UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior — Donald P. Hodel

Office of Hearing and Appeals - - - Paul T. Baird, Director

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

DECISIONS OF THE UNITED STATES DEPARTMENT OF THE INTERIOR

EDITED BY

RACHAEL CUBBAGE

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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1986, to December 31, 1986. It includes the most important administrative decisions and legal opinions rendered by officials of the Department during that period.

The Honorable Donald P. Hodel served as Secretary of the Interior during the period covered by this volume; Ms. Ann Dore McLaughlin served as Under Secretary; Messrs. Robert N. Broadbent, J. Steven Griles, William P. Horn, Richard Montoya, Gerald R. Riso, Ross O. Swimmer, served as Assistant Secretaries of the Interior; Mr. Ralph W. Tarr served as Solicitor. Mr. Paul T. Baird served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "93 I.D."

Donald Paul Hodel

Secretary of the Interior.

IN MEMORIAM

NEWTON FRISHBERG

1928–1986

This volume of Decisions of the Department of the Interior is dedicated to the memory of Newton Frishberg, former Chief Judge of the Board of Land Appeals and Special Counsel to the Director, Office of Hearings and Appeals. Judge Frishberg was instrumental in establishing the Office of Hearings and Appeals in 1970 and remained a guiding force in its operations until his death. He will be remembered by all who knew him for his knowledge, his wit, and most of all, his humanity.

CONTENTS [1]

[1] The "Table of Suits for Judicial Review of Published Departmental Decisions" and "The Cumulative Index to the Suits for Judicial Review of Departmental Decisions" are not included in this 93 I.D. volume as no new information was forwarded for 1986. Please refer to volume 90 I.D. for the most recent listings.

ERRATA:

Page 151—Line 3, first paragraph, cite sbould be 92 I.D. 378.

Page 373—Line 5, second paragraph should read "The Amy vein ran diagonally from one side line to the other side line, instead of from end line to end line along the claim's center line as would be the case in an ideal location."

Page 451—Date line in center of page should be under title line at heading.

Page 460—Second headnote begins "When an operator . . . ."

TABLE OF DECISIONS REPORTED

TABLE OF OPINIONS REPORTED [1]

[1] Solicitor's Opinions are printed as received from that office.

[redacted] x 1987

Table of Cases Cited

TABLE OF OVERRULED AND MODIFIED CASES FOR THE DEPARTMENT OF THE INTERIOR [1]

Volumes 1 to 93, inclusive

Administrative Ruling (43 L.D. 293); modified, 48 L.D. 97.

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

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

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

Affinity Mining Co., 5 IBMA 126, 82 I.D. 439, 1975–76 OSHD par. 19,992; set aside. Dismissal order vacated & case remanded; 6 IBMA 193, 83 I.D. 236.

Ahvakana, Lucy S., 3 IBLA 341 (1971); overruled to extent inconsistont, 53 IBLA 208, 88 I.D. 373.

Alabama By-Products Corp., 6 IBMA 168, 1975–76 OSHD par. 20,756; set aside, 7 IBMA 85, 83 I.D. 574.

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

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

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

Alaska Railroad, 3 ANCAB 273, 86 I.D. 397; affirmed in part, vacated in part, 3 ANCAB 351, 86 I.D. 452.

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

Alaska, State of, 2 ANCAB 1, 84 I.D. 349; modified, Sec. Order No. 3016, 85 I.D. 1.

Alaska *v.* Thorson, 76 IBLA 264 (1983); *rev'd,* 83 IBLA 237, 91 I.D. 331.

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

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

Alien Heirs (2 L.D. 98); overruled, 16 L.D. 463, 464.

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

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

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

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

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

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

Applicability of Montana Tax to Oil & Gas Leases of Ft. Peck Lands; superceded to extent it is inconsistent, 84 I.D. 905.

Archer, J. D., A–30750 (May 31, 1967); overruled, 79 I.D. 416.

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

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

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

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

Atlantic & Pacific R.R. (5 L.D. 209); overruled, 27 L.D. 241.

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

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

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

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

Barash, Max, 63 I.D. 51 (1956); overruled in part, 74 I.D. 285; overruled, 31 IBLA 150, 84 I.D. 342.

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

[1] Abbreviations used in this table are explained in the note on page XXXIII.

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

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

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

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

Bayou, Philip Malcolm, 13 IBIA 200; affirmed as modified; limits 7 IBIA 286 (1979) & 9 IBIA 43 (1981).

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

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

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

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

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

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

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

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

Blackhawk Coal Co. (On Recon.), 92 IBLA 365, 93 I.D. 285 (1986); amended, 94 IBLA 215 (1986).

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

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

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

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

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

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

Bradstreet *v.* Rehm (21 L.D. 30); *rev'd,* 21 L.D. 544.

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

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

Braucht *v.* Northern Pacific Ry. (43 L.D. 536, 538); modified, 44 L.D. 225.

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

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

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

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

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

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

Bundy *v.* Livingston (1 L.D. 152); overruled, 6 L.D. 280, 284.

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

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

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

Burnham Chemical Co. *v.* U.S. Borax Co. (54 I.D. 183); overruled in substance, 58 I.D. 426, 429.

Burns, David A., 30 IBLA 359 (1977); *rev'd,* Exxon Pipeline Co., *et al. v.* Burns, Civ. No. A82–454 (D. Ala., Oct. 22, 1985).

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

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

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

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

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

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

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

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

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

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

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

California, State of (44 L.D. 118; 468); overruled, 48 L.D. 97, 98.

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

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

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

California Energy Co., 63 IBLA 159 (1982); *rev'd,* 85 IBLA 254, 92 I.D. 125.

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

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

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

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

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

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

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

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

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

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

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

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

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

Chicago Placer Mining Claim (34 L.D. 9); overruled, 42 L.D. 453.

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

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

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

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

Clark, Yulu S., A-22852, Feb. 20, 1941; overruled so far as in conflict, 59 I.D. 258, 260.

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

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

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

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

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

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

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

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

Computation of Royalty Under Sec. 15, 51 L.D. 283; overruled, 84 I.D. 54.

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

Conger (Ford), Francis Ingeborg, 13 IBIA 296 (1985); modified (On Review), 13 IBIA 361, 92 I.D. 634.

Continental Oil Co., 68 I.D. 186; overruled in pertinent part, 87 I.D. 291.

Continental Oil Co., 74 I.D. 229; distinguished, 87 I.D. 616.

Cook, Thomas C. (10 L.D. 324) (See 39 L.D. 162, 227).

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

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

Copper Bullion & Morning Star Lode Mining Claims (35 L.D. 27); distinguished insofar as it applies to *ex parte* cases, 39 L.D. 574.

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

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

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

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

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

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

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

Cummings, Kenneth F., 62 IBLA 206 (1982); overruled to extent inconsistent, 86 IBLA 135, 92 I.D. 153.

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

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

Dakota Central R.R. *v.* Downey (8 L.D. 115); modified, 20 L.D. 131.
Davidson, Robert A., 13 IBLA 368 (1973); overruled to the extent inconsistent, 49 IBLA 278, 87 I.D. 350.
Davis, E. W., A-29889 (Mar. 25, 1964); no longer followed in part, 80 I.D. 698.
Davis, Heirs of (40 L.D. 573); overruled, 46 L.D. 110.
Debord, Wayne E., 50 IBLA 216, 87 I.D. 465; modified, 54 IBLA 61 (1981).
DeLong *v.* Clarke (41 L.D. 278); modified so far as in conflict, 45 L.D. 54.
Dempsey, Charles H. (42 L.D. 215); modified, 43 L.D. 300.
Dennison & Willits (11 C.L.O. 261); overruled so far as in conflict, 26 L.D. 122.
Deseret Irrigation Co. *v.* Sevier River Land & Water Co. (40 L.D. 463); overruled, 51 L.D. 27.
Devoe, Lizzie A. (5 L.D. 4); modified, 5 L.D. 429.
Dierks, Herbert (36 L.D. 367); overruled by unreported case of Thomas J. Guigham, Mar. 11, 1909.
Dixon *v.* Dry Gulch Irrigation Co. (45 L.D. 4); overruled, 51 L.D. 27.
Douglas & Other Lodes (34 L.D. 556); modified, 43 L.D. 128.
Dowman *v.* Moss (19 L.D. 526); overruled, 25 L.D. 82.
Dudymott *v.* Kansas Pacific R.R. (5 C.L.O. 69); overruled so far as in conflict, 1 L.D. 345.
Dunphy, Elijah M. (8 L.D. 102); overruled so far as in conflict, 36 L.D. 561.
Dyche *v.* Beleele (24 L.D. 494); modified, 43 L.D. 56.
Dysart, Francis J. (23 L.D. 282); modified, 25 L.D. 188.

Eastern Associated Coal Corp., 3 IBMA 331, 81 I.D. 567, 1974-75 OSHD par. 18,706; overruled in part, 7 IBMA 85, 83 I.D. 574; overruled in part, 7 IBMA 280, 84 I.D. 127.
Eastern Associated Coal Corp., 5 IBMA 185, 82 I.D. 506, 1975-76 OSHD par. 20,041; set aside in part, 7 IBMA 14, 83 I.D. 425.
Easton, Francis E. (27 L.D. 600); overruled, 30 L.D. 355.
East Tintic Consolidated Mining Co. (41 L.D. 255); vacated, 43 L.D. 80.
Elliot *v.* Ryan (7 L.D. 322); overruled, 8 L.D. 10 (See 9 L.D. 360).
El Paso Brick Co. (37 L.D. 155); overruled so far as in conflict, 40 L.D. 199.
Elson, William C. (6 L.D. 797); overruled, 37 L.D. 330.
Eklutna, Appeal of, 1 ANCAB 190, 83 I.D. 619; modified, 85 I.D. 1.
Emblen *v.* Weed (16 L.D. 28); modified, 17 L.D. 220.
Engelhardt, Daniel A., 61 IBLA 65 (1981); set aside, 62 IBLA 93, 89 I.D. 82.
Epley *v.* Trick (8 L.D. 110); overruled, 9 L.D. 360.
Erhardt, Finsans (36 L.D. 154); overruled, 38 L.D. 406.
Esping *v.* Johnson (37 L.D. 709); overruled, 41 L.D. 289.
Esplin, Lee J. (56 I.D. 325); overruled to extent it applies to 1926 Executive Order, 86 I.D. 553.
Ewing *v.* Rickard (1 L.D. 146); overruled, 6 L.D. 483.

Falconer *v.* Price (19 L.D. 167); overruled, 24 L.D. 264.
Fargo No. 2 Lode Claims (37 L.D. 404); modified, 43 L.D. 128; overruled so far as in conflict, 55 I.D. 348.
Farrill, John W. (13 L.D. 713); overruled so far as in conflict, 52 L.D. 472, 473.
Febes, James H. (37 L.D. 210); overruled, 43 L.D. 183.
Federal Shale Oil Co. (53 I.D. 213); overruled so far as in conflict, 55 I.D. 287, 290.
Ferrell *v.* Hoge (18 L.D. 81); overruled, 25 L.D. 351.
Fette *v.* Christiansen (29 L.D. 710); overruled, 34 L.D. 167.
Field, William C. (1 L.D. 68); overruled so far as in conflict, 52 L.D. 472, 473.
Filtrol Co. *v.* Brittan & Echart (51 L.D. 649); distinguished, 55 I.D. 605.
Fish, Mary (10 L.D. 606); modified, 13 L.D. 511.
Fisher *v.* Heirs of Rule (42 L.D. 62, 64); vacated, 43 L.D. 217.
Fitch *v.* Sioux City & Pacific R.R. (216 L. & R. 184); overruled, 17 L.D. 43.
Fleming *v.* Bowe (13 L.D. 78); overruled, 23 L.D. 175.
Florida Mesa Ditch Co. (14 L.D. 265); overruled, 27 L.D. 421.

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

Florida, State of (17 L.D. 355); *rev'd,* 19 L.D. 76.

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

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

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

Franco Western Oil Co., 65 I.D. 316; modified, 65 I.D. 427.

Freeman Coal Mining Co., 3 IBMA 434, 81 I.D. 723, 1974–75 OSHD par. 19,177 ; overruled in part, 7 IBMA 280, 84 I.D. 127.

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

Freeman *v.* Summers (52 L.D. 201); overruled, 16 IBLA 112, 81 I.D. 370; reinstated, 51 IBLA 97, 87 I.D. 535.

Freeman *v.* Texas & Pacific Ry. (2 L.D. 550); overrulod, 7 L.D. 13, 18.

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

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

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

Gallup *v.* Northern Pacific Ry. (unpublished); overruled so far as in conflict, 47 L.D. 303, 304.

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

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

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

Gates *v.* California & Oregon R.R. (5 C.L.O. 150); overruled, 1 L.D. 336, 342.

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

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

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

Gohrman *v.* Ford (8 C.L.O. 6); overruled, 4 L.D. 580.

Goldbelt, Inc., 74 IBLA 308 (1983); affirmed in part, vacated in part, & remanded for evidentiary hearing, 85 IBLA 273, 92 I.D. 134.

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

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

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

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

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

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

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

Grampian Lode (1 L.D. 544); overruled, 25 L.D. 459.

Gregg *v.* Colorado (15 L.D. 151); vacated, 30 L.D. 310.

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

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

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

Gulf Ship Island R.R. (16 L.D. 236); modified, 19 L.D. 534.

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

Gwyn, James R., A-26806 (Dec. 17, 1953); distinguished, 66 I.D. 275.

Hagood, L.N., 65 I.D. 405; overruled, 1 IBLA 42, 77 I.D. 166.

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

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

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

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

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

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

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

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

Hastings & Dakota Ry. *v.* Christenson (22 L.D. 257); overruled, 28 L.D. 572.

Hausman, Peter A. C. (37 L.D. 352); modified, 48 L.D. 629.
Hayden *v.* Jamison (24 L.D. 403); vacated, 26 L.D. 373.
Haynes *v.* Smith (50 L.D. 208); overruled so far as in conflict, 54 I.D. 150.
Heilman *v.* Syverson (15 L.D. 184); overruled, 23 L.D. 119.
Heinzman *v.* Letroadec's Heirs (28 L.D. 497); overruled, 38 L.D. 253.
Heirs of (see case name).
Helmer, Inkerman (34 L.D. 341); modified, 42 L.D. 472.
Helphrey *v.* Coil (49 L.D. 624); overruled, A-20899 (July 24, 1937).
Henderson, John W. (40 L.D. 518); vacated, 43 L.D. 106 (See 44 L.D. 112; 49 L.D. 484).
Hennig, Nellie J. (38 L.D. 443, 445); recalled & vacated, 39 L.D. 211.
Hensel, Ohmer V. (45 L.D. 557); distinguished, 66 L.D. 275.
Herman *v.* Chase (37 L.D. 590); overruled, 43 L.D. 246.
Herrick, Wallace H. (24 L.D. 23); overruled, 25 L.D. 113.
Hickey, M. A. (3 L.D. 83); modified, 5 L.D. 256.
Hildreth, Henry (45 L.D. 464); vacated, 46 L.D. 17.
Hindman, Ada I. (42 L.D. 327); vacated in part, 43 L.D. 191.
Hoglund, Svan (42 L.D. 405); vacated, 43 L.D. 538.
Holbeck, Halvor F., A-30376 (Dec. 2, 1965); overruled, 79 I.D. 416.
Holden, Thomas A. (16 L.D. 493); overruled, 29 L.D. 166.
Holland, G.W. (6 L.D. 20); overruled, 6 L.D. 639; 12 L.D. 433, 436.
Holland, William C., M-27696 (Apr. 26, 1934); overruled in part, 55 I.D. 215, 221.
Hollensteiner, Walter (38 L.D. 319); overruled, 47 L.D. 260.
Holman *v.* Central Montana Mines Co. (34 L.D. 568); overruled so far as in conflict, 47 L.D. 590.
Hon *v.* Martinas (41 L.D. 119); modified, 43 L.D. 196, 197.
Hooper, Henry (6 L.D. 624); modified, 9 L.D. 86, 284.
Howard *v.* Northern Pacific R.R. (23 L.D. 6); overruled, 28 L.D. 126.
Howard, Thomas (3 L.D. 409) (See 39 L.D. 162, 225).
Howell, John H. (24 L.D. 35); overruled, 28 L.D. 204.
Howell, L. C. (39 L.D. 92); in effect overruled (See 39 L.D. 411).
Hoy, Assignee of Hess (46 L.D. 421); overruled, 51 L.D. 287.
Hughes *v.* Greathead (43 L.D. 497); overruled, 49 L.D. 413 (See 260 U.S. 427).
Hull *v.* Ingle (24 L.D. 214); overruled, 30 L.D. 258.
Huls, Clara (9 L.D. 401); modified, 21 L.D. 377.
Hulsman, Lorinda L., 32 IBLA 280 (1977) & Curtis Peters, 13 IBLA 4, 80 I.D. 595 (1973); overruled, 85 IBLA 343, 92 I.D. 140.
Humble Oil & Refining Co. (64 I.D. 5); distinguished, 65 I.D. 316.
Hunter, Charles H. (60 I.D. 395); distinguished, 63 I.D. 65.
Hurley, Bertha C., (TA-66 (Ir.), (Mar. 21, 1952); overruled, 62 I.D. 12.
Hyde, F. A. (27 L.D. 472); vacated, 28 L.D. 284.
Hyde, F. A. (40 L.D. 284); overruled, 43 L.D. 381.
Hyde *v.* Warren (14 L.D. 576; 15 L.D. 415) (See 19 L.D. 64).

Ingram, John D. (37 L.D. 475) (See 43 L.D. 544).
Inman *v.* Northern Pacific R.R. (24 L.D. 318); overruled, 28 L.D. 95.
Instructions (4 L.D. 297); modified, 24 L.D. 45.
Instructions (32 L.D. 604); overruled so far as in conflict, 50 L.D. 628; 53 I.D. 365; A-20411 (Aug. 5, 1937) (See 59 I.D. 282, 286).
Instructions (51 L.D. 51); overruled so far as in conflict, 54 I.D. 36.
Interstate Oil Corp. (50 L.D. 262); overruled so far as in conflict, 53 I.D. 288.
Iowa Railroad Land Co. (23 L.D. 79); 24 L.D. 125; vacated, 29 L.D. 79.

Jacks *v.* Belard (29 L.D. 369); vacated, 30 L.D. 345.
Johnson *v.* South Dakota (17 L.D. 411); overruled so far as in conflict, 41 L.D. 21, 22.
Jones, James A. (3 L.D. 176); overruled, 8 L.D. 448.
Jones, Sam P., 74 IBLA 242 (1983); affirmed in part, as modified, & vacated in part, 84 IBLA 331 (1985).

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

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

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

Keating Gold Mining Co. (52 L.D. 671); overruled in part, 5 IBLA 137, 79 I.D. 67.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

L. A. Melka Marine Construction & Diving Co. (90 I.D. 322); vacated & dismissed, 90 I.D. 491.

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

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

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

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

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

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

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

Layne & Bowler Export Corp. (68 I.D. 33); overruled insofar as in conflict, with Schweigert, Inc. *v.* U.S. Court of Claims, No. 26-66 (Dec. 15, 1967) & Galland-Henning Manufacturing Co., IBCA-534-12-65 (Mar. 29, 1968).

Lemmons, Lawson H. (19 L.D. 37); overruled, 26 L.D. 389.

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

Liability of Indian Tribes for State Taxes Imposed on Royalty Received from Oil & Gas Leases (58 I.D. 535); superseded to extent inconsistent, 84 I.D. 905.

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

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

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

Liss, Merwin E. (67 I.D. 385); overruled, 80 I.D. 395.

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

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

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

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

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

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

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

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

Luse, Jeanette L. (61 I.D. 103); distinguished, 71 I.D. 243.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

McMurtrie, Nancy, 73 IBLA 247 (1983); overruled to extent inconsistent, 79 IBLA 153, 91 I.D. 122.

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

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

Mead, Robert E. (62 I.D. 111); overruled, 85 I.D. 89.

Mee *v.* Hughart (23 L.D. 455); vacated, 28 L.D. 209; in effect reinstated, 44 L.D. 414, 487; 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 659, 660.

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

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

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

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

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

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

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

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

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

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

Miller, Duncan, 6 IBLA 283 (1972); overruled to extent inconsistent, 85 I.D. 89.

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

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

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

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

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

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

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

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

Mobil Oil Corp., 35 IBLA 375, 85 I.D. 225; limited in effect, 70 IBLA 343 (1983).

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

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

Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 481-82.

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

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

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

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

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

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

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

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

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

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

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

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

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

Munsey *v.* Smitty Baker Coal Co., 1 IBMA 144, 162, 79 I.D. 501, 509; distinguished, 80 I.D. 251.

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

National Livestock Co., I.G.D. 55 (1938); overruled, 5 IBLA 209, 79 I.D. 109.

Naughton, Harold J., 3 IBLA 237, 78 I.D. 300; distinguished, 20 IBLA 162 (1975).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Oil & Gas Privilege & License Tax, Ft. Peck Reservation, Under Laws of Montana, M-36318 (Oct. 13, 1955); overruled, 84 I.D. 905.

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

Opinion of Ass't. Attorney General (35 L.D. 277); vacated, 36 L.D. 342.

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

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

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

Opinion of Associate Solicitor (64 I.D. 351); overruled, 74 I.D. 165.

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

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

Opinion of Deputy Assistant Secretary, Dec. 2, 1966, affirming Oct. 27, 1966, opinion by Asst. Sec.; overruled, 84 I.D. 905.

Opinion of Deputy Solicitor, M-36562 (Aug. 21, 1959); overruled, 86 I.D. 151.

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

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

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

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

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

Opinion of Solicitor, M-27690 (June 15, 1934); overruled to extent of conflict, 88 I.D. 586.

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

Opinion of Solicitor (55 I.D. 466); overruled to extent it applies to 1926 Executive Order, 86 I.D. 553.

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, & is affirmed, 84 I.D. 1; overruled, 86 I.D. 3.

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

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

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

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

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

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

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

Opinion of Solicitor, M-36051 (Dec. 7, 1950); modified, 79 I.D. 513.

Opinion of Solicitor, M-36241 (Sept. 22, 1954); overruled as far as inconsistent, 85 I.D. 433.

Opinion of Solicitor, M-36345 (May 4, 1956); overruled, 84 I.D. 905.

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

Opinion of Solicitor, M-36410 (Feb. 11, 1957); overruled to extent of conflict, 88 I.D. 586.

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

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

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

Opinion of Solicitor (64 I.D. 393); no longer followed, 67 I.D. 366.

Opinion of Solicitor (64 I.D. 351); overruled, 74 I.D. 165.

Opinion of Solicitor (64 I.D. 435); will not be followed to the extent it conflicts with these views, 76 I.D. 14.

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

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

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

Opinion of Solicitor, M-36575 (Aug. 26, 1959); affirmed in pertinent part, 87 I.D. 291.

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

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

Opinion of Solicitor, M-36735 (Jan. 31, 1968); *rev'd & withdrawn,* 83 I.D. 346.

Opinion of Solicitor, M-36779 (Nov. 17, 1969); M-36841 (Nov. 9, 1971); distinguisbed with respect to applicability of exemptions (4) & (9) of FOIA to present value estimates & overruled with respect to applicability of exemption (5) of FOIA to presale estimates, 86 I.D. 661.

Opinion of Solicitor (84 I.D. 1); overruled, 86 I.D. 3.

Opinion of Solicitor (86 I.D. 89); modified, 88 I.D. 909.

Opinion of Solicitor (88 I.D. 903) & earlier opinions on cumulative impact analysis witbdrawn, 88 I.D. 903.

Opinion of Solicitor (86 I.D. 400); modified to extent inconsistent, 90 I.D. 255.

Opinions of Solicitor, Sept. 15, 1914, & Feb. 2, 1915; overruled, D-43035 (Sept. 9, 1919) (See 58 I.D. 149, 154-156).

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

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

Orem Development Co. *v.* Leo Calder, A-26604 (Dec. 18, 1953); set aside & remanded, 90 I.D. 223.

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

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

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

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

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

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

Paul Jarvis, Inc. (64 I.D. 285); distinguisbed, 64 I.D. 388.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Provinse, David A., 35 IBLA 221, 85 I.D. 154 (1978); overruled to extent inconsistent with this decision, 89 IBLA 154 (1985).

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

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.

Ramsey, George L., A-16060 (Aug. 6, 1931); recalled & vacated, 58 I.D. 272, 275, 290.

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

Ranger Fuel Corp., 2 IBMA 163, 80 I.D. 708; set aside, 2 IBMA 186, 80 I.D. 604.

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

Rankin, John M. (20 L.D. 272); *rev'd,* 21 L.D. 404.

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

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

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

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

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

Relocation of Flathead Irrigation Project's Kerr Substation & Switchyard, M-36735 (Jan. 31, 1968); *rev'd & withdrawn,* 83 I.D. 346.

Rbonda Coal Co., 4 IBSMA 124, 89 I.D. 460; modified to extent inconsistent, 74 IBLA 170.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

St. Pierre, Roger *v.* Comm'r of Indian Affairs, 9 IBIA 203, 89 I.D. 132; overruled, 10 IBIA 464, 89 I.D. 609.

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

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

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

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

Schweite, Helena M., 14 IBLA 305 (1974); distinguished, 20 IBLA 162 (1975).

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

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

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

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

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

Shaw Resources, Inc., 73 IBLA 291 (1983); reconsidered & modified, 79 IBLA 153, 91 I.D. 122.

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

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

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

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

Simpson, Robert E., A-4167 (June 22, 1970); overruled to extent inconsistent, 31 IBLA 72, 84 I.D. 309.

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

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

Smith, M. P. (51 L.D. 251); overruled, 84 I.D. 54.

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

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

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

Southern Pacific R.R. (15 L.D. 460); *rev'd,* 18 L.D. 275.

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

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

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

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

Spaulding *v.* Northern Pacific R.R. (21 L.D. 57); overruled, 31 L.D. 151.

Spencer, James (6 L.D. 217); modified, 6 L.D. 772; 8 L.D. 467.

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

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

Standard Oil Co. of Calif. *v.* Morton, 450 F.2d 493; 79 I.D. 29.

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

Star Gold Mining Co. (47 L.D. 38); distinguished, 71 I.D. 273.

State of (see state name).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Taylor *v.* Yates (8 L.D. 279); *rev'd,* 10 L.D. 242.

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

T.E.T. Partnership, 84 IBLA 10 (1984); prior Board decision vacated, state office decisions *rev'd,* 88 IBLA 13 (1985).

Thorstenson, Even (45 L.D. 96); overruled, 36 L.D. 36 (See 37 L.D. 258).

Tibbetts, R. Gail, 43 IBLA 210, 86 I.D. 538 (1979); overruled in part, 86 IBLA 215 (1985).

Tieck *v.* McNeil (48 L.D. 158); modified, 49 L.D. 260.

Toles *v.* Northern Pacific Ry. (39 L.D. 371); overruled so far as in conflict, 45 L.D. 92, 93.

Tonkins, H. H. (41 L.D. 516); overruled, 51 L.D. 27.

Towl *v.* Kelly (54 I.D. 455); overruled, 66 IBLA 374, 89 I.D. 415.

Traganza, Mertie C. (40 L.D. 300); overruled, 42 L.D. 611, 612.

Traugh *v.* Ernst (2 L.D. 212); overruled, 3 L.D. 98, 248.

Tripp *v.* Dunphy (28 L.D. 14); modified, 40 L.D. 128.

Tripp *v.* Stewart (7 C.L.O. 39); modified, 6 L.D. 795.

Tucker *v.* Florida Ry. & Nav. Co. (19 L.D. 414); overruled, 25 L.D. 233.

Tupper *v.* Schwarz (2 L.D. 623); overruled, 6 L.D. 624.

Turner *v.* Cartwright (17 L.D. 414); modified, 21 L.D. 40.

Turner *v.* Lang (1 C.L.O. 51); modified, 5 L.D. 256.

Tyler, Charles (26 L.D. 699); overruled, 35 L.D. 411.

Ulin *v.* Colby (24 L.D. 311); overruled, 35 L.D. 549.

Union Oil Co. of California (Supp.), 72 I.D. 313; overruled & rescinded in part, 74 IBLA 117 (1983).

Union Pacific R.R. (33 L.D. 89); recalled, 33 L.D. 528.

United Indians of All Tribes Foundation *v.* Acting Deputy Ass't Secretary—Indian Affairs, 11 IBIA 226 (1983); vacated in part, 11 IBIA 276, 90 I.D. 376.

U.S. *v.* Barngrover, 57 I.D. 533; overruled in part, 21 IBLA 363, 82 I.D. 414.

U.S. *v.* Bush (13 L.D. 529); overruled, 18 L.D. 441.

U.S. *v.* Central Pacific Ry. (52 L.D. 81); modified, 52 L.D. 235

U.S. *v.* Cohan, 70 I.D. 178 (1973); overruled in part, U.S. Forest Service *v.* Milender, 86 IBLA 181, 92 I.D. 175.

U.S. *v.* Dana (18 L.D. 161); modified, 28 L.D. 45.

U.S. *v.* Edeline, 39 IBLA 236 (1979); overrulod to extent inconsistent, 74 IBLA 56, 90 I.D. 262.

U.S. *v.* Feezor, 74 IBLA 56, 90 I.D. 262; vacated in part & remanded, 81 IBLA 94 (1984).

U.S. *v.* Kosanke Sand Corp., 3 IBLA 189, 78 I.D. 285; set aside & remanded, 12 IBLA 282, 80 I.D. 538.

U.S. *v.* Livingston Silver, Inc., 43 IBLA 84 (1979); overruled to extent inconsistent, 82 IBLA 344, 91 I.D. 271.

U.S. *v.* McClarty, 71 I.D. 331; vacated & remanded, 76 I.D. 193.

U.S. *v.* Melluzzo (76 I.D. 181); 1 IBLA 37, 77 I.D. 172.

U.S. *v.* Mouat (60 I.D. 473); modified 61 I.D. 289.

U.S. *v.* O'Leary (63 I.D. 341); distinguished, 64 I.D. 210, 369.

U.S. *v.* Swanson, 34 IBLA 25 (1978); modified, 93 IBLA 1, 93 I.D. 288 (1986).

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

Utah Wilderness Ass'n (I), 72 IBLA 125 (1982); affirmed in part, *rev'd* in part, 86 IBLA 89 (1985).

Veach, Heir of Natter (46 L.D. 496); overruled so far as in conflict, 49 L.D. 461, 464 (See 49 L.D. 492).

Vine, James (14 L.D. 527); modified, 14 L.D. 622.

Virginia-Colorado Development Corp. (53 I.D. 666); overruled so far as in conflict, 55 I.D. 287, 289.

Virginia Fuels, Inc., 4 IBSMA 185, 89 I.D. 604; modified to extent inconsistent, 74 IBLA 170 (1983).

Vradenburg's Heir *v.* Orr (25 L.D. 323); overruled, 38 L.D. 253.

Wagoner *v.* Hanson (50 L.D. 355); overruled, 56 I.D. 325, 328.

Wahe, John (41 L.D. 127); modified, 41 L.D. 636, 637.

Walker *v.* Prosser (17 L.D. 85); *rev'd*, 18 L.D. 425.

Walker *v.* Southern Pacific R.R. (24 L.D. 172); overruled, 28 L.D. 174.

Wallis, Floyd A. (65 I.D. 369); overruled to extent inconsistent, 71 I.D. 22.

Walters, David (15 L.D. 136); revoked, 24 L.D. 58.

Warren *v.* Northern Pacific R.R. (22 L.D. 568); overruled so far as in conflict, 49 L.D. 391.

Wasmund *v.* Northern Pacific R.R. (23 L.D. 445); vacated, 29 L.D. 224.

Wass *v.* Milward (5 L.D. 349); no longer followed (See 44 L.D. 72 & Ebersold *v.* Dickson, D–36502 (Sept. 25, 1918).)

Wasserman, Jacob N., A-30275 (Sept. 22, 1964); overruled, 79 I.D. 416.

Waterhouse, William W. (9 L.D. 131); overruled, 18 L.D. 586.

Watson, Thomas E. (4 L.D. 169); recalled, 6 L.D. 71.

Weathers, Allen E., A-25128 (May 27, 1949); overruled in part, 62 I.D. 62.

Weaver, Francis D. (53 I.D. 179); overruled so far as in conflict, 55 I.D. 287, 290.

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

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

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

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

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

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

Wheeler, William D. (30 L.D. 355); distinguished &, te extent of pessible inconsistency, overruled, 56 I.D. 73.

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

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

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

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

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

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

Wilkens, Benjamin C. (2 L.D. 129); modified, 6 L.D. 797.

Willamette Valley & Cascade Mountain Wagon Road Co. *v.* Bruner (22 L.D. 654); vacated, 26 L.D. 357.

Williams, John B. (61 I.D. 31); overruled so far as in conflict, 61 I.D. 185.

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

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

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

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

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

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

Wolf Joint Ventures (75 I.D. 137); distinguished, 31 IBLA 72, 84 I.D. 309.

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

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

Young Bear, Victer, Estate of, 8 IBIA 130, 87 I.D. 311; *rev'd*, 8 IBIA 254, 88 I.D. 410.

Zeigler Coal Co., 4 IBMA 139, 82 I.D. 221, 1974-75 OSHD par. 19,638; overruled in part, 7 IBMA 85, 83 I.D. 574.

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

NOTE—The abbreviations used in this title refer to the following publications: "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2. "C.L.L." to Copp's Public Land Laws edition of 1875, 1 volume; edition of 1882, 2 volumes; edition of 1890, 2 volumes. "C.L.O." to Copp's Land Owner, vols. 1-18. "L. and R." to records of the former Division of Lands and Railroads; "L.D." to the Land Decisions of the Department of the Interior, vols. 1-52. "I.D." to Decisions of the Department of the Interior, beginning with vol. 53.—EDITOR.

DECISIONS OF THE DEPARTMENT OF THE INTERIOR

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

90 IBLA 186 Decided *January 28, 1986*

Petition for discretionary review of a decision of Administrative Law Judge Frederick A. Miller affirming a civil penalty assessment. CH 3-3 P.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Negligence

Mitigating factors such as the diligence and good faith effort of the permittee to effect compliance are properly considered in determining the amount of a civil penalty assessed for a violation under sec. 518(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and 30 CFR 723.15(a). However, where failure of the permittee to abate the violation within the time allowed results in a failure-to-abate cessation order, sec. 518(h) of SMCRA and 30 CFR 723.15(b) provide no authority for mitigation of tbe statutory minimum penalty of $750 per day on the basis of inability to comply.

APPEARANCES: Michael O. McKown, Esq., St. Louis, Missouri, for petitioner; Linda C. Breland, Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

Peabody Coal Co. (petitioner) has petitioned for discretionary review of a decision rendered on June 26, 1984, by Administrative Law Judge Frederick A. Miller which affirmed a civil penalty assessment of $22,500. Judge Miller held that 30 CFR 843.18(c), which authorizes consideration of the operator's inability to comply in mitigation of a civil penalty, did not give him jurisdiction to reduce the civil penalty in this case.[1] By order dated August 7, 1984, the Board granted the

[1] Although Judge Miller cited the regulation at 30 CFR 843.18(c), counsel for the Office of Surface Mining Reclamation and Enforcement (OSM) points out on appeal that the relevant regulation is actually the substantively identical provision at 30 CFR 722.17(c) pertaining to the interim regulatory program.

petition, and subsequently the parties filed briefs in support of their respective positions.

Petitioner is the operator of the Simco No. 4 underground mine located in Coshocton County, Ohio. Active mining ceased in October 1978, at which time the mine was sealed. On June 17, 1980, OSM issued Cessation Order No. 80-3-7-12, Violation 1, to petitioner for failure to abate an earlier notice of violation which had been issued because discharge from the disturbed area failed to meet effluent limitations. Petitioner filed an application for review and an application for temporary relief on July 9, 1980. The application for temporary relief was denied on August 4, 1980. On February 27, 1981, the Administrative Law Judge dismissed the application for review proceeding at the request of Peabody.

On September 21, 1982, the Assessment Office of OSM proposed a civil penalty assessment for the cessation order in the amount of $22,500. Petitioner requested a conference on the assessment which was held on November 17, 1982, and which resulted in no change in the assessment. On December 3, 1982, Peabody filed a petition for review of the proposed assessment of a civil penalty and a hearing was held before Judge Miller on April 20, 1983, in Columbus, Ohio.

The substantive facts as outlined by the Administrative Law Judge in his decision are not in dispute and are set forth as follows:

> On March 14, 1980, OSM Reclamation Specialist Jeffrey A. Smith conducted an inspection of Peabody Coal Company, Simco No. 4 mine. During the course of his inspection he noted there was a lack of drainage control facilities for the disturbed areas of tbe mine site. He found the discharge was in excess of the iron effluent limitation and Notice of Violation No. 80-3-7-17 was issued. The Notice of Violation stated the nature of tbe violation to be a discharge from the disturbed area which failed to meet the effluent limitations for iron (total) prior to discharge from the mine area. This was a violation of 30 CFR 717.17(a) of the Federal Interim Rules and Regulations. The petitioner was required to take all necessary measures so that discharge meets applicable effluent limitations of Section 717.17(a) by April 14, 1980.
>
> Subsequent lab tests entered into evidence revealed the total iron content to be 33.9 miligrams per liter. On April 10, 1980, an extension was granted until May 14, 1980, due to the need for engineering design requirements for abatement of the violation. Then a second extension was given until June 12, 1980. Cessation Order No. 80-3-7-12 was issued upon subsequent inspection when a total iron reading of 16.5 miligrams per liter was found.
>
> Under cross examination, Inspector Smith testified that he had given the petitioner two extensions and that extensions generally are not granted unless the operator is making all attempts to abate a violation but due to circumstances beyond his control additional time is warranted. He thus testified that Peabody Coal Company in his opinion, was diligent in it's [sic] attempts to obey the cessation order. [2]
>
> Earl Murphy, an environmental supervisor for Peabody Coal, testified that Simco No. 4 was an underground operation which started in 1970 and closed October 20, 1978, and the seal of the [mine's] portal was approved by both MSHA and also Ohio Division of Mines (Tr. 38). Mr. Murphy testified that eventual abatement was made possible only by the subsequent decrease in the amount of flow from Simco No. 4.
>
> Donald Z. Wilzbacher, manager of environmental affairs for Peabody Coal, testified that in his experience, or Peabody's experience, there was no established procedure for

[2] It appears that Judge Miller was referring to good faith effort to abate tbe violation outlined in the notice of violation. It is the failure to resolve this timely whicb led to the cessation order.

effectively sealing the mine. He further testified that only the eventual reduction in the volume of flow from Simco No. 4 enabled Peabody to institute a treatment system consisting of a three cell system of sedimentation ponds with sodium hydroxide, twenty percent sodium hydroxide liquid, and soda ash briquettes.

(Decision at 2-3).

Similarly, petitioner does not dispute the following analysis set forth in the decision of the Administrative Law Judge:

> The testimony of Inspector Smith and lab results clearly show that the petitioner was in violation of 30 CFR 717.17(a). In fact the petitioner does not contest the fact of the cessation order or that it was legally issued. It is petitioner's position that notwithstanding the fact of the violation and Peabody's inability to abate within 90 days, it's [sic] diligence and good faith attempt to abate the violation should be taken into account as a substantial mitigating factor and the civil penalty should be reduced substantially from twenty-two thousand five hundred dollars ($22,500.00) to five thousand dollars ($5,000.00).
>
> The evidence clearly reflects that Peabody did make honest, good faith attempts to abate the violation. In fact, Peabody even attempted a new innovative method to seal the mine using a material called Poz-o-tec which proved to be unsuccessful.

(Decision at 3).

The sole issue in dispute is Judge Miller's holding that 30 CFR 722.17(c)[3] does not confer jurisdiction upon an Administrative Law Judge to reduce the civil penalty imposed for a failure-to-abate cessation order.

Peabody contends that the amount of a civil penalty based on a cessation order may properly be reduced where the operator has been unable to timely abate a notice of violation through no lack of diligence on its own part. OSM contends that there is no authority to reduce a minimum statutory civil penalty assessment for a failure-to-abate cessation order.

In support of its contention Peabody relies upon the language of 30 CFR 722.17 which provides:

> § 722.17 Inability to comply.
>
> (a) Neither a notice of violation nor a cessation order issued under this part may be vacated because of inability to comply.
>
> (b) A permittee may not be deemed to have shown good cause for not suspending or revoking a permit by showing inability to comply.
>
> (c) Unless caused by lack of diligence, inability to comply may be considered in mitigation of the amount of a civil penalty under Part 723 of this chapter and the duration of the suspension of the permit under § 722.16 of this part.

[1] The relevant statutory provision of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), is found at section 518, 30 U.S.C. § 1268 (1982). Section 518(a) of SMCRA provides that "any permittee who violates any permit condition or who violates any other provision of this title, may be assessed a civil penalty by the Secretary, except that if such violation leads to issuance of a cessation order under section 521, the civil penalty *shall* be assessed." 30 U.S.C.

[3] Although Judge Miller addressed in his decision the regulation at 30 CFR 843.18(c), the relevant regulation here is 30 CFR 722.17(c), which is identical in substance.

§ 1268(a) (1982) (italics added). Section 518(a) provides a $5,000 maximum penalty for each violation, but further provides each day of a continuing violation may be deemed a separate violation for purposes of assessment. Section 518(a) further authorizes consideration of several enumerated factors in setting the amount of the penalty assessed including "whether the permittee was negligent" and "the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation." 30 U.S.C. § 1268(a) (1982).

A separate penalty provision governing violations which are not abated within the time provided in the notice or order is set forth in section 518(h) of SMCRA. 30 U.S.C. § 1268(h) (1982). Section 518(h) provides in pertinent part: "Any operator who fails to correct a violation for which a citation has been issued under section 521(a) within the period permitted for its correction * * * *shall* be assessed a civil penalty of not less than $750 for each day during which such failure or violation continues." 30 U.S.C. § 1268(h) (1982) (italics added).

The regulations developed to implement section 518 of the Act provide that OSM will review each notice of violation and cessation order in accordance with the regulatory assessment procedures to determine whether a civil penalty will be assessed, the amount of the penalty, and whether each day of a continuing violation will be deemed a separate penalty for purposes of the total penalty assessed. 30 CFR 723.11. OSM developed a point system to determine the amount of penalties providing for the assignment of points for such factors as history of previous violations, seriousness, negligence, and good faith in attempting to achieve compliance. 30 CFR 723.13.[4] OSM determines the amount of any such civil penalty by converting the total number of points assigned under 30 CFR 723.13 to a dollar amount using the conversion table in 30 CFR 723.14. The regulations specifically provide that OSM shall assess a penalty for each cessation order and for each notice of violation if the point total is 31 points or more. For notice of violation point totals of 30 points or less, assessment is discretionary. 30 CFR 723.12.

In determining whether to assess a civil penalty separately for each day, 30 CFR 723.15 provides:

(a) The Office *may assess* separately a civil penalty for each day from the date of issuance of the notice of violation or cessation order to the date set for abatement of the violation. In determining whether to make such an assessment, the Office shall consider the factors listed in 30 CFR 723.13 and may consider the extent to which the person to whom the notice or order was issued gained any economic benefit as a result of a failure to comply. For any violation which continues for two or more days and which is assigned more than 70 points under 30 CFR 723.13(b), the Office shall assess a civil penalty for a minimum of two separate days.

(b) In addition to the civil penalty provided for in paragraph (a), whenever a violation contained in a notice of violation or cessation order has not been abated within the

[4] These are the same factors set forth in sec. 518(a) of SMCRA.

abatement period set in tbe notice or order or as subsequently extended pursuant to section 521(a) of the Act, a civil penalty of not less than $750 *shall be assessed* for each day during which sucb failure to abate continues, * * *. [Italics added.]

Thus, under OSM's scheme for daily assessments, civil penalties are discretionary for each day from the date of issuance of the notice order to the date set for abatement. In determining whether to make such an assessment, OSM is required to consider the factors in 30 CFR 723.13. However, if the violation cited in the notice or order continues beyond the date set, or subsequently extended, for abatement, the regulations require, in accordance with section 518(h) of the Act, that not less than $750 *shall be assessed* for each day the failure to abate continues.

The regulation cited by Peabody, 30 CFR 722.17(c), allowing the consideration of inahility to comply in mitigation of the amount of the civil penalty assessed, is applicable only to discretionary civil penalties, whether established by OSM or by the administrative law judge in accordance with 43 CFR 4.1157.[5] In this case Peabody was served with a failure-to-abate cessation order and the penalty assessed pursuant thereto is under review herein. Such a penalty is clearly assessed in accordance with the mandatory requirements of section 518(h) and 30 CFR 723.15(b), neither of which makes any reference to mitigating factors.

Accordingly, we find no authority in the statute and regulations for consideration of mitigating factors such as inability to comply or good faith effort of the permittee to comply in assessing the statutory minimum penalty for a failure-to-abate cessation order.

In *Save Our Cumberland Mountains, Inc.* v. *Watt*, 550 F. Supp. 979, (D.D.C. 1982), the court rejected the Department's argument that the assessment of penalties for failure-to-abate cessation orders is discretionary. *Id.* at 982. The court held that the existence of administrative review procedures does not support a finding that the Secretary has prosecutorial discretion not to assess a penalty of not less than $750 per day under section 518(h) of SMCRA. *Id.* The court held that: "Although the order or assessment might not withstand the rigors of administrative review, the Secretary cannot rely on the possibility of an adverse outcome as an excuse for failing to take the first step in the penalty process required by statute." *Id.*[6] Further, the

[5] The regulation at 43 CFR 4.1157(b)(1), provides as follows:

"(b) If the administrative law judge finds that–

"(1) A violation occurred or that the fact of violation is uncontested, he shall establish the amount of the penalty, but in so doing, he shall adhere to the point system and conversion table contained in 30 CFR 723.12 and 723.13, except that the administrative law judge may waive the use of sucb point system where he determines that a waiver would further abatement of violations of the Act. However, the administrative law judge shall not waive the use of the point system and reduce the proposed assessment on the basis of an argument that a reduction in the proposed assessment could be used to abate other violations of the Act."

[6] Peabody argues that the quoted language supports a finding of discretionary authority in the administrative law judge to reduce the amount of the assessment. OSM contends the court did not address subsequent mitigation of failure-to-abate penalties. We find that proper construction of the statute and the implementing regulations precludes the administrative law judge from reducing the statutory minimum failure-to-abate penalty.

Department has in the past declined to reduce the minimum civil penalty of $750 per day for a failure-to-ahate cessation order on the ground that this is the minimum required by 30 CFR 723.15. *Apex Co.*, 4 IBSMA 19, 89 I.D. 87 (1982).

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

C. RANDALL GRANT, JR.
Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

BRUCE R. HARRIS
Administrative Judge

MARATHON OIL CO.

90 IBLA 236 Decided *January 30, 1986*

Appeal from a decision of the Acting Director, Minerals Management Service, denying a request for suspension of an order demanding payment of late payment charges on additional royalties assessed on oil and gas lease OCS-G 2234, pending administrative review of the assessment.

Reversed.

1. Administrative Procedure: Generally--Federal Oil and Gas Royalty Management Act of 1982: Generally--Oil and Gas Leases: Royalties--Rules of Practice: Appeals: Effect of

The regulation at 30 CFR 243.2 provides that decisions regarding payment of additional royalties are not suspended by the filing of an appeal therefrom, but authorizes the Director, Minerals Management Service, to stay the decision upon a finding that a suspension will not be detrimental to the lessor and upon submission of a bond deemed adequate to indemnify the lessor from loss or damage. A decision denying a stay pending resolution of a timely filed appeal may be reversed in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raises a bona fide legal issue, lessee is faced with the threat of irreparable injury if the stay is not granted, it appears the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and it does not appear from the record that a stay is contrary to the public interest.

APPEARANCES: Hugh V. Schaefer, Esq., and George H. Rothschild, Jr., Esq., Findlay, Ohio, and Patricia L. Brown, Esq., Washington, D.C., for Marathon Oil Co.; Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., and Bruce W. Dannemeyer, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

January 30, 1986

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

Marathon Oil Co. (Marathon) has appealed from a decision of the Acting Director of the Minerals Management Service (MMS), dated July 3, 1985, denying its request to suspend an order demanding payment of late payment charges on additional royalties assessed by a previous order for oil and gas lease OCS-G 2234. Both the order assessing additional royalties and the order assessing late payment charges based thereon are the subject of administrative appeals currently pending before MMS. Marathon is seeking to stay the requirement to pay the late charges pending resolution of the appeal of the royalty assessment.

On April 3, 1985, the Manager of the Tulsa, Oklahoma, Regional Compliance Office, MMS, issued an order directing Marathon to pay the sum of $2,914.36 in royalties on monies it had received from a purchaser of condensate produced from its oil and gas lease. The April 3, 1985, decision informed Marathon that the regulation at 30 CFR 206.150 requires that the value of production for royalty purposes be not less than "the gross proceeds accruing to the lessee from the produced substances or less than the value computed on the reasonable unit value established by the Secretary." Accordingly, that regulation, in the view of MMS, requires royalty payments on transportation and separation cost reimbursements received by Marathon from the purchasers of condensate production. On May 3, 1985, Marathon filed an appeal of the April 3, 1985, order that it pay such additional royalties, arguing it does not retain these monies, but, instead, pays them to an independent, unaffiliated third party to cover the costs of transporting the condensate. Marathon's position on appeal to the Director, MMS, is that these monies are an allowable, out-of-pocket transportation cost which should be credited by the regional manager in calculating royalty payments. Nevertheless, Marathon paid the $2,914.36 under protest, subject to its appeal.

On May 28, 1985, the Tulsa Regional Manager issued a second order, demanding that Marathon pay late payment charges in the amount of $2,558.20 on the additional royalties billed on April 3, 1985.[1] Subsequently, on June 27, 1985, Marathon filed a second notice of appeal with the Director, MMS, appealing the demand of late payment charges. In this appeal, Marathon requested the order to pay the late charges be stayed pending resolution of the appeal upon the posting of a bond to indemnify the United States, pursuant to 30 CFR 243.2.

[1] Late payment charges were assessed from the date on which the payment was due until the date on which payment was received, citing the regulation at 30 CFR 218.102. Although that regulation pertains to onshore oil and gas leases, a similar provision relating to offshore oil and gas leases is found at 30 CFR 218.150. Appellant's liability for the late charges assessed is contingent on the outcome of tbe appeal regarding the additional royalty assessment.

The Acting Director, MMS, advised Marathon by letter dated July 3, 1985, that he was denying Marathon's request to post bond in lieu of making payment of the late payment charges. Subsequently, Marathon filed an appeal with this Board, challenging the Acting Director's July 3, 1985, letter denying its request to post bond. Thus, the scope of this appeal presently before the Board is limited to the propriety of the decision refusing to stay the order to pay the late charges pending resolution of the appeal of those charges.[2]

At issue in this appeal is the application of the regulation promulgated at 30 CFR 243.2 (49 FR 37353 (Sept. 21, 1984)). As observed by the Board in its August 5, 1985, order, Marathon's appeal is the first to be reviewed by the Board involving the new "pay-pending-appeal" provision, 30 CFR 243.2, and as such, it presents issues of first impression concerning its proper interpretation and application. That regulation provides as follows:

> Compliance with any orders or decisions, issued by the Royalty Management Program after August 12, 1983, including payments of additional royalty, rents, bonuses, penalties or other assessments, shall not be suspended by reason of an appeal having been taken unless such suspension is authorized in writing by the Director, MMS * * * and then only upon a determination, at the discretion of the Director * * *, that such suspension will not be detrimental to the lessor and upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage.

The Acting Director of MMS, in his July 3, 1985, letter rejecting Marathon's request that it be allowed to post a bond rather than pay the late payment charges, explained that the suspension of compliance with any order or decision would be the exception rather than the general rule. The letter noted that the preamble to 30 CFR 243.2 "stated very clearly that the purpose of the regulation is to continue the longstanding practice that compliance with MMS orders is not suspended by reason of an appeal being taken." Quoting from the *Federal Register* notice of rulemaking, the letter stated that MMS gave notice in the preamble that although the regulation permits suspensions at the discretion of the Director: "In almost all instances MMS will not grant suspensions, since the effectiveness of MMS's

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[2] By letter dated July 26, 1985, MMS threatened a series of punitive actions against Marathon for failure to pay the $2,558.20 in late payment charges, including assessment of a penalty for failure to make late payment charges, reporting the delinquency to a credit bureau, shutting in wells, or cancelling affected leases. Marathon sent a copy of the July 26, 1985, letter to the Board on July 30, 1985, renewing its request for an "immediate stay of MMS' order denying bond, pending full review by this Board."

On Aug. 5, 1985, this Board issued an order temporarily suspending the effect of MMS' order of May 28, 1985, demanding that Marathon pay late payment charges in the amount of $2,558.20, and vacating the decision of the Acting Director, MMS, dated July 3, 1985, denying Marathon's request to suspend payment of late payment charges. The stay order provided it would remain effective ponding resolution of this appeal from denial of tbe request to post bond in lieu of payment ponding appeal. The order was expressly conditioned upon appellant's provision of a bond to MMS in an acceptahle form sufficient to cover amounts that may accrue while the appeals are pending.

royalty collection efforts is premised on compliance with orders during appeal. Only in the unusual circumstance will MMS grant suspension pending the appeal process." 49 FR 37336, 37344 (Sept. 21, 1984).

The Acting Director, MMS, proceeded to define what is meant by the term "unusual circumstance" in his letter rejecting Marathon's request for a suspension:

> Consequently, I will not grant suspensions unless the recipient of the orders demonstrates an unusual circumstance such as a significant material factual oversight by the MMS office issuing the order, or some other obvious gross error or defect in the order. I also have granted suspension pending appeal where the determination upon which the order is based is a legal issue under review by the Office of the Solicitor, and my decision on the appeal must await the outcome of that review.

The Acting Director furtber stated that Marathon had failed to identify any unusual circumstance justifying suspension of MMS' order dated May 28, 1985, and accordingly rejected Marathon's request to post a bond in lieu of payment pending resolution of tbe appeal.

Marathon contends the standards articulated by MMS in rejecting its request for suspension are inconsistent with the terms of 30 CFR 243.2. Marathon concedes 30 CFR 243.2 establishes a "general rule" that a lessee cannot suspend the effectiveness of an order merely by appealing it, but emphasizes that a suspension may be granted in certain instances under the regulations (Reply at 6). To obtain a suspension, the lessee must not only file a timely appeal, but obtain written autborization for the suspension from the Director of MMS. Marathon contends the regulation requires tbat the suspension be granted once an adequate bond is submitted unless it is determined that the suspension will be "detrimental" to the Department. Marathon objects to the "two possible sets of 'extraordinary facts' ", quoted above, under which MMS states it will grant suspension of an order or decision, characterizing those standards as arbitrary and absolutely inconsistent with the agency's published regulation: "In other words, a suspension may be granted only if MMS deigns to send the underlying Iegal issue in controversy to tbe Solicitor for review or if, in a preliminary proceeding, the lessee can prove to MMS that its order is invalid on its face and tberefore unenforceable anyway" (Reply at 8).

Counsel for MMS asserts the regulation mandates a two-step process in determining whether a suspension will be granted. First, there must be a finding that tbe "extraordinary facts of the case" merit a deviation from the ordinary pay-pending-appeal requirements. Second, if the first test is met, tbere must be a finding that suspension will not be detrimental to the lessor upon the posting of an acceptable bond (Answer at 3). MMS asserts the issue is wbether the Director abused bis discretion in not finding such unusual circumstances as would justify an exception to the rule.

[1] When a determination is left to the discretion of an agency, the general rule is that a decision made in the exercise of that discretion should be upheld unless it is arbitrary and capricious. Further, a decision is arbitrary and capricious when it is made on a basis other than the standard articulated in the authorizing statute or the implementing regulation. *Eudey* v. *Central Intelligence Agency*, 478 F. Supp. 1175, 1177 (D.D.C. 1979); *see Motor Vehicle Manufacturers Association* v. *State Farm Mutual*, 463 U.S. 29, 43 (1983); *Frisby* v. *U.S. Department of Housing & Urban Development*, 755 F.2d 1052, 1055 (3rd Cir. 1985). Our review of the decision of the Acting Director in exercising his discretion whether to grant or deny a stay under 30 CFR 243.2 must he performed with reference to the content of that regulation. Again, that regulation provides that the Director may authorize in writing a suspension of an order or decision "upon a determination, at the discretion of the Director * * *, that such suspension will not be detrimental to the lessor and upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage." 30 CFR 243.2. Thus, the crucial issue, assuming that an acceptahle hond (adequate to indemnify the lessor from loss or damage) is tendered, is whether the grant of a suspension will be detrimental to the lessor.

As pointed out by counsel for MMS, Departmental regulations governing both onshore and offshore oil and gas operations have long provided that decisions of MMS and its predecessor, the Conservation Division of the Geological Survey, are not suspended by the filing of an appeal in the absence of an order staying the decision. This is consistent with the recognition that many of the decisions regarding oil and gas lease operations would be rendered ineffective with irrevocable consequences (*e.g.*, waste of otherwise recoverable resources) if implementation were forced to await conclusion of the administrative review process. However, this rationale does not apply to the newly promulgated regulation at 30 CFR 243.2 (the pay-pending-appeal regulation) applying this provision to orders regarding payment of royalty on past production.[3] Since the issue is the liability for a certain dollar amount of royalty, there is little apparent reason why provision of an adequate bond may not be sufficient to protect the interest of the lessor.

The statement in the preamble to the rulemaking, quoted by the Acting Director in his decision, that the effectiveness of royalty collection efforts is premised on compliance with orders during appeal, offers no further guidance in determining when suspension of payment will not be detrimental to the lessor. Both statutory provisions of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), P.L. 97-451, 96 Stat. 2448 (1983), and the implementing regulations authorize collection of interest on late payments. 30 U.S.C. § 1721

[3] Although the prior regulation would apparently have been applicable to royalty determinations, *see* 30 CFR 221.66 (1982), it appears that, in the past, payments of disputed royalty amounts were suspended pending resolution of administrative and judicial appeals. *See Atlantic Richfield Co.*, 21 IBLA 98, 103, 82 I.D. 316, 323 (1975).

(1982); 30 CFR 218.102 (onshore), 218.150 (offshore). Similarly, the absence of the unusual circumstances cited in the decision of the Acting Director (*i.e.*, decision based on an obvious mistake of fact or on a legal issue under review by the Departmental Solicitor) does not establish whether suspension would be detrimental to the lessor in this case. If the policy is that no decision will be suspended pending appeal unless appellant shows obvious error of fact (which would render the decision arbitrary and capricious) or that the issue is currently under review by the Departmental Solicitor, then the regulation should be amended to so provide. As the regulation is written, the standard is whether the suspension will be detrimental to the lessor. The decision under appeal rejects the application, but gives no explanation why a bond in the amount of the disputed obligation is not sufficient to protect the interest of the lessor.

Counsel for MMS contends mere disagreement of appellant with the decision reached by MMS in the exercise of its discretion and judgment in denying the stay is not sufficient to justify changing the decision on appeal. Counsel noted the Board will not substitute its judgment for that of the delegated decisionmaker (MMS in this case) and the decision will ordinarily be affirmed in the absence of the showing of compelling reasons for modification or reversal, citing *Richard J. Leaumont*, 54 IBLA 242, 88 I.D. 490 (1981); *Rosita Trujillo*, 21 IBLA 289 (1975). However, this line of cases is distinguishable. Unlike *Leaumont* and *Trujillo* and many other cases where appellants have alleged an error in judgment in applying standards to reach a decision, appellant herein is alleging a failure to apply the regulatory standard. It is well established that the Department is bound by its regulations and a decision must be based on the criteria stated therein. *United States* v. *Nixon*, 418 U.S. 683, 696 (1974); *Frisby* v. *U.S. Department of Housing & Urban Development, supra* at 1055-1056.

In the absence of any criteria in the regulation as to when suspension will be detrimental to the lessor or a finding below stating reasons why granting appellant's request will be detrimental to the lessor, we believe the decision of the court in *Placid Oil Co.* v. *United States Department of the Interior*, 491 F. Supp. 895 (N.D. Texas 1980), offers relevant considerations in adjudicating a stay request. In *Placid*, the plaintiff/lessee of an Outer Continental Shelf oil and gas lease was ordered to recalculate its royalty obligation and pay the additional amount due based on a revised interpretation by the Department of the Interior of the definition of oil and gas on which royalty was payable. The new definition included vented and flared gas which had previously been excluded. Placid Oil sought to enjoin collection of the additional royalties pending resolution of the obligation to pay.

In order to grant the motion to stay payment of the royalty, the court required four factors: substantial likelihood of success on the merits; substantial threat of irreparable injury to the moving party if the stay is not granted; the threatened injury to the moving party must outweigh the potential harm the stay may do to the nonmoving party; and the stay must not be contrary to the public interest.

491 F. Supp. at 904; *see Sun Oil Co.*, 42 IBLA 254, 257-58 (1979). Balancing the probability of movant's success on the merits with the potential consequences of an injunction on the rights of the parties, the court quoted the opinion in *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953), which explained:

> To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (*i.e.*, the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.

Regarding the threat of irreparable injury, the *Placid* court held that if movant were to "go through the process and pay the royalties and then prevail on the merits of the lawsuit, it would be due a refund of the money actually given Interior, but it could not recover interest on the money, nor could it get compensated for the costs of compliance."[4] 491 F. Supp. at 905. In light of this lost interest, as well as the other cost, the court found the lessee was threatened with irreparable injury. *Id.* at 905-907.

The threat of lost interest has also been held to be a threat of irreparable harm justifying an injunction in the case of a civil penalty assessed under section 24(b) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1350(b) (1982). *Conoco, Inc.* v. *Watt*, 559 F. Supp. 627 (E.D. La. 1982). After noting that even if Conoco prevailed on the merits and the civil penalties were refunded, no interest would be paid by the Department on the funds, the court held that "[e]quity demands that the Court take such measures as will avoid the imposition of irreparable harm * * * especially where plaintiff's interest in escrowing funds with the court would also adequately protect defendant's interest." *Id.* at 630 (citations omitted).

Applying these factors to the present case, it is clear that appellant, like the lessees in *Placid* and *Conoco*, is threatened with the irreparable injury of lost interest on the funds ordered to be paid since there is no authority for payment of interest to the lessee on any royalty payments ultimately determined to constitute an overpayment. With respect to the potential harm to the adverse party, MMS in this context, and the effect on the public interest, there is no reason apparent from the record in this case why an adequate indemnity bond will not suffice to protect the interest of the United States in guaranteeing payment.[5] Further, as previously noted, there is

[4] Compliance in the *Placid* case required the lessee to spend approximately 1,000 man hours of time calculating the additional royalty due under the order on the vented and flared gas, a facter not involved in the present case where MMS calculated the additional royalty due.

[5] We do not hold that there may be no case where an indemnity bond is inadequate to protect the public interest, but rather that such a showing has not been made on the record here.

statutory authority for charging interest on royalty payments made after they are due. *See* 30 U.S.C. § 1721 (1982); 30 CFR 218.150.

Although we are mindful of the statutory policy of FOGRMA to "ensure the prompt and proper collection and disbursement of oil and gas revenues owed to the United States," 30 U.S.C. § 1701(b)(3) (1982), we note the issue here is what is owed, *i.e.*, whether royalties are payable on transportation and separation cost reimbursements. It has not been argued by MMS that this issue is not bona fide. Further, we are bound to take note that under the Administrative Procedure Act, 5 U.S.C. § 704 (1982), and Departmental regulations, 43 CFR 4.21, the failure to stay the order requiring payment makes it a final Departmental decision subject to immediate judicial review. *See Conoco, Inc.* v. *Watt, supra* at 629. We do not believe the public interest is generally served by short-circuiting the administrative review process within the Department and making the initial decision the final Departmental decision for purposes of judicial review.

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.

C. RANDALL GRANT, JR.
Administrative Judge

WE CONCUR:

JAMES L. BURSKI
Administrative Judge

WILL A. IRWIN
Administrative Judge

MORGAN UNDERWOOD, SR. *v.* DEPUTY ASS'T SECRETARY--INDIAN AFFAIRS (OPERATIONS)

14 IBIA 3 Decided *January 31, 1986*

Appeal from a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) refusing to issue a certificate of degree of Indian blood based upon the blood quantum of the individual's alleged father.

Reversed.

1. Indians: Blood Quantum

The Board of Indian Appeals has jurisdiction to review decisions by the Bureau of Indian Affairs concerning applications for certificates of degree of Indian blood.

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

The characterization of a decision rendered by the Deputy Assistant Secretary–Indian Affairs (Operations) as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

3. Indians: Blood Quantum--Regulations: Publication

The procedures followed by the Bureau of Indian Affairs in determining an individual's Indian blood quantum are rules within the meaning of 5 U.S.C. § 551(4) (1982) and are required by 5 U.S.C. § 552 (1982) to be published in the *Federal Register*.

4. Administrative Procedure: Rulemaking--Indians: Blood Quantum--Regulations: Publication

Under 5 U.S.C. § 552(a)(1) (1982) and the Supreme Court's holding in *Morton* v. *Ruiz*, 415 U.S. 199 (1974), an individual may not be adversely affected by a rule required to be published in the *Federal Register* that is not so published.

APPEARANCES: Judy I. Lewis, Esq., Oklaboma City, Oklaboma, for appellant; Scott Keep, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Katbryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

On July 16, 1984, the Board of Indian Appeals (Board) received a notice of appeal from Morgan Underwood, Sr. (appellant). Appellant sought review of a May 14, 1984, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) refusing to issue him a certificate of degree of Indian blood (CDIB) based upon the blood quantum of his alleged father, William Underwood. This refusal was inconsistent with a May 13, 1975, decision of the Ardmore Agency, Bureau of Indian Affairs (BIA, agency), which had issued appellant a CDIB showing him to be 4/4 Chickasaw, based upon the blood quantum of his mother and William Underwood. Appellee moved to dismiss the appeal. For the reasons discussed below, the Board denies the motions to dismiss and reverses the decision.

Background

Appellant was born on May 31, 1907, in Marshall County, Oklahoma. His birth apparently was not registered with the State. Appellant's mother was Bettie Sealy Burris, a 4/4 degree Chickasaw with enrollment No. 2836. Appellant states that his father was William Underwood, also a 4/4 degree Chickasaw with enrollment No. 1071. There is no dispute that both appellant's mother and William Underwood were full-blood Chickasaw. Appellant's mother died in 1955; William Underwood died in 1936.

In 1964 appellant applied for an Oklahoma Delayed Certificate of Birth. The application and supporting documentation were found sufficient by the Oklahoma State Bureau of Vital Statistics under procedures set forth in 63 Okla. Stat. § 1-313 (1963)[1] and regulations implementing that statute. A delayed birth certificate, showing appellant's father to be William Underwood, was issued on March 24, 1964.

On May 13, 1975, appellant and his son and grandchildren received CDIBs from the agency. Appellant's CDIB showed him to be 4/4 degree Chickasaw.

In 1983, the Indian Health Service in Lawton, Oklahoma, advised appellant that BIA was issuing CDIBs on a card rather than on the 8-1/2-by-11-inch certificate he had received in 1975. Appellant asked BIA for a card-size CDIB. Before issuing the smaller certificate, the agency reviewed appellant's records and determined it would not consider the blood quantum of William Underwood in issuing the card-size CDIB. In a December 20, 1983, letter concerning this matter, the agency Superintendent stated at page 1:

> We have reviewed the records available in this office and find that there is no judicial determination of heirs of record to establish Morgan Underwood as a son of William Underwood, Chickasaw 1071. The Departmental Proof of Death and Heirship on file for William Underwood, Chickasaw 1071, shows he was married only one time to Mary Underwood, Chickasaw 1W-355, until his death on October 18, 1936. There were *no* children listed. The Decree of Heirship for Bettie Burris, Chickasaw 2836, lists Morgan Underwood as her son, but does not list William Underwood as his father or as her husband. [Italics in original.]

Appellant appealed this decision to the Muskogee Area Director, BIA, who forwarded the appeal to appellee without decision. On May 14, 1984, appellee issued a decision affirming the action taken by the agency. Appellee stated at pages 1-2 of his decision:

> You base your appeal on several points. You contend that Morgan's parentage as shown on the delayed certificate of birth is proof of the facts contained therein; that the Departmental proof of death and heirship of William Underwood is not conclusive proof that William Underwood was not Morgan's father; that the county court of Marshall County made findings of fact and conclusions of law that Morgan Underwood is a full blood Chickasaw; that the 1975 certificate of degree of Indian blood issued by the Ardmore Agency Superintendent is res judicata on the issue of blood quantum; principles of estoppel preclude the Superintendent from now changing his 1975 decision; and that the unwarranted change in position of the federal government without notice and opportunity to be heard affected substantial rights and privileges of the appellant.
>
> While there is legislation which provides that the blood degree of persons named on the final rolls of the Five Civilized Tribes cannot be changed, there is no authority of law

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[1] Sec. 1-313 states in pertinent part:

"(a) When the birth of a person born in this state has not been registered, a certificate may be filed in accordance with regulations of the State Board of Health. Such certificate shall be registered subject to such evidentiary requirements as the Board shall by regulation prescribe, to substantiate the alleged facts of birth.

* * * * * * * *

"(c) A summary statement of the evidence submitted in support of the delayed registration shall be endorsed on the certificato.

"(d) When an applicant does not submit the minimum documentation required in the regulations for delayed registration, or when the State Commissioner of Health finds reason to question the validity or adequacy of the documentary evidence, the Commissioner shall not register the delayed certificate and shall advise the applicant of the reasons for his action."

which prevents the correction of blood degree for descendants of final enrollees where error has been established. The certificates of degree of Indian blood are Bureau of Indian Affairs documents issued to identify eligible recipients of Bureau services and, as sucb, are not directly affected by state or county laws. The Five Civilized Tribes, through their constitutions, require that applicants for enrollment submit certificates of degree of Indian blood as proof of their descent from final enrollees.

* * * * * * *

Based on the foregoing [discussion of the marital relations of William Underwood and Bettie Burris], we have concluded that Morgan Underwood was an illegitimate child of Bettie Burris. It has long been the policy of the Bureau that in determining the degree of Indian blood of children born out of wedlock, the child may only be credited with Indian blood derived from the mother UNLESS paternity has been acknowledged by the father or determined by the courts. The Bureau does not have the responsibility or obligation to make legal determinations of paternity. Only a court of competent jurisdiction has such authority.

We have concluded, therefore, that in Morgan Underwood's case, we can consider only Indian blood derived from his mother, Bettie Burris, until such time as a court determination of paternity has been made. Your appeal, therefore is denied. This decision is based on the exercise of authority delegated to me by the Secretary of the Interior and is final for the Department. [Italics in original.]

Appellant's appeal to the Board from this decision was received on July 16, 1984. In addition to the briefs filed by both parties, appellee filed a motion to dismiss the appeal, arguing that the Board lacks jurisdiction over the matter.

Jurisdiction

The parties and the administrative record in this case raise several logically disparate issues. These issues will not necessarily be addressed in the order in which they were raised.

Appellee challenges the Board's jurisdiction to hear this case on three grounds: (1) CDIB appeals are in the nature of enrollment appeals; (2) the underlying issue is a discretionary policy decision; and (3) there is no right to appeal this decision under 25 CFR Part 2.

Appellee first argues that the Board lacks jurisdiction over this case because it is "in the nature of an enrollment appeal." At page 3 of his answer brief, appellee states:

In the absence of any regulations requiring or defining the issuance of CDIBs, the Assistant Secretary has taken the position that the issuance of them is in the nature of an enrollment matter. Although some of the Bureau's Area Offices have advised individuals that they had a right to appeal the Area's decisions on CDIBs pursuant to 25 CFR Part 2, the Bureau's Central Office and the Assistant Secretary's Office have always treated appeals from decisions related to the issuance of CDIBs as enrollment appeals pursuant to 25 CFR Part 62.

The pragmatic justifications cited by appellee for treating appeals from CDIB decisions as enrollment appeals are that the same type of genealogical research must be done in both cases; review of CDIB decisions is often lengthy because of the research requirements, and could easily extend beyond the time periods set forth in 25 CFR Part 2; and enrollment appeals could be recast as CDIB appeals in order to circumvent the Department's proscription against Board review of enrollment disputes.

By regulation, the Board does not have jurisdiction over enrollment disputes. Section 4.330(b)(1) of 43 CFR states: "Except as otherwise permitted by the Secretary, the Assistant Secretary for Indian Affairs or the Commissioner of Indian Affairs by special delegation or request, the Board shall not adjudicate * * * Tribal enrollment disputes." *See Dahl* v. *Bureau of Indian Affairs*, 10 IBIA 466 (1982). Special procedures for appealing tribal enrollment decisions are provided in 25 CFR Part 62. Section 62.2 states the purpose of the regulations:

> The regulations in this Part 62 are for the purpose of establishing the procedure for filing appeals in conjunction with *the rejection of any name from a roll of an Indian tribe* when final approval thereof rests within the purview of the Secretary either because of provisions in tribal constitutions or specific acts of Congress. The regulations are not to apply in those instances where the procedures for filing appeals by applicants rejected for tribal membership are prescribed in tribal documents. [Italics added.]

Section 62.3(a) states in pertinent part: "Any person *who has been rejected for cnrollment* may file or have filed in his behalf an appeal from an adverse enrollment action." (Italics added.) Part 62 provides for initial action by superintendents and area directors, with appeals from area directors' decisions going to the Commissioner of Indian Affairs for transmittal to the Secretary, whose decision is final and conclusive. Section 62.9 provides that "[t]o facilitate the work of the [Area] Director, the Commissioner may issue special instructions not inconsistent with the regulations in this Part 62."

Part 62 clearly applies by its own terms only to appeals from rejections of applications for tribal enrollment. The issuance of CDIBs is thus not covered by the express language of Part 62.

