methvin, Esq., Office of the Field Solicitor, Charleston, West Virginia, John Pendergrass, Esq., and Walton D. Morris, Jr., Esq., Assistant Solicitor for Litigation and Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Virginia Fuels, Inc. (VFI), and Mole Coal Co., Inc. (Mole), have appealed from the Mar. 17, 1982, decision of Administrative Law Judge Tom M. Allen, Docket Nos. CH 2-21-R and CH 2-33-R, in which he held that the Office of Surface Mining Reclamation and Enforcement (OSM) had jurisdiction under the Surface Mining Control and Reclamation Act of 1977 (the Act), P.L. 95-87 (Aug. 3, 1977), 30 U.S.C. §§ 1201-1328 (Supp. IV 1980), and its implementing regulations, 30 CFR Chapter VII (the regulations), to issue Notice of Violation (NOV) No. 81-I-73-12 and Cessation Order (CO) No. 81-I-73-3, charging VFI with three violations of the Act and with failure to abate one of the violations. Judge Allen found the evidence insufficient to hold Mole liable for the violations,

but (for reasons that are unclear) both companies appealed,[1] essentially on the gound that the total area they had disturbed to facilitate their coal mining activities was less than 2 acres. We affirm the decision of the Administrative Law Judge, as hereinafter modified.

Facts

On Sept. 28, 1981, OSM Inspector Bill Arnett conducted an inspection of an underground mining site on Big Log Branch of Poplar Creek, off Route 604, in Buchanan County, Virginia. The mine was being operated by Mole, apparently as a contract operator for VFI, which held the rights to the mine and had done the faceup for it (Tr. 6-7, 25-26, 63). Upon completion of the inspection, Arnett issued NOV No. 81-I-73-12 to both Mole and VFI because each company had referred his questions regarding the mining operation to the other company (*Id.*). The NOV charged three separate violations of the Act; namely, (1) placing material on the downslope, in violation of 30 CFR 717.14(c), (2) failing to pass surface drainage through a sedimentation pond or a series of sedimentation ponds, in violation of 30 CFR 717.17(a), and (3) failing to maintain the access and haul roads adequately, in violation of 30 CFR 717.17(j)(3). Nov. 6, 1981, was set as the abatement date.

When Inspector Arnett returned to the site on Nov. 6, he found that VFI had done the necessary initial work on the haul road and on the sedimentation pond but that it did not intend to take any corrective action with respect to violation 1, dealing with the placement of waste material on the downslope. Therefore, on Nov. 9, Arnett issued CO No. 81-I-73-3, which directed compliance with the NOV in the most expeditious manner physically possible (Tr. 20-25). VFI filed an application for review of the NOV on the same date, pursuant to sec. 525 of the Act (30 U.S.C. § 1275 (Supp. IV 1980)); and on Dec. 4 it filed an application for review of the CO. As of the date of the hearing, Jan. 25, 1982, the CO had not been terminated, nor had violation 3 of the NOV (Tr. 25).

At the hearing, VFI's witness testified that the mining site, as described in its permit, consisted of only 1.12 acres (Tr. 57), and that the haul road used exclusively by Mole and VFI consisted of only 0.82 acres (Tr. 50), for a total of less than 2 acres. OSM's witnesses testified, however, that they estimated the disturbed area of the site to be 1.23 acres (Tr. 38) and the exclusive portion of the haul road to consist of 1.33 acres (Tr. 129), for a total in excess of 2 acres. They also estimated the nonexclusive portion of the haul road used by Mole and VFI to encompass 0.25 acres, excluding the portion previously deeded to Buchanan County, for an aggregate haul road total of 1.58 acres (Tr. 130) and a total disturbed area of 2.81 acres.

[1] OSM did not appeal Judge Allen's decision vacating the NOV and CO as to Mole; thus, the only real issue before the Board is OSM jurisdiction over VFI.

The record also contains testimony to the effect that VFI carried on other mining operations in the county (Tr. 76) and that certain of its officers and directors were also owners or officers of other corporations (Mattie D Coal Co. and Kimberly Sue Coal Co.) that were conducting mining operations along the same haul road (Tr. 117–22). Therefore, the Administrative Law Judge did not attempt to resolve the discrepancy in the evidence as to the amount of acreage but, rather, based his decision upon the "substantial integration" of these four companies (including Mole) which thus nullified any claim they might have to the 2-acre exemption provided by sec. 528(2) of the Act and sec. 700.11(b) of the regulations.

Discussion

[1] As we recently concluded in the similar case of *Rhonda Coal Co.*, 4 IBSMA 124, 89 I.D. 460 (1982), involving the same 2-acre exemption arguments by the same counsel, there is no need to rely upon a theory of economic integration in situations where the area physically disturbed by an ongoing coal mining operation, including haul roads, actually exceeds 2 acres. Where an access and haul road is used by more than one operator, it is properly attributed, at least in part, to each operator in calculating the extent of the surface area affected by that operator for the purpose of determining whether the operator qualifies for the 2-acre exemption.

In the case before us, even using the smallest estimates (provided by its own witness), VFI's site consisted of 1.12 acres plus an exclusively used haul road of 0.82 acres, for a total of 1.94 acres. To that total must be added some portion of the common haul road used by both VFI/Mole and Kimberly Coal, estimated by OSM to consist of 0.25 acres. Even attributing only one-half of that additional acreage to VFI (since it is clear that for the purposes of this violation, VFI and Mole are the same entity), we conclude that the additional 0.125 acres is sufficient to bring VFI's operation over the 2-acre limit of the statutory exemption. Therefore, we affirm the decision of the Administrative Law Judge, relying not on the companies' alleged economic integration but, rather, on VFI/Mole's admitted use of the haul road, which, when combined with the acreage admittedly disturbed at the mining site, exceeded 2 acres.

The Administrative Law Judge in this case, for reasons that are not clear to us, made a major procedural point of excluding certain rebuttal evidence offered by OSM's counsel as to VFI's implied [2] 2-acre exemption claim. We think he was incorrect in doing so, since to the extent that VFI actually raised the 2-acre exemption defense, OSM was certainly entitled to rebut that defense with whatever evidence was appropriate. Despite these exclusions, however, there is sufficient evidence in the record to make clear that the OSM had jurisdiction over the

[2] As counsel for OSM points out, VFI neither moved for dismissal on the basis of the 2-acre exemption nor explicitly claimed such an exemption in its testimony. However, Judge Allen treated the case as if it were being defended on the basis of a 2-acre exemption claim (Tr. 31–32), and counsel for appellant so argued on appeal.

site and that the NOV was properly issued.

[2] In any event, as we have said previously, exemption from the Act is a matter of affirmative defense. *Daniel Brothers Coal Co.*, 2 IBSMA 45, 87 I.D. 138 (1980). We do not find that VFI sustained such a defense on the basis of any clear evidence in the record. On the contrary, what is clear is that the VFI/Mole operation made use of another portion of the same haul road, namely, that portion lying between Route 604 and the 0.25-acre segment referred to by OSM, which had previously been deeded to the County. Thus, appellants might also have been charged with the use of the additional segment in connection with their coal mining operation unless they established that it was maintained by the county and not by them. *Fetterolf Mining Sales, Inc.*, 4 IBSMA 29 (1982). As we said in that case, a road used in surface coal mining and reclamation operations is subject to regulation by OSM, unless it is shown to be maintained with public funds. Appellants made no such showing in this case.

Accordingly, the decision of the Administrative Law Judge is affirmed as modified.

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

ROBERT BURNETTE v. DEPUTY ASSISTANT SECRETARY—INDIAN AFFAIRS (OPERATIONS)*

10 IBIA 464

Issued *November 16, 1982*

Board of Indian Appeals: Generally

On Nov. 16, 1982, the Board of Indian Appeals entered an order in *Burnette* v. *Deputy Assistant Secretary—Indian Affairs (Operations),* 10 IBIA 464, dismissing the appeal on grounds of mootness. Although it is not a normal practice of Departmental appeals boards to publish in the I.D.'s any matter which is not a full opinion complete with headnotes, the *Burnette* order is included for publication because it disapproves, in part, a previous decision of the Board of Indian Appeals in *Roger St. Pierre* v. *Commissioner,* 9 IBIA 203, 89 I.D. 132 (1982).

ORDER

On May 3, 1982, Deputy Assistant Secretary—Indian Affairs (Operations), John W. Fritz, rejected an appeal by Robert Burnette seeking the reinstatement of tribal court judge Trudell H. Guerue, Jr., and the disapproval of Rosebud Sioux tribal council resolution No. 81-120 dated Dec. 21, 1981, which accomplished the judge's suspension. The decision of May 3, 1982, was based upon the Deputy Assistant Secretary's interpretation of the Rosebud Sioux tribal constitution, a Rosebud Sioux election ordinance and prior Departmental precedent. Not in the record before the Deputy Assistant Secretary at the time of his decision was the fact, now established upon appeal to this Board, that the suspension of the tribal judge was vacated 4 days before the Departmental decision. It appears that the judge has been, for some time, fully restored to office. Based upon this uncontested fact, counsel for appellee, Bureau of Indian Affairs (BIA), moved to dismiss this matter because it had become moot.

Despite the restoration of the tribal judge, however, appellant contends his appeal is not moot. He alleges that the suspension of the judge had resulted in the completion of an election which would otherwise not have been held because of an injunction proposed by the judge. According to appellant, the election of an unqualified tribal council had resulted, which required BIA intervention to correct. Appellant contends this Board has the authority and obligation to review these allegations now stated by appellant for the first time on appeal because the acts complained of are violations of the United States Constitution and laws and also violate the Rosebud Sioux constitution and laws.

Briefs were requested from both parties despite the apparently well taken motion by appellee for dismissal, in order to clarify the record concerning the basis claimed by appellant for continued jurisdiction over this matter by the Board.[1] The submissions by

*Not in chronological order.

[1] Although not raised by appellant, the Board was concerned that this appeal, seemingly not meritorious on its face, might be the result of prior Board precedent supplied by the decision in *Roger St. Pierre* v. *Commissioner,* 9 IBIA 203, 89 I.D. 132 (1982). *St. Pierre* contained language which might be misconstrued to support a general

Continued

the parties make plain that the matter appealed to this Board, in fact, concerned only the question of the legal propriety of the suspension of the tribal judge. The relief sought from the Deputy Assistant Secretary was the reinstatement of the judge. That relief has been obtained. The BIA decision appealed from can, therefore, no longer be considered the basis for any relief claimed by appellant. *See* 25 CFR 2.1; 43 CFR 4.331. The motion by appellee to dismiss for mootness should be granted. *DeFunis* v. *Odegaard,* 416 U.S. 312, 317 (1974). Accordingly, upon consideration of the entire record on appeal, the motion to dismiss is reconsidered by the Board sua sponte and is granted.

This decision is final for the Department.

FRANKLIN D. ARNESS
Administrative Judge

WM. PHILIP HORTON
Chief Administrative Judge

JERRY MUSKRAT
Administrative Judge

RAILROAD AFFILIATES AND COAL LEASING

M-36945

December 6, 1982

Coal Leases and Permits: Leases—Mineral Leasing Act: Generally—Statutory Construction: Legislative History

The position that only companies actually operating common carrier railroads and their "alter egos" are prohibited from holding federal coal leases by sec. 2(c) of the Mineral Lands Leasing Act and the position that affiliates of such companies are also prohibited are both reasonable, judicially defensible constructions of an ambiguous provision of law. The legislative history of sec. 2(c) fails to answer clearly the question whether affiliates of railroad companies are included in or excluded from the coverage of sec. 2(c).

Statutory Construction: Generally

When a statute analogous in text and history to one administered by the Department has been construed by the Supreme Court, but that Court has criticized its own construction even while failing to overrule it, the Department can regard the construction of the statute it administers as a matter not governed by the precedent on the otherwise analogous statute.

Administrative Authority: Generally—Administrative Procedure:

investigation into tribal internal affairs by BIA such as was here sought by appellant. This concern prompted the Board to reconsider whether in announcing the holding in *St. Pierre* it had announced a policy for the Department in excess of its authority as delegated by the Secretary of the Interior at 43 CFR 4.1, to decide legal questions involving Indian affairs for the Department. In *St. Pierre,* the Board found that the Indian Reorganization Act of 1934 establishes a specific trust responsibility on the part of the United States with regard to tribal governments organized in accordance with its provisions. 89 I.D. at 146. This central thesis of *St. Pierre,* which was predicated on interpretations of the legislative history of the Indian Reorganization Act, had not been previously articulated by a court of this Department. It is now recognized by the Board that the trust proposition set forth in *St. Pierre* reflects the development of policy. Policymaking is properly reserved to the Assistant Secretary for Indian Affairs. The authority of this Board is limited by regulation to the decision of legal questions for the Department, as was correctly observed in the *St. Pierre* opinion by the analysis appearing at 89 I.D. 139. The holding in *St. Pierre* that the IRA bestows a trust responsibility on the Secretary must, therefore, be disapproved as an impermissible policy pronouncement by the Board and will not be followed in this or future Board decisions unless otherwise established as Departmental policy through appropriate means.

Generally—Coal Leases and Permits: Generally—Mineral Act: Generally

When the Secretary changes his construction of an ambiguous statutory provision for reasons of policy and law, the new construction operates prospectively only, and does not operate to invalidate actions (issuance of leases and approval of lease transfers) previously taken.

Safarik v. *Udall,* 304 F. 2d 944 (D.C. Cir. 1962), applied; *Enfield* v. *Kleppe,* 566 F. 2d 1139 (10th Cir. 1977), distinguished.

OPINION BY SOLICITOR COLDIRON

OFFICE OF THE SOLICITOR

MEMORANDUM
TO: SECRETARY
FROM: SOLICITOR
SUBJECT: RAILROAD AFFILIATES AND COAL LEASING

INTRODUCTION

Recent increases in coal leasing activities by the Department require a critical reexamination of section 2(c) of the Mineral Lands Leasing Act, 30 U.S.C. § 202(c) and the conflicting positions adopted by this Department and the Antitrust Division of the Justice Department. For the reasons set forth below, I conclude that both interpretations of this ambiguous provision are lawful and judicially defensible, and the Secretary has the authority to change his interpretation prospectively. Further, I recommend that this Department abandon the alter ego test previously adhered to, and maintain that section 2(c) prohibits certain railroad affiliates from holding federal coal leases.

BACKGROUND

Section 2(c) of the Mineral Lands Leasing Act (Leasing Act), 30 U.S.C. § 202,[1] provides in relevant part:

> No company or corporation operating a common-carrier railroad shall be given or hold a permit or lease under the provisions of this Act for any coal deposits except for its own use for railroad purposes; [with express limitations for acreage holdings for coal leases used for railroad purposes].

This provision was interpreted in a Solicitor's opinion dated May 18, 1976, captioned "Colowyo Coal Project." The Solicitor advised the Under Secretary that this provision was narrow in scope, and the prohibition applied only to companies "operating" a railroad. He concluded that the prohibition applied to a corporate affiliate of the company operating a railroad only when the affiliate was the "alter ego" of the operating company. The Solicitor concluded that the Colowyo Coal Company could hold a federal lease, because it was not an "alter ego" of the Escanaba and Lake Superior Railroad, a subsidiary of a subsidiary of the parent of one of the two companies in the Colowyo partnership.

The "Colowyo Coal Project" opinion reached two major conclusions. First, it concluded that the legislative history of section 2(c) showed the intent of Congress to limit its scope to companies operating railroads, and to exclude affiliates from its coverage. Second, he concluded that section 2(c) was

[1] As enacted, the provision at issue was a proviso within section 2 of the Leasing Act, 30 U.S.C. § 201. 41 Stat. 438. It was labeled section 2(c) of the Leasing Act by section 1 of the Act of June 3, 1948, 58 Stat. 275, which did not amend the substance of the provision.

in drafting and history, and therefore in interpretation, identical to the Commodities Clause of the Hepburn Act, 49 U.S.C. § 1(8), which the Supreme Court had construed not to prohibit railroads from transporting their corporate affiliates' goods. *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366, 414–15 (1909). In 1979, the Associate Solicitor, Energy and Resources, agreed with the "Colowyo Coal Project" opinion, emphasizing the first of these two conclusions. Memorandum of January 4, 1979, to Assistant Secretary, Land and Water Resources, "Section 2(c) of the Mineral Lands Leasing Act, 30 U.S.C. § 202."

On April 25, 1980, the Antitrust Division of the Justice Department issued a "Memorandum Concerning Section 2(c)" (Antitrust Division Memorandum), which was sent to Interior by the Assistant Attorney General on May 5, 1980, and the substance of which was included in the Justice Department's annual report to Congress for FY 1979, "Competition in the Coal Industry" 81–88 (November 1980), under section 8 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 208–2 (1976). In this memorandum, the Antitrust Division disagreed with both of the conclusions of the May 18, 1976, "Colowyo Coal Project" opinion. The Antitrust Division rejected the first of the Solicitor's conclusions by emphasizing early congressional debates on railroad participation in the federal coal leasing system. These debates establish the theme that Congress intended to separate the transportation of coal from its production. *E.g.*, 51 Cong. Rec. 15180–83 (1914). It is in light of this history that the Antitrust Division construed the debate on the adopted provision, reaching the conclusion Congress intended to prohibit railroad affiliates, as well as companies operating railroads, from holding federal coal leases. With respect to the second of the Interior conclusions, the Antitrust Division concluded that the Commodities Clause cases "are not a persuasive basis for intepreting 2(c). The rationale of *Delaware & Hudson* has been thoroughly discredited by more recent Supreme Court decisions." Antitrust Division Memorandum at p. 19.

No further Interior Department opinions followed that 1980 Antitrust Division memorandum (see letter of January 16, 1981, from Solicitor Martz to Assistant Attorney General Litvack, Antitrust Division), chiefly because the Justice Department's November 1980 report to Congress advocated the repeal of section 2(c) as an anachronism no longer necessary to prevent anti-competitive practices. Both the Interior and Justice Departments endorsed the repeal of section 2(c) in the 97th Congress. See letter of January 5, 1982, from Assistant Secretary Carruthers to Senator McClure on S. 1542. In the absence of Congressional action, however, the continued, adverse intrusion of section 2(c) into the conduct of the federal coal leasing program, and into the promotion of development of federal coal found in mixed ownership with the land grant railroads, has warranted re-examination of these issues.

THE AMBIGUITIES IN SECTION 2(c)

Both of the issues on which Interior and Antitrust Division have opined are issues which have more than one reaonable interpretation. Both Departments' view of each issue is reasonable, as the Antitrust Division recognized (Antitrust Division Memorandum at p. 3). Both views can be inferred from the literal words of the statute and the context in which they are used, and neither is repudiated by contemporaneous agency construction or authoritative judicial interpretation. "[W]hile the clear meaning of statutory language is not to be ignored, 'words are inexact tools at best,' *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479 (1943), and hence it is essential that we place the words of a statute in their proper context by resort to the legislative history." *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 157 (1972). We examine first the history of the adoption of section 2(c) in the Leasing Act.

A. *Congressional intent and the legislative history.* Various bills to enact a mineral leasing law were introduced into Congress before passage of the Leasing Act in 1920. In 1914 Congress considered versions of what was to become the section 2(c) prohibition against railroad leasing which contained the sentence, "The term 'railroad' or 'common carrier' as used in this act shall include any *company or corporation owning or operating* a railroad, whether under a contract, agreement, or lease, and *any company or corporation subsidiary or auxiliary thereto,* whether directly or indirectly connected with such railroad or common-carrier." 51 Cong. Rec. 15177 (1914) (italics added). In 1919 Senator Smoot had introduced a bill, S. 1269, that contained a similar, broadly-stated prohibition. When this bill was reported out of the Senate Committee on Public Lands as S. 2775, it contained the prohibition against railroad which in substantial part was enacted in the Leasing Act. During the Senate debate on S. 2775, Senator LaFollette introduced an amendment to broaden the prohibition, although its phrasing differed substantially from that quoted above. 58 Cong. Rec. 4591 (1919). To explain why the broader prohibition was no longer in S. 2775, and to oppose Senator LaFollette's amendment, Senator Smoot quoted from a letter that Gifford Pinchot, then President of the National Conservation Association, wrote regarding S. 1269 as it stood in committee. Senator Smoot explained that the broader definition of railroad (for both prohibition and relief purposes) was changed by the Committee in response to Mr. Pinchot's argument, "It is evident that if the relief is given fairly and squarely to common carrier railroads, the full purpose of the Act will be accomplished; and if an attempt is made to do more, we cannot foresee the consequences." 58 Cong. Rec. 4591 (1919). This argument is Delphic, and divergent interpretations of this letter have in part resulted in

the divergent interpretations of section 2(c).

In 1980, the Antitrust Division concluded that Cognress, in adopting Mr. Pinchot's language, sought to limit the ability of a railroad affiliate to hold under section 2(c) "for its own use", without implying that railroad affiliates were exempt from the leasing prohibition. In its 1976 and 1979 opinions, Interior concluded that Congress, in adopting Mr. Pinchot's language, sought to exclude railroad affiliates from section 2(c) entirely, and thus make them subject to the limitations of section 27 of the Leasing Act, 41 Stat. 448, which then limited any corporation *and its affiliates* to one federal coal lease of 2,560 acres per state. Here, both agencies correctly focused on the relief given to railroads by section 2(c), to hold leases to supply coal for locomotive uses. In interpreting the substitute, however, the Antitrust Division focused on the primary Congressional purpose, separation of mining and transportation, while Interior focused on the interrelation of section 2(c) with section 27 of the Act, which then provided strict "anti-monopoly" acreage holding limits on federal leases for coal and other minerals.

The Antitrust Division examined the changes made in the wording of the bill that was introduced and concluded the changes further restricted leasing of federal coal to railroads. Antitrust Division Memorandum at p.10. Interior considered those changes to be cosmetic once affiliates were excluded from the scope of section 2(c).[2] Interior regarded the crucial changes to be the amendments to section 27 (which to it governed rail affiliates after the Pinchot substitute was adopted) in 1948, 1958 and 1964, when Congress increased the coal acreage and lease holding limits that Mr. Pinchot ostensibly wanted to apply to affiliates instead of the relief of section 2(c).[3] In rebuttal to Interior's reliance on the import of section 27, the Antitrust Division points out that the relationship was never expressed in the debates.

Which of these two views Mr. Pinchot intended when he wrote the Delphic lines quoted above is unknown. In fact, that there were "two views" how the revised provision should be interpreted may never have occurred to the debaters, since the precise means by which Mr. Pinchot's formulation assured that railroad affiliates could not benefit from section 2(c)'s "relief" provision was irrelevant until after 1948, as the acreage limits in section 27 of the Leasing Act were changed. Only then did the question of whether affiliates had been excluded from the operation of section 2(c) take on significance.

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[2] The Antitrust Division regards this as an implicit conclusion by Interior that Congress inadvertently narrowed the prohibition. Antitrust Division Memorandum at p. 13. To Interior, the conclusion was express and the Congress acted knowingly, in the sense that the Committee understood that the scope of the relief as well as the prohibition in section 2(c) was narrowed by the deletion of any express reference to railroad affiliates.

[3] Act of June 3, 1948, sec. 6, 62 Stat. 291; Act of Aug. 21, 1958, 72 Stat. 688; Act of Aug. 31, 1964, 78 Stat. 710. The holding of leases by railroads for railroad purposes "used up" the acreage allowed to railroad affiliates, because of section 27's attribution of a lessee's holding to all of the lessee's affiliates. 41 Stat. 448. As these acreage limits were raised, railroad affiliates became eligible to hold acreage above and beyond the acreage held by the railroad for railroad use, but charged under section 27 to the affiliate. See 30 U.S.C. § 184(a), as amended.

The context in which the debate occurred further obscures the matter, and bolsters the conclusion that there is no definitive and unambiguous interpretation. Senator Smoot convinced Senator LaFollette to withdraw his amendment, and thus no vote ever occurred that clearly repudiated inclusion of auxiliaries and affiliates in section 2(c). He persuaded Senator LaFollette largely by offering, and getting passed, a further restriction on the relief accorded companies operating common carrier railroads, namely, the restriction to holding one lease per 200 miles of tract. The quoting of the Pinchot letter, see 58 Cong. Rec. 4591–92 (1919), resulted only in an hour long speech by Senator LaFollette. In this context, no solid inference about Congressional intent on the meaning of Mr. Pinchot's amendment may be drawn. The only conclusion that can be drawn, with caution, is that Congress narrowed the relief given by section 2(c) in the several amendments the Senate made in 1919. Again, this does not provide any instant answer for the question of the treatment of entities not expressly covered by the words of section 2(c).

On this issue, the Antitrust Division concluded, applying a "plain meaning" test, that section 2(c) "would seem to" prohibit railroad affiliates from holding federal coal leases. Antitrust Division Memorandum, Executive Summary at p. 1. In his May 18, 1976, opinion on the Colowyo coal project, the Solicitor found section 2(c) inapplicable where there was at best a remote connection between the railroad company and the coal lessee. In the Colowyo case, the lessee was a partnership of two corporations. One partner was a wholly-owned subsidiary of Hanna Mining Company of Cleveland (Hanna). Hanna owned a different subsidiary corporation which in turn owned all the stock in the Escanaba and Lake Superior Railroad. The 1976 "Colowyo" opinion reached a common sense conclusion that Colowyo itself did not, by any stretch, operate a common carrier railroad, and thus that no "plain meaning" rule would disqualify Colowyo Coal Company from holding a federal lease.

At the same time, however, the contemporaneous history of congressional opposition to mixing transportation and mining of federal coal argues against Interior's "plain meaning" interpretation that *no* corporate affiliate is subject to the prohibition unless it is the "alter ego" of a company operating a common carrier railroad. In fact, the Department's administration of section 2(c) supports no "plain meaning" view at all. The earlier Interior Department decision under section 2(c), *Sheridan-Wyoming Coal Co.*, A-24158 (October 11, 1945), was distinguished in the 1976 "Colowyo Coal Project" opinion. Under analysis, however, its impact on interpreting section 2(c) is to support the conclusion that the provision is ambiguous. The October 1945, decision dismissed a motion for rehearing of a May 21, 1945, Departmental

order that a lessee (Sheridan Wyoming) show that its parent companies were no longer affiliated with a railroad. The May 21, 1945, order appears to have been Interior action consistent with the Antitrust Division's current position, although it was rendered moot (and arguably without precedential value) by stock transactions not directly occasioned by the Department's order. In any event, *Sheridan-Wyoming* was *not* relied on in the "Colowyo Coal Project" opinion as the authority for the "alter ego" test. The basis for that test was the Commodities Clause. 1976 Colowyo Opinion at p. 7.

B. *The Commodities Clause.* With respect to the Commodities Clause issue, Interior in 1976 relied on the fact that when section 2(c) was enacted, *United States* v. *Delaware & Hudson Co., supra,* was neither old nor stale, and stood for the proposition that "stock ownership by a railroad company in a *bona fide* corporation, irrespective of the extent of such ownership, did not preclude a rail company from transporting the commodities . . .." 213 U.S. 366, 414-15 (1909). Further, the Commodities Clause was to Interior broader than section 2(c) (as revised at the suggestion of Mr. Pinchot), in that the former prohibited a railroad from transporting any commodity "which it may own in whole or in part, or in which it may have an interest, direct or indirect . . .." 49 U.S.C. § 1(8). Thus if the Commodities Clause did not apply to rail affiliates, *a fortiori* section 2(c) did not. Finally, Interior relied on the fact that Congress, in its deliberations on the Commodities Clause, rejected an amendment expressly covering railroad affiliates, history that the debate on section 2(c) seemed to imitate, and the Supreme Court in *Delaware & Hudson* had relied on this legislative history. "Colowyo Coal Project" opinion at p. 7.

For its part, the Antitrust Division maintained that the Commodities Clause is a dangerous analogy to use when construing section 2(c). First, it cited the commentators and later Supreme Court Justices who argued that *Delaware & Hudson* was wrongly decided, even while extending its shadow, "It is enough to say that if the Elgin [4] case was before us as a case of first impression, its doctrine might not now be approved. But we do not write with a clean slate." *United States* v. *South Buffalo R. Co.,* 333 U.S. 771, 774 (1948). With the *Delaware & Hudson* construction of the Commodities Clause so discredited, the Antitrust Division concluded, it would not be applied by analogy by any court construing section 2(c).

Second, the Antitrust Division pointed out that the Supreme Court was concerned in *Delaware & Hudson* that broad construction of the Commodities Clause would generate constitutional issues on the scope of the Commerce Clause which at the time were critical. 213 U.S. 366, 410 (1909). Aside from further support for the idea the *Delaware & Hudson* case is a derelict on the sea of the law, now that the Commerce Clause has been much more broadly con-

[4] *United States v. Elgin, J. & E. Ry.,* 298 U.S. 492 (1936), followed *Delaware & Hudson* while criticizing its holding.

strued, this makes these cases inapplicable to section 2(c). Commerce clause problems aside, however, section 2(c) is firmly grounded in the Property Clause (Art. IV, § 3, cl. 2) of the Constitution, and suffers no infirmities if it is construed to prohibit railroad affiliates from holding federal coal leases. See *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 474 (1915); *United States* v. *Gratiot*, 39 U.S. (14 Pet.) 526, 538 (1840); see also *Kleppe* v. *New Mexico*, 426 U.S 529 (1976).

In short, the Antitrust Division analysis casts reasonable doubt on the proposition that the Commodities Clause precedent would be applied judicially to support the "alter ego" test established in the 1976 and 1979 Interior opinions. It is, however, overly broad to say that a "review of major cases construing the Commodities Clause shows that they provide *no* foundation for interpreting section 2(c) to allow leasing to railroad affiliates." Antitrust Division Memorandum at p. 23 (italics added). Certainly the first Supreme Court cases were the only law available to the Congress that considered and enacted section 2(c) on the consequences of Congress not clearly listing corporate affiliates in a statutory prohibition.[5]

It is reasonable, however, to conclude that the Commodities Clause cases are dubious precedent and would be unlikely to compel any reviewing court to adopt a narrow reading of the prohibition in section 2(c). Under these circumstances, any judicial inquiry would return to the issues of intent and construction of section 2(c) discussed above.

THE CONSEQUENCES OF AMBIGUITY

Where a statute is susceptible to more than one reasonable construction, prior transactions permissible under one construction are not disturbed by changing, prospectively, to an alternate construction. This principle is generally applicable to administrative agencies, 1 Davis, *Administrative Law Treatise* § 5.09, at 350–52 (1958), and has been specifically applied by courts to changes in the construction of the Leasing Act and regulations implementing the Leasing Act. *E.g., Safarik* v. *Udall*, 304 F.2d 944, 948–49 (D.C. Cir.), *cert. denied*, 371 U.S. 901 (1962). See also *McDonald v. Watt*, 653 F.2d 1035 (5th Cir. 1981); *Runnells* v. *Andrus*, 484 F. Supp. 1234 (D. Utah 1980). As these cases amply illustrate, this principle has been judicially endorsed in the context of altered positions on public land laws or Interior regulations that are amenable to more than one construction. Interior's long-standing practice is to avoid upsetting settled expectations by applying retroactively new statutory constructions. *E.g., Timothy Sullivan*, 46 L.D. 110, 113 (1917); *Right-of-Way Across Tribal and Allotted Indian Lands . . .*, 58 I.D. 319 (1943); *Franco Western Oil*

[5] In addition to *Delaware & Hudson*, these cases include *United States v. Delaware, L. & W. R.R.*, 238 U.S. 516, 527 (1915); *United States v. Lehigh Valley R.R.*, 220 U.S. 257, 271–72 (1911).

Co., 65 I.D. 427 (1958), *affirmed sub nom; Safarik* v. *Udall, supra.*[6]

As the discussion above illustrates, section 2(c) is a provision reasonably subject to at least two readings. In such circumstances an agency is not bound to continue past policy indefinitely so long as the revised policy is consistent with the enabling statute, and prospective application of the revised policy may be implemented without affecting vested rights. *See American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967). The interests of serving current program needs and current understanding of Congressional purposes in enacting the provision, and the important interest of promoting harmony between federal agencies, are sufficient justification for the application of this principle. I conclude that it is lawful to alter the Department's position on the construction of section 2(c), and it is reasonable to abandon the view that only companies operating common carrier railroads and their "alter egos" are subject to the leasing prohibition. I recommend that Interior take the position that railroad affiliates are not excluded from the prohibition in section 2(c) on holding federal coal leases. By so concluding, I do not conclude that the Antitrust Division's guidelines for the scope of the affiliate prohibition (Antitrust Division Memorandum at pp. 29–31) are the only alternate view of the scope of the prohibition. The preceding discussion amply supports the view that Congress had no clear intention to define the statutory phrase "company or corporation operating a common carrier railroad" in a particular and specific manner.

You may proceed to define Interior's policy and construction of the statutory phrase, that is, the scope of the affiliate prohibition either by rulemaking or by adjudication. *SEC v. Chenery Corp.*, 332 U.S.C 194 (1947).[7] Finally, I conclude that any change in the Interior Department's construction and implementation of this section is prospective, and does not disturb past transactions. Thus, leases issued, or lease transfers approved, under the old construction were lawful actions not made voidable by the change in agency construction of the statute.

WILLIAM H. COLDIRON
Solicitor

APPROVED:

JAMES G. WATT
Secretary

[6] In light of the manifest ambiguity in the meaning of section 2(c), and this policy, it is unnecessary to examine what authority or obligation the Department might have to void actions taken under an unambiguously erroneous construction of law. *Compare Enfield* v. *Kleppe*, 566 F.2d 1139, 1142 (10th Cir. 1977) *with McDade v. Morton*, 353 F. Supp. 1006, 1012 (D.D.C. 1973), *aff'd without opinion*, 494 F.2d 1156 (D.C. Cir. 1974). *McDade* approved the statutory construction adopted in Solicitor's Opinion M-36686, 74 I.D. 285, 290 (1967).

[7] The Department has the authority, in interpreting section 2(c) consistent with the public interest, to fashion guidelines flexible enough to allow "emergency" leasing (43 C.F.R. Subpart 3425) and lease modification (43 C.F.R. Subpart 3432) to railroad affiliates currently holding federal coal leases in order to avoid bypass or waste of federal coal, in order to prevent supply disruption or premature mine closing, or otherwise to serve the public interest.

THEODORE J. ALMASY

69 IBLA 160

Decided *December 13, 1982*

Appeal from decision of the Alaska State Office, Bureau of Land Management, approving certain lands for conveyance to Doyon Limited. AA 8103-2.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests—Mining Claims: Determination of Validity—Mining Claims: Patent

Sec. 22(c) of the Alaska Native Claims Settlement Act permits the conveyance of land that is subject to unpatented mining claims located prior to Aug. 31, 1971, to a regional Native corporation. The possessory interest of the mining claimant in the claims is protected, although limited, as a valid existing right by sec. 22(c) and 43 CFR 2650.3-2.

APPEARANCES: Theodore J. Almasy, *pro se*; Elizabeth S. Ingraham, Esq., Fairbanks, Alaska, for Doyon Limited; Robert C. Babson, Esq., Office of the Regional Solicitor, Department of the Interior, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

On Apr. 30, 1979, the Alaska State Office, Bureau of Land Management (BLM), issued two decisions designating lands proper for selection by a regional corporation and approving the lands for interim conveyance to Doyon Limited (Doyon) on behalf of the village of Nikolai. *See* 44 FR 25937 through 25940 (May 3, 1979). The approved lands included all of T.26 S., R. 22 E., Kateel River meridian, Alaska.

On June 8, 1979, Theodore J. Almasy, on his own behalf and for his partner Margaret L. Mespelt, appealed the decisions to the Alaska Native Claims Appeal Board (ANCAB, docket number RLS 79-12),[1] asserting ownership of the lands in T. 26 S., R. 22 E., Kateel River meridian, based on their long use and occupancy of the lands and certain unspecified unpatented mining claims.

On June 26, 1978, ANCAB ordered the segregation of this township from the remainder of the lands selected by Doyon so that conveyance of those lands would not be delayed pending decision in this appeal.

By partial decision dated Feb. 27, 1980, ANCAB ruled that use and occupancy of lands prior to Dec. 18, 1971, other than pursuant to specific statutory authorization not claimed by appellant, does not give rise to any valid existing right in the land on the part of a third party as against a grantee Native corporation. *Appeal of Theodore J. Almasy*, 4 ANCAB 151, 87 I.D. 81 (1980). ANCAB reserved for further consideration the issues raised by appellant's al-

[1] Secretarial Order No. 3078, dated Apr. 29, 1982, abolished the Alaska Native Claims Appeal Board and transferred its functions to the jurisdiction of the Interior Board of Land Appeals effective June 30, 1982. 47 FR 22617 (May 25, 1982). Interim regulations at 43 CFR Part 4 implementing this organization change were published in the FEDERAL REGISTER on June 18, 1982 (47 FR 26390).

legation of ownership of various unpatented mining claims and ordered appellant to produce a list of those claims located in T. 26 S., R. 22 E., Kateel River meridian. *Id.* at 166, 87 I.D. at 88.

On Mar. 24, 1980, appellant filed a list of 110 lode and placer mining claims recorded with BLM as claims AA 033627 through AA 033736 and seven claims without serial numbers located in T. 26 S., Rs. 21 and 22 E., Kateel River meridian.[2]

By order dated Oct. 27, 1980, ANCAB identified the mining claims in T. 26 S., R. 22 E., Kateel River meridian, as encompassing some portion of secs. 5–8, 17, 19, and 20 and all of sec. 18 and proposed to segregate these lands from the remainder of the lands in the township so that the lands unaffected by this appeal could be conveyed to Doyon. Appellant responded that the areas identified did not cover all of his mining claims and submitted his own list of lands for segregation. Doyon objected to the proposed segregation because the segregation would be in less than whole sections. Appellant subsequently suggested that secs. 5–8, 17–20, and 29–32 be segregated in their entirety, but ANCAB did not issue another segregation order.