Appellee contends that despite the express language of Part 62, CDIB appeals are treated as enrollment appeals under Part 62 through a longstanding decision of the Assistant Secretary. Appellee fails, however, to cite any written policy statement or delegation of authority by the Secretary or Assistant Secretary making CDIB appeals subject to the enrollment disputes procedures of Part 62. The only evidence presented on this argument is an affidavit signed by the Chief, Branch of Tribal Enrollment Services, BIA, stating the conclusion that CDIB appeals are in the nature of enrollment appeals; a portion of a BIA instruction manual dealing with CDIB determinations; and a copy of a 1983 decision in an unrelated CDIB case in which the Assistant Secretary states that his "determination is based on the exercise of authority delegated to [him] by the Secretary of the Interior and is final for the Department" (Exh. C, page 2, to appellee's answer brief).

Neither the Chief of the Branch of Tribal Enrollment Services nor the BIA instruction manual does more than state a conclusion without legal support for that conclusion. The Assistant Secretary's 1983 decision does not cite the regulation or delegation of authority under which he was acting. The Assistant Secretary, as a Secretarial-level official, has authority to issue final decisions for the Department that are generally not reviewable by the Board. *See, e.g., Interim Ad Hoc Committee of the Karok Tribe* v. *Sacramento Area Director*, 13 IBIA 76, 92 I.D. 46 (1985). The fact that the Assistant Secretary stated his decision in a CDIB appeal was final for the Department does not, however, equate with a determination that finality attached because the decision involved a CDIB appeal that was in the nature of an enrollment appeal under Part 62.

Furthermore, appellee's arguments as to why CDIB appeals must be treated as enrollment appeals are unconvincing. The fact that the same type of genealogical research must be done in CDIB appeals as in enrollment appeals does not make the purpose of doing the research and the uses of the result equivalent. The time required for completing CDIB research can be allowed through a Board order granting a stay. Finally, BIA and the Department's Solicitor's Office are quite capable of informing the Board if an enrollment appeal were recast as a CDIB appeal in order to circumvent the finality of decisions under 25 CFR Part 62.

[1] Based on this discussion, the Board finds that although CDIB appeals have some features in common with enrollment appeals, CDIB appeals are not encompassed by the explicit language of 25 CFR Part 62, and there is no regulation or written policy statement equating CDIB appeals with enrollment appeals. Consequently, the Board holds that CDIB appeals are not subject to 25 CFR Part 62, and it is not precluded from reviewing CDIB appeals by 43 CFR 4.330(b)(1). Appellee's motion to dismiss this case for lack of jurisdiction on the grounds that CDIB appeals are in the nature of enrollment appeals is denied.[2]

Appellee next argues the Board lacks jurisdiction to hear this appeal because the underlying issue concerns the degree of proof BIA requires in establishing the blood quantum of an illegitimate child, which is the subject of a longstanding BIA policy under which only the mother's blood quantum is considered in the absence of proof of paternity. Appellee contends that this policy decision is discretionary, and that the Board consequently has no jurisdiction to revise or require amendment of the policy under 43 CFR 4.330(b)(2).

[2] The Board agrees it does not have jurisdiction over decisions committed to BIA's discretion. Section 4.330(b)(2) of 43 CFR states: "Except as otherwise permitted by the Secretary, the Assistant Secretary for Indian Affairs or the Commissioner of Indian Affairs by special delegation or request, the Board shall not adjudicate: * * * matters decided by the Bureau of Indian Affairs through exercise of its

[2] The fact that CDIB appeals may have been treated as enrollment appeals for a long period of time does not give validity to an erroneous interpretation of law. "Error is not to be perpetuated simply because it has been once made, and wisdom is not to be rejected merely because it comes late." *Western Coal Traffic League* v. *United States*, 694 F.2d 378, 391 (5th Cir. 1983).

discretionary authority." The Board has, however, held that whether a BIA decision is properly characterized as discretionary is a question of law over which the Board has jurisdiction. *See Wray* v. *Deputy Assistant Secretary--Indian Affairs (Operations)*, 12 IBIA 146, 91 I.D. 43 (1984), and cases cited therein. If after reviewing a particular case, the Board concludes that the decision is based upon an exercise of discretion, it will limit its opinion to the extent required to avoid trespassing on BIA's legitimate exercise of discretion. The initial allegation that a decision is discretionary, however, does not negate the Board's jurisdiction; that allegation is more akin to an affirmative defense.[3]

Therefore, appellee's motion to dismiss this appeal for lack of jurisdiction on the grounds that the decision involves the exercise of discretion is also denied.

Finally, appellee argues the Board lacks jurisdiction because there is no right to appeal his decision under 25 CFR Part 2. Appeals to the Board from BIA administrative actions and decisions are a continuation of the internal BIA administrative review procedures begun in 25 CFR Part 2. *See* 43 CFR 4.330(a)(1). Appellee contends at pages 2-3 of his answer brief:

> There is no statute or regulation or fundamental constitutional law which requires the issuance of CDIBs. CDIBs are granted for the convenience of the government, solely at the Assistant Secretary's discretion, to facilitate its work in determining eligibility of persons for federal programs. There is no regulation or statute which requires the issuance of these certificates nor is there any statute or regulation which makes the eligibility for any benefits or programs dependent on the possession of such certificates. Thus, no right or privilege of the Appellant within the meaning of Part 2 has been violated and the regulations of Part 2 do not apply.
>
> In the absence of any statute or regulation requiring the issuance of the CDIBs, the decision to issue such [a] certificate is a policy decision addressed to the Assistant Secretary's discretion.

According to appellee, because of the absence of regulations concerning CDIBs, their issuance is totally gratuitous and discretionary, and, therefore, not covered by 25 CFR Part 2, which conditions the right to appeal on the "violation of a right or privilege of the appellant. Such rights or privileges must be based upon fundamental constitutional law, Federal statutes, treaties, or upon Departmental regulations." 25 CFR 2.2. The fact of this appeal, which by definition asserts a violation of appellant's rights and/or privileges, thus raises the issue of the relationship between legal rights/privileges and CDIBs, and whether the absence of regulations concerning CDIBs is legally permissible.

Indian blood quantum and its corollary, Indian status, are legal concepts from which individual rights and privileges arise. Many

[3] The exercise of discretion with respect to the blood quantum of an illegitimate child may, however, be subject to limitations imposed by the Administrative Procedure Act (APA), 5 U.S.C. §§ 551, 553 (1982). *See* discussion, *infra*. All citations to the *United States Code* are to the 1982 edition.

Federal statutes refer to and grant special privileges based upon Indian status or degree of Indian blood. *See, e.g.*, the Indian Reorganization Act, June 18, 1934, 48 Stat. 988, 25 U.S.C. § 479 ("The term 'Indian' * * * shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, * * * and shall further include all other persons of one-half or more Indian blood"); and the Indian Appropriations Act of 1918, Act of May 25, 1918, 40 Stat. 564, 25 U.S.C. § 297 ("No appropriation, except appropriations made pursuant to treaties, shall be used to educate children of less than one-fourth Indian blood whose parents are citizens of the United States and of the State wherein they live and where there are adequate free school facilities provided."). Other statutes apply to Indians without definition of the term, leaving such definition to the agency. *See, e.g.*, 25 U.S.C. §§ 13, 44, 45, 46, and 47.

A cursory examination of 25 CFR Chapter I reveals that although for some purposes, BIA has defined "Indian" exclusively as a member of a Federally recognized Indian tribe, for many other purposes a certain percentage of Indian blood also qualifies a person as an Indian. *See, e.g.*, 25 CFR 5.1 (Indian preference in employment); 25 CFR 20.1(n) (eligibility for Federal financial assistance and social services); 25 CFR 22.6 (care of Indian children in contract schools); 25 CFR 26.1(g) (employment assistance for adult Indians); 25 CFR 27.1(i) (vocational training for adult Indians); 25 CFR 31.1(a) (enrollment in Federal Indian schools); 25 CFR 40.1 (eligibility for higher education loans, grants, and other assistance); 25 CFR 101.1(d) (loans from the revolving loan fund); 25 CFR 103.1(d) (loan guaranties, insurance, and interest subsidies for financing reservation economic enterprises and housing); 25 CFR 151.2(c)(3) (acquisition of land in trust status); 25 CFR 256.2(e)(3) (eligibility for the housing improvement program); and 25 CFR 286.1(f) (Indian business development program).

In his decision, appellee acknowledged that CDIBs are issued to identify eligible recipients of BIA services. This case demonstrates that CDIBs are also used for eligibility purposes by the Indian Health Service.

A BIA determination of Indian blood quantum is a prerequisite for acceptable proof of degree of Indian blood. BIA has chosen to memorialize its genealogic research through the issuance of a CDIB showing its determination of a person's degree of Indian blood. This CDIB is accepted as proof in determining eligibility or ineligibility for services and benefits available to Indians. BIA's practice of issuing CDIBs is thus an integral part of the process by which legal rights and privileges of Indians arise.[4] An action or decision of BIA regarding CDIBs is, therefore, a proper subject for appeal to the Board.

If the rights and privileges of Indians are dependent on the proper issuance of CDIBs, and no regulations exist for governing this practice,

[4] It is possible that BIA determinations of Indian blood quantum provided to tribes for their enrollment decisions might be held by the courts to the same standards as such determinations for eligibility for Federal services. Because the issue is not raised in this appeal and concerns enrollment disputes, the Board does not address this question.

the question then becomes whether or not this practice is subject to the APA requirements for rulemaking. An agency "rule" is defined in pertinent part in 5 U.S.C. § 551(4) as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."

> While no attempt precisely to define rulemaking can be wholly successful, the essence of its meaning is generally understood. Rulemaking by an agency characteristically involves the promulgation of concrete proposals, declaring generally applicahle policies binding upon the affected public generally, but not adjudicating the rights and obligations of the parties before it. *See* 1 K. Davis, Administrative Law Treatise, § 5.01 (1958). Furthermore, rules ordinarily look to the future and are applied prospectively only, whereas orders are directed retrospectively, typically applying law and policy to past facts.

PBW Stock Exchange, Inc. v. *Securities and Exchange Commission*, 485 F.2d 718, 732 (3rd Cir. 1973), *cert. denied*, 416 U.S. 969 (1974). *See also, American Express Co.* v. *United States*, 472 F.2d 1050, 1055 (C.C.P.A. 1973) (*inter alia*, rulemaking "looks not to the evidentiary facts but to policy-making conclusions to be drawn from the facts").

Agencies sometimes use the term "guidelines," rather than "rule," in describing certain pronouncements.

> It is of no moment that, for reasons it has failed to articulato, the Commission has clad its promulgation in the cloak of guidelines ratber than rules. * * * [I]t is the impact and not the pbrasing that matters. Indeed, agencies often adopt policies having the status of rules without codifying them in regulations, guidelines, or in other formal formats.

Western Coal Traffic League, supra, at 392 and 392 n.61. *See also Brown Express, Inc.* v. *United States*, 607 F.2d 695 (5th Cir. 1979). In *American Trucking Associations, Inc.* v. *ICC*, 659 F.2d 452, 463 (5th Cir. 1981), the court discussed the differences between rules and guidelines and the criteria for determining whether a statement labeled a guideline actually constitutes a rule within the meaning of 5 U.S.C. § 551(4): "A policy statement is in reality a binding norm (a rule) unless (1) it acts only prospectively, and (2) it 'genuinely leaves the agency and its decision-makers free to exercise discretion.' " (Quotation from *American Bus Association* v. *United States*, 627 F.2d 525, 529 (D.C. Cir. 1980).)

In this case, appellee has presented a BIA instruction manual and a 1977 memorandum from the Muskogee Area Director to the superintendents of the agencies serving the Five Tribes as evidence of BIA policy regarding blood quantum determinations. It is clear BIA intended its instruction manual to be followed by all employees working with blood quantum determinations. The 1977 memorandum was likewise intended to control agency operations with respect to blood quantum determinations. The language used in both documents is mandatory and sets evidentiary standards for blood quantum determinations. Furthermore, the 1977 memorandum operates retrospectively. There is no evidence and no allegation that these standards were ever made known to the persons affected by them.

[3] The Board holds that, under the criteria established by the Federal courts for determining whether an agency policy statement is a "rule" subject to the provisions of the APA, BIA's standards for determining Indian blood quantum are "rules." These rules were not, however, by appellee's admission, published in accordance with 5 U.S.C. § 553,[5] as mandated by section 552.[6]

In *Morton* v. *Ruiz*, 415 U.S. 199 (1974), the Supreme Court reviewed the consequences stemming from the lack of published regulations governing BIA's general assistance program. The Court stated at pages 230-32:

> Having found that the congressional appropriation was intended to cover welfare services at least to those Indians residing "on or near" the reservation, it does not necessarily follow that the Secretary is without power to create reasonable classifications and eligibility requirements in order to allocate the limited funds available to him for this purpose. * * * Thus, if there were only enough funds appropriated te provide meaningfully for 10,000 needy Indian beneficiaries and the entire class of eligible beneficiaries numbered 20,000, it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits. But in such a case the agency must, at a minimum, let the standard be generally known so as to ensure that it is being applied consistently and so as to avoid botb the reality and the appearance of arbitrary denial of benefits to potential beneficiaries.
>
> * * * The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. In the area of Indian affairs, the Executive has long been empowered to promulgato rules and policies, and the power has been given explicitly to the Secretary and his delegates at the BIA. This agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, * * * but also to employ procedures that conform to the law. * * * No matter how rational or consistent witb congressional intent a particular decision might be, the determination of eligibility cannot be made on an *ad hoc* basis by the dispenser of the funds.
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> The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain statod procedures so as to avoid the inherent arbitrary nature of unpublisbed *ad hoc* detorminations. [Footnotes omitted.]

The Court went on to hold that procedures for providing assistance, published only in the BIA Manual, were not effective to deny coverage to certain individuals. The Court concluded at page 236:

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[5] Sec. 553 provides in pertinent part:

"(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. * * *

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."

[6] Sec. 552 states in pertinent part:

"(a)(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."

> The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions. See, *e.g., Seminole Nation* v. *United States*, 316 U.S. 286, 296 (1942); *Board of County Comm'rs* v. *Seber*, 318 U.S. 705 (1943). Particularly here, where the BIA has continually represented to Congress, when seeking funds, that Indians living near reservations are within the service area, it is essential that the legitimate expectation of these needy Indians not be extinguished by what amounts to an unpublished *ad hoc* determination of the agency that was not promulgated in accordance with its own procedures, to say nothing of those of the Administrative Procedure Act. The denial of benefits to these respondents under such circumstances is inconsistent with "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Seminole Nation* v. *United States*, 316 U.S., at 296; see *Squire* v. *Capoeman*, 351 U.S. 1 (1956). Before benefits may be denied to these otherwise entitled Indians, the BIA must first promulgate eligibility requirements according to established procedures.

After the *Ruiz* decision, BIA promulgated regulations governing financial assistance that are now found in 25 CFR Part 20. In *Allen* v. *Navajo Area Director*, 10 IBIA 146, 89 I.D. 508 (1982), the Board was called upon to review the regulations in Part 20. Unfortunately, the Board was compelled to find that the regulations were still insufficient to inform those persons affected hy them of the eligibility requirements. Instead, BIA continued to rely on the BIA Manual for all of the pertinent requirements, while providing only general statements in Part 20.

This case presents the same situation. Accurate determinations of Indian blood quantum are required for the proper and consistent implementation of Federal statutes and regulations affecting the rights and privileges of Indians. In issuing CDIBs, BIA has assumed the responsibility for determining an individual's degree of Indian blood.[7] The procedures and rules hy which this determination is made, including the evidentiary standards employed, are known only by BIA, not by those persons affected. Unlike the situations in *Ruiz* and *Allen*, BIA has not even seen fit to set forth these rules in the BIA Manual. These are truly "hidden regulations," available to and known by only the initiated few.[8]

Based upon this discussion, the Board concludes that BIA's requirements relative to the issuance of CDIBs are rules within the meaning of the APA and should have been published in accordance with 5 U.S.C. §§ 552 and 553. The Board rejects appellee's argument that appeals from CDIB determinations are not subject to 25 CFR Part 2 because CDIBs are not required to be issued by regulation, when the reason they are not issued by regulation is that BIA has failed to follow the mandates of both the BIA Manual and the APA to publish rules of general applicability. *See* the discussion of the 1968

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[7] *Cf. Aleutian/Pribilof Islands Ass'n, Inc.* v. Acting Deputy Assistant Secretary–Indian Affairs (Operations), 9 IBIA 254, 260, 89 I.D. 196, 199 (1982). The Board there cited, *inter alia, United States* v. *Nixon*, 418 U.S. 683, 694-96 (1974), and *Service* v. *Dulles*, 354 U.S. 363, 388 (1957), for the proposition that when an agency adopts a rule that is not required by statute, but is clearly within the agency's discretion in implementing a statute, it is bound by the regulation even though it imposes duties in excess of those required by the statute.

[8] 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."

introduction to the BIA Manual and 25 U.S.C. § 553 in *Ruiz, supra* at 233-34.[9]

Accordingly, the Board denies appellee's final motion to dismiss based on the grounds tbat CDIB appeals are not subject to the provisions of 25 CFR Part 2.

Discussion and Conclusions

The Board therefore reaches the merits of appellant's appeal. Appellant requested that BIA issue him a card-size CDIB to replace the larger certificate he received in 1975. Rather than merely issuing the smaller CDIB, BIA, based upon the Muskogee Area Director's 1977 memorandum, reviewed the 1975 determination of appellant's blood quantum. As a result of this review, BIA determined tbat appellant's blood quantum should be changed from 4/4 to 1/2, because appellant was illegitimate and there had been no judicial determination of paternity. In reaching its decision, BIA apparently gave no weight whatsoever to appellant's delayed birth certificate. In fact, in his initial brief to the Board, appellee went to considerable length to suggest that appellant falsified the certificate.

[4] The Board has held herein that BIA's rules regarding Indian blood quantum determinations for the purpose of issuing CDIBs should have been published in accordance with 5 U.S.C. § 552. Section 552(a)(1) provides the penalty for failure to publish such rules: "Except to the extent that a person bas actual and timely notice of tbe 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." Accordingly, because the APA required the publication of BIA's rules regarding CDIB determinations and because the rules were not so published, appellant cannot be adversely affected by them. In this case, therefore, appellant's degree of Indian blood cannot be changed on the basis of the evidentiary standards set forth in unwritten policy statements or the Muskogee Area Director's 1977 memorandum, and he is thus entitled to receive a card-size CDIB consistent with the initial 1975 determination. *See* discussion, *supra*; *Ruiz*; and Allen.

Furthermore, even if the 1977 memorandum could be used to establish requirements, BIA did not follow the procedures set forth in it. The memorandum states at page 2:

> The issuing of a plasticized card for a CDIB has resulted in requests for such cards by individuals who have previously received a CDIB on the old form. Anyone who received a certificate issued after January I, 1975, can be issued a plasticized card. Those issued before January 1, 1975, must be reviewed in accordance with present standards hefore a card can he issued.

Appellant's initial CDIB was issued on May 13, 1975, a date clearly after January 1, 1975. Instead of being issued a plastic card in

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[9] Tbe necessity of publisbed regulations governing CDIB determinations and appeals is clearly demonstrated by appellee's own admission at page 3 of his answer brief that not even all BIA offices are aware of the procedures they should follow in CDIB appeals.

accordance with the Area Director's instructions, appellant's request was treated as if his initial CDIB had been issued before January 1, 1975. The BIA thus failed to follow its own hidden regulations.

In addition, even if the Board were to hold that appellant could be denied a card-size CDIB containing the same information as his original CDIB, appellee has failed to provide any credible reasons for not ascribing any weight to appellant's delayed birth certificate. Appellee's suggestion that appellant himself added information to the delayed birth certificate is refuted by the information presented from the Oklahoma official having custody of the records. No other reason for ignoring the delayed birth certificate is given. Under 63 Okla. Stat. 1-324(b):

> A copy of a certificate or any part thereof issued in accordance with subsection (a) of this section, certified to by the State Commissioner of Health or by a person designated by him for such purpose, shall be considered for all purposes the same as the original, and shall be prima facie evidence of the facts therein stated, provided that the evidentiary value of a certificate or record filed more than one (1) year after the event * * * shall be determined by the judicial or administrative body or official before whom the certificate is offered as evidence.

Appellant's delayed birth certificate is, at least, some evidence of the information it contains. The value of the certificate depends in part upon the nature of the evidence supporting the State's decision to issue a certificate showing William Underwood to be appellant's father. The nature of the evidence and degree of support is based on the State regulations implementing 63 Okla. Stat. 1-313. These regulations are not available to the Board.

If the Board had found that BIA could change appellant's CDIB under these circumstances, it would have referred this case for an evidentiary hearing and recommended decision based in part on the weight that should be given to the information contained in his delayed birth certificate.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 14, 1984, decision appealed from is reversed, and the Bureau of Indian Affairs is ordered to issue appellant a card-size certificate of degree of Indian blood showing him to be 4/4 Chickasaw.

JERRY MUSKRAT
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Alternate Member

FRANKLIN D. ARNESS
Alternate Member

[redacted] 26 1987

February 13, 1986

RIVERSIDE GENERAL CONSTRUCTION CO., INC.

IBCA-1603-7-82 Decided *February 13, 1986*

Contract No. M00C14202925, Bureau of Indian Affairs.

Sustained in Part.

1. Contracts: Construction and Operation: Changes and Extras--Contracts: Disputes and Remedies: Equitahle Adjustments--Rules of Practice: Appeals: Burden of Proof--Rules of Practice: Evidence

In a case involving a dispute over the amount of soil-cement slope protection placed on the embankment portion of a dam in which tbe appellant relies upon a survey made by a professional land surveyor and the BIA upon a survey performed by the project engineer (a registered professional engineer), the Board accepts the BIA survey as determinative of the quantity of soil-cement placed on the embankment where it finds (i) the BIA survey had been performed at an earlier time when conditions prevailing were more conducive te accurate measurements being taken and (ii) the records maintained with respect to the BIA survey appeared to be free of the internal inconsistencies shown to be present in the survey records of the licensed land surveyor.

2. Contracts: Construction and Operation: Changes and Extras--Coutracts: Disputes and Remedies: Burdeu of Proof--Contracts: Disputes and Remedies: Equitahle Adjustments--Rules of Practice: Appeals: Burden of Proof

When the parties differ as to the amount payable as an equitable adjustment for overrun quantities of soil-cement for slope protection placed on the embankment portion of a dam and when the principal item on which the parties are apart involves equipment costs, the Board finds that the appellant has failed to show that it is entitled to any greater amount than was allowed by the contracting officer where (i) information as to the cost of contractor-owned equipment was available in the contractor's records; (ii) such information was not furnished to the Government at the time of the audit of the contractor's books or at any time thereafter; (iii) instead of furnishing its costs for contractor-owned equipment, the appellant chose to rely upon a construction guideline for costing such equipment (a lot of which was fully depreciated) despite the fact that the guidelines relied upon specifically state that they should not be used for construction such as dams, highways, and bridges; (iv) by reason of the appellant's failure to furnish its costs for contractor-owned equipment, the Board was unable to apply the standards set forth in FPR 1-15.205-9 to determine the amount to which the appellant was entitled; and (v) the comparisons made by the project engineer to which he testified support the amount allowed by the contracting officer as an equitable adjustment.

3. Contracts: Construction and Operation: Changes and Extras--Contracts: Disputes and Remedies: Burden of Proof--Contracts: Disputes and Remedies: Equitahle Adjustments--Rules of Practice: Appeals: Burden of Proof

Under a contract for the construction of a dam requiring that, except for the initial layer, all layers of soil-cement slope protection be placed in lifts 8 feet wide, the contractor sought an equitable adjustment on the ground that by reason of safety it had been necessary to place the soil-cement in 9-foot-wide lifts since it would have been dangerous to attempt to maneuver its 8-foot-wide dump trucks so as to keep them on the 8-foot- wide soil-cement layers during the laydown operation and, in any event, it would have been virtually impossible to do so since the soil-cement layers themselves and the semi-pervious portion of the inclined bank were either slippery or slick. In denying the claim, the Board found that the appellant had failed to prove its claim by a preponderance of the evidence. Supporting the denial were the Board's findings (i) that the specification requirement that the soil-cement layers be placed in 8-foot lifts did not create a condition which was hazardous per se since it was contemplated that the contractor would use part of the slope of the dam for the inside wheels of the dump trucks in the placing procedure; (ii) that this was common practice in laying a soil-cement slope; (iii) that during the laydown operation the dump trucks used in placing the soil-cement consistently had at least their outer tires on the semi-pervious portion of the slope leaving a foot or so of space between the outside duals and the edge of the soil-cement lifts on the reservoir side; (iv) that while the project engineer knew that the contractor was placing and to some extent compacting soil-cement outside the 8-foot width shown on the plans, he attributed that to the fact that the contractor did not have the equipment to provide edge control for 8-foot widths; and (v) that with careful experienced drivers, the placement of soil-cement in 8-foot-wide lifts was a relatively safe operation.

In connection with its findings, the Board notes that while appellant's witnesses concerned with operation testified that the soil-cement layers and the semi-pervious portion of the inclined bank were slippery or slick at least most of the time, there is no evidence of record showing that at any time during the contract performance the appellant characterized either of the two surfaces (the soil-cement layers or the semi-pervious portion of the inclined bank) as slippery or slick.

4. Contracts: Construction and Operation: Actions of Parties--Contracts: Construction and Operation: Construction Against Drafter--Contracts: Construction and Operation: Contracting Officer--Contracts: Construction and Operation: Waiver and Estoppel--Contracts: Contracts Disputes Act of 1978: Jurisdiction

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

APPEARANCES: Charles E. Barnhart, Charles E. Barnhart & Associates, P.A., Attorneys at Law, Albuquerque, New Mexico, for Appellant; Barry K. Berkson, Department Counsel, Santa Fe, New Mexico, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The contractor has timely appealed from the final decision of the contracting officer dated June 19, 1981,[1] denying a substantial portion

[1] Appellant's Exhibit 1. Hereafter, appeal file exhibits will be designated AF followed by reference to the particular exhibit being cited. Other abbreviations used in referring to the record upon which this decision is based consist of the following: Appellant's Exhibit (AX); Government's Exhibit (GX); Transcript of Hearing (I Tr. or II Tr.); Appellant's Opening Brief (AOB). Government's Posthearing Brief (GPHB) and Appellant's Reply Brief (ARB).

of its overrun quantities of soil-cement, cement, and borrow excavation. Also appealed were the determinations of the contracting officer that the contractor had failed to furnish certain goods and services required by the contract.

Background

Contract No. M00C14202925 was awarded to Riverside General Construction Co., Inc., on July 27, 1979, in the amount of $1,062,653.15. The contract called for the construction of the Seama Reservoir at Laguna Indian Reservation, Valencia County, New Mexico. Performance of the construction work was to be completed by October 3, 1980 (AF-2-3).

Prepared on standard forms for construction contracts, the contract included the General Provisions set forth in Standard Form 23-A (Rev. 4-75). The contract documents also included specifications (SP) BIA-M00-79-21 dated May 29, 1979; Addendum 1 dated June 18, 1979; Addendum 2 dated June 21, 1979; and drawings entitled Seama Reservoir Plates 1 through 11 (AF-2, 5-6). In addition, the contract contained Part I--Special Provisions, as well as numerous technical specifications. Among the provisions included in the contract are the following:

Part I - Special Provisions

G. Variation in Estimated Quantities

1. Where the quantity of a pay item in this contract is an estimated quantity and where the actual quantity of such pay item varies more than fifteen percent (15%) above or below the estimated quantity stated in this contract, an equitable adjustment shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely te the variation above one hundred fifteen (115%) or helow eighty-five (85%) of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contracting Officer shall, within ten (10) days after the receipt of a written request for an extension of time, ascertain the facts and make such adjustment for extending the completion date as in his judgement the findings justify.

* * * * * * *

J. Quantity Surveys

1. The Contractor shall furnish all personnel, equipment and material required to make necessary original and final surveys. The Government will make computations to determine the quantities of work.

2. The Contractor shall furnish all personnel, equipment and material required to make surveys to determine the quantities of work performed or placed during the period covered by a progress payment. All original field notes, field computations, and other records taken in the field hy the Contractor for the purpose of layout, progress, original and final surveys shall be recorded in duplicating field books, the original pages of which shall be furnished promptly in ring binders to the representative of the Contracting Officer at the site of the work, and shall be used with other data in determining the proper amount of progress payments due to the Contractor. Unless waived in each specific case, quantity surveys made by the Contractor shall be made under the direction of a representative of the Contracting Officer.

* * * * * * *

O. Contractor Quality Control System

* * * * * * *

3. In addition to the Contractor's supervisory staff, he shall add to his jobsite organization one soils engineer who has completed the requirements for a Bachelor's Degree from an accredited college of engineering and has not less than five (5) years responsible jobsite experience, satisfactory to the Contracting Officer, in earthwork construction and is thoroughly knowledgeable of sampling, testing and control of excavation and placement of soil and soil materials as backfill and embankment. He must be a registered Professional Engineer in the State of New Mexico.

* * * * * * *

Q. As-Built Drawings

Upon completion of the work, the Contractor shall furnish one complete set of "as-built" drawings. These drawings shall be contract drawings corrected in red ink to show any differences between original contract drawings and actual construction. All buried drain lines and other structures not readily located by on-site observation shall be located on the "as-built" drawings by dimension lines to visible permanent structures.

(AF-1, SP-3, 4, 6, and 7).

Division 2 - Technical Specifications, Section 2E, Slope Protection for Upstream Slope of Embankment.

* * * * * * *

6. Measurement and Payment:

a. *Measurement:*

(1) Measurement for payment of soil-cement slope protection will be made in place after compaction to the lines, grades, and dimensions shown on the drawings or established by the Contracting Officer and on the basis of the prescribed thickness.

(2) No measurement for payment of soil-cement slope protection will be made of soil-cement which, after compaction, lies outside of the line of the upstream slope of the dam as shown on the drawings.

(3) Measurement of cement used in soil-cement slope protection will be by actual count of the number of ton[s] used in soil cement measured in accordance with subparagraph (1) above.

(4) No measurement for payment will be made for compaction, finishing, soil material used for curing, curing compound, scarifying, water or any other material or work except as provided for in subparagraphs (1) and (3) above.

b. *Payment:*

(1) Payment for soil-cement slope protection will be made at the unit price per cubic yard bid therefore in the unit price schedule, which unit price shall include all costs of obtaining and processing soil[,] obtaining and incorporating all water, mixing, transporting, placing, leveling, compacting, obtaining, and applying curing compound or cover soil and all other costs incurred in furnishing and installing the soil-cement slope protection in accordance with the plans and specifications.

(2) Payment for furnishing and handling cement used in soil-cement slope protection will be made at the unit price per ton bid in the unit price schedule, which price shall include all costs incurred in furnishing and handling cement for soil-cement slope protection.

(3) Payment will not be made for cement used in soil-cement that is rejected or is not included in the soil-cement paid for under the provisions of subparagraph (1) above.

(4) No other payment will be made for soil-cement slope protection nor for any other materials used in soil-cement slope protection.

(AF-5, 2E at 10).

A preconstruction conference was held on August 6, 1979, and the notice to proceed was issued effective as of that date (AF-3). Except for the placement of the soil-cement, all of the work called for by the contract was completed in the fall of 1979.

Resumption of contract performance was authorized beginning April 7, 1980. The contractor did not begin moving in any plant equipment or personnel until April 23, 1980. Calibration testing of the contractor's soil-cement processing plant (first pug mill) did not begin until May 9, 1980 (GX-C). A quantities report found that the contractor had used 90.35 tons of cement in the course of calibrating its first pug mill (GX-H at 8). Even after the pug mill was calibrated, the contractor continued to experience difficulty in producing soil-cement in the quantity required for the timely completion of the contract work. The principal problem with the first pug mill was insufficient capacity. When the contractor pushed the pug mill too hard in an effort to increase production, the machine would break down. For the period May 27 through June 19, 1980, the contractor processed and placed 1,271 cubic yards of soil-cement slope protection out of the required contract quantity of 12,850 cubic yards (AF-1; GX-D).

By letter dated June 25, 1980, the contracting officer requested the contractor to supply an updated progress schedule and detailed plans for overcoming equipment problems to which the lack of progress was attributed. A second pug mill was placed in operation on July 15, 1980.[2] It operated satisfactorily for the remainder of the project (GX-H at 4).

On August 21, 1980, a meeting was held between representatives of the contractor and of the Government (AF-17). In a letter to the contractor on that date, the acting contracting officer furnished the contractor with BIA's estimate of the quantities of item 2E (borrow excavation), item 4A (cement for soil-cement slope protection), and item 4B (soil-cement slope protection) required to complete the contract work. Citing the Variation in Estimated Quantities provision (text, *supra*), the contractor was requested to review the requirements for the anticipated overruns of items 2E, 4A, and 4B and to furnish its proposal for completing the additional work for those quantities exceeding 115 percent of the original quantities (AF-16).

The contractor's handwritten proposal containing proposed revised unit prices for items 4A and 4B were presented to the acting contracting officer on August 22, 1980. In a letter to the contracting officer, dated August 27, 1980, the contractor's president (Mr. George Sena) referred te a telephone conversation on that date in which Mr. Sena had been told by the contracting officer to continue with the work and that a stop work order would not be issued. The letter also stated that the contractor was proceeding with the work upon the understanding that the extra quantities would be paid for at the unit

[2] The contractor's superintendent testified that if he had come to the project in May instead of in July, he would have put up with the first pug mill for only about 2 weeks (I Tr. 108).

prices reflected in the break-down delivered to the acting contracting officer on August 22, 1980 (AF-16, 17).

On September 12, 1980, the contracting officer issued Interim Change Order No. 2 which increased the estimated quantities of items 2E, 4A, and 4B but which made no provision for adjustment of the unit prices specified in the contract for these items. Concerning this aspect, the change order states: "The interim change will be at the original unit cost pending an audit of costs presently being conducted * * *. At such time as the audit is completed, this office will have a basis for negotiation of revised unit costs for the overage bid items" (AF-11). The contractor proceeded with the contract and successfully completed the project on October 3, 1980 (AF-19).

Under date of December 18, 1980, the Office of Inspector General, Department of the Interior, issued a memorandum audit report concerning the revised unit prices requested by the contractor for quantities of items 4A and 4B exceeding 115 percent of the original contract quantities.[3] BIA determined that 769 tons of item 4A and 4,948 cubic yards of item 4B were subject to equitable adjustment. The revised unit prices requested by the contractor were $150 per ton for item 4A and $20.96 per cubic yard for item 4B. With respect to the two items, there is no evidence indicating that the contractor had agreed to BIA's determination of the quantities involved or that BIA had agreed to the revised unit prices sought by the contractor. However, the Government auditor used BIA's determination of quantities for items 4A and 4B and the contractor's proposed revised unit prices for such items in showing the proposed equitable adjustment for items 4A and 4B to be in the amount of $219,060 (AF-26 at 2, 6).

The Government auditor found that, for the most part, the cost information listed in the informal submission of August 22, 1980, did not come from the accounting, equipment,[4] or job records of the contractor. The audit report questioned proposed costs of $21,494 for item 4A and $54,619 for item 4B on the ground that such costs could not be substantiated due to incomplete or nonexistent contractor records. Concerning the questioned costs the report states that a contracting officer's decision was needed based upon technical reviews and evaluation (AF-26 at 2-3).

Subsequent to settlement negotiations between the parties on January 30, 1981, the contractor reasserted the unit prices for items 4A and 4B contained in the August 22, 1980, submission. According to the contractor, the unit prices of $150 per ton for item 4A

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[3] The overrun quantities of item 2E (borrow excavation) did not exceed the 115 percent limitation specified in the "Variation in Estimated Quantities" provision (text, *supra*). Consequently, the unit price of 15 cents per cubic yard specified in the contract for this item was also the price payable for overrun quantities (GX-J).

[4] The audit report states at page 5:

"The contractor used a construction industry guide for rental rates for new equipment to estimate rental costs of his own equipment. His equipment, while not all fully depreciated, was mostly old and thus fair rental rates would be difficult to determine. Equipment item ownership and operating costs could not be determined from the contractor's records." (AF-26).

and $20.96 per cubic yard for item 4B represented the proper amount of equitable adjustment for these items since these prices had been tacitly approved by the contracting officer when he directed the contractor to continue with the contract work after the contractor's estimated unit prices were received by the Government on August 22, 1980 (AF-17, 28).[5]

By letter dated April 15, 1981, the contractor submitted its formal claim to the contracting officer for decision (AF-33). In the letter, the contractor claimed $199,718.51 as an equitable adjustment on 8,556.92 cubic yards of item 4B (soil-cement) at $23.34 per cubic yard and $86,660.69 as an equitable adjustment on 926.06 tons of item 4A (cement) at $93.58 per ton (AF-33, Exh. F). The letter also included a claim in the amount of $2,500.39 for 1,669.25 cubic yards of item 2E (borrow excavation) over the original contract quantity but within the 115 percent limitation provision.

A principal contention advanced by appellant in support of the amounts claimed for items 4A and 4B is that through an outside survey it had determined that the quantity of soil-cement placed on the embankment was 18,191.13 cubic yards (AF-33, Exh. A) instead of the 16,536.59 cubic yards found by BIA (AX-61). An even more important contention of appellant is that it was necessary to widen the 8-foot soil-cement layers called for by the contract to 9-foot soil-cement layers by reason of safety. According to appellant, it was not possible to safely operate dump trucks which were 8 feet wide on an 8-foot-wide surface which was wet and slick. Also noted is appellant's position that defective or ambiguous specifications as to the percentage of cement to be incorporated into the soil-cement[6] created confusion and any resultant wastage (AF-33 at 4).

In the decision (AX-1) from which the instant appeal was taken, the contracting officer adopted the unit price proposed by appellant for item 4A (cement) of $93.58 per ton. None of the other principal assumptions reflected in appellant's claim were accepted by the contracting officer. Rejected was the position of appellant that the quantity of soil-cement placed on the embankment in the specified 8-foot lifts should be determined on the basis of an outside survey. Also rejected was appellant's position that the 8-foot layers of soil-cement

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[5] The day before the contractor submitted proposed revised unit prices for quantities of items 4A and 4B exceeding the 115 percent limitation, the acting centracting officer had written concerning the anticipated overruns and had requested the contractor to make an early response "so that this office can review your proposal and either accept or negotiato the costs as presented by you" (AF-16).

[6] Apropos this suhject, the claim letter of Apr. 15, 1981, states:

"The following percentages and places where such are set fortb in government specifications denote the variability of the percentages of cement provided by the government and are asserted as causing calibration problems and soil-cement mixture problems as well:

15.8% Bid Schedule (2600 T. 4A ÷ 16,493 T. 4B)

15.0% - Contract Specifications

12.0% - Contracting Officer Specifications alleged prior to S.C. operation

13.0% - Contracting Officer Specifications subsequent to S.C. operation. (1159 T. 4A ÷ 8825 T. 4B)

13.8% - BIA Quantity Report Allowance (344.79 T. 4A ÷ 24,986 T. 4B)"

[Note: Per B.I.A. Quantity Report, one (1) cy of soil-cement = 1.2835 T.] (AF 33 at 5).

called for by the contract had to be widened by an extra foot for safety reasons. Since cement and borrow excavation are constituent elements of soil-cement, these determinations by the contracting officer with respect to soil-cement also affected the quantities of items 2E and 4A for which payment was authorized.

The contracting officer also sustained the propriety of BIA having refused to pay the contractor for 90.35 tons of cement found to have been used in calibration; for 28.77 tons of cement included in rejected soil-cement; and for .60 tons of cement remaining after the completion of the soil-cement operation. In addition, the contracting officer determined that the contractor was indebted to the Government in the amount of $22,469.57 by reason of having failed (1) to furnish the services of a registered professional soils engineer; (2) to perform required quantity surveys; and (3) to submit as-built drawings (AX-1 at 14, 15).

Resolution of the instant appeal will entail passing upon nine claims of the contractor and three claims of the Government. Each of these claims is considered separately below commencing with the claims for soil-cement.

Equitable Adjustment Claim for Item 4B Soil-Cement - $199,718.51

Discussion

The appellant is claiming an equitable adjustment on 8,556.92 cubic yards of soil-cement at a unit price of $22.01 per cubic yard (ARB at 12-13). The contracting officer found the contractor to be entitled to an equitable adjustment on 4,689.34 cubic yards of soil-cement at a unit price of $12.85 per cubic yard (AX-1 at 11). The difference between the quantity of soil-cement for which a claim of equitable adjustment has been made and quantity of soil cement for which the contracting officer found the contractor entitled to an equitable adjustment is 3,867.58 cubic yards.

In support of its position appellant asserts that the quantity of soil-cement placed on the embankment in 8-foot soil-cement layer widths was 18,191.13 cubic yards as found by Southwest Surveying Co. and not 16,536.59 cubic yards as found by the contracting officer based upon a Government survey (a difference of 1,654.54 cubic yards). The appellant also contests the contracting officer's denial of its claim for another 2,213.04 cubic yards of soil-cement[7] on the ground that it was necessary to extend the 8-foot widths of the soil-cement layers to 9-foot widths for reasons of safety (AX-56; AX-61; AF-33 at 2-3).

Conflicting Surveys

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[7] The 2,213.04 cubic yards is the difference between the 20,465.02 cubic yards of in-place soil-cement based on a 9-foot width and 18,191.13 cubic yards based on an 8-foot width, less a deduction of 60.85 cubic yards. In the claim letter of Apr. 15, 1981, the contractor states:

"In computing the increase in soil-cement necessitated by extending the soil-cement layer widths from 8 to 9 feet, a deduction of 60.85 cy has been made from the total computation for the 1-foot section since the last layer of soil-cement embankment protection was level witb the top of the Seama Dam and the difficulty which would be realized in attempting to place all prior soil-cement embankment layers thus eliminated * * *." (AF-33 at 2-3).

In a survey made at the Seama Dam on September 30, 1980, Southwest found that on the embankment portion of the dam the contractor had placed 17,935 cubic yards of soil-cement (computed on the basis of lifts 8 feet wide) and had placed 19,037 cubic yards of soil-cement (computed on the basis of lifts 8-1/2 feet wide). The survey was made by Mr. Franklin Wilson (a licensed surveyor in the State of New Mexico, doing business as Southwest Surveying Co.) with the assistance of one or two of his employees. Over 6 months later Southwest checked and recalculated the notes of its September 30, 1980, survey and concluded that on the embankment portion of the dam the contractor had placed 18,191.13 cubic yards of soil-cement in 8-foot lifts and 20,465.02 cubic yards of soil-cement in 9-foot lifts (AF-18; AF-33, Exh. C).

A short time after the completion of the laying of the soil-cement, BIA surveyed the Seama Dam and found that on the embankment portion of the dam the contracter had placed 16,536.59 cubic yards of soil-cement in lifts 8 feet wide. The BIA survey was made by Mr. Frank White, a registered professional engineer in the State of New Mexico with the assistance of two other BIA employees (GX-H at 4; AX-61). The BIA survey made no finding with respect to soil-cement placed in 9-foot lifts in view of the Government's position that the laying of an extra foot had not been required by the Government and was not necessitated by reason of safety.

Based upon the above, it will be seen that the Wilson Survey of September 30, 1980 (as later modified upon an office review), found that 1,654.54 more cubic yards of soil-cement had been placed on the embankment in 8-foot lifts than had been found to be there in a BIA survey of the same area. None of the testimony adduced at the hearing shed any light on the reason for this substantial difference in the findings of the two surveys.

In a report prepared prior to the hearing, the project engineer stated that if Southwest had performed two surveys the differences in elevations and stationing could possibly be reasonably acounted for. The report went on to note, however, that only one field survey had been made (September 30, 1980), and that the data supplied by the company on April 7, 1981, was merely the result of an office computational check of the original survey (GX-I at 19).

At the hearing the project engineer's supervisor (Mr. Ernest Snyder) testified that had he known the difference between the Southwest figure for the amount of soil-cement placed on the embankment in 8-foot lifts and the corresponding figure found by BIA for such placement was in survey rather than in computations, he would have requested an outside survey to be made to determine which survey was accurate. He noted, however, that the reason for the difference could not be ascertained until Mr. Wilson's field notes were obtained which were not delivered to him until mid-afternoon on the Friday before the hearing commenced (II Tr. 47, 72).

In support of the position that the survey quantity found by Southwest should be accepted as the quantity of soil-cement placed on the embankment portion of the Seama Dam, appellant relies principally upon the fact that Mr. Franklin Wilson is a licensed land surveyor in the State of New Mexico and that neither Mr. Frank White (the project engineer) nor Mr. Ernest Snyder (the project engineer's supervisor) are licensed land surveyors. Apropos Mr. Snyder, appellant also notes that he is not a registered civil engineer. In addition, appellant states that at the hearing the Government chose to attack the accuracy of the professional land surveyor's findings[8] rather than to prove the accuracy of its own survey (AOB 7-9; ARB 9-10.) Contesting the accuracy of the Wilson survey the Government criticizes the nature of the survey records maintained by Mr. Wilson on a number of grounds including the following: (i) although acknowledging that all elevations taken should be in his field notes, Mr. Wilson was unable to offer a satisfactory explanation as to why certain necessary elevations were not included in such notes; (ii) the statement in the field notes to "add one foot to all elevations for sea level data" was not satisfactorily explained, especially since Mr. Wilson was using BIA bench marks; and (iii) Mr. Wilson was not certain whether he had added the extra foot or not. Another basic question raised by the Government concerned the conditions prevailing at the time the two surveys were performed. In this regard the Government states that Mr. Wilson's survey was performed after dirt had already been placed over the soil-cement pad making it necessary for his crew to dig holes to try and locate the soil-cement pad, a most difficult and unreliable task. By way of contrast the Government states that the BIA survey was performed before dirt accumulated over the soil-cement pad and that therefore it was not necessary for the BIA crew to conduct a dig and search operation (GPHB 11).

Turning to the evidence offered in this case, the Board notes that the Wilson survey was performed at a later time than the BIA survey and the difficulty Mr. Wilson had of locating the soil-cement pad in some instances by reason of an overburden of sloughed material was not a condition prevailing at an earlier time when the BIA survey was made (II Tr. 70). Entirely aside from the conditions obtaining at the time the two surveys were performed, there is a question as to the accuracy and completeness of the records maintained by the parties for their respective surveys.

Testifying at the hearing Mr. Wilson was unable to locate his field notes for some of the stations used in his calculations. In some

[8] Upon cross-examination Mr. Snyder acknowledged that the errors in Mr. Wilson's computation sheets involved only 29.34 cubic yards (II Tr. 66-68). While apparently conceding that the difference amounted to 2/1000 of 1 percent, Government counsel notos that Mr. Snyder was reviewing Mr. Wilson's quantity computation sheets, for which the Wilson field notes were deficient (GPHB at 12).

instances no elevations were recorded in the field notes for particular stations, although Mr. Wilson acknowledged that such elevations were necessary in order for him to make his quantity calculations for those stations (II Tr. 24-29). Mr. Snyder testified that the elevations shown in the field notes should correspond to the elevations used in the surveyor's computations. Mr. Snyder also testified that he could not see any direct transfer of elevations from Mr. Wilson's field notes to his calculation sheets (II Tr. 55). This testimony by Mr. Snyder is undisputed.

As to the accuracy and completeness of the records pertaining to the BIA survey, the Board notes (i) that both the quantity calculations and the field notes for the survey were furnished to the contractor some 27 months before the hearing was held in this case; (ii) that at the hearing the BIA survey quantity calculations showing 16,536.59 cubic yards of soil-cement were placed on the embankment of the Seama Dam was introduced as AX-61; (iii) that Mr. Wilson gave extensive testimony as to the difference between the BIA survey figures and his survey figures for both the higher and lower elevations at particular stations; (iv) that while he noted these differences in pencil on AX-61, Mr. Wilson offered no testimony to show that there were any errors in BIA's calculations of soil-cement quantities as set forth in AX-61; and (v) that although no testimony was elicited from Mr. White on direct examination with respect to the BIA survey, he was cross-examined extensively and could have been questioned on the survey findings reflected in AX-61 if appellant's counsel had chosen to do so (I Tr. 215).

Remaining for consideration is the assertion by appellant's counsel that "the testimony and records of the professional land surveyor are entitled to great weight especially when compared to that of a nonregistered 'amateur' in land surveys" (ARB 10). We have already discussed the nature of the testimony offered by the professional land surveyor and the nature of the records maintained by him with respect to the survey of September 30, 1980. Characterizing Mr. Frank White as a "nonregistered 'amateur' in land surveys" is considered te be entirely unwarranted as is indicated by the absence of any citation to either the evidence of record or to any legal authority. In this regard the Board notes that it was Mr. Frank White who was the person in charge of the BIA survey; that he is a professional engineer registered in the State of New Mexico; and that insofar as the record shows the survey he made was in his capacity of project engineer.

[1] Based upon the above discussion, the Board finds (i) that the BIA survey was made at an earlier time than the Wilson survey; (ii) that the conditions prevailing at the time of the BIA survey were more conducive to accuracy than the conditions obtaining when the Wilson survey was made at a later date; and (iii) that the records pertaining to the BIA survey were not shown to have the internal inconsistencies present in the records maintained to support the Wilson survey. So

finding, the Board further finds that appellant has failed to show by a preponderance of the evidence that it placed more than 16,536.59 cubic yards of soil-cement in 8-foot lifts on the embankment portion of the Seama Dam (GX-H at 3-4; AX-61).

Unit Price-Item 4B (Soil-Cement)

The principal difference between the amount claimed by appellant for item 4B (soil-cement) of $22.01 per cubic yard and the amount allowed hy the contracting officer of $12.85 per cubic yard (a difference of $9.16) is in the equipment cost area. In its initial brief appellant asserted that "[t]he end result of the decision is to deny the Appellant any equipment costs for pay item 4-B" (AOB 11). In its brief the Government points out that the contracting officer's decision allowed $12.85 per cubic yard for soil-cement and a portion of that included equipment costs as part of the final base cost of $9.61 per cubic yard (GPHB 12).

Addressing this question in its reply brief, appellant states that the Government's final base cost of $9.61 per cubic yard is unreasonably low and notes that the final base cost consists of three elements which are (i) labor, (ii) operating costs (fuel, etc.), and (iii) equipment rental. Thereafter appellant states:

> In Appellant's tabulation above, the labor cost is shown at $2.97 and the operating cost is shown at $2.90. It must be emphasized that these two elements of the cost per cubic yard are historical costs based on Appellant's audited records, and that these two figures are not in dispute between the parties. The remaining unknown element in this equation is equipment rental. Using the two known parts of the equation, i.e. labor at $2.97 and operating costs at $2.90, it is evident that in its final base cost of $9.61 per cubic yard, the Government has allowed only $3.74 for equipment rental ($9.61 - $5.87 = $3.74). As shown in the tabulation above, Appellant has claimed $10.57 for equipment rental * * *

(ARB at 14-15).

We now turn to the nature of the proof offered by appellant with respect to the amount of equipment costs claimed. In the claim letter of April 15, 1981 (AF-33), the contractor took exception to the statement in the audit report that fair equipment rates and values are not determinable and that age of equipment is a factor. Disagreeing with the auditor's assessment, the letter states (i) that 41 CFR 15.402-1(c) advises the use of set rates; (ii) that the same regulation also advises that fair value should be used for any fully depreciated equipment and supports the use of industry guides; and (iii) that the contractor relied on the cited regulation in utilizing the "1980 Building Construction Cost Data Guide" published by Means Co., Inc., which is a widely recoguized industry guide (AF-33 at 7).

At the hearing appellant's witness Mr. Miguel Abeyta (a CPA) stated that the April 15, 1981, claim reflected the use of the "Means Guide" for the equipment costs claimed. Although acknowledging that the contractor had actual records showing what the equipment was costing the company (I Tr. 134), Mr. Abeyta defended the use of the "Means Guide" for costing the contractor's equipment on the grounds that a lot of the equipment had been fully depreciated; that some NASA procurement regulations at their disposal support the approach followed; that he did not consider it fair to not charge the job any costs for equipment just because it had been fully depreciated; and that the "Means Guide" does not distinguish between old and new equipment (I Tr. 135-37).

Called as a Government witness Mr. Douglas Coster (a regional audit supervisor) confirmed that the contractor's proposal for equipment costs was based upon costs that came from the "Means Guide." Respecting the equipment costs claimed, Mr. Coster testified that he did not consider the guide to be indicative of the contractor's costs; that one point brought out in the "Means Guide" is that these are industry guidelines to be used in building construction and should not be used for construction such as dams, highways, and bridges; that since the "Means Guide" was dated 1980 it was understood to be based upon more currently acquired equipment; and that if the equipment had been fully depreciated, it had been acquired 5, 7, possibly 10 years before at a lesser cost. In other testimony Mr. Coster stated (i) that the workpapers indicated what the contractor's costs were in reference to rental equipment; (ii) that the auditor was unable to obtain information to identify what the costs were with respect to contractor-owned equipment, such as depreciation and operating costs dealing with the specific equipment; (iii) that he had no familiarity with NASA rental rates; and (iv) that the Federal Procurement Regulation[9] is the criteria that they audit from (II Tr. 78-84, 94-95, 102).

Turning to the legal theories relied upon by appellant for recovery of its equipment costs in the amount claimed, we wish to note at the outset that neither of appellant's briefs cites 41 CFR 15.402-1(c), although that is the authority relied upon in the claim letter of April 15, 1981, for resorting to the Means guidelines as the basis for costing the contractor's equipment. Our research has failed to disclose any such reference or any other reference supporting the use of industry guidelines for the costing of fully depreciated or substantially depreciated property. Also noted by the Board is the failure of appellant to offer the Means guidelines in evidence if it wished to rely

[9] In especially pertinent part the FPR state:

"§ 1-15.205-9 Depreciation

* * * * * * *

"(h) No depreciation or rental shall be allowed on property fully depreciated by the contractor * * * however, a reasonable charge for the use of fully depreciated property may be agreed upon and allowed. (*See* § 1-15.107). In determining this charge, consideration should be given to cost, total estimated useful life at time of negotiation, effect of any increased maintenance charges or decreased efficiency due to age, and the amount of depreciation, if any, previously charged to Government contracts and subcontracts.

* * * * * * *

"§ 1-15.107 Advance understandings on particular cost items

* * * * * * *

"(g) Examples of cost on which advance agreements may be particularly important are:

* * * * * * *

"(2) Use charges for fully depreciated assets * * *."

on it to refute Mr. Coster's testimony that the guidelines say they should not be used for construction such as dams, highways, and bridges.

As indicated by Mr. Coster in his testimony, the FPR is the criteria for determining the propriety of costs claimed under a contract placed by a civilian department or agency of the Government. The FPR includes use charges for fully depreciated assets among the examples of costs on which advance agreements may be particularly important. Elsewhere the FPR specifies that a reasonable charge for the use of fully depreciated property may be agreed upon and allowed; provided, that in determining the use charge, consideration is given to the total estimated useful life at time of negotiation, the effect of any increased maintenance charges or decreased efficiency due to age, and the amount of depreciation, if any, previously charged to Government contracts and subcontracts. In this case no consideration could be given to any of the enumerated factors, because, as Mr. Coster testified, the auditor was unable to obtain information to identify what the costs were with respect to contractor-owned equipment, such as depreciation and operating costs dealing with specific equipment.

In his testimony, the project engineer noted that after determining that $12.85 per cubic yard would represent a proper equitable adjustment for item 4B (soil-cement), he had compared that figure with the $10 and $12.80 per cubic yard for soil-cement bid by two other bidders on the Seama Dam project and with bids on soil-cement submitted by other companies on projects of similar size advertised for bids in February 1981 and September 1982, as well as taking into account a "Guide For Estimating Cost of Soil-Cement Slope Protection," as revised in 1980, 1981, and 1982. The project engineer considered that the comparisons so made confirmed the conclusion he had already reached that $12.85 per cubic yard was reasonable as an equitable adjustment for the quantity of soil-cement involved in the adjustment (GX-J, K, L, and M; I Tr. 187-92, 236-39).

[2] As the Court of Claims has indicated, the costs as recorded in the contractor's books of account are the best evidence of the costs attributable to contract performance. *See Meva Corp.* v. *United States*, 206 Ct. Cl. 203, 221 n.10a (1975). In this case the appellant has made no effort to show on the basis of recorded costs the amount of equitable adjustment to which it considers itself entitled for contractor-owned equipment costs, the principal item on which the parties differ. Even though recorded costs for such equipment were available to appellant, it failed to furnish information pertaining to such equipment to the Government either at the time its books were audited or at any subsequent time. Instead, appellant has chosen to rely upon the Means construction guidelines[10] for costing contractor-owned equipment (a lot

[10] For other cases involving attempts by contracters to rely upon industry guidelines for the equipment rates to be employed in determining the amount to be awarded on a claim, see *Clark & Hirt*, IBCA-1508-8-81 (Feb. 9, 1984), 91 I.D. 71, 95, 84-1 BCA par. 17,134 at 85,348 (Associated Equipment Distributors); *Capital Electric Co.*, GSBCA Nos. 5316 *et al.* (Feb. 17, 1983), 83-2 BCA par. 16,548 at 82,315 (National Electrical Contractors Ass'n).

which is fully depreciated), despite the fact that the guidelines expressly state that they should not be used for construction such as dams, highways, and bridges.

By reason of appellant's failure to furnish equipment costs, it has not been possible for the Board to apply the standards set forth in FPR 1-15.205-9 (note 9, *supra*) to determine the amount of such costs to which appellant is entitled. The Board notes that the comparisons made by the project engineer to which he testified support the recommendation made to the contracting officer that for item 4B (soil-cement) appellant be granted an equitable adjustment of $12.85 per cubic yard. Having carefully considered the testimony and other evidence, the Board finds that appellant has failed to show by a preponderance of the evidence that it is entitled to a greater amount as an equitable adjustment for item 4B soil-cement than the $12.85 per cubic yard found by the contracting officer.

The Extra Foot Question

In its opening brief appellant acknowledged that the contract specifications require the soil-cement slope protection to be placed in 8-inch lifts, with the first or initial layer to be 16 feet wide, and all subsequent lifts to be 8 feet wide, after which it states:

> A large portion of the overrun in the actual quantity of soil cement came about as a result of a decision made by Appellant at the outset of the soil cement placements, that it was required by the health and safety standards to widen the specified 8′ wide lift to 9′ wide; that it was not possible to safely operate dump trucks which are 8′ wide [[11]] on a 8′ wide surface which is wet and slick. (See Appellant's Exhibit 53 consisting of photographs marked AX 6 through AX 6-11).

(AOB at 2).

According to the Government if the contractor had had a genuine concern over safety, it could have avoided any possible safety hazard involved in the use of trucks for the placement of soil-cement by resorting to a conveyer system. Some testimony given by Mr. Mackie Murphy (the desiguer of the project) is quoted in support of this position (GPHB 7). In the course of his testimony, however, Mr. Murphy stated that the specifications[12] contemplate the use of dump trucks to place the scil-cement with a spreader. Moreover, in the testimony quoted and relied upon by the Government, Mr. Murphy was responding to a question about an acceptable construction practice for applying soil-cement lifts in 5-foot-wide layers, as to which he stated: "You use a conveyer system to elevate your soil cement from the trucks at the base of your embankment, to this spreader box."

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[11] Concerning the two dump trucks involved in hauling at the time of his safety inspection, Ross Wade (Area Safety Manager) states: "c. Both dump trucks were double axle, with the bed of the trucks 48″ off the ground, and the width of the rear wheels 7′9″ outside to outside" (GX-0).

[12] The specification in question reads as follows: "(1) The soil-cement mixture shall be transported from mixing plant to the placing area in trucks having tight, clean, and smooth beds and provided with canvas covers to protect the mixture from sun, wind and rain" (AF-5 at 2E-5).

Asked earlier how soil-cement lifts in 5-foot-wide layers might he placed, Mr. Murphy stated: "You–the hasic difference is that you use smaller equipment, and you do not use trucks to convey the soil cement *in place.*" (Italics supplied.)

While the specification provision could he interpreted in the manner now urged upon us by the Government and while such an interpretation would appear to be reasonable, there is nothing in the record to indicate that either party so interpreted the provision before the dispute arose. It is well-established that the interpretation the parties have placed upon a contract provision before it becomes the subject of controversy is entitled to great, if not controlling, weight. *Houston Ready-Cut House Co.* v. *United States*, 119 Ct. Cl. 120 (1951). Since appellant acted upon its interpretation of the specification provision here in issue and since there is no indication that the Government even suggested the use of a conveyer system for the placement of soil-cement during contract performance, this defense to the claim asserted is found to be lacking in merit.

Issues raised by the record in this appeal involve questions as to whether the specifications were defective either by reason of their terms or by reason of the manner in which the Government administered particular specification provisions. Before considering these issues, it would perhaps be advisable to address the question of what representations, if any, the project engineer made with respect to paying the contractor for the extra foot of soil-cement here in controversy. At the hearing appellant's president testified that the project engineer had told him that BIA would pay for the extra foot. In his testimony the project engineer denies that any such assurances had been given to the contractor. In connection therewith he called attention to the entries in the daily construction reports in which the contractor and his superintendent had been told that no payment would be made for soil-cement in-place and compacted outside of the design lines and grades shown on the plans, *i.e.*, exceeding the lifts of 8 feet specified in the contract (GX-E).

It has long been recognized that in evaluating conflicting versions of the content of conversations, the Board will give great weight to contemporaneous records maintained in the normal course of performing assigned duties. *See Timberland Management*, IBCA-1877 (July 31, 1985), 92 I.D. 340, 85-3 BCA par. 18,276; *Kean Construction Co.*, IBCA-501-6-65 (Apr. 4, 1967), 74 I.D. 106, 109-10, 67-1 BCA par. 6255 at 28,964. Since Mr. White's testimony is corroborated by contemporaneous records, the Board accepts his testimony as dispositive of the question presented. The Board therefore finds that no promise of payment for the extra foot of soil-cement claimed was made to appellant's president or to his superintendent by the project engineer.

[3] Called as a witness for appellant was Mr. Lawrence Serna (president of the Serna Trucking Co.) who had been in the business of hauling sand, gravel, and other road construction materials for

35 years. Mr. Serna testified that after visiting the jobsite and observing the operations, he had concluded that he did not wish to use his trucks on the job because it did not look safe to him.

Although on the occasion of his visit to the jobsite he was an eye witness to the manner in which the soil-cement laydown was being performed and although while he was there a truck had almost turned over and had to be pulled with a cable, no testimony was elicited from Mr. Serna with respect to whether the semi-pervious portion of the embankment or the soil-cement layers were wet, slippery, or slick. From the testimony given by Mr. Serna, it appears that the conclusion he reached that the hauling job being offered was not safe enough for him was primarily predicated upon Mr. Serna's view that "they didn't have enough room to work" (II Tr. 2-9).

Mr. Mackie Murphy testified extensively in support of the final plans and specifications (including the design of the soil-cement slope protection) which he had prepared. It was his testimony that the 8-foot-wide lifts shown in the plans were considered to be the proper design for the particular dam structure involved in the Seama Dam; that in normal construction 8-foot-wide lifts were not per se hazardous since the contractor should be encouraged to use part of the slope of the dam for the inside wheels of the trucks in the placing procedure; and that this was common practice in laying a soil-cement slope. Mr. Murphy also testified that the specifications call for the semi-pervious portion of the dam to be moist[13] and that if the layers were being moistened properly, the semi-pervious material would not be slick and there would be no hazard (II Tr. 164-81).

From what has been said it will be seen that Mr. Serna and Mr. Murphy are apart on the question of whether the 8-foot-wide soil-cement lifts called for by the contract provided the contractor with sufficient space for him to proceed safely with the placing of the soil-cement. While Mr. Serna had had some experience on several dam projects involving soil-cement (II Tr. 6-7), the parties stipulated that Mr. Murphy was a soil-cement expert (II Tr. 165). Accordingly, the Board accepts Mr. Murphy's testimony as persuasive and finds that in prescribing that the soil-cement should be placed in lifts 8 feet wide, the contract specifications were not defective.

Whatever the prospects may have been for safely placing the soil-cement layers in 8-foot lifts, it is appellant's pesition that in the

[13] After Mr. Murphy acknowledged during cross-examination that he had heard the testimony of Mr. Chavez and the two Senas to the effect that the slope of the dam and the soil-cement were wet and slick, the following exchange took place:

"Q. I show you a photograph identified as beinng a truck on the top of the dam, AX 6-3, for a moment, and ask if that's the kind of moistening you had contemplated to moisten the dam in that manner, then, immediately follow that with a layer of soil cement. Would that he wet?

"A. I would classify that as wet, counselor.

"Q. Se if the slope was wet, if the soil cement was wet, you might well contemplate a slick surface and difficulty in maneuvering the eight-foot-wide trucks on eight-foot-wide shelves? lifts?

"A. Yes." (II Tr. 180-81).

circumstances present in this appeal it was practically impossible to do so with reasonable safety (AOB 4). All of appellant's witnesses directly involved in the soil-cement operation in some capacity (Mr. George Sena, owner; Mr. Tony Sena, contractor's superintendent; and Mr. Christobal Chavez, a truck driver on the project) so testified.

Mr. Tony Sena testified[14] that it was not possible to safely operate the dump trucks used in the placement of the soil-cement by placing one of the duals of the truck up on the slope of the inside face of the dam because (i) the slope was wet and the previously placed soil-cement layer was compacted, wet and slick with the result that the truck would slide off the slope; and (ii) when they did get the truck up on the slope and they tried to raise the dump bed the bed would try to tip over. Mr. Tony Sena also testified that even with 9-foot lifts the trucks would try to slide off the slope despite the fact that they were carrying only about half of a regular truckload (I Tr. 95-96, 102-06).

In his rebuttal testimony Mr. Tony Sena stated that every time a lift of soil-cement was put on, the contractor was required to go through there with the water truck and spray the lift after which the contractor would put the spreader on the lift and begin laying soil-cement; that the soil-cement surface, as well as about 2 feet of the inclined surface of the dam not covered by the soil-cement, was wet most of the time, as requested by Mr. Lente of BIA; and that the two surfaces (the soil-cement and the inclined surface of the dam) were slick during the time they were wet (II Tr. 219-20).

Mr. Christobal Chavez (truck driver) testified that they tried putting the inside dual (wheel) next to the inside facing of the dam with a view to making the hauling safer but the trucks kept sliding down. Mr. Chavez also testified that even if they did succeed in keeping the trucks on the slope, they would not be able to raise the dump bed in order to dump the soil-cement while on the slope because the soil-cement would stick to the dump and cause it to become top heavy when the dump bed was raised (I Tr. 109-13). All three of appellant's witnesses involved in operations testified that the semi-pervious portion of the dam or the soil-cement lifts, or both, were slick when wet.

The two Government witnesses involved with the soil-cement operations on a day-to-day basis (Mr. Frank White and Mr. Michael Lente) disputed the testimony given by appellant's witnesses respecting the conditions obtaining on the project during the placement of the soil-cement. Mr. White testified that the semi-pervious portion of the embankment had a low clay content. Contesting the testimony of appellant's witnesses that the inner tires of the trucks were slipping on the semi-pervious layer of the embankment, Mr. White testified that

[14] Shown a picture of the water truck wetting a soil-cement lift (AX 6-3), Mr. Tony Sena testified (i) that the amount of water being used there was about typical of the amount of water used on the lifts as they went up; and (ii) that the picture did not have a har off te the side to wet the embankment as the picture was taken at the crest of the dam (I Tr. 89-90). Earlier, Mr. George Sena had testified that a piece of pipe had been added to the water truck so that it would wet the bank (I Tr. 50).

during the laydown operation the trucks consistently had at least the outer tire on the semi-pervious and that sometimes both inside duals (wheels) were on the semi-pervious material layer, leaving approximately a foot or so of space between the outside duals and the edge of the soil-cement lift on the reservoir side.[15] Mr. White also testified that, after moistening, the semi-pervious layer was neither slippery nor slick (I Tr. 142-44, 172-74, 221-26).

In his rebuttal testimony Mr. Michael Lente testified that during the laydown operation of the soil-cement, the truck tires were not spinning; that he had not observed any clay-like material that was real slick sticking to the tires of the trucks; and that he would describe the moisture content on the surface of the laydown operation as wet but not slick and slippery (II Tr. 220-27).

Mr. Ross Wade testified as to the conditions that he had observed at the jobsite during the course of his safety inspection of the Seama Dam on July 18, 1980.[16] It was Mr. Wade's testimony (i) that while backing up to the laydown machine, the dump trucks did have their inside dual wheels up on the slope of the dam off the soil-cement lift as shown by AX-6(6); (ii) that at the time of his inspection no slick condition in the soil was observed; (iii) that the dump bed of the truck was not up in the backup operation; (iv) that there should never be any case where that would occur; (v) that "the dump bed only was raised as they went to unload the load in the hopper as the hopper moved forward"; and (vi) that he considered the contractor's placement of the soil-cement to be a relatively safe operation (I Tr. 188-202).

Following the completion of his inspection visit, Mr. Wade furnished Mr. David Newcomh, a civil engineer with the Division of Safety Management in the Albuquerque office, with the dimensions of the truck and the dam slope dimensions, as well as other pertinent data verbally and asked Mr. Newcomb to determine when the trucks involved in the operation would be in danger of turning over, should two or more of its wheels get off the soil-cement pad that it was working on. Mr. Newcomb considered the assistance he rendered Mr. Wade to involve what he termed a "truck tip analysis," an evaluation as to when trucks would tip on which step, if they ever reached them going down the face of the dam. Based on the raw data furnished by Mr. Wade, Mr. Newcomb did some static mechanic's-type computations. These computations concerned the center of gravity and involved a determination of "at which point – at which angle a truck

[15] After noting that according to his measurements the soil cement pad was 8 feet 6 inches wide and the tire width on the dump truck was 7 feet 9 inches, Mr. Wade stated: "They have approximately 16 to 20 inches between the outside tire and * * * the outside edge of that soil cement pad. Therefore, the inside duals had to have been up on the upside of the dam" (II Tr. 191-92).

[16] In a writton report to the contracting officer concerning his safety inspection visit, Mr. Wade stated:

"Using these dump truck specifications and observing the dumping operations, with the dump trucks backing up to the laydown machine at 2 to 4 mph, using a far inside track, with the inside wheels on the dam face, and having to drop off 2 lifts, 16" before any danger of a roll over, the placement of soil cement was determined to be a relatively safe operation." (GX-O).

would turn over once the center of gravity is past the pivot point" (II Tr. 206).

Predicated upon the computations described above, Mr. Newcomb concluded (i) that if the rear wheels dropped onto the first step a safe recovery would be to drive the length of that step back to his ramp and recover that way; (ii) that if a truck went to the second step, the recovery should include some sort of assistance, as, for example, cables off dozers; (iii) that in the latter situation it was not recommended that the driver try to recover by himself; (iv) that in the second situation the truck involved would not turn over; (v) that if the truck reached the third step, it would be very close to either sliding or turning; (vi) that in that situation it was likely the truck would slide before it would turn but the momentum and the movement of sliding down the slope could cause a turnover; and (vii) that once they got to the third step, they would be very, very close to a problem.

In response to a question as to the conclusion reached as a result of his study, Mr. Newcomb stated:

> I concluded that if there were skilled, alert operators, that really had a lot of experience, that the operation, as described to me, and the dimensions of the trucks that were used, and the raw data that l used for the calculations, that this situation that was at Seama Dam, was a safe situation. Mainly hecause I do not feel that they would ever get down to this third step, that, to me, would be the start of a prohlem. [17]

(Tr. 203-09).

In an apparent effort to bolster its case, appellant cites certain testimony given by Government witnesses Frank White, David Newcomb, and Mackie Murphy. Appellant asserts that its position that the soil-cement surface was wet and slick and therefore dangerous is supported at least in part by the testimony of Mr. Frank White (I Tr. 222) who recalled at least one instance where a truck had slipped down the slope and had to be assisted back by the use of cables and tractors (AOB 5-6). This same testimony is cited in appellant's rebuttal brief which states on page 8: "Mr. Lente could recall no instances of trucks slipping, whereas Mr. Frank White (Tr. 222) did recall at least one instance where a truck had slipped off the slope and had to be assisted back by use of cables and tractor."

Concerning the testimony in question, the Board notes that it represented merely an acknowledgment by Mr. White that there had been one instance when a truck had slipped off the slope and there was a need to get the truck back onto the next layer using cables and a tractor. When asked later how the truck had got off the lift over by the outlet works, Mr. White stated that he had not been there and had not

[17] After noting that the area safety officer (Mr. Ross Wade) had supplied data on the basis of which a static analysis had been performed, the report states:

"Soil cement is being hauled to a laydown machine by two dump trucks in the 50,000 GVW range. It is being placed in 8-inch thick lifts, each 8 feet wide and the length of the dam. Each lift steps in toward the dam approximately 20 inches since the placement conforms to the 2.5 to 1 slopo. A loaded truck backs to the laydown machine on the 8 foot wide soil-cement slab upon which the next higher lift is being placed. The inside truck tires are utilizing abeut 20 inches of the dam fill inbeard of the slab leaving approximately 2 feet distance between the outside tires and the edge. With careful, experienced drivers, the truck operation as described appears safe." (GX-P).

observed how it got there (I Tr. 224). There is no apparent conflict between the cited testimony and that given by Mr. Michael Lente since a truck getting off a soil-cement lift over by the outlet works may have occurred when Mr. Lente was not on the jobsite by reason of other assigned duties or because he was on leave.

Adverting to the testimony offered by Mr. Newcomb, appellant states that in preparing the memorandum on which the contracting officer had based his denial of the claim, Mr. Newcomb had assumed a dry surface and had stated tbat a wet surface would result in a very dangerous situation (AOB 6). Returning to this subject in its rebuttal brief, appellant states that:

> In his testimony, Mr. David Newcomb (Tr. 209-210) stated that he reached the conclusion in his report (Government Exh. GX-P) that the operation was safe based on a dry rather than a wet surface. He agreed that if the surface was in fact wet, as was testified to hy the driver, that the situation [surface] was very dangerous even at nine feet.