By letter to ANCAB dated June 10, 1982, appellant urged ANCAB to "review its 'Order' and our modification request and issue an acceptable 'Order Segregating Lands' and close this case out."

The purpose of a segregation order is to release lands for conveyance that are unaffected by an appeal of a conveyance decision. Its purpose is not, as appellant's request seems to suggest, to remove the segregated lands from the decision approving conveyance.[3] Thus, the suggested segregation order would not "close this case out" but would simply limit the lands addressed by this appeal to something less than the entirety of T. 26 S., R. 22 E., Kateel River meridian.

We find no basis for issuing another segregation order in this case now as the township at issue is otherwise segregated from conveyance in another appeal.[4]

We turn to the issue of whether BLM erred in failing to exclude the lands encompassed by apellant's unpatented mining claims from the conveyance to Doyon.

[1] Sec. 22(c) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1621(c) (1976), provides:

[2] Sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), required the owner of an unpatented mining claim located on public land on or before Oct. 21, 1976, to file a copy of the official record of the notice of location and related documents with the BLM on or before Oct. 22, 1979. In addition, the owner of such claim is required to file evidence of assessment work or notice of intention to hold the claim on or before Dec. 30 of each calendar year thereafter. Failure to file the required documents conclusively consitutes abandonment of the claim by the owner under theAct. *See generally* 43 CFR Part 3833.

[3] In his correspondence to ANCAB appellant referenced several times an exclusion or attempted exclusion by Doyon of the lands encompassed by appellant's mining claims from its land selection entitlement. The record reflects that Doyon's selection application expressly included all of T. 26 S., R. 22 E., Kateel River meridian. There is no document in the record that constitutes a request from Doyon that the lands encompassed by appellant's mining claims be excluded from its land conveyance. Moreover, we note that ANCAB has held that 43 CFR 2651.4(e) does not permit a Native corporation to exclude lands within unpatented mining claims after the selection period has terminated. *Oregon Portland Cement Co.*, 6 ANCAB 65, 88 I.D. 760 (1981).

[4] By Notice date Nov. 17, 1980, the Regional Solicitor informed ANCAB that all of T. 26 S., R. 22 E., Kateel River meridian, is segregted in conjunction with the *Appeal of Doyon Limited*, ANCAB RLS 79-10(c). That appeal, docketed as IBLA 82-1124, is pending before this Board and the segregation order dated May 30, 1980, issued by ANCAB remains in effect.

(c) Mining claims; possessory rights, protection

On any lands conveyed to Village and Regional Corporations, any person who prior to August 31, 1971, initiated a valid mining claim or location under the general mining laws and recorded notice of said location with the appropriate State or local office shall be protected in his possessory rights, if all requirements of the general mining laws are complied with, for a period of five years and may, if all requirements of the general mining laws are complied with, proceed to patent.

Departmental regulation 43 CFR 2650.3–2 governing mining claims on selected lands reads in part:

(a) *Possessory rights.* Pursuant to section 22(c) of the act, on any lands to be conveyed to village or regional corporations, any person who prior to August 31, 1971, initiated a valid mining claim or location, including millsites, under the general mining laws and recorded notice thereof with the appropriate State or local office, shall not be challenged by the United States as to his possessory rights, if all requirements of the general mining laws are met. However, the validity of any unpatented mining claim may be contested by the United States, the grantee of the United States or its successor in interest, or by any person who may initiate a private contest. * * *

(b) *Patent requirements met.* An acceptable mineral patent application must be filed with the appropriate Bureau of Land Management office not later than December 18, 1976 on lands conveyed to village or regional corporations.

* * * * *

(c) *Patent requirements not met.* Any mineral patent application filed after December 18, 1976, on land conveyed to any village or regional corporation pursuant to this act, will be rejected for lack of departmental jurisdiction. After that date, patent applications may continue to be filed on land not conveyed to village or regional corporations until such land is conveyed.

The status of unpatented mining claims located prior to the enactment of ANCSA on land subsequently selected by a Native corporation has recently been reviewed by the United States Court of Appeals for the Ninth Circuit. In a suit brought by owners of such unpatented mining claims seeking a declaratory judgment and injunctive protection against BLM's conveyance of their alleged vested property rights in the claims, the court examined sec. 22(c) of ANCSA and the Department's regulations and held that ANCSA permits the Federal Government to convey lands subject to validly located mining claims and that the 5-year time limitation on the ability to patent placed on such claims by ANCSA is constitutional. *Alaska Miners* v. *Andrus,* 662 F.2d 577 (9th Cir. 1981). *Accord, United States Steel Corp.,* 7 ANCAB 106, 89 I.D. 293 (1982) (involving unpatented millsite claims).

We conclude the BLM may convey T. 26 S., R. 22 E., Kateel River meridian, to Doyon notwithstanding the existence of mining claims owned by appellants in that township and that appellant's rights to those mining claims are protected, although limited, by sec. 22(c) of ANCSA and 43 CFR 2650.3–2 until conveyance.[5] This land will not be conveyed until the appeals involving it have been resolved. 43 CFR 4.21(a). Until then appellant is entitled to whatever consideration the applicable law may afford. *See*

[5] Doyon has urged that BLM is required to adjudicate the validity of unpatented mining claims within Native-selected lands prior to conveyance. It is now well established, however, that BLM is not required to adjudicate mining claims before conveyance. *United States Steel Corp., supra; Oregon Portland Cement Co., supra. See Alaska Miners* v. *Andrus, supra* at 580.

43 CFR 2650.0-5(j); 43 CFR 2650.3-2.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, *as amended* (43 FR 26390 (June 18, 1982)), the decision of the Alaska State Office is affirmed.

WILL A. IRWIN
Administrative Judge

WE CONCUR:

JAMES L. BURSKI
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge, Alternate Member

TIGER CORP.

4 IBSMA 202

Decided *December 17, 1982*

Petition for discretionary review of a Feb. 13, 1981, decision by Administrative Law Judge Sheldon L. Shepherd in which Tiger Corp. was held to be in violation of the effluent limitations provision of 30 CFR 715.17(a).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof—Surface Mining Control and Reclamation Act of 1977: Hearings: Generally

OSM makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation; when it makes that showing and the showing goes unrebutted, it also carries its ultimate burden of persuasion.

APPEARANCES: Paul J. Borowitz, Esq., Zanesville, Ohio, for Tiger Corp.; Myra P. Spicker, Esq., Office of the Field Solicitor, Indianapolis, Indiana, Glenda R. Hudson, Esq., Office of the Solicitor, Division of Surface Mining, and Marcus P. McGraw, Assistant Solicitor, Branch of Litigation and Enforcement, Division of Surface Mining, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MIRKIN

INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This case is before the Board on Tiger Corp.'s (Tiger) petition for discretionary review of a Hearings Division decision upholding the validity of a notice of violation (NOV) issued by the Office of Surface Mining Reclamation and Enforcement (OSM) for a violation of the effluent limitations provision of 30 CFR 715.17(a). The evidentiary basis for the decision was the OSM inspector's testimony concerning his field tests of water samples at Tiger's surface coal mining operation.[1]

Factual and Procedural Background

On Nov. 3, 1979, an OSM inspector issued NOV No. 79-III-13-25 to Tiger for two alleged violations of 30 CFR 715.17(a): (1)

[1] Laboratory reports on water samples were ruled inadmissible on the ground that they were signed by a person whose name did not otherwise appear in the chain of custody record.

failure to meet the effluent limitations and (2) failure to pass all surface drainage from the disturbed area of its Muskingum County, Ohio, mine through sedimentation ponds. Tiger's petition challenged only the first alleged violation, but went only to the fact of violation and not to the penalty associated therewith. In his Feb. 13, 1981, decision, the Administrative Law Judge found that the effluent limitations were exceeded as alleged. He further found that the mine area had been deep-mined up to 75 years ago and that Tiger was unaware of that situation as it began its operations.[2] The earlier operators had tiled the old mine, and seepage had been allowed to enter the hydrologic system. The decision stated that some of the offending discharges are from the pre-existing deep mines and that the seepage is uncontrollable. Virtually continuous surveillance and treatment would be necessary to detect violative conditions and to neutralize the noxious discharges.

The Administrative Law Judge sustained the NOV on the basis of our decision in *Cravat Coal Co.*, 2 IBSMA 249, 87 I.D. 416 (1980). In *Cravat,* we ruled that the operator was responsible for assuring that discharges of drainage from areas disturbed by its mining operation did not exceed the effluent limitations even though the offending elements originated in principal measure as contaminated ground water from previously mined areas. 2 IBSMA 249, 255, 87 I.D. 416, 419. The Board has reached similar holdings in *Jeffco Sales & Mining Co.,* 4 IBSMA 140, 89 I.D. 467 (1982), and in *Central Oil and Gas, Inc.,* 2 IBSMA 308, 87 I.D. 494 (1980).

Discussion and Conclusions

[1] On appeal, Tiger argued that although OSM did present evidence that a violation of the effluent limitations in 30 CFR 715.17(a) had occurred, OSM nevertheless failed to make a prima facie case and to carry its ultimate burden of persuasion under 43 CFR 4.1155. Tiger believes that for OSM to carry its ultimate burden, OSM must also show that Tiger failed to "reclaim to conditions that approximate premining hydrologic conditions with minimal change in * * * water quality." (Tiger's brief at 2).[3] Tiger is incorrect.

OSM makes a prima facie case by the submission of sufficient evidence to establish the essential

[2] Although the Administrative Law Judge found that Tiger was unaware of the situation, one of the owners of the fee in the mine's land was aware of it at the time Tiger was engaged to do the work (Tr. 79, 82). Insofar as the owner contracted with Tiger for the mining, this presents a situation where the former's knowledge forces us to conclude that Tiger should have known of the problem even if by failing to make proper inquiry it actually did not. (*See generally* Comments 2 and 3, 42 FR 62649 (Dec. 13, 1977), and nn.3&5, *infra.*)

[3] The basis for this argument has two features: (1) a comment in the regulation's preamble highlighting the regulation's intent as matching that indicated by the language quoted in the last sentence in the text (Comment, 42 FR 62649 (Dec. 13, 1977)); and (2) various of the decision's findings regarding the pre-existing deep mines, current seepage therefrom, their contribution to the excess of effluents in discharges, and Tiger's lack of prior actual knowledge about those matters.

As to the first of those features, we have already noted (in *Cravat*) that the preamble to section 715.17 has as one of its objectives requiring the operator to plan and conduct its operation so as to minimize adverse effects on water quality, *i.e.,* taking steps to assure prior knowledge of such things as deleterious seeps from pre-existing deep mines. Tiger's appeal to our sensibilities based on its asserted ignorance of the seeps, therefore, works at least as much to its detriment as to its benefit.

facts of the violation.[4] That was done, and it was not rebutted. As those essential facts, if uncontroverted, were all that was necessary to prove a violation, OSM also carried its ultimate burden of persuasion.[5]

The decision below is affirmed.

MELVIN J. MIRKIN
Administrative Judge

I CONCUR:

NEWTON FRISHBERG
Administrative Judge

I CONCUR IN THE RESULT:

BERNARD V. PARRETTE
Administrative Judge

JEWELL SMOKELESS COAL CORP.

4 IBSMA 211

Decided *December 17, 1982*

Appeal by Jewell Smokeless Coal Corp. for review of the Dec. 3, 1981, decision (Docket No. CH 1-90-R) of Administrative Law Judge Tom M. Allen upholding enforcement action by the Office of Surface Mining Reclamation and Enforcement taken pursuant to the Surface Mining Control and Reclamation Act of 1977, P.L. 95-87, 30 U.S.C. §§ 1201-1328 (Supp. IV 1980), and the Department's regulations at 30 CFR Chapter VII.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally—Surface Mining Control and Reclamation Act of 1977: Roads: Generally

An access and/or haul road is subject to regulation as part of a surface coal mining operation in the absense of an affirmative demonstration that the road is maintained with public funds.

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof—Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally

One claiming an exemption from regulation under the Act bears the burden of affirmatively demonstrating entitlement to the exemption.

3. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Permittee." For purposes of the initial regulatory program, one who conducts a surface coal mining operation is a "permittee," whether or not required to hold a permit under state law, and is responsible for compliance with performance standards applicable to the operation.

APPEARANCES: Dennis E. Jones, Esq., Lebanon, Virginia, for Jewell Smokeless Coal Corp.; Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia; John Pendergrass, Esq., and Walton D. Morris, Jr., Esq., Assistant Solicitor for Litigation and Enforcement, Division of Surface Mining, Office of

[4] *James Moore*, 1 IBSMA 216, 86 I.D. 369 (1979).

[5] Assuming that Tiger could avoid liability on the basis of compliance with the "pre-mining hydrologic conditions" language of sec. 715.17(a) to which it refers, it would necessarily be by affirmative defense. In order to make that defense it would have to present evidence about the hydrologic balance both before and after it conducted its operations. Tiger could not make that showing because it did not have actual knowledge of the pre-existing deep mines until after it began its operations (Tr. 69). The only evidence it offered concerned the quality of the water and its efforts to treat it after the problem was discovered (Tr. 54-59). That is not sufficient.

the Solicitor, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MIRKIN

INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Jewell Smokeless Coal Corp. (Jewell) has appealed from the decision of the Hearings Division upholding Notice of Violation (NOV) No. 80-I-73-2, by which the Office of Surface Mining Reclamation and Enforcement (OSM) charged Jewell with three violations of 30 CFR 717.17.

Factual and Procedural Background

On Feb. 2, 1981, OSM inspected an underground mining operation in Buchanan County, Virginia. On the basis of the inspection OSM issued NOV No. 81-I-73-2 (OSM Exh. 4) charging three violations of the Department's initial program regulations, described as follows:

(1) The person has failed to pass all surface drainage from the disturbed area through a sedimentation pond or series of sedimentation ponds and treatment facilities prior to leaving the disturbed area, in violation of 30 CFR § 717.17(a).

(2) The person has failed to adequately maintain the access and haul road by means such as, but not limited to, surfacing, in violation of 30 CFR § 717.17(j)(1)(3)(i).

(3) The person has discharged water from the disturbed area which fails to meet the maximum numerical effluent limitation for total suspended solids, in violation of 30 CFR § 717.17(a).

In the NOV, OSM listed Jewell as the mine permittee and Shannon Coal Co. (Shannon) as the mine operator. OSM served both companies with the NOV; each company separately applied to the Hearings Division for review of the enforcement action.

A hearing on Shannon's application began on June 17, 1981, but the Administrative Law Judge ordered the hearing continued when he was informed that Jewell also had applied for review of the enforcement action. The Administrative Law Judge then consolidated the two applications and conducted a hearing on them on Aug. 11, 1981. At this hearing, OSM presented two witnesses, the investigating inspector and a resident of the area who had complained about the mining operation. From these witnesses OSM adduced testimony both as to the basic elements of the violations alleged (*e.g.*, Tr. 17-27, 37-38, 41-42, 46-49)[1] and as to the extent of the area disturbed by the mining operation (*e.g.*, Tr. 28-36, 54-55). Jewell rested without putting on a case (Tr. 65); instead, counsel for Jewell stated:

[T]here's a lot of testimony we could put on, but the critical issue boils down to whether there's two acres involved, whether it's entitled to the two acre exemption. The maps and survey have been submitted and I don't think that we could add anything to OSM's case. I think they've failed to make a prima facie case at this time

[1]This matter being covered by 43 CFR 4.1171, OSM was responsible for establishing a prima facie case as to the factual elements of the violations charged in the NOV. The transcript references indicate that it did so. The ultimate burden of persuasion, however, rested with Jewell. By resting without presenting a case, Jewell did not sustain its burden. (The cross-examination of the OSM witnesses did not suffice for that purpose.)

that we're in excess of two acres. Therefore, we're not going to offer any proof.

In this decision the Administrative Law Judge said: "Since the issue in this case is solely whether the area disturbed by surface mining is exempt from the Act because of disturbing less than 2 acres, a review of the evidence regarding the notices of violation is not necessary" (Decision at 2). The Administrative Law Judge then proceeded to take "judicial notice" of an earlier decision of the Hearings Division involving Jewell (Decision at 2), and to reminisce about findings and holdings in other cases over which he had presided which somehow concerned the meaning of the terms "permittee" and "operator" (Decision at 2-4). He concluded that the NOV should be upheld as to Jewell but dismissed as to Shannon.

Discussion

The extent of surface area disturbed in the coal mining operation is important because 30 CFR 700.11(b) provides that the extraction of coal where the operation affects 2 acres or less is exempt from regulation.[2] The legal status of the road used in the operation is of particular importance in this regard because a surface coal mining operation is defined to include areas affected by access and haul roads (30 CFR 700.5), except those roads that are maintained with public funds (30 CFR 710.5), and Jewell claims that the road is an exempt road because it had been deeded to Buchanan County, Virginia.[3] An expansion of the relevant facts is in order.

At the site in question there has been a deep mine for many years (Tr. 57-58). On Jan. 8, 1979, Jewell applied for a Virginia surface coal mine permit (OSM Exh. 2). Jewell's officers and directors were listed on that application. They were Messers. Thompson, Van Meter, and Young. The total number of acres to be covered by the permit was listed as 2.94. The owner of the surface and mineral estates was stated to be A. B. Jewell of Tazewell, Virginia, otherwise unidentified. Jewell's right to mine was stated to be by virtue of a written lease agreement made on Jan. 1, 1978, and executed by A. B. Jewell. The permit application was executed before a notary public on Jan. 6, 1979, by Van Meter. One of the attachments to the permit, signed by Joel M. Singleton, Jewell's Reclamation Superintendent, states that "2.19 + .75 = 2.94" acres had been disturbed during the last 12 months and that there were "0" total acres of undisturbed land remaining in the original permit area.

According to OSM's exhibit 3, on Mar. 23, 1979, Jewell conveyed the road to Buchanan County. On Mar. 26, 1979, the county accepted the conveyance, "subject to the terms of the ordinance adopted by the Buchanan County Board of Supervisors at their regular meeting on May 1, 1978, and the agreement entered into by Jewell

[2] Although this is an underground mine, a surface coal mining operation includes surface impacts incident to an underground coal mine. 30 CFR 700.5.

[3] Jewell has not challenged OSM's characterization of the road as a "haul road." *See* OSM's Exhs. 2 and 3. These exhibits, which were admitted without objection (Tr. 10, 16), also contain statements by Jewell that the surface disturbances associated with the mine, taking into account the haul road, cover more than 2 acres.

Smokeless Coal Corporation and the Buchanan County Board of Supervisors for maintenance of said roads." On Apr. 13, 1979, Jewell filed an amended permit request, asking the state to correct the acreage from 2.94 to 2.25 acres and to delete .76 acre representing the roadway that had been conveyed to the county. Part of the application was a form similar to the Singleton attachment. It also stated that "0" acres of undisturbed land remained under the original permit.[4]

At the original Shannon hearing on June 17, 1981, the parties stipulated that the acreage measurements on Jewell's survey of June 1981 were accurate (Jewell Exh. 1; Shannon Tr. 15–16). The total acreage indicated by this survey, including the disputed road, was 2.10 acres. The Administrative Law Judge also found the aggregate disturbed area comprised at least 2 acres (Decision at 2).

[1, 2] The effect of a general conveyance of a roadway to Buchanan County, pursuant to its ordinance of May 1, 1978, has recently been construed by this Board. *Jewell Smokeless Coal Corp.*, 4 IBSMA 51, 89 I.D. 313 (1982). We held that in order for the road exemption to apply, the road must be maintained with public funds and that the burden was on Jewell to demonstrate affirmatively that the exemption applied. Jewell failed to do it there and it has likewise failed here. The exemption is not applicable. *See also Rhonda Coal Co., Inc.*, 4 IBSMA 124, 89 I.D. 460 (1982).[5]

[3] The remaining question, and one not satisfactorily treated below, is the liability, if any, that Jewell has for the mining operation. The initial regulatory program is applicable to persons conducting coal mining operations. 30 CFR 710.11. A permittee is such a person. *Marco, Inc.*, 3 IBSMA 128, 88 I.D. 500 (1981). During the initial regulatory program, "a person who either has been granted the right to mine or reclaim an area or who is mining or reclaiming an area that would otherwise be subject to regulation is a permittee." *Marco, Inc.*, 3 IBSMA at 132, 88 I.D. at 502. One who should have a permit is a permittee whether or not there is in fact a permit. *Delight Coal Corp.*, 1 IBSMA 186, 86 I.D. 321 (1979); *Claypool Construction Co.*, 1 IBSMA 259, 86 I.D. 486 (1979). Further, a permittee's reliance on state interpretation of state law will not necessarily shield it from Federal regulations. *James Moore*, 1 IBSMA 216, 86 I.D. 369 (1979). The evidence of record is that Jewell became the lessee of the premises on Jan. 1, 1978, with the right to mine coal. There is no evidence that said lease was ever terminated or that, in fact, Jewell ever discontinued mining. Jewell's right to mine

[4] Although the parties seem to agree that the filing of the amended permit request resulted in Virginia's releasing Jewell from permit obligations, the only item of record that indicates there was a formal cancellation is the testimony of the OSM inspector to that effect (Tr. 16).

[5] Although the Administrative Law Judge said he would require it, no demonstration was made by Jewell to show it had the capacity to convey title to the roadway (Tr. 52). Indeed, the only evidence presented was that of a leasehold interest in Jewell (OSM Exh. 2).

under the lease has been continuous, as has actual mining. Jewell is a permittee.[6]

The decision below is affirmed.

MELVIN J. MIRKIN
Administrative Judge

WE CONCUR:

NEWTON FRISHBERG
Administrative Judge

BERNARD V. PARRETTE
Administrative Judge

GOBEL BARTLEY

4 IBSMA 219

Decided *December 17, 1982*

Appeal by Gobel Bartley from the Apr. 16, 1981, decision of Administrative Law Judge Tom M. Allen, upholding OSM jurisdiction and thus sustaining the validity of Notice of Violation No. 80-2-98-56 and Cessation Order No. 81-2-98-3 charging Bartley with operating a surface coal mine without a permit from the State regulatory authority (Docket No. NX 1-64-R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

The area of an access and haul road used by a coal mine operator is properly included, at least in part, in the surface area affected by the operation for the purpose of determining whether the operation qualifies for the 2-acre exemption of sec. 528(2) of the Act and 30 CFR 700.11(b).

2. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

Under 30 CFR 710.11(2)(i) of the initial regulatory program, a person conducting coal mining operations must obtain a permit if a permit is required by the State in which the mining occurs.

3. Surface Mining Control and Reclamation Act of 1977: Applicability: Postmining Land Use—Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

The extraction of coal as an incidental part of privately financed construction is not an activity excluded as such from the coverage of the performance requirements of the initial regulatory program.

4. Constitutional Law: Generally—Surface Mining and Reclamation Act of 1977: Administrative Procedure: Scope of Review

The Interior Board of Surface Mining and Reclamation Appeals is not the proper forum to decide constitutional issues.

APPEARANCES: Gobel Bartley, Rockhouse, Kentucky, *pro se;* Courtney W. Shea, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Glenda Hudson, Esq., and Walton D. Morris, Jr., Esq., Assistant Solicitor for Litigation and Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

[6] The Administrative Law Judge characterized Shannon as an "operator" and peremptorily dismissed charges against it. He termed Jewell a "permittee" on the basis of a talmudic, if superflous, analysis of the definitions in 30 U.S.C. § 1291(13), (15), (17), (18), and (19) (Supp. IV 1980). There is the suggestion that Shannon may have been contracted by Jewell to conduct the mining operations. That might render Shannon also liable as an operator. It would not relieve Jewell of its liability as a permittee.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Gobel Bartley (Bartley) has appealed from the Apr. 16, 1981, decision of Administrative Law Judge Tom M. Allen, Docket No. NX 1-64-R, which concluded that the Office of Surface Mining Reclamation and Enforcement (OSM) had jurisdiction under the Surface Mining Control and Reclamation Act of 1977, P.L. 95-87 (Aug. 3, 1977), 30 U.S.C. §§ 1201-1328 (Supp. IV 1980) (the Act), and its implementing regulations, 30 CFR Chapter VII (the regulations), to issue Notice of Violation (NOV) No. 80-2-98-56 and Cessation Order (CO) No. 81-2-98-3, charging Bartley, respectively, with a violation of the Act for operating a surface coal mine without a permit from the State regulatory authority and with failure to abate the violation within time prescribed. We affirm the decision.

Facts

On Oct. 9, 1980, OSM Inspector Tillon E. Turner conducted an inspection of a surface mining operation on Bartley's property, situated in the Dry Fork of Marrow Bone Creek, near Rockhouse, Kentucky. The site was located at the end of a mile-long private road, in a saddle on the top of a mountain. No mining activity was in progress on that date, but there were two stockpiles at the site with approximately 50 tons of coal in one and 30 tons in the other, and an uncovered coal pit was in view. The total disturbed area exceeded 90,000 square feet (Tr. 7-9).

Turner informed Bartley that since the site apparently exceeded 2 acres, Bartley would be subject to Federal jurisdiction if he had mined more than 250 tons of coal. Bartley did not disagree as to the 2 acres but said he had mined only 240 tons and later produced a tipple receipt for that amount. No NOV was issued by the inspector on Oct. 9 (Tr. 9-10). During the conversation, Bartley said that he was planning to build a house on the site (Tr. 39, 57). Turner returned to the site on Oct. 28, 1980, because of a State regulatory authority report that Bartley was again mining there. Upon finding that another bench of coal, disturbing another half acre of surface, had been uncovered, and that Bartley did not have a State mine permit, Turner issued NOV No. 80-2-98-56, charging Bartley with operating a surface coal mine without a permit from the State regulatory authority. At that time, Turner estimated the disturbed area to be 2.88 acres (Tr. 11-14). He also estimated that approximately 1,600 tons of coal had been removed from the site (Tr. 15-17). In his computation of the 2.88 acres, Turner included only half of the haul road, the half that ran from Bartley's television antenna to the minesite, since only that portion appeared to have been recently disturbed (Tr. 17-18). The

cessation order, CO No. 81-2-98-3, was subsequently issued on Feb. 13, 1981 (Tr. 4-5).[1]

Another OSM witness, Jeffrey Mason Robinson, an inspector for the Kentucky Department of Natural Resources, testified that when he visited the Bartley mine-site on Oct. 6, 1980, he estimated the disturbed area to be 4½ acres, including the one-mile access road. When he returned on Oct. 27, the original pit had been backfilled, coal had been removed from three other pits which had been newly uncovered at the time of his first visit, and Bartley was removing coal from still another cut. Robinson estimated that 1,944 tons of coal had been removed from the mine as of Oct. 27 (Tr. 31-32). He had also obtained a copy of a tipple receipt representing the sale of another 170.9 tons of coal from the Bartley site (Tr. 33-34). He testified that, under Kentucky law, any coal removal which involved the selling of more than 250 tons of coal from a site within a 12-month period was regulated by the State, but that no permit had been issued for the Bartley mine (Tr. 35).

Bartley himself subsequently acknowledged mining and selling the coal covered by the two receipts for 240 and 170 tons (Tr. 46-47). He originally thought that the house and trailer licenses he had obtained were all that he needed, and he felt that he was harming no one since all of the mining activity was on his own property (Tr. 43). He was aware of the need for surface permits under the Act (Tr. 44), and he understood that Inspector Turner had said on Oct. 6 that such a permit would be necessary if he mined more than 250 tons of coal (Tr. 45). His partner did obtain a license on Oct. 9, but apparently failed to ask about a permit. Bartley would himself have gotten a permit on that occasion, had he been obtaining the license, if he had then been told he needed one and if he could have afforded it (Tr. 46-48).

At the conclusion of the hearing, the Administrative Law Judge concluded that because Bartley had removed and sold into commerce in excess of 250 tons of coal within a 12-month period, he was considered by the Act and the regulations to be an operator, and that because the coal extraction operations affected in excess of 2 acres of land, he was subject to the Act regardless of his ownership of both the land and the minerals. The Administrative Law Judge therefore held that since OSM had made a prima facie case and that since Bartley had admitted most of the allegations and failed to deny others, "the only conclusion possible is that Mr. Gobel Bartley and his operation is [*sic*] subject to the Act. The regulations have been violated, and Notice of Violation 80-2-98-56 and Cessation Order 80-2-98-3 [*sic*] are affirmed."

Discussion

Bartley makes three principal arguments on appeal: First, that his site would not have exceeded 2 acres if he had not restored and graded his old abandoned access

[1] The circumstances surrounding the issuance of the CO are not discussed in the record. It was nevertheless admitted into evidence (referred to in the transcipt as CO 80-I-2-98-3, an apparent phonetic error) in the absence of any objection by Bartley.

road, thereby improving his own property; second, that the requirements of the Act constitute an unconstitutional taking of private property without just compensation; and third, that he was licensed by the State of Kentucky to operate a mine in order to develop a house site and thus a surface mining permit was not required.

We are not, nor was OSM or the Administrative Law Judge, unsympathetic to the underlying concern of the appellant that, because of the Act, he can no longer use his own land entirely as he sees fit. However, that concern was addressed at great length during the hearing and the full exposition already contained in the record (Tr. 57-70) need not be repeated here. Rather, we will limit our comments to the specific issues raised on appeal.

[1] The Act and the regulations define surface coal mining and reclamation operations to include "all lands affected by the construction of new roads or the *improvement or use of existing roads* to gain access to the site of [coal mining activities] and for haulage." 30 U.S.C. § 1291(28)(B); 30 CFR 700.5 (italics added). Thus, the abandoned road which Bartley improved and used for access and haulage, in connection with his coal mining activities, was properly included by the OSM inspector in his calculation of the area disturbed by Bartley's coal mining operations. Taking the area affected by this road into account, it is clear that Bartley's surface coal mining operation disturbed more than 2 acres and, accordingly, that the operation is not exempt from regulation under the provisions of 30 U.S.C. § 1278(2) and 30 CFR 700.11(b), as Bartley claimed.

[2] Bartley was charged with a violation of 30 CFR 710.11(2)(i), which provides that "[a] person conducting coal mining operations [during the initial regulatory program] shall have a permit if required by the State in which he is mining." Under Kentucky law applicable during the initial regulatory program, a mine "operator" was required to obtain a permit to mine. Ky. Rev. Stat. (KRS) § 350.060(1) (1978). For the purposes of this requirement, the term "operator" was defined to include "any person * * * engaged in strip mining who removes or intends to remove more than two hundred fifty (250) tons of coal from the earth by strip mining within twelve (12) successive calendar months." KRS § 350.010(6) (1978). The evidence shows that Bartley extracted at least 410 tons of coal from his mine within a few week's time.

[3] Bartley has not brought to our attention any provision of Kentucky law that modifies the permit requirement in the context of coal mining conducted in the preparation of a housing site. Further, as we stated in *James Moore,* 1 IBSMA 216, 86 I.D. 369 (1979), the extraction of coal as an incidental part of privately financed construction is not an activity excluded as such from coverage by the Federal performance requirements of the initial regulatory program. Accordingly, we con-

clude under the facts of this case that Bartley's admitted failure to obtain a Kentucky permit constituted a violation of 30 CFR 710.11(2)(i).

[4] As to Bartley's contention that the requirements of the Act are unconstitutional, his proper recourse, if any, is to the courts. As an instrumentality of the executive branch of Government, this Board is bound by Federal law and is not the proper forum to decide constitutional issues. *E.g., Amanda Coal Co.*, 2 IBSMA 395, 87 I.D. 643 (1980).

Accordingly, the decision of the Administrative Law Judge is affirmed.

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

CONSOLIDATION COAL CO.

4 IBSMA 227

Decided *December 17, 1982*

Appeal by Consolidation Coal Co. from the Feb. 10, 1982, decision of Administrative Law Judge Sheldon L. Shepherd, Docket Nos. CH O-387-R and CH O-388-R, upholding two notices of violation issued by the Office of Surface Mining Reclamation and Enforcement upon its findings of violations of 30 CFR 715.17(a) and 717.17(a) at appellant's Renton mine in Allegheny County, Pennsylvania.

Affirmed in part and reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

The sedimentation pond requirement of 30 CFR 717.17(a) is a preventive measure; thus, proof of the occurrence of the harm it is intended to prevent is not necessary to establish a violation of the requirement.

2. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

The elements of proof of a violation of the sedimentation pond requirement are: (1) the existence of surface drainage from areas disturbed in the course of mining and reclamation operations; (2) that such drainage was not passed through a sedimentation pond; and (3) that the drainage left the permit area.

3. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Acid and Toxic Materials

An operator of an underground coal mine must undertake practices to control and minimize water pollution which include, but are not limited to, preventing water contact with acid- or toxic-forming materials and minimizing water contact time with waste materials.

4. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: General-

ly—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas

An alleged violation of the effluent limitations prescribed in 30 CFR 717.17(a) cannot be upheld where the evidence shows that the drainage identified in the notice of violation neither originated in an area disturbed by the surface coal mining and reclamation operations nor became commingled with drainage from that disturbed area.

5. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas

The effluent limitations prescribed in 30 CFR 717.17(a) apply to all discharges that include drainage from areas disturbed by surface coal mining and reclamation operations.

APPEARANCES: Daniel E. Rogers, Esq., 1800 Washington Road, Pittsburgh, Pennsylvania, for Consolidation Coal Co.; William F. Larkin, Esq., and Walton D. Morris, Jr., Esq., Assistant Solicitor for Litigation and Enforcement, Division of Surface Mining, Office of the Solicitor, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Consolidation Coal Co. (Consolidation) has appealed the decision of the Hearings Division upholding Notice of Violation (NOV) Nos. 80-I-110-6 and 80-I-110-7 issued by the Office of Surface Mining Reclamation and Enforcement (OSM) pursuant to its authority under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (Supp. IV 1980), and the Department's regulations at 30 CFR Chapter VII. OSM issued the NOVs after inspections of surface facilities at Consolidation's Renton underground mine in Allegheny County, Pennsylvania.

Factual and Procedural Background

On Aug. 14, 1980, OSM inspected the surface facilities of the Renton underground mine operation in Allegheny County, Pennsylvania (Tr. 10; Respondent's Exh. A). After the inspection, on Aug. 19, 1982, OSM issued NOV No. 80-I-110-6 to Consolidation, alleging two violations of 30 CFR 715.17(a): (1) Failure to pass surface drainage from portions of the disturbed area through a sedimentation pond; and (2) failure to control the quality of discharges of surface drainage from the disturbed area to meet the effluent limitations specified in the regulations.[1] Consolidation applied for review of and temporary relief from the NOV. By order dated

[1]Because the surface operations inspected by OSM were being conducted in connection with an underground coal mine, OSM should have cited 30 CFR 717.17(a) in support of its enforcement action, as it did in the second NOV issued to Consolidation. Given the similarity between the provisions of secs. 715.17(a) and 717.17(a), however, we consider this error to have been harmless. In any event, Consolidation did not question the discrepancy on appeal.

Nov. 13, 1980, and with the consent of OSM, the Administrative Law Judge granted Consolidation temporary relief from the abatement requirements of the NOV pending a hearing on its merits.

On Aug. 25, 1980, OSM conducted a further inspection of surface operations at the Renton mine and, on the following day, issued NOV No. 80-I-110-7 (Respondent's Exh. I). This NOV alleged two violations of 30 CFR 717.17(a) (the counterpart of sec. 715.17(a) applicable to underground coal mining operations). As in the prior NOV, the violations concerned the sedimentation pond requirement and effluent limitations set forth in the regulations. Consolidation applied for review of and temporary relief from the NOV. By a second order dated Nov. 13, 1980, and again with the consent of OSM, the Administrative Law Judge granted temporary relief from the abatement requirements imposed in the later NOV pending a hearing on its merits.

On June 2, 1982, the Administrative Law Judge conducted a hearing on both NOVs. The following is a summary of the evidence presented during this proceeding relevant to Consolidation's appeal.[2]

[2] During this proceeding the Administrative Law Judge also heard Consolidation's petition for review (Docket No. CH 1-111-P) of the civil penalty assessment proposed by OSM on the basis of NOV No. 80-I-110-6. Neither party petitioned the Board to review the portion of the decision below pertaining solely to the assessment. We are unaware whether any civil penalty was assessed on the basis of NOV No. 80-I-110-7.

NOV No. 80-I-110-6

(Docket No. CH O-387-R)

The first of two violations in this NOV alleged Consolidation's failure to pass surface drainage from two locations on the disturbed area through a sedimentation pond. Inspector Sulka, who issued the NOV, testified that this alleged violation concerned a basin area created by a berm along the western perimeter of the top of Consolidation's refuse pile and two openings in old mine workings near the base of the west side of the refuse pile (Tr. 13-17; Respondent's Exhs. P-4 through P-9). Concerning the basin area of the refuse pile, the inspector testified that there was a breach in the surrounding berm and puddled water in the vicinity of the breach, but that there was no drainage flowing through the breach on the date of his inspection (Tr. 52). He further testified that, while he observed indications that water had overflowed the berm at another point (Tr. 56-57), he could not determine whether the breach was the result of water having broken through the berm or the result of an intentional cutting of the berm (Tr. 61-62).

Concerning the openings in the old mine workings, the inspector testified that he was told by Consolidation employees during his inspection that, in response to a complaint by an operator of a small mine in the vicinity of Consolidation's operation, Consolidation had reopened an entry to the abandoned mine to relieve water pressure (Tr. 41-42). The inspector further testified that he had col-

lected samples of drainage from the abandoned mine openings (Tr. 23, 25–28, 41–43) and that laboratory analysis of these samples indicated effluent concentrations in excess of limitations imposed in 30 CFR 715.17(a) (Tr. 29–33). OSM introduced the reports of the laboratory analyses of these samples in support of the second alleged violation in the NOV (Respondent's Exhs. B through H).[3]

Consolidation's sole witness, a civil engineer employed by the company, testified that Consolidation had constructed the berm at the top of the refuse pile to create a basin in which to collect surface drainage from the area, covering approximately 70 to 90 acres, where the company disposes of refuse (Tr. 110–11, 132, 136–37). This witness further testified that the basin was not lined, except with compacted refuse material, and that Consolidation had not installed any facilities to control the quality of any drainage from the basin (Tr. 132–33). As to the abandoned mine openings, the witness testified that Consolidation had excavated in the area of one opening to locate the source of seepage and had found a mine drain device (Tr. 112–13). The company then filled the opening and reseeded the area approximately 8 months prior to OSM's inspection (*see* Tr. 114). According to this witness, this action had not been undertaken by Consolidation to facilitate any of its mining or reclamation activities at the Renton site (Tr. 115).