(ARB 6).

The statements cited and quoted above from appellant's briefs are not accurate representations of Mr. Newcomb's testimony in two important respects. First, Mr. Newcomb did not assume a dry surface but assumed rather that "the surface would not have been so wet that it would cause the problem" and that "the surface was not slick" (II Tr. 209). Second, Mr. Newcomb did not testify that merely a wet surface would constituto a very dangerous situation. His assessment of a dangerous situation arising came in response to a question from appellant's counsel in which it was assumed that the dam was as slick as had been tostified to by Mr. Christobal Chavez, the driver (II Tr. 210-11). The Board notes, however, that Mr. Chavez' testimony that the semi-pervious portion of the dam was slick was disputed by Government witnesses White, Lente, and Wade.

Appellant also relies upon testimony elicited from Mr. Mackie Murphy (the designer of the project) upon cross-examination. Referring to Mr. Murphy's testimony (Tr. 181) appellant notes that when asked about the moisture conditions reflected in a photograph (AX 6-3) shown to him, Mr. Murphy had stated "I would classify that as wet, counselor." Thereafter, appellant states: "Mr. Murphy also answered in the affirmative the question that if the surface and slope were wet and slick, there would be difficulty in maneuvering the 8′ wide trucks on 8′ wide lifts" (AOB 6). According to the testimony of the contractor's superintendent, the photograph as to which Mr. Murphy testified was taken at the top of the dam (I Tr. 89-90). Concerning the situation depicted in the photograph (AX-53, AX 6-3) shown to Mr. Murphy, it appears that neither the Government nor the contractor needed to be concerned as to the amount of water placed on a soil-cement lift at the top of the dam since, according to the claim letter of April 15, 1981, "the last layer of soil-cement embankment protection was level with the top of the Seama Dam and the difficulty which would be realized in attempting to place all prior soil-cement embankment layers thus eliminated" (note 7, *supra*).

In evaluating the conflicting testimony offered by the parties, the Board has given great weight to what the record shows with respect to the position of the parties before the dispute arose. In arriving at our decision we have considered the following factors: (1) The evidence available to show that during the performance of the contract appellant considered the semi-pervious portion of the bank or the soil-cement layers, or both, to be slick or slippery thereby creating a safety hazard; (2) what records, if any, were maintained by the contractor to support the claim now asserted exclusive of the records it was required to keep by the Government (*e.g.*, those pertaining to payrolls and progress payments); and (3) the notice of claim, if any, given to the contracting officer prior to the completion of the contract work.

With respect to item 1, the Board notes that the record is entirely devoid of any reference to either of the dual surfaces (the semi-pervious portion of the inclined bank or the soil-cement layers) being either slippery or slick in the correspondence exchanged between the parties during the performance of the contract work; nor is there any reference to the contractor having so characterized either of the dual surfaces in the daily construction reports in evidence. Although the term "slick" is used frequently by appellant's witnesses to describe the ground conditions confronting them in proceeding with the placement of the soil-cement, it does not appear that prior to the hearing the term was used by anyone in reference to either the soil-cement layers or the semi-pervious portion of the embankment.

The term "slippery" appears for the first time in exhibit B to the claim letter of April 15, 1981 (AF-33). This exhibit is comprised of photocopies of three photographs ostensibly of the dam but of such poor quality that without the captions under the photocopies it would not be possible to tell what is said to be shown. Exhibit B is referred to in the claim letter as showing the difficulty and resultant hazard involved in attempting to maneuver the trucks transporting the soil-cement mixture to the placing area (AF-33 at 2). No information is furnished, however, as to who took the photographs, when they were taken, or who expressed the opinions reflected in the captions. No testimony was offered at the hearing with respect to exhibit B. In these circumstances the Board finds exhibit B to the claim letter (AF-33) to be without any probative value.

We now turn to the question of the records maintained by appellant to support the present claim, insofar as entitlement is concerned. At the hearing Messrs. Chavez, Serna, and White all referred to a truck having left the embankment. None of appellant's witnesses concerned with operations (Messrs. George Sena, Tony Sena or Christobal Chavez) testified as to when this event or events occurred. In fact, there is no way of telling from this record whether one, two, or three trucks left the embankment and had to be assisted with cables and a tractor during the course of contract performance.

The extent of the contractor's dependence upon the Government's records is well illustrated by the width of the soil-cement layer said to be required by reasons of safety. While in his testimony appellant's president testified that the contractor had made soil-cement layers "go out that I know nine feet, solid, solid. Not counting the loose stuff" (I Tr. 49), the fact is that in the claim letter of October 21, 1980 (*i.e.*, after the completion of the contract work), appellant's then counsel refers to "the engineering error which necessitated at .5 foot increase in soil-cement layer width" (AF-20). In the claim letter of April 15, 1981, the same counsel states: "[W]e acknowledge the B.I.A.'s determination that the average width of the in-place soil-cement embankment layers is 9 feet [18] as opposed to the 8 foot widths initially required by government specifications for this project" (AF-33 at 2).

Left for our consideration is the question of what notice of the claim now asserted was given to the contracting officer during performance of the instant contract. Citing and quoting from the testimony given by the contracting officer, the Government posthearing brief states at page 4: "Appellant cannot be paid for extending the 8-foot width to 9 feet because he failed to provide timely written notice to the Contracting Officer and otherwise failed to comply with clause 3, Changes, of the General Provisions of the contract (*see also* page 2 of GX-F)." Appellant does not say that timely written notice of the claim now asserted was given to the contracting officer as contemplated by the changes clause. Instead, it contends that the contracting officer was on constructive notice prior to submission of the claim (ARB-3).

In support to its position appellant advances a number of arguments including, *inter alia*, (i) that responsible Government personnel were aware of the 9-foot lifts from the beginning; (ii) that Mr. Frank Wbite testified that the lifts were being compacted in excess of 8 feet from the beginning and on the average to 9 feet; (iii) that Mr. White also tostified to having told appellant's vice president on several occasions that no payment would be made for any amount of soil-cement in excess of the 8-foot lifts; (iv) that GX-E consists of several daily construction reports spanning a time period of May 7 through August 20, 1980; (v) that these reports which document Mr. White's conversation with the contractor regarding the soil-cement lifts are an integral part of the contracting officer's official records for this contract; (vi) that as Mr. Whito was also the desiguated authorized representative of the contracting officer for this project, his knowledge must be imputed to the contracting officer; and (vii) that further evidence of the contracting officer's knowledge is found in the fact that

[18] Based upon the BIA determination referred to in the text, the contractor greatly increased the amount claimed for soil-cement by reason of exceeding the 8-foot lifts prescribed by the contract. In so doing the contracter entirely ignored the following statement from the BIA determination relied upon for the increase in the amount of the claim: "The additional one (1) foot of in-place processed material varied from being fully compacted at the inner most section to being entirely loose at the outer edge" (GX-H at 5).

he caused a safety inspection to be made at the construction site on July 18, 1980 (ARB 2-3).

As to item (vii) the Board notes that the statement the contracting officer caused the safety inspection to be made is not accompanied by any citation to the record; that the earliest report concerning this item is dated July 25, 1980 (GX-P); that the report is not addressed to the contracting officer; that the contracting officer is not shown te have received a copy of the report; that the July 18, 1980, safety inspection took place approximately 2 months after the soil-cement operation began (GX-H at 6); and that the safety inspection confirmed the view of the project engineer that the extra width of the soil-cement lifts was not necessitated by reason of safety.

In particular circumstances knowledge has been imputed to the contracting officer. *See,* for example, *Hartford Accident & Indemity Co.*, IBCA 1139-1-77 (June 23, 1977), 84 I.D. 296, 306-08, 77-2 BCA par. 12,604 at 61,078-79. The question in this case, however, is the significance of the knowledge imputable to the contracting officer from the daily construction reports and when the knowledge imputable could be said to constitute notice of the claim now asserted. These reports show the contractor to have been told (i) that edge control was required; (ii) that under the contract specifications only a soil-cement embankment width of 8 feet was subject to payment; and (iii) that BIA would not be able to pay for soil-cement placed outside the specified width (GX-E).

The same daily construction reports also show the contractor to have indicated that it did not have the equipment to provide edge control at 8 feet wide. In addition, they show the contractor to have stated that it could not hold the soil-cement to 8-foot lifts; and that its trucks would not fit on an 8-foot embankment. According to the daily construction reports, it was not until August 22, 1980—on the same day the contractor submitted to the acting contracting officer its proposed new unit prices for cement and for soil-cement (AF-16, 17)—that the contractor stated they were compacting out to 9 feet so the trucks could back up to the cat and spreader and not tip over (GX-E). The Augnst 22, 1980, date is approximately 3 months after the soil-cement operations on the project began (GX-H at 6).

The information contained in the daily construction reports in evidence is entirely consistent with the testimony Mr. White gave at the hearing. It is clear that Mr. White knew that the contractor was placing and to some extent compacting soil-cement outside the width shown on the plans but that he considered that to be attributable to the fact that the contractor did not have the equipment to provide edge control at 8 foot widths. Mr. White was sufficiently concerned about the matter, however, to repeatedly tell the contractor that he would not be paid for soil-cement placed outside of the 8-foot lifts shown on the plans.

In important respects this case is similar to the case of *The Jordan Co.,* ASBCA No. 10874 (Dec. 15, 1966), 66-2 BCA par. 6030 at 27,869.

There, in denying one of the claims asserted, the Armed Services Board stated:

> Where instructions given or requirements imposed orally by the Government representative are an expression of that representative's concept of the requirements of the contract, the contractor must protest these instructions, if he expects to claim successfully that these oral instructions and/or impositions amount to a constructive change order. [Citations omitted.]

The record indicates that in a conversation with the project engineer sometime in mid-July 1980, the contractor raised a question as to the safety of the soil-cement laydown operation as it was being carried out (I Tr. 168). The safety inspection by Mr. Ross Wade on July 18, 1980 (*see* GX-0 and GX-P) appears to have been in response to the question so raised. Although there is some indication that the results of the safety inspection was communicated to the contractor's superintendent, the safety question does not appear to have been specifically raised again until August 22, 1980, as is reported in the daily construction report for that date.

In the circumstances of this case there would appear to be no need to finally decide the question of timely notice[19] or the extent to which the failure of appellant to give the written notice contemplated by the Changes Clause would preclude consideration of at least some portion of the claim on the merits. This is because based upon a careful review of the record made in these proceedings, the Board has concluded that the entire claim for an extra foot of soil-cement is lacking in merit.

In support of the above-stated conclusion, the Board finds: (i) that in requiring the soil-cement to be placed and compacted in 8-foot lifts, the specifications were not defective; (ii) that during the soil-cement laydown operations neither the semi-pervious portion of the embankment nor the soil-cement layers themselves were slick; (iii) that in the course of backing up during the laydown operation the trucks consistently had at least the outer tires onto the semi-pervious portion of the embankment and sometimes had both of the inside duals on the semi-pervious material layer, leaving approximately a foot or so of space between the outside duals and the edge of the soil-cement lift on the reservoir side; (iv) that at least one and perhaps more than one truck left the embankment during the laydown operations; (v) that when a truck (or trucks) left the embankment it had to be pulled back up by the use of cables attached to a tractor or grader at the top of the dam; (vi) that it has not been shown that any truck turned over or that it was in a dangerous situation as described by Mr. Newcomb in his testimony; (vii) that the claim for extra soil-cement was not increased from 0.5 foot to 1 foot until April 15, 1981 (*i.e.*, more than

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[19] *Cf. Electrical Enterprises, Inc.*, IBCA-971-8-72 (Mar. 19, 1974), 81 I.D. 114, 137, 74-1 BCA par. 10,528 at 49,874 in which the Board stated:

"The Government has not raised the defense of untimeliness to this claim and we will decide it on the merits. Of course, the failure to assert the claim at an earlier time is a factor to be considered in determining whether appellant has met its hurden of proof (note 17, *supra*)."

6 months after the completion of the contract work); and (viii) that with careful, experienced drivers, the placement of soil-cement on the Seama Dam project was a relatively safe operation (GX-O and P).

So finding, the Board further finds that appellant has failed to show by a preponderance of the evidence that it is entitled to be paid for an additional 2,213.04 cubic yards of soil-cement, because, by reasons of safety, it was required to place the soil-cement in 9-foot lifts rather than in the 8-foot lifts prescribed by the contract.

For the reasons stated and on the basis of the authorities cited, the claim for an extra 1 foot of soil-cement is denied.

Decision

The in-place quantity of soil-cement claimed by appellant is 23,334.42 cubic yards. This figure exceeds the quantity payable at the contract price under the 115 percent variation in quantities clause by 8,556.92 cubic yards. In the claim letter of April 15, 1981, the contractor claimed an equitable adjustment on this quantity at $23.34 per cubic yard for a total amount of $199,718.51 (AF-33, Exh. F). At the hearing and in the appellant's rebuttal brief the appellant reduced the amount claimed by an aggregate amount of $1.33 per cubic yard (ARB at 12-13) resulting in a revised claim for item 4B (soil-cement) of $188,337.81. The contracting officer determined that the contractor was entitled to an equitable adjustment on 4,689.34 cubic yards of soil-cement at $12.85 per cubic yard for a total equitable adjustment of $60,258.02 (AX-1 at 13).

The difference between the 8,556.92 cubic yards on which the contractor claimed an equitable adjustment and the 4,689.34 cubic yards on which the contracting officer granted an equitable adjustment is 3,867.58 cubic yards. This figure is comprised of the contractor's claim that 1,654.54 more cubic yards of soil-cement were placed in 8-foot lifts than were allowed by the contracting officer based upon his acceptance of BIA survey figures for 8-foot lifts of 16,536.59 cubic yards (AX-1 at 6-8) and the contracting officer's denial of the claim that an additional 2,213.04 cubic yards of soil-cement had to be placed as a result of the contractor having to add an extra foot to the soil-cement embankment by reason of safety (AX-1 at 10). The parties are also apart on the amount of the equitable adjustment with the contractor claiming $22.01 per cubic yard as a equitable adjustment (ARB at 13) and the contracting officer having found the proper amount of the equitable adjustment to be $12.85 per cubic yard (AX-1 at 11).

The Board finds that appellant has failed to prove by a preponderance of the evidence (i) that it placed more than 16,536.59 cubic yards of soil-cement in 8-foot lifts on the embankment portion of the Seama Dam; (ii) that it is entitled to a greater amount as an equitable adjustment for item 4B (soil-cement) than the equitable adjustment of $12.85 per cubic yard found by the contracting officer; and (iii) that it is entitled to be paid for an additional 2,213.04 cubic yards of soil-cement placed as a result of the soil-cement embankment having to be extended an extra foot by reason of safety. So finding, the Board further finds that appellant is entitled to an equitable adjustment on 4689.34 cubic yards of soil-cement at $12.85 per cubic yard for a total equitable adjustment in the amount of $60,258.02 (*i.e.*, the amount found by the contracting officer).

Equitable Adjustment Claim for Item 4A (Cement) $86,660.69

Appellant is claiming an equitable adjustment on 926.06 tons of cement at a unit price of $93.58 per ton for a total claim of $86,660.69 (AF-33, Exh. F). The contracting officer found the contractor entitled to an equitable adjustment on 454.79 tons of cement at $93.58 per ton for a total adjustment of $42,559.25 (AX-1 at 12; and AX-56).

Cement claim items disallowed by the contracting officer involved 471.27 tons of cement at $93.58 per ton for a total claimed amount of $44,101.45 (AX-56). The disallowances are comprised of claims by appellant for the following items:

(1) 351.55 tons of cement in the extra 1-foot width;

(2) 90.35 tons of cement subject to processing and expenditure in calibration of the first pug mill;

(3) 28.77 tons of cement included in soil-cement rejected prior to placement; and

(4) 0.60 tons of cement remaining in the contractor's storage silo after the completion of the soil-cement operation.

Each of these disallowed items are considered below.

Cement in Extra Foot of Soil-Cement $32,898.05

Discussion

In support of this element of the cement claim, appellant states:

> A large portion of the clain for the amount of cement is contained in the additional 1′ width of soil cement protection. If the Board finds that Appellant is entitled to payment for the extra 1′ width, then a suhstantial portion of the claimed quantity will likewise be in line for payment.

(AOB 11). As shown in AX-56, appellant is claiming $32,898.05 for this cement claim item.

Decision

In the preceding section of this opinion pertaining to the equitable adjustment for soil-cement, the Board denied the claim for an extra foot of soil-cement on the ground that appellant had failed to show by a preponderance of the evidence that the soil-cement embankment had to be extended an extra foot by reason of safety. Since it is clear and undisputed that the cement for which claim is here being made was included in the extra foot of soil-cement placed on the embankment, this claim is perforce unallowable. Accordingly, the claim for 351.55 tons of cement in the amount of $32,898.05 is hereby denied.

Cement Rejected During Calibration $8,454.95

Discussion

In denying the instant claim the contracting officer found, *inter alia,* (i) that the 90.35 tons of cement used in calibration was based upon three shipment quantities to the project site and not estimated; (ii) that the specifications were not ambiguous nor defective in that the proportioning of cement was *approximated* to be 15 percent by dry weight of the soil; and (iii) that the *exact* amount was determined prior to the commencement of the soil-cement work (AX-1 at 9-12).

In the claim letter of April 15, 1981 (AF-33), the contractor stated that it was inconceivable that *90 tons* of cement had been used for calibration but that "however much wastage there may have been it is our position that defective or ambiguous specifications as to the percentage of cement to be incorporated into the soil-cement created confusion and any resultant wastage" (AF-33 at 4). This appraisal is supported by the testimony of the contractor's superintendent during the soil-cement operations, Mr. Tony Sena. It was Mr. Sena's testimony (i) that about three times during the progress of the job, the project engineer had requested that the percentage of cement in the soil-cement be changed; (ii) that each time such a change was made, it was necessary to recalibrate the pug mill; and (iii) that if the man running the machine knows what he is doing, calibration should not involve a waste of more than 6, 7, or 8 tons at the most (I Tr. 78, 107).

In the quantities report prepared by him, the project engineer acknowledged that there was an apparent discrepancy between the 1,979.22 tons of cement required to complete the contract using design criteria as opposed to the 2,600 tons reflected in the bid schedule and that information was not available to determine the basis for this difference (GX-H at 10). In the quantities report, the project engineer (Mr. White) also acknowledged that the 90.35 tons of cement said to have been wasted in the calibration of the first pug mill was an estimated quantity (GX-H at 8).

Mr. White testified that the first pug mill wasted a lot of material and that there was a great improvement in the quality and quantity of the processed soil-cement coming from the second pug mill. The exceedingly high wastage involving the first pug mill was attributed by Mr. White to operational problems with the processing plant itself and to the operator (I Tr. 162-66, 207, 241-42). At the hearing the project engineer still had no explanation for the discrepancy noted in the quantities report between the cement required for the contract under the design criteria and that called for in the bid schedule (I Tr. 244-45); nor was any testimony elicited from Mr. White to refute Mr. Tony Sena's testimony that about three times during the soil-cement operation, Mr. White had requested that the percentage of cement in the soil-cement he changed. During the course of his testimony Mr. White estimated that an experienced contractor should be able to calibrate his equipment hy using 8 to 12 tons of cement (1 Tr. 162).

In assessing the disparate position of the parties the Board notes that one of the findings made by the contracting officer cited above is not supported by the evidence of record. The contracting officer's finding that the 90.35 tons of cement said to have been used in calibrating the first pug mill was not an estimated figure is contrary to what is stated in the quantities report (GX-H). There the project engineer refers to the 90.35 tons of cement as an "estimated quantity." The Board also notes, however, that the first pug mill was continued in use for ahout 2 months, even though the contractor's superintendent testified that if he had heen on the job from the beginning he would have replaced it with an adequate pug mill within about 2 weeks (I Tr. 107-08).

Under the terms of the contract, the contractor is responsible for all costs associated with calibrating the soil-cement processing plant for the purpose of obtaining the design soil-cement ratio (AF-5 at 10). Appellant acknowledged that there was some wastage in the calibration of the first pug mill but contends that the quantity involved was not the quantity found by the contracting officer in his final decision (AOB 13-14; ARB 16).

The Board therefore finds that the abnormal wastage which occurred in the course of calibrating the first pug mill is partially the fault of each of the parties. In this regard the Board notes that the Government appears to have failed to carefully determine the amount of cement to be included in the soil-cement before the invitation for bids was issued and that it appears to have failed to promptly investigate the cause of so high a percentage of cement having been used in the calibration of the first pug mill. On the other hand, the contractor failed to promptly replace a clearly inadequate pug mill for a period of almost 6 weeks during which time a relatively small quantity of soil-cement was processed and a very high quantity of cement was wasted in attempting to calibrate an inadequate processing plant (GX-H at 4).

In the circumstances, it is impossible to apportion responsibility with any degree of exactitude. It is considered that the Government must assume the greater burden of responsibility, however, where, as here, (i) it could offer no explanation for the substantial difference in the cement to soil-cement ratio comparing the design criteria with the quantities called for in the bid schedule and (ii) it offered no testimony with respect to the three occasions on which the project engineer changed the ratio of cement to soil-cement during the progress of the soil-cement operation (*e.g.*, what were the dates on which the changes were made? What was the rationale for the changes?). Taking these factors into account but also weighing, as best we can, the inordinate delay of the contractor in replacing the highly inefficient first pug mill, the Board finds that the Government should be held responsible for two-thirds of the wastage which occurred in the calibration of the first pug mill and the appellant should be held responsible for the remaining one-third.

Decision

The Board has found that appellant is only responsible for approximately one-third of the cement wasted in the calibration of the first pug mill or for 30 tons of cement rather than the 90.35 tons of cement for which it was charged in the contracting officer's decision. Accordingly, on this claim item, appellant is entitled to be paid for 60.35 tons of cement at $93.58 per ton for a total of $5,647.55.

Cement Included in Rejected Soil-Cement - $2,692.30

Appellant disputes the contracting officer's finding that 28.77 tons of cement were included in rejected soil-cement batches. Computed at the agreed upon unit price of $93.58 per ton of cement, the amount involved in this element of the claim is $2,692.30 (AX-56).

In support of its position appellant asserts (i) that ambiguous and defective specifications created conditions which resulted in the calibration and mixture problem; (ii) that the initial fallacy underlying the determination is that it was based on visual inspection only and not on actual weight; (iii) that in his testimony the project engineer stated that he had based his judgment on visual inspection and not on any laboratory testing methods; and (iv) that the amount of cement in rejected soil-cement could only be determined arbitrarily, since the mixture was wet, noncompacted and visually estimated as to cubic yardage quantity (AOB 11-12).

The quantities report (GX-H) shows that the 132 cubic yards of soil-cement rejected by the Government involved 85 cubic yards of soil-cement processed by the first pug mill and 47 cubic yards of soil-cement processed by the second pug mill. For calibration of the first pug mill, the weight of cement per cubic yard of soil-cement processed was determined to be 498.48 pounds/cubic yards (19.418%). For calibration of the second pug mill, the weight of cement per cubic yard of soil-cement processed was determined to be 322.72 pounds/cubic yards (12.72%). Based upon these calculations, the quantities report shows the following with respect to the 28.77 tons of rejected soil-cement:

c. *For Rejected Soil-Cement*

85 x 498.48/2,000 =	21.19	tons
47 x 322.72/2,000 =	7.58	tons
	28.77	tons

(GX-H at 9-11).

Concerning the use of figures derived from calibration to determine the amount of cement included in the rejected soil-cement, the quantities report acknowledges that it is only an assumption that the average quantity (weight per cubic yard of soil) of cement included in rejected soil-cement was equal to the average quantity of cement used during each calibration phase (GX-H at 11). The project engineer testified, however, that he was unaware of any laboratory tests available to determine the cement content of soil-cement after mixture but that tests were available to determine moisture content and compaction density (I Tr. 211, 214-15). Government witness Michael Lente testified that he had been responsible for performing compaction tests on materials and that he had performed such tests by the use of a moisture density gauge (II Tr. 221).

While appellant has criticized the Government's failure to use laboratory tests to determine the cement content of soil-cement, it has failed to offer any evidence to show that during the performance of the instant contract any laboratory tests were available to determine the amount of cement in soil-cement after mixture of the materials; nor has it offered any evidence to show that during contract performance it ever questioned the method employed by the Government to determine the amount of cement included in soil-cement placed on the embankment or included in rejected soil-cement.

In the absence of any countervailing evidence, the Board accepts the Government's method of determining cement quantities included in soil-cement. However, there is a problem of proof for the Government. The problem is that detailed information concerning the amount of cement in rejected soil-cement is apparently contained in attachment 5 to the quantities report (GX-H) and that attachment 5 to GX-H is not a part of the record on which our decision is to be based. Without access to such detailed information as may be included in the said attachment 5, the Board has been constrained to rely on the very limited evidence available to show the amount of cement included in the rejected soil-cement processed by the first pug mill. The Daily Construction Report for June 27, 1980 (GX-E), shows that on that date a total of 12 cubic yards of soil-cement was rejected. Using the formula employed in the quantities report for soil-cement processed by the first pug mill (text, *supra*), we have determined that 3 tons of cement were included in rejected soil-cement for which record evidence is available.

We now turn to the question of the 7.58 tons of cement included in the 47 cubic yards of rejected soil-cement processed by the second pug mill. Mr. Tony Sena testified that about 6 tons of cement were used in the calibration of the second pug mill. Mr. Sena denies that any wastage of cement occurred incident to that calibration (I Tr. 78). The Board infers from his testimony that the Government only allowed the material used in the calibration to be placed on the slope upon the understanding that the contractor would not be paid for such material. Based upon the admission of Mr. Tony Sena, the Board finds that the contractor acquiesced in the Government's determination that the soil-cement in question did not meet the requirements of the specifications. This being so, the Board sees no reason for not requiring appellant to adhere to the informal arrangements between the parties under which it was understood that appellant would not be paid for 6 tons of cement included in 47 cubic yards of rejected soil-cement placed on the soil-cement embankment.[20]

Decision

Based upon the evidence of record and the above discussion, the Board finds that 3 tons of cement were included in the rejected soil-cement processed by the first pug mill and 6 tons of cement were included in the rejected soil-cement processed by the second pug mill. Since the contracting officer found that 28.77 tons of cement were included in 132 cubic yards of rejected soil-cement and since the Board finds that only 9 tons of cement were shown to have been included in rejected soil-cement, appellant is entitled to be reimbursed for 19.77 tons of cement at $93.58 per ton or in the amount of $1,850.08.

Cement Remaining After Soil-Cement Operation Completed - $56.15

Discussion

This small claim involves a deduction made by the Government for the 0.60 tons of cement remaining after completion of the soil-cement operation. Computed at the agreed upon unit price of $93.58 per ton of cement, the claim is in the amount of $56.15 (AX-56).

The claim letter of April 15, 1981 (AF-33 at 4), notes that this deduction has also been calculated on the basis of visual examination and not by actual weight. The quantities report states that the 0.60 tons of excess cement was determined by visual inspection and that the visual inspection was of cement removed from the contractor's cement storage silo and placed in the bed of one of the contractor's dump trucks. There is no indication in the evidence that, either before or after the removal of this quantity of cement from the cement storage silo, the contractor requested that the excess cement be weighed rather than have the quantity determined on the basis of a visual inspection.

Decision

Having reviewed the available evidence, the Board finds that the contracting officer properly charged the contractor for 0.60 tons of cement placed in the bed of its dump truck following the completion of

[20] The 47 cubic yards of rejected soil-cement included 7.58 tons of cement on the basis of the calculations set forth in the quantities report (text, *supra*). Detailed information in support of the 7.58 tons figure is presumably included in attachment 5 of the quantities report (GX-H). As noted in the text, the said attachment 5 is not included in the evidence of record and is therefore not for consideration by the Board.

the soil-cement operation. Accordingly, this element of the cement claim in the amount of $56.15 is denied.

Overrun of Item 2E (Borrow Excavation) - $2,500.39

Discussion

The claim for borrow excavation is for 16,669.25 cubic yards over the original contract quantity but within the 115 percent variation. Computed at the bid price of $0.15 per cubic yard, the claim is in the amount of $2.500.39 (AX-56). The contracting officer found that for 12,119.16 cubic yards of borrow excavation, the contractor was entitled to be paid the sum of $1,817.42 (AX-1 at 12).

The difference between the overrun quantity claimed of 16,669.25 cubic yards and the overrun quantity allowed by the contracting officer of 12,119.16 cubic yards is 4,550.09 cubic yards. This difference represents the borrow excavation included in the extra foot of soil-cement claimed by the contractor but disallowed by the contracting officer (AX-1 at 12; AX-56). Testifying at the hearing, appellant's witness Mr. Abeyta noted that the claim for borrow excavation above the amount the contracting officer had allowed was entirely related to the l-foot disagreement (I Tr. 127).

Decision

The entire amount claimed for borrow excavation in excess of the amount allowed by the contracting officer is for borrow excavation included in the extra foot of soil-cement. Earlier in this opinion we denied the claim for the extra foot of soil-cement on the ground that appellant had failed to carry its burden of showing that the soil-cement embankment had to be extended an extra foot by reason of safety. For the same reason, the claim for 4,550.09 cubic yards of borrow excavation involved in this claim is denied. Accordingly, the overrun claim for borrow excavation is approved in the amount allowed by the contracting officer of $1,817.42 and is otherwise denied.

Government Claims

In his final decision (AX-1 at 13-15) the contracting officer deducted the sum of $22,469.57 from funds otherwise due the contractor for goods and services required by the contract but not furnished. The items for which the deductions were made and the amounts deducted are shown below:

1. Registered Professional Soils Engineer	$18,750.00
2. Quantity Surveys	1,046.57
3. As-Built Drawings	2,673.02

[4] *Registered Professional Soils Engineer.* It is undisputed that the contract required the services of a registered professional soils engineer whose qualifications and experience were satisfactory to the contracting officer (AOB 14). Also undisputed are the facts (i) that the soils engineer required by the contract specifications was to have completed the requirements for a bachelor's degree from an accredited college of engineering and to be a registered professional engineer in the State of New Mexico; (ii) that to satisfy this specification requirement, the contractor tendered the services of one Ulisses Luciani; (iii) that Mr. Luciani did not have a bachelor's degree from an accredited college of engineering and was not a registered professional engineer in the State of New Mexico; (iv) that Ulisses Luciani was listed as a soils engineer in the certified payrolls submitted to the contracting officer for 7 weeks commencing on September 8 and concluding on October 13, 1979; (v) that such payrolls show that Mr. Luciani was paid the sum of $300 per week (AX-47); (vi) that before Mr. Luciani was employed by the contractor he was interviewed by both Mr. Mackie Murphy (COR) and Mr. Frank White (project engineer); (vii) that when the contract work was resumed and the soil-cement operation commenced, no one requested the contractor to provide the services of a soils engineer; and (viii) that at no time were the qualifications of Mr. Ulisses Luciani submitted to the contracting officer for approval in satisfaction of the specification requirement that the contractor furnish a registered professional soils engineer.

The appellant seeks to avoid the consequences of having failed to submit the name of Ulisses Luciani to the contracting officer for approval as a registered professional soils engineer on the apparent ground that the requirement was waived by the actions of the project engineer (Mr. Frank White) and the COR (Mr. Mackie Murphy).

Although acknowledging that Mr. White had expressed concern over the qualifications of Mr. Luciani to satisfy the specification requirement, appellant appears to be contending that Mr. White waived any objection he might have had to Mr. Luciani by his failure to write the contracting officer and request that Mr. Luciani be replaced (ARB 18-19). This view of the matter overlooks Mr. White's testimony that in a meeting attended by the contractor's superintendent and Mr. Luciani, he had requested that a resume of Mr. Luciani's qualifications be submitted to the contracting officer for review (I Tr. 146-47). Appellant has not even alleged that a resume of the qualifications of Mr. Luciani was ever submitted to the contracting officer for review. Not only is the testimony of Mr. White in this area uncontradicted, it is corroborated by the Daily Construction Report for August 23, 1979 (GX-A). After noting in the report that he had not seen any tangible evidence that the man could perform as required in the technical specifications, Mr. White states: "I have asked for the soils man's resume be submitted for review by our contracting officer." The Board notes that this request by Mr. White was made over

2 weeks before Mr. Luciani went on the payroll on September 8, 1979 (AX-47).

After asserting that the Government had a responsibility to advise appellant that Mr. Luciani was incompetent, if it believed that, appellant goes on to state: "In fact, Mr. Luciani's services as soils engineer were accepted by Mr. Murphy in his capacity of Contracting Officer's authorized representative. The evidence is very clear as to this fact" (ARB 19). As a preliminary matter, the Board notes that appellant has made no effort to show that in his capacity of COR Mr. Murphy had any authority to waive the requirements of the specifications and accept Mr. Luciani. We need not resolve this question, however, for appellant has failed to show by a preponderance of the evidence that Mr. Murphy ever accepted Mr. Luciani as satisfying the specification requirement for a registered professional soils engineer. At no time in his testimony did Mr. Murphy state that he had accepted Mr. Luciani for that position or that he had waived the specification requirements governing the position. In the course of his testimony Mr. Murphy stated (i) that during the performance of the contract in 1979 he was on the project every day; (ii) that Mr. Luciani was not doing the work of a soils engineer; (iii) that during the time he was on the job he (Mr. Murphy) was in effect the soils engineer; and (iv) that Mr. Luciani was doing excellent work as a soils technician (I Tr. 177-82). Mr. Murphy also testified that between Mr. Johnson (the contractor's superintendent), Mr. Luciani, and himself, he considered that they had all the expertise that was needed te build a dam (I Tr. 182-84).

Based upon the foregoing analysis, the Board finds that Mr. Murphy did not approve placing Mr. Luciani on the contractor's payroll as a registered professional soils engineer, but that he did approve putting him on the payroll as a soils technician. The Board further finds that Mr. Luciani was qualified as a soils technician and that in his capacity of COR, Mr. Murphy had authority to enter into such an informal arrangement[21] as was involved in approving the employment of Mr. Luciani as a soils technician.

Another question raised by this record involves determining the period for which the contractor was required to furnish the services of a registered professional soil engineer. In his decision the contracting officer found that the contractor was required to furnish the soils engineer for the duration of the contract and the $18,750 found to be as owed te the Government was predicated on the soils engineer being employed for 9 months at a salary of $25,000 a year ($25,000 x .75). At

[21] *Cf. Futuronics, Inc.*, DOT CAB No. 67-15 (June 17, 1968), 68-2 BCA par. 7079 at 32,767 in which the Transportation Board stated:

"This doctrine is grounded on the civilized assumption that contracts prescribe only the minimum duties of the parties and they habitually do more than that minimum for each other - frequently on an informal trade-off basis; sometimes for good-will; and for a variety of other reasons. It would be most unfair, long after the event, to disturb what may have become an established equilibrium of minor informal accommedations by the parties * * *."

the hearing, Mr. George Sena testified that after the contract work was resumed for the soil-cement operation, no one requested that a soils engineer be furnished. In his testimony Mr. White confirmed that he had not requested the contractor to furnish a soils engineer during the soil-cement phase of the contract work. Although Mr. White testified initially that the contract required the contractor to furnish a soils engineer for the entire period covered by the contract, he admitted upon cross examination that the contract does not say that a soils engineer must be present for the soil-cement operation (I Tr. 201-02). In these circumstances the Board finds that the specification provisions were ambiguous with respect to the time for which the contractor was obligated to furnish the services of a registered professional soils engineer and that since the contractor's interpretation is considered to be reasonable, it is entitled to have this question resolved in its favor.[22]

From the above discussion it will be seen that appellant is entitled to have the $18,750 deducted by the contracting officer for failure to furnish the services of a registored professional soils engineer adjusted downward to reflect the Board's findings that the contractor's obligation to furnish a soils engineer was for a period of 7 weeks rather than for 9 months. In the calculations set forth below we have assumed that the contract period of 9 months is the equivalent of 275 days and therefore the $18,750 deducted by the contracting officer for a 9-month period would be the equivalent of a charge of $68.18 per day. The Board finds that the adjustment to which the contractor is entitled is in the amount of $15,408.68, computed as follows:

Amount deducted by the contracting officer for failure to furnish the services of a registered professional soils engineer	$18,750.00
Adjustment for 226 days for which no obligation found (226 x $63.18)	$15,408.68
Deduction for failure to furnish soils engineer as found by Board	$3,341.32

Decision

For the reasons stated and on the basis of the authorities cited, the Board finds that of the $18,750 deducted by the Government for the failure of the contractor to furnish the services of a registered professional soils engineer, the Government is entitled to retain $3,341.32 and that appellant is entitled to the remainder in the amount of $15,408.68.

[22] *See WPC Enterprises, Inc.* v. *United States*, 163 Ct. Cl. 1, 6-7 (1963) in which the Court of Claims stated:

"The Government, as the author, has to shoulder the major task of seeing that within the zone of reasonahleness the words of the agreement communicate the proper notions-as well as the main risk of a failure to carry that responsibility. If the defendant chafes under the continued application of this check, it can ohtain a looser rein by a more meticulous writing of its contracts and especially of the specifications * * *."

February 13, 1986

Quantity Surveys $1,046.57

Discussion

Initially, appellant contested the claim on the ground that the Government had made no showing through the tender of evidence of any additional costs to the Government occasioned hy the quantity surveys. Since the surveys had been performed by full time Government employees who had not been brought in solely for the purposes of performing the quantity surveys, appellant contended that the Government incurred the same expenses notwithstanding the modest amount of time spent by three Government employees in performing the quantity surveys (AOB 16-17). A similar argument was rejected by the Board in *B&E Constructors, Inc.*, IBCA Nos. 526-11-65 and 550-3-66 (Mar. 30, 1967), 67-1 BCA par. 6239.

In its reply brief appellant abandoned the approach taken in its earlier brief by asserting (i) that Southwest had been utilized to perform such services; (ii) that the Government's surveying efforts were apparently made independently to satisfy its own requirements for certifying payments, etc.; (iii) that it is inconceivable that the Government would have performed the service for appellant with no notification to appellant to bring itself into compliance; and (iv) that there is no evidence in the record that appellant failed or refused to perform the required quantity surveys (ARB 20-21).

In the contracting officer's decision the quantity surveys for which the Government is making claim are specifically identified by reference to the pay requests to which they relate, the individuals who performed the surveys are named and the costs charged for making the surveys are detailed. Despite the specificity of the Government's claim, appellant's witness Franklin Wilson of Southwest, does not even allude to the quantity surveys in his testimony or suggest in any way that he had performed them. The fact that in its opening brief appellant admitted the Government employees had performed the quantity surveys and sought to escape liability on the ground that the Government had failed to prove any damages is considered to be dispositive of the question presented.

Decision

For the reasons stated and on the basis of the authority cited, appellant's claim for the $1,046.57 deducted by the Government for having performed quantity surveys is denied.

As-Built Drawings $2,673.02

Discussion

In its initial brief appellant states (i) that appellant had furnished the as-built drawings prior to the issuance of the final decision;

(ii) that in the case of all these withholdings there is no record of any communication, written or oral, giving appellant any direction or opportunity to make any necessary corrections; and (iii) that these items of withholding appear nowhere except in the contracting officer's final decision, thus giving the appearance of punitive measures against appellant for having filed its claim (AOB 17-18). Suhstantially the same arguments are repeated in appellant's closing brief (ARB 21-22).

From the claim letter of April 15, 1981 (AF-33 at 8), it appears that appellant was aware that deductions for Government claims were in the offing. With respect to the as-built drawings, it is clear that appellant was aware of its failure to furnish the required drawings at least as early as February 3, 1981, since in a letter of that date it had indicated that tbey would be furnished in the near future (AF-28). In fact, the as-built drawings were not furnished to the contracting officer for another 4 months (AF-38).

Contrary to appellant's assertions, the Board finds that the appellant had been apprised of its failure to furnish the required as-built drawings at least 4 months before it did so. It also finds (i) that had the as-built drawings been furnished shortly after appellant's letter of February 3, 1981, as had been indicated in that letter, there would have been adequate time to make any needed corrections in the drawings before the contracting officer's decision on June 19, 1981 (AX-1); (ii) that because the as-built drawings had not been received by the project engineer at the time he prepared his memorandum to the contracting officer of June 5, 1981 (GX-I), no allowance was made in his recommendations for any work reflected in any as-built drawings received; and (iii) that in substance the contracting officer's decision simply adopted what the project engineer had recommended with respect to as-built drawings even though by the time the decision was issued (June 19, 1981), it appears that the as-built drawings submitted by the contractor on June 2, 1981, had been received in the contracting office.

Testifying at the hearing, Mr. Frank White stated that the as-built drawings submitted to the contracting officer on June 2, 1981, contained the changes in the soil-cement slope protection embankment reflecting the use of the 9-foot-wide stair step embankment the contractor had constructed but that they did not reflect three other changes considered by Mr. White to be significant. These changes were identified as consisting of (i) the over excavation in the keyway as shown in the typical embankment cross-section for a large area along the dam; (ii) a change in the concrete structural feature of the outlet works; and (iii) a slight modification to the access hatchway on the outlet works. Based upon its evaluation of Mr. White's testimony, the Board finds that only the change involving overexcavation in the keyway was substantial but that even that change was not of the same magnitude as the change involved in showing in the as-built drawings the construction of a 9-foot embankment. While in these circumstances no mathematical precision is possible, the Board finds that the

Government claim against the contractor for the failure to furnish as-built drawings should be reduced by approximately two-thirds to reflect the fact that the as-built drawings furnished did show the cbanges necessitated by the construction of a 9-foot soil-cement slope protection embankment.

Decision

For the reasons stated, the appellant's claim for the $2,673.02 deducted by the contracting officer by reason of appellant's failure to furnish as-built drawings as required by the contract is hereby granted in the amount of $1,782 and is otherwise denied.

Summary

Contractor Claims	*Amount Claimed*	*Amount Allowed*
Equitable Adjustment—Item 4B (Soil-Cement)		
4,689.34 c.y. ($22.01 vs $12.85 per c.y.)	$103,212.37	$60,258.02
1,654.54 c.y. (Survey difference 8' lifts) @ $22.01 per c.y	36,416.43	0.00
2,213.04 c.y. (Extra foot)—$22.01	48,709.01	0.00
Equitablc Adjustment—Item 4A (Cement)		
454.79 tons ($93.58 per ton)	42,559.25	42,559.25
351.55 tons ($93.58 per ton)—Extra foot	32,898.05	0.00
90.35 tons ($93.58 per ton)—1st pug mill	8,454.95	5,647.55
28.77 tons ($93.58 per ton)—Rejected soil-cement	2,692.29	1,850.08
.60 tons ($93.58 per ton)—Excess cement	56.15	0.00
Overrun Claim on Item 2E ($.15 per c.y.) Borrow Excavation	2,500.39	1,817.42
Total (Claimed vs Allowed) [23]	$277,498.89	$112,132.32
Government Claims (Deductions Made by Governmcnt):		
Services of Registered Professional Soil engineer	$18,750.00	$15,408.68
Quantity Surveys Pertaining to Pay Requests	1,046.57	0.00
As-Built Drawings Not Acceptod by Government	2,673.02	1,782.00
Total (Claimed vs Allowed)	$22,469.59	$17,190.68
Total	$299,968.48	$129,323.00

[23] The claim as presented totaled $288,879.59 (exclusive of Government counterclaims totaling $22,469.59 which sum was deducted from sums otherwise due appellant). The figure shown in the summary of $277,498.89 represents a downward adjustment in the soil-cement claim of $11,380.70 (8556.92c.y.x $1.33perc.y.). Properly computed to take into account the add-ons applicable to the downward adjustments agreed to by appellant, the claim for soil-cement is subject te an additional reduction of $3,850.61, resulting in a claim for soil-cement in the amount of $184,487.20 and a revised total claim of $273,648.28 (exclusive of appellant's claims for the sums deducted by the Government for its countorclaims).

The claims of appellant as shown above are allowed in the amount of $129,323, together with interest thereon computed in accordance with the provisions of the Contract Disputes Act of 1978 (41U.S.C §601-613), after adjusting for any payments applicable to such claims previously made. To the extent not specifically sustained herein, the appeal is denied.

WILLIAM F. MCGRAW
Chief Administrative Judge

WE CONCUR:

RUSSELL C. LYNCH
Administrative Judge

DAVID DOANE
Administrative Judge

ROBERT D. LANIER ~~ET AL.~~

90 IBLA 293 Decided *February 20, 1986*

Appeals from separate decisions of the Colorado State Office, Bureau of Land Management, dismissing private contest complaint (Contest No. 722), and denying application for recordahle disclaimer of interest in lands, C-39463.

Affirmed.

1. Act of Jnly 17, 1914--Federal Land Policy and Management Act of 1976: Disclaimers of Interest--Homesteads (Ordinary): Mineral Reservation--Oil and Gas Leases: Lands Subject to--Patents of Public Lands: Reservations

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, *as amended*, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patontee or his successor in interest is properly rejected.

APPEARANCES: Stephen H. Muse, Esq., San Antonio, Texas, for appellants; Ellen V. Gross, Esq., Houston, Texas, Ted P. Stockmar, Esq., and Marla Williams, Esq., Denver, Colorado, for Shell Western E & P, Inc.; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

This case involves a dispute between the United States and Robert D. Lanier and others (appellants herein) concerning ownership of the carbon dioxide (CO_2) underlying certain land situated in Dolores and Montezuma Counties, Colorado, which had heen patented to appellants or their predecessors in interest pursuant to section 1 of the Act of July 17, 1914, *as amended*, 30 U.S.C. § 121 (1982), with a reservation to the United States of deposits of "gas." The land is situated either within or in close proximity to the McElmo Dome (Leadville) Unit, of which Shell Western E & P, Inc. (Shell Western) is the unit operator. Carbon dioxide was discovered underlying appellants' land in the 1950's.

Appellants have appealed from two decisions of the Colorado State Office, Bureau of Land Management (BLM), dated July 27, 1984 (IBLA 84-814), and December 17, 1984 (IBLA 85-271). The appeals were consolidated for decision by order of the Board dated February 19, 1985.[1] In its July 1984 decision, BLM dismissed appellants' private contest complaint (Contest No. 722) challenging the claim of the United States to the carbon dioxide underlying appellants' land. In its December 1984 decision, BLM adjudicated appellants' claim to the carbon dioxide in an application for a recordable disclaimer of interest (C-39463) under section 315 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1745 (1982). The latter BLM decision denied the claim and rejected a request to place revenues from carbon dioxide leases in escrow.

On January 9, 1984, appellants submitted a "claim" for the rights to the carbon dioxide underlying approximately 20,000 acres of land owned by them.[2] Appellants stated the carbon dioxide is 99 percent pure and occurs in a liquid state. Appellants asserted that the United States had improperly leased these rights to Shell Oil Co. and others and that the McElmo Dome (Leadville) Unit agreement, dated August 24, 1982, improperly included carbon dioxide in its definition of unitized substances. Appellants requested BLM to "disclaim all right, title and interest" in the carbon dioxide, to account for "all [past] royalty payments or other proceeds from the sale of the carbon dioxide" attributable to their land, and to place future royalty payments or other proceeds in escrow, in accordance with section 28 of the unit agreement. In support of their claim, appellants argued that section 1 of the Act of July 17, 1914, did not authorize the reservation

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[1] The names of the appellants, as well as the affected lands, are set forth in Exh. 1 attached to the Decemher 1984 BLM decision.

[2] BLM states in its Dec. 1984 decision that appellants' amended claim includes 20,931.43 acres, of which 20,043.39 acres were patented under the Act of July 17, 1914, with a reservation of oil and gas to the United States. The lands patented under the 1914 Act are at issue in this appeal. The reasons for rejection of the claim as to the balance of the lands are set forth in fn. 4 below.

Of the lands patented under the 1914 Act, BLM states that 15,742.01 acres are situated within the McElmo Dome (Leadville) Unit. The McElmo Dome (Leadville) Unit embraces a total of 203,234.26 acres in Dolores and Montezuma counties in southwest Colorado, of which approximately 154,638.98 acres contain Federal oil and gas. The decision found all of the land claimed by appellants within the unit to be emhraced in existing Federal oil and gas leases. BLM further stated that the "primary purpose" of the unit is te extract carbon dioxide from the Mississippian Leadville formation and to transport it "by pipeline to oil fields in Texas for injection [into existing wells] to aid recovery of the remaining reserves." The BLM decision disclosed that the carbon dioxide was discovered within the unit "about 1950" and "[d]uring the 1970's, Sbell Oil Company and Mohil Oil Corperation formed seven exploratory units, [which in turn formed the basis for the present unit,] for [the] development of anticipated CO_2 reserves in the area."

of carbon dioxide to the United States in patents issued under the Act and that the United States did not reserve carbon dioxide when issuing such patents. Appellants submitted numerous documents in support of their arguments.

On July 3, 1984, appellants filed a private contest complaint pursuant to 43 CFR 4.450, challenging the title of the United States to the carbon dioxide involved herein. Appellants stated that the complaint was "in accordance with the Order of Judge Kane, U.S. District Court for the District of Colorado, dated March 25, 1981." In that order, styled *Dean Ives* v. *United States*, Civ. No. 80-K-705 (D. Colo. Mar. 25, 1981), the court dismissed a suit challenging the title of the United States te the carbon dioxide involved herein, in part because the plaintiffs had failed to exhaust their administrative remedies by pursuing their claim before the Department of the Interior.

In its July 1984 decision, BLM dismissed appellants' private contest complaint because private contests cannot be brought against the United States under 43 CFR 4.450. BLM also noted the case involved the question of whether carbon dioxide was a reserved mineral under section 1 of the Act of July 17, 1914, which, as a matter of law, was properly resolved in an adjudication of appellants' previously filed "claim."

In the statement of reasons for appeal from the July 1984 BLM decision, appellants state they filed the private contest complaint because they felt constrained to do so by the court order in *Ives.*[3] On August 27, 1984, BLM filed a motion for an extension of time to file an answer to appellants' statement of reasons, noting that BLM would soon issue a decision denying appellants' "claim" and requesting that any appeal from the anticipated decision be consolidated with the earlier appeal. BLM also recognized appellants were "forced" to appeal the dismissal of their contest complaint in order to avoid being "foreclosed on the issue of title to carbon dioxide for failure to appeal." On August 31, 1984, appellants filed a response to BLM's motion, essentially acknowledging that their appeal from the July 1984 BLM decision was a protective appeal. In view of the fact that BLM has since acted upon appellants' claim, thus providing an appropriate forum for consideration of the essential controversy in the case (*i.e.*, who holds title to the carbon dioxide under the Act of July 17, 1914) and recognizing the inappropriateness of a private contest to quiet title as against the United States (*see* 43 CFR 4.450-1), we hereby affirm the July 1984 BLM decision dismissing appellants' private contest.

In its December 1984 decision, BLM concluded that the United States holds all right, title, and interest to the carbon dioxide in lands patented under the Act of July 17, 1914, by reason of a reservation of

[3] The court order referred to the private contest regulations at 43 CFR Part 4, Subpart E, in noting the availability of an administrative forum for determining whether carbon dioxide is a gas reserved in a patent under the Act of July 17, 1914, 30 U.S.C. § 121 (1982). However, as noted below, we regard appellants' appeal from the Dec. 1984 BLM decision as the appropriate administrative forum for addressing appellants' claim.

oil and gas to the United States. As a basis for the decision BLM relied on two memoranda issued by the Office of the Regional Solicitor, dated July 12, 1979, and July 26, 1984, and a memorandum issued by the Office of the Solicitor, dated July 20, 1984. Treating appellants' respective claims as a single consolidated application for a recordable disclaimer of interest in the carbon dioxide, BLM denied the application.[4] BLM also found that any doubts regarding the invalidity of appellants' claim were resolved hy the "severe administrative consequences" of a finding of validity, noting the Department has "for at least 40 years" considered oil and gas leases to convey carbon dioxide. BLM stated that a finding of validity would, for example, cloud the title of existing leases, especially those held by the production of carbon dioxide, and complicate the issuance of leases where the land underlying portions of those potential leases had been patented under the Act of July 17, 1914. BLM concluded: "Absent a clear, positive basis for a determination that the landowner is the owner of the CO_2, the resulting complications should weigh in favor of ownership by the United States of America."[5] Finally, BLM rejected appellants' request to account for or to place in escrow "revenues attributable to the carbon dioxide in the claimed lands."

Section 315(a) of FLPMA, 43 U.S.C. § 1745(a) (1982), provides, in relevant part, that the Secretary of the Interior may issue a recordable disclaimer of interest "in any lands * * * where the disclaimer will help remove a cloud on the title of such lands and where he determines * * * a record interest of the United States in lands has terminated by operation of law or is otherwise invalid." Thus, the Secretary, and his delegated representative, BLM, have the discretionary authority to issue a recordable disclaimer of interest if it is determined that certain lands are "not lands of the United States or that the United States does not hold a valid interest in the lands." 43 CFR 1864.0-1. The term "lands" includes "interests in lands." 43 CFR 1864.0-5(e). Hence, BLM may properly consider whether to

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[4] BLM further stated the application was properly treated as 140 separate applications, all of which were subject to the "recently issued regulations" set forth at 43 CFR Subpart 1864 (49 FR 35297 (Sept. 6, 1984)), including payment of filing fees and processing costs. However, BLM concluded that appellants would not be required to comply with these regulations, unless they were successful on appeal, because BLM had substantially adjudicated their application prior to promulgation of the regulations.

BLM also noted that, with respect to pertions of the claims of particular appellants, the application for a recordable disclaimer of interest was suhject to rojection because the United States had either clearly conveyed its mineral interest or retained that interest. BLM stated the following land had been patented with no mineral reservation: lot 2, sec. 4, T. 37 N., R. 19 W., sec. 16, T. 38 N., R. 16 W.; and the NE 1/4 sec. 1, T. 38 N., R. 19 W., New Mexico Principal Meridian, Colorado. BLM stated the following land had not been patented: W 1/2 SW 1/4 sec. 17, T. 37 N., R. 19 W., New Mexico Principal Meridian, Colorado.

BLM also noted that, with respect to a pertion of the claim of one appellant, the patent from the United States had, in addition to reserving oil and gas under sec. 1 of the Act of July 17, 1914, reserved coal and other minerals under sec. 9 of the Stock-Raising Homestead Act, *as amended*, 43 U.S.C. § 299 (1982). BLM stated this additional reservation was probably due to an inadvertent mistake and it would adjudicato the claim based on the reservation under the 1914 Act. However, it reserved the right to adjudicate the claim under the Stock-Raising Homestead Act. BLM indicated the following land was affected by this dual reservation: SE 1/4 NE 1/4, N 1/2 SE 1/4 and SE 1/4 SE 1/4 sec. 8, T. 39 N., R. 19 W., New Mexico Principal Meridian, Colorado.

[5] BLM states that, in view of tbese complications, it reserves any procedural defenses it may have against appellants' individual claims, including laches, estoppel, or the statute of limitations.

issue a recordable disclaimer of interest with respect to the carbon dioxide located beneath the lands owned by appellants. The crucial question is whether carbon dioxide was an interest reserved to the United States when it issued patents to the land pursuant to section 1 of the Act of July 17, 1914. This question requires that we examine the meaning of the Act.

[1] Section 1 of the Act of July 17, 1914, *as amended*, 30 U.S.C. § 121 (1982), provides, in relevant part, that:

> Lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject te appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title *with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable*, together with the right to prospect for, mine, and remove the same. [Italics added.]

Section 3 of the Act of July 17, 1914, 30 U.S.C. § 123 (1982), provides that the appropriate mineral reservation will also be included in a patent where entry is made prior to classification, withdrawal, or reporting of the lands "as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals." In the present case, the patents to appellants or their predecessors in interest contain a reservation of the oil and gas, in accordance with these statutory provisions. The question, therefore, is whether carbon dioxide comes within the scope of the term "gas" as used in the Act of July 17, 1914.[6]

It is clear that under normal atmospheric pressure and temperature carbon dioxide is a "gas" in the sense that it has neither independent shape nor volume but tends to expand indefinitely. Bureau of Mines, U.S. Department of the Interior, *A Dictionary of Mining, Mineral, and Related Terms* 479 (1968) (definition of "gas"); S. B. Talmage and A. Andreas, "Carbon Dioxide in New Mexico," (New Mexico Bureau of Mines and Mineral Resources Circular No. 9 (1942)) (Appellants' Brief at Tab 28). However, appellants argue a distinction should be drawn between two types of gas–hydrocarbons and nonhydrocarbons–when interpreting the reservation under the 1914 Act. In their statement of reasons for appeal, appellants contend that in providing for a reservation of gas under the Act of July 17, 1914, Congress intended only to reserve hydrocarbons which (unlike nonhydrocarbons) may be used as a source of fuel. Appellants recite that certain lands of the United States had been withdrawn from nonmineral entry by petroleum withdrawals in the early days of the 20th century in order to conserve supplies of "mineral fuels" for the benefit of the entire country (Message from the President, dated Feb. 13, 1907, 41 Cong.

[6] Appellants argue on appeal that the mineral reservation under the Act of July 17, 1914, could only encompass those minerals which, prior to patent, specifically led to the withdrawal, classification, or reporting as valuahle of the land embraced therein. There is no evidence that the land involved herein was withdrawn, classified, or reported as valuable on account of carbon dioxide. However, the mineral reservations clearly embrace the term "gas." We must, therefore, presume that the land was either withdrawn, classified, or reported as valuable on account of "gas." The time to challenge the propriety of a reservation contained in a patent is at the time of issuance of the patent. *See Brennan* v. *Udall*, 379 F.2d 803, 807 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967).

Rec. 2806-08 (1907) (Appellants' Brief at Tah 15)), but that this had resulted in the closing of millions of acres of land to homestead and other entry. In order to open such land to nonmineral entry, but yet to continue the protection afforded these minerals, appellants point out, Congress enacted the Act of July 17, 1914, and other similar acts, opening the lands to nonmineral entry while reserving these minerals to the United States. *See United States* v. *Union Oil Co. of California,* 549 F.2d 1271, 1274-75 (9th Cir.), *cert. denied,* 434 U.S. 930 (1977).[7] Appellants argue that the reservation in the 1914 Act had the same purpose as the various withdrawals, *i.e.*, to protect "mineral fuels." Appellants also recognize the intent to reserve mineral fertilizers in the 1914 Act. Appellants state that oil, gas, and asphaltic minerals fall into the category of mineral fuels and phosphate, nitrates and potash fall into the category of mineral fertilizers.

In support of their argument that the minerals listed in the Act of July 17, 1914, fall into two basic categories, *i.e.*, mineral fuels and fertilizers, appellants refer first to a statement by A. A. Jones, First Assistant Secretary of the Interior, in a letter to the Chairman, Committee on Public Lands, U.S. Senate, dated September 16, 1914, recommending passage of Senate Bill 6484 extending the provisions of the Act of July 17, 1914, to Alaska. After discussing the Act of July 17, 1914, and other statutes opening mineral land to agricultural entry subject to a reservation of minerals, First Assistant Secretary Jones stated: "From the foregoing, it appears that Congress has, in the United States proper, inaugurated a definite policy of separate dispositions of surface estates and mineral deposits in certain classes of important fuel and fertilizer minerals. With this general policy, this Department is in hearty accord" (Appellants' Brief at Tab 15).

In further support of their contention that, at the time of passage of the Act of July 17, 1914, both Congress and the Department considered gas to be a hydrocarbon, appellants refer to a Departmental publication in which the term "oil and gas" is used interchangeably with the term "hydrocarbons." George Otis Smith, "The Classification of the Public Lands" (Geological Survey, U.S. Department of the Interior, Bulletin 537, 1913) (Appellants' Brief at Tab 6). In particular, Survey stated: "The immediate purpose of the classification of oil and gas land is to withhold from entry all lands containing valuable deposits of fluid hydrocarbons pending the enactment of adequate legislation providing for their disposition." *Id.* at 117.

It appears from the record that at the time of passage of the Act of July 17, 1914, carbon dioxide was recognized as a constituent of natural gas, although it was regarded as an impurity. It is unlikely that Congress had any specific intent regarding whether the

[7] The *Union Oil* case involved an analysis of the scope of the mineral reservation in patents issued under sec. 9 of the Stock-Raising Homestead Act of 1916, 43 U.S.C. § 299 (1982). The opinion of the court provides an illuminating discussion of the background and purpose of the mineral reservations.

reservation of gas under the Act included a reservation of carbon dioxide since, although carbon dioxide was known to be a component of natural gas, it was not considered to have commercial value.[8]

Courts have had occasion previously to consider whether a conveyance of "gas" encompasses nonhydrocarbon gases. In *Navajo Tribe of Indians* v. *United States*, 364 F.2d 320 (Ct. Cl. 1966), the court was called upon to detormine whether a lease of "oil and gas deposits" on the Navajo Reservation approved by the Assistant Secretary of the Interior in 1923 conveyed the right to produce helium, a noncombustible, nonhydrocarbon gas found to be associated with other hydrocarbon and nonhydrocarbon gases.[9] The court noted first that gases existing in nature do not fall into mutually exclusive categories such as hydrocarbon and nonhydrocarbon. Rather, the various elements are commingled and the hydrocarbon content cannot be produced separately from the other components. *Id.* at 326.

After noting that the parties to the lease may have been contemplating mainly fuel-type gases, the court found it "more realistic to presume that the grant included not only hydrocarbons but other gaseous elements as well." *Id.* at326. Hence, the court held that, regardless of whether the percentage of helium content was high or low, the helium component was part of the gas deposit conveyed to the lessee. *Id.* at326. The court found this holding consistent with the general intent of the parties and rejected lessor's contontion that, in the absence of a showing of specific intent to convey helium, the lease included only hydrocarbon gases. *Id.* at326-37.[10]

In *Northern Natural Gas Co.* v. *Grounds*, 441 F.2d 704 (10th Cir. 1971), the court was called upon to determine whether oil and gas leases in the enormous gas fields of the Hugoton area embracing approximately 33,000 square miles and 21 million acres conveyed the

[8] In a letter to the Trans-America Oil Co., dated July 13, 1932, quoted in appellants' brief, Joseph M. Dixon, Acting Secretary of the Interior, stated:

"In August, 1921, the Utah Oil Refining Company drilled a test well on oil and gas prospecting permit, Salt Lake City 026100, on the Farnham Structure in Utah, and at a depth of 3086 feet encountered a flow of approximately twelve million cuhic feet per twenty-four hours of practically pure carbon dioxide gas. However, as carbon dioxide gas was considered at that time as of no commercial value, the well was plugged and abandoned at a depth of 3235 feet in January, 1924." (Appellants' Brief at Tab 26).

[9] The composition of the gas was set forth in the opinion of tbe court as follows:

	Percentage
Methane and other hydrocarbons	17.0
Nitrogen	72.6
Helium	7.6
Carbon Dioxide	2.8
	100

[10] The court also rejected application of the doctrine of *ejusdem generis* (general words following enumeration of specific things are to bo construed as including only things of the same kind or class) to find from the lease of "oil and gas" that the term "gas" was limited in scope to hydrocarbons. This is one of the arguments made by appellants in the present case.

helium produced with the hydrocarbon gas. After quoting the trial court's definition of gas as including any naturally formed aeriform substances indigenous to the underlying reservoir, which aeriform substances include helium, *id.* at 711, the court found the issue to be one of intent. The court rejected the landowners' reliance on the doctrine of *ejusdem generis* te support their claim that helium, a nonhydrocarbon, was not conveyed by the oil and gas leases. The court found the word "gas" to have "equal status" with the word "oil," citing *Navajo Tribe of Indians* v. *United States, supra.*

The *Northern* court characterized the critical issue as whether general or specific intent controls. The court accepted the trial court finding that gas did not connote helium to the average landowner, that no landowner contemplated helium in granting the right to produce gas, and that the landowner had no intention whatever regarding helium. After finding that helium emerges as a component of the gas produced from a gas well which necessarily comes from the wellhead and into the transmission line with all the gases which make up the entire stream, the court held that general intent would include in the lease all components of the gas produced by the wells, whereas specific intent would embrace only combustible gas. *Northern Natural Gas Co.* v. *Grounds*, 441 F.2d at 712-14.

The court found that nothing in the leases disclosed an intent to convey only combustible (hydrocarbon) gases and that, if such were the intent of the lessor, it should have been specified. More significantly, the court held that in the absence of lessor's knowledge of the presence of helium at the time of leasing, they could not have had a specific intent and the general intent is dispositive. *Id.* at 714. The court found that the general intent must be determined by considering the purpose of the grant in terms of enjoyment of the rights created, *i.e.*, the desire of the landowners to profit by production of gas from their lands, to which end they gave exclusive leases permitting exploration, development, production, and marketing of gas. After noting that the gas came from the ground with all its components and that wellhead separation of the helium was impractical, the *Northern* court refused to read into the leases a "subjective intent to convey only those components of the gas which comport to a subjective notion of the commercial end uses at the time of lease execution." *Id.* at 715.

We find the analysis of the courts in the *Navajo* and *Northern* decisions compelling in determining the scope of the reservation of "gas" under the Act of July 17, 1914. Although Congress and tbe Department were apparently thinking of gas primarily as a hydrocarbon fuel at the time of enactment, there is no limitation of the reservation in the Act to hydrocarbon gas. The fact that carbon dioxide, although recognized as a component of gas, was not perceived to have commercial value, further tends to negate the existence of a specific intent with respect to reservation of carbon dioxide. In the absence of a specific intent to exclude carbon dioxide from tbe reservation of gas, we must reject appellants' attempt to read into the Act a "subjective intent to [reserve] only those components of the gas which comport to a subjective notion of the commercial end uses at the time." *Northern Natural Gas Co.* v. *Grounds, supra* at 715.

This is consistent with the holding of the court in *Brennan* v. *Udall*, 251 F. Supp. 12 (D. Colo. 1966), *aff'd*, 379 F.2d 803 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967), in examining the applicability of tbe reservation of oil under the 1914 Act to oil shale. After noting Congress did not specifically address oil shale in passing the Act, the court found that the purpose and history of the Act, viewed in light of the overall policy of Congress regarding separation of mineral and surface rights, leads to the conclusion that the term "oil" was used in its broadest, generic sense which included oil shale. *Id.* at 24-25. Similarly, the term "gas" must be interpreted te include all of the component parts of gas and not only the hydrocarbon content thereof.[11]

An important additional factor when considering the intent of the withdrawals and the subsequent reservations in agricultural entry patents is the recognition of the fugacious character of oil and gas. Early cases compared oil and gas to wild animals which are not reduced to ownership until captured. *New American Oil & Gas Mining Co.* v. *Troyer*, 76 N.E. 253 (1905); *Dark* v. *Johnston*, 55 Pa. 164 (1867). As a result, steps were taken to protect these fugacious commodities from drainage by adjacent owners, and the waste which resulted from attempts to capture oil and gas before it was captured by others. This being the case, it can reasonably be assumed that when using the term "gas," the intent was to include all mineral deposits of a gaseous nature, rather than to differentiate between hydrocarbon gas and nonhyrocarbon gas.

Further, it is clear that for many years both Congress and the Department have considered a gas lease to convey nonhydrocarbon gaseous components, unless there is an express provision to the contrary. Thus, section 1 of the Mineral Leasing Act of February 25, 1920, which provided for the leasing of oil, gas, and other mineral deposits owned by the United States, expressly reserved to the United States the ownership of and the right to extract helium from all gas produced from leased lands. Mineral Leasing Act of 1920, ch. 85, §1, 41 Stat. 437-38 (codified at 30 U.S.C. § 181 (1982)). This Department has previously recognized that, if nonhydrocarbon gases were not within the meaning of the term "gas," it would not have been necessary to expressly exclude the right to extract helium under

[11] Appellants seek to distinguish the carbon dioxide deposit in this case from other occurrences of carbon dioxide produced from underground wells on the basis that this depesit is 99 percent pure. The record indicates the remaining content of the gas is nitrogen, 0.9 percent, and methane (a hydrocarbon component of gas), 0.1 percent. Accordingly, appellants argue that the carbon dioxide is not "commingled" with hydrocarbon gas. Although it may be conceded that in tbis case the hydrocarbon content is so minor as to be insignificant, the deposit remains a naturally formed gas indigenous to the underlying reservoir consisting of several commingled components. The notion that title to an underlying gas reservoir may rest on the results of a "purity test" is properly rejected.

Federal oil and gas leases. Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits, *Solicitor's Opinion,* 88 I.D. 538 (1981).

On May 7, 1936, the Department promulgated regulations implementing the Mineral Leasing Act, specifically listing "carbon dioxide" as a gas which was subject to leasing, and providing for the payment of royalties on production. Circular No. 1386, 55 I.D. 502, 511, 521 (1936). Moreover, since 1942, the Department has defined gas as "any fluid, either combustible or noncombustible, which is produced in a natural state from the earth and which maintains a gaseous or rarefied state at ordinary temperature and pressure conditions." 30 CFR 221.2(o) (7 FR 4133 (June 2, 1942), currently codified at 43 CFR 3000.0-5(a)). A letter dated July 13, 1932, from Joseph M. Dixon, Acting Secretary of the Interior, to the Trans-American Oil Co. (reproduced in Appellants' Brief at Tab 26) confirms that at least since 1928 carbon dioxide was considered to be leasable under the Mineral Leasing Act of 1920:

> In a letter dated June 16, 1928, to Mr. George D. Parkinson of Salt Lake City, Utah, the First Assistant Secretary of the Interior stated that:
>
> "In my opinion the regulations pertaining to prospecting for oil and gas under the act of February 25, 1920 (41 Stat. 437), would be applicable to prospecting for carbon dioxide gas and in the event of a valuable discovery of such gas a lease would issue in accordance with the provisions, regulations, and royalties pertaining to that act."
>
> On February 4, 1930, the Solicitor of the Department again considered this question and others in connection with the development of carbon dioxide gas for commercial purposes, affirming tbe former conclusions.

Thus, we have recognition by Congress that the scope of the term "gas" embraces nonhydrocarbon gases such as helium, as well as the long Departmental history of treating carbon dioxide gas as embraced within an oil and gas lease issued pursuant to the Mineral Leasing Act of 1920. Although not conclusive, this supports a finding that carbon dioxide is within the scope of the gas reservation under the Act of July 17, 1914.

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 affirmed.

C. RANDALL GRANT, JR.
Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

R. W. MULLEN
Administrative Judge

APPEAL OF DON SIMPSON

IBCA-2058 Decided *February 24, 1986*

Contract No. CO-050-CT5-5, Bureau of Land Management.

Sustained.

Contracts: Construction and Operation: Contracting Officer--Contracts: Disputes and Remedies: Termination for Default: Generally

Termination of a tree-thinning contract for default was held to be improper, because the Government's failure to discharge its bid-verification responsibilities warranted rescission of the contract. The Board found that the actions of tbe parties constituted "mutual fault," where the contractor abandoned performance of the work in a case involving an admitted mistake in judgment in bidding the contract, the contracting officer failed to request verification of the bid price in light of the wide range of bids received, and the disparity between the contract bid price and the Government's estimate for the work.

APPEARANCES: Don Simpson, *pro se,* Villa Grove, Colorado; Gerald D. O'Nan, Department Counsel, Denver, Colorado, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

This appeal is timely filed hy appellant, Don Simpson, from the decision of the contracting officer dated June 12, 1985, terminating for default Contract No. CO-050-CT5-5. As neither party requested an evidentiary hearing, the appeal is submitted for decision on the written record as supplemented by the parties, pursuant to section 4.109 of the Board's rules.

Findings of Fact

By Solicitation No. CO-050-RFP5-2, dated March 25, 1985, the United States Department of the Interior, Bureau of Land Management (BLM/Government), requested proposals for supplies and services under a project known as the Clayton Cove Precommercial Thinning contract. The purpose of this project was to initiate a program of intensive forest management through removal of undesirable pine and fir trees and subsequent reduction in the number of trees per acre at the site, located 9 miles southwest of Villa Grove, Colorado (Appeal File, Exh. 4).[1] The solicitation estimated the number of acres to be thinned at 46 acres, with approximately 40 trees per acre to be cut. Performance time under the contract was 30 days. As indicated by the Abstract of Bids, eight offerors, including appellant, responded to the Solicitation (AF-3). Bids were opened on May 10, 1985, with appellant

[1] Hereinafter, appeal file exhibits will be designated "AF" followed by reference to the particular exhibit cited, *e.g.*, (AF-4).

submitting the low bid of $2,298.62. The contracting officer determined appellant's bid to be the low, responsive, and responsible bid and awarded Contract No. CO-050-CT5-5, to appellant on May 14, 1985 (AF-4, 6; Affidavit of Contracting Officer, dated Nov. 15, 1985). Notice to proceed with the work was issued on May 15, 1985 (AF-11).

Subsequent to a prework conference held on May 15, 1985, appellant began work under the contract employing one other cutter (AF-10, 12). Shortly after commencing performance under the contract, the BLM inspector's report dated May 17, 1985, indicates that appellant had requested an extension of time, due to rainfall the previous 2 days (AF-14). The inspector advised appellant that some adverse weather was expected and that 2 days of rain would not justify an extension. The next day, May 18, 1985, appellant called the BLM inspector saying that "he had misjudged the area and wanted out of the contract" (AF-14). On May 20, 1985, the BLM inspector called the BLM District Forester and advised him of appellant's desire to default (AF-13, 14). The contracting officer was notified of appellant's situation and discussed the necessary termination procedures with the inspecter (AF-14). On May 21, 1985, the inspector explained the default procedures to appellant and advised him that he could be liable for reprocurement costs on the contract. Appellant indicated to the inspector that he did not have the money to pay for such excess costs (AF-14).