[3] Consolidation did not object to the admission of the laboratory reports (Tr. 33, 37), but moved for dismissal of the NOV on the grounds that two of the water samples analyzed were collected by OSM on Sunday, Aug. 17, during a followup inspection when the inspector did not present credentials to any Consolidation employee (Tr. 44–47). The Administrative Law Judge took the motion under advisement and, ultimately, denied it in his written decision. Consolidation did not appeal this ruling; in any event, the ruling below is mooted by our decision.

NOV No. 80–I–110–7

(Docket NO. CH 0–338–R)

OSM issued NOV No. 80–I–110–7 on Aug. 26, 1982, on the basis of observations made during its inspection on the previous day. The first of two violations of 30 CFR 717.17(a) alleged in this NOV was Consolidation's failure to pass surface drainage from certain disturbed areas on the eastern side (opposite the area addressed in the Aug. 19 NOV) and to the north of the refuse pile through a sedimentation pond (Tr. 71). More specifically, Inspector Sulka, who issued this NOV, testified that the alleged violation concerned drainage from the eastern slope of the refuse pile, drainage which emanated from seeps at the base of the east side of the refuse pile, and drainage from areas disturbed by an access road and a railroad siding located to the north of the refuse pile (Tr. 71–77; Respondent's Exhs. P–11 through P–20).

Regarding the eastern top and slope of the refuse pile, the inspector testified that the only drainage controls were vegetated terraces on the slope of the pile (Tr. 87). He further testified that, while he did not observe any drainage flowing over the east slope of the pile on the day of his inspection, there were gullies and rills throughout this terraced

slope (Tr. 88, 92–93). The inspector did not testify whether he had observed any drainage on the access road or railroad siding during the inspection.

The samples taken during the inspection were from drainage from the seeps at the eastern base of the refuse pile (Tr. 80–84; Respondent's Exhs. P–15, P–17, P–19). OSM introduced the laboratory reports of the analyses of these samples in support of the second violation alleged in the NOV issued on Aug. 26 (Respondent's Exhs. L though O; Tr. 83–84).

Consolidation's witness opined that some of the seepage observed by OSM's inspector at the base of the refuse pile, on the east side, came from an air intake into abandoned underground workings located under the refuse pile, approximately 700 feet to the southwest of the area of seepage (Tr. 121–25, 145–50; Applicant's Exh. A). The witness acknowledged that water percolating through the refuse pile could contribute to the seepage (Tr. 136–37, 154), but also testified that the rate of seepage did not appear to be affected by precipitation (Tr. 122–23). In response to further questioning concerning the source of the seepage, the witness testified that, while the previously mined coal seam underlying the refuse pile dipped from east (or northeast) to west (or southwest), the abandoned workings could be "roofed" (*i.e.* completely filled with water) and that, under this circumstance, drainage from the workings could surface at the location of the seepage observed by the inspector at the base of the east side of the pile (Tr. 155–65). However, the witness also testified that Consolidation had not performed any tests to trace the flow of water throughout the abandoned workings (Tr. 140–41, 161).

The witness testified that the railroad siding and access road to the north of the refuse pile were constructed prior to May 3, 1978 (Tr. 117, 120), and that as of the time of OSM's inspections Consolidation had not taken any action to prevent drainage from the area of the railroad siding from flowing into a nearby creek without first passing through a sedimentation pond (Tr. 118). The witness did not say whether there were any surface drainage controls along the access road.

Decision Below

Docket No. CH O–387–R

The Administrative Law Judge upheld the sedimentation pond violation charged in NOV No. 80–I–110–6, as it related to drainage from the basin area of the refuse pile, but concluded that Consolidation was not responsible for the drainage from the abandoned mine entry to the west of the refuse pile because the company had not disturbed that area to facilitate its mining and reclamation activities at the Renton minesite (Decision at 2–3). Nonetheless, the Administrative Law Judge also upheld the violation of the effluent limitations charged in the NOV, which pertained to the drainage from the abandoned mine workings, apparently on the basis of his findings that the drainage sampled by the OSM inspector consisted of both drainage

from those workings and drainage from the basin at the top of the refuse pile (Decision at 3-4, 6).

Docket No. CH O-388-R

The Administrative Law Judge upheld both violations charged in NOV No. 80-I-110-7. As it relates to the sedimentation pond violation, the decision below appears to be based on the finding that surface drainage from the east side of the refuse pile was allowed to percolate through the pile and that this drainage surfaced as seepage at the base of the pile, on the eastern side, perhaps commingled with drainage from abandoned mine workings (Decision at 4-5). In discussing this alleged violation, the Administrative Law Judge did not refer to the access road to the north of the refuse pile; however, he concluded that Consolidation was responsible for controlling surface drainage from the area of the railroad siding (located near the access road), despite Consolidation's representation that the siding was constructed prior to May 3, 1978 (*id.*). Concerning the alleged violation of the effluent limitations, the Administrative Law Judge concluded that OSM's evidence of effluents in the samples taken from this drainage supported the violation charged (Decision at 5).

Discussion and Conclusions

Sedimentation Pond Requirement

[1] First, we consider the violations of the sedimentation pond requirement charged in the two notices of violation. The Board previously has characterized this requirement as a preventive measure and has stated that a showing of the harm it is intended to prevent is not necessary to establish a violation of the requirement. *E.g.*, *Avanti Mining Co.*, 4 IBSMA 101, 106-07, 89 I.D. 378, 380-81 (1982). Accordingly, a violation of the requirement can be proven independently of a violation of the effluent limitations prescribed for discharges of drainage from disturbed area.[4]

[2] The elements of proof of a violation of the sedimentation pond requirement are straightforward: (1) The existence of surface drainage from areas disturbed in the course of mining and reclamation operations; (2) that such drainage was not passed through a sedimentation pond; and (3) that the drainage left the permit area. *See Black Fox Mining & Development Corp.* v. *Andrus*, No. 80-913 (W.D. Pa. filed Jan. 21, 1981); *Avanti Mining Co.*, *supra*. Upon the facts before us, we conclude that these elements were shown in relation to two areas of Consolidation's Renton mine operation.[5]

[4] This requirement, which facilitates control over surface drainage from areas disturbed by surface coal mining and reclamation, follows from the general mandate to an operator to "minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation." 30 U.S.C. § 1265(b)(10) (Supp. IV 1980). With respect to surface drainage associated with underground coal mining, an operator is required to undertake "[p]ractices to control and minimize pollution [which] include, but are not limited to," * * * preventing contact with acid- or toxic-forming materials, and minimizing water contact time with waste materials." 30 CFR 717.17.

[5] Our evaluation of the evidence takes into account the respective burdens of proof of the parties in the proceeding below. OSM had the burden of going forward to establish a prima facie case; Consolidation had the ultimate bruden of persuasion. 43 CFR 4.1171.

The basin area located on top of the southwest end of the refuse pile, identified in the first notice of violation issued to Consolidation, was described by the OSM inspector as being surrounded by a berm which was breached at one point and which showed signs of having been topped by water at another point (Tr. 52, 56–57). OSM introduced aerial photographs showing the general basin area (Respondent's Exhs. P–1 and P–2; Tr. 18–19), as well as a photograph of the area of the breach in the berm, as observed during the surface inspection conducted on Aug. 14, 1980 (Respondent's Exh. P–6; Tr. 14–15). The photograph of the area of the breach clearly shows an erosion channel containing standing water. Although the inspector testified that he did not observe water flowing through the breach during his inspection (Tr. 52), the conditions shown in the photograph, in combination with the topographic features of the area shown in applicant's exhibit A and with the inspector's testimony, amply constitute a prima facie showing that surface drainage from the disturbed area of the refuse pile had flowed over the southwestern slope of the refuse pile and off the permit area.[6]

Consolidation argues that the basin area itself served as a sedimentation pond and that, therefore, the company could not properly be charged with a violation of the sedimentation pond requirement with respect to drainage from that area (Appellant's Brief at 5). We do not agree. The term "sedimentation pond," as used in the provisions of 30 CFR 717.17(a), must be considered in connection with the provisions of 30 CFR 717.17(e) for the design and performance of sedimentation ponds. We acknowledge that prior to OSM's enforcement action in this case the Secretary suspended certain of the sedimentation pond design criteria originally promulgated by the Department (44 FR 77447 (Dec. 31, 1979)), and that the process of revising these provisions continues (47 FR 20631 (May 13, 1982)). Throughout the revision process, however, certain minimum performance requirements have remained in effect, including that which now appears in 30 CFR 717.17(e)(3): "Sedimentation ponds shall provide the required theoretical detention time for the water inflow or runoff entering the pond from a 10-year, 24-hour precipitation event (design event), plus the average inflow from the underground mine." *See* 46 FR 34784–85 (July 2, 1981). There is no indication in the record that the basin area at the southwest end of the refuse pile was designed to meet such a performance requirement. Accordingly, this basin area cannot properly be considered as a sedimentation pond for the purposes of 30 CFR 717.17(a). Consolidation did not rebut OSM's evidence that

[6] The Board has previously indicated that, during the initial regulatory program, when an area of surface coal mining operations is not specifically covered by a state permit the "permit area" is at least coextensive with the disturbed area. *Bethlehem Mines Corp.*, 2 IBSMA 215, 220, 87 I.D. 380, 383 (1980). Neither party introduced evidence of a state permit in which there is an identified area for Consolidation's Renton mine operations. (OSM introduced a copy of portions of a Pennsylvania Water Quality Management Permit issued to Consolidation on June 25, 1974 (Respondent's Exh. P; Tr. 96–99), but this material does not identify the geographical limits of the area on which Consolidation is permitted to conduct coal mining and reclamation operations under state law.) For the purpose of this case, we conclude that the "permit area" is the area contained within the property boundary lines shown on applicant's exhibit A, as identified by Consolidation's witness (Tr. 109, 130–31, 142–44).

drainage had flowed from the basin and off the permit area; therefore, we affirm the decision below with respect to the violation of the sedimentation requirement charged on the basis of this drainage.

The OSM inspector described the eastern side of the refuse pile as not having any drainage control structures, except for terraces on the eastern slope of the pile (Tr. 79, 87), and further testified that, while he did not observe drainage on the slope during his inspection, there were rills and gullies throughout the terraced slope "showing that there [had been] drainage down over the side" (Tr. 88, 92–93). OSM introduced a aerial photograph showing the top of the pile and terraces on the eastern side (Respondent's Exh. P–14), and a photograph, taken during the Aug. 25, 1980, surface inspection, showing a stream of water along the base of the slope (Respondent's Exh. P–20; Tr. 73, 77). Additionally, the inspector testified that he observed drainage seeping from two locations, approximately 50 feet apart at the base of the pile, during his inspection (Tr. 85, 91–92). The inspector followed the course of the drainage from the seeps to its convergence with a stream, approximately 500 feet away (*see* Tr. 77, 91; Respondent's Exh. P–19).

Consolidation argues that the Administrative Law Judge erred in his determination that the violation of the sedimentation pond requirement, as alleged in NOV No. 80–I–110–7, was intended by OSM to refer to any drainage associated with the east side of the refuse pile (Appellant's Brief at 7–8). We do not agree. Violation 1 of the NOV contained a broad description of the portion of the operation to which the notice applied: "The entire area of the refuse pile facing Clement road" (Respondent's Exh. I). Furthermore, the inspector indicated on direct examination that the violation included reference to the area of seepage (Tr. 72). We therefore reject Consolidation's argument in this regard.[7]

Consolidation also argues that the seepage observed by the OSM inspector emanated from abandoned deep mine workings underlying the refuse pile, that these workings have not been disturbed by the company during its operations, that the drainage surfaces are on land that is not owned by Consolidation, and, therefore, that the drainage is not surface drainage from a disturbed area that must be passed through a sedimentation pond (Appellant's Reply Brief at 3–4).[8]

This argument ignores the testimony of Consolidation's witness that the company has performed no tests to determine the source of the drainage supplying the

[7] Consolidation cites testimony of the inspector (Tr. 170), in support of its argument. Our reading of that testimony is that the inspector was referring only to a portion of the area covered by violation 1.

[8] Certain testimony of an employee of the Pennsylvania Department of Environmental Resources (Tr. 96–104), and of Consolidation's witness (Tr. 127–129), as well as information contained in respondent's exhibits P and Q, indicate that Consolidation has for several years been engaged in an effort to acquire property adjacent to the eastern base of the refuse pile to provide space for the construction of facilities to collect and treat drainage from the abandoned underground workings that underlie the refuse pile.

seeps (Tr. 140–41, 161), and that percolation of drainage from the disturbed surface area at the top of the refuse pile could contribute to the seepage (Tr. 136–37, 154).

[3] As indicated in note 4, *supra*, an operator of an underground mine is required, under 30 CFR 717.17(a), to follow practices to prevent water contact with acid- or toxic-forming materials and to minimize water contact time with waste materials. From the record it is apparent that Consolidation has not followed such practices with respect to drainage on the surface of its refuse pile. To allow the company to avoid the sedimentation pond requirement through the circumstance of its having ignored the other preventive requirements of sec. 717.17(a) clearly would be contrary to the collective purpose of the requirements of that section. Accordingly, we affirm the decision below with respect to drainage on the eastern portion of the refuse pile, including the drainage from the seeps observed by OSM and the drainage that has flowed from the top of the refuse pile over the east slope of the pile.[9]

In contrast, we do not find sufficient evidence in the record to affirm the decision below with respect to the areas of the access road and railroad siding located to the north of the refuse pile. OSM's inspector did not testify that he observed drainage from either of these areas during his inspection, nor did he testify that he observed any evidence of past drainage flowing from these areas off the permit area. Without some credible evidence of present or past drainage from the disturbed area flowing off the permit area, an alleged violation of the sedimentation pond requirement cannot be upheld. *Black Fox Mining & Development Corp.*, *supra* at 6.

Effluent Limitations

We turn, finally, to the violations of the effluent limitations alleged in the two notices of violations. The first such violation, alleged in NOV No. 80-I-110-6, related to drainage on the west side of the refuse pile. The Administrative Law Judge upheld this alleged violation on the basis of his finding that the drainage sampled by the OSM inspector included drainage flowing through the breach in the berm at the southwest end of refuse pile (Decision at 6). We disagree with this finding.

[4] Although our decision affirms the decision below upholding the alleged violation of the sedimentation pond requirement with respect to drainage from the basin at the southwest end of the refuse pile, our affirmance is based on the substantial evidence of past drainage and not on evidence of drainage flowing at the time of OSM's inspection. As we noted above, OSM's inspector testified that he did not observe drainage flowing through the berm around the basin during his inspection. We conclude, therefore, that the drainage sampled by the inspector emanated solely

[9] If there is not sufficient space within Consolidation's property boundaries to construct a sedimentation pond at the base of the refuse pile on its eastern side, then it will be necessary for Consolidation to control drainage within its property boundaries by such diversion measures as are necessary to accomplish this purpose. We leave to OSM the details of assuring appropriate remedial action.

from the abandoned mine workings. The Administrative Law Judge determined that Consolidaton was not responsible for this drainage (Decision at 2–3, 6), and OSM did not appeal that determination. Accordingly, we reverse the decision below upholding the violation of the effluent limitations alleged in NOV No. 80–I–110–6.

[5] The second violation of the effluent limitations charged by OSM, included in NOV No. 80–I–110–7, concerned the seepage from the eastern base of the refuse pile. Consolidation argues, as with respect to the sedimentation pond violation concerning this drainage, that OSM did not show that it included any surface drainage from areas disturbed by the company (Appellant's Brief at 12). We conclude that OSM made a prima facie showing that at least some of the drainage appearing in the seepage had percolated through the refuse pile from the top surface, which was disturbed by Consolidation, and that Consolidation did not rebut this evidence.[10] Accordingly, we affirm the decision below upholding the violation as alleged.

[10] Our decision does not ignore Consolidation's evidence to the effect that the seepage was caused by drainage from abandoned mine workings underlying the refuse pile. We find this evidence inadequate, however, to persuade us that drainage from the top of the pile did not also contribute to the seepage. Consistent with our prior decisions, we conclude that Consolidation is responsible for the quality of the seepage at least until such time as the company might demonstrate by more than conjecture that the drainage is solely from an area that the company has not disturbed in the course of its operations. *Jeffco Sales & Mining Co.*, 4 IBSMA 140, 89 I.D. 467 (1982); *Thunderbird Coal Corp.*, 1 IBSMA 85, 86 I.D. 38 (1979).

Order

In accordance with the foregoing, it is hereby ordered:

1. That the decision below is affirmed as to violation 1 of Notice of Violation No. 80–I–110–6;

2. That the decision below is reversed as to violation 2 of Notice of Violation No. 80–I–110–6;

3. That the decision below is affirmed as to that portion of violation 1 of Notice of Violation No. 80–I–110–7 concerning the eastern part of the refuse pile identified in the notice;

4. That the decision below is reversed as to that portion of violation 1 of Notice of Violation No. 80–I–110–7 concerning the access road and railroad siding identified in the notice; and

5. That the decision below is affirmed as to violation 2 of Notice of Violation No. 80–I–110–7.

It is further ordered that the Office of Surface Mining Reclamation and Enforcement shall remit to appellant the $1,100 civil penalty amount based on violation 2 of Notice of Violation No. 80–I–110–6, as calculated in the decision below (under Docket No. CH 1–111–P), with appropriate interest, in accordance with 30 CFR 723.20(c).

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

415-259 O - 83 - 41

NORTHWAY NATIVES, INC., DOYON LIMITED

69 IBLA 219

Decided: *December 17, 1982*

Appeal from easement reservations across Native-selected lands reserved by the Bureau of Land Management on behalf of the Secretary under authority of sec. 17(b) of the Alaska Native Claims Settlement Act.

Affirmed in part, modified in part.

1. Alaska Native Claims Settlement Act: Easements: Review

When an interested party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is upon the party challenging the determination to show that the decision is erroneous. A decision to reserve easements must be affirmed as long as it is supported by a rational basis.

2. Alaska Native Claims Settlement Act: Easements: Review

The failure of BLM to include in the predecision record or the easement reservation decision itself all factors bearing on its selection does not render the decision arbitrary and capricious. The lack of a formal requirement that BLM fully justify its decisions in writing does not mean that BLM may reserve public easements across Native-selected lands without abiding by the selection criteria set forth in the Alaska Native Claims Settlement Act and Departmental regulations, or that BLM need not be able to document a rational basis for its decision to reserve or not reserve an easement.