Thereafter, by certified mail dated May 23, 1985, the contracting officer notified appellant that he had failed to make substantial progress, and advised that unless conditions were cured within 10 days that the contract would be terminated for default (AF-15). In response to the cure notice, appellant called the contracting officer on May 24, 1985, and stated that he was not going to finish the work (AF-16). Appellant indicated to the contracting officer that he "didn't realize how much work there would be," and that he did not want an extension because it "would cost him too much money" (AF-17). Appellant was again advised that he could be held responsible for the Government having to reprocure services to complete the contract (AF-17). On May 30, 1985, the BLM inspector conducted an inspection of the contract area and determined that less than 1 acre of trees were thinned before appellant abandoned the work (AF-19). On June 12, 1985, the contracting officer issued a final decision terminating the contract for default (AF-18). Appellant timely appealed the termination for default which was received by the Board on June 24, 1985 (AF-20).

In his Notice of Appeal appellant states (i) that he had misjudged the work; (ii) that he had not cut cedar or pine before; (iii) that his estimate of the acreage involved in the contract work was off by 70 percent; (iv) that information he received from a Government employee (later assigned to the project as the inspector) had contributed to the low bid submitted; (v) that in making an award to him BLM had exerised poor judgment; (vi) that he had no finances;

and (vii) that he should not be penalized 100 percent for the misjudgments of all concerned.

Discussion

From the record in this case it is clear that prior to the expiration of the time for contract performance, appellant had abandoned the contract work and had unequivocally stated his intention not to resume contract performance. In normal circumstances, these actions and words would confer upon the Government the right to summarily terminate for default the right of appellant to proceed with performance. *See Timberland Management*, IBCA-1877 (July 31, 1985), 92 I.D. 340, 85-3 BCA par. 18,276.

This case is distinguishable from our holding in *Timberland Management*, however, in that here there is incontrovertible evidence that the bid submitted by appellant for performance of the contract work was unconscionably low. The abstract of bids shows (i) that the unit price bid by the appellant for the tree-thinning work called for by the contract was $49.97 per acre; (ii) that the next low bid was $82.67 per acre (a percentage increase of 40 percent); (iii) that the engineer's estimate for performing such work was $100 an acre, or more than double the bid submitted by appellant; and (iv) that the average of the seven other bids received was $120.31 per acre or approximately 240 percent higher than appellant's bid.

Despite the great disparity between appellant's bid and the other bids received, there is no evidence that the contracting officer requested appellant to verify its bid. FAR 14.406-1 imposes certain bid verification obligations on the contracting officer as follows:

> 14.406 Mistakes in bids.
>
> 14.406-1 General.
>
> After the opening of bids, contracting officers shall examine all bids for mistakes. In cases of apparent mistakes and in cases where the contracting officer has reason to helieve that a mistake may have been made, the contracting officer shall request from the bidder a verification of the bid, calling attontion to the suspected mistake. If the bidder alleges a mistake, the matter shall be processed in accordance with this section 14.406. Such actions shall be taken before award.

On the basis of the evidence before us, we conclude that the contracting officer should have suspected a mistake in appellant's bid and discharged her responsibilities in requesting verification so that when appellant confirmed his bid, he had notice of the nature and extent of the mistake which was suspected. *United States* v. *Metro Novelty Mfg. Co.*, 125 F. Supp. 713 (1954). Although appellant admits that he misjudged the amount of work to be performed under the contract, the Government's failure to discharge its bid-verification responsibilities constituted a case of "mutual fault" to the extent that neither party is entitled to recover on any claims that may be asserted against the other. *United States* v. *Hamilton Enterprises, Inc.*, 711 F.2d 1038, 1048 (1983). *Lewis Management and Service Co.*, ASBCA

Nos. 24802, 24803, 24804, 26180, 26182 (Sept. 12, 1985), 85-3 BCA par. 18,416.

In such situations, the Court of Appeals for the Federal Circuit stated that "The court must let the chips lie where they fall." *Hamilton Enterprises, supra* at 1048. Here, there is no evidence that the Government has assessed excess reprocurement costs against appellant. Nor is it entitled to any future assessment of such costs. Moreover, to the extent that any amounts for services performed have been withheld as an offset against excess reprocurement costs, appellant is entitled to be paid such amounts.

Although it is well established that an erroneous bid based upon a mistake in judgment does not entitle the contractor to reformation of its contract, *Aydin Corp.* v. *United States*, 229 Ct. Cl. 309 (1982), it is clear that rescission may be granted, at least for some errors in judgment where the Government has, as in this case, failed in its bid-verification responsibilities. *Sealtite Corp.*, ASBCA Nos. 25805, 26235 (Jan. 27, 1984), 84-1 BCA par. 17,144. We apply the rule of rescission here, finding that the Government either knew or should have known of appellant's mistake. So finding, we further find that no binding contract was awarded to the appellant under which excess reprocurement costs could be assessed.

The appeal is sustained.

William F. McGraw
Chief Administrative Judge

I concur:

Russell C. Lynch
Administrative Judge

ATCHISON, TOPEKA & SANTA FE RAILWAY CO. *v.* DEPUTY AREA DIRECTOR, ALBUQUERQUE AREA OFFICE, BUREAU OF INDIAN AFFAIRS

14 IBIA 46 Decided *February 25, 1986*

Appeal from a decision of tbe Deputy Albuquerque Area Director approving a resolution of the Pueblo of Acoma that imposed a leasehold tax on non-retail commercial leaseholds within the Pueblo boundaries.

Affirmed.

1. Indians: Taxation--Indians: Tribal Powers: Tribal Sovereignty--Regulations: Generally

Approval by tbe Bureau of Indian Affairs of a tax ordinance passed by an Indian tribe in the exercise of its tribal sovereignty does not constitute an agency rule within the meaning of 5 U.S.C. § 551(4) (1982).

2. Bureau of Indian Affairs: Administrative Appeals: Generally--Constitutional Law: Generally

The Bureau of Indian Affairs and its officials are subject to the limitations imposed on the Federal Government by the United States Constitution.

3. Board of Indian Appeals: Generally--Bureau of Indian Affairs: Administrative Appeals: Generally--Constitutional Law: Generally

The due process requirements of the Fifth Amendment to the United States Constitution are met through the administrative review afforded by the Board of Indian Appeals.

4. Constitutional Law: Generally--Indians: Taxation

A tax ordinance passed by an Indian tribe does not unduly burden interstate commerce if it applies to an activity with a substantial nexus with the tribe, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the tribe.

5. Administrative Procedure: Burden of Proof--Indians: Taxation

A taxpayer claiming immunity from an Indian tribal tax has the burden of proving entitlement to an exemption.

6. Constitutional Law: Generally--Indians: Civil Rights: Indian Civil Rights Act of 1968--Indians: Tribal Powers: Tribal Sovereignty

Constitutional proscriptions, such as those contained in the Fifth and Fourteenth Amendments te the United States Constitution, that limit the exercise of Federal and state governmental powers, are not applicable to Indian tribes except to the extent they are explicitly endorsed by a tribal constitution or imposed by Congress.

7. Board of Indian Appeals: Jurisdiction--Indians: Civil Rights: Indian Civil Rights Act of 1968--Indians: Tribal Powers: Tribal Sovereignty

The Board of Indian Appeals is not the proper forum in which to challenge a tribal ordinance as being violative of the guarantee of equal protection of the laws as provided in the Indian Civil Rights Act.

APPEARANCES: Linda K. Cliffel, Esq., and Ellen L. Falkof, Esq., Chicago, Illinois, for appellant; Peter C. Chestnut, Esq., Albuquerque, New Mexico, for tbe Pueblo of Acoma. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

On May 13, 1985, the Board of Indian Appeals (Board) received the administrative record in this case on referral from the Bureau of Indian Affairs (BIA) pursuant to 25 CFR 2.19(a)(2). The Atchison, Topeka and Santa Fe Railway Co. (appellant) filed an appeal under 25 CFR Part 2 with the Deputy Assistant Secretary--Indian Affairs (Operations) seeking review of a January 15, 1985, decision issued by the Deputy Albuquerque Area Director (appellee). Appellee's decision approved Resolutions Nos. TC-SEPT-27-84-01-1 and TC-NOV-20-84-18-5, passed hy the Pueblo of Acoma (Pueblo), imposing a leasehold tax on non-retail commercial leaseholds within the Pueblo's boundaries. For the reasons discussed below, the Board affirms that decision.

Background

The Pueblo is a federally recognized Indian tribe located in the State of New Mexico. *See* 50 FR 6057 (Feb. 13, 1985). Although in 1934 it voted to accept the provisions of the Indian Reorganization Act (IRA), June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461-479 (1982),[1] it maintains its traditional organization and has neither reorganized under the IRA nor adopted a written constitution.

On September 27, 1984, the Acoma Tribal Council adopted Resolution No. TC-SEPT-27-84-01-1, a general revenue-raising tax ordinance providing for the imposition of a tax on non-retail commercial leaseholds within the Pueblo boundaries. The tax was made effective retroactively to Septoinber 1, 1984. By lettor dated October 25, 1984, the Pueblo requestod approval of the resolution by the Albuquerque Area Director, Bureau of Indian Affairs (BIA, Area Director). The Area Director suggested two amendments to the resolution. The first amendment would make the tax effective January 1, 1985; the second would provide a procedure for protesting the valuation placed on leasehold interests and certain other matters. On November 20, 1984, the tribal council adopted Resolution No. TC-NOV-20-84-18-5, which amended Resolution No. TC-SEPT-27-84-01-1 as suggested by BIA. Both resolutions were approved by appellee on January 15, 1985.[2] The approval letter stated that after review by the agency, area office, and Field Solicitor's office, it was "determined that the Ordinance in question [was] a proper exercise of Tribal governmental authority."

Appellant first became aware of the resolution when it received a letter from the Pueblo dated October 16, 1984, and entitled "Notice to Taxpayer." The letter stated that a notice of valuation and tax due would shortly be sent to appellant. By letter dated November 9, 1984, appellant requested from the Superintendent of the Southern Pueblos Agency (Superintendent), BIA, an opportunity to comment on the tax if it had not already been approved by the Secretary. Although the record contains a supplemental notice to taxpayers, dated November 15, 1984, which sets forth the amendments to the original resolution and provides an opportunity to comment, there is no indication that this notice was sent to appellant, or that appellant was given an opportunity to comment. The tax levied upon the railroad by the Pueblo is not under direct review by the Board in this appeal. Appellant's brief on appeal explains that a direct protest against tbe tax has been filed with the Pueblo (Appellant's Brief at 3). Direct

[1] All citations to the United States Code are to the 1982 edition.
[2] The September and November resolutions will be referred to collectively as "the resolution."

review of the Pueblo's tax scheme itself (as distinguished from Departmental approval of the council's resolution) is beyond the authority of this Board. *See* 43 CFR 4.1(b)(2).

On February 14, 1985, the area office received notice of appellant's intent to appeal BIA's approval of the tax. Appellant's brief in support of the appeal was received on March 14, 1985. Appellee transmitted the appeal documents and background information to the Deputy Assistant Secretary on March 26, 1985.

On May 8, 1985, the appeal was transferred without decision to the Board in accordance with the provisions of 25 CFR 2.19(a)(2).[3] Appellant and the Pueblo filed briefs on appeal. Although appellee did not file a brief addressing all of the issues raised, he submitted a statement with respect to one issue.

Discussion and Conclusions

Appellant raises five arguments on appeal. Appellant first contends that BIA approval of the tax must be vacated because it was given in violation of (1) the rulemaking requirements of 5 U.S.C. § 553 and (2) the Due Process Clause of the Fifth Amendment to the United States Constitution. Appellant further asserts that approval was arbitrary, capricious, and unlawful because the tax itself violates (1) the Commerce Clause of Art. I, § 8, cl. 3, of the United States Constitution; (2) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; and (3) section 306 of the Railroad Revitalization and Regulatory Reform Act (4-R Act), Oct. 17, 1978, 49 U.S.C. § 11503, 92 Stat. 1445, P.L. 95-473.

Initially, the Board notes that the Pueblo has the inherent power to impose taxes. As stated by Interior Solicitor Margold in an opinion dated October 25, 1934:

> Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.* Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty. [Italics in original.]

55 I.D. 14, 19 (1934). Solicitor Margold expressly noted that:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be

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[3] Sec. 2.19(a) 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 Affairs (Operations)] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision."

exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

55 I.D. at 46. In support of this statement Solicitor Margold cited *Morris* v. *Hitchcock*, 194 U.S. 384, 392 (1904); *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), *appeal dism.*, 203 U.S. 599 (1906); *Maxey* v. *Wright*, 3 Ind. T. 243, 54 S.W. 807, *aff'd*, 105 F. 1003 (8th Cir. 1900); and 23 Ops. Atty. Gen. 528 (1901).

Tribal power to tax has recently been unequivocally affirmed by the Supreme Court in *Kerr-McGee Corp.* v. *Navajo Tribe*, ____ U.S. ____, 105 S. Ct. 1900 (1985), and *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982). In *Merrion* the Court discussed an oil and gas severance tax imposed by the Jicarilla Apache Tribe, which is reorganized under a written constitution approved by the Secretary in accordance with the IRA. The Court stated at 455 U.S. 155 that Congress has

provid[ed] a series of federal checkpoints that must be cleared before a tribal tax can take effect. Under the Indian Reorganization Act, 25 U.S.C. §§ 476, 477, a tribe must obtain approval from the Secretary before it adopts or revises its constitution to announce its intention to tax nonmembers. Further, before the ordinance * * * challenged here could take effect, the Tribe was required again to obtain approval from the Secretary. * * *

As we noted earlier, the * * * tax challenged by petitioners was enacted in accordance with this congressional scheme. Both the Tribe's Revised Constitution and the challenged tax ordinance received the requisite approval from the Secretary. This course of events fulfilled the administrative process established by Congress to monitor such exercises of tribal authority. [Footnote omitted.]

In *Kerr-McGee* the Court affirmed the power of Indian tribes that do not have written constitutions approved by the Secretary to tax leasehold interests in tribal lands held by non-Indians. The Navajo Nation did not accept the provisions of the IRA. After passing two taxing ordinances, it submitted them to BIA for approval. BIA held that Secretarial approval was not necessary. In holding that Federal approval of tribal taxes was not required by the IRA or any other statute, the Court found that such approval was in most cases required only because of provisions in tribal constitutions, and that those provisions were subject to amendment to remove the approval requirement. The Court declined te impose a duty on tbe Secretary to approve taxing ordinances when neither Congress nor the tribe had found such approval necessary. After citing earlier cases relating to a tribe's power as a sovereign to tax both members and nonmembers, the Court observed with respect to present Federal Indian policy:

As we noted in *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324 * * * (1983), the Federal Government is "firmly committed to the goal of promoting tribal self-government." *Id.*, at 334-335. * * * The power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs. See President's Statement on Indian Policy, 19 Weekly Comp.Pres.Doc. 98, 99 (Jan. 24, 1983).

Id. at 1904.

In this case, the Pueblo apparently believed that under the *Merrion* decision its tax resolution needed to be submitted for Secretarial approval.[4] The Area Director, as requested, reviewed the resolution, suggested certain changes, and ultimately approved the resolution after his suggested changes were accepted. Appellant argues that this decision to approve the resolution constituted a rule within the meaning of 5 U.S.C. § 551(4), and was, therefore, subject to the notice and comment procedures of 5 U.S.C. § 553. The question is whether appellant is correct that BIA's action in approving a legislative enactment of a dependent, but sovereign Indian tribe, recognized by the United States as having a government-to-government relationship with it and possessing full powers of sovereignty in tax matters, constitutes an agency rule within the meaning of 5 U.S.C. § 551(4).

Section 551(4) defines "rule" as

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

"Rule making" is defined in section 551(5) as the "agency process for formulating, amending, or repealing a rule." The Department of the Interior is an "agency" within the meaning of section 551(1).

While no attempt precisely to define rulemaking can be wholly successful, the essence of its meaning is generally understood. Rulemaking hy an agency characteristically involves the promulgation of concrete proposals, declaring generally applicable policies binding upon the affected public generally, but not adjudicating the rights and obligations of the parties before it.

PBW Stock Exchange, Inc. v. *Securities & Exchange Commission,* 485 F.2d 718, 732 (3rd Cir. 1973), *cert. denied,* 416 U.S. 969 (1974). Rulemaking involves the power of an administrative agency to "formulat[e] policy and mak[e] rules to fill any gap left [in a congressionally created and funded program], implicitly or explicitly, by Congress." *Morton* v. *Ruiz,* 415 U.S. 199, 231 (1974). "The Administrative Procedure Act was adopted to provide, *inter alia,* that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherent arbitrary nature of unpublished *ad hoc* determinations." *Ruiz, supra,* at 232.

[1] BIA approval, when necessary, of legislation enacted by a sovereign Indian tribe is not an agency rule within the meaning of 5 U.S.C. § 551(4). The tribal power to tax is an attribute of tribal sovereiguty--not a grant of power from the Federal Government. BIA

[4] Because it is not raised by the parties, the Board expresses no opinion on this interpretation of law.

approval of a tribal tax resolution therefore does not constitute the promulgation of policy by a Federal agency to fill the gaps left by Congress in a congressionally created program. Furthermore, and most significantly, throughout the history of its consideration of tribal taxing laws, the Supreme Court has never held that Secretarial approval of such laws constitutes rulemaking. In light of the fact that Federal review of such laws is not required by any statute of the United States, the Board declines to hold that when approval is given, it is subject to 5 U.S.C. § 553. The Board, therefore, rejects appellant's argument that BIA approval of this tax ordinance was subject to the rulemaking provisions of 5 U.S.C. § 553.

Appellant next argues that BIA approval of the resolution violates the Due Process Clause of the Fifth Amendment to the United States Constitution, which states in pertinent part: "No person shall * * * be deprived of life, liberty, or property, without due process of law." Appellant places primary reliance for its due process argument on *Historic Green Springs, Inc.* v. *Bergland*, 497 F. Supp. 839 (E.D.Va. 1980), which it states holds that "[a]dministrative agency decisions which are not governed by statutory procedures but which nevertheless affect an individual's rights, obligations or opportunities are required to be issued only after procedural requirements have been followed in accordance with the Due Process Clause of the Fifth Amendment" (Appellant's opening brief at 5).

[2, 3] As a Federal agency, BIA and its officials are indeed subject to the limitations imposed on the Federal Government by the United States Constitution.[5] Appellant is thus correct in its contention that the due process clause of the Fifth Amendment applies to actions and decisions of appellee. However, any due process violation which appellee may have committed in not accepting receipt of appellant's comments prior to issuing the decision appealed has been rendered harmless by the present proceeding. In *Racquet Drive Estates, Inc.* v. *Deputy Assistant Secretary--Indian Affairs (Operations)*, 11 IBIA 184, 195, 90 I.D. 243, 249 (1983), this Board held that the requirements of due process could be met through its administrative review proceedings. In the course of the present proceedings, appellant has been given the opportunity to comment on the tax, te have its comments considered on the merits and to have a reasoned decision issued. Any prior due process violation of appellant's Fifth Amendment rights has therefore been rendered moot and/or harmless.[6]

[5] "[A]ctions by Congress and by administrative officials in Indian affairs are subject to judicial review under principles of constitutional and administrative law." Felix S. Cohen's *Handbook of Federal Indian Law* at 218 (1982 ed.).

[6] The Board notes the tribe and its official may likewise be subject to the similar due process requirements of the Indian Civil Rights Act, Apr. 11, 1968, P.L. 90-284, 82 Stat. 77, 25 U.S.C. § 1302(8) ("No Indian tribe in exercising powers of self-government shall * * * deprive any person of liberty or property without due process of law"). *See* discussion, *infra* relating to the Indian Civil Rights Act.

Appellant next attacks the constitutionality of the tax itself under the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, which states: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Normally, the Board will not reach an argument alleging the unconstitutionality of a statute because of the limited nature of its administrative jurisdiction. *See, e.g., Zarr* v. *Acting Deputy Director, Office of Indian Education Programs*, 11 IBIA 174, 90 I.D. 172 (1983). However, as the Supreme Court noted in *Merrion*, administrative review of tribal ordinances by the Secretary was intended by Congress to ensure that such tribal legislation does not impermissibly impact upon areas of legitimate Federal concern, such as interstate commerce. The tax in *Merrion* was imposed by an IRA tribe and approved in accordance with the requirements of that tribe's constitution. The Court stated at 455 U.S. 155-56:

> As we noted earlier, the * * * tax challenged by petitioners was enacted in accordance with this congressional scheme [established in the IRA]. Both the tribe's Revised Constitution and the challenged tax ordinance received the requisite approval from the Secretary. This course of events fulfilled the administrative process established hy Congress to monitor such exercises of tribal authority. As a result, this tribal tax comes to us in a posture significantly different from a challenged state tax, which does not need specific federal approval to take effect, and which therefore requires, in the absence of congressional ratification, judicial review to ensure that it does not unduly burden or discriminate against interstate commerce. Judicial review of the Indian tax measure, in contrast, would duplicate the administrative review called for by the congressional scheme.
>
> * * * Congress, of course, retains plenary power to limit tribal taxing authority or to alter the current scheme under which the tribes may impose taxes. However, it is not our function nor our prerogative to strike down a tax that has traveled through the precise channels established by Congress, and has obtained the specific approval of the Secretary.

The tax resolution at issue here was submitted for Secretarial approval and approved in accordance with *Merrion*. As a delegate of the Secretary and part of the administrative review process, it is thus appropriate for the Board to address the constitutionality of the Pueblo's resolution.[7]

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[7] In undertaking this analysis, the Board is mindful of Justice Frankfurter's admonition in *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444-45 (1940):

"The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of tecbnical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical oporation of a tax the state has exerted its power in relation to opportunities whicb it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.

* * * * * * * *

"* * * Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances, or even occasional deviations over a long course of years, not unnatural in view of the confusing complexities of tax problems, do not alter tbe limited nature of the function of this Court when state taxes come before it. At best, the responsibility for devising just and productive sources of revenue cballenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate process of fiscal policy-making. We must be on guard against imprisoning tbe taxing power of the states within formulas tbat are not compolled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances wbich they profess to summarize."

[4, 5] The Supreme Court has established the rules for determining if a challenged state tax impermissibly burdens interstate commerce.[8] In *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), the Court held that a tax should be sustained against a Commerce Clause challenge if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." The Court has further instructed that "[t]he general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption. This burden is never met merely by showing a fair difference of opinion which as an original matter might be decided differently." (Footnotes omitted.) *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, 537-38 (1951). *See also New York ex rel. Cohn* v. *Graves*, 300 U.S. 308, 316 (1937); *Compania General de Tabacos de Filipinas* v. *Collector of Internal Revenue*, 279 U.S. 306, 310 (1929). Thus, appellant here has the burden of showing that the challenged tax impermissibly burdens interstate commerce.

Appellant does not challenge the nexus between its activities and the taxing authority. It does, however, challenge each of the remaining three prongs of the *Complete Auto Transit* test. Appellant first argues that the tax is not fairly apportioned. In support of this argument appellant states that its tracks merely traverse the Pueblo, no loadings or unloadings occur on the Pueblo, and no revenues are received directly from the Pueblo. Appellant states that if its entire system were taxed at the rate imposed by the Pueblo, the tax burden would be more than one-half of its net railway operating income. Appellant concludes that there is clearly no relationship between its activities on the Pueblo and the amount of tax.

In *General Motors Corp.* v. *Washington*, 377 U.S. 436, 440-41 (1964), the Court discussed the requirements for a tax to be constitutionally sound under the "fairly apportioned" prong of the Commerce Clause test:

> A careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. * * * As was said in *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 (1940), "[t]he simple but controlling question is whether the state has given anything for which it can ask return."

As stated in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 624-25 (1981), the tax must be "apportioned to activities occurring within the State."

[8] In *Merrion*, the Court "note[d] that reviewing tribal action under the Interstate Commerce Clause is not without conceptual difficulties." 455 U.S. at 153. In its discussion the Court assumed that tribal taxes could be considered under the standards developed for reviewing state taxes. The Board will make the same assumption.

Here, appellant concedes that its tracks cross the Puehlo. It furthermore admits that the tax is levied only against that portion of its tracks that are within the Pueblo's houndaries. The tax is, therefore, apportioned to that part of appellant's activities that occur within the Puehlo and thus to those activities that are made possible by the opportunities and protections the Pueblo has provided. Appellant's argument as to the amount of tax it would have to pay if its entire systom were taxed at the rate imposed by the Pueblo is irrelevant in determining whether the Pueblo has the power to impose this tax without constitutional objection. The Board holds that the tax is fairly apportioned.

Appellant next contends that the tax impermissibly discriminates against interstate commerce in that, on its face, it applies only to interstate commerce through the exclusion of retail commercial leaseholds. Thus, appellant argues that the tax "has effectively eliminated all intra-Reservation business from the tax, and thus made interstate commerce the sole subject of the tax. * * * Thus, since only non-retail businesses owned by non-members of the Tribe are subject to the tax, the tax discriminates against interstate commerce because it provides 'a direct commercial advantage to local business' " (Appellant's opening brief at 10).

The Supreme Court reviewed the discrimination prong of the interstate commerce test in *Boston Stock Exchange* v. *State Tax Commission,* 429 U.S. 318, 329 (1977):

> No State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." [*Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 457 (1959). Other citations omitted.] The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects. *Dean Milk Co.* v. *Madison,* 340 U.S. 349, 356 (1951).

According to a December 11, 1984, memorandum from the Superintondent to the Area Director, the businesses affected by the tax are Mountain States Telephone and Telegraph Co., Continental Divide Electric Co-op, Inc., El Paso Natural Gas Co., Inc., Westorn Union, and appellant. These are all companies clearly involved in interstate commerce. Appellant's contention that these companies are not owned by tribal members is probably also correct.

However, appellant reasons that the tax on itself and these other companies provides a direct commercial advantage to local business. It is difficult to conceive that intra-Pueblo retail business is in competition with the interstate businesses affected by the tax, so that local businesses would receive a commercial advantage from the operation of the tax. Appellant makes no showing that any intra-Pueblo retail railroad is commercially advantaged by the tax. Appellant has failed to prove its contention that the tax discriminates against interstate commerce within the meaning of the third prong of the *Complete Auto Transit* test.[9]

Finally, appellant argues that the tax is not fairly related to the services provided by the Pueblo. Thus, appellant contends: "A 'just share' of the tax burden is precisely what is missing in this tax ordinance. [Appellant] * * * is bearing the brunt of the leasehold tax while the beneficiaries of the governmental services of the Tribe, that is the members of the Tribe, escape taxation altogether" (Appellant's opening brief at 11).

The "fairly related" aspect of the Commerce Clause test was discussed in *Commonwealth Edison, supra* at 625-26:

> The relevant inquiry under the fourth prong of the *Complete Auto Transit* test is not * * * the *amount* of the tax or the *value* of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities. Rather, the test is closely connected to the first prong of the *Complete Auto Transit* test. Under this threshold test, the interstate business must have a substantial nexus witb the State before *any* tax may be levied on it. * * * Beyond that threshold requirement the fourth prong of the *Complete Auto Transit* test imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made te bear a "just share of state tax burden," *Western Live Stock* v. *Bureau of Revenue*, 303 U.S., at 254. * * * As the Court explained in *Wisconsin* v. *J. C Penney Co., supra*, at 446 (italics added), "tbe incidence of tbe tax *as well as its measure* [must be] tied to the earnings which the State . . . has made possible, insofar as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes." [Citations and footnotes omittod; italics in original.]

The Court concluded at page 627 that "[w]hen a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of 'police and fire protection, the benefit of a trained work force, and "the advantages of a civilized society." ' *Exxon Corp.* v. *Wisconsin Department of Revenue*, 447 U.S., at 228, quoting *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S., at 445."[10]

The tax at issue here is assessed in proportion to appellant's presence on the Pueblo. Appellant's objections to the tax relate to its level and the fact that it is allegedly levied only against non-tribal members, who do not have access to the legislative process within the

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[9] There is also a reasonable basis for differentiating between retail and non-retail leaseholds, in that a retail enterprise may more easily be subjected to other forms of taxation, such as a sales or gross receipts tax, than can a non-retail business.

[10] The Court also noted that "states have considerable latitude in imposing general revenue taxes" under both the Due Process Clause and the Commerce Clause. 453 U.S. at 622-24. The tax at issue here is a general revenue tax. *See also Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 522-23 (1937):

"A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government–that it exists primarily to provide for the common good. A corporation cannot object te the use of the taxes which it pays for the maintenance of schools because it has no children. This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys te be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him." (Citations omitted.)

Pueblo. In regard to appellant's second point, it is in no different situation tban any out-of-state taxpayer subjected to a state tax. The out-of-state status of a taxpayer does not, *a fortiori*, render a tax confiscatory, as appellant suggests.

As to the amount of the tax, the Supreme Court further stated in *Commonwealth Edison Co., supra* at 627-28:

> The simple fact is that the appropriate level or rate of taxation is essentially a matter of legislative, and not judicial, resolution. * * * In essence, appellants ask this Court to prescribe a test for the validity of state taxes that would require state and federal courts, as a matter of federal constitutional law, to calculate acceptable rates or levels of taxation of activities that are conceded to be legitimate suhjects of taxation. This we decline to do.
>
> In the first place, it is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxation, and yet be reasonably capable of application in a wide variety of individual cases. But even apart from the difficulty of the judicial undertaking, the nature of the factfinding and judgment that would be required of the courts merely reinforces the conclusion that questions about the appropriate level of state taxes must be resolved through the political process. Under our federal system, the determination is to be made by state legislatures in the first instance and, if necessary, by Congress, when particular state taxes are thought te he contrary te federal interests.

Thus, the level of the tax was a question for determination through the Pueblo's legislative process. The fact that appellant does not believe that the tax level is fairly related to the services it receives from the Pueblo does not invalidate the tax under the forth prong of the *Complete Auto Transit* test.[11]

Accordingly, the Board holds that the Pueblo's tax does not violate the Commerce Clause.[12]

Appellant next argues that the tax violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This amendment states in pertinent part: "[N]or shall any State * * * deny te any person witbin its jurisdiction the equal protection of the laws." Appellant contends that "[t]he tax is imposed only on leaseholds belonging to non-members of the Tribe. By basing the tax on the ethnicity of the owner of the property, the Tribe is making an unreasonable classification which is not rationally related to a legitimate tribal purpose" (Appellant's opening brief at 13).

[6] Appellant's argument overlooks the fact that Federal constitutional proscriptions applicable te the Federal and state governments do not restrict the exercise of governmental powers by an Indian tribe except to the extent they are explicitly endorsed by a tribal constitution or imposed by Congress. *See e.g., Trans-Canada*

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[11] In contrast, the Pueblo contends that the services required by appellant's presence on tbe Pueblo are very costly.

[12] Appellant concludes its Commerce Clause discussion with the statement that the Pueblo's tax impermissibly subjects it to multiple taxation by the Pueblo and the State of New Mexico. Appellant does not allege that it is being taxed by both jurisdictions. The Board has found that appellant has the requisite nexus with tbe Pueblo to be subjected to a tax by it. The Board is not the proper forum for challenging any tax that is or may be levied against appellant by the State of New Mexico because of appellant's presence on the Pueblo.

Enterprises, Ltd. v. *Muckleshoot Indian Tribe,* 634 F.2d 474 (9th Cir. 1980).

[7] The equal protection provisions of the Fifth and Fourteenth Amendments to the United States Constitution have been applied to Indian tribes through the Indian Civil Rights Act: "No Indian tribe in exercising powers of self-government shall * * * deny to any person within its jurisdiction the equal protection of its laws." 25 U.S.C. § 1302(8). The determination of what constitutes a violation of the equal protection clause of the Indian Civil Rights Act is, however, a question for decision in trihal court. *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978). Furthermore, the meaning of equal protection may be modified in light of basic tribal cultural interests. *Groundhog* v. *Kceler,* 442 F.2d 674 (10 Cir. 1971); *McCurdy* v. *Steele,* 353 F. Supp. 629 (D. Utah 1973). This Board is, therefore, not the proper forum in which to challenge a tribal ordinance as being violative of equal protection of the laws.[13]

Finally appellant challenges the tribal ordinance under the 4-R Act, 49 U.S.C. § 11503. This section states in pertinent part:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (1) assess rail transportation property at a value that has a higher ratio te the true market value of the rail transpertation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

Initially, appellant makes no attempt to show that Indian tribes are subject to the restrictions imposed on states under the 4-R Act.[14] However, assuming *arguendo* that the Pueblo is subject to this statute, there is no basis for appellant's claim that it is being taxed at a higher ratio than other commercial enterprises. As was previously shown, four companies besides appellant are subject to this tax legislation: Mountain States Telephone and Telegraph Co., Continental Divide Electric Co-op, Inc., El Paso Natural Gas Co., Inc., and Western Union. These are the enterprises against which the ratio of the tax must be judged. Appellant has made no showing whatsoever that it is being taxed at a higher ratio to the true market value of its rail transportation property (assuming *arguendo,* again, that a leasehold qualifies as such property) than are the other companies subject to the tax. Accordingly, the Board holds that the Pueblo's tax does not violate the 4-R Act.

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[13] The Board notes, however, that appellant's characterization of tbe tax as based on the ethnicity of the owner of the property is incorrect. The tax is clearly based on the type of commercial enterprise. There is also no showing that all retail enterprises on the Pueblo are owned by Indians.

[14] *See* n.8, *supra.*

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 15, 1985, decision of the Deputy Albuquerque Area Director approving appellant's tax ordinance is affirmed.

JERRY MUSKRAT
Administrative Judge

I CONCUR:

FRANKLIN D. ARNESS
Alternate Member

A. D. ROSSI CORP.

IBCA-1923 Decided *February 27, 1986*

Contract No. CX1600-3-0064, National Park Service.

Sustained.

Contracts: Construction and Operation: Changes and Extras--Contracts: Disputes and Remedies: Equitable Adjustments--Rules of Practice: Appeals: Burden of Proof

Under a dam rehabilitation contract containing unit prices for construction items, where the Government claims it is entitled to a downward equitable adjustment on change order work but fails to offer any persuasive evidence in support of the revised unit prices contended for, the Board finds that the Government has failed to sustain its burden of proof.

APPEARANCES: Allen F. Gear, Gear and Davis, Inc., Attorneys at Law, Burlington, Vermont, for Appellant; Mark Barash, Department Counsel, Newton Corner, Massachusetts, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal from the final decision of the contracting officer denying the claim of A. D. Rossi Corp. for contract unit prices for additional structure excavation and for additional concrete work. Neither party requested a hearing and this appeal is submitted for decision on the record.

Background

Contract No. CX1600-3-0064 in the original amount of $102,996.80 was awarded by the National Park Service to the A. D. Rossi Corp. on September 13, 1983, for rehabilitation of the Blow-Me-Down Pond Dam, Saint Gaudens National Historical Site, Cornish, New Hampshire. The contract contained a number of unit-priced items of construction, including item No. 3 for 10 cubic yards of structure excavation at $25 per cubic yard and item No. 7 for 115 cubic yards of concrete work at $290 per cubic yard (Appeal File, Tab No. 1).

On July 27, 1984, Philip Koury, National Park Service engineer, Andy Stine, project engineer, Andy Pinakoski, architect/engineer, and Michael Quaid, project manager, met on the site to discuss a change order for installation of a concrete footing slab beneath the downstream face of the dam, in order to stabilize the dam and prevent future undermining (Appeal File, Tab No. 12).

Affidavits submitted by Michael Quaid and Philip Koury set forth divergent recollections of the discussions that took place. Mr. Quaid recalled that he was told by Mr. Koury that the change order work would be at the contract unit prices and that there was no discussion of the total amount for the change order because the quantities of excavation and concrete had not been determined. Mr. Koury recalled no discussion of specific price or payment and stated that Mr. Quaid was simply notified of the extent of the new work to be performed.

The changes discussed on July 27, 1984, were incorporated into Change Order No. 5, effective September 18, 1984, which directed A. D. Rossi Corp. to furnish all materials, equipment, labor, and related incidentals necessary to install 68 cubic yards of concrete for a footing slab beneath the downstream face of the dam. The total contract price was increased by $10,000 as a result of the change. Unlike the previous four change orders which were priced at the contract unit prices or at prices agreed upon in advance, Change Order No. 5 contained the following:

> In accepting this Change Order #5, the Contractor acknowledges that he has no unsatisfied claim against the Government arising out of or resulting from this order, and the Contractor hereby releases and discharges the Governnment from any and all claims or demands whatsoever arising out of or resulting from this Order.

Change Order No. 5 was signed by Michael H. Quaid, project manager, and Sandra E. Ridley, contracting officer, on September 28, 1984 (Appeal File, Tab No. 14).

At the contract unit price of $25 per cubic yard for structure excavation and $290 per cubic yard for concrete work, placement of the 68 cubic yards of concrete in the footing slab would have been priced at $21,420 rather than $10,000 as provided by the change order. A claim for the completed work was submitted on Augnst 10, 1984, using the contract unit prices as a basis for the calculation. The difference between the contract unit prices and the amount allowed by the change order, $11,420, is the amount of the claim.

Decision

The Government has taken the position that none of the Government employees at the meeting on July 27, 1984, had actual or apparent authority to commit the Government to pay the contract unit prices for the additional work which was eventually set forth in

Change Order No. 5. Further, the Government argues that acceptance of the change order hy appellant constitutes an accord precluding the successful assertion of a suhsequent claim for any additional amount arising out of the change. Unfortunately for the Government's arguments, the sword of authority has two edges and it cuts both ways. If it is true that none of the Government employees had authority to bind the Government to pay contract unit prices for the additional work, it is equally true that Michael Quaid had no authority to release the claim on behalf of A. D. Rossi Corp.

According to his affidavit, Michael Quaid was president of Quicksilver Contracting, Inc., a subcontractor of A. D. Rossi Corp., and there is no evidence of record that he ever had authority to represent the A. D. Rossi Corp. to the extent of releasing its claim against the Government. The Board finds that A. D. Rossi's claim was not released and is properly before the Board for decision.

The Government further asserts that appellant has the burden of proving that payment at the original contract unit price was authorized. This assertion ignores the fact that it is the Government which deviated from the course of dealing in the first four change orders where the contract unit prices were used in the change orders or the price was agreed upon in advance for the additional work ordered. Where, as here, the Government is the proponent of a downward equitable adjustment, it has the burden of proving the extent of any downward departure from the unit price established by the contract for the items comprising the extra work. *Victory Construction Co.* v. *United States*, 206 Ct. Cl. 274 (1975).

To support the conclusion that $10,000 was a reasonable payment for the extra concrete work, the Government submitted cost figures compiled by a Government inspector showing costs of $9,474.94 for the 68 extra cubic yards of concrete work. This total did not include payroll taxes, cost of precutting rebar in Burlington, form rental, and framing material cost nor did it include overhead and profit. The calculations by which the Government derived the figure of $10,000 from the foregoing are not a matter of record.

The issue of whether the additional 68 cubic yards of concrete work were accomplished at a different and lower cost, as the Government contends, could have been resolved easily had the Government submitted cost figures for the original 115 cubic yards of concrete work in the basic contract. Without such a basis for comparison, the record will not support a finding that the change order work was accomplished at a lesser unit cost than the original work.

Accordingly, the Board finds that the Government is not entitled to a downward equitable adjustment from the contract unit prices for the additional concrete work in Change Order No. 5. Appellant is entitled to the contract unit prices for the change order work, a total of $21,420, less the amount of $10,000 authorized by and paid pursuant to the change order, leaving a balance due of $11,420 plus interest in accordance with the Contract Disputes Act of 1978.

G. HERBERT PACKWOOD
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

SUN OIL CO. ~~ET AL.~~

91 IBLA 1 Decided *February 28, 1986*

Appeals from a decision by Administrative Law Judge Jobn R. Rampton, Jr., sustaining the allocation formula prepared by Geological Survey to allocate production of unitized substances and fixing interest. OCS-G 2087 and OCS-G 2088.

Affirmed as modified.

1. Oil and Gas Leases: Unit and Cooperative Agreements--Outer Continental Sbelf Lands Act: Oil and Gas Leases--Outer Continental Sbelf Lands Act: Unit Plans

Where an appellant criticizes a division of a reservoir delineated by Geological Survey on the Outer Continental Shelf on the grounds that various errors resulted in inaccurate allocation of original gas-in-place, and the evidence fails to establish that any substantial error occurred, the reservoir division will be affirmed.

2. Oil and Gas Leases: Unit and Cooperative Agreements--Onter Continental Sbelf Lands Act: Oil and Gas Leases--Onter Continental Shelf Lands Act: Unit Plans

The law of capture, which provides that the owner of a tract acquires title to the oil and gas which he produces from wells drilled thereon, even though part of such oil or gas migrated from adjoining lands, is fully applicable on the Outer Continental Shelf in the absence of a unitization agreement. Where, however, unitization has been ordered, allocation of production to competing tracts should normally be made on the basis of net-acre feet.

3. Oil and Gas Leases: Drainage--Oil and Gas Leases: Unit and Cooperative Agreements--Outer Continental Shelf Lands Act: Oil and Gas Leases--Outer Continental Shelf Lands Act: Unit Plans

Where Geological Survey decides to deviate from straight net-acre feet allocation of production from a common reserve, a 6-month period prior to formation of a unit agreement (during which all wells in a competitive reservoir were producing and during which the parties were negotiating the terms of the unit agreement) will not be found to be an unrepresentative period for purposes of calculating the production factor in an allocation formula.

4. Accounts: Payments--Oil and Gas Leases: Unit and Cooperative Agreements--Outer Continental Shelf Lands Act: Oil and Gas Leases--Outer Continental Shelf Lands Act: State Laws--Outer Continental Shelf Lands Act: Unit Plans--Payments: Generally

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the suhsoil and seabed of the Outer Continental Shelf which would be within the area of the stato if its boundaries were extended seaward to the outer margin of the Outor Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

APPEARANCES: Theodore L. Garrett, Esq., and William P. Skinner, Esq., Washington, D.C., for Petro-Lewis Corp.; Joseph C. Bell, Esq., and Mary Anne Sullivan, Esq., Washington, D.C., for Shell Offshore, Inc.; Rohert Shaw, Esq., and John T. McMahon, Esq., New Orleans, Louisiana, for Shell Offshore, Inc.; Dana Contratto, Esq., Philip A. Fleming, Esq., Thomas R. Lundquist, Esq., and Diane K. Rogell, Esq., Washington, D.C., for Clark Oil Producing Co. and Diamond Shamrock Exploration Co.; L. Poe Legette, Esq., Washington, D.C., for Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

These appeals focus upon a gas reservoir located in the Gulf of Mexico, Vermilion Blocks 320 and 321. Sun Oil Co. (Sun) is the lessee-operator of oil and gas lease OCS-G 2087 in Block 320 overlying a reservoir identified by it as the PL-6 No. 15 Sand Series reservoir. Shell Oil Co. (Shell) is the lessee-operator of oil and gas lease OCS-G 2088 in Block 321 overlying the reservoir identified by it as the P Sand Series Reservoir A. On November 10, 1975, the Acting Conservation Manager, Gulf of Mexico Outer Continental Shelf (OCS) Region, Geological Survey (Survey), determined that a single competitive reservoir existed, required unitization, and ordered the parties to submit a proposed unit plan within 6 months.

Although the Sun group appealed this decision to the Director, Survey, the parties continued to negotiate a unit agreement. These negotiations were unsuccessful, however, causing the Conservation Manager on February 3, 1977, to propose a unit agreement to the parties. After some modifications suggested by the parties, the Conservation Manager directed the parties to sign the unit agreement, as modified, within 30 days and to submit a unit operating agreement within this same period.[1] On May 9, 1977, the parties executed the

[1] Letter to Shell and Sun, dated Mar. 23, 1977, from the Conservation Manager. A second appeal to the Director by Sun was filed in response to this order.

modified unit agreement (although the Sun group did so under protest) and submitted a unit operating agreement.

By letter dated April 21, 1977, Sun requested the Director, Survey, to stay the Conservation Manager's November 10, 1975, and March 23, 1977, orders requiring unitization. Though this request was denied on April 29, 1977, that denial was rescinded and the stay was granted on May 10, 1977. By letter dated May 17, 1977, Shell informed the Director, Survey, of its opposition to his grant of a stay. On June 1, 1977, Shell submitted a motion to vacate the stay. Shell suggests that it was informed at that time that a decision by the Director might be expected within 2 months after completion of briefing. Based on this information Shell asserts that it decided not to appeal the granting of the stay.[2]

In any event, the Director affirmed the decision of the Conservation Manager on February 7, 1979. Sun thereupon pursued an appeal to this Board. Contemporaneously therewith, Sun filed a motion for reconsideration with the Director, Survey. In the meantime, on February 23, 1979, Shell had filed with the Director a motion seeking clarification of the decision. Shell subsequently filed a motion to dissolve the stay and compel operation under the unit agreement. In light of these motions, the Solicitor's Office requested that this Board remand the case to the Director, Survey, so that he might rule on these questions. In a decision styled *Sun Oil Co.*, 42 IBLA 254 (1979) (*Sun Oil I*), this Board granted the Solicitor's motion and remanded the matter to the Director, Survey. At the same time, the Board expressly ordered the stay be continued "unless and until the Director provides otherwise upon his assumption of jurisdiction of this case on remand." *Id.* at 259.

On June 5, 1981, the Director once again affirmed the decision of the Conservation Manager. The Directer found the evidence established that the reservoir was competitive and that unitization would prevent the drilling of unnecessary wells. He also agreed with the allocation formula adopted by the Conservation Manager, holding it was a reasonable synthesis of two factors, viz., the amount of gas-in-place under Sun and Shell's leases and the productivity of their respective wells. The Director did modify his February 7, 1979, decision, changing the effective date of unitization from November 1 to November 14, 1975. This, in effect, altered the date of unitization from the date of issuance of the original unitization order to the date Sun received the order. Sun duly filed an appeal from the Director's June 5, 1981, determination.[3]

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[2] *See* Motion to Dissolve Stay & to Compel Operation under the Unit Agreement, dated Apr. 20, 1979, at 15 n.15.

[3] Sun appealed on behalf of itself and other working interest owners of lease OCS-G 2087. These co-owners are: Anadarko Production Co. (Anadarko), Diamond Shamrock Corp. (Diamond Shamrock), Northern Michigan Exploration Co. (Northern Michigan), Elf Aquitaine Oil & Gas Corp. (Elf Aquitaine), & Petro-Lewis Corp. (Petro-Lewis). Petro-Lewis had obtained its interest from Clark Oil Producing Co. (Clark) in 1979, subject to Clark's right to participate in the on-going litigation to protect its pre-sale interest.

In *Sun Oil Co.*, 67 IBLA 80 (1982) (*Sun Oil II*), the Board held that compulsory unitization of the P Sands reservoir[4] was in the interest of conservation. As noted above, allocation of production from this reservoir was established by Survey using a formula based on both reserves and demonstrated production. Reserves were determined by isopach maps of the reservoir. Survey concluded that 81.1 percent of gas-in-place underlay Shell's lease and the remaining 18.9 percent underlay Sun's lease. Demonstrated production during the period from January 1 through June 30, 1976, was considered by Survey as representative. In these 6 months, Sun's share of production was 54.9 percent and Shell's 45.1 percent. Noting that during this period Shell had five wells in production and Sun three, the Board held these actual production rates to be so divergent from Survey's determination of the division of the reservoir volume that a hearing was appropriate to allow Sun an opportunity to establish by relevant evidence that the distribution of the gas-in-place was different from that determined by Survey. We assigned to Sun the burden of showing by persuasive evidence that the allocated reservoir shares were incorrect. *Id.* at 85. Additionally, the Board stated that it was unable to ascertain the basis for the 36 percent "weighting" factor utilized by Survey and noted that the parties "may wish to present evidence concerning whether or not this factor is arbitrary." *Id.* at 86. Finally, the Board ruled that the effectiveness of the unitization orders would be stayed until the matter was finally resolved within the Department.

On October 1, 1982, Shell filed a motion for clarification of the Board's decision in *Sun Oil II*. This motion sought express recognition that Sun was liable for interest on the value of Shell's portion of the gas that Sun had produced from the P Sands. This request was subsequently opposed by Sun. By order dated December 1, 1982, the Board denied the motion to clarify its decision, noting that "since the matter has been referred to the Hearings Division for appointment of an administrative law judge, Shell's request should be presented to him for initial consideration."

In order to facilitate the decisionmaking process before the administrative law judge, the parties agreed to submit written direct and reply testimony prior to the actual hearing date. Thus, the actual hearing was limited to cross-examination of the various witnesses on their written testimony and redirect examination and recross-examination, as necessary. Pursuant te this arrangement, Sun, Shell, and the Minerals Management Service (MMS)[5] submitted extensive written testimony. Two days of hearings were held on April 19 and 20, 1982. More written testimony was exchanged and 2 additional days of hearings were held on June 15 and 16, 1982.

[4] We use the term "P Sands" for the sake of simplicity to denote the common gas-bearing sands at issue here. *See Sun Oil II, supra* at 82 n.3 (1982).

[5] The responsibilities of the Conservation Division, Geological Survey, were transferred to MMS hy Secretarial Order No. 3071, 47 FR 4751 (Feb. 2, 1982). For purposes of convenience, the terms "Survey," "Geological Survey," and "MMS" will be used interchangeably in this opinion.

By decision dated July 24, 1984, Administrative Law Judge John R. Rampton, Jr., held that Sun had not shown by persuasive evidence that the original gas-in-place had been incorrectly apportioned to each lease. The weighting factor used by Survey in its allocation formula was sustained by Judge Rampton, and Shell was awarded simple interest at 7 percent for the value of gas produced by Sun in excess of its allocated share. Appeals from this decision were filed by all parties.[6]

[1] Sun's basic criticism of the gas-in-place division was that Survey failed to allocate a sufficient percentage of the reservoir to its tract. Sun contended, in essence, that numerous individual errors occurred which cumulatively resulted in undervaluing the net-acre feet of pay allocated to its lease and overvaluing the amount allocated to Shell.

Two of the alleged errors occurred in mapping the northeast portion of the reservoir. First, Sun argued that the isopach contours for the total interval of P Sands should have been drawn with a sharp turn to the northwest, with the effect that the gas-in-place allocated to the areas to the east of its A-5, A-10, and A-16 wells would be substantially increased. This was referred to by Shell as the "hairpin turn" argument. Sun also argued that additional land which should have been included in the reservoir in a northeasterly direction was not because Survey erroneously assumed that a fault existed in that portion of the reservoir. Sun further argued that additional land should have been included in the southeast. The addition of these areas resulted in a configuration which resembled and was referred to as the "Horn of Africa."

In addition, Sun contended that Survey showed a greater reservoir thickness underlying the Shell lease than was warranted because Survey had failed to consider the effect of a "bed boundary" error and had failed to normalize two of Shell's logs to account for anisotropic effects. Finally, Sun contended that Survey's isopach was clearly erroneous because Survey failed to account for the 130 bcf of gas which Sun contended was shown to exist in the reservoir.

Despite these numerous criticisms, Sun did not present an alternative division of reserves. Rather, the thrust of its argument was that the manifest difficulties in correctly delineating the reservoir

[6] In addition to the co-owners identified in n.3 comprising the Sun group, Clark and Shell have also appealed. Subsequent to the filing of these appeals, a number of the parties entered into a settlement agreement, dated Nov. 15, 1984, stating that their interests in all unit operations would be in accordance with the terms of the unit agreement and joint operating agreement in disputo, except to the extent that these agreements were modified therein. As a result of this settlement, the following parties partially withdrew their appeals and requested that their appeals be dismissed insofar as they relate to each other: Shell Offshore, Inc. (successor to Shell Oil Co.), Sun Exploration and Production Co., Elf-Aquitaine, Anadarko, Northern Michigan, and MMS. Shell Offshore, Inc., Diamond Shamrock, Clark, Petro-Lewis, and MMS were identified as parties who had not settled as to each other and whose pending appeals would go forward against each other. Although it signed a stipulation announcing the settlement agreement, MMS noted that it was not a party to the Nov. 15, 1984, settlement and that, with respect to MMS, nothing in that agreement amended the unit agreement and joint operating agreement in dispute. Although Sun is no longer an appellant, we will, for the sake of convenience, continue to use the term "Sun" to describe those working interest owners in lease OCS-G 2087 whose appeal is still pending.

militated against ascribing much weight to net-acre feet in an allocation formula.

Thus, Sun's Reservoir Engineering Manager for Offshore Development, W. Bartel Morgan, after noting that the Conservation Manager's estimate of acre feet was "far off," stated:

> There are not enough data available to determine with any confidence where the error in the Conservation Manager's estimate lies, or how it can fairly be corrected to arrive at a more accurate estimate of the relative volume of gas underlying each lease. Accordingly, *Sun has not attempted to prepare a new estimate of relative acre-feet.* The point of my analysis is simply to show that it is extraordinarily difficult to make an accurate estimate for this reservoir of acre-feet in relation to lease boundary lines. Because it is so difficult to estimate acre-feet in this reservoir, less weight should be given to acre-feet in the allocation formula in order to reduce the probability of error. [Italics added.]

Sun Direct Testimony, Morgan at 17.

For its part, Shell agreed with Survey's mapping of the reservoir with one major difference. It agreed with Sun that the total volume of gas in place was approximately 130 bcf. Unlike Sun, however, it did not believe that adjustments should be made in the northeast of the reservoir. Rather, it argued that Survey had erroneously excluded from the reservoir isopachs an area underneath its lease which Shell believed, on the basis of seismic data, originally contained gas-bearing P Sands.

MMS maintained its division of the reservoir was clearly justified by available data.[7] It rejected Sun's hairpin turn and Horn of Africa arguments for increased allocation of reservoir volume in the northeast and southeast as being inconsistent with discernible trends and requiring an unjustified extrapolation beyond the control points. MMS also rejected Sun's argument that either a bed boundary error or a failure to normalize Shell's logs resulted in an over-allocation of net pay to Shell. It similarly rejected Shell's contention that its seismic data indicated original gas-in-place in the southwest area of the reservoir, noting that such area could only have been gas-bearing if it were assumed to have been separated from the main reservoir by a sealing fault which gave way after the seismic data was obtained but prior to the measurement of well-hole pressure. Inasmuch as the initial measurement of well-hole pressure showed pressure communication throughout the reservoir, there was no possibility that the area could then contain gas-bearing sands because the area was lower structurally than the observed gas-water contact which would define the down-dip limit of the reservoir. Finally, contrary to the view expressed both by Shell and Sun that the total gas-in-place aggregated approximately 130 bcf, MMS argued that total gas-in-place aggregated approximately 107 bcf, an amount which comported with its most recent isopach.[8]

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[7] While Survey's original division of reserves was 81.1/18.9, its most recent analysis results in a 79.6/20.4 division. *See* MMS Direct Testimony, Introduction and Conclusions at 2.

[8] Survey had originally estimated total gas-in-place to be approximately 86.6 bcf. Over time, the production history of the reservoir showed this estimate to be conservative. Survey's original estimate was ultimately revised upward to

Continued

The Board had expressly noted in its referral of this case to the Hearings Division that Sun hore the hurden of showing that the Survey division of the reservoir was incorrect. While Sun raised numerous questions as to the correctness or reliability of the Survey division, it also utilized the Survey estimates in its suggestions for an allocation formula, a matter examined *infra*. Thus, inferentially at least, Sun acquiesced in the reservoir division adopted by Survey.[9]

While Sun did not propose an alternate division, it did attack certain bases for Survey's determination. Thus, it premises a significant portion of its argument for a revised production allocation formula on what it perceives to be the unreliahility of reservoir mapping techniques. It is, therefore, appropriate that we briefly examine some of Sun's substantive contentions on this issue.

It is generally recognized that reservoir mapping is not an exact science. But neither can it be gainsaid that substantial amounts of capital are ventured regularly based upon such estimates. The mere fact that such techniques are incapable of absolute precision or that experts may differ over the proper interpretation of data cannot, ipso facto, serve to invalidate reservoir mapping as a basis for production allocation. Moreover, it is abundantly clear that allocation of production on the basis of net-acre feet as ascertained from such mapping is the most commonly used approach for the OCS.

The evidence establishes that 82 out of 100 offshore units in existence allocate production on the basis of net-acre feet and 17 allocate on the basis of productive surface acres. Leaving aside for the present the question whether all of these units serve as a valid precedent for allocation where there are competing lessees, the fact remains that such allocation formulas implicitly accept the validity of reserve mapping. It is obvious that, while there may well be accuracy limitations in determining reservoir distribution, industry and other interested parties have sufficient confidence in the process to allow it to be the basis for determining their pecuniary remuneration. Although we do not share Sun's rejection of the utility of using reserve calculations as a basis for production allocation, we recognize that it is, of course, possible in any specific case to make errors which bring into question the ultimate result. We will, therefore, briefly address the specific criticisms leveled by Sun as to Survey's determination of reserves.

107.1 bcf. A comparison of the original net gas isopach which served as the basis for the proposed unit agreement (MMS Exh. 3) with its most recent net gas isopach, drawn in light of Survey's new volume estimates (MMS Exh. 10), would show that, under Survey's analysis, even though the estimates of the total gas-in-place have risen suhstantially the relative division of net pay between Sun and Shell has remained reasonahly constant.

[9] It is true that testimony hy Sam Park III, subsequent to that of Morgan, sought to assign 35.6 percent of the reservoir to Sun, as depicted in an updated isopach map (Sun Reply Testimony, Park at 11; Sun Exh. 26). Shell's Geological Engineering Consultant James A. Hartman testified, however, that this new isopach depicted a reservoir too small to accommodate the volume of original gas-in-place Sun contends existed, since its new isopach could accommodate only 92 bcf, far less than the 130 bcf Sun estimated to be present (Shell Rehuttal Testimony, Hartman at 8-9). No substantial response te Hartman's criticism of this new isopach was offered by Sun.

We will first turn to the question whether Survey inadequately credited Sun for net pay areas in Sun's portion of the reservoir. This involves consideration of hoth the hairpin turn and Horn of Africa arguments, though, of the two, the hairpin turn is far more important in increasing reservoir volumes underneath Sun's lease.[10]

The hairpin turn argument is predicated on Sun's conclusion that reservoir thickness increased in the area immediately to the east of the Sun A-10, A-5, and A-16 wells. Sun's contention is graphically shown on Sun Exh. 23, its total sand interval map. Sun derived its total net gas isopach maps (Sun Exhs. 25 and 26) by superimposing information from a percentage net sand map (Sun Exh. 24) on its total sand interval map. Sun obtained a "conservative" total net pay reading of 150 feet for the area on the east side of the reservoir.[11]

Both Shell and MMS attack this analysis as being a totally unjustified extrapolation beyond any control points, contrary to observed trends in the reservoir. Thus, Shell notes that proceeding from west to east from the Shell A-10 well, to the Shell A-22 well, to the No. 1 well (jointly drilled by Shell and Sun near the lease boundary) to the Sun A-5 well, the net thickness of reservoir-quality sand increases from 105 feet at the A-10 well to 220 feet at the A-22 well and then decreases at the No. 1 well to 143 feet and further diminishes to 77 feet at the A-5 well. *See* Shell Exh. 25. An even greater relative decline in total interval sand is observable between the No. 1 well and the A-5 well (declining from 255 to 125 feet). *See* Shell Exh. 26. A similar thinning trend is discernible between the Shell A-22 well and the Sun A-10 and A-16 wells. Shell argues that, despite this observed trend, Sun postulates that both the total interval P Sand and net pay increase dramatically as one proceeds east from the A-5 well. Shell urges the Board to reject such extrapolations as unsupported. MMS similarly finds Sun's analysis unsupported by any existing data (MMS Direct Testimony, Compton and Hrabec at 4).

Sun replies that there is evidence in support of its extrapolation because its three wells, A-10, A-5, and A-16 (which lie in a general northsouth line) show net sand increasing from south to north. Thus, A-16 shows 76 feet, A-5 shows 101 feet, and A-10 shows 132 feet of net sand, with the total sand interval for these wells being 306 feet for the A-16, declining to 125 feet for the A-5, and then increasing to 186 feet for the A-10. Sun suggests this trend justifies the hairpin turn in the reservoir thickness.

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[10] Thus, even were Sun shown to be correct in its assertion that additional lands should be included in the reservoir's exterior beundaries, the total increase in reserves attributable to Sun's lease would be approximately 0.8 percent. *See* Tr. 488. Indeed, since this calculation is based on the total increase of surface productive acres, as estimated by Sun as existing under its lease, multiplied by average thickness for the added areas, the 0.8 per percent also includes an additional extension of the reservoir in the southeast direction where a discernible extension appears in Sun's isopach (Sun Exh. 26).

[11] Paradoxically, Sun's "conservative" interpretation (Sun Exh. 26), while showing a decline in net pay on the northeast portion of the reservoir over that shown on its more "liberal" interpretation (Sun Exh. 25), not only substantially reduced allocated net pay on the Shell side of the reservoir, hut actually *increased* net pay in the southeast portion of the reservoir underlying Sun's lease.

While the available data is not absolutely inconsistent with Sun's net gas isopach, we think it highly unlikely that Sun's interpretation correctly depicts reserve thickness. Thus, MMS Exh. 10, drawing on the same data, describes a much less complex reservoir which results in an isopach that does not depend on radical trend reversals outside of the area of well control and actually accounts for more gas-in-place (107 bcf) than does Sun's isopach (Sun Exh. 26, 92 bcf). This is particularly telling as Sun contends the reservoir contains a total of 130 bcf.

As recognized above, all extrapolations are based on inference outside points of control and complete certainty can never be achieved. The validity of any extrapolation is, therefore, dependent upon its consistency with both known facts and observed trends. Rather than attempting to depict the most likely distribution given the various facts known about the reservoir, it seems relatively clear that Sun's net gas isopach was drawn to maximize the amount of gas attributable to Sun's lease. The mere fact that Sun's isopach did not actually contradict any of the data points scarcely means that it represents a more likely depiction of reserve thickness. To the extent, therefore, that Sun's analysis of reserve thickness is dependent upon the inferred existence of a hairpin turn, it is correctly rejected.[12]

Regarding the Horn of Africa argument, we note an apparent disagreement between MMS and Sun on interpretation of data on the northeast edge of the reservoir. MMS argues that a fault terminates the reservoir along that boundary, while Sun contends that this fault does not exist and the reservoir's boundary is the known salt diapir. Sun's interpretation moves the northeast boundary further northeast. A similar expansion is also discernible toward the southeast. But, even were we to assume Sun was correct in both reservoir boundary placements, the evidence is undisputed that the increase in productive surface acreage is only 4.4 acres and the increase in net-acre feet is only 330. *See* Tr. 487-88. Thus, if it were assumed that Sun was correct in its assertions, the total change in the reservoir would be less than 1 percent. So small a margin of error can hardly be said to undermine the reliability of isopach mapping.

Sun also alleges Survey erred in calculating the net sands it allocated to Shell's lease. Its criticism on this point is directed to the failure of Survey to take into account a "bed boundary" error and to "normalize" logs on two of Shell's wells (A-3 and A-9). Both of these

[12] Sun's only other support for its hairpin turn analysis is graphically depicted on Sun Exh. 22. Sun, relying on the fact that its portion of the reservoir is up-dip, points out that the Sun A-10 showed 132 feet of net gas sand and 15 feet of net water. Sun suggests that further east, the P Sand would eventually rise above the gas-water contact so that it could be presumed that a total of 147 feet of net gas sand would exist. The obvious fallacy of this argument is that it is premised on an assumption that the total net-pay thickness is constant. There is, however, no support in the record for such an assumption and, indeed, Sun's own analysis is premised on an *increase* in net pay as one moves east of the Sun A-10 well.

problems arise, Sun asserts, because of the high angle at which Shell's wells penetrated the reservoir.

The "bed boundary" error relates to the fact that induction logs have a depth of investigation of approximately 3 feet, meaning that they "see" a distance of 3 feet beyond the well bore in all directions. Thus, in theory, a high angle well penetrating a reservoir might "see" and accordingly register the gas-bearing sands 3 feet before it actually penetrated those sands and for an additional 3 feet after leaving the sands. *See* Sun Exh. 40. The problem with Sun's argument resides in the fact that Survey determined its "net pay picks," *i.e.*, determinations of the net gas-bearing portion of the sands, on the basis of three logs. In addition to the induction log, Survey used spontaneous potential (SP) logs and short-normal logs. The short-normal log has a depth of investigation of only 16 inches while the SP log has virtually no depth of investigation. Yet all three of the logs showed no appreciable differences. *See* Tr. 541, 563-64. We agree with Shell that whatever the validity of Sun's argument as a general matter, it clearly does not apply in the instant case.

Sun also argues that the logs from these two high angle wells should have been normalized to account for anisotropic effects. The term "anisotropic" is used to describe the properties of certain substances which result in significant differences in electro-conductivity in the horizontal and vertical planes. Thus, where a high angle well penetrates an anisotropic substance, measurement of conductivity and resistivity (measured in the induction and short-normal logs, respectively) could be considerably distorted.

While all parties recoguized that shale exhibits anisotropy, there was general agreement that sand, particulary clean sand, is not nearly as anisotropic. *See* Tr. 543, 555. Charles Sever, however, testifying on behalf of Sun, did contend the sand *sequence* would exhibit a forn of anisotropic effect known as macroscopic anisotrophy (Tr. 546-47). Don Pert, who participated on behalf of Survey in the 1976 meeting which determined net pay picks, was of the opinion that though normalization might be justified in some situations he did not agree that it should apply in this case (MMS Direct Testimony, Pert, Attachment 1, "Memorandum to Acting Oil and Gas Supervisor," dated Oct. 22, 1976). He specifically rejected normalization on the basis of anisotropic effects on the following basis:

> The major difference between USGS pay picks and those of Sun Oil seem to be in that they adjusted the conductivity values in two wells, thereby lowering resistivity values which lowered the amount of pay. Our interpretation is that these intervals have sufficient increases in resistivity above the shale base background to be productive regardless of this normalization they propose.

(MMS Direct Testimony, Pert at 2).

One of the difficulties in quantifying the impact Sun ascribes to Survey's refusal to normalize the logs te adjust for anisotropic effects arises because of Sun's failure to separately delineate the degree to which the bed boundary error supplemented any error generated by failure to consider anisotrophy. Sun's net pay picks for the two Shell wells represented its conclusions based on both allegations of error. We have rejected as unsupported in the present record Sun's arguments regarding the bed boundary error. While it is by no means a certainty, it would seem likely, given the number of net pay picks in each of the wells, that the alleged bed boundary error would have had a far greater effect on total net pay than errors relating to failure to normalize for anisotropic effects. Thus, the effect of failure to normalize for anisotrophy, by itself, might have only minimal impact on Survey's net pay determination for these two wells. We must find that Sun has failed to establish any significant error as a result of Survey's failure to normalize the well logs to account for anisotropic effects resulting from high angle penetration.

The last major criticism directed at Survey's reserve division relates to Sun's argument that the reservoir as described by Survey can contain only 107 bcf rather than the 130 bcf shown to be in the reservoir. We have noted, however, that this is an error in which Sun, itself, clearly partakes. Its most recent isopach shows even less gas-in-place than MMS's latest isopach.

While MMS admits that the original Survey estimates of gas-in-place were "conservative," it asserts its present estimates account for all of the gas-in-place within the reservoir. The predicate for this conclusion is MMS's belief that original gas-in-place was only approximately 107 bcf, not the 130 bcf as now estimated both by Sun and Shell. The reason for this differential is that, unlike either Sun or Shell, MMS posits a relatively strong water drive in the reservoir, requiring various modifications to its reservoir computations.

Survey originally estimated that the reservoir contained 32,681 acre-feet of gas-bearing sands with an initial gas-in-place estimate of 86.6 bcf. *See* MMS Exh. 11.[13] As subsequent production history clearly established that the gas-in-place exceeded 86.6 bcf, Survey had occasion to increase its reservoir estimate to 40,393 acre-feet with initial gas-in-place of 107.1 bcf. Sun, while admitting that it, too, originally underestimated the size of the reservoir, rejects Survey's most recent analysis as too low.

The focal point of the disagreement is whether or not the Shell A-9 well shows a strong water drive in the reservoir. Both Sun and MMS prepared analyses based on production history to ascertain original gas-in-place. Sun submitted what is referred to as a P/Z graph (Sun Exh. 12, Attachment A) which shows the relationship of pressure decline to cumulative gas production. Since, in the absence of water influx the P/Z plot will be a straight line, the total original gas-in-

[13] This figure is based on an estimate that the reservoir contained 2.65 MMCF per acre-foot. While Sun posited, at that time, that the net-acre feet of the reservoir totalled 37,422, considerably more than the Survey original estimate, its total gas-in-place estimate was 88,728, only slightly more than Survey. This was a result of Sun's estimate that the reservoir contained only 2.371 MMCF per acre-foot. *See* Sun Exh. 11.

place was extrapolated to be 134 bcf. It was admitted, however, that in preparing this graph, data obtained from the Shell A-9 was ignored. Sun argued that the A-9 well had apparently watered out at that time and, therefore, its pressure readings were irrelevant because the well was no longer in pressure communication with the reservoir. *See* Sun Exh. 12 at 2 n.1; Tr. 85.

The Shell A-9 well played a critical part in MMS's analysis as the basis for its conclusion that a strong water drive existed, a fact which would undermine Sun's reliance on a straight P/Z plot. In addition, MMS presented testimony asserting that material balance calculations were in a range of between 104 to 117 bcf, with the average being 106.6 bcf. *See* MMS Direct Testimony, Durr and Tschoepe at 2-3. The method utilized to compute this range of values was developed by Havelena and Odeh.

The Havelena and Odeh methodology, however, was sharply criticized by Sun's expert witness, Morgan, who noted that the problem with that methodology is that it does not result in any one answer, but in a number of reservoir-aquifer pairs which satisfy the material balance equation.[14] Morgan further testified that, precisely because of this problem, the Havelena and Odeh methodology had been attacked by other experts as resulting in unreliable conclusions (Sun Reply Testimony, Morgan at 7-8). In rebuttal, MMS's expert, Vivian Tschoepe, testified that while she was familiar with the criticisms, she disagreed with the general conclusion that the Havelena and Odeh method was unreliable in all cases. *See* Tr. 331.

Clearly, on this matter we have a conflict among experts who present plausible analyses supportive of their position. This Board has the full power of the Secretary to review de novo all matters within its jurisdiction. *See Exxon Company, U.S.A.*, 15 IBLA 345 (1974). But, even where the Board exercises its full de novo review authority, the Board, as does the Secretary, has the right to rely on the reasoned conclusions of the Department's technical experts. In such a situation, the record is not a tabula rasa on which an appellant must merely inscribe his view in order to carry the day. Rather, an appellant must, by a preponderance of the evidence, establish error in the technical conclusions which he challenges. It is not enough to show a possibility of error or that reasonable minds may differ in their interpretation of the data or in the formulation of the conclusions. What must be shown is that error, in fact, occurred. In the instant case, while appellant has presented a plausible analysis of original gas-in-place which is supported by expert testimony, appellant has failed to undermine the plausibility of MMS's updated analysis. Thus, Sun has failed to carry its burden.

We must, however, take note of the fact that subsequent production history has resulted in a recomputation by MMS of the relative shares

[14] Sun noted that the Havelena and Odeh approach "used the Hurst-Van Everdingen method of describing a possible aquifer, and adjusting the aquifer description by trial and error until a match was found for the pressure-production performance using the material balance equation" (Sun Reply Testimony, Morgan at 7).

of the original gas-in-place, reducing Shell's percentage of net-acre feet of P Sands from 80.1 percent to 79.6 percent. Judge Rampton, doubtless owing to the fact that Sun essentially waived this question, affirmed the original Survey division. This Board, however, in the full exercise of its de novo review authority is not limited to consideration of only those issues pressed by the parties (*see, e.g. United States* v. *Gassaway*, 43 IBLA 382, 388 (1979)). The fact appellant may have waived this issue does not bar any action on our part in correcting perceived errors. It is our view that in determining the amount of gas which is attributable to Shell's tract the more recent apportionment by MMS, *i.e.*, 79.6/20.4, should be used, and we so direct.[15]

In summary, after a thorough review of the various challenges made by Sun to Survey's reservoir division we find, in the full exercise of our de novo review authority, that the division of the reservoir depicted in MMS's most recent isopach is correct.

[2] The second issue referred for hearing was whether the weighting factors used by Survey in its allocation formula were arbitrary. This formula is set forth in exhibit C of the unit agreement:

Tract 1 [Shell] Participation $= 0.64(81.1) + 0.36(45.1) = 68.14\%$
Tract 2 [Sun] Participation $= 0.64(18.9) + 0.36(54.9) = 31.86\%$

The weighting factors that we must examine are 0.36, the weighting facter derived from production during the period January 1 through June 30, 1976, and 0.64, the weighting factor applied to reserves (1.00 minus 0.36). The 0.36 weighting facter represents the difference between Shell's share of reserves (.811) and its share of production (.451) during the aforementioned 6-month period.

Our decision to examine whether Survey's weighting factor was *arbitrary* reflects a longstanding policy of this Board to place great reliance on the reasoned analysis of Survey in matters concerning geological evaluations. *Shaw Resources, Inc.*, 66 IBLA 57, 61 (1982). Thus, it is not enough in the instant appeal that Sun offer other possible allocation formulas. As we noted in *Tenneco Oil Co.*, 57 IBLA 85, 89 (1981), an appellant objecting to Survey's allocation formula must demonstrate that such formula is not an appropriate method of allocating production by offering a clearly superior alternative.

Three arguments are presented by the Sun group in seeking to establish the arbitrariness of Survey's allocation formula. First, the formula awards Shell more than it could have obtained in the absence of unitization by drilling three additional wells; second, the formula assigns too little weight (0.36) to production; and finally, the formula is based on an erroneous production percentage (45.1) because the time

[15] Effectively, under Survey's allocation formula this would decrease total production attributable to Shell's lease from 68.14 percent to 67.68 percent. While such alteration should be made on remand, our discussion on the allocation formula, set out *infra* in the text, will, for the sake of convenience, utilize Survey's original division as all of the arguments of the parties were premised thereon.

span used was not representative of production over the life of the reservoir.