3. Alaska Native Claims Settlement Act: Easements: Present Existing Use

Pursuant to 43 CFR 2650.4-7(a)(3), the primary standard for determining which public easements are reasonably necessary for access shall be present existing use. In light of the detailed concern repeatedly expressed in the easement regulations about controlling the "uses" of public easements, it makes little sense to regard the "primary standard" for determining which public easements are reasonably necessary as nothing more than favoring trails, regardless of their purpose, which have recency of use. The most reasonable interpretation of the "present existing use" requirement is that easements substantially conform to existing uses *and* that such evidence of use by recent.

4. Alaska Native Claims Settlement Act: Easements: Access—Alaska Native Claims Settlement Act: Easements: Present Existing Use

The regulations contain safeguards to guarantee the public access to the public domain via easements across Native-selected lands so that other than present existing uses of the public domain may be enjoyed. At 43 CFR 2650.4-7(a)(3) it is provided that a public easement may be reserved absent a demonstration of present existing use if, among other things, there is no reasonable alternative route available or if the public easement is for access to an isolated tract or area of publicly owned land.

5. Alaska Native Claims Settlement Act: Easements: Generally

There is no requirement in the Alaska Native Claims Settlement Act easement regulations that all of the standard uses described for 25-foot-wide trails be allowed in every easement reservation. To the contrary, the regulations specifically permit variances from standard uses "when justified by special circumstances." 43 CFR 2650.4-7(a)(4). In this case, the evidence supports the use of easement 14 for "travel by foot, dogsleds, [and] animals" (43 CFR 2650.4-7(b)(2)(i)), but the record does not support use by "snowmobiles, two and three-wheel vehicles, and small all-terrain vehicles (less than 3,000 lbs. G.V.W.)" *Id.*

APPEARANCES: James Q. Mery, Esq., Fairbanks, Alaska, for appellants; M. Francis Neville, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for appellee.

OPINION BY ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF LAND APPEALS

Northway Natives, Inc. (Northway), and Doyon Limited (Doyon) (appellants), are, respectively, a Native village corporation and a Native regional corporation established under authority of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601–1628 (1976 and Supp. II 1978). They have appealed from a decision of the Bureau of Land Management (BLM) (appellee), reserving to the United States two easements, EIN 5 C5 L (easement 5) and EIN 14 C5 L (easement 14), across lands selected by appellants pursuant to land selection rights under the Act. The easements were reserved by BLM under authority of sec. 17(b) of ANCSA (43 U.S.C. § 1616(b)(1) (1976)).

The easements in question were reserved to the United States in BLM's Decision to Issue Conveyance (DIC), dated June 26, 1978. By decision dated Aug. 24, 1979, BLM conformed the easements reserved in the DIC of June 26, 1978, to new easement regulations now codified at 43 CFR 2650.4–7. Following separate appeals to the Alaska Native Claims Appeal Board (ANCAB) from the BLM easement decisions, the cases were consolidated by ANCAB and referred to the Hearings Division for a hearing and recommended decision by an Administrative Law Judge, pursuant to 43 CFR 4.911(c). ANCAB reserved final determination of the matter to itself.

An evidentiary hearing was held in this case on June 23–24, 1981, in Northway, Alaska, by Administrative Law Judge E. Kendall Clarke. Judge Clarke issued a recommended decision on Mar. 10, 1982, in which he concluded that BLM's easement reservations should be upheld.

ANCAB's functions and pending caseload were transferred to the Board of Land Appeals (IBLA) by Secretarial Order No. 3078, dated Apr. 29, 1982. Interim rules to govern IBLA's disposition of cases pending before ANCAB were published June 18, 1982. *See* 47 FR 26390. Jurisdiction is therefore properly vested in IBLA to decide this case.

Summary of Controversy

Easements 5 and 14 were reserved by BLM across Native-selected lands in order to ensure reasonable access to public lands located north and east of the Native-selected areas. At this stage of the proceedings, appellants' objections to the two easements may be summarized as follows: Although easement 5 may be justified as a 25-foot-wide trail easement to allow access for recreational activities on the public domain north of Native-selected lands, use of easement 5 as a 50-foot-wide heavy equipment transportation easement is unnecessary and unreasonable; easement 14 is not the most reasonable of possible alternative routes and, unless a restriction against mechanized

travel is imposed in conjunction with use of easement 14, trespasses on Native-selected lands will occur (Posthearing Reply Brief, filed Nov. 30, 1981).

Legal Requirements

Sec. 17(b)(3) of ANCSA directs the Secretary of the Interior, after consultation, to "reserve such public easements as he determines are necessary." In *Alaska Public Easement Defense Fund* v. *Andrus,* 435 F. Supp. 664 (D. Alaska 1977), it was held that in making easement reservations, the Secretary must adhere to the specific selection criteria set forth in sec. 17(b)(1) of the Act. Sec. 17(b)(1) states:

> The Planning Commission [Joint Federal-State Land Use Planning Commission for Alaska established under section 17(a) of the Act] shall identify public easements across lands selected by Village Corporations and the Regional Corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important.

Subsequent to the decision in *Alaska Public Easement Defense Fund* the Department published substantive regulations governing easement reservations to conform to the court's analysis of ANCSA's statutory requirements. *See* 43 FR 55326 (Nov. 27, 1978), codified at 43 CFR 2650.4-7. Among the regulatory requirements in the foregoing section pertinent to this appeal are the following:

> § 2650.4-7 Public easements.
>
> (a) *General requirements.* (1) Only public easements which are reasonably necessary to guarantee access to publicly owned lands * * * shall be reserved.
>
> * * * * *
>
> (3) The primary standard for determining which public easements are reasonably necessary for access shall be present existing use. However, a public easement may be reserved absent a demonstration of present existing use * * * if there is no reasonable alternative route * * *, or if the public easement is for access to an isolated tract or area of publicly owned land. * * * The natural environment and other relevant factors shall also be considered.
>
> * * * * *
>
> (b) *Transportation easements.* (1) Public easements for transportation purposes which are reasonably necessary to guarantee the public's ability to reach publicly owned lands * * * may be reserved across lands conveyed to Native corporations. * * * If public easements are to be reserved, they shall:
>
> (i) Be reserved across Native lands only if there is no reasonable alternative route of transportation across publicly owned lands;
>
> * * * * *
>
> (iv) Follow existing routes of travel unless a variance is otherwise justified;
>
> * * * * *
>
> (vi) Be reserved in topographically suitable locations whenever the location is not otherwise determined by an existing route of travel * * *;
>
> * * * * *
>
> (2) Transportation easements shall be limited to roads and sites which are related to access. * * *
>
> (i) The width of a trail easement shall be no more than 25 feet if the uses to be accommodated are for travel by foot, dogsleds, animals, snowmobiles, two and three-wheel vehicles, and small all-terrain vehicles (less than 3,000 lbs. G.V.W.);
>
> (ii) The width of a trail easement shall be no more than 50 feet if the uses to be accommodated are for travel by large all-terrain vehicles (more than 3,000 lbs. G.V.W.), track vehicles and 4-wheel drive vehicles, in addition to the uses included under paragraph (b)(2)(i) of this section;

[1] In addition to the above, IBLA is guided by prior decisions of ANCAB in adjudicating easement selection disputes. However, most prior ANCAB decisions involving easement reservations have only addressed the limited question of "standing" to appeal.[1] This is said to be "the first case in which a hearing has been held concerning the section 17(b) easement regulations issued in 1978" (BLM's Posthearing Brief at 2; *see also* Statement by BLM counsel (Tr. 14)). Still, ANCAB has articulated principles concerning "burden of proof" and "standards of review" which IBLA regards as proper and controlling in this case. In *Appeal of Goldbelt, Inc.*, ANCAB G 80-1, decided Oct. 9, 1981, it was held "that when an appellant appeals a BLM easement determination made pursuant to ANCSA and its enabling regulations, the burden of proof is upon the party challenging the determination to show that the determination is erroneous." *Id.* at 2. Further, *Goldbelt* provides that a decision to reserve easements must be affirmed "unless the appellant shows by substantial evidence that such decision was arbitrary and capricious." *Id.* Agency action inconsistent with statutory and regulatory easement criteria "would be arbitrary and capricious," according to *Goldbelt. Id.* at 4.[2]

Discussion, Findings, and Conclusions

Easement 5

The legal description of easement 5 is set forth in BLM's decision of June 26, 1978, *as amended,* Aug. 24, 1979, to conform the easement reservation to new regulatory requirements, as follows:

(EIN 5 C5, L) An easement for an existing access trail fifty (50) feet in width from the Alaska Highway in Sec. 19, T. 16 N., R. 18 E., Copper River Meridian, easterly to public lands. The uses allowed are those listed above for a fifty (50) foot wide trail easement.[3]

Easement 5 is depicted on various map exhibits received into evidence at the evidentiary hearing. It is most plainly shown on exhib-

[1] *See, e.g., Ray DeVilbiss,* 6 ANCAB 290, 89 I.D. 9 (1982); *Patrick J. Bliss,* 6 ANCAB 181, 88 I.D. 1039 (1981); *Joseph C. Manga,* 5 ANCAB 224, 88 I.D. 460 (1981). Standing is not at issue here.

[2] *Goldbelt's* reference to "substantial evidence" as the degree of proof required to establish that a decision is arbitrary or capricious merits comment. Under the Administrative Procedure Act, the scope of review prescribed for courts is that agency action shall be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. § 706(2)(A) (1976)) or if such action is "unsupported by substantial evidence" (5 U.S.C. § 706(2)(E) (1976)).

While the APA sets forth a substantial evidence test and an arbitrary-capricious test, among others, by which to judge agency action, there is doubt as to whether the tests really differ. *See* Davis, Administrative Law Treatise, Second Edition, § 29.00-1 (1982 Supp.). As to factual questions, the test of substantial evidence has long meant "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 229 (1938). But Davis asks, "Does what is 'reasonable' differ from what is not arbitrary or capricous? If it does, the case law since 1938 has not developed the difference." *Davis, supra* at 522. Rather than second-guess what ANCAB intended by including substantial evidence language in its pronouncement of an arbitrary-capricious test, we think it is clear that the rule simply means that easement decisions rendered by BLM must have a rational basis. Consistent with BLM's delegated authority from the Secretary to reserve such easements determined to be necessary, the *Goldbelt* rule seems to recognize the "discretionary" nature of the decisionmaking involved. Thus, it is fair to say that as long as the easement decision appealed is supported by a rational basis and is consistent with the selection criteria of sec. 17(b)(1) of ANCSA, it should not be nullified by a reviewing board even though from the facts presented the Board might reach a different result. *See NLRB* v. *Minnesota Mining & Manufacturing Co.,* 179 F.2d 323 (8th Cir. 1950).

[3] As earlier described in BLM's modified decision of Aug. 24, 1979, 50-foot-wide trail easements may be used for "travel by foot, dogsleds, animals, snowmobiles, two and three-wheel vehicles, small and large all-terrain vehicles, track vehicles, and four-wheel drive vehicles." *See also* 43 CFR 2650.4-7(b)(2)(i).

it 2 as a continuous black line labeled "5L C5." This easement begins at the Alaska Highway and provides access to the South Fork of the Ladue River, as well as to the Ladue River drainage area generally. It follows an easterly course across lands selected by Northway and Doyon for approximately 5 miles before arriving at the western edge of public domain lands.

In his recommended decision the Administrative Law Judge made the following findings concerning easement 5: (1) The easement is reasonably necessary to guarantee the public's ability to reach public land north and east of appellants' selected lands; (2) the alternate route proposed by appellants, viz., the Nine Mile Trail emanating from the Taylor Highway, is not a reasonble alternative route because it does not extend to portions of the South Fork of the Ladue River, where mining claims are located, and because the trail is not suitable for year-round use or heavy equipment traffic; (3) the proposed 50-foot width for easement 5 is reasonable since mining operations are possible in the future for the South Fork area of the Ladue River and a wide trail is necessary to accommodate heavy equipment. Without such an easement, Judge Clarke states, "a large block of public land would be effectively closed to mineral development" (Recommended Decision at 9).

The Board agrees with the above findings and conclusions concerning easement 5 although we do so under a different interpretation of the "present existing use" standard set forth at 43 CFR 2650.4–7(a)(3). In addition, the Board notes that the recommended decision does not directly respond to a major contention raised by appellants in their posthearing brief regarding the proper scope of review. The proper scope of review is addressed first.

Appellants argue that the BLM action in this matter must be evaluated on the basis of the predecision record which was before the agency at the time it made its easement selections. Accordingly, appellants submit that evidence received at the hearing concerning mineral claims along the South Fork of the Ladue River is irrelevant in reviewing the BLM action in question because BLM's prehearing justifications made no reference to mineral activity along the South Fork. As stated by appellants:

> Claims along the South Fork of the Ladue, and testimony regarding alternate access to them, are irrelevant to the challenge of the instant easement reservation. What is relevant only is the information found in the record upon which BLM justified its easement decision. When considering this easement, BLM had no information about any mineral activity along the South Fork. No claims had been filed there until 1979. Transcript at p. 30. As pointed out earlier, all data used to justify this easement decision was gathered in 1975. Transcript at p. 15. This data clearly refers only to the claims and renewed interests along the Ladue River itself, which is north and perpendicular to the South Fork and McArthur Creek, which is many miles to the east.
>
> Nor was there information available which would have indicated mineral potential along the South Fork. The inventory of known mineral resource potential as depicted on one of the maps of the URA [Unit Resource Analysis] for the Forty Mile area specifically excludes the South

Fork while including the Ladue. *See,* Transcript, Exhibit 1.

Given this perspective, testimony regarding recent, meager claim staking activity along the South Fork which postdates the gathering of information by BLM and which had no part in the decision-making process, is irrelevant to challenges to the reasonableness of that decision. Thus, alternative access *must* be considered only in light of access to the Ladue River drainage. By removing this cloud imposed by the BLM with testimony of activity on the South Fork, it becomes clear that the BLM's dismissal of an alternate route of access to mineralized areas along the Ladue was not only unreasonable but truly arbitrary and capricious. [*Italics* in original.]

(Appellants' Posthearing Brief at 6).

The record as comprised prior to hearing supports appellants' position that BLM's justification for selecting easement 5 includes no stated reliance on known mineral activity or claims along the South Fork.

[2] In advancing the argument that the Board should evaluate BLM's easement decision on the basis of the written record compiled by BLM prior to the decision and on reasons set forth in the decision document itself, appellants refer to a memorandum opinion by former Deputy Solicitor Lindgren, dated May 23, 1975, the relevant portion of which states:

In the exercise of his [the Secretary's] authority he must be reasonable and not arbitrary or capricious in his determinations of what easements are necessary or not necessary. A determination that an easement is necessary or not necessary should be recorded and accompanied by a written record in support thereof in case the determination is challenged. (*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Camp v. Pitts*, 411 U.S. 138 (1973)).

82 I.D. 325, 331 (1975).

It is undoubtedly true that to the extent BLM's easement selection decisions are administratively and judicially reviewable for reasonableness, they stand a greater chance of approval if accompanied by full and complete written justifications. However, the failure of BLM to include in the predecision record or the easement reservation decision itself all factors bearing on its selection does not render the decision arbitrary and capricious. As stated by appellee:

The BLM decision to reserve the two disputed easements is to be reviewed on the basis of the facts presented at the hearing—not solely on the written record which existed prior to the decision. If appellants could sustain their burden of proof by merely pointing out alleged inadequacies in the pre-decision record, there would be no reason to hold a factual hearing.

(Appellee's Posthearing Brief at 3).

Appellee goes on to note that under general procedural regulations of the Office of Hearings and Appeals found at 43 CFR 4.24(a), when a matter is referred for hearing on the instructions of an appeals board, the record made before the presiding official shall be the sole basis for decision insofar as the referred issues of fact are involved (Appellee's Posthearing Brief at 3). An exception included in the foregoing regulation allows official notice to be taken of public records of the Department of the Interior and of any

matter of which the courts may take judicial notice.[4]

Notwithstanding the Deputy Solicitor's advice to the Secretary in 1975, the easement reservation regulations promulgated by the Department in 1978 do not require a detailed written justification in decisions reserving easements under authority of sec. 17(b) of ANCSA.[5] The lack of a formal requirement that the BLM fully justify its decisions in writing does not mean that BLM may reserve public easements across Native-selected lands without abiding by the selection criteria set forth in the Act and Departmental regulations, or that BLM need not be able to document a rational basis for its decision to reserve or not reserve an easement. In this case, because there was not adequate documentation before ANCAB regarding BLM's decision from which to ascertain whether the decision was proper, a hearing was ordered to receive evidence concerning the basis for its decision. It should not be necessary to do this in many cases if BLM has adequately documented its easement decisions and provided that documentation for administrative review.

From the evidence adduced at the hearing and the briefs of the parties, it is clear that BLM selected easement 5 to provide access to the South Fork of the Ladue River, among other areas, not on the basis of known mineral claims or activity along the South Fork, but on the belief that the vicinity had the potential for mining. *See* Tr. 30-31, 202-03, 210-11. Since 1979, at least seven mining claims have, in fact, been filed along the South Fork (Tr. 48).

[3] Appellants contend that although easement 5 is reserved along an existing trail, the trail has never been used to haul heavy mining equipment. The contention seeks to prove that easement 5 is not "reasonably necessary" on its face since the primary standard for determining which easements are reasonably necessary for access "shall be present existing use." 43 CFR 2650.4-7(a)(3). "Present existing use" is defined at 43 CFR 2650.0-5(p) as:

> [U]se by either the general public which includes both Natives and non-Natives alike or by a Federal, State, or municipal corporation entity on or before December 18, 1976, or the date of selection, whichever is later. Past use which has long been abandoned shall not be considered present existing use.

Appellee interprets the "present existing use" standard as requiring the mere finding of a trail *in use* before Dec. 18, 1976. According to this theory, the standard does "not establish the uses to be allowed on the easement" (Appellee's Reply Brief at 7).

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[4] In prior cases, ANCAB has looked to the "record as a whole," including the BLM case file and the record made before an Administrative Law Judge, in reaching its decision. *Appeal of Doyon, Limited*, 4 ANCAB 50, 59, 86 I.D. 692, 696 (1979).

[5] 43 CFR 2650.4-7(a)(2) provides: "In identifying appropriate public easements assessment shall be made in writing of the use and purpose to be accommodated." The preamble comment accompanying this regulation states, however:

"In response to one comment which called for assessments in subsection (2) to be in writing, such a provision was intended and is now provided. These assessments are part of the official easement file and are available for public inspection. The concerned Native Village now has and will continue to have an opportunity to review this file before the final decisions are made. Also, the 'must' in subsection (2) is changed to 'shall' to reflect the mandatory nature of this provision." 43 FR 55327 (Nov. 27, 1978).

Judge Clarke adopted appellee's interpretation, noting that reservation of easement 5 for future mining purposes along a trail not formerly used for access to mining was, nevertheless, "consistent with the Congressional intent to guarantee a full right of public use and access" (Recommended Decision at 9).