Sun's first argument is that, as a conceptual matter, Shell should not receive any more, based upon Survey's allocation formula, than Shell could have produced in the absence of unitization. Though Shell disputes how many additional wells it would have profitably drilled absent unitization, Shell's Staff Engineer in Production Administration, Harold O. Amadon, testified that Shell's plans for additional wells were effectively stopped by Survey in early 1975. According to Amadon, J. Rodgers Pearcy, Acting Deputy Conservation Manager of the Gulf of Mexico OCS Region, advised him that existing well spacing was far closer than that normally required to effectively deplete a gas reservoir of this type and that Shell should not do any unnecessary drilling. *See* Shell Direct Testimony, Amadon at 8; Shell Exh. 2. Thereafter, Survey ordered unitization of the instant reservoir in the interest of conservation to prevent the drilling of unnecessary wells.

Sun contends that prior pleadings of Shell indicate that Shell would have profitably drilled *at most* three additional wells. *See* Reply Memorandum of Petro-Lewis, Appendix A. Sun contends that, even if it were assumed these three wells were as productive as Shell's A-22 (the most productive Shell well), Shell's share of total production would have been 51.63 percent in the absence of unitization, rather than the 68.14 percent allocated by Survey. Sun argues that Shell should be awarded no greater share of production than it could have obtained had there been no unitization.

We note, however, that while such an approach conserves Shell's expenditures and protects environmental values, it also provides an incentive to drill, as did Sun, in an unusually dense pattern near the common lease line.[16] Moreover, as Shell points out, implicit in such a theory is the right of Sun to substantially drain that portion of the reserves beneath Shell's lease. As such, it represents a departure from the result approved in *Tenneco Oil Co., supra*. We also note that Sun's theory involves considerable speculation. It is premised on expectations that the three wells would match and not exceed the productivity of the Shell A-22 well and that the three wells would not have impacted on the production dynamics of the reservoir. Ultimately, however, it proceeds from assumptions as to the relationship between the law of capture and unitization which deserve greater examination.

[16] In an Aug. 18, 1976, memorandum from the Conservation Manager to the Acting Chief, Conservation Division, Sun's well density of one well per 46 acres was described as "much closer spacing than normal for gas wells in the Gulf of Mexico" (Shell Exh. 8). Amadon argued that Sun's well density was "unusually high and far in excess of what was necessary to deplete its share of the reserves" (Shell Direct Testimony, Amadon at 7). Despite these views, the Conservation Manager approved Sun's plan to drill its three wells (Reply Memorandum of Petro-Lewis at 8, n.l). Unlike the situation onshore, no well spacing requirements or preduction allowables have been adopted for offshore development. To the contrary, in para. 14A of OCS Order No. 11, 39 FR 15889 (May 6, 1974), Survey states that the location and spacing of wells is detormined independently for each lease or reservoir, in a manner which will locate wells in the optimum structural position for the most effective preduction of reservoir fluids and to avoid the drilling of unnecessary wells. As te the location of Sun's wells near the common lease line, *see Sun Exh. 4 (MMS Exh. A).*

In *Tenneco*, a net-acre feet allocation was affirmed on appeal in a situation where, as here, the operator of a lease overlying a small part of the original reserves drilled early and aggressively along the lease boundary and thereby produced more hydrocarhons. *Id.* at 88. Despite this result, we intimated in *Tenneco* that situations might arise where recourse to net-acre feet allocation would not fairly treat all unit participants. *Accord, Texaco Inc.*, 51 IBLA 332, 87 I.D. 648 (1980). The instant case is the first compulsory offshore unit on appeal in which Survey has varied from an allocation based strictly on reserves (net-acre feet). In the case now before us, Survey has recognized a second element in adopting its allocation formula, viz., actual production over a 6-month period. To the extent that Survey's formula allocates Shell less than 81.1 percent of production, Sun production depletes Shell reserves. Sun argnes that all it seeks to do is utilize Survey's own formula but change the production fignres to represent actual production since the unit plan was ordered.[17] Sun argues that the resultant percentage allocated to Shell (53.81) is greater than that which Shell would have obtained in the absence of unitization (51.63) and Shell has no cause for complaint.

In support of its formula allowing substantial drainage of Shell, Sun asserts that the rule of capture remains fully applicable to the OCS. Under this principle, the owner of a tract of land acquires title to the oil and gas only when he reduces the oil or gas to his possession. Thus, he obtains title to all that he produces even though it may be proved that part of such oil or gas migrated from adjoining lands. *See* Hardwicke, "The Rule of Capture and Its Implications as Applied to Oil and Gas," 13 Texas L. Rev. 391, 393 (1935). Sun points to the preamble to 1980 regulations wherein the Assistant Secretary stated:

> Generally, unitization will not be authorized solely to protect correlative rights. *A lease does not grant lessees the ownership of minerals in place, and the Law of Capture applies to the development and production of OCS minerals.* However, where development rights are constrained so that different lessees with separate rights to develop a common resource have unequal development opportunities, and the inequality was not apparent at the time the leases were offered, unitization may be authorized to protect correlative rights. [[18]; italics added.]

45 FR 29280, 29281 (May 2, 1980).

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[17] Sun would allocate as follows:

Shell's share = .4775(81.11) + .5225(28.86) = 53.81%

Sun's share = .4775(18.89) + .5225(71.14) = 46.19%

where .5225 is the difference between Shell's share of reserves (.8111) and Shell's share of production (.2886) during the period from Nov. 14, 1975, through June 30, 1982. *See* Sun Direct Testimony, Morgan at 13.

[18] As defined in OCS Order No. 11, *supra* n.16, "correlative rights" means "the opportunity afforded each lessee or operator to produce without waste his just and equitable share of oil and gas from a common source of supply." Regulations at 30 CFR 250.2(i) (1985) provide:

" 'Correlative rights,' when used with respect to lessees of adjacent tracts, means the right of each lessee to be afforded an equal opportunity to explore for, develop, and produce, without waste, oil or gas, or beth, from a common source."

Sun also argues that the parties have accepted the rule of capture by their *onshore* practice of allocating primary production[19] on the basis of actual production. Sun Exh. 15 summarizes the factors used as the basis of allocation formulas for 22 voluntary, onshore units in which both Sun and Shell participate. Judge Rampton found most of these formulas allocating primary production to be based exclusively on production. Underscoring this fact, Sun's Manager of Unitization, Joseph Thornton, testified that the dominant factor in allocation formulas of "hundreds or even thousands" of onshore field units during primary recovery is related to productivity, *i.e.*, what each of the separate tracts could have produced under competitive conditions without unitization (Sun Direct Testimony, Thornton at 4-5). Moreover, Sun notes that the inherent uncertainties in estimating the division of reserves require that greater weight be assigned to production.

Shell distinguishes the 22 onshore units in Sun Exh. 15 by noting that these units were formed to facilitate secondary recovery. Shell also points out that Sun's expert Thornton testified that during the secondary recovery phase the largest percentage of an allocation formula is usually based on hydrocarbons in place. *See* Shell Response Brief at 27. Moreover, Shell continues, the 22 units involve oil, not gas, fields, as here. *See* Tr. 170-71. To the extent onshore practices are pertinent, Shell argues, Survey's formula is wholly consistent with the units set forth in exhibit 15.[20]

Shell and MMS focus their attention on what they assert is consistent practice in determining *offshore* allocation formulas. Of the 100 units in the Gulf of Mexico, Pearcy testified that 82 allocate production by net-acre feet, 17 by surface acres, and one by a formula assigning 50 percent weight to production and 50 percent weight to net-acre feet. This last unit, MMS points out, was formed to facilitate secondary recovery (water flooding). *See* MMS Direct Testimony, Pearcy at 4, *as amended*, on April 6, 1983. Thus, 99 of 100 offshore units base allocation exclusively on reserves. *Id.* Moreover, Amadon, testifying on behalf of Shell, contended that, with the exception of the instant case, production has never been a factor in the allocation formulas of the 60 offshore units in which Shell has participated (Tr. 346; Shell Exh. 12).

Sun challenges Pearcy's statistics pointing out that, of the 100 units, 5 were compulsory and 3 of these were appealed. The frequency of appeal, Sun argues, suggests there exists no consensus in the industry for offshore allocation. Sun further argues that the remaining 95

[19] "Primary production" is production from a reservoir by primary sources of energy, *i.e.*, from natural energy in the reservoir when it is in an early stage of production, with little loss of pressure and with most wells still flowing. Williams and Meyers, *Manual of Oil and Gas Terms* (1984) at 669. *See also* Sun Direct Testimony, Thornton at 3. All production in the instant appeal is primary production.

[20] In this vein, Shell maintains that since state conservation agencies onshore have almost uniformly adopted well spacing requirements and production allowables, which protect against drainage by one operator of the reserves underlying the lease of a neighboring operator, there is little practical difference between an allocation based on production and an allocation based on reserves (Shell Direct Testimony, Amadon at 18). Sun disputes this view, pointing out that if an owner fails to drill enough wells on his lease or if the quality of his wells is too poor to produce their allowables, the state conservation agency will not curtail his neighbor's wells to prevent drainage, nor will the agency require his neighbor to share the fruits of prudent development (Sun Reply Testimony, Thornton at 5-9).

voluntary units provide little meaningful precedent because 61 of those involved only one lessee.[21] An additional 21 involved more than one lessee, but either the unitized leases were jointly owned by the same lessees, or the lessees had entered into an agreement establishing an allocation formula before development. Sun maintains that none of these 21 are precedential here because the instant appeal involves two competing lessees who developed their leases prior to the establishment of an allocation formula. Thus, out of 95 voluntary units, Sun finds only 13 to have been negotiated at arm's length after development.

Of these 13, Sun states that eight were negotiated during the same time period for eight sand reservoirs in the same field. Two of the four parties had interests in all eight units, and the other two owned joint interests in three of the units. In Sun's view, negotiation in this type of situation is simplified because there is more room for compromise from one reservoir to another. No apparent explanation exists for the allocation formulas of the remaining five units, Sun maintains, and one of these units, the West Delta Block 73, F-40 Sand, Reservoir A, has an allocation formula based 50 percent on net-acre feet and 50 percent on production. The remaining four units have allocation formulas based on reserves, Sun notes, but they constitute too small a sample to provide any meaningful precedent.

The record assembled by the parties indicates a clear distinction in the manner in which *primary* production is allocated onshore and offshore. Offshore allocates by reserves and onshore predominantly by production. The reasons for this distinction, however, are less clear. Steven E. Whiteside, Division Reservoir Engineer for Shell, points out that the onshore fields summarized in Sun's Exh. 15 are older producing areas subject to multiple ownership interests. Whiteside suggests that available well logs are usually older and less sophisticated than those for OCS wells and, consequently, are subject to greater differences in interpretation (Shell Direct Testimony, Whitoside at 13). Evaluation of underlying reserves in many of these onshore reservoirs is also difficult because of the existence of massive carbonate pay zones, which are geologically quite different from the P Sand. *Id.* Finally, the existence of a large number of onshore interest owners makes the effort to reach agreement based upon projection of the size and location of these reservoirs much more difficult. As a result, in many cases the only reliable records reasonably acceptable to all parties are production records. *Id.*

Sun, however, rejects Shell's reasons for the distinction. Citing the onshore units in Sun Exh. 15, Sun notes that the relationship between productivity factors and hydrocarbons-in-place factors is about the

[21] Pearcy testified that 45 units were formed offshore in which part of the reservoir was on Federal land and part on Louisiana land. The great majority of these involved only one lessee (Tr. 274).

same whether the logs are old or new, and whether the reservoirs are carhonate or sandstone. As to the number of interest owners in an onshore unit, Sun argues that the industry's onshore unitization experience has been enriched by these difficulties.

Ultimately, of course, Sun's position is premised on its view that the law of capture should be the critical reference point for the determination of production allocation from a common reservoir. Admittedly, as a historical matter, the law of capture recognized fee ownership as providing, at most, merely an equal *opportunity* to produce from a common reservoir. To no small degree, this approach was dictated by the difficulties attendant in delimiting an underground reservoir in the early days of oil and gas production. *See, e.g., Stephens County* v. *Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 167, 254 S.W. 290, 292 (1923). It was a logical and rational method of determining ownership given the limited capabilities of that era in ascertaining the nature and distribution of hydrocarbons beneath the earth's surface. It also served to put a premium on development since ownership of the oil and gas only arose upon production. Rapid development was thereby essential in order to protect the surface owner's interests, particularly where adjoining lands were under development.

But, as is often the case, the rule of capture fostered a number of unwelcomed side effects. Because ownership of oil and gas was dependent upon reducing them to the individual's possession, a race to produce was inevitably generated. This often resulted in the drilling of wells which, while unnecessary to adequately drain the reservoir, were deemed essential to prevent drainage by wells on adjoining tracts. Moreover, since an individual would own only that which he produced, production practices which maximized an individual's production, even though they resulted in lower total field recovery, were encouraged. Finally, the nature of ownership patterns of small individual tracts made attempts to implement secondary recovery techniques virtually impossible in the absence of established procedures for permitting and, if necessary, compelling full field development on a unified basis.

In light of these conservation concerns, the oil producing states both by statutory enactments (*see, e.g.*, N.M. Laws 1935, ch. 72, § 12; Okla. Laws 1935, ch. 59, 3; Okla Stat. Ann. §§ 85-87, 136-38; La. Rev. Stat. Ann. § 30:5(B)) and judicial decisions (*see, e.g., Halbouty* v. *Railroad Commission*, 357 S.W.2d 364 (Tex. 1962)) adopted procedures which authorized forced pooling of lands for purposes of well spacing, as well as voluntary and permissive unitization of entire fields to allow maximum recovery of hydrocarbons. But, what must be clearly seen is that these enactments, particularly in their mandatory aspects, represented a repudiation of the untrammeled law of capture as it had existed in earlier years.

As a necessary corollary to mandatory unitization and forced pooling, it became necessary to adopt procedures for allocating production. Obviously, inasmuch as the result of such actions was the affirmative limitation of the right to drill, actual production could no longer serve as a valid basis for apportioning production as some parties could be absolutely barred from drilling any wells on their properties.[22] The question then became one of devising appropriate formulas for allocation of production.

In examining this question it is clear that numerous and varying formulas have been used by those possessed of competing interests in a common reservoir. So long as the parties agree and the Government's royalty interest is not adversely affected, it would seem a matter of no concern to the Department whether the division of the production proceeds on net-acre feet, net productive surface acres, actual production, structural advantage or any combination of these factors. In the absence of such an agreement, however, it becomes necessary to determine what is, in fact, the preferred method of allocation.

Generally speaking, the Board grants considerable weight and deference to the determination of MMS on such matters as it is the Secretary's expert, and this Board is entitled to rely on its reasoned conclusions. More specifically, inasmuch as MMS is not directly affected by the allocation of production, its formulation will generally be untainted by those special concerns which necessarily color the views of the interested parties. Beyond that, however, it is the Board's view that, as a general matter, where mandatory unitization of an OCS reservoir has been ordered and the parties are unable to agree among themselves on allocation of production, allocation based upon relative net-acre feet should nonnally be directed.

We recognize, of course, that while this conclusion is consistent with our past pronouncements (*see, e.g., Tenneco Oil Co., supra; Texaco Inc., supra*), Sun has argned that it is inconsistent with both onshore practice and the law of capture. However, unitization is, itself, not consistent with the law of capture as orginally developed and, indeed, mandatory unitization was developed precisely because the law of capture impeded optimum recovery of oil and gas. Thus, rigid fidelity to the law of capture in determining production allocation within the context of mandatory unitization is incompatible with the animating purposes of unitization. What *is* essential, however, is that the formula adopted be fair to the competing interests of the lessees.

[22] In this regard, Clark and Diamond Shamrock's argument on appeal that actual production from the P Sands should be the sole determinant for allocation of the gas must be rejected out of hand. *See* Statement of Reasons in Support of Appeal of Clark and Diamond Shamrock at 12-15. Carried to its extreme, this approach would make unitization a tool by which the first developer of a common reservoir could, hy the simple expedient of drilling enough wells to adequately drain the reservoir, prevent other parties not only from sharing in the proceeds but from even drilling their own wells. To argue that this somehow preserves correlative rights is ludicrous.

While Clark and Diamond Shamrock suggest that production only during the period from Jan. 1 through June 30, 1976, (resulting in an allocation of 54.9 percent to Sun and 45.1 percent to Shell) should serve as the basis for division rather than total production through 1982, this suggestion ignores the fact that the Conservation Manager, GS, had already advised Shell that further wells wonld be unnecessary and, indeed, had ordered unitization on Nov. 10, 1975. Thus, production during the period in question should not, under any theory of allocation, be the sole determinative factor in dividing the reserves. Shell's productive abilities had already been circumscribed by Survey. In any event, as the subsequent text will make clear, it is the Board's view that net-acre feet should, as a general rule, be the basis for allocation of reserves from a common reservoir when MMS requires mandatory unitization.

In this regard, we find it difficult to discern how a formula which grants each lessee the gas-in-place under its lease can be said to be unfair.[23] Sun, however, suggests that such an approach removes all incentive for rapid development of leases in areas where no hydrocarbons are known to exist. This is simply not true. First of all, unitization is ordered only after a showing that a competitive reservoir exists. Moreover, as a general rule, unitization on the OCS is effective as of the date of approval of the unit plan by the authorized officer. Thus, all production occurring prior to the effective date of the unit agreement is not subject to allocation under the agreement, and is solely owned by the lessee who produced it. In this specific case, Sun produced 12 bcf prior to the effective date of the unitization agreement. This production was not subject to the unit allocation formula and Sun retained all of it. We think that this aspect of the law pertaining to unitization more than adequately provides incentives for the rapid development of federal leases on the OCS and compensates the earlier developer for such risks as might have been undertaken.[24] The dilatory developer is, thus, subject to the very real possibility that substantial reserves beneath its lease will be drained, for which it will receive no compensation, until such time as it can establish that there is a common reservoir underlying its and its neighbor's lease.

Nothing we have said is inconsistent with the 1980 declaration of the Assistant Secretary that "[a] lease does not grant lessees the ownership of minerals in place, and the Law of Capture applies to the development and production of OCS minerals." 49 FR 29280 (May 2, 1980). This statement must be read in tandem with the line immediately following, to wit, "However, when development rights are constrained so that different lessees with separate rights to develop a common resource have unequal development opportunities, and the inequality was not apparent at the time the leases were offered, unitization may be authorized to protect correlative rights." *Id.*

In the instant case, the law of capture did originally apply. This, indeed, is the theoretical basis on which Sun is allowed to keep all of its pre-unit production, even though a substantial portion of such production represents drainage from Shell's tract. But, upon the determination of the Conservation Manager that the reservoir was competitive and no further wells were needed to adequately drain the P Sands, Shell's ability to further develop its lease was effectively terminated. At that point, the law of capture was no longer applicable to the allocation of production.

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[23] We recognize that a number of OCS units have allocated production on the basis of productive surface acres. While such an approach has the advantage of simplicity of calculation, the failure to consider relative thickness of a reservoir makes it less likely that a formula based on surface acres will actually result in a distribution of production which mirrors the subsurface hydrocarbon accumulations.

[24] In the instant case, we note Sun and Shell had jointly drilled the No. 1 well prior to Sun's development of its lease, and this well had shown significant bydrocarbon accumulations in the P Sands. Thus, while the extent of the deposit would remain somewhat speculative, the risks which Sun took in aggressively developing its lease were not as great as would be the case for a rank wildcat area.

It is, of course, true that in this case Survey has deviated from a straight net-acre feet allocation to one which does give some consideration to production during the 6-month period between January 1 and June 30, 1976. In the past, the Board has intimated that in unusual circumstances such a variance might he justified. *See, e.g., Texaco, Inc., supra* at 355, 87 I.D. at 660; *Tenneco Oil Co., supra* at 87. It seems possible that, in the instant case, Survey determined that Sun's clear structural advantage warranted a variance from a strict net-acre feet allocation.[25] Whether such a modification was justified by this or any other consideration we need not determine. Shell, the party adversely affected by the consideration of actual production, has seen fit not to challenge Survey's allocation formula. Therefore, we can find no compelling reason to revise the allocation formula to remove any consideration of production, particularly since MMS did not have cause to directly address its reason for varying from net-acre feet. However, having decided to accept MMS's variance from a straight net-acre feet allocation in this case, it becomes necessary to examine Sun's basic contention that other variants represent clearly superior allocation formulas. But, to the extent Sun's appeal is premised on the concept that any allocation formula developed under a mandatory unitization directive should attempt to result in an ultimate division similar to that which would obtain in the absence of unitization, it must be rejected.[26]

[3] Sun's second argument is that insufficient weight was given to production. Although Sun's witness Thornton testified to the "hundreds or even thousands" of onshore units allocating *primary* production on the basis of a production factor, the 22 units Sun offered in support of its position in exhibit 15 were formed for *secondary* recovery. We agree with Shell that, in these 22 units, the allocation formula for primary phase recovery is less likely to be of importance to the interest owners.[27] As a result, we do not find that this onshore

[25] In its Mar. 23, 1977, letter to the parties containing the unit agreement at issue, Survey set forth those factors that it sought te recognize in its allocation formula:

"The participating formula (USGS Exhibit C) for the PL-15 reservoir is designed to recognize productive capacity and the interpreted original reservoir volume associated with each lease and to express this recognition in a proportion that reflects the effective contribution of each lease to unitized operations.

"It is our opinion that productive capacity should be recognized and assigned credit in the allocation formula in the specific case of the PL-15 reservoir. The participating formula reflects: (a) recognition of structural position, (b) demonstrated well capacity, (c) the ability of wells to sustain efficient reservoir depletions with time, (d) the demonstrated productive capacity relative to interpreted reservoir volume under each lease, and (e) proved net effective feet of gas saturated sand observod to underlie each lease as determined from subsurface control and pertrayed by rigorous mapping techiques."

[26] Moreover, as we indicated earlier in the text, the assumptions necessary to even attempt to determine relative prodnction in the absence of unitization would make any resulting apportionment highly speculative and, thus, actually increase the possibility of an unfair result.

[27] Sun maintains that Shell's argument reveals a complete misunderstanding of how onshore unit allocation formulas work. Primary recovery does not end when secondary recovery oporations begin, Sun contends, but rather when the unit has produced all the oil and gas that would have been produced in the absence of secondary recovery operations (Reply Brief at 14). Yet, Sun's own witness, Joseph Thornton, testified that when an onshore unit formed for secondary recovery becomes effective, well patterns are changed, additional wells are drilled for injection, and the whole pattern of the unit productivity changes (Tr. 169).

practice supports Sun's second argument in favor of increasing the weight assigned to production in Survey's formula.

Offshore, the practice is directly contrary to increasing the weight assigned to production. The five prior compulsory units, for example, assigned no weight whatsoever to production. The same is true of those units that cross the State-Federal boundary in the Gulf and involve but a single lessee. Although these units are factually distinguishable from the unit on appeal, they do reflect a choice by the royalty interest holders involved (two competing interests in a common reservoir) to share the royalty portion of production according to a formula based exclusively on reserves. While the existence of different royalty rates would obviously preclude allocation solely on production, since a lessee would, to the extent possible, confine production to the lease with a lower royalty rate, it would still have been possible to devise a formula which factored in elements such as structural advantage. Yet, none of these single lessee units considered this aspect–which is ultimately related to the *ability* to produce. Therefore, these units are entitled to our consideration. The 13 additional units (eight of which were negotiated during the same period for eight sand reservoirs in the same field) do not support a contrary conclusion. All but one allocate exclusively on the basis of reserves, and the one unit assigning a 50 percent weight to production was formed for secondary recovery.

Sun also argues that increased weight should be accorded to production because of the uncertainties of reservoir mapping. We note that Judge Rampton referred to both this consideration and the general prevalence of the law of capture onshore in noting tbat, were he not constrained by prior Board precedent, he would give equal weight to production and reserve factors. We disagree.

First of all, we have already noted that unitization represents an essential departure from the law of capture, in that it affirmatively limits the rights of lessees to fully develop their leases. It is functionally inconsistent to first limit a lessee's right to develop and then base allocation on a factor which penalizes the party whose right to develop has been constrained.

With respect to the alleged difficulties inherent in mapping the reservoir, we have addressed Sun's specific complaints in some detail already. Suffice it, here, for the Board to observe that, while we recognize that some degree of uncertainty is present in any such activity, we cannot agree with either Sun or Judge Rampton that this specific reservoir was exceptionally difficult to map,[28] or that mapping in general is so imprecise as to yield inherently unreliable results. Indeed, the fact that both Judge Rampton and Sun would still premise 50 percent of the allocation formula on Survey's initial reservoir division undercuts the argument that reservoir mapping techniques are too unreliable to serve as a basis for the allocation of production.

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[28] MMS and Shell agreed that the instant reservoir was a typical Gulf of Mexico reservoir (Tr. 294, 658). Shell's Hartman, who testified that he had mapped in detail hundreds of reservoirs, used only standard techniques in mapping this one (Tr. 659).

We must reject Sun's argument tbat increased weight should be afforded to production in tbe allocation formula approved by Survey.[29]

Sun's third argument seeking to establish the arbitrary nature of Survey's allocation formula is the contention that this formula is based on erroneous production percentages. The production percentages in Survey's formulas are underscored below:

$$\text{Tract 1 [Shell] Participation} = 0.64(81.1) + 0.36(\underline{45.1}) = 68.14\%$$
$$\text{Tract 2 [Sun] Participation} = 0.64(18.9) + 0.36(\underline{54.9}) = 31.86\%$$

Sun objects to Shell's 45.1 production percentage, contending that it is based on an unrepresentative 6-month period from January 1 through June 30, 1976, during which, Sun concedes, Shell's share of production was 45.1 percent. In support of its argument Sun notes tbat its share of production during the period from November 14, 1975, tbrough June 30, 1982, amounts to 71 percent (Sun Exh. 8). Sun contends its disproportionate share of total production is the result of its superior structural position and sustained production. Thus, it correctly notes that two of Shell's wells watered out before Survey ordered the parties to sign the unit agreement in March 1977, and a third watered out shortly thereafter (Sun Exh. 6; Tr. 397). In place of Survey's 6-month period, the Sun group argues that the formula should be corrected to reflect Shell's share of production (34 percent) at the time the formula was adopted or, alternatively, that it reflect the complete production experience.

At the hearing, Pearcy explained why Survey chose the 6-month period:

> We deemed it was a representative period because it was a period when all the wells on both leases were producing.
>
> It was also a period prior to the time that unitization was ordered. That is, the final unitization agreement was submitted to the parties to subscribe to.
>
> It was also a period when both parties were negotiating or attempting to negotiate a unit.

(Tr. 266).

Although time has shown this 6-month period to overstate Shell's share of ultimate production by approximately 16 percent (0.451 less 0.2886) of reservoir reserves, Survey's *method* was a reasonable one. As Pearcy notes, Survey chose a period when all wells were in production. To have done otherwise, we think, would invite a finding of arbitrary action.

[29] Subsequent to Judge Rampton's decision herein, the Court of Appeals for the Tenth Circuit held that the traditional standard of proof, viz., a preponderance of the evidence, is the proper standard to be applied to a factual determination whether certain lands overlie a known geologic structure. *Bender* v. *Clark*, 744 F.2d 1424 (10th Cir. 1984). However, where, as here, the issue is whether Survey's allocation formula, and particularly the weighting factors therein, adequately compensates the parties, the issue calls more for the exercise of discretion and judgment than for a factual determination. Accordingly, the *Bender* holding is seemingly inapposite with respect to this issue. Should it be held that *Bender* does apply in this situation, we bold that the evidence assembled hy Sun does not overcome by a prependerance of the evidence Survey's determination in this respect.

Survey's choice of a period prior to the formation of the unit agreement also appears reasonahle hecause it allows the parties to make unit decisions with a fixed allocation formula in mind. Pearcy explained Survey's reasoning in this way:

> Unitization allows for the reservoirs to be operated in the most efficient manner using sound engineering and geological principles.
>
> Decisions, such as when to work over wells, when to drill new wells, maximum production rates are made jointly by all parties.
>
> If the Conservation Manager were to order unitization and not reveal the participating formula for some years later, and maybe even depletion of the reservoir, it would be difficult for operators to make these types of decisions or come to an agreement on these decisions because it may affect their final participation.

(Tr. 267). Moreover, Sun's Thornton admitted that the allocation formulas for all 22 units in Sun's exhibit 15 used a period *prior to* unitization to allocate primary production (Tr. 173).

Sun's suggestion that Shell's 45.1 share of production be changed to a figure (34) representing Shell's actual share of production at the time the allocation formula was adopted has a surface sheen of legitimacy. As Shell points out, however, the Conservation Manager removes the parties' incentive for delay and recalcitrance when negotiating or formulating a unit agreement if, in those cases where negotiations fail, he uses only the information available to the parties during their negotiations. Moreover, Survey apparently did not regard the production between July 1, 1976, and March 23, 1977, to be representative. MMS's testimony indicates that Shell's well A-9 was off production during most of this period, and the Conservation Manager had no reason to believe it would not be placed back on production given Shell's March 15, 1977, request to workover this well.[30]

If, as Sun desires, we were to reduce Shell's share of production, the weighting factor associated with production would necessarily rise. This is because Shell's weighting factor equals its reservoir share less its share of representative production. Sun does not seek to change the relationship of these three factors but states instead that it will adhere to the fundamental structure of the Conservation Manager's original formula and utilize the same procedure for determining weighting factors.[31] A rise in the weighting factor assigued to production, however, increases the amount of reserves originally underlying Shell's lease which will be allocated to Sun. If, for example, the portion of production attributable to Shell is reduced from 45.1 to 34, Shell is effectively drained of 22 percent of reservoir reserves, an increase of 9 percent over Survey's formula. No basis exists for such adjustment, nor for the periodic adjustments to the production percentage that Sun seeks.[32] Moreover, if Shell's production percentage is reduced to reflect

[30] MMS Direct Testimony, Durr and Tschoepe at 4.

[31] Sun Direct Testimony, Burns at 6.

[32] The periodic adjustments Sun mentions are contrary to its definition of "production during representative period" wherein it defines this term as "actual production during some specified time *prior* to unitization, such as 1-1-70 to 7-1-70, which the parties consider representative of the actual producing ability of the wells on each tract" (Sun Exh. 16).

its production (28.86 percent) through June 30, 1982,[33] Shell would then be subject to drainage of 27 percent of reservoir reserves. For reasons illustrated above, this result does not offer a clearly superior alternative to Survey's formula.[34]

Implementation of the Conservation Manager's order to unitize has been stayed throughout the course of this litigation. *See Sun Oil I, supra* at 259, and *Sun Oil II, supra* at 85. As a result, the parties have at no time operated under the joint operating agreement that they prepared to carry out the objectives and purposes of the unit agreement. Production by both Sun and Shell has not, however, been stayed. Each has continued to produce and Sun, because of a higher structural position and prolific wells, has, in fact, produced more than its 31.86 percent aliquot share of production.

Article XI of this joint operating agreement addressed the procedures to be followed to compensate Shell for the gas produced by Sun in excess of Sun's 31.86 percent share. This provision states in part:

> Both Tract 1 and Tract 2 have been producing before and since the November 14, 1975 effective date of the Unit Agreement, and their production since that date has not conformed to their unit participation nor been allocated to the tracts in accordance with the Unit Agreement. As a result, a net over-production relative to unit participation is owed in the way of compensation for drainage by the lessees of Tract 2 (Sun et al) to the lessee of Tract 1 (Shell).
>
> *By way of compromise and settlement, this net over-production by Sun et al. will be settled by a cash payment to Shell* for gas sold, gas processing plant liquids sold or taken in kind, and gas condensato recovered and sold in the field. *Sun et al will make said payment to Shell not less than thirty days after the effective date of this Joint Operating Agreement* provided each party has access to all production records within 10 days after such effective date. Said payment will equal the total sum realized by Sun et al (based upon the prices actually receivod by those producers comprising Sun, et al that are not small producers under FPC definition) from the sale of the aforesaid mentioned unitized products, after deducting therefrom the value of the 1/6 royalty paid and a production charge equal to three cents ($.03) per thousand cubic feet as set out in Article X pertaining to such Tract 2 over-production. The quantum of unitized substances for which such payment shall be made shall be that proportionate amount of unitized substances allocated to Tract 1 under the terms of the unit agreement and actually produced from Tract 2. [Italics supplied.]

Shell estimates that as of January 1, 1983, Sun has retained approximately $24 million worth of gas and condensate allocable to

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[33] Though Sun now asks that the period of representative production be 6-1/2 years long, it earlier proposed to Survey that a 1-month period, May 1976, be chosen to determine the productivity factor. Sun's proposed formula would credit Shell with 65.5 percent of reserves and assign equal weights of 50 percent to reserves and production (Shell Exh. 7, Unit Agreement, Exh. C thereto).

[34] We note that Art. IV of the unit agreement provides for revision of this production percentage if unit production should decrease on either or both of the unit tracts due to reasons other than natural reservoir depletion. In such instance, the operator or suboperator may propose for the Supervisor's approval, or the Supervisor may direct, under the procedure provided in para. 17, OCS Order No. 11, that the participation schedule be revised. A revised participation schedule would employ the same tract reservoir volume percentages and weight factors, hut different tract production percentages. Thus, where one party's actions adversely affect continued well production, the formula may be revised accordingly. If, as Shell believes, its decreused production was caused by natural roservoir depletion, Art. IV would not authorize an adjustment of the production percentage.

Shell. Shell argues that the interest on this sum, itself, is approximately $12 million.

The remaining issue on appeal is whether Shell is entitled to interest on the value of gas produced by Sun in excess of Sun's 31.86 percent share from May 1977 forward.[35] Judge Rampton held that Shell was so entitled and awarded simple interest at 7 percent. Sun and Shell have each appealed this ruling.

Sun's arguments are numerous but generally unpersuasive. It argues the joint operating agreement makes no provision for interest; the interest provision of accounting procedure 3(C) is inapplicable; the Board lacks statutory, regulatory, or inherent authority to award interest to a private party; Shell has waived its interest claim by failing to timely raise and appeal this issue; interest here would be inequitable; assuming interest is proper, Judge Rampton's application of Louisiana law, providing for 7 percent simple interest, should be upheld; and if prejudgment interest is awarded, equity demands that Sun be fully reimbursed for the cost of producing gas for Shell's benefit.

Shell seeks interest at 12 percent, relying upon paragraph 3(C) of the accounting procedures that form exhibit C to the joint operating agreement. Federal law, not surrogate state law, Shell contends, governs the computation of interest that Sun owes Shell.

[4] We hold Judge Rampton's application of Louisiana law calling for 7 percent simple interest to be proper. Use of state law is specifically authorized by section 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982). That section provides in part:

> (2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, * * * which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf * * *.

Although this Board has not previously construed this statute in a similar context, the Board has held that Survey has the authority, independent of any specific statutory, regulatory, or contractual authority, to make a unilateral determination of interest owed where equity requires that it be imposed. Thus, in *Peabody Coal Co.*, 72 IBLA 337, 348 (1983), we stated that interest payments were appropriate to compensato the Hopi and Navajo tribes for the loss of the use of coal royalties due but not paid, even when the lessee pursues a bona fide appeal of the underlying determination instead of paying the demanded amount. A similar holding was reached in *Full Circle, Inc.*, 35 IBLA 325, 85 I.D. 207 (1978), a case involving the imposition of interest charges to a sum owed to the United States by the holder of a

[35] The May 1977 date was chosen by Shell as it was the date that the provisions of Art. XI of the joint operating agreement, liquidating its claims for prior production, would have become effective but for the appeal of Sun. *See* Shell Post-Hearing Brief at 78.

right-of-way who paid no right-of-way charges during a reappraisal period. And in *Atlantic Richfield Co.*, 21 IBLA 98, 107, 82 I.D. 316, 320 (1975), we looked to the totality of the circumstances to determine whether equity warranted the imposition of prejudgment interest on royalty payments due the United States. The failure of the parties to provide for interest on amounts attributable to Sun's overproduction is, therefore, not a bar to Shell's recovery in the instant case.[36]

Nor is Shell's failure to file a notice of appeal from the Director's June 5, 1981, decision a bar to its recovery. Although this decision followed Shell's initial request for interest on April 20, 1979, the Director's decision is entirely silent as to this issue. The issue of interest was considered for the first time hy Judge Rampton. Although a remand to MMS is one option presently available to the Board, the considerable length of time already consumed by this litigation and the likelihood of a further appeal to this Board on the interest issue compel us to decide this issue now.

Judge Rampton held that Louisiana law must be applied in determining what interest rate to fix because he found no controlling contractual provision in the joint operating agreement. We agree with Judge Rampton that the 12 percent interest rato called for in paragraph 3(C) of the accounting procedures (Exh. C to the joint operating agreement) is not expressly applicable. That rate applies to unpaid amounts that the operator may require a non-operator to advance for the succeeding month's operation.

Our examination of the relevant materials has disclosed no statute or Departmental regulation that would fix the interest rate in dispute, nor have the parties demonstrated otherwise. It was proper, therefore, for Judge Rampton to look to state law. Louisiana statute LSA-C.C. Art. 1940 (West 1977) provides that where no conventional interest rate is stipulated in a contract, the legal rate of interest in effect at the time the contract was made shall be recovered. A subsequent change in the legal rate does not change the rate recoverable. *Id.* Recourse to this statute could properly be made in determining the amount of interest owed to Shell.

Judge Rampton found the legal rate of interest under Louisiana law at the time the field was unitized to be 7 percent. LSA-C.C. Art. 1938 (West 1977). Simple interest is the rule in Louisiana, Judge Rampton determined, applicable to all corporations regardless of custom or the character of business involved. LSA-C.C. Art. 1939 (West 1977). In the absence of a statutory exception, interest can be compounded only by adding it to the principal and creating a new debt with a new contract. *Id.*

Our holdings in *Peabody Coal Co., Atlantic Richfield Co.*, and *Full Circle, Inc., supra*, provide clear authority for an award of prejudgment

[36] *See also Amoco Production Co.*, 78 IBLA 93 (1983); *Donald R. Clark*, 39 IBLA 182 (1979).

interest. To deny interest to Shell for the more than 8-year period during which Sun has had the use of funds belonging to Shell (in excess of $24 million) would unjustly enrich Sun at Shell's expense. Such windfall could also create an incentive in the future for parties to unduly prolong litigation. We reiterate our conclusion in *Peabody Coal Co.* that, given the high rate of inflation during the period in question, equity requires compensation for the time value of money. Judge Rampton's award of 7 percent simple interest is, accordingly, affirmed.[37]

Sun argues that if this Board awards prejudgment interest, Sun should be fully reimbursed for the cost of producing gas for Shell's benefit. By the terms of Article X of the joint operating agreement, Shell is to pay $0.03 per Mcf for gas produced by Sun in excess of its share. This sum was fixed by the parties "in lieu of payment for the actual operating and maintenance cost of producing unitized substances" in excess of Sun's share. Sun states that its production costs in 1982 exceeded twenty-seven cents ($0.27) per Mcf, though Shell replies this is double its own production costs during the same period.

Judge Rampton denied relief on two bases: First, he noted that he was not asked to decide this issue by the Board; second, he held that jurisdiction over this dispute involving, as it does, the terms of a private contract, lies with the Louisiana state courts.

Sun's Manager of Strategic Projects, Ernest D. Watson, testified that Sun never agreed that the $0.03 figure would apply to future gas volumes. That figure would, however, have been appropriate for gas production during November 14, 1975, and March 23, 1977 (Sun Reply Testimony, Watson at 2-3). When asked by Judge Rampton how such a cost figure could find its way into the joint operating agreement, Watson testified:

> THE WITNESS: We fully recognized that operating costs go up substantially over time as the production goes down.
>
> Now, how it could have gotten into the operating agreement and why we didn't object to it, quite frankly, the formula gave us more concern than did the operating costs.
>
> The formula was ten or twenty or thirtyfold what was at issue in a three cent operating cost that we felt we could do something about later on or with the operating agreement. In a suspended state, let's say.

(Tr. 210). Sun signed the joint agreement in May 1977 under protest, but does not appear to have objected to this term (Shell Direct Testimony, Amadon at 23). Indeed, Sun concedes its objection has not been preserved on appeal (and includes Shell's request for interest in

[37] Effective Jan. 1, 1985, Arts. 1938, 1939, and 1940 of the Louisiana Civil Code were amended by Arts. 2000 and 2001. Art. 2000 provides: "When the object of the performance is a sum of money, damages for delay in performance are measured by the interest on that sum from the time it is due, at the rate agreed by the parties or, in the absence of agreement, at the legal rate in effect at the time it is due. The obligee may recover these damages without having to prove any loss." Art. 2001 addresses interest on interest and is not applicable. Thus, for payments coming due after Jan. 1, 1985, interest at the then current legal rate, as provided by Louisiana law, must be paid. For purposes of determining when payments for overproduction come due, the stay granted by the Director, and in effect ever since, shall not affect this calculation.

this same category).[38] Sun's request that this term be revised to provide for reimbursement of actual operating costs[39] is tantamount to a request for reformation of this article. Appellants Clark and Diamond Shamrock argue that if the Board has the authority to rewrite the joint operating agreement to provide interest for Shell in the name of equity, the Board has a corresponding equitahle duty to reform the joint operating agreement to allow an offset for the Sun group's actual production costs.[40]

Clark and Diamond Shamrock mischaracterize the Board's action in granting Shell's request for interest as a "rewrite" of the joint operating agreement. This is simply inaccurate. The Board's decision to grant interest is premised not on any view that it has the authority to unilaterally modify agreements between the parties, but rather proceeds from its recoguition that it may, in the interest of equity, require interest payments on funds withheld in order to make the prevailing party whole. In the instant case, Sun sought and obtained a stay of the effect of the original order directing that operations under the unit plan commence, alleging that it would show error in the Survey allocation formula. It can now be seen that Sun has failed to establish such error. It remains, therefore, for Sun to tender such payments as would make Shell whole. Indeed, by seeking a stay of the effect of the Conservation Manager's order, Sun has implicitly obligated itself to pay such amounts as might be deemed necessary to restore the status quo ante should its arguments prove substantively unavailing. These are the considerations which lead to the assessment of interest in this case and they are independent of and without any necessary reference te the terms of the joint operating agreement.

This must be contrasted with the alteration which Sun now seeks in the joint operating agreement. The provision which is codified in Article X was not included at the behest of Survey. Rather, it resulted from the negotiations of the parties. It may be that the provision was included by inadvertence. Be that as it may, it would seem to us that the power to revise this provision cannot be said to be incidental to the Department's authority to compel unitization. This Board has no authority to reform the unit agreement by amending Article X.

We hold, therefore, that: (1) Survey's division of the reservoir based upon a 79.6/20.4 apportionment is correct; (2) in ordering mandatory unitization production should be allocated on the basis of net-acre feet save in unusual circumstances; (3) Sun has failed to establish that its proposed allocation formulas were clearly superior to Survey's; (4) Shell is entitled to 7 percent simple interest on the amounts owed it

[38] Brief of Sun Exploration & Production Co. at 3 and Reply Memorandum of Petro-Lewis Corp. at 17-18. This latter memorandum of Petro-Lewis is the subject of a motion to strike by Shell and a request by Shell te further plead. Both the motion and request are denied.

[39] Sun Direct Testimony, Burns at 9.

[40] Statement of reasons in support of the appeal of Clark and Diamond at 54. This pleading also contains a request for oral argument. In light of the quality and quantity of pleadings in the record, this request is denied.

by Sun; and (5) the Board has no authority to revise Article X of the unit agreement.

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 Administrative Law Judge Rampton is affirmed as modified.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

BRUCE R. HARRIS
Administrative Judge

R. W. MULLEN
Administrative Judge

WHETHER THE DEPARTMENT MAY ISSUE A CALL FOR INFORMATION & NOMINATIONS FOR OUTER CONTINENTAL SHELF LEASE SALE 91*

M-36954 *February 10, 1986*

Outer Continental Shelf Lands Act: Generally

The Department may begin presale procedures for a lease sale before the approval of the 5-year schedule on which it is listed.

OPINION BY SOLICITOR TARR

OFFICE OF THE SOLICITOR

Memorandum

TO: SECRETARY
FROM: SOLICITOR
SUBJECT: WHETHER THE DEPARTMENT MAY ISSUE A CALL FOR INFORMATION & NOMINATIONS FOR OUTER CONTINENTAL SHELF LEASE SALE 91

As a part of the second 5-year oil and gas leasing schedule,[1] the Department proposed to hold a lease sale, numbered 91, in September 1985 in the Central and Northern California planning area. Because of spending bans in the Department's appropriations bills for tbe four prior fiscal years,[2] the Department has postpened the start of its presale procedures for this sale. The sale is now proposed to be carried over into the next 5-year schedule as a sale to be held in the propesed Northern California planning area in April 1988. You bave asked whether the Department may now begin its presale procedures for this sale, by issuing a call for information and nominations ("the call"), before your final approval of the next 5-year schedule. I conclude the Department may lawfully issue the call.

ANALYSIS

Section 18 of the Outer Continental Shelf (OCS) Lands Act requires you to prepare, poriodically revise, and maintain "a schedule of proposed lease sales . . . for the 5-year poried following its approval or reapproval." 43 U.S.C. 1344(a). Once this scbedule is approved (or reapproved), "no lease shall be issued unless it is for an area included in the approved leasing program." 43 U.S.C. 1344(d)(3). However, after its approval (or reapproval), "leasing shall be permitted to continue

* Not in chronological order.
[1] This schedule, approved on July 21, 1982, was upheld in all respects in *California v. Watt*, 712 F.2d 584 (D.C. Cir. 1983).
[2] The history of these "moratoria" provisions was explained in detail in former Solicitor Richardson's memorandum to you on "Exploration Permits in the Central & Northern California Planning Area," (Mar. 25, 1985).

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. . . for so long thereafter as such program is under judicial or administrative review." *Id.*

The area considered in the call for Sale 91 is in the current 5-year schedule, so holding the sale would not violate section 18's ban on leasing areas not in the schedule. Additionally, the current schedule has been under administrative review for over a year and will remain under review until your final decision on the next schedule in 1987. Consequently, the Department could lawfully hold the sale itself before your final approval of the next schedule.[3]

Because the sale itself could be held, it is unquestionable that the Department may carry out presale steps, such as issuing the call. The call merely asks interested persons and officials to identify areas of special concern and areas of interest for leasing. 30 CFR 256.23 (1985). The call, like the other presale steps, in no sense constitutes the issuance of a lease, the one action subject to the restriction in section 18(d)(3). See 30 CFR 256.47(i) and 256.50 (1985). So the Department may undertake any of the presale steps before a sale appears on an approved schedule.[4]

Court rulings under section 18 support this analysis. In the first suit challenging a 5-year schedule, *California v. Watt*, 668 F.2d 1290 (D.C. Cir. 1981), the court ruled that the phrase "administrative review" in section 18(d)(3) is not limited to "the pre-approval period of administrative decision-making." *Id.* at 1326 n.176. It applies equally to the administrative review leading to the revision and reapproval of an existing schedule. And in the second suit, *California v. Watt*, 712 F.2d 584 (D.C. Cir. 1983), the court upheld the Secretary's view "that as a practical matter some sales on the prior schedule must be continued on the revised schedule because presale steps for these sales have been long under way [,] and it would be grossly ineffective to reschedule these sales for later in the program." *Id.* at 598-99.[5]

Consequently, consistent with its duties under section 18, the Department may issue the call for Sale 91.

RALPH W. TARR
Solicitor

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[3] As a practical matter, of course, the sale cannot be held before your approval of the next schedule. It will take at least 2 years to complete the steps leading up to the sale.

[4] For this reason, former Soliciter Martz was clearly correct that "the Secretary has discretion to all new milestones [for presale steps] te an approved program for sales beyond that program. These in our view, would not affect the substance of an approved program [and therefore may be added without first completing the process for reapproving the schedule]." Solicitor's Opinion, M-36932, "Annual Review, Revision, & Reapproval of 5-Year OCS Oil & Gas Leasing Programs," 88 I.D. 20, 23 (1981).

[5] The issue before the court was whether the Secretary must always offer those planning areas with comparatively lew "net social value" at the end of each schedule. The court rejected the argument of the petitioning States that he must, finding it at edds with the "*congressional intent to expedite* offshore lease sales." *Id.* at 599 (italics in original).

March 6, 1986

SINGLETON CONTRACTING CORP.

IBCA-1770-1-84 Decided: *March 6, 1986*

Contract No. CX-5000-3-1156, National Park Service.

Appeal denied.

Contracts: Formation and Validity: Bid Award--Contracts: Formation and Validity: Mistakes--Contracts: Disputes and Remedies: Burden of Proof

Upon finding that a notice of award was signed by the contracting officer and mailed to the contractor on the same day that the contractor mailed a notice of mistake in bid, including a request to witbdraw the bid, to the contracting officer; that both documents were received by the respective addressees on the same day, five days lator; that the bid form provided for acceptance by mailing or otherwise furnished within a specified time; and that the contracting officer was in good faith accepting the bid and had no apparent reason to suspect that a bid mistake had been made; the Board holds: that the contractor has failed to sustain its burden of proof to establish entitlement to relief from the mistake, since the law is well settled that a notice of award is effective on the date mailed–if mailing is permitted by the bid document–constitutes an acceptanco of an offer, and results in a binding contract; while a notice of mistake in bid and request for withdrawal constitutes an attempt to withdraw an offer to form a contract, or rescind a contract already made, and is not effective until received by the offeree–the contracting officer.

APPEARANCES: Wayne Singleton, President, Singleton Contracting Corp., Atlanta, Georgia, for Appellant; Donald M. Spillman, Department Counsel, Atlanta, Georgia, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

Contract No. CX-5000-3-1156, dated September 30, 1983, was awarded te Singleten Contracting Corp. (Singleton) by tbe National Park Service for the construction of a structural foundation for the Biosphere Reserve Center at Lind Point, St. John Island, U.S. Virgin Islands, Virgin Islands National Park. The contract price was $89,182. The contractor here is requesting that it be awarded some $22,400 including overhead and profit and an additional bond premium together with interest and costs in connection with the appeal. In its complaint, Singleton alleges that this entitlement arises from a mistake in bid. Singleton alleges that in preparing its cost estimate for the subject contract, a mathematical mistake in the amount of $20,174 was made in the tabulation of the bid amount; that approximately 8 days following the bid submission and the opening of the bids, the mistake was discovered and that on September 30, 1983, the contracting officer (CO) was notified of the mistake and Singleton requested permission to withdraw the bid. Singleton further alleges that on October 5, 1983, appellant received the Notice of Award for the subject contract dated September 30, 1983, by certified mail in an envelope with no dated postmark and delivered to appellant's post office box in Atlanta, Georgia, on October 5, 1983; that by letter of October 25, 1983, which was the CO's decision from which this appeal is taken, the CO denied the request to withdraw the bid; that following receipt of the CO's final decision, appellant executed the subject contract under protost and proceeded to completo the work required under the contract. Singleton contends that it was required to proceed with the contract despite actual knowledge on the part of the CO of the mistake at or prior to what should be considered the time or date of the contract award and that, therefore, Singleton is entitled to relief from the mistake in the amount claimed.

The Government, on the other hand, contends that the request to withdraw the bid was denied primarily because the Government accepted the bid in goed faith without notice or suspicion of a mistake and that the mistake, if any, was not mutual but due solely to the carelessness of appellant; and that therefore, there is no basis for an adjustment in price or rescission of the contract.

In the CO's findings and decision dated October 25, 1984, it is disclosed that at the bid opening on Septomber 22, 1983, only 2 of the 29 firms solicited submitted bids; that appellant's bid was for $89,182 and that of Logan Construction, Inc., was for $106,990; that the independent engineer's estimato was $88,094, a variation of only abeut 1 percent from appellant's bid; and that, tberefore, the CO did not have constrnctive notice or suspicion of an error when the difference between the Government estimate and the low bid was only $1,088. Appellant's lettor of October 3, 1983, explained that the mistake occurred by stapling tbe mechanical and electrical estimate to the back of another bid estimato for a different project whicb was to be bid the following day. The Government further asserts that the alleged mistake resulted solely from Singleton's negligence in the preparation of the bid since it was stated in appellant's lettor of October 17, 1983, "I did not have the time to separato the total contract amount into individual costs, I didn't pay any attontion to the costs of the individual bid items. The only thing l was concerned about was the total cost."

At the prehearing conference, the parties agreed that the primary issue first to he resolved, and with respect to which appellant had the burden of proof, is at what time did the CO have notice of the alleged mistake in bid (Tr. 4). Both parties recognized the difference in relief that may be awarded to a contractor regarding a mistake in bid, depending upen whether the mistake is discovered prior to award or after award. In fact, Mr. Singleton stipulated (Tr. 20), in effect, that if the contract was actually awarded prior to receipt of notification of the mistake the contractor would not bo allowed to withdraw his bid or adjust his bid.

March 6, 1986

The contractor's bid in tbe amount of $89,182 was dated September 22, 1983, and submitted on Standard Form 21 (Rev. 9-81) which included the following language:

The undersigned agrees that, upon written acceptance of this bid, mailed or otherwise furnished within _____ calendar days* after the date of oponing of bids (unless a different poriod is inserted by the bidder), bidder will, within 15 calendar days after receipt of the prescribed forms (unless a longer peried is allowed), execute Standard Form 23, * * *.

The mistake in bid was discovered by appellant on Friday, September 30, 1983, and notice thereof mailed on that date after Mr. Singleton failed to reach the CO by telephone around 5 p.m.

Discussion and Findings

The Board here must determine whether the CO received the notice of mistake in bid prior to or after tbe award became effective.

It is well established that where a bid contains the language set forth abeve, found in Standard Form 21, tbe Government's acceptance of the bid or notice of award to the bidder is effective on the date it is placed in the mail. *Imco Precision Products, Inc.*, ASBCA 17572 (1973), 73-2 BCA par. 10,250; *Lyon Engineering Co.*, ASBCA 10135 (1965), 65-1 BCA par. 4534; *Dudek & Bock Spring Manufacturing Co.*, ASBCA 9753 (1965), 65-2 BCA par. 4931; 35 Comp. Gon. 272 (1955); 45 Comp. Gen. 700 (1966). It is also well settled that a witbdrawal of an offer is not effective until received by the offeree. *Burton* v. *United States*, 202 U.S. 344 (1906); *Patrick* v. *Bowman*, 149 U.S. 411 (1893); 35 Comp. Gon. 272 (1955).

Effective Date of Award

At the hearing the CO testified that she recollected signing tbe lettor constituting the acceptance by the Government of the contractor's offer and the notice of award, at abeut 4 o'clock on September 30, 1983. However, she had no personal knowledge as to the exact time wben the letter was placed in the U.S. mails. We find in the appeal file, however, under Tab C on the correspondence side of the appeal file, a letter from the contractor te the National Park Service datod October 7, 1983. That letter acknowledged receipt of tbe notice of award delivered to the contractor's post office bex on October 5, 1983, and it requested that the National Park Service send to tbe contractor a copy of the original receipt from the U.S. Postal Service for the referenced certified mail showing the date of mailing tbe notice of award. The appeal file also contains a copy of a letter dated October 14, in reply to the contractor's letter of October 7, which contained a copy of the certified slip showing the date of mailing. The enclosure contained a handwritten dato, rather than a dato stamp, but showing that the mailing occurred on September 30, 1985. The October 14 letter explained that, "This handwritten date is the standard policy of this agency at the request of the U.S. Postal Service." Apparently, not believing that it would require from September 30, even though a Friday, to Wednesday, Octeber 5, for a letter to be delivered across the City of Atlanta, the contractor introducod into evidence a series of envelopes (Exhs. A through F) to indicate the time required for such deliveries. However, these envelopes were all mailed during the month of December 1984 and did demonstrate that a letter mailed on Friday would normally be received on Monday and that a letter mailed on week days would normally be receivod within 1 or 2 days after mailing. All of these letters were mailed at the post office near the Federal Building most likely to be used by the National Park Service and was addressed to the contractor at his post office box. There was no other evidence adduced at the hearing relating to the date of mailing of the notice of award except an affidavit of the stenographer who typed the letter signed by the CO at 4 o'clock on Septomber 30, 1985. The stenographer's affidavit simply confirmed that it was the normal policy of such letters te be mailed on the date of signing and that it was likely that it was mailed on September 30. However, she had no personal knowledge as to the actual time of mailing. We are not convinced that the demonstration of the six letters mailed in December 1984 proves that in Septomber and Octeber 1983 the mail service would be the same and that the subject mailing actually occurred lator than September 30, 1983, contrary te the date shown on the slip enclosed with the CO's letter of October 14, 1983. The evidence adduced indicatos to us that the mailing of the notice of award did take place on the date of Septomber 30, 1983, and we so find.

Date of Receipt of the Notice of Mistake in Bid

It is undisputed that the contractor mailed his notice of mistake in bid to the National Park Service also on September 30, 1983, but the question is, when was that notice of mistake in bid received by the CO. The CO testified that this lettor notifying her of the mistake in bid was received on October 5, 1983, at around 12:46 or 12:48 of that dato. Also, the document itself, on its face, contains a date stamp which indicates the same, October 5 at 12:48 p.m., 1983. We therefore find that the notice of alleged mistake in bid was received by the CO on October 5, 1983. We hold, therefore, pursuant to the legal authorities abeve set forth, that the award became effective prior te receipt of notification of the mistake in bid. Thus, whether the contractor is entitled te relief is dependent upon the law regarding mistakes communicated after award.

The Federal Procurement Regnlations, 41 CFR 1-2.406-4(c), deals with mistakes after award. That section provides that relief to a contractor may be made only on the basis of clear and convincing evidence that a mistake in bid was made, and either that the mistake was mutual or that the unilateral mistake made by the contractor was so apparent as to have charged the CO with notice of the probability of the mistake. Since it has been conceded by the contractor that the CO exercised due diligence with regard to the mistake, and from the other evidence of record it is apparent that the CO had no notice of the probability of the mistake, it is clear that appellant/contractor is not entitled to any relief.

Decision

Based on the record, the evidence adduced in this case, the foregoing discussion, findings, and conclusions of law, it is our decision that the appellant failed to sustain its burden of proof establishing entitlement to any relief from the mistake in bid.

DAVID DOANE
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge & Vice Chairman

POWER CITY CONSTRUCTION, INC.

IBCA-1839 Decided: *March 12, 1986*

Contract No. 1-07-3D-C7443, Bureau of Reclamation.

Appellant's Cross Motion for Summary Judgment granted.

Contracts: Contract Disputes Act of 1978: Interest--Contracts: Disputes and Remedies: Generally--Contracts: Performance or Default: Release and Settlement

Where a contract settlement arrived at pursuant to a termination for the convenience of the Government expressly omits any provision for the payment of interest on the amount of the agreement, the contractor is entitled to intorest on the settlement amount from the date of its certification of the claim until the date payment of the settlement amount is made, notwithstanding the provisions of 41 CFR 1-8.212-2(c) (1981) and subsequent similar provisions which preclude interest on normal tormination settlements.

APPEARANCES: Brian A. Bannon, Esq., 1140 - 19th Street NW., Washington, D.C., for Appellant; Ernest London, Esq., Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

Power City Construction, Inc. (Power City/appellant), has timely appealed from the final decision of the contracting officer (CO), dated May 24, 1984, which incorporates by reference the CO's previous determination of May 11, 1984, that interest is not payable on a termination settlement in the amount of $425,000 previously agreed to by the parties in connection with a termination for convenience by the Bureau of Reclamation (BR/Government) of Contract No. 1-07-3D-C7443 (contract), dated December 12, 1980. The notice of termination was issued on June 1, 1981, because the Government was unable to provide certain Government-furnished property necessary for the performance of the contract. The parties agree that the appeal involves no material issue of fact, and each has moved for summary judgment.

Background

The issue of interest arose during settlement negotiations between the parties subsequent to the tormination. Power City argued that the Government was obliged under the Contract Disputos Act of 1978, 41 U.S.C. §§ 601-613 (Act), section 611, to pay intorest on the settlement amount. The CO denied intorest on the settlement amount because of 41 CFR 1-8.212-2(c)[1], which states that, "No interest shall be paid by the Government on the amount due under a settlement agreement or a settlement by detormination." Thus, by consent of the parties, the settlement agreement, dated April 19, 1984, recites that, "This modification provides for full and complete settlement of all outstanding contract claims *except the claim for interest for the Termination for Convenience dated June 1, 1981.*" (Italics supplied.) Payment under the agreement was made on April 26, 1984. When the CO subsequently denied Power City's claim for interest on the settlement amount, it appealed to this Board.

Appellant argues that interest is payable from August 21, 1981, when it first submitted its settlement claim requesting a net payment of $853,779. It avers that 41 CFR 1-8.212-2(c) was superseded by the Act, and that it certified its claim in accordance with section 605(c) of the Act at the time the claim was submitted. However, in the alternative, appellant states that it recertified the claim when a revised amount was submitted on October 28, 1982. In addition, appellant alleges that the Government withheld $15,000 in retainages, to which Power City was entitled for work completed, pending resolution of the claim. Power City received this $15,000 amount on April 30, 1984, but is seeking intorest on it from August 21, 1981, until the payment date.

The Government argues that 41 CFR 1-8.212-2(c) was in fact reissued subsequent te the Act and that the regulation is in full force and effect. It also asserts that the adjudicative claim procedure of the Act, 41 U.S.C. § 605, does not apply to termination-for-convenience settlements, not only because of the regulation cited by the CO, but also for two other reasons: first, because the request for payment was not properly certified and therefore did not meet the definition of "claim" set forth in the implementing regulation, 41 CFR 7.102-12, and

[1] All CFR references are to 1981 edition.

second, because there was no intent hy appellant at the time it suhmitted its settlement proposal te invoke a final decision by the CO within 60 days, as the disputes procedure contemplates. The Disputes Clause of the Act becomes applicable to a termination-for-convenience situation, in the Government's view, *only* if and when the parties are unable te reach a negotiated settlement and the CO makes a unilateral determination as to the amount due. That, it argues, did not occur here. Thus, the Act, with its provision for mandatory interest on claims that were in dispute because of the CO's determination, is not applicable to this situation.

Discussion

These are not totally uncharted wators, but the law on the subject is not fully settled. The ultimate issue involved, whether interest is payable under the Act on a termination-for-convenience settlement amount when the parties specifically exclude intorest from the provisions of their agreement, has not previously been addressed by this Board. We do so now.

Preliminarily, we hold that the case is ripe for decision by the Board. The CO's decision and his May 24, 1984, letter make clear that he felt he was prohibited by law from paying interest, and that he fully intended that his final decision on the matter would be appealable to the Board or to the U.S. Claims Court. Thus, a dispute as te a claim exists. *See Racquette River Construction, Inc.*, ASBCA 26486 (1982), 82-1 BCA par. 15769, at 78054.

Further, the matter is appropriate for summary judgment. No material fact is in dispute, and we agree with the parties that what is required is an application of the pertinent law and regulations to the facts of the instant case. *Cf. McCutcheon-Peterson (JV)*, IBCA 1392-9-80 (1981), 88 I.D. 361, 81-1 BCA par. 14997.

For convenience, we will consider the questions involved in reverse order: First, if interest is payable, for what period is it payable? Next, if certification of a claim is necessary in order for interest to be paid on it, when did that certification take place in this case, if it did? Finally, does 41 CFR 1-8.212-2(c) preclude the payment of interest on a termination settlement despite the interest provisions of the Act, 41 U.S.C. § 611?

This Board has already addressed the question of whether it is necessary to certify an underlying claim in excess of $50,000 if interest is to be paid on it, and has concluded that such certification is required under section 6 of the Act, 41 U.S.C. § 605. *Ferguson Construction Co.*, IBCA 1681-6-83 (1983), 91 I.D. 343, 84-1 BCA par. 17090. Once such certification has been made, interest, if payable, runs from date of certification until date of payment. *Luedtke Engineering Co.*, ENG BCA 4556 (1982), 82-2 BCA par. 15,851.

A secondary issue here, however, is what is required for the necessary certification, since more than one purported certification was made. Appellant asserts that it properly certified its claim on August 21, 1981, when it submitted its initial proposal for settlement. The Government contends that this certification was insufficient. We agree.

Section 6 of the Act requires that for claims over $50,000 the contractor must certify that: (1) the claim is made in good faith; (2) the supporting data are accurate and complete to the best of the contractor's knowledge and belief; and (3) the amount requested accuratoly reflects the contract adjustment for which the contractor believes the Government is liable. 41 U.S.C. § 605(c)(1). Power City's August 21, 1981, certification was as follows:

> The undersigned certifies that the above proposed settlement includes only charges allocable to the terminated portion of the contract or purchase order, that the total charges (item 5) and the disposal credits (item 6) are fair and reasonable, and that this proposal has been prepared with knowledge that it will, or may, be used directly or indirectly as a basis for settlement of a claim or claims against the United States or an agency thereof.
>
> I hereby certify that to the best of my knowledge and belief, the above statements are true and correct.

Even if we agreed, *arguendo*, that appellant's foregoing certification met requirements (1) and (3) dealing with the contractor's good faith and honest belief as to amount, it is deficient in failing to certify the accuracy and completeness of the supporting data, which the Act clearly requires. Thus, this certification is deficient as a matter of law. *W. H. Moseley Co.* v. *United States*, 677 F.2d 850 (1982).

However, on October 28, 1982, appellant made the statutory certification in proper form with respect to both previously supplied data and data newly submitted with the certification, and mailed that certification to the CO on November 2. Therefore, if interest on the claim is payable, it is payable from that date. *Luedtke, supra.*

We thus arrive at the ultimato issue in this appeal; namely, whether interest is payable on a termination settlement. Appellant urges extensively and vigorously that it was a principal purpose of the Act to make contractors whole, and that that purpose cannot be accomplished unless interest accrues on their claims during the long dispute resolution process. Government counsel argues that this problem was resolved in connection with termination settlements by the provisions of 41 CFR 1-8.703(j), which provides for partial payments to the contracter while settlement negotiations are in progress. However, he notes that 41 CFR 1-8.212-1(a) places the burden on the contractor to request any such partial payment.

Our research of cases that have denied interest payments indicates that such denials are most common when the contracter does not submit a claim as such, when it fails to certify the claim, or when there is no statutory provision for the payment of interest, such as occurred, for example, in *Esprit Corp.* v. *United States*, 6 Cl. Ct. 546 (1984), and *Dawson Construction Co.*, VABCA 2005 (1984), 84-3 BCA

March 12, 1986

par. 17587. We deem those cases inapposite to the factual situation before us. Moreover, on balance, we are disposed to agree with appellant that it was a primary purpose of section 12 of the Act, 41 U.S.C. § 611, te provide interest to contractors on claims (that are ultimately allowed) while the Government makes up its mind as to their merits. *See, e.g., Tera Advanced Services Corp.*, GSBCA 7109-NRC (1985), 85-2 BCA par. 17941, where the board allowed interest in connection with a termination settlement but did not discuss the apparent regulatory prohibition against the payment of interest.

We are thus reduced to a simple dilemma: 41 U.S.C. § 611, which permits the payment of interest on claims, makes no distinction between termination settlement claims and other forms of claims; whereas, 41 CFR 1-8.212-2(c) expressly prohibits the payment of intorest on settlement agreements. At least two boards that have considered the problem appear simply to have concluded that the regulation was superseded by the Act. *See Walber Construction Co.*, HUDBCA 80-445C2 (1983), 83-2 BCA par. 16885 at 84031; and *Essex Electro Engineers, Inc.*, DOTCAB 1025, 1119 (1980), 81-1 BCA par. 14838 at 73251-54, *aff'd*, 702 F.2d 998 (1983). Our preference, however, is te find a solution that gives full weight to both the Act and the regulation.

Accordingly, we adopt the rationale utilized in *Western Contracting Corp.*, ENG BCA 5066 (1985), 85-2 BCA par. 17951, in which the board held that a contractor was entitled to interest on the amount he had agreed to in a termination settlement, despite the regulation to the contrary, because the settlement differed from a normal termination settlement in that it did not include any payment for interest. The beard notod that in a traditional settlement the contractor is given a lump sum payment to compensate it entirely for costs attendant to the disputo, including an equitable rate of interest. That was not the situation of the contractor in *Western*, and it is not the situation here. Thus, we hold that 41 CFR 1-8.212-2(c) does not preclude the payment of intorest in connection with a termination settlement which expressly omits any provision for the payment of interest.

Decision

Appellant's motion for summary judgment is therefore granted, and the case is hereby remanded to the contracting officer for the payment of interest both on the $425,000 termination settlement and on the $15,000 in retainages, for the period from November 2, 1982, until the respective principal payment was made, at the rate prescribed by law.

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

G. HERBERT PACKWOOD
Adminisrative Judge

APPEALS OF PAPAGO INDIAN TRIBE OF ARIZONA

IBCA-1962 & 1966 Decided: *March 17, 1986*

Contract Nos. H50C14200685 & H50C14203712.

Motion to Dismiss denied.

APPEARANCES: Dabney R. Altaffer, Attorney at Law, Strickland & Altaffer, Tucson, Arizona, for Appellant; Robert Moeller, Department Connsel, Phoenix, Arizona, for the Government.

Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Dispntes and Remedies: Jurisdiction

In a case where an Indian tribe moves to dismiss appeals for lack of jurisdiction in the Board where the Government claims for repayment of disallowed costs under cost reimbursement contracts, tbe Board finds the Contract Disputes Act of 1978 to be inapplicable to contracts awarded under P.L. 93-638, but finds the Board has jurisdiction under a delegation of authority from the Secretary and the agreement of the parties under a disputos clause in the contracts. The claim of sovereign immunity by the tribe is found to relate to enforcement of any decision finding the tribe liable to the Government, and does not affect Board jurisdiction over the claims.

APPEARANCES: Dabney R. Altaffer, Attorney at Law, Strickland & Altaffer, Tucson, Arizona, for Appellant; Robert Moeller, Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE RUSSELL C. LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

Appellant has filed a Motion to Dismiss the above-captioned appeals on the ground that the Secretary of the Interior and the Board are without authority or jurisdiction to recover, through administrative proceedings, contracted funds that are disallowed by the contracting officer.

These appeals arise under two cost reimbursable contracts awarded to the Papago Tribe of Arizona pursuant to Title I of the Indian Self-Detormination and Education Assistance Act of 1975, P.L. 93-638 ("638" Act). Audits of the contracts resulted in the contracting officer determining that certain costs were unallowable and issuing Bills of Collection in the amounts of $15,953, $89,119.24, and $299,586 to require repayment of the disallowed costs. Appellant asks the Board to set aside the Bills of Collection and to dismiss the appeals for lack of jurisdiction for the reason that: (1) Congress did not grant such authority to the Secretary; (2) regulations adopted pursuant to the Act do not provide for such recovery in administrative proceedings; (3) if such right exists, it is a common law right subject to the defense of sovereign immunity; (4) the Act must be interpreted liberally to protect tribal sovereignty and resources where the statuto has the dual objectives of promoting self-determination and accountability; (5) in the Act, Congress did not expressly overrule the power given to Indian tribes in the Indian Reorganization Act of 1934, 25 U.S.C. § 476, to prevent disposition of tribal assets in satisfaction of disallowed costs; and (6) Congress specifically recognized in the Act the historic sovereign immunity of Indian tribes against claims based on torts or contracts. In furtherance of this view, on December 14, 1981, the Papago Council passed a resolution, citing the powers vested by the Indian Reorganization Act and the Constitution of the Papago Tribe, prohibiting the use or disbursement of tribal funds or assets in satisfaction or payment of disallowed costs paid to the Tribe unless the Council has first specifically approved such action.

The parties have extensively briefed the issue of jurisdiction with many citations of precedents. The Board has extensively considered all of the arguments; however, the conclusion reached makes it unnecessary to recount all our deliberations in this non-dispositive decision.

The legislative history of the "638" Act makes it clear that the Congress specifically considered whether the mechanism for implementation should be grants or contracts and provided for contracting as the primary vehicle for implementation. It is equally clear that the Act authorized the Secretary of the Interior to adopt regulations for its implementation, providing that contracts shall be in accordance with all contracting laws and regulations except that, in the discretion of the Secretary, contracts may be negotiated without advertising and that the Secretary may waive any provision of such contracting laws and regulations which he determines are not appropriate for the purposes of the contract. Such regulations were promulgated and published in 41 CFR Part 14H-70 with the provision that unless spocifically made applicable to contracts under the Act, the requirements of the Federal Procurement Regulations and the Interior Procurement Regulations are waived. Thus, a distinctive and unique group of contracts were evolved under these regulations. The Department elected to utilize the cost-reimbursable contract type, with advance payments authorized, retrocession upon request of the Indian tribe, allowable costs to be determined in accordance with 25 CFR Part 276 Appondix A–Principles for Determining Costs applicable to Grants, and provision for the appoal of any adverse decision or action of the contracting officer to this Board. By the act of entering into a contract subject to these regulations, both the sovereign Government of the United States and the Indian tribe agreed to submit disputes relating te the contract to this forum for resolution. The fact that both parties are sovereigns does not vitiate the contractual agreement to submit to a given forum for resolution of disputes. This Board has previously been so designated on the occasion of the United States Government undertaking a large project at the behest of the government of Saudi Arabia. Pursuant to an agreement between the two governments, the Department contracted for the work and Saudi Arabia agreed to pay for the work. The disputes clause was included in the contracts, resulting in over 50 appeals to this Board. Saudi Arabia submitted to our jurisdiction appearing with counsel other than counsel representing the contractor.

Here, as in the case of Saudi Arabia, there may be a question of whether there is a means of enforcing any judgment rendered against a soverign other than the United States, which has by statute agreed to pay such judgments. However, the Board is not deterred from adjudicating a dispute over which it has jurisdiction because the decision reached may not be enforceable. That issue must be addressed by the parties by proceeding elsewhere in the event the appellant should lose on the merits.