The Board rejects the interpretation given to the Department's easement regulations by appellee and the Administrative Law Judge. We hold it is contrary to the express and implied purposes of the easement selection criteria to say that whenever an existing trail of any sort can be located, it is thereby eligible for reservation for a markedly different use. Present existing use cannot reasonably be construed to mean, in effect, future possible use.

It is a constant theme running through the easement regulations that where it is necessary to reserve a right-of-way across Native-selected lands to provide access to the public domain, their lands shall be protected to the maximum extent possible from change in use. Thus, the regulations express the need to protect "Native culture, lifestyle, and subsistence needs" and direct that "natural environment and other relevant factors" be considered in determining which public easements are reasonably necessary (Sec. 2650.4–7(a)(3)); public transportation easements are to follow "existing routes of travel" as a general proposition (*id.* at (b)(1)(iv)), and, where they cannot be so located, they are to be reserved in "topographically suitable locations" (*id.* at (b)(1)(vi)).[6] As stated by Robert Arnold, Assistant to the State Director for ANCSA: "[T]he thrust of the regulations is clear, to minimize the impact on the lands * * *" (Tr. 65; *see also* Tr. 101).

In light of the detailed concern repeatedly expressed in the easement regulations about controlling the "uses" of public easements, it makes little sense to regard the "primary standard" for determining which public easements are reasonably necessary as nothing more than favoring trails, regardless of their purpose, which have recency of use. The most reasonable interpretation of the "present existing use" requirement is that easements should substantially conform to existing uses *and* that evidence of use be recent. Robert Arnold, who is ultimately responsible for all easement reservation decisionmaking (Tr. 64, 195), acknowledged at the hearing that BLM does not merely look to the fact of activity in studying trails for selection but that the purposes of trails are also considered (Tr. 72).[7]

[6] Regulations controlling other types of easements across Native-selected lands not here at issue are found at 43 CFR 2650.4–7(b)(3) (site easements) and 2650.4–7(c) (miscellaneous easements). These regulations also safeguard the existing uses of Native-selected lands by such measures as prohibiting site easements related to transportation from being reserved for recreational use "or other purposes not associated with use of the public easement for transportation" (sec. 2650.4–7(b)(3)) and permitting miscellaneous easements "in order *to continue* certain uses of publicly owned lands and major waterways." *id.* at (c) (Italics added).

[7] In *Alaska Public Easement Defense Fund* v. *Andrus*, *supra*, the court analyzed, among other things, the Department's standard for reserving easements along recreational rivers and streams "having highly significant present recreational use," as prescribed by sec. 5(b)(3) of Secretarial Order No. 2982, dated Feb. 5, 1976, published

Continued

[4] Notwithstanding our interpretation of "present existing use," the regulations contain safeguards to guarantee the public access to the public domain via easements across Native-selected lands absent a showing of present existing use. Sec. 2650.4–7(a)(3) states in pertinent part:

> However, a public easement may be reserved absent a demonstration of present existing use only if it is necessary to guarantee international treaty obligations, if there is no reasonable alternative route or site available, or if the public easement is for access to an isolated tract or area of publicly owned land.[8]

In the present case, since reservation of a public easement to the South Fork of the Ladue River across Native-selected lands would be possible for the purpose of ensuring access for possible future mining activities, even without a demonstration of present existing use, it was proper that the evidentiary hearing fully examined the issue of "reasonable alternative routes." In the Board's opinion, the record supports the conclusion that easement 5 is the only reasonable route for entering the South Fork area for future mining purposes there.

The recommended findings and conclusions by the Administrative Law Judge regarding alternate routes of travel are adopted as findings and conclusions of the Board. These are: To deny the reservation of easement 5 would force a person to travel along the Alaska Highway to a point where there is other access to the public lands which does not cross over Native-selected lands. Native-selected land extends over 60 miles along the highway. Consequently, a person would have to detour great distances to get around the Native-selected lands in order to reach the public land. The alternate route proposed by appellants, the Nine Mile Trail, is not a reasonable alternative route for several reasons. The time and distance required to reach the public lands would be much greater along the Nine Mile Trail than along easement 5. The Nine Mile Trail does not extend to the South Fork of the Ladue River where mining claims are located and where future mining operations are possible. The Nine Mile Trail is unsuitable for year-round use and it cannot be used to haul heavy equipment because it traverses steep terrain. In addition, parts of the trail are in swampy land. There is substantial evidence to support BLM's decision that easement 5 is reasonably necessary as a 50-foot-wide trail to provide access to the public lands north and east of Native-selected lands and that without easement 5 a large block of public land would be effectively closed to mineral development.

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at 41 FR 6296 (Feb. 12, 1976). *See* 435 F. Supp. 664, 678. It was obviously not necessary for the court to address whether the present use requirement of sec. 5(b)(3) contemplated type of use versus currency of use or both since the section expressly dealt with *recreational* use only. Accordingly, the issue of concern was merely "the date which has been set for ascertaining 'present recreational use.'" (The court approved the date adopted by the Secretary, Dec. 17, 1976, rejecting the Natives' contention that easements should be reserved on the basis of their use on the date ANCSA was passed.)

[8] *Cf.* with former easement policies and procedures published in Secretarial Order No. 2982, *supra*, which provided at sec. 4:

"[E]asements in behalf of the general public for recreation, access, transportation, utilities, airports, and aircraft landing sites will be reserved only on the basis of present existing use with the following exceptions: * * * (2) the reservation of easements to assure present and future access to all public lands and resources. These exceptions describe the only local easements in behalf of the general public to be reserved for other than *present existing uses.*" (Italics added.)

Easement 14

The legal description of easement 14 as set forth in BLM's decision of June 26, 1978, modified on August 24, 1979, is as follows:

(EIN 14 C5, L), An easement for an existing access trail twenty-five (25) feet in width from the Alaska Highway in Sec. 11, T. 14 N., R. 19 E., Copper River Meridian, northerly to public lands. The uses allowed are those listed above for a twenty-five (25) foot wide trail easement.[9]

Easement 14 is depicted on exhibit 2 as a continuous black line labeled "14 L C5." It begins at the Alaska Highway near Northway Junction and traverses 2 miles of Native-selected land in a northeasterly direction before arriving at public lands adjacent to Demundtali Lake.

As with easement 5, the Administrative Law Judge concluded that easement 14 is reasonably necessary to guarantee the public's ability to reach public lands north and east of appellants' selected lands. Certain contentions made by appellants in their posthearing brief regarding easement 14 are not specifically addressed in the Recommended Decision. The Board has considered appellants' objections to easement 14 and, for reasons given below, it is concluded that the record as constituted does not support the multiple uses proposed by BLM for this easement.

As an initial matter, it is held that there is substantial evidence to support BLM's selection of easement 14 to serve as a trail to the publicly owned lands near Damundtali Lake. There is no dispute that prior to 1976 there was present existing use of the public lands accessed by easement 14, primarily for trapping and hunting. Further, appellee's position that there are no reasonable alternative routes to the publicly owned lands which would not cross Native-selected lands, challenged by appellants only in conclusory statements to the Board, is not directly refuted by appellants or the record as presently constituted.[10]

[4] Notwithstanding the showing of specific and present use regarding easement 14 and the publicly owned lands accessed thereby, appellants submit it is not an existing route of travel for mechanized traffic. Appellants contend that mechanized travel along easement 14 would, in fact, result in unlawful trespass on Native-selected lands adjacent to the easement corridor. Appellants state:

43 C.F.R. § 2650.4-7(b)(1)(vi) requires a transportation easement to be located in a topographically suitable location whenever there is not an existing route of travel.

[9] As earlier described in BLM's modification decision of Aug. 24, 1979, 25-foot-wide trail easements may be used for "travel by foot, dogsleds, animals, snowmobiles, two and three-wheel vehicles, and small all-terrain vehicles (less than 3,000 lbs. Gross Vehicle Weight (GVW)." *See also* 43 CFR 2650.4-7(b)(2)(i).

[10] Appellee's assessment of the alternative route evidence is set forth at page 13 of its posthearing brief as follows:

"Although there are several existing trails from the Alaska Highway to the Damundtali Lake area which are located on the lands which have been conveyed to the appellants, there are no trails to this area located on the publicly-owned lands southeast of the Native selections. Cross-country travel through the lands east of the selections to the Damundtali Lake area is not feasible for local residents. The journey would be too long and too difficult for most people to undertake (Tr. 110, 141, 181). Furthermore, the publicly-owned lands one would have to cross are wet and swampy, making summer travel unfeasible (Tr. 166, 181). The absence of a reasonable alternative route of access on publicly-owned lands supports the BLM decision that easement 14 is reasonably necessary."

Proposed Easement 14 is an old Indian *foot trail.* Transcript at p. 114. It was established prior to snowmobile development as a recreation vehicle, for part of the trail is not negotiable by snowmobile due to the excessively steep grades. Transcript at p. 115, 140, 141. Thus, it is not an existing route of mechanized recreation traffic, and easement rationales must make a finding that the trail is compatible with the proposed uses to be permitted by the easement reservation.

The purpose of this and most ANCSA easements is to provide the public with access to publicly-owned lands located at the terminus of the easement. 43 C.F.R. § 2650.4-7(a). Easements cannot be established to provide recreational opportunities for the public on conveyed lands. *Alaska Public Easement Defense Fund v. Andrus,* 435 F.Supp. 664, 674 (D. Alaska 1977); 43 C.F.R. § 2650.4-7(a)(7). Recreation on conveyed private lands is a trespass. But, an easement which effectively ends on Native lands because mechanized recreation type vehicles cannot pull the grades on hills leading to the public lands will encourage prohibited and unlawful public use of private lands.

Testimony has shown that snowmobiles might be able to reach the public lands, but only by utilizing far more lands than are being reserved by the easement corridor. To negotiate the steeper hills, wide "S"-type switchbacks would have to be used. Transcript at pps. 169-170. Any use of private lands outside of the easement corridor constitutes a trespass.

* * * * *

If the reservation of this easement is allowed, use should be restricted to travel by foot, horse or dogsled. The environment and topography are known to support these activities. The trail as it exists and proposed to be reserved prevents access to the public lands by any other mode of transportation. There is no requirement in ANCSA transportation easement regulations that all of the permitted uses be allowed. Transportation easements under 43 C.F.R. § 2650.4-7(b)(2) address only standard and maximum permitted uses and sizes. Standard sizes and uses may be varied when justified by special circumstances. 43 C.F.R. § 2650.4-7(a)(4). The special circumstances noted * * * justify the suggested variance in this situation. [Italics in original.]

(Appellants' Posthearing Brief at 13-15).

Appellee contends that appellants' objections to allowing mechanized travel on easement 14 are untimely and outside the scope of review in this appeal:

> The BLM particularly objects to the appellants' request to have the BLM decision modified or reversed on the basis of factual arguments raised for the first time in the post-hearing brief. * * * [I]n preparing for the hearing, the BLM had no reason to believe that the suitability of Easement 14 for mechanized travel would be an issue. * * * If BLM had fair notice that the appellants would seek to limit the use of the trail to unmechanized modes of travel, evidence would have been introduced on this issue by the BLM.

(Appellee's Posthearing Brief at 1-2).

The Board holds that it was not improper for appellants to adduce evidence at the hearing regarding an alleged unsuitability of easement 14 to accommodate snowmobile traffic. The evidentiary hearing was not preceded by any order that appellants specifically plead their claims or the nature of proof to be offered in support thereof. Rather, the hearing was held pursuant to ANCAB's order of Nov. 20, 1980. That order merely required that a hearing be held "to resolve the issue of whether BLM erred in its decision to reserve public easements EIN 5 C5, L and EIN 14 C5, L to the United States." It is also noted that appellee did not object when appellants questioned witnesses at the hearing regarding the above issue (*see* Tr. 115, 141). To the contrary, appellee questioned one of its own witnesses on the same matter (Tr.

165-66).[11] The alleged unsuitability of easement 14 for snowmobile traffic was also raised by appellants in their opening statement, again without objection (Tr. 96).[12]

In short, appellee cannot be heard to complain about evidence not objected to at the hearing and which bears on the reasonableness of the easement decision at issue.[13]

From the Board's examination of the evidence, it must conclude that BLM's decision that easement 14 is suitable for snowmobile travel is not supported by substantial evidence. The testimony of witnesses called by appellants and appellee supports this conclusion.

Ina Albert, resident of Northway, Alaska, for 56 years, testified:

Q. The route, the way the Old Indian trail goes, is it or is it not real steep?
A. Steep.
Q. Yes?
A. Yes.
Q. You told me yesterday that in the wintertime a snowgo cannot get up there?
A. No.
Q. Is that true? No snowgo?
A. No snowgo.
Q. You would have to walk?
A. Yes.
Q. Part of the way?
A. (Nodding head).

(Tr. 115).

David Stout, a storeowner residing near Northway, Alaska, called as a witness on behalf of appellee, testified on cross-examination:

Q. Mr. Stout, you're a dog musher, correct?
A. Occasionally.
Q. Occasionally? You say you run your dogs through this country around 14, not necessarily on that trail in particular, but—
A. Yes. I have been up through there with dogs.
Q. But only when you wind [14] them up single file until you get them up over that last ridge or so into public lands?
A. Well, generally speaking, after you leave the pipeline, you have to run them single file.
Q. Rough going?
A. Uh huh.
Q. Can't get a snowgo up in there?
A. You couldn't get it up that trail. If you went up another trail you could come down that trail on a snow machine.

(Tr. 141).

Danny Grangaard, a resident of Tok, Alaska, since 1965, called as a witness on behalf of appellee, testified as follows on cross-examination regarding easement 14:

Q. You said something about even though you had never been in there in the wintertime, that you thought you could get a snowgo up there?
A. Right.
Q. Even though it is very steep?
A. Yes. The trail would have to be built different. Instead of going straight up the hill, you have got to "S"-curve up.
Q. When you take the S-curve, how many feet do you think you need?
A. Your trail is a lot longer, but there's only—
Q. To get up there, you would have to go out of the present trail as it exists?
A. What do you mean, outside of it?
Q. Well, that's a 25-foot trail back up into the Damundtali Lake area. You would

[11] Correspondingly, appellee questioned appellants' witnesses concerning the suitability of easement 5 for snowmobile travel (Tr. 49-50).

[12] Thus, appellee is wrong in asserting that this factual argument of appellants was "raised for the first time in the post-hearing brief."

[13] In addition, it is somewhat inconsistent for appellee to oppose appellants' proposed exclusion of evidence regarding such matters as mining activity on the South Fork and its contention that "the two disputed easements * * * be reviewed on the basis of the facts presented at the hearing" (Appellee's Posthearing Brief at 3) while arguing that evidence related to the reasonableness of easement 14 should be ignored. It was a proper use of the hearing in this case for the Administrative Law Judge to receive any and all evidence related to the reasonableness of both easement reservations.

[14] As appears in transcript. Probably said "line."

have to, when you're doing your 25-foot sweep, when you're doing your sweeps, you would have to sweep outside of that 25 feet?

A. Probably.

(Tr. 169–70).

[5] There is no requirement in the ANCSA easement regulations that all of the standard uses set forth at 43 CFR 2650.4–7(b)(2) be allowed in every easement reservation. To the contrary, the regulations specifically permit variances from standard uses "when justified by special circumstances." 43 CFR 2650.4–7(a)(4). We hold in this case that while the evidence supports the use of easement 14 for "travel by foot, dogsleds, [and] animals" (43 CFR 2650.4–7(b)(2)(i)), the record does not support use by "snowmobiles, two and three-wheel vehicles, and small all-terrain vehicles (less than 3,000 lbs. G.V.W.)." *Id.*[15]

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of BLM to reserve easement 5 C5 L is affirmed; the decision to reserve easement 14 C5 L is modified to allow only those uses denominated in this opinion. This decision is final for the Department.

WM. PHILIP HORTON
Administrative Judge, Alternate Member

I CONCUR:

WILL A. IRWIN
Administrative Judge

ADMINISTRATIVE JUDGE HENRIQUES DISSENTING IN PART:

I respectfully dissent from the holding of the majority that the easement EIN 14 C5, L should be limited to travel by foot, dogsleds, and animals, and not be open to the other uses set out in 43 CFR 2650.4–7(b)(2)(i), *i.e.*, "snowmobiles, two and three-wheel vehicles, and small all-terrain vehicles (less than 3,000 lbs. G.V.W.)."

The majority seem to rest their decision on the testimony that the steepness of the trail precludes any other type of use than on foot, and that no evidence was presented to show past use of the trail by mechanized vehicles. I do not regard the lack of past use as creating "special circumstances" which justify deviation from the uses prescribed in 43 CFR 2650.4–7(b)(2)(i).

In *Alaska Public Easement Defense Fund* v. *Andrus*, 435 F. Supp. 664 (D. Alaska 1977), the court held (syllabus):

> Public easement section of Alaska Native Claims Settlement Act was intended to preserve right of public access to lands remaining in public domain after native selection, and date of enactment was not appropriate date to be considered in reserving easements, but rather it was appropriate to reserve easement for future use.

That interpretation appears to have been followed by the Department when it promulgated the regulations relating to public easements in Alaska Native selec-

[15] The dissenting opinion states that the majority seems to rest its decision that easement 14 is not suitable for mechanized travel on grounds that "no evidence was presented to show past use of the trail by mechanized vehicles." The majority's decision is based on the uncontroverted testimony of all witnesses questioned on the matter that snowmobiles cannot negotiate easement 14 within the confines of a 25-foot-wide trail, the width limitation imposed by regulation. 43 CFR 2650.4–7(b)(2)(i).

tions. 43 CFR 2650.4-7 (43 FR 55329 (Nov. 27, 1978)).

The need for reservation of easement EIN 14 C5, L was clearly established. I would not limit its use to less than all the uses set forth in the regulations.

DOUGLAS E. HENRIQUES
Administrative Judge

WESLEY WISHKENO *ET AL.* *v.* DEPUTY ASSISTANT SECRETARY—INDIAN AFFAIRS (OPERATIONS)

11 IBIA 21

Decided *December 30, 1982*

Appeal from a decision by the Deputy Assistant Secretary—Indian Affairs (Operations) declining to give retroactive approval to an attempted conveyance of Indian trust land.

Remanded.

1. Board of Indian Appeals: Jurisdiction

The Board has jurisdiction to review a decision of the Deputy Assistant Secretary—Indian Affairs (Operations) that is based upon an application of facts to law.

2. Indian Lands: Allotments: Alienation—Indian Lands: Restricted Allotment

Under Departmental and judicial precedents, the Secretary of the Interior has the authority to give retroactive approval to the conveyance of Indian trust or restricted land despite the fact that the Indian grantor has died before approval is given.

3. Indian Lands: Allotments: Alienation—Indian Lands: Restricted Allotment

The Secretary or his delegate has the authority to approve a conveyance of Indian trust or restricted land after the death of the Indian grantor if the Secretary is satisfied that the consideration for the conveyance was adequate; the grantor received the consideration; and there was no fraud, overreaching, or other illegality in the procurement of the conveyance.