In *Busby School of the Northern Cheyenne Tribe et al.* v. *United States*, No. 221-85L (U.S. Cl. Ct. July 30, 1985), the U.S. Claims Court dismissed a claim of breach of a contract under the "638" statute finding such contracts are not subject te the Contract Disputes Act of 1978 (CDA), stating:

> The nature of these Indian contracts, which are not "procurement" oriented contracts, hut are basically grant or sociological type contracts designed to accomplish government social policy goals, seem to place them outside the pale of the Act's provisions, 41 U.S.C. § 602. The fact that applicable regulations may follow some procurement type procedures for administrative purposes does not alter this conclnsion. The court is of the view that these types of contracts were not meant to be covered by the Contract Disputes Act.

In *Delta Steamship Lines, Inc.* v. *United States*, 3 Cl. Ct. 559 (1983), the Court concluded that

> from a reading of the Contracts Disputes Act and its legislative history that it was not intended to reach this type of contract covering the payment of subsidy for construction of a vessel purchased by a private party for its own use. It is ratber the conventional contract for tbe direct procurement of property, services and construction, to be used directly by the Government, which is the type of Government contract covered by the Act.

Here, as in *Delta* and *Busby*, we are confronted with unconventional contracts, exempt from procurement rules of general applicability. The contracts are in furtherance of the Indian self-determination and trust responsibilities of the Government toward the Indian tribe, rather than to acquire goods, services or construction for direct use by the Government. The contracts are designed to benefit the Indian tribe, one of the parties to the contract, and are governed by regulations promulgated by the Department prior te the CDA. Disputes or claims under Government contracts, which was the primary focus of all the testimony and deliberations in the Congress in the consideration of the CDA, concerned those claims traditionally arising under general procurement contracts for goods, services and construction needed for use directly by the Government. Claims by the Government against Indian tribes under "638" contracts received no mention. We cannot presume that this was an oversight on the part of the Congress, but rather, conclude that the CDA was not intended to embrace all claims under all contracts or to displace existing procedures for the resolution of disputes relating to statutes with a primary governmental purpose other than procurement. Therefore, we find that the CDA does not apply to "638" contracts. We hasten to add that the Department does award contracts te Indian tribes and tribal organizations from appropriations other than the "638" appropriations, for the purposes of building roads, schools, irrigation projects and other purposes. These latter contracts are not subject to the special regulations of 41 CFR Part 14H-70, but rather the procurement regulations of general procurement applicability found in the FPR. Such contracts are subject te the CDA. See *Crow Creek Sioux Tribe*, IBCA-1431-2-81 (November 10, 1982), 82-2 BCA 16118; affirmed in an unpublished decision of October 20, 1983, by the United States Court of Appeals for the Federal Circuit.

Having found that the Board has jurisdiction over the appeals by reason of the delegation of authority by the Secretary and the contractual agreement of the parties, the appellant's Motion to Dismiss is hereby denied.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

APPEAL OF LOUISIANA STATE UNIVERSITY

IBCA-2057 Decided: *March 21, 1986*

Contract No. 14-08-0001-17225, Minerals Management Service.

Sustained.

Contracts: Construction and Operation: Allowable Costs--Contracts: Construction and Operation: Contracting Officer

The Board finds disallowed costs under a cost-reimburseable contract with an educational institution to be allowable where additional documentation provided the contracting officer indicated that the disallowances resulted from occasional lapses, errors, or omissions in an otherwise accurate accounting system and that the contracting officer had not exercised his independent judgment to review such evidence respecting costs questioned by the auditor.

APPEARANCES: Jerry J. Baudin, Director and Comptroller Louisiana State University, Batou Rouge, Louisiana, for Appellaut; Alton Woods, Department Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

In this appeal, Louisiana State University (LSU) contests the disallowance of $20,766 under a cost-reimbursement-type contract. The disallowance results in an alleged over-payment of $13,198.85, for which amount, the contracting officer issued a Bill for Collection. Appellant elected to have tbe appeal processed under the Board's accelerated procedures. Neither party requested a hearing, and the appeal will be decided on the record.

On August 23, 1978, LSU was awarded a cost-reimbursement-type contract for research for the purpose of development of improved well-control procedures to be used in deep wator, floating drilling operations. The contract was completed on April 1, 1983, after several modifications with a total contract amount of $822,962. LSU claimed a total of $822,300 in allowable costs. An audit resulted in the disallowance of various claimed costs including $10,157 of direct laber, associated indirect and fringe benefit costs, and $8,309 of material or service costs.

By letter dated December 19, 1984, tbe contracting officer provided the results of the audit to LSU and asked for a refund of the overpaid amount or additional supporting documentation for the questioned costs. LSU responded by letter of February 18, 1985, addressing each of tbe disallowed amounts and providing additional documentation. A price analyst reviewed the material, and recommended allowance of $3,730 of the costs questioned by tbe auditor. Accepting the recommendation of the price analyst, the contracting officer then issued a final decision and Bill for Collection on March 29, 1985.

It is noteworthy that the price analyst commented that the auditor considered tbat LSU has an automated accounting systom that accurately accumulates costs. The more frequent problems in these cost-disallowances cases to be decided from tbe appeal file result from inadequato accounting systoms or failures to document transactions. Here, we are confrontod with the minor percentage of the total costs claimed to be unrelated to the project or to have inadequato documentation, under an accounting system deemed to accurately accumulate costs.

Of the disallowed direct labor charges, $3,249 are claimed by the Government to have been chargeable to another unrelated project. LSU contends that the auditor was sbown the timesheets for the individuals and times concerned with the explanation that the account number was the primary department number used for check distribution purposes. The auditor intorpreted the account number to refer to another project. LSU provided the contracting officer with a certification of the principal investigator that the two individuals concerned were paid for work done on this project for the time periods involved.

Additional direct laber in the amount of $6,908 was disallowed because it lacked supporting documentation as required by OMB Circular A-21, Cost Principles for Educational Institutions. Basically, the documentation required is timecards or timesheets, or personnel activity reperts (PAR) signed by the individual and by an official having firsthand knowledge of tbe work performed. The PAR must acceunt for the full tiune of each employee and the distribution of time to various projects or activities. ln support of the costs, LSU submitted a certification by the principal investigator that all the individuals concerned did work on the project for the times and amounts billed, a time and effort report signed by the department head showing that a Mr. Hise was involved in a short continuing education effort, a time and effort report for four other persons which was not signed by the department head, and a signed PAR. lt is noted that two of the persons whose time is questioned, Messrs. Hise and Holden, are named in the schedule of the contract to be key individuals. As such, they are specified to be considered essential to the research program, and cannot be diverted to other programs without the prior written consent of the contracting officer. The documentation was not accepted by the Government because of the lack of signatures or because of the lack of the appropriate job order number on the document.

Regarding the questioned matorial cests, LSU sent requisitions with correspending issue slips from plant steres, requisitions with corresponding gas and oil receipts from LSU's filling station, and copies of invoices for supplier services on the well, including the nitrogen supplied to the well on March 22, 1983. The documentation was not accepted as adequate because of the lack of a signature, the use of a stamped signature, the tardy transfer of some charges to the centract from another project, and the lack of need for a new supply of nitrogen in the last days of the project. All of the material and services appear to be appropriato for use in a well project. Regarding the nitrogen, LSU peints out that it was incorrectly identified as a new supply of nitrogen by the centracting officer, and states that tlie voucher indicates that it was for a one-day service charge for nitrogen used at tlie well on March 22, 1983. LSU further states that this service was required to satisfactorily complete the research project.

Discussion and Findings

At the outset, we note that the auditor, price analyst, and finally, the contracting officer appear to have disallowed every cost that could be questioned for any deviation from what is characterized as an adequate accounting system. The total amount of the costs for whicb supporting documentation deviated equals only 2-1/2 percent of tbe entire project costs. Tbere are different accounting principles for educational institutions as opposed to those for commercial organizations. These principles recognize that the purpose and organization of educational institutions differ from commercial firms, and that the differences warrant special rules for accounting for costs. The lack of provision for profit in contracts with colleges and the variety of duties of the faculty that militates against precision of timekeeping are among the reasons for different cost principles. For a more detailed discussion of the reasons, see Accounting Guide for Government Contracts, Paul M. Trueger, (7th ed. 1982) at pages 781-83.

A primary difference in the cost principles for educational institutions is the use of the PAR in accounting for time charges. The PAR is prepared after the fact by a responsible official to account for all of the time of each person contributing to the project. The official estimates the percentage of time each person performed work on the project. Both the official and each person whose time is reported must sign the PAR.

Under the circumstance of this case, it appears that the contracting officer was influenced by the auditor to apply the harsh standard that any deviation or error in maintaining cost records must result in a disallowance of the cost. Such a standard punishes an institution with an excellent accounting system with a very low error rate on the same basis as similar institutions found to have a deficient accounting systems or practices. *See Washington University*, IBCA-1228-11-78 (1980), 87 I.D. 88, 80-1 BCA par. 14,297, where post-contractual transfers of salaries and associated burden were found to be unallowable where regular violations of proper accounting practices undermimed the credibility of the propriety of the transfers. There, the university regnlarly charged projects on tbe basis of budget estimates rather than actual time records and commonly made transfers between projects. There, we rejected an affidavit of the principal investigator in support of the attempted transfers. In the present case, we find many distinctions from *Washington University*. The certification offered by LSU is that of a department head with regnlar and continuous duties requiring his presence where the work was being performed. In *Washington University*, the affidavit was that of a much-traveled project director whose other activities prevented his regnlar presence on the project. Washington University did not maintain cost records in accordance with its contractual obligation, nor did it provide any other evidence in support of the transfer.

In the present case, there are a number of indications that the claimed costs were properly expended and charged to the project. The personnel whose time is questioned did work on the project. Two of the people were named key individuals in the contract and required

March 21, 1986

thereby not to be diverted to other tasks. As there is no suggegstion that this contract obligation was violated, a presumption arises that Messrs. Hise and Holden did work on the project fulltime. The auditor's admission of the intogrity of the accounting system and the low error rate are persuasive that the people in-putting cost data, while not perfect, did conscientiously keep accurate records. The fact tbat LSU did provide supperting documents, even though lacking all signatures, indicates that project time records and matorial invoices were systomatically kept in the project accounting files. The missing project number on several invoices for material commonly used on a well project is more persuasive of a minor error of omission, than it is tbat material was improperly charged te the project.

Although the auditor may question any cost when the record of the cost contains minor irregularities of cost-accounting requirements, it is not incumbent on the contracting officer to blindly treat all questioned costs as unallowable. In looking at the evidence supplied by LSU in support of the costs, the contracting officer must use his own judgment to determine whether, despite errors in the records, the evidence available is persuasive that the costs were properly expended on the project. The penalty for project personnel making occasional errors in reporting a cost should not be the automatic disallowance of the cost. The appropriate penalty would be to have the contractor submit added justification for the questioned cost to the considered judgment of the contracting officer. It is assumed that the contracting officer's fainiliarity with the project over the 5-year performance period will provide him with greater knowledge of the project personnel assigued and the material used than the auditor who sees the project only through its cost records after completion. Therefore, it is important that the contracting officer use the expertise gained during performance of the contract and exercise his judgment to resolve cost questions raising from omissions or errors in accounting. Only after the exercise of such judgment should a cost be disallowed and sent to the Board for resolution.

In this instance, we find that tbe questioned costs are supperted by the record. The costs are allowed in the amount of $20,766 to the extent that they have not already been paid. Interest shall be paid on the unpaid balance as provided for in the Contract Disputes Act of 1978.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

BALL, BALL & BROSAMER, INC., & BALL & BROSAMER (JV)

IBCA-1566-3-82 Decided: *March 25, 1986*

Contract No. 1-07-3D-C7455, Bureau of Reclamation.

Denied.

Coutracts: Construction and Operation: Allowable Costs--Contracts: Construction and Operation: Contract Clauses--Contracts: Construction and Operation: Contractor--Contracts: Construction and Operation: Geueral Rules of Construction

A contract is not ambiguous merely because there is imperfect correspondence between its specifications and its pay items. Thus, a contractor is not entitled to additional compensation for work that is clearly required by its contract, even though such work is not expressly included, or is arguably inadequately included, in the specific pay items of the contract.

APPEARANCES: Dario De Benedictis, Esq., Two Embarcadero Center, San Francisco, Califoruia, for Appellant; Fritz L. Gorebam, Esq., Department Counsel, Pboenix, Arizona, for tbe Goverument.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

This appeal was timely filed by Ball, Ball and Brosamer, Inc., and Ball and Brosamer (JV) (contractor/appellant), from the decision of the contracting officer (CO) dated January 22, 1982, denying the contractor's claim for an additional payment in the amount of $106,388 (subsequently revised to $113,602.50), plus interest, for compacting 18 inches of foundation (227,205 cubic yards at $0.50 per yard) beneath Sonoqui dike as part of the Central Arizona Project, pursuant to Bureau of Reclamation (BR/Government) Centract No. 1-07-3D-C7455, dated February 23, 1981 (contract). A hearing on the appeal was held in San Francisco, California, on March 24, 1983, and posthearing briefs were filed by both parties.

The claim was one of several filed by the contractor in connection with various contracts associated with the project, but all of the other claims were settled subsequent to appeal.

Background

The facts in this matter are undisputed. The contract required the construction of Sonoqui dike, an earthfill structure of compacted embankment approximatoly 15 feet high, 100 feet in width at the bottom, and 8 miles long. Completion time was 2 years, and completion was due on March 4, 1983. The work was satisfactorily completed.

On Septembor 30, 1981, the contractor wroto to the CO noting that payment for 2 feet of compacted foımdation was in dispute. It claimed that the work had been done and was payable under paragraph Nos. 1 and 5 of section 3.4.2, and under paragraph Nos. 1 and 2 of section

3.4.5(b), of the contract specifications, which read, in pertinent part, as follows:

The foundation under Sonoqui dike shall be compacted to not less than 95 percent of the laboratory standard maximum soil density (dry) in accordance with Paragraph 3.1.2 at a depth of 2 feet below the compacted ground surface.

(Par. 1, sec. 3.4.2)

The cost of compacting the foundation in place under Sonoqui dike and the cost of scarifying the foundation surfaces under the collective and Sonoqui dikes and canal embankments and under other emhankments shall be included in the unit prices per cuhic yard hid in the schedule for compacting emhankments.

(Par. 5, sec. 3.4.2)

Measurement for payment for compacting embankments will be made of the embankments in place, including a six-inch layer of the foundation for the emhankment scarified or plowed as previded in Paragraph 3.4.2 and will include ouly such portions of the embankments and foundations as have been actually compacted at the direction of the contracting officer and as provided in this paragraph.

(Par. 1, sec. 3.4.5(b))

Payment for compacting embankments will be made at the unit price per cubic yard bid therefor in the schedule * * *.

(Par. 2, sec. 3.4.5(b)).

The CO replied on November 12, 1981, seeking additional information as to the basis and amount of the claim; and the contractor responded on November 25 that the claim was based on compacting an additional 1.5 feet of foundation depth, excluding 6 inches in depth that had already been paid for. On November 30 the contractor also submitted a certification of the $106,388 claim, as required by section 6 of the Contract Disputes Act of 1978, 41 U.S.C. § 605(c)(1) (1982).

On January 22, 1982, the CO denied the claim, stating that the cost of compacting the foundation under the dike was to have been included in the unit prices for compacting embankments, and that the contract made no separate provision for payment for compacting the foundation other than the top 6-inch layer, which was scarified.

At the hearing on appeal, the centractor contended that the requirement for 2 feet of foundation compaction was an atypical requirement, since the other foundation work on the Central Arizona Project involved only a 6-inch compaction requirement; and that the contractor had therefore expected to be paid for the extra compaction work at the unit price for embankments. It also stated that the correct figure for the foundation compaction work was 227,205 yards, resulting in a total claim of $113,602.50.

In its posthearing brief, appellant argues that although there was no separato pay item for compacting the foundation, the relevant pay language made it clear that the entire foundation actually compacted (*i.e.* to a depth of 2 feet) would be measured and paid for at the unit price bid for the compacted embankment bid item, under paragraph 3.4.5, as follows:

> Measurement for payment for compacting embankments will be made of the embankments in place, including a 6-inch layer of the foundation for the embankment scarified or plowed as provided in paragrapb 3.4.2 *and will include* only such portions of the embankments *and foundations as have been actually compacted* at tbe direction of the contracting officer and as provided in this paragraph. [Italics in original.]

(Contractor's Posthearing Brief at 44).

Appellant disputes the Government's assertion that the contract's specifications restrict payment to that quantity comprising the first 6 inches of foundation because, it alleges:

> [T]his interpretation * * * totally ignores half of the language of Par. 3.4.5. * * *. It is true that Par. 3.4.5 *begins* by saying that measurement for payment will be made of the embankments in place, including a six inch layer of foundation scarified or plowed. The Government stops reading there and would have the Board do the same. However, Par. 3.4.5 *continues* and unequivocally provides tbat measurement for payment will include such portions of tbe foundation *as have been actually compacted* as provided in Par. 3.4. That includes the full two feet compacted and tested beneath Sonoqui Dike in accordance with Par. 3.4.2. * * *
>
> * * * * * * *
>
> * * * There is nothing in the standardized pay paragrapb, 3.4.5, indicating that payment will *not* be made for foundation beneath the first six inches. On the contrary, that paragraph begins by referring to the six inch foundation typically required on Central Arizona Project dikes and embankments, but *goes on* to make it clear that payment will be made for *all foundation actually compacted*. Clearly, that would include the full amount of foundation for an atypical structure such as the Sonoqui Dike.
>
> At best, the Government's position demonstrates a latent ambiguity in the language of the Contracts. Any such ambiguity must be resolved in favor of the Contractor. [Italics in original.]

(Contractor's Posthearing Brief at 46-47).

In support of its position, appellant appears to rely primarily on *Brezina Construction Co.* v. *United States*, 196 Ct. Cl. 29, 449 F.2d 372 (1971), in which the court found a latent ambiguity in the contract and held for the contractor on the ground that its interpretation was reasonable.

Discussion

We agree that *Brezina* involves possible analogies to the present case but do not agree that the case supports appellant's position. In that case, the contractor was permitted to bid on two alternatives, the second (upon which the contract was awarded) involving only the construction of barracks, excluding the casework, or interior trim, which consisted of built-in beds, desks, wardrobes, and wall partitions. The dispute concerned whether lighting fixtures were included in the casework portion, or in the basic construction portion, of the project. The court found that the fixtures were part of the casework, despite contract language under the casework description referring to only a portion of the fixtures, since the first sentence of the fixture provision stated unequivocally that, "Electrical fixtures, where indicated, shall be provided by the casework manufacturer."

The court stated:

> Plaintiff admits that the contract is ambiguous, but argues that, under all the circumstances, its interpretation of the contract is reasonable. Primary emphasis is placed on the first sentence * * *. We agree with plaintiff and think that it was within the zone of reasonableness for plaintiff to rely upon the above-mentioned sentence and to construe it as meaning that all fixtures indicated on the drawings as attached to the casework were not required under bid item 2.

(196 Ct. Cl. at 33-34).

At the conclusion of its opinion, the court takes care to point out: "The two paragraphs of the specifications are not hopelessly at odds with one another. Rather, as mentioned above, they may reasonably be read together." *Id.* at 35.

The reason the conflicting provisions may so readily be read together in *Brezina*, in our view, is that the first sentence of the relevant provision is clear and unequivocal, and that the subsequent language is relatod to it in suberdinate fashion as a part is related to the whole. Such a relationship is also present in the case before us. In fact, we are at a loss to find any ambiguity in either of the two key contract provisions in the present contract.

Paragraph 5 of section 3.4.2 states clearly that, "The cost of compacting the foundation * * * under the Sonoqui dike * * * shall be included in the unit prices * * * for compacting embankments." Similarly, paragraph 1 of section 3.4.5(b) states unequivocally that, "Measurement for payment for compacting embankments will be made *of the embankments* in place, *including a 6-inch layer of the foundation for the embankment* * * * and will include only such portions of the embankments and foundations as have been actually compacted * * *." (Italics supplied.) In other words, payment is to be made only for the embankment, not for the foundation, *except* to the extent that 6 inches of the foundation (if actually compacted) may be considered as part of the embankment. Here, analogously with *Brezina*, the 6-inch portion of the foundation is related to the embankment as part to whole.

Thus, the real issue in this case, in our view, is whether it was atypical, to the point of being unreasonable, to require the contractor te recover its remaining foundation compaction costs simply as part of the unit costs for constructing the embankment. In other words, is the contractor entitled to any form of relief because it may not have adequately included its foundation costs in its unit costs for the embankments? We think not.

In *Coker Corp.*, GSBCA No. 6918 (1983), 84-1 BCA par. 17007, a contractor sought additional compensation for removing floor coverings and suspended ceilings before installing the new materials required by its contract. There was no dispute between the parties that the contract drawings did not explicitly require removal of existing parquet tiles, carpeting, and ceiling tiles before installation of the coverings. The drawings simply indicated where the new materials were te be placed. The contractor argued that he was entitled te additional compensation because the specifications did not require the removal of existing work; whereas, he necessarily had to do it and therehy incurred expense for which he was not compensated.

In denying the claim in *Coker*, the beard commented:

> Appellant ignores a fundamental principle of contract law: an interpretation of a contract that gives reasonable meaning to all of its parts is preferred over one which leaves pertions of it useless, meaningless, or inoperative. * * * The key to determining the extent of appellant's obligations under this contract is to determine whether the disputed work was necessary to the performance of other contract work. Appellant's interpretation totally ignores those other provisions of the contract which require appellant te furnish labor and material which are "necessary for performance," or which are "required for installation" of new work.

84-1 BCA at 84,706.

The beard went on to add:

> Obviously, the two specification provisions relied on by appellant would have been clearer had they directed appellant te remove existing work as specified or required for proper installation of new work. However, the contract has not been rendered ambiguous by the lack of such direction. Appellant simply created the ambiguity that it complains of by failing to consider all provisions of the contract as a whole. We reject appellant's interpretation.

Id. at 84,707.

The principle involved is sometimes referred to hy the Armed Services Board of Contract Appeals as the "Zisken rule," from *Zisken Construction Co.*, ASBCA No. 7875 (1963), 1963 BCA par. 4001. According to the *Zisken* rule, a contractor is not entitled to additional compensation where work is clearly required by contract specifications and drawings, even though not included in any specific pay item. As stated by the Board in *Zisken*, "Pay items are never so particularized as to describe every itom of work to be performed. That is a function of the specifications and plans." *Id.* at 19,744. *See Atlantic, Gulf, & Pacific Co. of Manilla, Inc.*, ASBCA No. 13533 (1972), 72-1 BCA par. 9415; *recon'd* and *aff'd*, 72-2 BCA par. 9698 (1972); *aff'd*, 215 Ct. Cl. 938 (1977).

Numerous other cases have espoused the same principle without reference to the *Zisken* rule. *See, e.g., Time Contractors, Joint Venture*, DOT BCA No. 1354 (1983), 83-2 BCA par. 16643; *Edgemont Construction Co.*, ASBCA No. 23794 (1980), 80-2 BCA par. 14468; *Liles Construction Co.*, ASBCA No. 11062 (1965), 65-2 BCA par. 5270; *Ward Painting Co.*, ASBCA Nes. 9848 and 10014 (1965), 65-2 BCA par. 5228. *See also Brady Williamson Contractors, Inc.*, ASBCA No. 23111 (1979), 79-2 BCA par. 13946, *recon. denied*, 79-2 BCA par. 14168 (1979).

We agree with the holdings in those cases. The contractor in this case merely did what it was required to do under its fixed-price contract. We therefore see no merit in appellant's arguments.

March 25, 1986

Decision

Accordingly, the appeal is denied.

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

G. HERBERT PACKWOOD
Administrative Judge

U.S. GOVERNMENT PRINTING OFFICE : 1986 O - 153-713 QL 3

April 1, 1986

APPEAL OF MAXIMA CORP.

IBCA-1828 Decided: *April 1, 1986*

Contract No. 68-01-6466, Environmental Protection Agency.

Government Motion for Summary Judgment granted; Appellant Motion for Summary Judgment denied.

Contracts: Construction and Operation: Contracting Officer--Contracts: Disputes and Remedies: Termination for Convenience--Contracts: Formation and Validity: Governing Law

Under a guaranteed minimum quantity contract, where the Government failed to order the minimum quantities and the contractor agreed to extend the contract for 30 days without additional consideration on condition that a CPFF follow-on contract be negotiated, that payment be made for the minimum quantities, and that limited requirements be ordered during the 30-day extension, the Board finds that the extonded contract was constructively terminated for convenience and that the payment for the minimum quantities was outside the authority of the contracting officer and must be repaid to the Government as a mistaken payment.

APPEARANCES: Joe R. Reeder, Attorney at Law, Patton, Boggs & Blow, Washington, D.C., for Appellant; Richard Feldman, Government Counsel, Environmental Protection Agency, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

On Cross Motions for Summary Judgment

This is the second opinion issued respecting these Cross Motions for Summary Judgment. In our decision dated September 10, 1985, *Maxima Corp.*, IBCA-1828, 85-3 BCA par. 18,381, 21 I.D. 263, we denied both motions as we found there were disputed questions of material fact requiring resolution. Thereafter, the parties filed with the Board a Parties' Joint Motion for Clarification asking guidance from the Board regarding the disputed facts to provide the basis for a stipulation. Subsequently, in a conference held on November 25, 1985, the parties agreed that the third condition in appellant's letter of September 27, 1982, limiting the services to be called for in the thirteenth month, was based upon appellant's concern that the Environmental Protection Agency (EPA) might exceed appellant's capacity te perform. The parties further agreed that they considered the case ripe for decision of the question of law presented.

Because this opinion is dispositive of the appeal, the factual presentation of the appeal presented in our earlier opinion is set forth in its entirety below.

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, DC 20402

On April 23, 1981, EPA issued a request for proposal for a fixed-price, indefinite quantity contract for typing, photocopying, editing, and related services. Maxima Corp. (Maxima) responded with a cost and technical proposal, and included advice that with the lack of quantity definition and the magnitude of fixed costs involved, serious consideration should be given to a contract on a cost reimbursement or labor hour/time and materials type agreement. EPA considered Maxima's prices to be excessive and Maxima advised that the firm could lower its proposed prices if EPA were to increase the minimum quantities. EPA did raise the minimum quantities to half the maximum quantities with the result that Maxima's revised proposal substantially decreased its original prices. The resulting contract was awarded to the Small Business Administration (SBA) by EPA under the 8(a) program for minority and disadvantaged small business firms. SBA subcontracted the entire contract to Maxima, effective October 1, 1981. The performance period was 1 year to September 30, 1982, with 2 additional option years at the election of the Government.

The contract contained the "Termination for Convenience" clause for supply and service contracts. The contract contained 12 attachment pages describing the work to be done with some items providing for a "Guaranteed Minimum No. of Pages" and a "Maximum No. of Pages," and other items providing for a "Guaranteed Minimum No. of Hours" and "Maximum No. of Hours." The face page of the contract contained the following:

Production Requirements Year 1—Guaranteed Minimum	$419,009.00
Equipment Charges Year 1	79,689.00
Travel Charges Year 1—Guaranteed Minimum	1,525.00
Total Guaranteed Minimum	500,223.00

The above figures were computed by multiplying the estimated minimum quantities for each type of service by the contract's fixed price for that service.

From the outset of the contract, the services required by Maxima by the issuance of delivery orders were significantly below the minimums expressed in the contract. In monthly progress reports, Maxima reported the amount of work for the period and the work to date on a cumulative basis as a percentage of the minimum quantities. In several of the reports, Maxima noted a concern that the services were being underutilized on the contract. In the waning months of the first year of performance, EPA determined that it did not want to exercise the option to renew the contract with minimum and maximum quantities, but would seek to replace the contract with a cost-reimbursement type. Because of time constraints to process the new contract and desiring continuous service, EPA wanted an extension of 1 month on the existing contract. Maxima was asked to provide its cost-reimbursable proposal to provide the service for the following 2 years, which it did by letter of September 13, 1982. The letter also stated Maxima's belief that it should be paid for the initial contract term on the basis of the negotiated fixed-unit prices and minimum guarantees.

The parties met on September 24, 1982, to discuss a 1-month extension of the existing contract and the proposal for the following years on a cost-plus-fixed-fee basis. The parties disagree as to what, if anything, was agreed upon at the meeting. By letter dated September 27, 1982, Maxima discussed the meeting of September 24 and then stated:

> The Maxima Corporation will agree to re-negotiation of the subject contract to extond the poriod of performance for thirty (30) days without additional consideration, provided that the Environmental Protection Agency will agree to the following terms:
>
> 1. EPA will negotiate to effect the award of a sole-source contract to the Maxima Corporation for word processing, editing, and other production related services at a level of effort consistent with the enclosed statement of work (Enclosure B). This contract will be a cost-plus-fixed-fee contract for a twelve (12) month period of performance and will include two (2), twelve (12) month option periods. The fixed fee for this agreement will not be less than 8% of the total estimated costs.
> 2. EPA will agree to approve and expeditiously process Maxima's invoice for all guaranteed minimum items under the current contract.
> 3. EPA will agree that production requirements for tbe thirty (30) day extension period will not exceed the requirements for the peried August 2, 1982 through August 29, 1982 by more than 10%.
>
> The acceptance of these terms is essential to re-negotiation.

Beside each of the numbered paragraphs are handwritten notations with the initials "JK" for James Kranda, the contracting officer. Beside paragraph 1 is the word "agreed," beside paragraph 2 are the words "when received EPA will process," and beside paragraph 3 appear the words "understood qty did not exceed."

Under date of September 21, 1982, modification 1 to the existing contract was prepared deobligating $40,000 from fiscal year 1981/1982 and reobligating $40,000 of fiscal year 1982/1983 funds, and extending the period of performance for 1 month through October 31, 1982. By voucher dated October 31, 1982, Maxima billed EPA for the month of October 1982, in the amount of $272,210.90. This amount was calculated by deducting previous billings of $152,661.50 from the total of the contract minimum dollar amounts of $420,534 leaving a balance of $267,872.50. To this was added the October lease costs (not in issue) of $4,338.40. The voucher was forwarded by the EPA finance office to the project officer, who checked the box next to the words "Goods or services have been delivered as requested by the contract to support this payment." It appears that this was the regular payment procedure and that the contracting officer did not see or approve the voucher. The voucher was paid on or about December 20, 1982.

In October 1983, the EPA Office of General Counsel learned that the voucher had been paid. By letter dated November 16, 1983, the EPA termination and claims contracting officer (successor to James Kranda) advised Maxima that EPA's failure to order the contract minimum quantities was a constructive termination of the contract for the convenience of the Government effective October 31, 1982, and requested Maxima to submit a termination settlement proposal in accordance with the termination clause by January 31, 1984. There has been no termination proposal submitted by Maxima. On May 31, 1984, the contracting officer issued a final decision demanding repayment to EPA of $233,974.05[1] after deducting estimated amounts for October 1982 equipment costs, production requirements, and termination expenses. Maxima appealed that final decision to this Board. EPA has requested this Board to order Maxima to submit a termination settlement proposal. Maxima counterclaims in an unspecified amount for the services performed in October 1982 plus interest thereon. EPA has moved to dismiss the counterclaim as premature because appellant did not submit the claim to the contracting officer for a final decision.

Appellant's motion is accompanied by an Appendix A entitled "Material Facts as to Which There is no Genuine Dispute" and contains a listing of 39 statements. Appellant argues that in lieu of exercising his right to terminate the contract for convenience, the contracting officer agreed to pay the guaranteed minimums in exchange for an added month of free services and a more favorable follow-on cost-reimbursement contract. It contends that the Government received additional consideration for the bargain it made and that it cannot now upset the consummated agreement by claiming the actions of the contracting officer were based on a mistake in law and were beyond the scope of his authority. In the Government's response, counsel addressed each of the "Material Facts" set out by appellant and showed specific disagreement, in whole or in part, with 18 of them. Most siguificant of these are the alleged material facts relating to consideration, on which appellant relies to underpin a new consummated agreement. Regarding Mr. Kranda's notations in the margin of the September 27, 1982, letter (statement 17), the Government contends the notations were not a confirmation of agreement to the three terms, but were added in the mid-to-late October 1982 timeframe, nor were they discussed with any EPA or Maxima employee before or after their entry. Regarding statement 22 that the October services of Maxima were provided without added consideration, both the affidavits of the contracting officer and the project officer support the view that EPA did not expect the October services to be provided free, but were to be billed at the contract unit prices. Additionally, the Government challenges the fact contentions that the contracting officer and project officer agreed to pay the

[1] Amount changed to $229,635.65 by amendment of Government's complaint to correct mathematical error.

guaranteed minimums in return for the Octoher services or the negotiation of a cost-reimbursement contract. This is supported by the oft-repeated assertion of the contracting officer and project officer that they had always believed EPA to be obligated to pay the guaranteed minimums to Maxima regardless of the quantities ordered. Therefore, we found that there were disputed material facts concerning the alleged consideration for the agreement under which Maxima claimed entitlement and was paid the guaranteed minimums under the contract.

The Government's motion is based on the following propositions: (1) The contracting officer had no express authority to pay Maxima the guaranteed minimum. The argument here rests heavily on the presence in the contract of a payments provision, the "guaranteed minimum" provision, and the "Termination" clause and tbe need to read them together to give effect to all the contract terms. The interpretation of the minimum payment regardless of the amount of work produced is said to be contrary to the payment provision permitting payment only for completed work and would render the termination provision meaningless because it would prevent the Government from invoking it in the event minimum orders did not occur. The Government contends the contract did not authorize payment of a guaranteed minimum, but that those words simply represent the buyer's promise to order a minimum quantity, the failure of which would result in payment pursuant to the termination clause if invoked by the contracting officer or by operation of law and (2) a contracting officer has no authority to make agreements wbich violate the Federal procurement regulations, including those requiring an audit prior to certain agreements, those which violate the termination clause and the implementing regulations, and those placing limitations on his authority.

The Government's extensive arguments and citations are severely truncated here for the reason that the issues have not been joined in the pleadings. Appellant seeks to prove a new agreement supported by consideration and consummated by payment, and has addressed only in passing the many cases cited respecting the contracting officer's authority and those dealing with constructive termination of indefinite quantity contracts. Appellant relies on cases dealing with the authority of the contracting officer to make unwise or improvident agreements, and the Government relies on cases of contract interpretation, limits on the contracting officer's authority, constructive terminations, and erroneous payments.

Discussion and Decision

In addition to a decision on the central question of law, the question of whether the termination clause of the contract can be asserted retroactively where guaranteed minimum quantities have not been ordered, the parties ask that the Board include in its decision an interpretation of the guaranteed minimum and payment provisions of this contract. As stated above, the parties did not join issue in the pleadings of this case, leaving much original research to the Board. That research has convinced the Board that there can be little value placed on any interpretative analysis of a guaranteed minimum contract that purports to bind the Government to order or pay for any minimum quantities. Since *College Point Boat Corp.* v. *United States*, 267 U.S. 12 (1925), the availability of the termination for convenience right of the Government to escape liability for breach of contract damages or other contractual commitments, even when asserted retroactively, has been expanded as a doctrine of federal procurement law. There Mr. Justice Brandeis stated:

> A party to a contract who is sued for its breacb may ordinarily defend on tbe ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later.

Thus, the right to retroactively assert the termination for convenience right was established long ago, in a case with striking similarities to the instant case. There, both parties were unaware of the availability of the termination option until long after the contract had been cancelled. Here, both parties mistakenly believed that the Government was liable to pay an amount equal to the cost of the guaranteed minimum quantities of services.

Later, in *John Reiner & Co.* v. *United States*, 163 Ct. Cl. 381 (1963), *cert. denied*, 377 U.S. 931 (1964), the Court of Claims relied on *College Point* to extend the right of the Government to limit liability to the Termination provisions even though no action had been taken to invoke those provisions. Subsequently, the doctrine of constructive partial termination for convenience has been applied in many cases of requirements contracts and minimum quantity contracts where the Government failed to order all its requirements or the minimum quantity to limit the recovery to the compensation allowed under the terms of the termination clause. *See Manuals, Inc.*, ASBCA 24123, 80-2 BCA par. 14,579, at 71,882. It is clear from the precedents that the availability of the right to terminate for convenience, even though untimely asserted or not asserted at all, limits the liability of the Government to costs recoverable under the termination clause.

In the instant case, we are confronted with appellant's assertions that the contracting officer knowingly considered terminating the contract, chose not to do so, and entored into a new agreement for which there was consideration; thereby, preventing a constructive termination or an untimely act of termination by the Government after completion of the contract. We note that appellant's letter of Septomber 27, 1982, agreed to a 30-day extension of the contract "witbout additional consideration" on condition that EPA will negotiate a follow-on contract with Maxima on a cost-plus-fixed-fee basis, that EPA would pay the invoice for the guaranteed minimum quantities, and that EPA would limit the services required during the 30-day extension.

In stating that the extension was agreed to "without additional consideration," appellant was relying on being paid for services rendered during the 30-day extension from funds already obligated on the contract. Both appellant and the contracting officer were iguorant of the fact that the Government was liable only for termination costs for the failure to order the minimum quantities. By agreeing that the 30-day extension was without additional consideration, appellant merely allowed the contract performance period to be extended. There were no amendments to the contract agreement, and therefore, the terms during the 30-day extension were the same as they were during the previous 12 months. The Government would order services during the extended period and pay for those services on acceptance. There was no new agreement, but simply an extension of the existing contract, expressly without consideration.

The first condition expressed in the letter was that a sole-source contract be negotiated with Maxima on a cost-plus-fixed-fee basis. EPA had asked Maxima for its cost-reimbursable proposal for a new contract, which was provided by letter dated September 13, 1982. Stating this condition repeated EPA's intentions, that had already been communicated te Maxima, that EPA desired to contract with Maxima for continuing the services on a cost-reimbursable basis. The 30-day extension, given without consideration, was for the purpose of avoiding interruption of securing the services. The condition that a new CPFF contract be negotiated with Maxima related to EPA's expressed intentions, Maxima's proposal of September 13, and the prospective new CPFF contract. It did not relate to the existing contract, and we find no consideration for any new agreement in this condition.

The second condition of the agreement to pay an invoice for all guaranteed minimum items expressed the mutually held mistaken belief of the parties that the Government was liable for payment for the guaranteed minimum quantities. Under existing judicial determinations, no such liability existed. *See United States* v. *Amdahl Corp.*, No. 85-2760 (CAFC Mar. 6, 1986). There, the court cites, with approval, a law journal article dealing with the limits placed on the authority of Government agents to act by statute, regulation, and judicial and administrative determinations. The cases discussed *supra* clearly limit the Governments liability for failure to order contract minimums, and it would follow that the case law also limited the authority of the contracting officer to make payments for services not rendered and for which there is no liability. Whether the contracting officer agreed with this second condition or not is of no consequence. He had no authority to do so and could not bind the Government to make such payments. Appellant is charged with knowledge of the longstanding judicial restrictions of the Government's liability in minimum quantity contracts, and could not rely on the contracting officer's unauthorized promise to make payments for which the Government was not liable. The unauthorized promise of the contracting officer to do so cannot be found to be consideration.

The third condition restricting production requirements during the 30-day extension period to no more than 10 percent over the production requirements for August 1982, relates to the existing contract. James Kranda's notation beside this condition of "understood qty did not exceed" is in the past tense, indicating that the work requirements for October had been completed when the notation was made. This is also supportive of the Government's position that the notes placed on the lettor were written sometime after the extended contract had been completed. In any case, the limitation on the production requirements during the 30-day extension did not benefit the Government, but rather protected appellant from requirements that might exceed appellant's capacity to perform. We find no consideration for any new agreement in this condition.

Having found there was no new agreement, nor any consideration for one, we conclude that the contracting officer was without authority to agree to pay for the unordered production requirements under the contract. The payment of the invoice was unauthorized and therefore mistaken. Such funds paid under a mistake of law must be refunded. *DiSilvestro* v. *United States*, 405 F.2d 150 (2d Cir. 1968), *cert. denied,* 296 U.S. 964 (1969). In the circumstances of this case, and based on the authorities cited, we conclude that the original contract was constructively terminated for the convenience of the Government on October 31, 1982.[2]

Appellant's counterclaim for compensation in an unspecified amount for services for the month of Octeber 1982 is subsumed in our quantum determination which is predicated on the Government's computation based on the sound standard of services not exceeding the August 1982 requirements, a known quantity. Clause 12 of the contract provides that the contractor's termination claim shall be submitted within 1 year aftor the effective date of termination, and thereafter for the unilateral determination of the amount owing the contracter by the contracting officer. We see no useful purpose in remanding this long-standing dispute for negotiation of the termination settlement.

The appeal is denied. Maxima has refused to provide its termination settlement proposal. The Government computed an amount by allowing $32,236.85 for the October requirements ordered, $4,338.40 for October equipment costs, and $6,000 for termination settlement expenses. This reduces the overpayment te $229,635.65, which Maxima

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[2] The effect of the case law is to avoid any guarantees concerning minimum quantities promised by the Government by the operation of the termination rights. We note that some agencies have undertaken to warn contractors in the contract that failure to order minimum quantities will result in payment in accordance witb the termination clause. This practice should be encouraged to avoid misleading contractors with unenforceable promises.

[redacted]

is hereby ordered to repay to the Government, together with interest computed pursuant to P.L. 92-41 (85 Stat. 97) (Clause 34 of the contract) from May 31, 1984, the date of the final decision demanding repayment.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

WILLIAM PERLMAN

91 IBLA 208 Decided *April 2, 1986*

Appeal from a decision of the Acting Director, Colorado State Office, Bureau of Land Management, affirming assessments for noncompliance with oil and gas lease operating regulations. MOO-C-1420-1521, MOO-C-1420-1530.

Affirmed as modified.

1. Bureau of Land Management--Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Civil Assessments and Penalties

Failure to obtain written approval prior to initial drilling, plug-back, or recompletion drilling operations violatos provisions both of 25 CFR 211.20 and 30 CFR 221.21(b) (1982). Whether a penalty should be assessed under provision of 25 CFR 211.22 or 30 CFR 221 requires interpretation of both the regulatory scheme and the oil and gas lease affected. Departmental regulations implementing the Indian Mineral Leasing Act are found to have specific and primary application in cases involving Indian lands leased for oil and gas.

2. Bureau of Land Management--Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Civil Assessments and Penalties

Where a lessee of Indian lands commences drilling operations without written approval, penalties assessed must be reasonably related to the nature of the prohibited conduct. Maximum penalties should not be imposed if mitigating circumstances are present. Pursuant to provision of 25 CFR 211.22, the amount of penalty to be imposed is committed to the sound exercise of agency discretion.

3. Bureau of Land Management--Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Civil Assessments and Penalties

Determination of the proper amount to be assessed as a penalty for violation of the provisions of 25 CFR Subpart 211 is committed to the sound discretion of the agency and is governed by considerations of fairness applied to the individual facts of each violation.

4. Estoppel

Where an oil and gas operator obtains oral permission to do preliminary work at a drilling site for which an application for permit to drill is pending, and then begins drilling without written permission to do so in violation of Departmental regulation, there is no factual basis for finding an estoppel of the Government which would prevent assessment of a penalty for unauthorized drilling operations.

APPEARANCES: Julia Hook, Esq., Denver, Colorado, and John F. Shepard, Esq., Washington, D.C., for appellant; William R. Murray, Esq., and Linda C. Breland, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

Following a Bureau of Land Management (BLM) review hearing on January 12, 1984, William Perlman was assessed penalties in the amount of $28,750 by the Acting Colorado State Director, BLM, for the conduct of oil and gas drilling operations on four wells located on Indian lands. Penalties were assessed for three Perlman wells, 17-1, 17-2, and 20-1B, located on lease No. MOO-C-1420-1521. These penalties were assessed against drilling operations commenced prior to BLM approval of Perlman's applications to drill for each of the three wells. In the case of the fourth well (number 1-33), located on lease No. MOO-C-1420-1530, Perlman was assessed penalties for making unapproved plug-backs[1] and well recompletions into the Mesaverde and Fruitland geologic formations.

Perlman was properly authorized to complete well 1-33 to the Dakota formation, and did so.[2] When exploration of the Dakota formation failed to produce favorable results, the well was plugged at the Dakota level, and higher strata, (the Mesaverde and Fruitland formations) which were penetrated by the drill hole, were tested. This plugging back was undertaken, however, without notice to Minerals Management Service (MMS), the agency then responsible for management of the lease.[3]

As to the three wells drilled prior to receipt of written approval (17-1, 17-2, and 20-1B), Perlman contends he had obtained oral permission to commence operations which should estop the Department's attempt to assess penalties for having commenced drilling at these wells. He also contends, even assuming his commencement of operations was not proper, the penalty assessed was improper.

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[1] "Plug-back" is defined by the Bureau of Mines *A Dictionary of Mining, Mineral, and Related Terms* (1968) as: "To cement off lower section of casing; to block fluids below from rising in casing to a higher section being tested."

[2] It appoars this well site had been staked upon an oral approval of the location. (*See* Exh. D to Appollant's Reply Brief).

[3] The supervising agency has twice been changed. On Jan. 19, 1982, the Secretary of the Interior transferred administration of Indian oil and gas lease oporations from the Conservation Division, U.S. Geological Survey, to the newly created MMS. Secretarial Order No. 3071, 47 FR 4751 (Feb. 2, 1982). On Dec. 3, 1982, and Feb. 7, 1983, tbe administrative function was again transferred, this time to BLM. Secrotarial Order No. 3087, *as amended* 48 FR 8982, 8983 (Mar. 2, 1983).

April 2, 1986

As to well 1-33, Perlman contends the penalty is excessive. He also argues the penalty sought is erroneously computed on the assumption the unauthorized exploration of the Mesaverde and Fruitland were continuing violations of Departmental regulations which took place between February 17 and June 3, 1982. Perlman also contends oral permission to explore the higher strata at well 1-33 was given by an officer of the Department, and that, in any case, those operations conducted between February 17 and June 3, 1982, cannot reasonahly be considered to be of a continuing nature.[4]

At a January 12, 1984, BLM review hearing conducted pursuant to 25 CFR 211.22 evidence was presented regarding all four alleged violations. Testimony by Perlman's landman established that well 1-33 was drilled into the Dakota formation, which formation, consisting of "tight sands," was perforated at depths of from 7,880 to 7,870 feet on February 17, 1982 (Tr. 12). The well was then plugged back to the Mesaverde formation, and, on February 23, 1982, perforation was made in the Mesaverde formation at the 5,850-foot level, again in "tight sands," (Tr. 13). This drilling technique, which involves initial fracture at the deepest formation followed by perforations at successively higher levels, is said by Perlman to be part of a patented process he developed for exploration of tight-sand formations (Tr. 13). On April 15, 1982, a second perforation of the Mesaverde formation was made at 5,584 to 5,592 feet (Tr. 13). Finally, on June 3, 1982, there was a recompletion of well 1-33 in the Fruitland formation, the highest formation explored (Tr. 14). The approved application for permit to drill allowed completion (in this case fracturing) of well 1-33 only at the lowest level, in the Dakota formation (Tr. 9). The subsequent plugging-back and fracturing of the higher strata encountered in well 1-33 was not approved in advance by BLM (Tr. 9). To perform the unauthorized work, a "workover rig" operated at the well for approximately 3 to 4 days in February 1982, 1 day in April 1982, and 3 days in June 1982 (Tr. 16). All the work required to plug-back to, perforate and explore the Mesaverde and Fruitland formations was conducted during those days, for an actual working time of about 8 days (Tr. 16). Following the review hearing, Perlman amended the testimony concerning unauthorized drilling work to conform to documented work performance; the drilling record indicates 13 days were spent on recompletions of well 1-33. The penalty originally assessed for the unauthorized work done on well 1-33 was $16,000; the BLM review panel affirmed this assessment.

In the case of wells 17-1, 17-2, and 20-1B, on Southern Ute Tribal Lease No. MOO-C-1420-1521, penalties were assessed in the aggregate sum of $12,750 for commencement of drilling prior to approval of

[4] Appellant requested oral argument. The Board, however, finds the record on appeal is sufficiently developed to permit decision, and concludes oral argument is unnecessary.

Perlman's application for permit to drill (Tr. 17). Applications for drilling permits for all three wells were filed on September 1, 1982. In the case of well 17-1, preliminary site preparatory work was begun by the operator on September 15, 1982 (Tr. 18). The well was spudded on September 22, 1982. Perlman's application for permit to drill was approved on September 30, 1982. Drilling this well required 6 days (Tr. 18).

Site preparation for well 17-2 was begun on September 16, 1982, and the well was spudded on September 28, 1982 (Tr. 18). On October 1, 1982, Perlman's application for permit to drill 17-2 was approved. This well also required 6 days to drill. Road construction and drill-site preparation by Perlman was commenced for well 20-1B on September 13, 1982, the well was spudded on Septomber 18, 1982, and Perlman's application for permit to drill was approved on October 1, 1982 (Tr. 18). Drilling took 6 days.

Appellant was assessed penalties for violations at well site 17-1 at the rate of $250 per day for 15 days for a total penalty of $4,000 (Tr. 19). For well 17-2 appellant was assessed $250 per day for 15 days, or a total penalty in the sum of $4,000 (Tr. 19). For well 20-1B, appellant was assessed $250 per day for 18 days, totaling $4,750 (Tr. 19).

Perlman contonds BLM gave oral permission to commence drilling at all four wells and that recompletion at various levels in the case of well 1-33, was begun in the belief that it had been authorized (Tr. 26). Oral permission to commence work was said to have been given to Perlman employee Duke Fennewald by Tim Barrett of the Bureau of Indian Affairs (BIA), Don Englishman of MMS, and Brian Reid, a representative of the tribe (Tr. 29-30). BLM, however, denied that oral approval for commencement of drilling was ever given, while admitting some communication between Departmental employees and Perlman employees did take place concerning well operations (Tr. 31). The BLM review panel permitted the later filing of an affidavit concerning this issue executed by Perlman employee Fennewald, which was received by BLM on January 18, 1984. The Fennewald affidavit recites that on September 13, 1982, Don Englishman gave Fennewald oral permission to proceed with drilling operations on wells 17-1, 17-2, and 20-1B (Fennewald Affidavit at 2). The Fennewald affidavit describes a conversation which took place at the well-site inspections for wells 17-1, 17-2, and 20-1B between Fennewald and Englishman at which Barrett and Reid were present, when Englishman outlined additional or changed requirements needed before drilling could begin (Fennewald Affidavit at 1, 2). The affidavit concludes: "He [Englishman] told me [Fennewald] * * * Perlman could proceed with drilling operations * * *" (Fennewald Affidavit at 2). Fennewald also observes that staking of several well sites was done with oral permission where changes in site location were made (Fennewald Affidavit at 2). The record further indicatos staking for well 1-33 and other Perlman wells was in fact done in reliance upon oral approval (Exh. D to Appellant's Reply).

Subsequent to the filing of the Fennewald affidavit by Perlman, BLM also supplemented the record with an affidavit by Frank Salwerowicz, a member of the BLM review panel (BLM Response to Appellant's Reply Brief at 2). This document offers a definition of the expression "dirt work" which was used at the review hearing to describe preliminary operations at the four Perlman drill sites. The Salwerowicz affidavit offers an explanation of this term as it relates to the drilling of an oil well, ostensibly for the purpose of clarifying the record:

> 3. In my experience, oral approvals are given for the commencement of "dirt work" when time is a critical factor to the lessee or operator. "Dirt work," however, is limited to road construction and site preparation. "Dirt work" does not include drilling operations.
>
> 4. Oral approval for dirt work, if warranted hy the circumstances, is only given after the application for permit to drill has been completely reviewed and when written approval of the permit will be issued shortly.
>
> 5. Operations conducted pursuant to an oral approval for dirt work must stop short of "spudding in" the well, that is, the first bering of the hole for the well.

(Salwerowicz Affidavit at 2.)

Review of the hearing transcript and the parties' briefs on appeal indicates Perlman has indeed attempted to equate permission to begin preliminary work such as staking, road construction, and site preparation, with permission to do the actual drilling of the wells, which involves spudding the well, drilling, plugging off unproductive levels, and making recompletions at new, unexplored levels. Perlman argues this approach is reasonable and should be accepted as a matter of logic; that is, permission to begin work for any purpose associated with drilling should be treated as approval to proceed with drilling itself. *See, e.g.*, Letter dated Jan. 18, 1984, Hook to Moore at 3, transmitting documents to supplement the record. This analysis is not, however, as logical or compelling as Perlman would make it appear. If, as the Salwerowicz affidavit explains, permission to begin preliminary work does not lead ineluctably to permission to drill, the only possible point te Perlman's argument on this point must be that the time spent on preliminary work or "dirt work" should not be considered part of the time spent drilling when calculating the number of days during which unauthorized operations took place at the various drill sites. That is, assuming "drilling" cannot be equated to all operations conducted at the drill site, the period of unauthorized drilling should not include time spent in preparatory work.

Certainly, this logic was applied by BLM in the case of well 1-33. Preliminary oral permission for initial work on well 1-33 was apparently obtained. Significantly, however, prior written permission to commence drilling well 1-33 was obtained before actual drilling began. The well was spudded only *after* written permission to drill was given. Well 1-33 was drilled before wells 17-1, 17-2, and 20-1B. All circumstances considered, if Perlman could reasonably have interpreted oral permission to begin work to encompass drilling, in addition to work preparatory to drilling, there should be a showing on the record such a belief was reasonable. The record on this point is ambiguous. Had Perlman acted in reliance upon his past dealings with the agency, *i.e.*, the drilling of well 1-33, it would be reasonable to assume prior written permission was necessary before spudding wells 17-1, 17-2, and 20-1B, since he did not commence drilling at well 1-33 before written permission was issued. His argument in this respect is therefore inconsistent with his prior conduct.

[1] On appeal, Perlman contends each act of unauthorized drilling is a single discrete act, which merits only a single $25 penalty under 30 CFR 221.54(c), (d) (1982), for a total cost to Perlman of $100 instead of $28,750. Perlman ignores the distinctions between the BIA rule codified at 25 CFR 211.22, which requires a penalty imposition, the former MMS regulations appearing at 30 CFR Subpart 221 (1982), which imposed punitive measures for rule violations treated as civil penalties, and newer regulations published at 43 CFR Part 3163 which, in part, purport to assess liquidated damages based upon injury to the leasehold. Perlman challenges the BLM determination which finds action properly could be taken to regulate drilling on these Indian leases both under BIA rules in effect in 1982 at 25 CFR Part 211, and by MMS, at 30 CFR Part 221 (1982). In this connection, it should be observed Perlman's lease specifically incorporates the provisions of 30 CFR Part 221 and "all regulations * * * in force." *See* Lease MOO-C-1420-1521, paragraph 5(g).

The record on appeal indicates there have been prior instances of enforcement of the Indian leasing (or BIA) regulation which were relied upon by BLM when determining provisions of 25 CFR 211.22 controlled decision of these four lease violations. *See* Memorandum to District Manager from Petroleum Engineer dated Sept. 30, 1983, subject: *Appeal of Assessment for Noncompliance.* In this case Perlman was twice given actual notice that the penalties provided by 25 CFR 211.22 would be applied against violations of regulations at his drilling operation. First, the lease provisions gave notice of this fact. Second, Perlman was provided with notice and a hearing concerning the four violations at issue; assessments for the violations were made and notice given to Perlman of the reasons for the assessments on Augnst 23, 1983. At the hearing conducted on January 12, 1984, Perlman, represented by counsel, presented witnesses and argument. A verbatim transcript of the hearing was prepared. Subsequently, Perlman was allowed to supplement the record on appeal and brief the issues presented. The fact violations took place as claimed by BLM is not challenged by Perlman. Nor are the unauthorized drilling starts denied. While Perlman seeks to excuse them as having been orally approved, it is clear they occurred. The principal issue on appeal therefore concerns the proper amount of the penalty assessment, and, as a subsidiary issue, the characterization of the assessment itself–whether it is "penal" or "civil."

April 2, 1986

The reason for Perlman's objection to the application of 25 CFR 211.22 is practical, since 25 CFR 211.22 provides for penalties not to exceed $500 "for each and every day the terms of the lease, the regulations, or * * * [the supervisor's] * * * orders are violated." The operating regulations developed by MMS, however, which appeared at 30 CFR 221.54(c), (d) (1982), provided for single penalties of $25 for each violation. It is clear that past Departmental practice was to apply the Indian leasing rules in cases involving Indian land leases. *See* Memorandum dated September 29, 1983, from Petroleum Engineer to District Manager, Montrose.

The general operating regulations appearing at 30 CFR Part 221 have since been revised, and now appear at 43 CFR Part 3160. *See* 48 FR 36583 (Aug. 13, 1983). As amended in 1983, the general operating regulations provided for increased charges for noncompliance, now denominated "assessments." The rationale for these charges under the revised regulations was changed: certain violations of the regulations were considered to be in the nature of damages to the lessor for which the assessments were a form of compensation akin to damages. *See* 43 CFR 3163.3. Under the revised rules, drilling irregularities, involving either premature starts without written approval or departures from approved written permits, merit assessments of $250 instead of $25 as was formerly true. Further, these assessments could now, under the revised regulation, be cumulated for each day of violation. 43 CFR 3163.3 (1983). A 1984 amendment of this rule, however, eliminated the provision permitting cumulation of assessments for successive days of the same violation. 49 FR 37365 (Sept. 21, 1984) (and *see* Proposed Rulemaking at 51 FR 3882, 3885 (Jan. 30, 1986), providing for a uniform imposition of assessments and penalties for oil and gas operations application of these operating regulations was partially suspended on March 22, 1985. 50 FR 11517.

Perlman does not seek to obtain the benefit of the later promulgated rules which establish the current (and now suspended) regulatory scheme, but argues, simply, that the general oil and gas lease operating rules in effect in 1982, as published at 30 CFR Part 221, should control his conduct occurring in 1982. He further contends the penalty provisions of the BIA regulations published at 25 CFR 211.22 do not apply to him because they were not violated by his conduct in this case. Perlman argues that, until November 26, 1982, there was no specific BIA regulatory provision requiring a lessee to submit an application for permit to drill, and that therefore drilling begun without written permission was a violation of the MMS operating regulation codified at 30 CFR 221.21(b), which forbids drilling, redrilling, or plug-back operations without written approval.

The issue framed by these arguments concerns which regulations are to be applied, the MMS regulations at 30 CFR Part 221 or the BIA regulation at 25 CFR Part 211. There is a customary rule of statutory construction which dictates that, where there are two acts which contain conflicting provisions, the specific act controls over the general act. A similar construction logically also applies in the case where conflicting or duplicative regulations must be construed. *See generally* Davis, *Administrative Law Treatise* § 30.12 (1958).

As between the BIA oil and gas operating rules and MMS's general operating rules in effect at the time of these leases, the BIA rule at 25 CFR 211.22 specifically requires its provisions be given primary effect so far as concerns impositions of penalties for noncompliance. Thus, the BIA regulation preempts the oil and gas lease operating penalty provisions of any other Departmental regulation, providing:

> Failure of the lessee to comply with any provisions of the lease, of the operating regulations, of the regulations in this part, order of the superintondent or his representative [officers of the BIA] or of the orders of the supervisor or his representative, (sic) shall subject the lease to cancellation by the Secretary of the Interior or the lessee to a penalty of not more than $500 per day for each and every day the terms of the lease, the regulations, or such orders are violated; or to both such penalty and cancellation: *Provided,* That the lessee shall bo entitled to notice and hearing, within 30 days after such notice, with respect to the terms of the lease, regulations, or orders violated, which hearing shall bo held hy the supervisor, whose findings shall be conclusive unless an appeal be taken to the Secretary of the Interior within 30 days after notice of the supervisor's decision, and the decision of the Secretary of the Interior upon appeal shall be conclusive.

25 CFR 211.22. The quoted regulation is promulgated to implement the Act of May 11, 1938, 52 Stat. 348, the Indian Mineral Leasing Act, which authorized leasing on Indian lands (25 U.S.C. § 396d (1982)). This statute also provides that the Secretary shall promulgate rules respecting oil and gas operations on Indian lands. The provisions of 25 CFR 211.22 implement the Act; they therefore are specific rules promulgated te control the leasing of Indian lands, and control over the general operating rules which apply generally to all leased lands adininistered by the Department. When Perlman agreed to lease these Indian lands he accepted, as part of his lease, the provisions of 25 CFR 211.22, providing for penalties for failure to comply with lease terms. Having agreed to the lease terms, he cannot now avoid application of these rules.

Appellant also argues in the event 25 CFR 211.22 should be held to apply, that the regulation is impermissible as a penal rule not authorized by law. The authority of the Secretary te administer and to cancel leases of Indian lands in his discretion pursuant to provision of 25 CFR 211.22 in the event of breach of the lease terms is, however, established in law. *See Yavapai-Prescott Indian Tribe* v. *Watt,* 707 F.2d 1072 (9th Cir. 1983); *Sessions, Inc.* v. *Morton,* 491 F.2d 854 (9th Cir. 1974). Since the unauthorized drilling, which undoubtedly took place, constituted a breach of the lease terms, cancellation was a possibility here both as an alternative to imposition of the penalty provisions of 25 CFR 211.22 or as an additional sanction. *See* 25 CFR 211.27. The provision of 25 CFR 211.22 authorizing a daily assessment of up to $500 was invoked instead, but was further mitigated te recoguize

April 2, 1986

Perlman's violations were not considered extreme. As a result Perlman was penalized at the rate of $250 per day for the number of days during which the violation was found to persist.

Current Departmental policy concerning administrative sanctions for oil and gas operating violations is in flux;[5] while the BIA regulation at 25 CFR 211.22 establishes a ceiling in the amount of $500 and speaks in terms of "penalties" for breach of lease terms, it is clear the Departmental policy expressed in the regulation requires the exercise of a degree of discretion in fixing sanctions for violations of operating rules by a lessee on Indian lands. The regulation provides for "a penalty of not more than $500 per day." As appellant points out, the BIA regulations appearing at 25 CFR Part 211 are silent concerning exactly how this charge is to be calculated. The fixing of the penalty, from zero to $500, is therefore committed wholly to agency discretion. It is within this context that Perlman complains, first, he was assessed too much for the conduct which he admits took place, and second, that the assessment was a civil penalty imposed pursuant to a regulation which lacks underlying statutery authority for the imposition of such a penalty. To support his position, he cites *Gold Kist, Inc.* v. *U.S. Department of Agriculture*, 741 F.2d 344 (11th Cir. 1985).

Gold Kist involved the marketing of peanuts under regulations imposed by the Secretary of Agriculture. Although the 1938 statutory authority for the regulation of peanut marketing which was involved in *Gold Kist* did not provide specifically for the imposition of civil penalties, the Secretary of Agriculture had nonetheless imposed civil penalties under regulations implementing the statute. The *Gold Kist* court found two conflicting positions co-existed in the law on the subject, some authorities permitting imposition of penalties under an agency's general rulemaking authority, the other requiring specific authority for imposition of penalties in the implemented Act. *Id.* at 347, 348. The *Gold Kist* opinion cut through this Gordian knot, stating:

> To resolve these conflicting lines of precedent we hold that the statute must plainly establish a penal sanction in order for the agency to have authority to impose a penalty but tbat an agency has broad administrative powers to impose administrative sanctions that are not penalties as long as the sanctions are reasonably related to the purpose of the enabling statuto. " 'Penal' means punishable; inflicting a punishment; constituting a penalty; or relating to a penalty." Black's Law Dictionary 1289 (4th ed. 1957). The dictionary also defines "penal laws" as "[t]hose which prohibit an act and impose a penalty for the commission of it....Strictly and properly speaking, a penal law is one imposing a penalty or punishment (and properly a pecuniary fine or mulct) for some offense of a public nature or wrong committed against the stato...." *Id.* at 1290 (citations

[5] *See* 43 CFR Part 3160. Prior to partial suspension of the regulations governing assessments for noncompliance on Mar. 22, 1985 (*see* 50 FR 11517) the Department issued Instruction Memorandum No. 84-594, Change 3 (Jan. 4, 1985), establishing a maximum assessment or "cap" for assessments involving on-shore Federal and Indian oil and gas lease operations. Change 4 to this Instruction Memorandum issued Apr. 16, 1985, further limited assessments for offenses said to be continuing in nature. *See also* proposed rulemaking at 51 FR 3882, *supra*.

omitted). We conclude the fines imposed on Gold Kist were penalties, not administrative sanctions.

Id. at 348.

As *Gold Kist* indicates, however, there is no unanimity in court decisions considering the power of agencies to impose administrative civil money penalties. *See, e.g., Commissioner* v. *Acker*, 361 U.S. 87, 94 (1959), holding a penalty provided by a tax regulation invalid as an "attempted addition to the statute of something wbich is not there" in a case where the tax statute did not specifically provide for penalty imposition. In contrast, in *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356 (1973), the Court, finding a credit regulation providing for penalties to be valid, opined the penalty regulation was a reasonable exercise of administrative authority although penalties were nowhere provided for by the Truth in Lending Act, tbe implemented statute in that case. In the third case cited by the *Gold Kist* opinion, *West* v. *Bergland*, 611 F.2d 710 (8th Cir. 1979), *cert. denied*, 449 U.S. 821 (1980), a regulation permitting the Secretary of Agriculture to impose an administrative penalty by withdrawing meat-grading services was approved even though the Court considered the regulation to be penal in nature, and despite the fact the implemented statute did not specifically require such a penalty provision.

These cases, and the *Gold Kist* case itself, illustrate there is no set formula for determining whether an administrative civil-money penalty is properly imposed by regulation. The cases decide each situation on its own merits, as is illustrated by the *Acker* case, where the Court's opinion characterized the disfavored penalty provision as an attempt to impose a double penalty for the same conduct already punished by a provision of the tax code. *See* 361 U.S. at 93.

The regulation under attack in this appeal, 25 CFR 211.22, is part of a comprehensive plan for development of Indian minerals put into motion by the provisions of 25 U.S.C. §§ 396a-396g. This plan is described in *Crow Tribe of Indians* v. *Montana*, 650 F.2d 1104 (9th Cir. 1981):

The 1938 Act provides that an Indian tribe may lease its lands for mining purposes with the approval of the Secretary of the Interior. 25 U.S.C. § 396a. Section 396b provides for the sale of oil and gas mining leases under regulations to be prescribed by the Secretary. The Secretary is authorized to reject all bids and readvertise leases when in the Secretary's judgment that course would be in the Indians' best interests. With the Indians' consent, a lease may be privately negotiated. Section 396b also safeguards the rights of tribes organized under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), to enter into mining leases in accordance with the provisions of that Act and with their tribal constitutions and corporate charters. Other sections specify the type of bond to be furnished by the lessees and authorize the Secretary to promulgate regulations. 25 U.S.C. §§ 396c, 396d.

The regulations promulgated by the Secretary under authority of the 1938 Act cover many aspects of mineral leasing between tribes and non-Indian lessees, including the procedures for acquiring mineral leases, minimum rates for rentals and royalties and the manner in which payments are to be made, *penalties for failure to comply with the terms of leases*, information to be supplied by lessees, acreage limitations, inspections of lessees' records by Indian lessors or the Department of Interior officials, and cancellation of leases. 25 C.F.R. §§ 171.1-.30 (1980); *see also* 25 C.F.R. §§ 173.1-.29 (1980) (Italics supplied.)

(650 F.2d 1112, fn.9). Consistent with the quoted analysis, in *United States* v. *Forbes*, 36 F. Supp 131 (D. Mont 1940), *aff'd* 125 F.2d 404 (9th Cir. 1942), *aff'd* 127 F.2d 862 (1942) the imposition of administrative penalties by the Department was approved as a necessary and reasonable exercise of the power of the Secretary exercised incident to mineral leasing under the Mineral Leasing Act of 1920. It is concluded, therefore, the regulation attacked by Perlman, 25 CFR 211.22, was duly promulgated under the authority of the Indian Mineral Leasing Act, and properly provides for penalties for violation of rules implementing the Act. This Board has often observed it lacks the authority to declare invalid such a duly promulgated regulation of the Department. *See, e.g., Ahtna, Inc.*, 87 IBLA 283 (1985).

The record establishes Perlman was in fact authorized to begin the preliminary "dirt work" for wells 17-1, 17-2, and 20-1B. Preliminary staking notices for wells 17-1, 17-2 and 20-1B were signed in August 1982. An onsite inspection of the well sites was held on September 1, 1982. Tr. 30, 31; Fennewald affidavit at 1, 2. The Salwerowicz affidavit submitted by BLM in response to the Fennewald statement admits oral approval for preliminary dirt work was given by BLM employees in the case of well 1-33, on June 2, 1981, substantiating Perlman's claim that such a practice was customary under certain circumstances. Salwerowicz affidavit at 2, 3.[6] Since, according to Salwerowicz, such permission is given only when written approval of a permit to drill is imminent, the fact that the written approval of the applications for permits to drill wells 17-1, 17-2, and 20-1B was issued less than 20 days after the alleged oral approval for dirt work was said to have been given, gives further credence to the claim that oral approval for dirt work was in fact given. Despite this fact, however, the penalty review panel charged Perlman with a penalty from the date preliminary dirt work began, rather than from the times when unauthorized drilling commenced. The record, as previously summarized, establishes that, for well 17-1, there were 6 days of actual unauthorized drilling prior to issuance of a written permit to drill; for well 17-2, 3 days; and for well 20-1B, 6 days, for a total of 15 days. On well 1-33, unauthorized recompletion or plug-back operations occurred over a period of 13 days.

The BLM review panel apparently calculating all operations, rather than only those operations concerned with drilling without written

[6] According to the dissent, Departmental policy regards surface disturbance without prior written approval to be a serious violation. It is apparent, however, that in Colorado at any rate, the policy was not quite so strict as the dissent believes. At no place in the record is there any mention that the oral approval for work on 1-33 was considered to be a breach of Departmental policy by any Departmental employee. On the contrary, it appears to have been a recognized practice. *See* Salwerowicz Affidavit at 2.

permission for operations, assessed a penalty for 64 days of continuing violation (Tr. 7). The well log for well 1-33, however, considered with the testimony at hearing and the supplemental material received following hearing, indicates an overstatement of the time actually spent in unauthorized recompletions. The testimony of Perlman's landman, based upon the well log reports, was to the effect that, following initial completion of the well, (which was made with written approval), recompletions without written authorization occurred during a much shorter period (Tr. 14). The well logs indicate actual time spent upon recompletion at 1-33 to be 13 days rather than 64 days, as found by the review panel. This figure, 13 days, is arrived at by counting the number of days actually spent in recompletion activity. This figure does not include days during which no work was done, nor does it continue to assess a penalty for periods between recompletion activity at the various levels, since only unauthorized "operations" are forbidden. *See* 25 CFR 211.20(b).[7] This Board therefore finds Perlman conducted unauthorized operations on all four wells for a total of 28 days. The penalty for these violations, computed at $250 per day (the figure arrived at by the review panel), totals $7,000, rather than $28,750.

[2] While the number of days of violation was overestimated by including other preparatory work under the "drilling" category, the basis for the computation of penalty at $250 per day remains to be considered. The review panel justified its finding concerning the amount of the penalty assessed in the case of well 1-33, stating:

> The maximum assessment that can be levied under 25 CFR 211.22 is lease cancellation or a penalty of not more than $500 per day for each and every day the terms of the lease or the regulations are violated; or both such penalty and cancellation. Since the operating practices were proper for tight sands, and since the initial assessment was set at $250 per day rather than $500 per day, we believe that appropriate discretion was shown in establishing the amount of the assessment.

Panel decision dated January 26, 1984, at 2. Similar logic was applied by the panel in computing the penalty amount and quite clearly, the intention of the panel was to mitigate the penalty to half its potential severity as an exercise of agency discretion. This decision was based upon consideration of the effect of Perlman's operation upon the leasehold, and allowed leniency for the fact the operator had used appropriate drilling techniques.

In an elaborate 1979 case study of agency penalty procedure, the Administrative Conference of the United States arrived at recommendations for civil money penalty administration. *See Recommendation of the Administrative Conference of the United States* (RACUS) (GPO 1979). Concluding that considerations of due process require a hearing in penalty cases, the conference recommended standards be established for the determination of the amount of

[7] If, for example, on Sept. 13, 1982, well 20-1B had been spudded and Perlman then notified the driller to stop work because a permit to drill had not issued, Perlman should be liable for 1 day rather than for the 17 days which elapsed between the 13th and the issuance of a permit on October 1.

penalty to be levied. Recommending the use of penalty formulas as helpful to such determinations the conference opined that:

> Penalty standards should, in addition, specify whether and to what extent the agency will consider other factors such as compensation for harm caused by the violation or the impact of the penalty on the violator's financial condition. In order to reduce the cost of the penalty calculation process and increase the predictability of the sanction, simplifying assumptions about the benefit realized from or the harm caused by illegal activity should bo utilized.

Recommendation 79-3: Agency Assessment and Mitigation of Civil Money Penalties. RACUS at 24-25. Quite clearly, in this case, similar considerations entered into the decisionmaking by the review panel, and were part of the rationale for the ultimate penalty assessed.

When it determined mitigation of the penalty was appropriate, the review panel indicated that consideration of the absence of property damage and other circumstantial concerns were taken in account in setting the amount of the penalty to be assessed. The review panel also found "[t]he determination to apply assessments for the total period of noncompliance rather than as a single date violation is consistent with both past and present practices" (Review Decision at 3). The review panel cites 30 CFR Part 221 as support for this proposition. This reasoning is incorrect, since general Departmental regulatory policy since 1984 has clearly been otherwise. *See* 43 CFR 3163.3 (1984). And *see also* Instruction Memorandum No. 84-594, Change 4, declaring an end to the collection of charges for successive days of noncompliance with leasing regulations. The conclusion reached, however, is correct, since the controlling regulation here applicable, 25 CFR 211.22, leaves the agency no discretion but requires that the penalty imposed (which *is* subject to agency discretion) shall apply to "each and every day the terms of the lease, the regulations, or [the superintendent's] orders are violated." 25 CFR 211.22. Here, therefore, the review panel correctly assessed a penalty for successive days of operation.

[3] So far as concerns the fixing of the penalty assessment at $250 for each day of drilling operation at each well, we find the review panel and District Director arrived at this amount by mitigation by 50 percent of the maximum penalty which could have been assessed. This mitigation considered Perlman's overall conduct of the drilling operation. It was also a recognition he had violated the Department's regulations requiring written permission to drill, which could have resulted in serious damage to the leasehold and to the Indian lessor. The Board finds, therefore, that under the circumstances, no further reduction in the penalty amount is warranted. So much of the decision as provides for assessment of civil penalty in the amount of $250 per day for each violation is, therefore, affirmed. The total amount due from appellant, as so computed, is $7,000; the penalty is reduced accordingly.

In connection with the calculation of penalty for successive days of operation, it should be observed, in calculating the appropriate penalty for the recompletion operation at well 1-33, that even were the total period of 64 days of "continuing" violation as calculatod by the BLM review panel to be accepted as a basis for calculating penalty, it would not be possible to penalize equally days during which recompletion operations were under way and days when plug-back activity had halted. Quite clearly, in the case of 1-33, Perlman could have stopped at any formation explored by him, and need not have gone forward with successive plug-backs at different levels. Presumably, had he been notified his activity was unauthorized prior to completion of the last and highest level, he would have stopped work. Since his lack of prohibited activity between plug-backs could itself have caused no damage, the Board finds that, even assuming a violation during those days of inactivity, no penalty should be assessed for those days in which no activity took place, considering all the factors just described.[8] Similar reasoning would apply in the case of wells 17-1, 17-2, and 20-1B; no penalty at all should be assessed for orally permitted operations or for periods of inactivity. The result reached, therefore, would be the same in either case as is reached by finding only days of actual operation to be violations of the applicable regulation.

[4] When considering Perlman's estoppel argument, that the Government should not be allowed to penalize conduct which it allowed to occur, it must be kept in mind that, although ofton changed, the Department's Indian mineral leasing regulations have consistently required written approval prior to commencement of drilling. *See, e.g.*, 25 CFR 211.21, previously codified at 25 CFR 171.21 (198I). To invoke estoppel against the Government, four factors must be present: There must be (1) full knowledge of all relevant facts by the Government official who (2) intends his affirmative misrepresentation or concealment of a material fact will be acted upon under circumstances which entitle the party asserting estoppel to believe the misrepresentations, (3) the party asserting the estoppel must be iguorant of the true facts, and (4) he must rely upon the representation as made by the official. *See United States* v. *Ruby Co.*, 588 F.2d 697 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979). This case discloses no evidence of affirmative misconduct by a Federal employee. Further, assuming permission to begin preliminary work could be considered to amount to an affirmative misrepresentation or concealment of the regulatory requirement that written permission to drill was required, because Departmental regulation provides such permission must be obtained in writing, failure to do so could not be excused so easily. Valid regulations may not be avoided by reliance upon claimed lax, uneven, or mistaken administration by governmental employees, since all persons are presumed to know of

[8] Had his drilling resulted in environmental damage Pearlman would also have been subject to penalties for violation of other provisions of the lease. The amount would, in such case, be based upon the number of days the environmental damage continued.

the existence of valid regulatory requirements. Thus, an essential element of a claim of estoppel, that the party asserting the claim he iguorant of the true facts, is missing when a party asserts he is ignorant of pertinent provisions of a relevant regulation. *See, e.g., Tom Hurd*, 80 IBLA 107 (1984). Because knowledge of the regulation is imputed to those affected hy its provisions, there can he no claim of iguorance of the rule. *Tom Hurd, supra*. The provisions of 25 CFR 211.20 and 30 CFR 221.21 (1982), requiring written permission prior to drilling, redrilling, or plugging-hack and other operations, were hinding upon Perlman at the time he conducted drilling on wells 1-33, 17-1, 17-2, and 20-1B.

Pursuant to the authority delegatod to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, therefore, so much of the BLM decision as provides for a civil-money-penalty assessment in the sum of $250 for successive days violation for each infraction as modified by th is decision is affirmed. The penalty for all violations under review, is assessed in the total amount of $7,000.

FRANKLIN D. ARNESS
Administrative Judge

I CONCUR:

R. W. MULLEN
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

I cannot agree that the penalties for the violations on these two leases should be reduced from $16,000 to $3,250 (for well 1-33) and from $12,750 to $3,750 (for wells 17-1, 17-2, and 20-1B) respectively. At well 1-33, the Bureau of Land Management concluded that "two unapproved plug backs and recompletions to other formations were performed, that is, from the Dakota to the Mesaverde and from the Mesaverde to the Fruitland."[1] It assessed $16,000 in penalties for these violations, on the basis of a total of 64 days of violation at $250/day. Its explanation for the number of days was:

> Since these violations have been determined to be continuing, a starting and ending date must be established. The starting date of the violations has been determined to be the date recompletion operations started to test the unapproved formation. The determination of the end of the period of the violations is a judgment. It could be when the BLM approved the recompletion operations or it could be the end of some particular operation determined from reports. It was determined by the Hearing Panel that the ending date should be the Well Completion Date as recorded on the Well Completion Reports, Item 17. This date is interpreted te be the date the well or formation is capable of being produced, which is after stimulation of the formations by acidizing or fracturing.

[1] Decision of Jan. 26, 1984, at 1. A "recompletion" in this context is "redrilling the same well bore to reach a new reservoir after preduction from the original reservoir has been abandoned," (8 Williams & Meyers, *Oil and Gas Law* 729 (1984)), except that in this case there was no preduction from the Dakota formation before recompletion was initiated.

This date could have been established as the date that the final work reports were submitted to our office.

* * * * * * *

Accordingly, the hearing panel sustains the decision of tbe Montrose District Manager and finds as follows:

Mesaverde Formation:

1. Recompletion operations started on February 17, 1982.
2. The formation was fractured on April 16, 1982.
3. Time frame of violation is 59 days.
4. Assessment: 59 days @ $250 per day - $14,750

Fruitland Formation:

1. Recompletion operations started on June 1, 1982.
2. The formation was acidized on June 5, 1982.
3. Time frame of violation is 5 days.
4. Assessment: 5 days @ $250 per day - $1,250.

Total assessment - $16,000

A fuller technical explanation was provided to the BLM hearing panel:

MR. MOORE: Any questions from the Panel?

MR. SALWEROWICZ: I'd like to try to clarify something. You say the period of ass[ess]ment for recompletion for Mesa Verde started February 17th and endod April 17th?

MR. KENDRICK: Right.

MR. SALWEROWICZ: What was it on February 17th that started it and what happened on April 17th that stopped it?

MR. KENDRICK: I'd have to look at tbe records. Could you help me with that, Terry?

MR. GALLOWAY: February 17th, that date started when they pulled up the 'set packer' and pulled up the hole and perforated the Mesa Verde Formation and they did work for a period of a couple of weeks. I don't have the date off the top of my head. The well was shut-in for a period of time and then the further completion work was done in the Mesa Verde up until April 17th when I believe they fraced and was the end of the assessment period when the formation could reasonably have been expected to produce.

MR. SALWEROWICZ: And then June 1st would be the date that recompletion was –

MR. GALLOWAY: Yes. The 4 1/2-inch casing was pulled and perforated in the Fruitland Formation and June 5th is when it was fracod or acidized in the Fruitland Formation, at which time the reasoning was the fromation [sic] could reasonably have been expected to be producing. There was further work carried on later, but that was the reason for those periods of time. [[2]]

The majority, adopting a suggestion made by Perlman to the BLM hearing panel that "recompletion" should be defined as "when you have the rig on the location,"[3] conclude that he should be penalized only for 13 days "actually spent in unauthorized recompletions."[4] In my view the purpose of the regulation requiring written permission before starting any operation–namely, te prevent waste of the oil and gas resource and damage to other resources–is better served by defining the recompletion operation as BLM did in its January 26 decision, namely beginning when operations started to test the unapproved formation and concluding when the formation is capable of

[2] Transcript of the Jan. 12, 1984, hearing at 7-8.

[3] *Id.* at 16.

[4] Majority opinion, *supra*, at 169-170.

being produced. Since, contrary to the majority's assertion, waste or damage could occur even when drilling is not occurring, it is not unreasonable to impose assessments for the days between unauthorized drilling periods.

At wells 17-1, 17-2, and 20-1B, the violations were "dirt work for pad and road construction and the drilling commenced prior to the approval of the APD."[5] Penalties of $12,750 were assessed for a total of 48 days of noncompliance (at $250/day), computed from the day dirt work began at each site until the day before each APD was approved.[6] The majority reduce the number of days of violation to 15 (for unauthorized drilling only) because they believe BLM gave oral approval for the dirt work. They base this belief on an affidavit from one of Perlman's employees[7] and on the fact that oral approval to commence dirt work was given for well 1-33.[8] BLM's January 26 decision addresses the issue of oral approval, which was discussed at the hearing:

> 25 CFR 211.10(b) requires that written approval be ohtained hy the lessee before commencing operations. At the time of these violations all written approval for drilling operations on Indian leases were made hy the Minerals Management Service. Oral approvals were not the policy of the Minerals Management Service in the past and are not the policy of the Bureau of Land Management. During the on-site inspection of the well locations, various statements may have been made as to the completeness or acceptahility of the plan, hut we find nothing to indicate that these statements should be considered an oral approval te commence earth work or drilling operations. [[9]]

Neither Perlman's affidavit nor the oral approval for well 1-33 persuade me that oral approval for dirt work on wells 17-1, 17-2, and 20-1B was given. Even if it was given, 25 CFR 211.10(b), which Perlman is presumed to know, states categorically that "[w]ritten permission *must* be secured from the supervisor before *any* operations are started on the leased premises." (Italics added.) Reliance by Perlman on contrary information or opinion of a Departmental employee cannot operate to vest any right not authorized by law, nor is the authority of the United States to enforce a public right lost by an employee's neglect of duty.[10] 43 CFR 1810.3. Contrary to the majority's view, Departmental policy still regards both drilling without approval

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[5] Decision of Jan. 26, 1984, at 3. Less cement was used for production casing at each well than was specified in the APD.

[6] Of this amount $750 was for failure to use the specified amount of cement. *See* note 5, *supra*.

[7] Affidavit of Duke Fennewald dated Jan. 13, 1984, Exhibit A to Appollant's Reply to BLM's Response, filod June 13, 1984:

"10. On or about Septembor 13, 1982, Don Englishman (MMS) told me that the stipulations for the Nos. 17-2 and 20-1B Wells and the rehabilitation plans for the Nos. 17-1, 17-2, and 20-1B Wells had been received in the Grand Junction Office of the MMS. He told me at this time that Perlman could proceed with drilling operations on the Nos. 17-1, 17-2, and 20-1B Wells."

[8] Exhibit B to Appellant's Reply to BLM's Respense.

[9] Decision of Jan. 26, 1984, at 4.

[10] Oral approval of any operation on an Indian lease would have clearly been neglect of duty in September 1982. For the present law, *see* 43 CFR 3162.3-2; 3165.2. *See also* the proposed amendment of 3162.3-2 at 51 FR 3889 (Jan. 30, 1986).

and surface disturbance preliminary to drilling without approval as serious violations.[11]

I would affirm the January 26, 1984, BLM decision.

WILL A. IRWIN
Administrative Judge

DAVID SOHAPPY, SR., *ET AL. v.* ACTING DEPUTY ASS'T SECRETARY--INDIAN AFFAIRS (OPERATIONS)[1]

14 IBIA 100 Decided *April 4, 1986*

Appeal from a decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) concerning the use of in-lieu fishing sites on the Columbia River.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Indians: Hunting, Fishing, and Gathering Rights: Generally--Regulations: Generally

The Board of Indian Appeals does not have authority to change a duly promulgated regulation of the Department or to declare it invalid.

2. Indians: Hunting, Fishing, and Gathering Rights: Generally

The use of Columbia River in-lieu fishing sites for permanent residences or for the permanent storage of trailers and other personal property violates 25 CFR Part 248.

APPEARANCES: Jack L. Schwartz, Esq., Portland, Oregon, for appellants; Vernon Peterson, Jr., Esq., Office of the Solicitor, U.S. Department of the Interior, Portland, Oregon, for appellee; Gary M. Berne, Esq., Portland, Oregon, for *amicus curiae,* The Chiefs and Council of the Columhia River Indians. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

On January 30, 1985, the Board of Indian Appeals (Board) received a notice of appeal from David Sohappy, Sr., Myra Sohappy, David Sohappy, Jr., John Jackson, Henry Alexander, David Winnier, Michael Brisbois, and Michael Hunt (appellants). Appellants sought review of a November 16, 1984, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) concerning their eviction from certain in-lieu fishing sites along the Columbia River. For the reasons discussed below, the Board affirms that decision.

[11] *See* proposed 43 CFR 3163.3(a)(2), 51 FR 3890 (Jan. 30, 1986).

[1] This case was originally styled as *Columbia River In-Lieu Fishing Sites.*

Background

The present case is part of a larger controversy having its genesis in four treaties signed in 1855 between the United States and the Confederated Trihes of the Umatilla Reservation, 12 Stat. 945; the Yakima Nation, 12 Stat. 951; the Nez Perce Tribe, 12 Stat. 957; and the Indians of the Tribes of Middle Oregon (Confederated Tribes of the Warm Springs Reservation), 12 Stat. 963. These treaties preserve to these Pacific Northwest Indians the right to take fish at "their usual and accustomed places" and to use these places for such purposes as the "erecting of [temporary or suitable] buildings for curing" fish taken. Because these Indians historically lived and fished along the Columbia River and its tributaries, there were numerous "usual and accustomed" fishing places along the banks of the rivers.

The construction of the Bonneville Dam, which was completed in 1937, submerged or destroyed several of the Indians' usual and accustomed fishing places. Consequently, in exchange for the peaceful relinquishment of these places, in 1945 Congress authorized the U.S. Army Corps of Engineers to acquire land along the Columbia River to replace these fishing places. *See* Act of March 2, 1945, 59 Stat. 10, 22, ch. 19, *as amended by* Act of June 8, 1955, 69 Stat. 85, ch. 131, P.L. 62. Pursuant to this authority, the United States, through the Department of the Army, acquired fee simple title to five tracts of land. Two of these sites are in Oregon, and three are in Washington State. Supervision of the sites was later transferred te the Secretary of the Interior for the benefit of those Indians from tribes having treaty fishing rights in the Columbia River. The Secretary of the Interior has delegated supervision of these sites to the Bureau of Indian Affairs (BIA), which manages them pursuant to regulations found in 25 CFR Part 248.

Title to these in-lieu fishing sites is thus held by the United States of America. Although the sites are managed for the benefit of treaty Indians, they are not Indian trust lands and are not part of any Indian reservation.

Appellants all maintain cabins or trailers at the Cook's Landing, Underwood, and Lone Pine in-lieu sites.[2] Some of these facilities have permanent electrical connections; others are apparently not used continuously, but are nevertheless not removed from the sites when not in use. Between March 16 and 18, 1984, each appellant was personally or constructively served with notice to terminate unlawful occupancy of Federal property, and remove abandoned personal property. Appellants were each informed they and/or their personal property were in violation of 25 CFR 248.6,[3] which prohibits the

[2] Appellant Michael Hunt apparently removed his trailer from the Lone Pine in-lieu site in response te a BIA trespass uotice.

[3] Sec. 248.6 states in pertinent part:

Continued

erection, placement, or maintenance of permanent dwellings or structures on the in-lieu sites. Appellants were told to remove the unauthorized structures within 30 days or BIA would refer the matter to the United States Attorney with a request that he initiate appropriate civil court action. The notice also advised appellants that BIA would assist them in locating alternative housing. The notices were signed by the Portland Area Director, BIA.

Appellants appealed these notices to appellee. Appellee determined that appellants had not filed an adequate statement of reasons for their appeal as required by 25 CFR 2.10(a). Thus, the appeal was subject to summary dismissal under 25 CFR 2.17(a). Rather than dismissing the case, however, appellee granted appellants additional time to file a statement of reasons. Nothing was filed. Consequently, on November 16, 1984, appellee issued a decision stating at page 1: "I have concluded that the Area Director's interpretation of 25 CFR Part 248 was correct. Also, these appeals are subject to summary dismissal for failure to set forth a statement of reasons for the appeals. See 25 CFR Part 2, 2.17(a)."[4]

Appellants took an appeal to the Board. On appeal briefs were filed by both appellants and appellee. In addition the Board granted *amicus curiae* status te and accepted a brief from the Chiefs and Council of the Columbia River Indians. *Amicus* is not a federally recognized Indian tribe, but states that appellants recognize it as their governing tribal organization.[5] *Amicus'* brief was submitted in support of appellants' position.

Discussion and Conclusions

The main thrust of appellants' appeal is that the Departmental regnlations in 25 CFR Part 248, governing the use of Columbia River in-lieu sites, are unconstitutional, in excess of Departmental authority, contrary to the 1855 treaties and 1945 Act authorizing the sites, and destructive of traditional Columbia River Indian culture. Secondarily they argue that BIA has improperly interpreted those regnlations.

[1] The Board is not the proper forum to consider appellants' main arguments. The Board does not have authority to change or declare invalid a duly promulgated Departmental regulation. *See, e.g., Jones* v. *Acting Sacramento Area Director*, 13 IBIA 124 (1985); *Zarr* v. *Acting Deputy Director, Office of Indian Education Programs*, 11 IBIA 174,

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"No dwellings or structures shall be erected, placed, or maintained upon the sites, except that camping facilities may be placed thereon only as herein described and fish drying facilities and fishing platforms may be erected by Indians for use during the fishing season. Facilities for camping on the sites shall be limited te tents, tepees, campers, and mohile trailers. All such tents, tepees, campers, and mohile trailers shall be removed from the sites at any time the owners thereof are not actively engaged in fishing, drying fish, or processing fish by other means."

[4] From this quotation of appellee's decision it is clear that he decided the appeal on the substance of the regulations in 25 CFR Part 248. Although appellee now argues that the appeal te him was dismissed for failure to previde a statement of reasons, his decision merely notes the appeals were "suhject to summary dismissal;" there is no indication they were so dismissed. The Board will, therefore, treat the substance of appollants' arguments.

[5] Appellee states that most of the appellants are members of the Yakima Nation, which prohibits dual membership in another Indian tribe. Whatever the precise extent of *amicus'* political status, it represents an entity with which appellants identify.

90 I.D. 172 (1983). Accordingly, the Board cannot consider any of appellants' arguments challenging the regulations in Part 248.

[2] Appellants also argue that those regulations have been improperly interpreted to prohibit the construction or maintenance of "permanent" residences on the in-lieu sites. The Board has carefully reviewed 25 CFR Part 248. The entire part, and particularly 25 CFR 248.6, clearly contemplates only the temporary use of the sites during the fishing season. Appellee properly determined that appellants' use of the sites for permanent residences or for the permanent storage of trailers and other personal property violated the regulations.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Deputy Assistant Secretary's November 16, 1984, decision is affirmed.

JERRY MUSKRAT
Administrative Judge

I CONCUR:

BERNARD V. PARRETTE
Alternate Member

HARNEY ROCK & PAVING CO.

91 IBLA 278 Decided *April 14, 1986*

Appeal from a decision of the Burns, Oregon, District Office, Bureau of Land Management, holding appellant liable for trespass damages. O 4-246.

Set aside and remanded.

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

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

2. Trespass: Measure of Damages

Departmental regulation 43 CFR 9239.0-8 provides that the measure of damages for an unintentional trespass is determined by the laws of the state in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized.

3. Trespass: Measure of Damages

Consistent with Oregon law, damages for an unintentional mineral trespass involving crushed rock may consist of either (1) the royalty value of the mineral or (2) tbe market value of the severed and crushed rock less the expenses of severing it and crushing it.

APPEARANCES: William D. Cramer, Esq., Burns, Oregon, for appellant; Eugene A. Briggs, Esq., Office of the Regional Solicitor,

Pacific Northwest Region, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

Harney Rock and Paving Co. (Harney) has appealed from a letter decision of the District Manager, Burns, Oregon, District Office, Bureau of Land Management (BLM), dated August 1, 1984. The BLM decision found appellant had removed, without authorization, between July 21, 1983, and August 1, 1984, crushed aggregate mineral materials from stockpiles owned by the United States on land patented under the Stock-Raising Homestead Act of 1916 (SRHA), 43 U.S.C. § 291 (1970) (repealed by section 702 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2787). BLM detormined appellant had engaged in a nonwillful trespass and held appellant liable for $2,196 in damages, the estimated delivered value of the crushed aggregate, after deducting transportation costs.

BLM records indicate that prior to July 21, 1983, Harney excavated and crushed approximately 10,000 cubic yards of aggregate rock from land patented under SRHA, and stockpiled the material on the tract. The tract, SRHA patent No. 1069161, lies in the SW 1/4, S 1/2 SE 1/4, NE 1/4 SE 1/4, T. 23 S., R. 30 E., Willamette Meridian.

On July 25, 1983, BLM informed representatives of Harney the material stockpiled on this tract still belonged to the United States. To support this opinion, BLM provided Harney with a copy of the Supreme Court decision in *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 37 (1983). Shortly afterward, Harney began to remove material from the stockpiles on this tract in order to fulfill a preexisting railroad crossing construction contract with the United States Forest Service.

[1] Section 9 of SRHA, 43 U.S.C. § 299 (1970), provides in part for "[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." This section also provides for bonding and compensation for damage to the surface owner. In *Western Nuclear*, the Court intorpreted the minerals reservation in SRHA to include substances such as gravel which can be removed from the soil for commercial purposes. 462 U.S. at 53, 55. The Court found no reason to suppose Congress intended such material to be included in the patented surface estate. Like appellant here, Western Nuclear had acquired SRHA-patented land to extract materials for commercial road and construction projects. We find the *Western Nuclear* decision to have controlling effect in this case and hold that the aggregate removed here, like the gravel in *Western Nuclear*, was reserved to the United States, and was not conveyed along with the surface estate when the land was patented. Although the Court in *Western Nuclear* was dealing with a gravel deposit rather than a rock quarry, which the instant appeal apparently involves, the *Western Nuclear* decision is

clearly dispositive of this issue. For example, in *Pacific Power & Light Co.*, 45 IBLA 127 (1980), *aff'd, Pacific Power & Light Co.* v. *Watt*, No. C 80-073K (D. Wyo. June 17, 1983), the Board similarly held the removal of scoria to constitute a trespass.

Departmental regulation 43 CFR 9239.0-7 establishes procedures for dealing with unauthorized removal of materials from Federal lands and provides:

> The extraction, severance, injury, or removal of timber or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages te the United States, and will be subject to prosecution for such unlawful acts.

An application of the *Western Nuclear* decision leads to the conclusion the United States owns this resource. Appellant's unauthorized disposal of tbe crushed aggregate was therefore a trespass. While Harney has not conceded this point, the commercial removal of the material from the SRHA tract is not denied. Indeed, Harney admits in its statement of reasons the removal of 366 yards of crushed stone material from its stockpile located three-tenths of a mile from the gravel pit where the material originated. However, appellant denies any trespass, contending the material was mined, processed, transported, and stockpiled before July 21, 1983, and, therefore, no trespass occurred as that term was defined by BLM Instruction Memorandum No. 84-183.

BLM responds to Harney's argument by explaining that the rock was crushed and stockpiled on a portion of the same SRHA-patented land from which it was extracted. BLM argues the Federal Government has always owned the material and did not waive its right to damages by declining to pursue mineral extractors who were active before the *Western Nuclear* decision was handed down by the Supreme Court. It is argued that excavation of the material owned by the United States was therefore a trespass whenever it occurred, and that Harney had actual notice of this fact, but chose to disregard it when it removed the stockpile in 1983. Both BLM and Harney argue each party was willing to negotiato a settlement of this dispute but the other side was unwilling to do so.

The BLM Instruction Memorandum to which appellant refers does not purport to establish a limitation on *liability* for trespass; to do so would be contrary to the precedent established by *Western Nuclear*, which affirmed a determination of damages for a trespass which occurred in 1975. The Instruction Memorandum rather acts as a guideline for the exercise of prosecutorial discretion not to collect damages. Thus, the fact the material may have been excavated prior to July 21, 1983, does not absolve appellant of liability. It was not an abuse of prosecutorial discretion to cite appellant for the trespass involved in this appeal. Pursuant, however, to the policy stated in the

Instruction Memorandum, BLM did not assess damages for appellant's removal prior to July 21, 1983, of 10,000 cubic yards of rock, despite appellant's liability for such damages under *Western Nuclear*.

The BLM Instruction Memorandum relied upon by appellant does not excuse acts of trespass occurring prior to July 21, 1983. A change to the memorandum dated January 25, 1984, provides this explanation:

> The instructions in the fourth paragraph of Instruction Memorandum 84-183 imply that the Bureau should only seek damages for mineral materials removed 6 years prior to the date of notice. This is not the case. In all trespasses, the Bureau should attempt to collect the total amount of materials severed and the notice of trespass should reflect that total. However, the Bureau should be aware that where the amount of damages are in dispute, the trespasser may be liable for only those damages accruing within the statute of limitation period. There may also be situations where the statuto of limitations period may not apply, making the trespasser liable for damages incurred outside of the normal statute of limitations period.

Instruction Memorandum No. 84-183, Change 1 (Jan. 25, 1984). It should be noted also that these agency memoranda are binding only upon employees of BLM, and are in the nature of an operating brochure for use by the Bureau. They do not have the force and effect of regulations, *see United States* v. *Kaycee Bentonite Corp.*, 64 IBLA 183, 89 I.D. 262 (1982), and lack authority to confer upon appellant a vested right to relief from liability for damages resulting from its trespass.

Harney raises several other arguments, none of which provide a basis for relieving appellant of liability for the trespass. Harney contends removal of its name from a list of contractors eligible to contract with the Government already has cost more than the amount assessed as damages for trespass. Appellant points out it has paid county and local property taxes on the stockpiled materials, that the material was taken to satisfy a Government contract bid before July 21, 1983, and that appellant is a small local contractor unable to absorb the loss of money expended in stockpiling this material. None of those arguments, however, are relevant to deciding whether a trespass occurred or to the amount of damages. However, Harney correctly objects to the method by which BLM appraised the value of the material removed by Harney. BLM determined the unit value of the crushed aggregate in the stockpile was $6 per yard, based on the actual quantities used, the payment specified in the Harney-Forest service contract, and deductions for transportation from the stockpile to the construction site. Harney argues also the value of the stockpiled material is not the same as its value in place, *i.e.*, in the pit, so that when the cost of crushing, hauling, and stockpiling is subtracted, the value of the rock taken is $36.60, not $2,196.

[2] Departmental regulation 43 CFR 9239.0-8 makes the following provision for the determination of damages in a trespass case such as this:

> The rule of damages to be applied in cases of timber, coal, oil, and other trespass in accordance with the decision of the Supreme Court of the United States in the case of Mason et al. v. United States (260 U.S. 545, 67 L. ed. 396), will be the measure of

damages prescribed by the laws of the State in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized.

See United States v. *Marin Rock & Asphalt Co.*, 296 F. Supp. 1213 (C.D. Cal. 1969). Apparently, BLM determined there was no Oregon rule to apply in this case since the BLM decision on appeal cited 43 CFR 9239.5-1, which provides that the measure for an ores trespass in a state where there is no state law governing such a trespass would be the same measure as in the case of a coal trespass. Under this regulation, BLM is required to identify the measure for a coal trespass under Oregon law, and if there is none, apply 43 CFR 9239.5-3(a). Subsection (1) of that regulation provides that payment must be made for the value in place before severance.

BLM did not apply this rule correctly. The value of rock in place is not its value in appellant's stockpile but its value in the ground, prior to severance from the ground. *See Knife River Coal Mining Co.*, 70 I.D. 16 (1963). Furthermore, BLM's citation to a regulation which applies only when there is no state law defining the measure of damages means that BLM overlooked a decision by the Supreme Court of Oregon, *Holliday* v. *Dunn & Baker, Inc.*, 125 Or. 144, 265 P. 1096 (1928), which held, concerning damages for unintentional removal of rock from a quarry: "[W]e think the true measure to be not the value of the rock as it was ready for placing on the road, but that value less the expense of preparing it for the road." *Id.* at 1097. The court further stated: "The true measure of damages was the rock in the quarry severed and crushed, less the expense of severing and crushing it." *Id.* Thus, appellant's argument as to the proper method of determining damages is consistent with Oregon law. However, the Oregon court observed that the plaintiff at trial "did not seek by his questions to employ that standard," *id.*, and because of this deficiency in evidence, the court affirmed a jury award of damages which corresponded more closely to the royalty value of the mineral, a smaller amount than would have been awarded had the plaintiff submitted proof which corresponded to the appropriate test. The *Holliday* court faulted the plaintiff for failure to frame the questions to a witness so as to get at the true measure of damages.

The royalty standard for computing damages is not widely favored. One authority opines:

The royalty method has been criticized on the ground that royalty is a matter of contract, not of damages for a tort, and an owner of minerals who is in a position to do so should not be deprived of the right to mine his own minerals and reap the profits himself, by a rule of damages which grants him, in the case of innocent trespass, an award of royalties merely, and thereby, in effect, compels him to execute a retroactive lease to the trespasser.

54 Am. Jur. 2d *Mines and Minerals* § 253 (1971).

In *Knife River Coal Mining Co., supra,* the Department rejected the use of the royalty standard for computing damages if state law did not require its use. In that case, BLM determined the trespass had been innocent, and stated that the trespass payment must he made for the value of the coal in place before severance. The Government demanded $272,305.94, which it calculated by determining the average selling price of coal and subtracting the actual mining expenses directly related to the coal extraction process. The appellant in that case, however, contended the damages only amounted to $32,650.60, or $.10 a ton for the coal mined, the royalty rate which the Government would have been paid had the deposits been under lease. The Department rejected appellant's arguments for the following reasons:

> The cases cited by the appellant involving mineral trespass are from other jurisdictions which appear to have adopted the rule that the measure of damages for innocent trespass in removing minerals from the land of another not hiinself engaged in mining is the usual and customary royalty. These cases do not help the appellant. lt has not pointed to any North Dakota cases wherein any such "royalty" rule has been apphed. Thus the appellant has failed to show that the North Dakota statute sets forth a different rule for the measure of damages for an innocent coal trespass from the rule applied by the State Supervisor. Consequently, the rule prescribed in 43 CFR 288.6 is applicable.
>
> lt is, of course, completely unrealistic to say that the detriment suffered by the United States is to be measured by its loss of royalty alone. To accept damages on such a basis would be to completely disregard the detriment suffered by the Government in having its coal deposits, which it administers under the terms of the Mineral Leasing Act (30 U.S.C., 1958 ed., Supp. III, sec. 181 *et seq.*), for the good of the Nation, taken from it without regard te whether it deems it administratively desirable to dispese of them at any particular time, without regard to whether the taking of coal from this 80-acre tract would permit the most economical mining of the coal, without regard to the advantage to be gained from the selection of a qualified lessee to mine the coal, and without regard to the loss of the bonus which would have been received through competitive bidding for the property (30 U.S.C., 1958 ed., Supp. III, sec. 201). ln addition to the above, such a settlement would place a trespasser in a preferred status and would penalize those who complied with the law. For example, the trespasser is not bound by the coal mining operating and safety regulations of the Department (30 CFR, Part 211) as is the lessee.
>
> ln the circumstances of this case and in view of the fact that the state of the North Dakota law is such that it cannot be said with certainty that the State has prescribed any measure of damages for coal trespass different from that applied in this case, it must be held that the demand made upon the appellant was proper.

Id. at 18. In *Western Nuclear Inc., supra*, and *Pacific Power & Light Co., supra*, however, we affirmed a determination of damages based on the royalty method. In *Pacific Power & Light*, we indicated concern about BLM's use of this measure, noting we were not aware of any provision of Wyoming law which limited damages only to the royalty value of the material removed, and where no State law so limits compensation for damages, the measure of damages may be somewhat higher than the royalty rate of the material removed. *Id.* at 140 n.5, *citing Knife River Coal Mining Co., supra*. The *Knife River* and *Pacific Power & Light* cases indicate BLM should make damage determinations for Federal mineral trespass by the method most favorable to the trespass victim, unless it can be said "with certainty" that state law requires a different method. *See Knife River, supra* at 18.

April 14, 1986

One point which must be made is that in the *Knife River* case, the royalty rate would have given the United States a lower compensation than a computation based upon the value of the minerals extracted less the cost of extraction. However, there may be circumstances in which the extraction costs are so large that recovering a reasonable royalty rate would ensure the United States a larger recovery. In light of appellant's allegations concerning the cost of mining, this appeal might be such a case. To apply a royalty standard for calculating damages which would more generously compensate the United States is not inconsistent with the result in the *Holliday* case. A similar issue was considered by a court in determining damages owed to the United States for a sand and gravel trespass under California law:

> If a reasonable royalty rate is a correct measure of damages for good faith trespass of this type under California law, how then can one reconcile with such a measure of damages the result in Whittaker v. Otto, [248 C.A. 2d 666, 56 Cal. Rptr. 836 (1967)] in which the plaintiff was allowed to recover the value of the minerals extracted less the cost of extraction? The answer to this question is provided in National Lead Co. v. Magnet Cove Barium Corp., 231 F. Supp. 208 (W.D. Ark. 1964). In that opinion, which involves a good faitb trespasser wbo extractod minerals, the court concludes that the plaintiff may elect between two different damage formulae, i.e. a royalty rate or the value of the extracted minerals less costs of production. The court goes on to analyze the purpose and advantages of the two formulae. As the court says on page 217:
>
> There are two general measures of damage for trespass to minerals which are described as the "mild" and the "harsh" rules. The "mild" rule applies where the trespass is inadvertent, innocent or not in bad faith, and fixes the damages as the value of the minerals in situ. The so-called "harsh" rule, applied when the trespass is wilful, intentional, or in bad faith, allows the injured party the enhanced value of the product at the tiine of conversion.
>
> *Within the framework of the mild measure, there are two different guidelines to determine the in-place value of ore*: first, the royalty value whereby the injured party is allowed as damages an amount equivalent to the value of the privilege of mining and removing the minerals; second, another application of the mild rule allows the injured party to recover the value of the minerals after extraction less a credit to the trespasser of its production costs. The effect of allowing the royalty method as damages is not to punish the nonwilful trespasser, but to compensate the injured party for being deprived of the possibility of extracting the minerals. Altornatively, allowing the injured party to recover the enhanced value of the converted minerals with a deduction in favor of the trespasser for the cost of mining them will also compensate for being deprived of the right of mining the minerals and developing them, while preventing the trespasser from profiting from his wrongdoing. *When the royalty method is used in applying the in-place measure of damages, the question of allowance to the trespasser of credit for his expenses in producing the minerals is not reached.* [Italics added.]
>
> * * * The royalty formula obviously is a simpler one to apply. It does not involve the parties or the court in any complicated accounting. It provides damages to the aggrieved party even where the trespasser's operations have proved unprofitable. The other formula, as stated in the above quotation from *National Lead,* prevents the trespasser from profiting from his wrongdoing and requires him to account to the aggrieved party for all of his net profits. Surely fairness would dictate that the Plaintiff in this type of a case have such an election of remedies and I hold that such an election exists under California law. ln the instant case the government has elected to claim under the royalty formula.

United States v. *Marin Rock & Asphalt Co., supra* at 1219.

[3] Accordingly, we hold that absent a clear expression to the contrary in the law of Oregon, damages for an unintontional trespass involving crushed rock may consist of either (1) the royalty value of the mineral or (2) the market value of the severed and crushed rock less the expenses of severing and crushing it, whichever is greator. Because BLM did not calculate the damages to be paid by appellant in accordance with either method, this case must be remanded for BLM to do so.

In this appeal, BLM overlooked the *Holliday* case, a controlling state court decision. In *Pacific Power & Light Co., supra* at 140 n.5, this Board criticized BLM's failure to cite state law in support of its determination of damages. In *United States* v. *Marin Rock & Asphalt Co., supra* at 1216, the court observed that "neither counsel has really understood that California state law governs the damage question and neither has done an adequate job of briefing the California law on the subject." It is because this error is frequent, and is apparently easy to fall into, that this opinion has discussed the matter in detail.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Intorior, 43 CFR 4.1, the decision of the Burns District Office is set aside and the case remanded for further action consistent with this opinion.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

GAIL M. FRAZIER
Administrative Judge

BRUCE R. HARRIS
Administrative Judge

JACK WILLIAMS

91 IBLA 335 Decided *April 21, 1986*

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejectiug simultaneous oil and gas lease application AA-54456.

Reversed and remanded.

1. Oil and Gas Leases: Applications: Drawings--Oil and Gas Leases: Applications: Filing

A decision rejecting a simultaneous oil and gas lease drawing application bearing the holographic signature of tbe applicant on the basis that it has been executed in pencil rather than pen will be reversed on the ground that it is a nonsubstantive error.

APPEARANCES: Jack Williams, *pro se.*

April 21, 1986

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

Jack Williams has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated November 6, 1984, rejecting his simultaneous oil and gas lease application, AA-54456, which was selected with first priority for parcel AK-108 in the October 1984 simultaneous oil and gas lease drawing.

BLM rejected appellant's lease application because appellant signed the application form (Form 3112-6a (Apr. 1984)) in pencil, rather than in ink, as required by the instructions on the form and the regulation at 43 CFR 3102.4. In his statement of reasons for appeal, appellant questions why he was allowed to participate in the drawing if his signature was in pencil, and inquires about his $75 filing fee.

[1] The applicable regnlation, 43 CFR 3112.2-1(c), provides that a simultaneous oil and gas lease application "shall be signed * * * in accordance with § 3102.4." The latter regulation provides that an application "shall be holographically (manually) signed in ink." The requirement to sign an application in ink is also set forth in the instructions on the application form. The record shows that appellant's lease application was signed in pencil.

An understanding of the background of the signature requirements for Federal oil and gas lease applications aids in resolution of this appeal. The applicable regulation with respect to the preparation of a simultaneous oil and gas lease application (formerly a drawing entry card), 43 CFR 3112.2-1(a) (1971) at one time provided only that an application must be "signed and fully executed." In *Mary I. Arata*, 4 IBLA 201, 78 I.D. 397 (1971), and subsequent cases, the Board held the term "signed" in 43 CFR 3112.2-1(a) (1971) encompassed the use of a rubber stamp to affix a signature to a drawing entry card provided it was the applicant's intention that the stamp be his signature. *See Elizabeth McClellan*, 45 IBLA 342 (1980). In *Mary I. Arata, supra* at 204, 78 I.D. at 398, the Board acknowledged that "perhaps it would be better policy to require that the signature on the drawing [entry] card be 'handwritten in ink' by the [applicant]," but refused to read such a requirement into the regulation as written. Subsequently, the Board recognized that such a signature may be applied to the application not only by the applicant himself, but also by the agent of the applicant. *See D. E. Pack (On Reconsideration)*, 38 IBLA 23, 85 I.D. 408 (1978).

Effective June 16, 1980, the Department amended 43 CFR 3112.2-1 to specifically require that a lease application be "holographically [1]

[1] Holograph is defined as "a document wholly in the handwriting of its author." *Webster's New Collegiate Dictionary* 541 (1979).

(manually) signed in ink by the applicant." 43 CFR 3112.2-1(b) (45 FR 35164 (May 23, 1980)). In the preamble to the amended regulations, the Department stated it was expressly overturning the rule established in *Mary I. Arata, supra,* which permitted the use of mechanically affixed signatures. 45 FR 35157 (May 23, 1980). The Department explained the reason for requiring the personal handwritten signature of applicant:

> Personal signatures help to eliminate fraud against the United States and those who participate in the leasing system through agents. In may [sic] cases those who participate through agents have limited exposure to materials issued by the Department of the Interior concerning the leasing program. In view of these factors, and in order to impress on the applicant the seriousness of the leasing procedures and the statements the applicant is required to certify, it is appropriate to require a holographic signature.

45 FR 35157 (May 23, 1980). The requirement that an application be "holographically (manually) signed in ink" is currently embodied in 43 CFR 3102.4.

Hence, the avowed purpose of the requirement that an application be "holographically (manually) signed in ink" is to involve the applicant more directly in the application process and, thus, reduce the opportunity for fraud against both the United States and other participants in the leasing system.

The Board has held on numerous occasions that strict compliance with the requirements of 43 CFR Subpart 3112 is required to protect the rights of other qualified applicants. *See, e.g., Ballard E. Spencer Trust, Inc.*, 18 IBLA 25 (1974), *aff'd, Ballard E. Spencer Trust, Inc.* v. *Morton*, 544 F.2d 1067 (10th Cir. 1976). Thus, in *Betty J. Thomas*, 56 IBLA 323 (1981), and *Fred E. Forster III*, 65 IBLA 38 (1982), the Board affirmed rejection of applications with a typewritten signature, as distinguished from a holographic signature, in violation of 43 CFR 3112.2-1(b) (1980). However, we are not unmindful of the distinction between substantive and technical defects which the court sought to recognize in *Conway* v. *Watt*, 717 F.2d 512 (10th Cir. 1983).

In *Conway* v. *Watt, supra* at 516, the court concluded that the failure to date a lease application, as required by 43 CFR 3112.2-1(c) (1980), was "*de minimis*, a non-substantive error," and that it could not form the basis for a per se disqualification of the applicant where the record established the application was in fact signed within the time limitation established by regulation. The court, in essence, concluded that the absence of a date on the lease application does not necessarily establish the applicant is not qualified to receive a lease or has committed any fraud which threatens the integrity of the simultaneous leasing system, and if the Department is concerned that a fraud has been committed or that the applicant was not qualified as of a particular qualifying date, it may readily and effectively pursue those questions after a drawing has taken place.

We have applied the *Conway* rationale in a number of cases. In *Richard W. Renwick (On Reconsideration)*, 78 IBLA 360 (1984), we held the inadvertent misdating of a lease application as prior to the filing period, in violation of 43 CFR 3112.2-1(c) (1982), was nevertheless a nonsubstantive error where the application was in fact signed within the filing period and there was no intimation of fraud. *See also Satellite 8305136*, 85 IBLA 190 (1985). In *Charles Fox and George H. Keith, Partnership*, 77 IBLA 199 (1983), we held that even though Part B of the lease application, which serves to identify the parcels selected, was signed by two individuals, as members of the partnership/applicant, and the machine readable portion of Part A of the application indicated the applicant was a single individual, in violation of 43 CFR 3112.2-1(g) (1982) which required that lease applications be "properly completed," this was a nonsubstantive error where the identity of the applicant could be discerned by inspecting the non-machine readable portion of Part A of the application. *See also Winkler* v. *Andrus*, 594 F.2d 775 (10th Cir. 1979). In *Satellite Energy Corp.*, 77 IBLA 167, 90 I.D. 487 (1983), we held the failure to fill in the appropriate blocks on Part B of the lease application with the applicant's social security number, in violation of 43 CFR 3112.2-1(a) (1982), was a nonsubstantive error where the machine readable portion of the application disclosed the number.

We do not mean to suggest the Board will apply the *Conway* rationale across the board to all defects in simultaneous oil and gas lease applications. Indeed, as the court observed in *Brick* v. *Andrus*, 628 F.2d 213, 216 (D.C. Cir. 1980), "the Secretary can properly adopt *per se* rules if he deems them useful in the administration of the [simultaneous leasing] program--even rules the application of which may at times yield results that appear unnecessarily harsh." In *KVK Partnership* v. *Hodel*, 759 F.2d 814 (10th Cir. 1985), the court explained its *Conway* decision as follows: "[W]e did not hold that the agency may never adopt per se requirements. Read in light of its facts, *Conway* holds only that a BLM regulation may not be per se grounds for disqualification if it does not further a statutory purpose." *Id.* at 816. The per se disqualification of a lease applicant is appropriate where the failure to complete an application in accordance with the applicable regulations and instructions on the application form adversely affects the ability of the Department to establish the applicant's qualifications or to protect the integrity of the simultaneous leasing system. *See Irvin Wall*, 69 IBLA 371, 375 (1983) (Burski, Administrative Judge, concurring). Thus, in *Satellite 8309220*, 87 IBLA 93 (1985), we held, in the face of a *Conway*-based challenge, that the failure to sign a lease application properly results in the per se disqualification of the applicant, because the signature constitutes a certification of the truthfulness of the statements made on the application. These statements concern the applicant's qualifications to receive a lease and compliance with applicable regnlations wbich protect the integrity of the simultaneous leasing system. In *Thomas N. Gwyn*, 82 IBLA 11 (1984), we similarly held, in the face of a *Conway*-based challenge, that an admission by an applicant that his application was not signed within the filing period, as required by 43 CFR 3112.2-1(c) (1982), properly results in the disqualification of the applicant. We distinguished those cases involving an inadvertent misdating of an application.

In the present case, appellant did not omit any required information from his application, including his signature. Rather, appellant failed to comply with 43 CFR 3102.4 by not completing his application in the proper *manner*. The signature was nevertheless valid. As the court noted in *Joseph Denunzio Fruit Co.* v. *Crane*, 79 F. Supp. 117, 128 n.16 (S.D. Cal. 1948), *vacated on other grounds*, 89 F. Supp. 962 (S.D. Cal. 1950), *rev'd*, 188 F.2d 569 (9th Cir. 1951), *cert. denied*, 342 U.S. 820 (1951), a signature includes the name of an individual impressed on a document by any known means with the intention of executing that document. *See also Roberts* v. *Johnson*, 212 F.2d 672 (10th Cir. 1954). Thus, it is immaterial to the validity of appellant's signature that it is in pencil, rather than in ink.

It appears that the holographic signature of applicant in this case has fulfilled the regulatory objective of ensuring the personal participation of applicant in the filing process in order to reduce the opportunity for fraud, notwithstanding the fact the siguature was executed in pencil rather than ink.[2] There is no intimation that any information relevant to establishing appellant's qualifications to hold an oil and gas lease has been omitted or that compliance with any requirement necessary to police the integrity of the noncompetitive oil and gas leasing system has been neglected.

In conclusion, we can discern no valid statutory purpose which would be served by rejecting appellant's application in the present circumstances and believe this case requires the invocation of the rule announced in *Conway* that nonsubstantive errors are not properly treated as the basis for a per se disqualification of a lease applicant.[3] *See KVK Partnership* v. *Hodel, supra.*

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case is remanded to BLM for further consideration.

C. RANDALL GRANT, JR.
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

[2] It should be noted that other parts of the automated simultaneous oil and gas lease application must be completed in pencil in order to permit machine processing and avoid rejection of the application as unacceptable. *See Shaw Resources, Inc.*, 79 IBLA 153, 91 I.D. 122 (1984).

[3] This case is limited to its facts, *i.e.*, a holographic signature made in pencil on the automated simultaneous leasing application, and we express no opinion whether such a signature on a lease offer in violation of 43 CFR 3102.4 would be considered a nonsubstantive error.

April 30, 1986

BRUCE R. HARRIS
Administrative Judge

APPEAL OF YAZZIE CONSTRUCTION CO.

IBCA-2104 Decided: *April 30, 1986*

Contract No. M00C14204245, Bureau of Indian Affairs.

Sustained.

Coutracts: Coustruction and Operation: Changes and Extras--Contracts: Constructiou aud Operation: Differing Site Conditious (Changed Conditions)--Contracts: Construction and Operation: Intent of Parties

Where a road repaving contractor bids on the basis of a visual inspection indicating a limited number of road surface spots needing patching before resurfacing, and that number is reasonably consistent with the number that is estimated by the project engineer, but at the preconstruction conference after the award the contractor is alerted for the first time to the possibility of roadbed failure, and it subsequently experiences such failure, being required to use 2,272 tons of asphalt for patching rather than the 250 tons it had estimatod or the 280 tons the project engineer had estimated, it is entitled to compensation under the differing site conditions clause not only for the extra asphalt used, but also for the additional labor and machinery costs incurred in connection with the patching.

APPEARANCES: Russell E. Yates, Esq., Attorney, Durango, Colorado, for Appellant; Barry K. Berkson, Esq., Department Counsel, Santa Fe, New Mexico, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

This appeal is timely filed by appellant, Yazzie Construction Co., on behalf of its subcontactor, Burnett Construction Co., (subcontractor), from the August 26, 1985, decision of the contracting officer (CO) denying its claim for additional compensation for labor and equipment costs in the amount of $51,376.54 (reduced on appeal to $49,900 in order to utilize accelerated claims procedures) because of differing site conditions. Appellant also seeks attorney fees, costs, and witness fees. Neither party has requested a hearing, and the appeal will be decided on the basis of the record.

FINDINGS OF FACT

On July 23, 1984, appellant entered into Contract No. M00C14204245 (the contract), a total Indian set-aside contract with the Bureau of Indian Affairs (BIA) for the hot bituminous concreto pavement overlay of approximately 14 miles of Stone Lake Road and La Jara Road at Jicarilla Indian Reservation in Rio Arriba County, New Mexico. The amount of the contract was $1,032,699,50. A substantial completion date of September 20, 1984, was established by BIA and met by the contractor. The notice to proceed was issued on August 16, 1984.

On September 4, 1984, a BIA road construction engineer's report noted that the existing pavement in the eastern half of one road, where the original road was built over silt and clay subgrade soils, and portions of the other road, were showing sizeable areas of distress as a result of the use of the road by the contractor's trucks, and that the areas involved had been marked for removal and patching.

The report notes that the subcontractor's main concern was that the "unforeseen" amount of patching would affect construction work costs and slow or delay the project, since it had already crushed the anticipated quantity of materials and moved its crusher to another jobsite.

On September 7, 1984, appellant wrote to the CO, calling attention to the subgrade failures, and stating that they were occurring even though the subcontractor had lowered the gross weight of its trucks below the legal limit and had rerouted its operation in order to avoid hauling over the new asphalt. The letter notes that the matter had been brought to the attention of BIA several times without any answer as te whether it intended to pay for the extra work. Appellant attributed the subgrade failures to the fact that the existing asphalt was only 3 inches thick rather than 5 to 5-1/2 inches, as shown on the cross sections of the plans.

A memorandum from the CO's representative (COR) to the CO, dated September 17, 1984, points out that BIA had warned the contractor during the preconstruction conference that it should expect considerable breakup of the existing pavement, *since similar breakups had been experienced on other similar projects*. The memorandum states: "So, although *the extra work could not have been estimated* in the original bid schedule, the contractor should have made provisions for the additional materials needed after the preconstruction conference." (Italics added.)

The memorandum also states that because pavement failures were occurring in areas where the existing pavement was 5 to 5-1/2 inches thick as well as where there was less thickness, the breakup was not primarily due to the lack of 5 inches of asphalt but to "the conditions discussed in the preconstruction conference." It recommends that the contractor be paid for the additional patching at "contract unit prices," but that any further costs (such as equipment mobilization costs) should be at the contractor's expense.

On September 19, 1984, a memorandum from the area road engineer echoes the COR's recommendation. It discloses (for the first time) that the area road design engineer for the project had in fact estimated the need for approximately 1,500 tons of patching materials, and that the contractor had already used 2,500 tons. It concludes:

> As the correction of all distressed areas of existing pavement is a prerequisite prior to the placement of any new overlay paving materials, and as the subject contract includes methods of payment not only for the paving materials utilized for patching, but also a Roadway Surface Preparation item specifically addressed to the proper correction of the existing pavement, it is recommended the contractor be notified that the Bureau of Indian Affairs does not consider the placement of patching materials for the correction of distressed pavement as extra work.

This recommendation was accepted by the CO, and on October 10, 1984, he wrote to appellant that:

> Since the correction of all distressed areas of existing pavement is a prerequisite prior to the actual placement of the new overlay paving materials, and the subject contract includes methods of payment *not* only for the paving materials utilized for patching, but also a roadway surface preparation item, it is hereby determined that placement of patching materials for the correction of distressed pavement does *not* constitute extra work. [Italics in original.]

Various change orders were subsequently issued to reimburse the subcontractor for the costs attributable to the materials themselves (had they previously been stockpiled) and for ordinary surface preparation, but not for the costs associated with the remobilization of the crusher at the jobsite or the cleaning and filling of the places where the old pavement had failed. Consequently, on December 28, 1984, about a week after substantial completion of the job, the subcontractor wrote to appellant requesting that it submit a claim against the project for $59,739.06 in equipment costs and $19,424.04 in labor costs, a total of $79,163.10, for the mixing and placing of 2,272 tons of patching materials, less a $27,786.56 credit resulting from BIA's additional payment for the asphalt mix itself, for a total claim of $51,376.54. The letter included a breakdown of these additional costs. Appellant submitted the claim to BIA on December 31.

On January 4, 1985, the CO sent appellant BIA's final audit report, which determined that no liquidated damages were to be assessed by BIA, denied appellant's claim for additional costs, and requested that appellant sign and return three copies of the audit and of the accompanying request for final payment. Appellant thereafter apparently requested a meeting to discuss the matter, for on January 28 the CO wrote to it noting that the subject of the additional costs had previously been addressed by BIA on Octeber 10, 1984, but agreeing to set up a meeting if appellant insisted upon one, concluding that, "The need for your subcontractor, Burnett Construction Company, to accompany you in this matter is not warranted." The letter also complains about appellant's lack of direct involvement in the project and about "the continued dictation of contractual matters by your subcontractor, Burnett Construction Company."

The next document in the file is a February 21, 1985, letter from appellant's attorney to the CO thanking him for the meeting and reiterating appellant's position concerning the claim, as follows:

> The unit price hid by Robert Yazzie included an estimated 250 tons for patching. A visual inspection of the roadway by Robert Yazzie and representatives of the paving subcontractor, Burnett Construction, showed several failed areas that would indeed, need patching. From a visual inspection it was impossible to anticipate wholesale failure in the road when the overlay began. The project was bid on the visual observations of approximately 250 tens as indicated. The subsequent markings by the Project Engineer of the areas to be repaired came to actually 280 tons of patching.
>
> It was not until *after* the bid and at the preconstruction conference that the general and subcontractors were informed to expect considerable road failure.
>
> It seems to me that to require Mr. Yazzie, in this case, to anticipato failures that could not be seen by either a visual inspection of the road or by notification of some kind from the specifications of the job, is unreasonable and unwarranted. The actual failures even exceeded the design engineers' estimate by over 1,052 tons. That estimate, I might add, for the record, was never disclosed to the bidders before the bid letting. It is very difficult to believe that a bidder for a project is expected to enter a bid on items not fully disclosed or even known to the B.I.A.
>
> Another point that needs be made is that it is absolutely incorrect to maintain that the additional patching that was required above and beyond the marked areas could be accomplished for the same per unit price paid for laying the asphalt. A check of area contracters leads me to believe that the cost is much more expensive when you use trucks, labor and rollers to apply the asphalt, as well as, are required to dig out the failures and haul matorials away.
>
> The per unit cost paid for the 2,272 tens of extra asphalt *does not* compensate the contractor for the extra machinery and labor required. This condition could not have been anticipated and resulted in "additional work," which has even been substantiated by the September 17, 1984 Memorandum from the Contracting Officers Representative, William L. Staples, to the Contracting Officer. In that Memorandum he further admits that the "extra work could not have been estimated in the original bid schedule."
>
> Clearly the "extra work" is deserving of a claim consideration. It is not the subcontracter's respensibility to anticipate, prior to the bid, items which cannot be seen either by the plans and specifications or by visual inspection of the proposed jobsite. [Italics in original.]

On February 28, 1985, the area road engineer wrote a memorandum to the CO concerning the meeting, again recommending that the claim not be paid. The memorandum, in part, stated the following:

> While it is true the projects did require the placement of more patching materials than was estimated, the contractor's "claim is strictly for mixing and placing of patching matorials" and the contractor has already been credited for the total tonnage of all patching materials placed as shown on the final audit under the contract pay Item 403(1), Hot Bituminous Concrete Pavement.
>
> The contract special provisions, sub-section 403.03, clearly states the contract unit price will be for the bituminous mixture and bituminous material (asphalt used in the mixture) complete in place. This means the "mixing and patching" costs the contractor is claiming for the additional patching materials, has already been included for payment as shown on the final audit.
>
> *Some consideration may have been recommended had the contractor sought in the subject claim to seek additional funds under contract Item 306(1), Roadway Surface Preparation, due to the additional work involved in properly preparing the old roadbeds for the placement of a larger than estimated quantity of patching materials. As the*

contractor has not submitted his claim in this manner, this office does not recommend payment for additional compensation as requested in the subject claim. [*Italics added.*]

Accordingly, on March 15, 1985, the CO wrote to appellant, stating in pertinent part the following:

> Again, this office reiterates our interpretation of the contractual requirements placed before your firm. According to your claim in question, your firm is strictly seeking compensation for additional mixing and placing of patching materials. Our final audit quantities indicate that your firm has already been credited for total tonnage of all patching materials placed under the contract pay item 403(1), Hot Bituminous Concrete Pavement.
>
> If you review the contract specifications under Special Contract Provisions, sub-section 403.03, clearly states that the contract unit price will be for the bituminous mixture and bituminous material (aspbalt used in the mixture) *complete* in place. This interprets to mean the "mixmg and patching" costs for which your firm is seeking additional compensation has already been included for payment as indicated on the final audit document.
>
> With the determination provided, it shall be concluded that your firm will be returnmg the final audit documents, all signed in accordance with our instructions within the next (10) calendar days. Your prompt response shall expedite final payment due your firm. [Italics in original.]

Appellant's attorney responded on April 5, 1985, asking whether the CO's letter represented a final denial of the claim that it could appeal and, if so, where the next level of appeal might be. He also asked that the funds that were undisputed as a result of the final audit be released so that the stripping subcontractor could be paid.

On April 24, 1985, the CO wrote to appellant stating that it had not yet submitted a formal claim, and pointing out the need for certification of the claim since it was over $50,000. Appellant's attorney submitted the requested certification and documentation of the claim on May 10, and the CO formally denied the claim on August 26.

In connection with its appeal, appellant has submitted affidavits from the president and from the chief financial officer of the subcontractor. The president averred that he had made a site visit in the company of BIA's project engineer prior to bidding on the job; that no mention was ever made at this pre-bid inspection that considerable roadbed failure should be anticipated; that the project engineer indicated merely that there would be selected spots that would need patching prior to the overlay; and that the bid submitted was based upon an estimate that 250 tons of asphalt would be needed for that purpose. The financial officer averred that the units costs per ton for patching are far greater than the unit price for laying asphalt by machine; tbat the bid specifications should have contained an item for either unclassified excavation or for extra patcbing had the engineer anticipated the breakup of the road; and that the breakdown of costs for the extra labor and equipment requirements submitted with the claim are accurate and represent a changed condition.

Government counsel on appeal, in four sentences, merely (1) denies all of the allegations of the complaint; (2) contends that the CO's decision is correct and should be upheld; (3) contends that appellant is not entitled to attorney fees; and (4) waives an oral hearing, requesting that the Board decide the appeal on the record. No authority is cited in support of the Government's legal position, and we have found none.

Discussion of the Record

Government counsel has submitted no explanation of his position that a differing site condition was not encountered by appellant's subcontractor. It might easily be inferred from the record as a whole that the CO and his advisers in connection with this contract were far more concerned about appellant's lack of direct personal involvement in the construction project than they were about the conditions its subcontractor encountered at the jobsite.

Such a lack of objectivity by BIA in determining whether the conditions actually encountered were significantly different from those that bidders might reasonably have anticipated when they bid upon the project becomes particularly significant when the appeal incorporates a request for attorney fees, as this one does. However, attorney fees is a subject for discussion under a subsequent heading.

To summarize, in support of appellant's allegation of a differing site condition under clause 52.236-02 of the contract, the record discloses the following:

1. A sworn statement by the subcontractor that:

(a) no mention was ever made at the pre-bid inspection that considerable failure in the roadbed should be anticipated;

(b) the subcontractor estimated that 250 tons of asphalt would be needed for the patching work, and that it bid on that basis;

(c) mention was made to the subcontractor of possible roadbed failure for the first time at the preconstruction conference;

(d) at the time the road construction began, the Government project engineer circled the areas needing patching, which totaled 280 tons of asphalt;

(e) 2,272 tons of asphalt were actually required to reconstruct the roadbed once roadbed failure began to occur; and

(f) the subcontractor's figures with respect to the extra labor and machinery expense incurred are accurate.

2. BIA's area road design engineer for the project had estimated a need for approximately 1,500 tons of asphalt (Appeal File Exh. (AF) 13), a fact apparently unknown to the project engineer.

3. BIA does not contend that bidders were warned prior to letting the contract that they should expect "considerable break-up of the existing pavement." Rather, the COR appears to believe that because this facter was mentioned at the post-award preconstruction conference, BIA was justified in not paying for the extra work involved (AF 11).

4. There is no Government allegation that a more thorougb prebid inspection by the subcontractor would have disclosed the potential for roadbed failure. Thus, we are entitled to assume that the subcontractor's prebid inspection was competent and adequate, and that its assumptions as to the amount of patching required were reasonable.

5. Aftor meeting with appellant's attorney, the CO's advisers admit in writing that they might have given favorable consideration to paying the subcontractor additional costs if it had sought to recover them under a different clause of the contract than the one it used (AF 27).

In support of the Government's position, there is only a general denial. Under the circumstances, we do not find the Government's position that a differing site condition did not exist to be reasonable or justified. Nor, given the fact that the subcontractor used nine times more asphalt to patch tbe subsurface conditions it encountered than it had estimated, is there any doubt that the differing site condition involved a very substantial change from what appellant was led to believe it was bidding on.

Moreover, there is a clear indication that even if the project engineer did not anticipate substantial roadbed failure, the design engineer did. Certainly, if at the time of the preconstruction conference the Government already knew that roadbed failure was a likely possibility, there was no reason why it could not have discovered and disclosed this fact to potential contractors in connection with the invitation for bids.

Accordingly, appellant is entitled to recover the costs involved in the additional patching that was required, regardless of whether the differing site condition was the result of an unknown and latent defect (*Peabody N.E., Inc.*, ASBCA No. 26410 (1985), 85-1 BCA par. 17867), or mutual mistake (*Active Fire Sprinkler Corp.*, GSBCA No. 5461 (1984), 85-1 BCA par. 17868), or failure by the Government to disclose its superior knowledge of actual site conditions (*Tyroc Construction Corp.*, EBCA No. 210-3-82 (1984), 84-2 BCA par. 17308).

Discussion of Attorney Fees

The Equal Access to Justice Act, 5 U.S.C. § 504 (1982), *as amended* in August 1985, provides for the payment of attorney fees and expenses, under defined and fairly specific criteria, upon application to the Board within 30 days after its decision is final, where a party prevails by a final judgment against the Government through adversary adjudication under circumstances in which the Government's position was not substantially justified. P.L. 99-80, Augnst 5, 1985. *But see Monark Boat Co.* v. *NLRB*, 708 F.2d 1322 (1983), and *Dunn* v. *United States*, 775 F.2d 99 (1985).

However, since either party to an appeal before a board of contract appeals may seek review of its decision within 120 days after receipt of such decision (41 U.S.C. § 607(g) (1982)), it is clear that a judgment by this Board may not be considered final until the appeal period has expired. Thus, appellant's application for attorney fees is premature. *But see Auke Bay Concerned Citizen's Advisory Council* v. *Marsh*, 779 F.2 1391 (1986).

Decision

Accordingly, the appeal is sustained, and appellant's application for attorney fees is dismissed without prejudice, and with the right of resubmission in accordance with the statute, after expiration of the appeal period. Interest shall be paid on the $49,900 claim in accordance with the Contract Disputes Act of 1978.

BERNARD V. PARRETTE
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

May 8, 1986

TURNER BROTHERS, INC. *v.* OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT

92 IBLA 23 Decided *May 8, 1986*

Appeal from a decision of Administrative Law Judge Frederick A. Miller upholding the issuance of Notice of Violation No. 84-3-38-10 for a blasting violation. TU 4-10-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: Blasting and Use of Explosives: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

Where OSM issues a 10-day notice to the State and the State fails to take appropriate action·to cause the violation te be corrected, or show good cause for such failure, 30 CFR 843.12(a)(2) requires OSM to reinspect prior to taking any enforcement action. In the case where the violation is a failure to file with the State regulatory authority information concerning hlasting, proof that OSM contacted the regulatory authority and was informed that the documentation had not heen filed would satisfy the reinspection requirement.

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Bnrden of Proof--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

In an application for review proceeding of a notice of violation issued by OSM following 10-day notice to the State, OSM has the burden of going forward to establisli a prima facie case as to the validity of tlie notice. As part of that prima facie case, OSM must establish that it reinspectod in accordance with 30 CFR 843.12(a)(2). However, the permittee waives any objection to OSM's failure to do so by presenting evidence which establishes tlie violation.

APPEARANCES: Robert J. Petrick, Esq., Muskogee, Oklahoma, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

INTERIOR BOARD OF LAND APPEALS

Turner Brothers, Inc. (TBI) has appealed from a February 4, 1985, decision of Administrative Law Judge Frederick A. Miller upholding the issuance of Notice of Violation (NOV) No. 84-3-38-10 by the Office of Surface Mining Reclamation and Enforcement (OSM), pursuant to section 521(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a) (1982). That notice was served on TBI on March 30, 1984. It charged that on February 24, 1984, TBI conducted a blast after sundown at its Welch Mine No. 1 in Craig County, Oklahoma. It stated that TBI violated "30 CFR 936 OPRPR 816.65(a)(2) 30 CFR 816.65(a)(2)," and it required TBI to "submit reports as required by 816.65(a)(2) to state regulatory authority & furnish OSM with a copy," no later than April 16, 1984.[1] On April 6, 1984, TBI filed an application for review of the notice. At the hearing on August 2, 1984, the parties presented no witnesses. They merely stipulated certain facts and submitted various documents as exhibits for the record.

There is no disputo that TBI conducted a blast after sunset on February 24, 1984. TBI asserts it was justified in doing so; however, that is not an issue in this case. The violation for which OSM cited TBI, as acknowledged by counsel for TBI at the hearing (Tr. 6), was failure te notify the Oklahoma Department of Mines (ODOM) as required by 816.65(a)(2)(iii).

The record in this case indicates an OSM inspector, Samuel M. Petitto, Jr., was conducting an inspection of TBI's Welch No. 1 mine on February 24, 1984, when the blast occurred. On March 12, 1984, he issued a 10-day notice to ODOM in accordance with 30 U.S.C. § 1271(a) (1982), informing ODOM of TBI's activity. The State did not respond to that notice or contact TBI within 10 days.[2] OSM issued the NOV on March 30, 1984. On April 17, 1984, OSM terminated the NOV because "[r]eports required by OPRPR 816.65(a)(2) have been submitted to the ODOM" (Exh. A-3). The record includes a copy of a letter from TBI to ODOM, dated April 4, 1984, explaining the circumstances of its February 24, 1984, blast (Exh. A-1).

In affirming the violation the Administrative Law Judge concluded:

> OSM clearly informed ODOM and the applicant of the nature of the violation. ODOM did not take any appropriate action and OSM was justified in intervening under Section 521(a)(1) of the Act. OSM did not have to inspect the minesite but only had to reconfirm

[1] 30 CFR 936 is a citation to the Oklahoma Stato program. OPRPR 816.65(a)(2) is the Oklahoma regulatory counterpart to 30 CFR 816.65(a)(2) (1982) and contains essentially the same wording with only minor changes not relevant herein.

30 CFR 816.65(a)(2) (1982) provides:

"(2) Blasting may, however, be conducted between sunset and sunrise if:

"(i) A blast that has been prepared during the afternoon must be delayed due to the occurrenco of an unavoidable hazardous condition and cannot be delayed until the next day because a potential safety hazard could result that cannot be adequately mitigated.

"(ii) In addition to the required warning signals, oral notices are provided to porsons within one-half mile of the blasting site; and

"(iii) A complete written report of blasting at night is filed by the person conducting the surface mining activities with the regulatory authority not later than 3 days after the night blasting. The report shall include a description in detail of the reasons for the delay in blasting including why the blast could not be held over to the next day, when the blast was actually conducted, the warning notices given, and a copy of the blast report required by § 816.68."

This regulation was not, however, in effect at the time of issuance of the NOV. On Mar. 8, 1983, OSM published final rules revising 30 CFR Part 816, effective Apr. 7, 1983. 48 FR 9788 (Mar. 8, 1983). That revision deleted 30 CFR 816.65. Certain of the requirements found in 30 CFR 816.65(a) were adopted in amended form in new 30 CFR 816.64(a). 48 FR 9793-94 (Mar. 8, 1983). The necessity for filing a written report with the regulatory authority under 30 CFR 816.65(a)(2)(iii) was eliminated. 48 FR 9807 (Mar. 8, 1983). There is no evidenco, however, of amendment of the State program regulations. Thns, the filing of a report remained a requirement of the State program which OSM had the authority to enforce under 30 CFR 843.12(a)(2) at the time of issuance of the NOV.

[2] At the hearing counsel for TBI stated: "And, secondly, the parties will further stipulate that the [Oklahoma] Department of Mines conceded the ten day notice did absolutely not respond to the ten day notice or notify Turner Brothers within ten days" (Tr. at 8, 9).

the lack of notice by the applicant. This lack of notice constituted a violation of 30 CFR § 816.65(a)(2). [3]

Decision at 3.

On appeal TBI first charges OSM failed to apprise it of the nature of the violation. This argument is fallacious. The notice of violation clearly statod TBI was in violation of the Stato blasting regulations by failing to submit required reports. Counsel for TBI admittod at the hearing the violation was "simply for failure to notify the Oklahoma Department of Mines timely within–as required by the regulation, providing written reports under 81665-A-2-III" (Tr. 6). In response to Judge Miller's question whether that was the Oklahoma regulation, counsel for TBI stated, "That is the Oklahoma reg. Again this is federal enforcement of the Oklahoma rules and regulations" (Tr. 7). Counsel for TBI further stated, "The only portion of the regulation that we did not comply with at the time was that we failed to notify, or as the regulation is written, for failure to notify the regulatory agency in this case the Oklahoma Department of Mines in writing of that fact" (Tr. 6).

[1] TBI further claims Judge Miller errored in affirming the NOV because OSM failed to comply with 30 CFR 843.12(a)(2). That regulation provides:

(2) When, on the basis of any Federal inspection other than one described in paragraph (a)(1) of this section, an authorized representative of the Secretary determines that there exists a violation of the Act, the State program, or any condition of a permit or exploration approval required by the Act which does not create an imminent danger or harm for which a cessation order must be issued under § 843.11, the authorized representative shall give a written report of the violation te the State and to the permittee so that appropriate enforcement action can be taken hy the State. Where the Stato fails within ten days after notification to take appropriate action to cause the violation to be cerrected, or to show good cause for such failure, *the authorized representative shall reinspect and, if the violation eontinues to exist, shall issue a notice of violation* or cessation order, as appropriate. No additional notification to the State by the Office is required hefore the issuance of a notice of violation, if previous notification was given under § 842.11(b)(1)(ii)(B) of this chapter. (Italics added).

TBI alleges by failing to reinspect prior to issuance of the NOV, OSM violated the regulation which makes the duty to reinspect mandatory and that such failure "negates any jurisdiction to invade the states [sic] primacy under § 521." Brief at 9. OSM argued in its post-hearing brief at 2:

By March 30, 1984 the state still had not responded to the ten day notice and Mr. Petito [sic] again called the ODOM to check the status of the reports. Immediately following ODOM's assurance that no blasting report had been filed, Inspector Petite [sic] wrote NOV 84-3-38-10 citing TBI with a violation of 30 C.F.R. 816.65(a)(2).

[3] This finding by the Administrative Law Judge was incorrect because notice was no longer a requirement under the regulations in 30 CFR. That requirement did exist in the State regulations, however, and we modify the Judge's decision accordingly.

The Administrative Law Judge made the following finding regarding reinspection:

> The applicant cites 30 CFR § 843.12(a)(2) for the proposition that OSM did not "reinspect" the minesite after the state failed to respond to the ten-day notice and thus the notice of violation was unlawfully issued. These regulations require reinspection to insure the violative conditions still exist at the time of the notice of violation. In this situation no reinspection of the minesite was necessary because the violation involved a failure te notify the state regulatory authority. *Inspector Petitto "reinspected" by calling ODOM to see if their office had received the required notification.* They had not received notification and therefore the notice of violation was validly issued for this failure to notify. (Italics added).

Decision at 3.

There is no question the statute and the regulations at 30 CFR 843.12(a)(2) require reinspection. The rationale for that requirement is that when the State fails to respond or show good cause for its failure, the Secretary must determine whether the violation which precipitated the State notification, in fact, still exists. If so, the Secretary is required to take the appropriate enforcement action. *See Shamrock Coal Co.* v. *OSM*, 81 IBLA 374, 379 (1984), *appeal filed*, No. 84-238 (E.D. Ky. July 27, 1984). The statute and regulation describe the determination process as reinspection. In most cases reinspection would require that the OSM inspector physically return to the minesite to detormine whether the violative conditions still exist. This ensures the permittee is not burdened with a notice of violation for a nonexistent violation.

The question presented is whether a physical return to the minesite is required when the violation involved, as in this case, is a paperwork violation. If the inspector returned to the minesite, he might be able to find out whether the permittee filed the necessary documentation. However, we find that a return to the minesite is not required by the statute or regulations if, in the case of a paperwork violation, OSM can establish that it ascertained in some fashion whether or not the violative conditions continued. Such ascertainment may constitute the required reinspection. Where the violation is a failure to file information with the state regulatory authority, proof that OSM contacted that regulatory authority and was informed the documentation had not been filed would satisfy the reinspection requirement.