APPEARANCES: Wesley Wishkeno, Mary E. Wishkeno Delg, Alethia Wishkeno Bedwell, Virginia Wishkeno Cadue, and Wilma Wishkeno Anquoe, *pro sese.* Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

On May 17, 1982, the Board received a letter from Wesley Wishkeno, Mary E. Wishkeno Delg, Alethia Wishkeno Bedwell, Virginia Wishkeno Cadue, and Wilma Wishkeno Anquoe (appellants) objecting to an Apr. 5, 1982, decision of the Deputy Assistant Secretary—Indian Affairs (Operations) refusing to give retroactive approval to a warranty deed of Indian trust land. Approval had been sought in the context of the probate of the estate of appellants' father, Arthur Wishkeno.

Background

On Aug. 8, 1980, the Board of Indian Appeals issued a decision in the *Estate of Arthur Wishkeno,* Docket No. IBIA 80-13, 8 IBIA 147 (1980). That appeal involved the estate of Arthur Wishkeno (decedent), Prairie Band Potawa-

tomi Allottee 330, who died on May 13, 1978. On July 19, 1979, Administrative Law Judge Sam E. Taylor disapproved decedent's will and determined his heirs. The Administrative Law Judge's decision held that a copy of a will allegedly executed by decedent in Dec. 1958 would not be admitted to probate because the proponent of the will failed to account for the absence of the original and evidence was introduced suggesting that the original may have been destroyed.

At the probate hearing Virginia Wiskeno Cadue, a daughter of decedent and an appellant in the present case, introduced a copy of a warranty deed, purportedly executed by decedent on Nov. 21, 1968, which attempted to convey certain trust lands held by decedent to her. The Administrative Law judge held that this warranty deed was ineffective to convey decedent's trust lands because the deed had not been approved by the Secretary of the Interior or his delegate, the Superintendent of the Horton Agency, Bureau of Indian Affairs (BIA), as required by law.

In its Aug. 8, 1980, decision the Board held that decedent's purported will was properly denied probate. Concerning the warranty deed to Virginia Cadue, the Board stated at 8 IBIA 148-49:

> The main thrust of appellants' argument is that the purported warranty deed * * * should receive subsequent approval by the Secretary of the Interior and be upheld as a valid instrument. Appellants cite several state and Federal cases in support of their position. One in particular, *Lykins* v. *McGrath*, 184 U.S. 169 (1902), held that:
>
> "Consent of the Secretary of the Interior to a conveyance by an Indian patentee whose patent prohibits alienation by him or his heirs without such consent may be given after death of the Indian grantor, and when so given is retroactive in its effect, and relates back to the date of the conveyance, so as to cut off any claim of the heirs of such grantor to the land."
>
> Whether the purported warranty deed is null and void or whether it was lawful or at least voidable and, therefore, subject to ratification is appropriately a matter for the Commissioner of Indian Affairs to decide, not this Board. *See* 25 CFR Part 121. [Now codified at Part 152.]
>
> Because this matter is within the purview of the Commissioner of Indian Affairs, it is referred to the Commissioner for *expeditious* resolution and return. The decision should include findings of fact and conclusions for incorporation in a final decision by the Board for the Department regarding decedent's estate. [Italics in original.]

On Apr. 8, 1982, the Board received a memorandum dated Apr. 5, 1982, from the Deputy Assistant Secretary—Indian Affairs (Operations), which, after a brief recitation of facts, stated:

> After analyzing the record and related legal opinions on the retroactive approval of deeds by the Secretary, it is our opinion that there is not sufficient evidence to show that this particular transaction, if retroactively approved, would bar possible equitable claims to title.
>
> We, therefore, are declining to approve the deed, and submit this notice thereof for incorporation in the record.

On Apr. 23, 1982, the Board established a schedule under which parties in this case could respond to the Deputy Assistant Secretary's decision. In a letter dated May 6, 1982, and received by the Board on May 17, 1982, the present appellants filed an objection to the Deputy Assistant Secretary's decision. On May 21, 1982, the Board issued an order stating that it would treat appellants' objection as an administrative

appeal of the Deputy Assistant Secretary's decision under 43 CFR 4.331. The order established a briefing schedule for this appeal. No briefs have been filed.

Jurisdiction

In referring to the Commissioner the question whether decedent's warranty deed should receive retroactive approval, the Board acknowledged that the Department's regulations in 25 CFR Part 121 placed this initial determination with BIA. Once rendered, however, that decision, like any other decision of a BIA official rendered under 25 CFR Chapter I, may be reviewed in accordance with the provisions of 25 CFR Part 2 and 43 CFR Part 4, Subpart D to the extent it is based upon an interpretation of law.

Under 43 CFR 4.1(b)(2), the Board of Indian Appeals "decides finally for the Department appeals to the head of the Department pertaining to (i) administrative actions of officials of the Bureau of Indian Affairs, issued under Chapter I of Title 25 of the Code of Federal Regulations, in cases involving determinations, findings and orders protested as a violation of a right or priviledge of the appellant." *See also* 43 CFR 4.330(a)(1). The Board's regulations recognize that those decisions properly issued under the exercise of discretionary authority vested in the BIA may be made final for the Department without Board review. *See* 43 CFR 4.330(b)(2) and 4.337(b). *See also* 25 CFR 2.19(c)(1). However, as the Board discussed in *Roger St. Pierre* v. *Commissioner of Indian Affairs,* 9 IBIA 203, 219, 89 I.D. 132, 139 (1982), disapproved, in part, on other grounds in *Burnette* v. *Deputy Assistant Secretary,* 10 IBIA 464 (1982), the area of discretion recognized by the courts and the Administrative Procedure Act (5 U.S.C. § 701(a)(2) (1976)) as inappropriate for judicial review is quite narrow and involves situations in which "there is no law to apply." *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 410 (1971). *See also Aleutian/Pribilof Islands Association* v. *Acting Deputy Assistant Secretary—Indian Affairs (Operations),* 9 IBIA 254, 89 I.D. 196 (1982).

[1] In the present case, appellee has not challenged the Board's jurisdiction to review this decision. Furthermore, as discussed *infra,* the Board finds that the Deputy Assistant Secretary has stated that his decision was based upon the analysis of legal precedents. Because this decision was not based solely upon an exercise of discretion, it is reviewable by the Board.[1]

Discussion and Conclusions

Decedent's trust allotments were derived under the authority

[1] This finding does not deny that the ultimate decision whether or not to approve this conveyance may, under 25 CFR Part 152, be discretionary. It merely notes that to the extent the decision was based upon a legal analysis, it is reviewable. *See* 43 CFR 4.331. To the extent any matter appealed to the Board involves solely the exercise of discretionary authority, the Board, as previously noted, lacks jurisdiction (43 CFR 4.330(b)(2)). In appeals involving both interpretations of law and the exercise of discretion, the board is required by regulation to refer discretionary matters to the Deputy Assistant Secretary—Indian Affairs (Operations) for the exercise of such discretionary authority (43 CFR 4.337(b)).

of the Act of Feb. 8, 1887, *as amended,* 24 Stat. 388, 25 U.S.C. §§ 331–349 (1976) (General Allotment Act). That Act contains the following prohibition against alienation of allotted land: "And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the [25-year period established in this section during which the land shall be held in trust for the Indian allottee by the United States] * * *, such conveyance or contract shall be absolutely null and void." Act of Feb. 8, 1887, *as amended,* ch. 119, § 5, 24 Stat. 389, 25 U.S.C. § 348 (1976).

The Secretary of the Interior has promulgated regulations, currently found in 25 CFR Part 152, dealing with the sale, exchange, or conveyance of Indian trust lands.[2] The regulations in force in 1968, the date of the attempted conveyance, govern whether that conveyance was proper. Sec. 121.9(a) (1968) stated that "the following classes of land may be sold or exchanged by the Indian owner(s) with the approval of the Secretary of the Interior: (1) Allotted land, and devised and inherited interests therein." Sec. 121.11 (1968) provided that "[s]ales [of Indian trust or restricted land] 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)." Sec. 121.18(b) (1968) provided an exception to the general standard for determining whether a proposed conveyance was equitable:

> An Indian owner of trust or restricted land may, with the approval of the Secretary, convey land to a member of his or her immediate family for a consideration less than that prescribed in paragraph (a) of this section [the appraised value of the land], or for no consideration. For purposes of this section, immediate family is defined as the Indian's spouse, brothers and sisters, lineal ancestors of Indian blood, and lineal descendants.

These provisions are essentially unchanged in the current regulations and are found in 25 CFR 152.17, 152.23, and 152.25(d).

Decedent's attempted conveyance of certain tracts of his trust land to his daughter in Nov. 1968 comports with these regulations. The warranty deed states the consideration for this conveyance as "One ($1.00) Dollar and other good and valuable considerations." This arrangement was permissible under 25 CFR 121.18(b) (1968). The only apparent problem with the attempted conveyance is that decedent failed to obtain Secretarial approval prior to his death.

[2] Appellants argue that the Secretary has the authority to approve decedent's attempted conveyance despite the intervening fact of his death. This argument is based on well-established legal precedent both of the Department of the Interior and the Supreme Court of the United States.[3]

In *George Big Knife,* 13 L.D. 511 (1891), the Assistant Attorney General of the United States dis-

[2] These regulations were moved to Part 152 by notice published in 47 FR 13327 (Mar. 30, 1982). Previously, these regulations were contained in Part 121.

[3] These legal precedents were brought to BIA's attention in a Feb. 13, 1981, memorandum from the Acting Associate Solicitor, Division of Indian Affairs, Office of the Solicitor.

cussed the "long established practice of the Indian Office and this Department [Interior] to approve Indian deeds, where the transaction was fair in all respects." 13 L.D. at 515. The Assistant Attorney General concluded

> that the fact that the grantor * * * died after the execution of the conveyance and prior to the presentation of the same to the Executive Department for approval has not of itself been considered an obstacle to prevent the proper officer from approving said deed. This long established practice ought not to be now changed, except for cogent and conclusive reasons.

Id. at 516. The Assistant Attorney General specifically modified an earlier contrary opinion he had rendered in *Mary Fish,* 10 L.D. 606 (1890). *Id.* Following receipt of the opinion in *George Big Knife,* the Acting Secretary approved the deed at issue in that case on July 15, 1891, and, following the same rule, approved the deed that had been questioned in *Mary Fish* on Oct. 16, 1891.[4]

Judicial precedents similarly uphold the authority to approve conveyances of trust property retroactively. In *Pickering* v. *Lomax,* 145 U.S. 310 (1892), the Supreme Court upheld the authority of the President[5] to approve a conveyance 13 years after its execution and after the death of the grantee and the sale of the land by his administrator. The Court held that "so far as [the Indian grantor] * * * and his grantees are concerned, the approval of the President related back to the execution of the deed and validated it from that time." 145 U.S. at 315.

The Court again considered this case in *Lomax* v. *Pickering,* 173 U.S. 26 (1899). In the second case appellant Lomax claimed title to former restricted Indian land under a deed given by the Indian owner 9 years after a similar deed had been given to Pickering's predecessor-in-interest. The Pickering deed had been approved by the President, but not recorded before the second deed was executed. The Court held that the second deed was void and that upon "approval of the first deed [by the President] the title of Robinson [the Indian owner] was wholly divested." 173 U.S. at 31. This "approval was retroactive, and operated as if it had been endorsed upon the [first] deed when originally given." 173 U.S. at 32.

In *Lykins* v. *McGrath,* 184 U.S. 169 (1902), the Supreme Court directly considered the questions whether the death of the Indian grantor extinguished the Secretary's power to approve a conveyance of restricted land and whether the interests of the grantor's heirs superseded the interests of the grantee. The Court stated, on the basis of the *Pickering* cases, that:

[4] *See also Estate of Phillip Tooisgah,* 4 IBIA 189, 82 I.D. 541 (1975), *aff'd Tooisgah* v. *Kleppe,* 418 F. Supp. 913 (D. Okla. 1976), in which the Board remanded an appeal to the Administrative Law Judge for a determination of whether Secretarial approval had been given for an assignment of revenues derived from restricted Indian land at the time of the assignment or subsequently and , if no approval had been given, whether there were "compelling grounds for approval now." 4 IBIA at 199-200; 82 I.D. at 546. The Board cited *Udall* v. *Taunah,* 398 F. 2d 795 (10th Cir. 1968), which in turn cites *Lykins* v. *McGrath,* 184 U.S. 169 (1902), (*see infra*) for the proposition that Secretarial approval can be given even after the death of allottee.

[5] Early treaties and statutes frequently vested authority to approve conveyances in the President. Under the Act of Sept. 21, 1922, 42 Stat. 995, 25 U.S.C. § 392 (1976), this authority was transferred to the Secretary of the Interior.

It must, therefore, be considered as settled that the consent of the Secretary of the Interior to a conveyance by one holding under a patent like the present may be given after the execution of the deed, and when given is retroactive in its effect and relates back to the date of the conveyance.

But the applicability of the doctrine of relation is denied [by plaintiffs] on the ground that the interests of new parties, to wit, the plaintiffs [heirs of the grantor], have sprung into being intermediate the execution of the conveyance and the approval of the Secretary. But one of the purposes of the doctrine of relation is to cut off such interests, and to prevent a just and equitable title from being interrupted by claims which have no foundation in equity. The doctrine of relation may be only a legal fiction, but it is resorted to with the view of accomplishing justice. What was the purpose of imposing a restriction upon the Indian's power of conveyance? Title passed to him by the patent, and but for the restriction he would have had the full power of alienation the same as any holder of a fee simple title. The restriction was placed upon his alienation in order that he should not be wronged in any sale he might desire to make; that the consideration should be ample; that he should in fact receive it, and that the conveyance should be subject to no unreasonable conditions or qualifications. It was not to prevent a sale and conveyance, but only to guard against imposition therein. When the Secretary approved the conveyance it was a determination that the purposes for which the restriction was imposed had been fully satisfied; that the consideration was ample; that the Indian grantor had received it, and that there were no unreasonable stipulations attending the transaction. All this being accomplished, justice requires that the conveyance should be upheld, and to that end the doctrine of relation attaches the approval to the conveyance and makes it operative as of the date of the latter.

* * * * *

The plaintiffs have no equities superior to those of the purchaser. They are the heirs of the Indian grantor, and as such may rightfully claim to inherit and be secured in the possession of all that property to which he had at his death the full equitable title; but when, as is shown by the approval of the Secretary, he had received full payment of a stipulated price and that price was ample, and he had been subjected to no imposition or wrong in making the conveyance, then their claims as heirs cannot be compared in equity with those of one who had thus bought and paid full value.[6]

184 U.S. at 171–73.[7]

Retroactive approval has been denied in cases where there was clear evidence of overreaching or fraud in the procurement of the conveyance. Thus, in *Kendall* v. *Ewert,* 259 U.S. 139 (1922), the Court refused to give retroactive effect to Secretarial approval of a conveyance of restricted Indian land when the grantor was mentally incompetent at the time of the execution of the deed. The Court, citing the *Pickering* cases and *Lykins,* stated:

[T]he doctrine of relation is a legal fiction, resorted to for the purpose of accomplishing justice, "to prevent a just and equitable title from being interrupted by claims which have no foundation in equity." * * * Obviously such a doctrine cannot be resorted to to give validity to a deed obtained [when the grantor was incompetent] * * *. We cannot know what disclosure of the conditions under which it was executed was made to the Department when the deed was approved, but we do not doubt that if a full disclosure had been made approval would not have been given, and the deed must be decreed to be void. [Citations omitted.]

259 U.S. at 148–49.[8]

[6] The fact that the grantee in the present case did not pay the full appraised value of the land conveyed does not deprive her of the protections given by the Court to a *bona fide* purchaser. As already mentioned, the Department's regulations in effect at the time of the conveyance specifically provided for conveyance of property for less than appraised value to members of the grantor's immediate family. *See* 25 CFR 121.18(b) (1968).

[7] For similar results, *See also Anchor Oil Co.* v. *Gray,* 256 U.S. 519 (1921) and *Harris* v. *Bell,* 254 U.S. 103 (1920).

[8] In *McCurdy* v. *United States,* 264 U.S. 484 (1924), the Court refused to give retroactive effect to certain approvals of the Secretary when retroactivity would subject the lands to local taxation.

[3] Thus, it is clear that the Secretary or his delegate has the authority to approve a conveyance of Indian trust lands after the death of the Indian grantor if the Secretary is satisfied that the consideration for conveyance was adequate; the grantor received the full consideration bargained for; and there is no evidence of fraud, overreaching, or other illegality in the procurement of the conveyance. Such approval will be applied retroactively to the date of the attempted conveyance and will extinguish third-party rights arising after the date of the conveyance, including rights acquired through inheritance or devise.

In the present case, the Deputy Assistant Secretary stated in his decision "that there [was] not sufficient evidence to show that this particular transaction, if retroactively approved, would bar possible equitable claims to title." In light of the legal background in which this decision was rendered, this statement can only mean that the Deputy Assistant Secretary determined as a matter of fact that decedent did not receive the value for which he bargained or that the transaction was otherwise tainted by fraud, overreaching, or other illegality.[9]

The Board's order of Aug. 8, 1980, referring the warranty deed to the Commissioner of Indian Affairs, also stated that the decision returned to it "should include findings of fact * * * for incorporation in a final decision by the Board for the Department regarding decedent's estate." *See* 8 IBIA at 149. Although the file contains a request for information from the Agency Superintendent on the circumstances surrounding the execution of the deed, there is no response. Thus, the record is totally devoid of any evidence of legally adequate grounds for denying approval of this conveyance.

Under the circumstances described, the Board sees no alternative to remanding this matter to the Deputy Assistant Secretary for the issuance of a new decision approving or disapproving the warranty deed in question. For the new decision to be legally sufficient it should seek to apply the legal standards recognized in this opinion as controlling in cases where Secretarial approval of deed conveyances is sought after the death of the Indian grantor. A new decision which shows proper regard to the applicable law and the facts at hand, whatever those facts may be, will not be set aside by the Board as it is not the Board's function to substitute its judgment for that of the agency in matters committed to agency discretion. *Oglala Sioux Tribe* v. *Commissioner of Indian Affairs and Richard Tall,* 7 IBIA 188, 86 I.D. 425 (1979), *aff'd, Oglala Sioux Tribe* v. *Hallett,* ——— F. Supp. —— (D.S.D. 1982). In view of the protracted nature of this warranty deed dispute, it is advised that the Deputy Assistant Secretary seek to render a written decision within 30 days from receipt of this decision.

[9] As discussed in note 6, *supra,* the Secretary has already determined by regulation that when a conveyance is made to a member of the grantor's immediate family, "no consideration" may be adequate consideration.

Following receipt by the Board of the Deputy Assistant Secretary's new decision, the Board will allow interested parties thirty (30) days in which to file exceptions of law, if any, to the decision with the Board. If no exceptions are filed, the Board shall issue a final order concluding this case and incorporating the Deputy Assistant Secretary's decision into a final decision in Docket No. IBIA 80-13.

WM. PHILIP HORTON
Chief Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

JERRY MUSKRAT
Administrative Judge

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