[2] In an application for review proceeding, the regulations provide at 43 CFR 4.1171(a) that OSM shall have the burden of going forward to establish a prima facie case as to the validity of the notice of violation. The applicant for review has the ultimate burden of persuasion. 43 CFR 4.1171(b). We find that as part of its prima facie case for a violation involving a failure te file information with the State regulatory authority, issued following a 10-day notification to the State, OSM must establish that it reinspected either by a physical return to the minesite or by ascertaining in some other fashion the continued existence of the violation.

In this case the record shows issuance of an NOV following State notification. While OSM asserts the inspector telephoned ODOM prior to issuance of the NOV, it presented no evidence thereof at the hearing. Therefore, the Administrative Law Judge's reliance on that allegation in support of his finding that reinspection had taken place was improper.[4]

While evidence of reinspection is a vital component of OSM's prima facie case, it is possible that a failure by OSM to provide such evidence could be rectified by evidence submitted by the permittee. In mining claim contest cases the Board has held that a timely motion to dismiss the contest complaint may be made at the completion of the Government's case on the basis of failure to present a prima facie case. *United States* v. *Winters*, 2 IBLA 329, 78 I.D. 193 (1971). However, where the contestee proceeds to present evidence after making the motion to dismiss, that evidence must be considered as part of the entire evidentiary record and, though the Government may have failed to establish a prima facie case, any record proof which supports the Government's case may be considered for purposes of decision. *United States* v. *Anderson*, 83 IBLA 170, 178 (1984).

Herein, there was no independent presentation of evidence by OSM to which TBI might have filed a timely motion to dismiss. This case was presented for decision on the basis of stipulations and exhibits. The record shows 10-day notification by OSM and the March 30, 1984, issuance of the NOV. TBI's exhibit A-1 is a letter dated April 4, 1984, to ODOM in which TBI stated: "As requested by Section 816.65(a), Turner Brothers is herein notifying the Oklahoma Department of Mines that a blast occurred at our Welch No. 1 Mine in Craig County Oklahoma outside the published hours and after sunset."[5] TBI does not allege it filed any report pursuant to the regulation prior to its receipt of the NOV. In fact, in an amended application for review filed with Judge Miller on May 15, 1984, TBI explained as follows:

> The charge was set early in the afternoon; but due to a broken down endloader below the shot area, it was necessary to delay the shot until such equipment could be moved. Further, it was necessary that the blast be completed on this evening because it is the policy of the Mining Safety and Health Administration, the Oklahoma Mine Board, and Turner Brothers, Inc. to *NEVER* leave a shot in the ground overnight as this presents too many hazards. Faced with this situation, the emergency provisions of OPRPR § 816.65 were followed except that *due to an oversite* [*sic*] *at the mine, Applicant failed to file a written report with the Oklahoma Department of Mines within the three days required by OPRPR 816.65(a)(2)(iii).* [Italics added.]

[4] TBI argued before the Administrative Law Judge that following receipt of the 10-day notice ODOM conducted its review and "concluded rightly that TBI had followed the requirements of OPRPR § 816.65(a)(2)(i) and (ii) and decided to take no action" (Post Hearing Brief at 7). In response thereto the Administrative Law Judge stated that TBI had "presented no evidence to support this contention. *Mere allegations do not carry any evidentiary weight*" (Decision at 3). (Italics added.)

[5] The record shows that on May 3, 1984, TBI filed a copy of OSM's notice of termination of the NOV in question with Judge Miller. That termination notice dated April 17, 1984, stated: "Reports required by OPRPR 816.65(a)(2) have been submitted to the ODOM."

2. Applicant contends this is a "paper violation" * * *.

* * * * * * *

* * * Applicant notes that when it became aware of the oversite [sic] in filing a written report regarding this blasting, it immediately filed a report with the Oklahoma Department of Mines and sent a certified copy te OSM as required by the NOV. [[6]]

Amended Application for Review at 2-3. Thus, according to the record, TBI failed to comply with the 3-day reporting requirement of the Oklahoma regulation 816.65(a)(2)(iii).

We find TBI waived the opportunity to raise any objection to a deficiency in OSM's prima facie case by agreeing to submit the case to the Judge for decision based on stipulations and exhibits. Since the violation is established by TBI's evidence, tbe inadequate prima facie case is not fatal.[7]

Accordingly, pursuant to the authority delegatod to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.[8]

BRUCE R. HARRIS
Administrative Judge

I CONCUR:

GAIL M. FRAZIER
Administrative Judge

ADMINISTRATIVE JUDGE ARNESS DISSENTING IN PART:

The holding in this case turns upon language in footnote 3 of the majority opinion where the Administrative Law Judge's ruling is "modified" to change an "incorrect" finding of a violation of Departmental regulation 30 CFR 816.65(a)(2) (1982), by Turner Brothers, Inc. (TBI), into a finding TBI had, instead, violated an Oklahoma State surface mining program regulation when it failed to timely report nighttime blasting. This change substitutes a finding by this Board for the ultimate holding made by Administrative Law Judge Miller, on the assumption there is proof in the record to show that a violation of the State's surface mining regulation took place. It also assumes that conduct which would be a violation of former regulation 30 CFR 816.65(a)(2) would violate the State rule.

Ultimatoly at issue in this appeal is whether the record is sufficient to permit this Board to decide there was or was not a violation as

[6] This admission contradicts the dissent's speculation whether a report was actually required under the Oklahoma regulation. It is clear TBI believed it was.

[7] The dissent poses the question whether the record is sufficient to support the violation charged or whether there should be a new hearing. The violation, as TBI agreed at the hearing, was failure to file a timely report in accordance with the Oklahoma regulation. The present record shows TBI did not make a timely filing. The record is sufficient to support the violation. To remand for a further hearing is not justified.

[8] We note that in *Clinchfield Coal Co.* v. *Hodel*, No. 85-0113-A (W.D. Va. June 20, 1985), the district court found 30 CFR 843.12(a)(2) expanded OSM's authority beyond that contemplated hy the Act and held that the Secretary had no authority to issue notices of violation in States with approved programs, except where OSM finds that a violation causes "imminent danger of environmental harm." That decision is on appoal. *Clinchfield Coal Co.* v. *Hodel*, No. 85-2206 (4th Cir. Nov. 22, 1985).

charged, or whether there should be another hearing ordered to permit the development of a record which will permit rendition of a final decision. Review of the entire record leads to the conclusion another hearing is required. This conclusion is based upon provisions of Departmental regulation 43 CFR 4.1171 which establisb the allocation of the burden of proof between the parties to this proceeding. The regulation provides that the Office of Surface Mining Reclamation and Enforcement (OSM), shall have the burden of going forward to establish a prima facie case as to the validity of the order; TBI, however, bears the ultimate burden of persuasion. 43 CFR 4.1171. The prima facie case to be proven by OSM requires, as the majority point out, proof that a reinspection made pursuant to 30 CFR 843.12(a)(2) revealed the existence of a violation; that is to say, proof a report required by Oklahoma law had not been made.

In this case the parties stipulated their evidence into the record at a hearing before Administrative Law Judge Miller. No witnesses were called. The entire record consists of a 10-page transcript of the appearance before the Administrative Law Judge by the attorneys for the parties. The Administrative Law Judge accepted the stipulations and exhibits as offered by the attorneys. His decision, however, is not based upon their agreed record, but upon later assertions and counter-assertions appearing in the briefs of the parties, concerning which there is no agreement. This occurrence may be explained by the manner in which the parties approached the hearing, and how their agreed statement of facts was altered by their subsequent briefing of the case. Not only did they shift the focus of their arguments during the progression of their briefing, they altered the issues in a fashion which tended to blur the questions in dispute.

At the hearing before the Administrative Law Judge, OSM apparently considered the main issue in contention to concern OSM's jurisdiction to issue the notice under review. Apparently OSM was primarily interested in showing that a "Ten-Day Notice," Departmental form IE-160 (March 3, 1981), was in fact sent by the Tulsa Field Office of OSM to the State of Oklahoma's Department of Mines (ODOM). *See* OSM's Post Hearing Brief dated Jan. 25, 1985, at 3, 4. Counsel for TBI, on the other hand, in response to OSM's cited brief, argued that TBI was not in violation of the Oklahoma regulation requiring reports of nighttime blasting and that OSM, by failing to reinspect as required by 30 CFR 843.12(a)(2) had failed te discover essential facts which revealed the TBI operation was outside the reperting requirement of the Oklahoma regulation (Appellant's Post Hearing Brief at 3-5).

Responding to TBI's arguments, OSM filed a reply which contains a detailed statement of fact concerning the circumstances surrounding the issuance of OSM's 10-day notice to Oklahoma and the subsequent contacts between OSM and Oklahoma employees concerning the matter (OSM Reply Brief at 1-3). Following this exchange, the Administrative Law Judge issued his decision which relies upon facts stated in the OSM brief.

The transcript of the hearing establishes that the parties agreed to narrow the question at issue to whether there was a violation of an Oklahoma State Reglation. They stated:

MR. PETRICK: * * * This regulation is simply–this violation is simply for failure to notify the Oklahoma Department of Mines timely within–as required by the regulation, providing written reports under 81665-A-5-III. And we will provide a copy of the regulation.

JUDGE MILLER: Is that the Oklahoma reg?

MR. PETRICK: That is the Oklahoma reg.

Again, this is federal enforcement of the Oklahoma rules and regulations.

JUDGE MILLER: Do you accept this stipulation, Ms.–

MS. O'CONNELL: Yes. I do, Your Honor, but could I also get co-counsel to stipulate that OSM did comply with the procedural requirements of the ten day notice to the state. That seemed to have been in issue in the original complaint, and I assume that has been dropped, since we supplied them with a copy of the ten day notice.

MR. PETRICK: I will–I think we need to submit that portion of the ten day notice for your detormination. [1]

(Pause)

MR. PETRICK: Your Honor, I have no objection to the introduction of the ten day notice.

(Tr. at 6, 7).

Exhibit A-2, consisting of two typewritten pages, was stipulated into evidence as a copy of Oklahoma regulation OPRPR 816.65(a) through (e)(1). Except for TBI's blasting report, dated April 4, 1984, no other evidence concerning the Oklahoma surface mining program regulations or the administration of those regulations was offered by either party. There was no testimony whatever concerning the violation charged.

As the majority correctly state in their footnote 1, the Departmental regulations published at 30 CFR 816.65(a)(2) (1982), were amended in 1983 and the reporting requirement formerly appearing at 30 CFR 816.65(a)(2)(iii) was removed. 43 FR 9807 (Mar. 8, 1983). The text of former regulation 30 CFR 816.65 when compared to exhibit A-2 appears to be nearly identical to the Oklahoma rule, except for appropriate substitutions made to indicate the regulatory authority

[1] TBI argues that it was prevented from offering proof on this issue by the manner in which OSM presented its case. TBI explains:

"An administrative law judge has no authority to consider evidence not properly admitted in his decision. In this case the administrative law judge hinged a decision on the validity of an NOV (notice of violation) upon their allegations made in the post hearing brief. At the time of the hearing concerning NOV 84-3-38-10, certain mattors were presented to the administrative law judge upon stipulation of the parties and no evidence outside of these stipulations was admitted into the case. In this matter, TBI is basically alleging a failure on the part of OSM to properly exercise its oversite [sic] jurisdiction due to the fact that it did not fairly appraise [sic] TBI of the suhject matter of the violation, and that it did not reinspect the mine site as required by regulations after a ton day notice. The only defense offered to these allegations hy OSM is a statement made outside of the hearing in a post hearing brief claiming that Inspector Petitto had oral contact, which cannot be verified in writing, with members of ODOM concerning TBI's failure to file blasting records. This evidenco was never entered in the trial on the hearings [sic] but was relied upon heavily by the administrative law judge in rendering his decision." (Appellant's Brief at 11). Review of the record indicates this statement fairly characterizes the manner in which the record was assembled on this issue. Clearly, as early as the initial hearing, it was apparent there were factual issues in dispute by the parties at the hearing which only the testimony of witnesses could elucidate.

enforcing the rules is the Oklahoma Department of Mines (ODOM). Since there is no provision of the Surface Mining Control and Reclamation Act of 1977 which requires a report of nighttime blasting, and since there is no longer a Federal regulation which requires such reports, the only possible violation which could have occurred in this case must have involved the State's regulation.

Despite this circumstance, the Administrative Law Judge made no findings concerning any violation of the State regulation. Nor does it appear this was a matter of inadvertence; in the section of his opinion entitled "Factual Background," Administrative Law Judge Miller limited his inquiry to the charged violation of the Department regulation 30 CFR 816.65(a)(2), which was alleged in the NOV (Decision at 2). While the Administrative Law Judge's decision refers to the receipt into evidence of a copy of the Oklahoma regulation as exhibit A-2, the fact-finder chooses instead to focus upon the application of the former Federal regulation, 30 CFR 816.65, as applied to the conduct charged against TBI. However, responding to TBI's arguments that there was no violation under the circumstances agreed upon by the parties, the Administrative Law Judge comments:

> The applicant argues that OSM has not properly exercised jurisdiction under Section 521 of the Act. They claim that ODOM did not receive specific notification of the violation. The ten-day notice (Respondent's Exhibit No. 1) states under nature of violation "blasting outside scheduled time frames without meeting requirements of 816.65(a)(2). The applicant focused on Section 816.65(a)(2)(i) and (ii) which are not specifically mentioned in the ten-day notice. OSM obviously informed ODOM that any and all provisions of 816.65(a)(2) could have been violated. Including § 816.65(a)(2)(iii) which requires notice to the state [sic]. The applicant asserts that ODOM determined that there was an emergency exemption but they have presented no evidence to support this contention. Mere allegations do not carry any evidentiary weight. The decisive issue is whether ODOM took appropriate action. It seems clear that they did not take any action and OSM was justified in exercising jurisdiction.

(Decision at 3). TBI's brief attacks this position at two points; first, it is argued that the Administrative Law Judge applied different evidentiary standards to OSM and to TBI. Appellant argues:

> In this case the administrative law judge hinged a crucial decision on a NOV upon "mere allegations" made by OSM without support of any evidence entered on the record but was totally unwillimg te consider any statements or rationale offered by TBI that was not entered upon the record.
>
> While the appollant should rightfully be held to support its arguments with evidence derived from statements of stipulations, this same rule must equally apply te the Office of Surface Mining, and [at] the very least the administrative law judge's failure to base his decision upon matters entered on the record of the administrative hearing should necessitate the remand of this hearing to the administrative law judge so that these allegations concerning verbal contact between Inspector Petitto and ODOM may be supported by evidence and so that TBI may be afforded its constitutional right to cross-examine any witness making these statements.

(Appellant's Brief at 12).

Secondly, TBI points out the need to explain the inaction by the Oklahoma Department of Mining: "Here OSM informed ODOM of the belief TBI had blasted after sunset. ODOM upon review of the information concluded rightfully that TBI had followed the requirements of OPRPR § 816.65(a)(2)(i) and (ii) and decided to take no action" (Appellant's Brief at 13).

Both these arguments merit consideration, since the question presented on appeal is whether TBI's failure to report violated an Oklahoma regulation, the administration of which is the primary responsibility of the State of Oklahoma. TBI's arguments are not idle speculation, but point to a real void in the evidence in this case, which prevents adjudication of this matter now, and requires another hearing on the question of the validity of the notice in this case. It is apparent the Administrative Law Judge permitted the parties to shift the issue in dispute to whether there was a reinspection by OSM. Later, when argument on this issue was joined, OSM was permitted to introduce, during briefing, facts concerning the reinspection of the TBI notice of violation. This circumstance led the Administrative Law Judge te enter a finding there had in fact been a reinspection and that the facts it discovered had been sufficient to establish a violation as charged. *See* Decision at 3. The conclusion reached, therefore, (that there was a violation of the former OSM rule, 30 CFR 816.65(a)(2) (1982)), was doubly erroneous.

First, as the majority points out, since the Federal regulation was removed in 1983, it could not have been violated hy TBI a year later. Second, the pivotal issue under review was whether there had been an effective reinspection, which showed a violation of the state reporting regulation had taken place. Since there was no agreement concerning the operative facts which would reveal whether there had been such an investigation hy OSM, much less whether the State regulatory agency interpreted its own regulation to require a report in this case, proof was required to create a record which supports a finding on this central issue.

It does appear, upon examination of exhibit A-2, (the State's regulation OPRPR 816.65), that some discretion may be allowed the state in determining whether a nighttime hlasting report is required. The regulation is written in two apparently divisible parts: It provides, in pertinent part:

> § 816.65 Use of explosives: Surface blasting requirements.
>
> (a) All blasting shall be conducted between sunrise and sunset.
>
> (1) The Department may specify more restrictive time periods, based on public requests or other relevant information, according to the need to adequately protect the public from adverse noise.
>
> (2) Blasting may, however, be conducted between sunset and sunrise if:
>
> (i) a blast that has been prepared during the afternoon must be delayed due to the occurrence of an unavoidable hazardous condition and cannot be delayed until the next day because a potential safety hazard could result that cannot be adequately mitigated.
>
> (ii) in addition to the required warning signals, oral notices are provided to porsons within one-half mile of the blasting site; and
>
> (iii) a complete written report of blasting at night is filed by the operator conducting the surface mining activities with the Department not later than 3 days aftor the night blasting. The report shall include a description in detail of the reasons for the delay in

blasting including why the blast could not be held over to the next day, when the blast was actually conducted, the warning notices given, and a copy of the blast report required by Section 816.68.

(b) Blasting shall be cenducted at times announced in the blasting schedule, except in those unavoidable hazardous situation, previously approved by the Department in the permit application, where operator or public safety require unscheduled detonation.

(Exhibit A-2, at 1, 2). The arrangement of this regulation is such as appellant argues, that it is possible to construe the rule so as to excuse a written report in the case of a an unavoidable hazardous condition, the contingency provided for by subparagraph (i), quoted above. Understood in this fashion, the written report is required only after the activity described in subparagraphs (ii), and (iii). Whether this is, in fact, the actual situation is not known, because the parties did not consider this aspect of the charged violation at all in their agreed statement of facts, and also because it is not possible to reconstruct enough of the facts concerning the matter from the docunents available in the record. While the April 4, 1984 letter from TBI establishes that no report was earlier filed, it does not prove that a report was required. In fact, it is merely confusing, since it is neither consistent with a showing that a report was required, nor a showing that a report was not necessary.

Clearly, there is no longer a Federal rule on this subject, and the 1977 Act itself does not explicitly require reporting a nighttime blast. It is inferable, therefore, as TBI suggests, that no report was required given the circumstances of this case. The evidentiary record on the question is simply blank, unless it be considered permissible for the Administrative Law Judge to fill in the gap with assertions by counsel for the parties concerning what happened between the time the shot was fired by TBI on February 24, 1984, and the time it inexplicably reported the fact te the State on April 4, 1984. But, even if such an approach is permissible, it does not establish that reinspection took place as required by Department regulation. Neither party has carried the burden of proof allotted to it by 43 CFR 4.1171, as a result, since neither has established either the fact that a reinspection took place, nor that a required report was not made in violation of State law.

On the present record it is not possible to say whether OSM has correctly interpreted the State rule respecting reporting of nighttime blasts, because, as appellant argues, if OSM failed to reinspect as required by 30 CFR 843.12(a)(2), OSM failed to obtain sufficient information concerning the handling of this matter by the State to know whether there had been a reporting violation or not. The administrative law judge considered the mere fact of OSM's telephonic inquiry to the State to satisfy the reinspection requirement, and now the majority members of this Board seek to avoid the procedural problems inherent in considering evidence of this tolephone call which was received outside of the record by placing the burden to show compliance with the regulation upon TBI. This approach, however, ignores the burden which 43 CFR 4.1171 places upon OSM of going forward with evidence to make a prima facie case. Although the parties chose to present evidence by stipulation instead of through witnesses, neither of them may avoid the requirements of the regulation, which applies to whatever evidence is offered, regardless of the form it may take. TBI did not supply the missing prima facie showing here, because it did not offer proof of reinspection or facts obtained upon reinspection. These facts are denied by TBI and can only be found in OSM's legal argnment.

While I agree that reinspection need not always require a trip to the minesite, it seems certain that reinspection should be purposive and should be done to reveal whether a violation is continuing or, in this case, whether it has taken place. Reinspection must be done to discover whether a violation exists. It is not enough to know, in this instance, whether there was a report made (the April 4, 1984 letter from TBI te OSM), in the face of a consistent contention none was required. It could be as easily concluded, on the State of the present record, that TBI has proven no report was required under the State rule, since it is shown none was required to be filed by the State enforcement agency. Looked at in this way, TBI might argue it has satisfied the burden placed upon it by 43 CFR 4.1171 by reliance upon the rule that presumes officials at ODOM perform their duty in a regnlar manner and will not be assumed to have acted contrary to regulations which they administer. *See, e.g., Jack Bolke*, 88 IBLA 58 (1985) (Departmental employees are presumed to perform their duty in regular fashion). In this case, following such reasoning, ODOM's failure or refusal to act establishes prima facie that no report was required. Such a conclusion is no more absurd than the notion that TBI waived the requirement to prove a violation by stipulating to admission of the exhibits received at hearing. The record before this Board simply does not contain proof that a required report was not filed.

OSM, the Administrative Law Judge, and now this Board have equated the former Federal rule at 30 CFR 816.65 (1982) to the present State rule, and assume the application of each rule in practice should be identical. It might be possible in a proper case to conclude that the State rule OPRPR 816.65(a)(2) is interchangeable with 30 CFR 816.65(a)(2) (1982). But since the Oklahoma State program is now more demanding of reports than is the Federal scheme, it is difficult to see how a state waiver of a state reporting rule, or a lenient state interpretation of a state rule which has no Federal counterpart, could permit a finding there was a violation of the 1977 Act. But an affirmation of the Administrative Law Judge's findings leads to just such a result.

TBI has continuously objected that the NOV was defective and denied its inaction violated the State program. The scanty record now before the Board is not sufficient to permit the making of findings by substitution so as to cure the erroneous finding by the Administrative Law Judge that TBI violated 30 CFR 816.65 (1982), by filing a late blasting report. Because the only proof in the record concerning OSM's reinspection of this alleged violation came into the record after the evidentiary hearing as a recital in a legal brief, TBI should be afforded an opportunity to present rebuttal evidence to show contrary facts, in the manner suggested by its brief.

The 1977 Act requires, upon an application for review of a NOV, that an investigation and findings be made. *See* 30 U.S.C. § 1275. This appeal reveals the investigation of the charged violation to have been incomplete, and the findings made by the Administrative Law Judge to be erroneous as a result. It cannot be said on the record before the Board as now constituted that a reinspection pursuant to 30 CFR 843.12(a)(2) was conducted by OSM which established the validity of the NOV issued to TBI. Another hearing is therefore required to permit inquiry into the events between February 24, and April 4, 1984, which will establish whether there was a reinspection pursuant te 30 CFR 843.12(a)(2), and to discover whether the Oklahoma State program required a report of the February blast at TBI's mine, and whether such a report was given as required.

FRANKLIN D. ARNESS
Administrative Judge

JIM D. SCHLOSSER *ET AL.* v. VERLE PIERCE *ET AL.*

92 IBLA 109 Decided *June 6, 1986*

Appeal from a decision of Administrative Law Judge Robert W. Mesch, in a private contest action declaring invalid mining claims W MC 211304 through W MC 211358.

Affirmed in part as modified, and reversed in part.

1. Mining Claims: Discovery: Generally--Mining Claims: Discovery: Marketability--Mining Claims: Determination of Validity

A bentonito mining claimant is not required to show each claim he has locatod is capable of independently supporting a paying mine. Rather, marketability of a known bentonito clay depesit, a low-grade, high-volume clay material, may be demonstrated by sbowing the feasibility of mining several claims under a single operation where each claim is shown to contain sufficient mineralization to qualify for inclusion within the mined group.

2. Mining Claims: Determination of Validity--Mining Claims: Mineral Lands--Mining Claims: Placer Claims

Where the mineral character of land has been contosted for lack of bentonite clay of sufficient quality and quantity, the locator of a bentonite placer mining claim must show the mineral character of each 10-acre tract within the claim. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. Where a preponderance of the evidence at hearing establishes an absence of bentonite from several 10-acre tracts claimed, those parts of the contestod claims are properly declared invalid.

3. Mining Claims: Contests--Mining Claims: Determination of Validity

As a general rule, in a private contest the burden of proof is on the contestant to establish the invalidity of the contested claim or claims by a prependerance of the evidence. Where the contestant fails to do so as to all or parts of 16 of 55 contested bentonite claims, the contest is properly dismissed as to those 16 claims. The remaining claims are properly found to be invalid.

APPEARANCES: Thomas C. Jepperson, Esq., Arthur H. Nielsen, Esq., Jonathan L. Reid, Esq., Salt Lake City, Utah, for contestees; William R. Marsh, Esq., James M. King, Esq., Denver, Colorado, for contestants; Stephen M. Brown, Esq., R. Timothy McCrum, Esq., Department of the Interior, for the Bureau of Land Management, filed an *amicus* brief.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

Verle Pierce and American Colloid Co. bave appealed from an August 24, 1984, decision of Administrative Law Judge Robert W. Mesch, declaring invalid a group of 55 unpatented bentonito mining claims, W MC 211304 through W MC 211358.[1] The decision resulted from a private contest brought by Jim C. Schlosser, Katherine Schlosser, and Jimmy D. Schlosser, lessees of public lands under the Taylor Grazing Act, 43 U.S.C. § 315 (1982), and owners of lands patented with mineral reservations which conflict with the contested claims. Judge Mesch invalidated all 55 of the contested claims for failure to support each claim with a valid discovery. Pierce and American Colloid seek review of the decision as to 16 of those claims only.

In January 1974, Pierce and others located 18 bentenite claims of 160 acres each in Crook County in northeastern Wyoming. These claims, known as the "V" claims, were maintained by Pierce through 1980.[2] In September 1980, Jimmy D. Schlosser and Treva Schlosser staked 40-acre bentonite mining claims, the "ZX" claims, in the same area as the "V" claims. The "V" claims were invalidated in 1981 when affidavits of annual assessment work for 1981 were not filed timely with the Bureau of Land Management (BLM). In April 1981, Pierce located the 20-acre "L" claims at issue here to substitute for the invalidated "V" claims. By agreement dated April 13, 1981, Pierce entered into a lease arrangement with American Colloid for development and mining of the "L" claims. Jimmy D. and Treva Schlosser contested the validity of the "L" claims over their "ZX" claims in the United States District Court. Judgment in favor of the "L" claims was entored on

[1] The 55 claims are located within secs. 25, 26, and 35, T. 58 N., R. 66 W.; and secs. 3, 4, 9, 16, and 17, T. 57 N., R. 66 W., sixth principal meridian, Wyoming.

[2] At that time, the lands within the "V" claims were leased under the Taylor Grazing Act or owned by Pierce's father, who transferred the leases and patented lands to the Schlossers in 1978.

September 9, 1982. *See Schlosser* v. *Pierce*, No. C81-0196B (D. Wyo. Sept. 9, 1982).

On March 21, 1983, a private contest complaint against the "L" claims was filed by Jim C. and Katherine Schlosser.[3] They alleged the claims are invalid because discovery of a valuable mineral deposit has not been made and the lands within the "L" claims are nonmineral in character (Complaint, Paragraph 14; Amended Complaint, Paragraph 5(b)). A timely answer denying the allegations was filed and an evidentiary hearing was held on April 17, 18, and 19, 1984, before Administrative Law Judge Mesch in Belle Fourche, South Dakota.

The primary issue in controversy at the hearing was whether or not each "L" claim contains a sufficient deposit of marketable F-bed bentonite to constitute discovery. Bentonite is a low-value clay composed primarily of the mineral montmorillonite; it is relatively abundant in the State of Wyoming and is mined by open-pit methods. The unique qualities of bentonite which make it a locatable material have been recognized by the Board. *See, e.g., United States* v. *Kaycee Bentonite Corp.*, 64 IBLA 183, 89 I.D. 262 (1982). The primary end uses for processed bentonite, unique from other clays, include well drilling mud component, taconite processing (iron pelletizing) binder, and foundry mold bonding agent. F-bed bentonite is one of several stratigraphic beds of bentonite clay found in north-eastern Wyoming (Tr. I, 72-73; Tr. II, 29-30).[4] There are eight major companies involved in bentonite mining and processing; American Colloid has been the largest producer over the last several years (Exhs. 11 and 14).

The first witness called at the hearing by the contestants was Gary A. Ballenger, an employee of American Colloid with supervisory responsibility for exploration and development of the "L" group. Ballenger was questioned whether bentonite has been mined or produced from these claims and whether he had stated during unrelated trial proceedings in June 1982 that further exploration would be necessary to determine the marketability of the claims (Tr. I, 27, 45). He answered that F-bed bentonite possesses the same quality as other recognized commercial bentonite such as Clay Spur or Newcastle (Tr. I, 79). He testified that American Colloid has not obtained an operating permit for any bentonite operation in northeastern Wyoming, and would probably not apply for a permit for the "L" claims until 8 to 10 years after judicial litigation and administrative contests of the claims have been completed (Tr. I, 7, 18). He acknowledged on direct questioning he did not believe each claim could be individually mined and marketed at a profit (Tr. I, 8). He also stated that the proposed 120-mile roundtrip haul from the "L" claims

[3] Jimmy D. Schlosser was later added as a contestant after his appeal to the Ninth Circuit Court of Appeals of the decision in *Schlosser* v. *Pierce*, *supra*, was voluntarily withdrawn on Mar. 18, 1983.

[4] The hearing transcripts are divided into three volumes corresponding to the 3 separato days during which the hearing was conducted.

to American Colloid at Belle Fourche, South Dakota, was not unusual for the bentonite industry, although it was "on the upper end of the spectrum of haul length" (Tr. 1, 5-6).

Ballenger explained his rationale for suspecting deposits of F-bed bentonite existod in the area of the claims prior to conducting exploratery work:

Q [by Marsh] I am going to hold up one of your counsel's exhibits which I have no objection to. It is the, "Bentonite Deposits of the Northern Black Hills District, Montana, Wyoming, and South Dakota," geological survey bulletin, I don't see a date on the outside but I do see that it is by Maxwell M. Knechtel and Sam H. Patterson. Would you like to look that over and tell me if that's what you are referring to:
A [by Ballenger] Yes, that's what I am referring to as the Patterson Map.
Q There is a map in the pocket of that publication?
A Yes.
Q And that was the map you were referring to as the Pattorson Map?
A Yes.
Q So that we won't get confused I will just call it the Patterson Map.
A Yes.
Q How do you use the Patterson Map?
A We locate a bed of bentonite and you look at the quadrangle – U.S.G.A. quadrangle.
Q Does the Patterson Map show then the path of the F-bed throughout the Belle Fourche-Colony area?
A Yes.
Q Is it accurate?
A Yes.
Q Very accurate? I believe in your earlier testimony in civil action you referred to it as sort of being the Bible for lecating the F-bed?
A Yes.
Q And that's what it's used for? (Exhibit H was marked for identification.)
A Yes.

(Tr. I, 74-75).

Pierce also appeared as a hostile witness called by contestants to testify. He acknowledged that under his arrangement with American Colloid he was to be paid a graduated royalty rate ranging from 22 te 40 cents per ton of F-bed bentonite mined from his claims (Tr. II, 10). His explanation for a rate comparatively lower than the royalty rate offered for other commercial bentonite clays was the further distance from the processing plant rather than a difference in commercial quality (Tr. II, 10).

Two expert witnesses for the contestants, Richard Thayer and Donald Hentz, presentod evidence and opinion on the locatability and marketability issues. Thayer, an independent consultant with more than 12 years of experience with bentonite, examined the "L" claims on March 17 and 18, 1984, accompanied by Jimmy D. Schlosser and others. Thirty-five shovel samples were collected during the field examination. Thayer supplemented those samples with 100 drill samples of the "ZX" claims taken by Jimmy D. Schlosser. Thayer analyzed the 35 surface samples and 25 of the drill samples which he considered representative of the F-bed material throughout the "L" claims (Tr. II, 38-39, 42-47). He discussed in his tostimony suitability tests and industry specifications used by the major bentonite industries and commented that, in his opinion, the bentonite samples he analyzed were of poor quality and, treated or untreated, could not satisfy the industry's minimum requirements (Tr. II, 58). Thayer focused on treating the bentonite samples with soda ash or polymers to enable the clay to conform with the identified industry standards. He expressed an opinion that such materials could not be successfully added to the F-bed clay within economic limits because of its low quality (Tr. II, 57-58). After considering sample quality, existing market, mining conditions, and hauling distance to the plant, Thayer concluded the bentonite clay on the "L" claims cannot be mined and marketed at a profit (Tr. II, 59, 132, 145).

Commenting on the topography of the claims, Thayer observed that the claims are bisected by Thompson Creek. He stated that a relatively steep hill emerges on the north side of the creek. The F-bed, he testified, outcrops near the base of the hill, but dips directly into it. He reasoned that such a down-dip would restrict effective pit operations due to a rapid increase in the amount of overburden (Tr. II, 65-72). He found the claims on the south side of the river contained a high degree of erosion, stream washouts, and alluvial overburden (Tr. II, 40-41). He also observed the presence of a relatively high level of physical contaminants, or concretions, in the F-bed clay tested (Tr. II, 41).

On cross-examination, Thayer admitted his lack of previous experience with the F-bed bentonite clay found in northeastern Wyoming (Tr. II, 84). With regard to his 35 shovel samples, he acknowledged that he did not personally select and dig all of the samples, but was sometimes several hundred yards away when some of the samples were obtained (Tr. II, 95-97). He was not certain the samples not taken by him were from the F-bed layer and not the nearby G-bed layer present in the area (Tr. II, 114-16). Moreover, he testified most of the shovel samples were taken from weathered outcrops susceptible to contamination (Tr. II, 98). Thayer also explained he had no specific field notes on Schlosser's drill samples describing the conditions or exact location from where they were obtained (Tr. II, 105-07). Each bagged sample had a "ZX" claim name written on it, but, in most instances, Thayer was unable to find a drill stake to sbow where the corresponding sample was drilled and was unable to identify with certainty which 20-acre "L" claim the sample represented (Tr. II, 45, 155).

Hentz, an employee of Federal Bentonite, another major bentonite producer, also tostified the bentonite from the contested claims could not be marketed at a profit (Tr. III, 29-30). He did not personally examine the claims or samples, but relied upon Thayer's test results to conclude the F-bed clay from the "L" claims was of low quality (Tr. II, 191; Tr. III, 22). His opinion was primarily grounded on Federal Bentonite's unsuccessful experience with one F-bed mine and his own assumption that blending of polymers or soda ash to enhance the qualities of bentonito clay is "cheating" and undesirable for marketing (Tr. III, 24-26, 31). Hentz commented that Federal Bentonite would not market material of this quality and definitely would not attempt to treat it (Tr. III, 10-12, 24-26). On cross-examination, he acknowledged American Colloid and other companies have been mining F-bed bentonite clay for nearly 10 years, but would not verify that it was being marketed successfully (Tr. III, 18-20).

Hentz stated the market for processed bentonite has steadily declined since 1981. He characterized the current conditions as a "buyer's market" where the producing companies are selling high-quality bentonite clay for lower prices in competition with lower quality clays (Tr. II, 173-75). He reviewed sample data prepared by American Colloid and testified 75 percent of the analyzed samples were too low in quality for his company to market and the other 25 percent would require further study to determine marketability (Tr. III, 12-15).

Ballenger and Ed Odom, another American Colloid employee, tostified on behalf of contestees. During the course of Ballenger's direct testimony, contestees conceded the invalidity of 39 of the "L" claims when Ballenger admitted American Colloid would not mine those claims without further exploration and drilling (Tr. III, 83-85).[5] Ballenger testified that drill sampling was conducted on the remaining 16 claims between April 7 and 10, 1984. He explained that American Colloid drillers sampled the F-bed by drilling through the entire thickness of the clay seam with an auger and placing the material obtained in a sack identifying the test hole. The method and location of drilling were monitored and recorded, and the sealed samples were delivered to the American Colloid laboratory for testing (Tr. III, 62-67).

Ballenger also discussed American Colloid's experience with developing F-bed mines near the "L" claims (Tr. III, 85-87). Based upon his experience with American Colloid's "successful marketing" of

[5] The 39 claims were identified by reference to Exhibit P. Those claims not listed were conceded by contestees to lack the necessary mineral analysis or discovery work to support a finding that a discovery had been made. Exhibit P, the list of the 16 claims at issue here, appears as follows:

"L-CLAIMS

Claim Name	Quality	Tons
L-18	Type II, III, IV	88,110
L-19	Type II, IV	78,685
L-20	Type II, IV	44,861
L-21	Type II, III, IV	51,174
L-22	Type II, III	32,238
L-23	Type IV	2,700
L-24	Type II, III, IV	22,840
L-25	Type II, III, IV	20,988
L-56	Type III, IV	39,762
L-57	Type II, III	40,842
L-58	Type II, III, IV	46,400
L-59	Type III, IV	10,409
L-60	Type IV	14,720
L-66	Type III	42,633
L-67	Type III	38,052
L-68	Type III	14,400
		588,787"

The claims are identified as W MC 211313 through W MC 211320, W MC 211346 through W MC 211350, and W MC 211356 through W MC 211358, respectively.

"millions of tons of F-bed bentonito" and test results showing the comparative quality of the "L" claim material, Ballenger offered his opinion that the bentonite found on the 16 claims could be successfully extractod, mined, and marketed at a profit (Tr. III, 87).

On cross-examination, certain 10-acre parcels within the 16 claims were identified as lacking marketable amounts of bentonite clay according to the map prepared from the tost results. Ballenger acknowledged that the eight claims north of the Thompson River and the eight claims south of the river would have to be mined in two separate groups and on a contiguous basis to produce a successful operation (Tr. III, 121-22). He reaffirmed his opinion that no single claim in either group contains a deposit of bentonite clay which could be mined and marketed at a profit without regard to the other claims in the group.

Odom testified concerning American Colloid's success in mining and marketing F-bed bentonite. He did not personally visit the claims or test the samples, but grounded his testimony on a review of American Colloid's test results. Odom testified that F-bed bentonite is not worthless, but can be successfully treated under a process developed by American Colloid (Tr. III, 130-31). He offered an opinion that the F-bed bentonite clay from the "L" claims can be marketed at a profit even in a depressed market (Tr. III, 126-33). Although a cost and pricing analysis verifying Odom's opinion was prepared by American Colloid for an operation on the "L" claims, the analysis was not offered into the record (Tr. III, 132-34). Odom testified that the 16 contestod claims could only be developed as two groups and that he was not prepared to demonstrate the marketability of any claim individually (Tr. III, 134-36).

Jimmy D. Schlosser was called as an adverse witness for contestees. He testified he had located the "ZX" claims for bentonite on the same lands as the "L" claims (Tr. III, 140-41).

In his August 24, 1984, decision, Judge Mesch characterized the discovery requirement under the mining laws as mandating a mining claimant te show that a valuable mineral deposit has been found within the limits of each individual claim. He rejected contestees' contention that discovery exists where evidence shows a group of claims can be mined and marketed at a profit where each claim in the group contains siguificant signs of mineralization. Based on contestees' concession that 39 claims were not adequately tested to demonstrate a viable mineral deposit and testimony that the remaining 16 claims could not be developed individually, Judge Mesch concluded the 55 claims were invalid because they were not perfected by discovery.

In their statement of reasons, contestees challenge Judge Mesch's formulation of the law of discovery. They argue the "independent mine requirement" expressed by Judge Mesch is not the prevailing rule and assert cooperative development of contiguous claims is acceptable and necessary for mining of low-grade minerals such as bentonite clay. Contestees also assert the burden of proof is upon contestants to show the invalidity of the claims by a preponderance of the evidence and allege the burden has not been satisfied. They claim they have met the traditional standards for discovery with respect to the 16 contested claims through the exhibits and testimony offered at the hearing. They likewise argue contestants' evidence is insufficient to preponderate on the issue that no discovery has been made. They question the credentials of contestants' expert witnesses and allege the shovel and drill samples taken by Thayer were flawed, lacked foundation, and were not distinguished from G-bed bentonite. They challenge contestants' comments that F-bed clay cannot be treated or blended for marketing and claim contestants have not substantiated that processed bentonite clay must absolutely conform to specific industry standards before it can be marketed. They also point out that contestants did not present a cost analysis to support their views on marketability.

Contestants agree in their answer with the Administrative Law Judge's conclusion that the mining laws require the contestee to demonstrate each individual claim can be mined and marketed separately. They argue F-bed bentonite is not suitable for location because it lacks sufficient character as a bentonite clay to be a valuable material and, therefore, conclude F-bed bentonite is not currently marketable. They also contend several 10-acre portions of these claims are conclusively proven nonmineral in charactor in testimony offered by one of contestees' expert witnesses. Contestants claim there was a presumption of no discovery because the claims were not developed during a substantial period of time and will not be developed for many more years. They also assert sufficient evidence was presented to create a presumption discovery was not made and that contestees failed to rebut that presumption. They allege that contestees did not submit specific evidence on costs and pricing because they could not support a valid discovery on each claim.

BLM appears in an *amicus* brief filed on the issue of the correct standard for determining discovery. It argues a single claim of low-grade, high-tonnage material rarely will contain a deposit which can be mined and marketed on an individual basis and without regard to other claims. BLM asserts the long history of judicial and administrative decisions regarding discovery under the mining laws does not establish a requirement that each claim be capable of supporting an independent mine. The agency contends Judge Mesch inappropriately characterized the discovery requirement and requests his decision be set aside with respect to his findings predicated upon an "independent mine requirement."

[1] Review of the discovery requirement begins with section 2 of the Mining Law of 1872, 30 U.S.C. § 23 (1982), which reads in part: "[B]ut no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Placer claims are subjected to the same conditions as lode claims under the Placer Act of

1870, 30 U.S.C. § 35 (1982). The 1872 Mining Law did not define "discovery," but left implementation of the statutory requirement to the Department and the courts. *See Converse* v. *Udall*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969). The "prudent man rule" of discovery was developed by the Department as a method to determine the existence of a discovery. This rule of discovery was described in *Castle* v. *Womble*, 19 L.D. 455, 457 (1894), as being satisfied "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine." This prudent man rule was endorsed as the correct rule of discovery by the Supreme Court in *Chrisman* v. *Miller*, 197 U.S. 313, 322 (1905), *reaffirmed in Cameron* v. *United States*, 252 U.S. 450 (1920), and *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334 (1963). Difficulty in applying this test has focused upon the meaning of "ordinary prudence." The Department has recognized that the rule imposes an objective rather than a subjective test. The standard applied in these cases is that of a prudent man, not necessarily an experienced miner. *United States* v. *Jenkins*, 75 I.D. 312 (1968).

Section 1 of the 1872 Mining Law permits entry upon public lands for mining "valuable mineral deposits." 30 U.S.C. § 22 (1982). Thus, a claimant must demonstrate the material which has been discovered is valuable. The "marketability test" was formulated to distinguish a discovery by requiring the claimant to show "the deposit is of such value that it can be mined, removed and disposed of at a profit." *Layman* v. *Ellis*, 52 L.D. 714, 721 (1929).[6] It was adopted as a "logical complement" to the prudent man test by the Supreme Court in *United States* v. *Coleman*, 390 U.S. 599, 603 (1968). One of the primary elements of this rule is the existence of a present market or demand for the minerals in question. *United States* v. *Bartlett*, 2 IBLA 274, 78 I.D. 173 (1971).

Whether a discovery has been made according to the requirements of these tests is a question of fact. *Converse* v. *Udall, supra*. After Judge Mesch reviewed the facts, he declared invalid for lack of discovery the two groups of eight contiguous 20-acre claims for the reason that the "evidence shows that no single claim contains a deposit of bentonite which can be mined and marketed at a profit on an individual basis and without regard to any of the other claims" (Decision at 2-3). This application of the rules of discovery by Judge Mesch represents an express invalidation of a group of contiguous mining claims on the

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[6] One of the first summaries of the rule by the Department appeared at *Solicitor's Opinion*, 54 I.D. 294, 296 (1933): "[T]he mineral locator or applicant, to justify his possession, must show that by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit."

basis of a rule which will be referred to here for convenience as an "independent mine requirement."

The determination by Judge Mesch that the 16 claims must be capable of development independently was based upon the following analysis:

> The Department has consistently ruled that a mining claimant must show that a valuable mineral deposit has been found within the limits of each individual claim in a group of claims, and a showing that all of the claims taken as a group satisfy the requirements of discovery is not sufficient. *See*, e.g., *United States* v. *Melluzzo*, A-31042, 76 I.D. 181 (1969); *United States* v. *Chas. Pfizer & Co., Inc.*, A-31015, 76 I.D. 331 (1969); *United States* v. *Bunkowski*, 5 IBLA 102, 79 I.D. 43 (1972); *United States* v. *Block*, 12 IBLA 393, 80 I.D. 571 (1973); *United States* v. *Clifton*, 14 IBLA 146 (1974); *United States* v. *Gardner*, 14 IBLA 276, 81 I.D. 58 (1974); *United States* v. *Melluzzo*, 32 IBLA 46 (1977); *United States* v. *Williamson*, 45 IBLA 264, 87 I.D. 34 (1980); *United States* v. *Cactus Mines Limited*, 79 IBLA 20 (1984).
>
> In the 1969 *Melluzzo* decision, supra, the Department stated:
>
> * * * The appellants must show *as to each claim* that they have found a valuable mineral deposit and that a prudent man would have been justified in the further exponditure of his labor and means with a reasonable prospect of success in developing a valuable mine *on that claim*. (p. 189). (Italics in original)
>
> * * * * * * *
>
> Other assertious were made that all the claims are necessary to support the variety of colors and even shapes that are desired by customers and that business will be lost unless the requests can be met (Tr. 681, 907, 1115, 1369).
>
> This strongly supports the conclusion that none of the claims in issue can satisfy the test of discovery in that a prudent man would not invest time and money in any one claim with a reasonable prospect of success in developing a valuable deposit. (p. 192).
>
> In the 1977 *Melluzzo* decision, supra, the Board of Land Appeals statod:
>
> * * * Where a contestee is attempting to establish the validity of a group of claims he must prove that a valuable mineral deposit exists on each individual claim. An attempt to show that all the claims in several groups, or all the claims in a particular group, taken as a whole, satisfy the requirements of discovery, is not sufficient. An assumption that a discovery on one claim can inure to the benefit of another is a mistake of law. [Citations omittod]. In short, if it takes the mineral from six or more claims together to warrant a prudent man to attempt to develop a valuable mine, then none of the claims may be regarded as valid, as each claim must be supported by discovery of a valuable mineral deposit within its own boundaries. (p. 59).

Decision at 3-4.

The 1969 *Melluzzo* decision quoted by the Administrative Law Judge was, however, only dicta to the decision to which it was appended as an apparent afterthought. Tbe actual holding in the case was that "each of the claims is invalid because it was located on land that was not chiefly valuable for building stone as required by the act of August 4, 1892 * * *." *Id.* at 189. After deciding the case on the ground the claims were invalid under the 1892 Building Stone Act, however, the Solicitor nonetheless went on, stating: "This conclusion is sufficient to dispose of the appeals and makes unnecessary consideration of the question whether the claims are also invalid because of lack of discovery *on each of them*, as required by the mining law." (Italics in original.) *Id.* The opinion then continued in this vein, as quoted and relied upon by the Administrative Law Judge here. Reliance upon this dictum was error, since it attributed te the gratuiteus comments by the Solicitor the weight of a holding, when he was merely taking an excursion at the invitation of arguments raised by the parties on appeal. In actuality then, the 1969 *Melluzzo* decision simply stands for the proposition that the claims there at issue were invalid because they were not "chiefly valuable for building stone." *Id.* at 189; *and see* 30 U.S.C. § 161 (1982).

Similarly, the 1977 *Melluzzo* decision turned upon application of the Act of July 23, 1955, 30 U.S.C. § 611 (1982), which excluded from the operation of the mining law claims for common varieties of stone and building materials. In the 1977 *Melluzzo* decision this Board's holding was based upon a finding Melluzzo had not located his claims for a common variety of stone prior te the July 1955 termination date for such claims. *Id.* at 64. After holding the claims invalid because they were not located prior to July 1955, the Board continued on to discuss what were, again, apparently contentions of the parties, and, echoing the approach taken by the 1969 Solicitor's Opinion, entered into a discussion concerning the perceived need to find the existence of a valuable mineral depesit on each individual claim. *Id.* at 59. In 1977, as in 1969, this discussion was dictum, since the case had already been decided by the application of the 1955 Common Varieties Act.

Moreover, both these *Melluzzo* cases, and the other building stone cases relied upon by the Administrative Law Judge must be distinguished from the situation presented by cases involving deposits of low-grade disseminated ores of valuable mineral. The fact that the *Melluzzo* decisions and other building stone cases cited also discussed theories of the quantity of mineral needed to constitute a discovery on a mining claim merely confuses the holding in each of the cases. Cortainly the language of none of these cases can be relied upon for the proposition announced by the Administrative Law Judge in the decision here on appeal, to the effect that there is a legal requirement that one must be able to develop, from a single claim, an independent mine. It is true that other building stone cases relied upon by the Administrative Law Judge such as *United States* v. *Bunkowski, supra,* and *United States* v. *Gardner, supra,* repeat the requirement there must be enough material within each claim to warrant developing a valuable mine. This requirement in the building stone cases derives from the limitation upon building stone claims imposed by statute, that each building stone claim must be shown to be chiefly valuable for building stone. As will be lator explained in detail, a different rule applies to other mining claims which leads the Board here to the conclusion that the determination whether a claim is valuable for bentonite may properly consider tbe existence of adjacent reserves on contiguous claims containing large, low-grade deposits of bentenite.[7]

The law of discovery in the 1872 Mining Law has on numerous occasions been construed to require each claim in a group to contain valuable mineral within the limits of the claim. *See Cactus Mines Limited*, 79 IBLA 20 (1984); *United States* v. *Williamson, supra*. It is not enough for a claimant to offer evidence simply for claims as a unit; the existence of mineral on one claim cannot, by geological inference or otherwise, support the existence of mineral on another contiguous or nearby claim. *United States* v. *Dresselhaus*, 81 IBLA 252 (1984); *United States* v. *Feezor*, 74 IBLA 56, 90 I.D. 262 (1983). Each claim must be shown to contain minerals of sufficient quality so it can be mined, processed, and marketed at a profit. *Cactus Mines Limited, supra* at 30. The issue of a common discovery among group claims was addressed by the Board in *United States* v. *Foresyth*, 15 IBLA 43, 58 (1974):

> Both contestant and contestees contend that if any of the claims are valid, all of the claims are valid. We expressly reject such a theory of bulk validation. In order for any claim te be valid, it must be shown that not only a mineral deposit has been found on a claim, but tbat the deposit on *that* [italics in original] claim is reasonably perceived as marketable at a profit. To put it more plainly, each claim must independently support a discovery.

Unless carefully examined, the pattern developed through these decisions of the Board could logically lead to the conclusion reached by Judge Mesch.[8] However, review of the Department's practices illustrates development of the law of discovery has been contrary to his independent mine requirement.

The prudent man rule of discovery focuses in part upon the development of "a valuable mine." The marketability rule is presented in terms of mining, removing, and disposing of a deposit. Within these two formulas there is no indication whether each claim should be considered a separate unit or whether after location and during development several claims may be developed as a group into a working mine. In this inquiry, several early cases are helpful in interpreting the 1872 Mining Law before the development of the two-part discovery rule. In *Smelting Co.* v. *Kemp*, 104 U.S. 636, 653 (1881), the Court recognized the common practice of miners to consolidate claims "for convenience and economy in working them," because "the

[7] BLM submits that in making such an evaluation, if the mineral on a particular claim is found to be below the cut-off grade required for a group operation, rendering the mining operation unprofitable with respect to that claim, then that claim does not contain a discovery (BLM's Brief at 21-22). BLM states it employs this methodology to determine the validity of low-grade, high-tonnage mineral claims and that this complies with the law that "each claim must contain a discovery of a valuable mineral deposit within the limits of the claim." *United States* v. *Dresselhaus*, 81 IBLA 252 (1984); *United States* v. *Cactus Mines Limited*, 79 IBLA 20 (1984).

[8] The pessibility the Department will require each claim te be independently capable of supporting a mine on the basis of decisions like *Melluzzo* has been discussed in *American Law of Mining* (2d ed.), § 35.04[8] (1984); Haggard and Curry, "Recent Developments in the Law of Discovery," 30 Rocky Mtn. Min. L. Inst., 8-1, 8-16 (1984); Knutson and Morris, "Locating, Maintaining and Patenting Groups or Large Blocks of Mining Claims," 26 Rocky Mtn. Min. L. Inst., 517, 620 (1980); Reeves, "The Law of Discovery Since Coleman," 21 Rocky Mtn. Min. L. Inst., 415, 460-64 (1975).

great majority of claims, wbether on lodes or on placers, can be worked advantageously only by a combination among the miners, or by a consolidation of their claims." In *Jackson* v. *Roby*, 109 U.S. 440, 445 (1883), the Court stated:

> It often happens that for the development of a mine upon which several claims have been located, expenditures are required exceeding the value of a single claim, and yet without such expenditures the claim could not be successfully worked. ln such cases it has always been the practice for owners of different locations to combine and to work them as one general claim * * *.

The Supreme Court has thus indicated, in construing the 1872 Mining Law, that where low-grade, commercially valuable materials are involved more than a single claim must be available in order for a mining operation to be economically feasible. More recently, the Department focused on the uncertainties associated with developing low-grade material and observed as follows in *United States* v. *Denison*, 76 I.D. 233, 243 (1969):

> It is also essential to have an estimato of the quantity of ore within the mining claims since a large quantity of ore would justify expenditures for equipment, etc. which a small deposit could not support. That the quantity of ore is important was established in early Supreme Court cases, such as *Davis's Administrator* v. *Weibbold*, [139 U.S. 507] at 523-4, and *Chrisman* v. *Miller*, 197 U.S. 313, 322 (1905). A recent case in the United States District Court for the District of Columbia, *Pressentin* v. *Udall*, March 19, 1969, Civil Action No. 1194-65, affirming *United States* v. *E. V. Pressentin et al.*, 71 I.D. 447 (1964), ruled that there had to be a sufficient quantity of mineral so that mining would be an "economically viable venture," and that even though the mineral is marketable, without a showing that the whole mining operation could be profitable mining claims were properly declared void for lack of a discovery of a valuable mineral deposit.

A logical inference to be drawn from these precedents is that of mining claims may be considered together as a group for the purpose of ascertaining the validity of individual claims, so long as valuable mineral is shown to exist on each claim.

Decisions in the Department involving mining claims of high-volume substances are legion. Among those cases are several where the validity of claims was reviewed with the understanding they would be developed under a joint operation. In *United States* v. *Shuck*, A-27965 (Feb. 2, 1960), the Department contested the validity of several placer claims in close proximity. To evidence the prospective profitability of a proposed mining operation for construction gravel, the contestees presented testimony on costs for road building, plant facilities, and other construction associated with joint development of the claims and then estimated the amount of gravel to be extracted from *all* the claims in order to recover costs and render the operation profitable. *Id.* at 9. These figures and the contestees' approach were not refuted by the Department, but the claims were ultimately invalidated on the basis of a lack of market sufficient to support the claims when the lands were withdrawn from mining activities. *Id.* at 13.

Fourteen lode mining claims for a low-grade material, pyroxemite, were contested in *United States* v. *New Jersey Zinc Co.*, 74 I.D. 191 (1967), and declared invalid on the grounds a single mining operation comprising the claims and patented lands could not be successfully conducted. No economic analysis was presented for any particular claim in order to satisfy the discovery rules. Rather, a cost and revenue estimate was prepared for an open pit mine without reference to individual claims. The hearing examiner declared the 14 claims valid owing largely to the economic analysis. On appeal, after previously disregarded freight costs were added to the analysis, the petential profitability of the operation was considered disproved and the claims were invalidated.

In *In Re Pacific Coast Molybdenum Co.*, 75 IBLA 16, 90 I.D. 352 (1983), the claimant applied for patents of contiguous claims on a large molybdenum deposit. The ore body was shown te be of consistent quality and each claim was demonstratod to contain ainple mineralization. Costs for developing a single mine were estimated and apportioned to each claim according to the estimated tonnage of material to ascertain the profitability of each claim. The Board affirmed the decision to patent the claims.

From these given examples, it is apparent the practice of the Department has been to allow the consideration of a group of claims as a mining unit where the issue of profitability is at stake. Moreover, decisions where the Department restricted the rules of discovery to a showing of the profitability of each claim in a group as a potentially viable independent mine do not appear to exist. In most instances, decisions deal with the concept of developing a "mining operation" or "mine" from a series of contiguous or nearby claims, although specific information is not directly elaborated upon that point. *E.g., United States* v. *Wood,* 51 IBLA 301, 87 I.D. 629 (1980); *United States* v. *Martinez,* 49 IBLA 360, 87 I.D. 386 (1980); *United States* v. *Melluzzo,* 38 IBLA 214, 85 I.D. 441 (1978); *United States* v. *Pittsburgh Pacific Co.*, 30 IBLA 388, 84 I.D. 282 (1977); *United States* v. *Winegar,* 16 IBLA 112, 81 I.D. 370 (1974); *United States* v. *Gunn,* 7 IBLA 237, 79 I.D. 588 (1972); *United States* v. *Denison,* 76 I.D. at 233 (1969); *United States* v. *New Jersey Zinc Co.*, 74 I.D. 191 (1967); *United States* v. *Pressentin,* 71 I.D. 447 (1964); *United States* v. *Foster,* 65 I.D. 1, 3 (1958).

More recently, the Board found 10 contiguous gold and silver claims invalid for lack of discovery on each claim in *United States* v. *Cactus Mines Limited, supra.* In his concurring opinion, Administrative Judge Mullen provided this insightful comment on the law of discovery as it pertains to group claims:

> While the proof of quantity and quality are often interrelated, a claimant must prove that a valuahle mineral is actually present on each of the claims. Once mineral is demonstrated te be present, the proof of sufficient quality and quantity of mineral to warrant development can take into consideration the overall mining operation. There is little question that circumstances exist in which a group of mining claims containing low grade ore can support a mining operation, and thus demonstrate a discovery on each claim, even though taken individually the claims might not contain sufficient quantity of

ore of sufficient quality to support discovery. However, that fact does not relieve the claimant from the responsibility for presenting the proof of mineralization and the suitability of the project to low grade high tonnage extraction.

Id. at 32, 33 n.2. Administrative Judge Mullen's remarks were relied upon in *United States* v. *Dresselhaus, supra* at 270, to reverse a determination that three claims were invalid for lack of discovery:

With respect to the Silver Ball No. 7, Silver Ball No. 9, and Silver Ball No. 10 claims, appellants have shown that mineralization exists there which is suitable for heap leaching and contains value high enough to return the costs of extraction and produce a profit. We also conclude that there is reasonable expectation that more ore will be developed through orderly operation of the mine. Appellants presented sufficient evidence to preponderate over the Government's prima facie case as to these claims. *See United States* v. *Cactus Mines Limited, supra* at 32-33 n.2 (1984) (concurring opinion of Judge Mullen).

Also a circumstance in support of a construction allowing group claims is the Department's practice of allowing group assessment work, 43 CFR 3851.1, and group patenting. Counsel for BLM has attached to their brief affidavits of two BLM employees with responsibility for administration of the 1872 Mining Law. Both affiants declare it is the practice of BLM where a group of contiguous claims are involved to consider the economic feasibility of a mining operation as a whole. The following examples were provided where a single patent representing an individual mining operation was issued for large groups of claims: 32 lode claims (647 acres) (molybdenum); 40 lode claims (636 acres) (uranium); 113 lode claims (1,877 acres); 25 lode claims (353 acres); 18 association placer claims (1,640 acres) (bentonite). The second affiant asserts most of the individual claims in those groups of claims could not have complied with an independent mine requirement.

It seems reasonable a prudent man would consider the availability of the entire deposit for development when determining whether to make further expenditures for the development of low-grade materials. Few, if any, mining claimants can demonstrate an economically viable mine within the confines of a 20-acre claim where large low-grade deposits are involved. Moreover, Judge Mesch's construction of the discovery rules would prove prejudicial to the lone claimant who must locate a placer claim on each 20 acres. An association of eight or more persons may locate a placer claim of 160 acres. 30 U.S.C. §§ 35, 36 (1982); 43 CFR 3842.1-1. A showing of profitability for a mine operation involving low-grade ore on a 160-acre claim would be much less onerous than the burden to show independent profitability for eight 20-acre claims. Quite simply, a legal basis is lacking upon which to construe the 1872 Mining Law to distinguish between mining claims with respect to the validity of a discovery based on the difference in size of the claims. Accordingly, Judge Mesch's application of a requirement that each claim be independently capable of being mined and marketed at a profit is rejected.

[2] Before reviewing the evidence received relevant to discovery, it is advantageous to address here an ancillary issue raised by contestants. They have contested the mineral character of the land embraced by the claims.

The charge that lands embraced by a mining claim are not mineral in character can raise two distinct issues. First, it is a challenge to the validity of the entire claim and is the normal adjunct to a charge no discovery exists. Alternatively, it can be applied to placer claims which are supported by discovery, with the effect that the claimant must demonstrate that each 10 acres of the claim are mineral in character. *United States* v. *Williamson*, 45 IBLA 264, 293, 87 I.D. 34, 50 (1980). In their pleadings, contestants observe that at the hearing, witnesses for the contestees "testified that various ten-acre parcels of the sixteen remaining contested claims either do not contain any bentonite at all or require 'further exploration' in order to determine if there is bentonite thereon in economic quantities."

Even where a legal discovery has been demonstrated, the locator of a placer mining claim must show the mineral character of each 10-acre tract within the claim if the mineral character of the land has been contested. *United States* v. *Bell*, 68 IBLA 367 (1982); *United States* v. *McCall*, 7 IBLA 21, 79 I.D. 457 (1972), *aff'd, McCall* v. *Andrus*, 628 F.2d 1185 (9th Cir. 1980), *cert. denied*, 450 U.S. 996 (1981). If the contestee fails to establish the mineral character of any 10-acre tract, that tract is excluded from the claim. *Id.* Land is mineral in character where known conditions engender the reasonable belief the land contains mineral of such quantity and quality as would justify a prudent man in the future expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. *United States* v. *Lara (On Reconsideration)*, 80 IBLA 215, 217 (1984); *United States* v. *Williamson, supra*. Thus, the test as to whether land is mineral in character is essentially the same as the test for discovery, except for one important distinction. The mineral character of land may be based solely on less reliable inferential evidence, including geological conditions, discoveries of minerals in adjacent lands, and other observable external conditions upon which a prudent and experienced person would rely. *United States* v. *Bell, supra*; *United States* v. *Meyers*, 17 IBLA 313 (1974).

The mineral nature of each 10-acre section in the northern group of contested "L" claims was thoroughly reviewed as follows at the hearing:

Q [By Marsh] * * * Now, doesn't this map indicate that there is no bentonite on the northern ten acres of tbe L-20?

A This map indicates that.

Q Okay. That must be the truth then because Mr. Brorby said you are being real frank about your case?

A Yes.

Q On the northern ten acres of L-20 there is no –

A Well, we show one and a half foot on the north ten up here,

Q One and a half foot?

June 6, 1986

A Thick, bentonite, yes. It indicates to us that there is bentonite up here and we would probably do more drilling.
Q You would need more drilling on the northern half of the L-20 to determine whether there is any bentonite there that can be marketed, is that correct?
A Yes.
Q Okay. Now, on the L-18 it's in much better shape, isn't it?
A Well, it has bentonito on both the north and the south.
Q There are circles on both the north and south and triangles?
A Yes.
Q That was the L-18 we are speaking of. Now, the L-19, all the circles are down here with one triangle. One triangle on the northern part, is that correct?

* * * * * * *

Q On the northern half then of the L-19 you would have to do further exploration to determine whether your pit would include that?
A Yes.
Q Tbere isn't anything up there, is there, but one triangle?
A Yes.
Q Now, the L-21, there is no bentonite on the northern ten acres of the L-21, is that correct?
A That is correct.
Q Okay. The L-22, there is no bentonito on the nothern portion of the L-22, is that correct?
A That is correct.
Q Okay. Let's see what we have got left. We have got the L-23, it doesn't have anything, does it.
A Its shows an outcrop.
Q But it has no circles, no triangles, no stars or bars or – it just has an outcrop, doesn't it?
A That is correct.
Q Okay. So, you have to do further exploration on the entire L-23 to determine whether there is bentenito there that can be marketed, is that correct?
A We would mine the outcrop.

* * * * * * *

Q Okay. Now, on the L-24 there is no indication whatsoever of any bentonite on the southern half or southern ten acres of the L-24?
A Yes, that is correct. There is no bentonite on the south ten acres.
Q Okay. That is an established fact. On the L-25 is it an established fact that there is no bentonite on the southern half or southern ten acres of the L Claim?
A No it is not. We indicate an outcrop on the south.

(Tr. III, 105-09). Close scrutiny of contestee's Exhibit Y, American Colloid's map for the eight contested claims north of the Thompson River showing the respective sample drill locations, indicates the contostoes have not found appreciable amounts of bentonite in the northern halves of L-20, L-21, and L-22 and the southern halves of L-23 and L-24. Whether or not these 10-acres tracts have been sampled is not disclosed. However, none of the evidence, including the Patterson map, infers mineralization on those lands. A small amount of bentonite was found at one spot in the northern half of L-19; but, according to Ballenger's testimony, further examination is needed before the land could be said to contain a deposit capable of being profitably extracted. Such a description of the parcel's known condition fails to satisfy the test used to determine mineral character of land. *See United States* v. *Lara (On Reconsideration), supra*. Moreover, nothing appears in the record to infer mineralization of this parcel.

With respect to the southern group of eight claims, the hearing produced the following discussion:

Q Okay. So, we have five [claims]?
A Yes.
Q Running consecutively L-56, 57, [L-58], L-59 and L-60?
A Yes.
Q Those are numbered moving from east to west?
A Yes.
Q Now, let's just draw a hypothetical line, Mr. Ballenger, right through the middle of that group of claims so that the line running from west to east or east to west, so that what we have done is divided those claims exactly in half.
A All right.
Q So that we have a northern half and we have a southern half. Now, bentonito on the northern half of that block of claims is nearly nonexistont, is it?
A Yes, we show no indications.

* * * * * * *

Q Now, let's go down to L-66. Now, that has bentonito on both the north half and the south half, doesn't it?
A Yes.

* * * * * * *

Q Okay. Now, let's do the same thing with L-67. Now, on L-67 we don't have any bentonite on the north half, correct?
A That is correct.

* * * * * * *

Q Okay. Now, [L-68[9]] has a very low tonnage, doesn't it, based on Exhibit P? It is the lowest tonnage that you have indicatod?
A No, it is not the lowest tonnage.
Q Okay. It's –
A It has 14,400 tons on it.
Q Okay. Well, let's just take it – it's obvious that there is no bentonite whatsoever on the southern half?
A That is correct.

(Tr. III, 115-16, 119-20). Exhibit Z, American Colloid's drill map for the southern eight contested claims, reveals that contestees have not found any significant exposures of bentonite on the northern halves of L-56, L-57, L-58, L-59, L-60, and L-67 and the southern half of L-68. Again, no other evidence suggests mineralization of the lands.

Contestees have not offered any testimony or evidence to show mineralization exists on the identified 10-acre tracts. Rather, the evidence from the hearing substantiates contestants' charges that the land is nonmineral in character with respect to the following: The northern halves of L-19, L-20, L-21, L-22, L-56, L-57, L-58, L-59, L-60, and L-67, and the southern halves of L-23, L-24, and L-68. We,

[9] The transcript reads L-67 where L-68 is the obvious focus of discussion. The extent of bentonite on L-67 as illustrated by Exhibit Z bad already been reviewed on cross-examination and Exhibit P indicates L-68, not L-67, contains a projected 14,400 tons. Moreover, Exhibit Z reflects bentenite readings for tbe soutbern balf of L-67.

therefore, conclude the preponderance of the evidence does not warrant devoting time and effort to developing those parcels with hope of developing a successful operation. Accordingly, the decision that the contested claims are invalid is affirmed with respect to the above-identified tracts.

[3] In his decision, Judge Mesch discussed contestees' proof without commenting on the quality of contestants' evidence. This practice implies the burden of proof to show the validity of the contested claims has been placed upon the contestee. Such an approach is acceptable where the United States has initiated a contest to satisfy its duty to protect federal lands. *See United States* v. *Chapman*, 87 IBLA 216 (1985). However, the allocation of burden of proof differs in situations where private parties contest the validity of a mining claim, as explained in *Massirio* v. *Western Hills Mining Association*, 78 IBLA 155, 160 (1983):

> When Government contest proceedings are brought against a mining claim, contestant has the burden of establishing a prima facie case that no discovery of a valuable mineral deposit has been made. When such a prima facie case is established by contestant, the burden then is upon the mineral claimant to show by a preponderance of the evidence that a discovery has been made within the limits of the claim. *Foster* v. *Seaton*, 271 F.2d 836 (D.C. Cir. 1959). However, as a general rule, in a private contest the burden of proof is on the contestant to establish the invalidity of the contested claim by a preponderance of the evidence. *In Re Pacific Coast Molybdenum Co.*, 75 IBLA 16, 22 n.4, 90 I.D. 352 [357 n.4]; *State of California* v. *Doria Mining & Engineering Corp.*, 17 IBLA 380, 389 (1974); *Marvel Mining Co.* v. *Sinclair Oil & Gas Co.*, 75 I.D. 407, 423 (1968). We find some justification for the distinction in that when the Department contests a claim it is exercising its statutory responsibility to adjudicate the validity of a claim to the public lands. A private contestant, on the other hand, is asserting the primacy of a conflicting private claim to the public lands requiring invalidation of contestee's claim. Thus the private contestant may properly be regarded as the proponent of the rule, *i.e.*, the invalidity of the contested claim.

Accordingly, the sum of evidence offered by contestants to establish the invalidity of the claims must preponderate over contestees rebuttal evidence. It is not possible to find such a preponderance of the evidence in light of the testimony and exhibits which have been offered into the record. Contestants have failed to carry their burden of proof.

Contestants infer a presumption of no discovery based upon a perceived lack of development over a long period of time. Such an inference is traditionally considered weak and is easily overcome by a demonstration that the questioned material is marketable. *See United States* v. *Kaycee Bentonite, supra* at 220, 89 I.D. at 282; *United States* v. *Hess*, 46 IBLA 1, 7-9 (1980). Moreover, the presumption is reserved for Government contests. *Id.* The contested claims have been held since 1981, although Pierce held partial interest in predecessor claims. The period since 1981 has passed mostly under circumstances where contestees have not been free to openly develop the "L" claims. It would be difficult to infer no discovery under those conditions. Contestants have identified testimony summarizing American Colloid's intention not to develop the claims expeditiously should the claims be upheld and argue such intent infers no discovery. However, given the allocation of the burden of proof in this private contest the fact the claims are not developed will add little weight to contestants' case provided siguificant evidence is present in the record te show the claims are marketable.

Contestants focus their argument upon a perceived major decline in the demand for bentonite, said to produce a "buyer's market," that is to say, producing companies are willing to sell quality clays for lower prices in competition with lower-quality clays (Tr. II, 175). The recent decline in bentonite sales is attributable to many factors; current lack of demand adversely affects all bentonite producers, according to Hentz (Tr. II, 172-75, 197-200). The following excerpts from contestants' Exhibit ll, a discussion on bentonite production, illustrates some then-current problems in marketing bentonite:

> The total U.S. Market peaked in 1981 at 4,310,000 tons and dropped to 2,475,000 tons in 1982; 63% of the 1981 level.
>
> * * * * * * *
>
> The Drilling Industry is the predominate consumer in the Industry and continues to consume nearly 50% of the total bentonite production. Even though 1982 consumption dropped only 30%, the Hughes Tool Co. rotary rig count hottomed out at 1,846 rigs in April 1983 compared to 4,521 rigs at the December 1981 peak, a 59% reduction * * *.
>
> The Iron Ore Pelletizing Industry took a dramatic drop in 1982 at only 44% of the 1981 level. * * * Indications in 1983 are that the industry is restabilizing at a much lower level of operation.
>
> The Foundry Industry reflects the general economy; particularly the automotive industry. In general, the Industry has seen its heyday; however, 1983 indicators are that this industry has bottomed out and a slow recovery is taking place.
>
> * * * * * * *
>
> * * * At the close of 1981, there was a theoretical installed capacity of 4.87 million tons per year.
>
> * * * * * * *
>
> With 1983 being a copy of 1982, the Industry was in serious trouble. The Industry was operating at less than 1/2 capacity and suffering a 1/3 reduction in sale price.
>
> * * * * * * *
>
> It will probably be well inte 1985 before there is sound stability within the industry and the ensuing years should prove interesting. It will probably be well into the 1990's before the Bentenite Industry's installed capacity will be utilized.

Exhibit 11 at 3-10. *See also* Exhibits 41-45. Contestants' witnesses and exhibits strongly suggest a negative outlook for bentonite sales and extreme difficulty in marketing anything but high-quality bentonite (Tr. II, 145-46). Contestants did not, however, present specific evidence which would establish that F-bed material in particular is unmarketable in a depressed market.

Contestants' case moved from a discussion on marketability to one on standards and specifications for bentonite. The major bentonite-consuming industries each desire special qualities in the clay they use associated with their specific needs. Contestants asserted that untreated F-hed material from the "L" claims could not comply with any of the established specifications and, in the depressed market they have pictured, would not be marketable. Contestants' Exhibits 20 through 24 and Exhibit 29 discuss the standards or specifications formulated for bentonite used in drilling, oil-well cementing, taconite pelletizing, and foundry binding. Comparing his test results with those standards, Thayer testified as follows:

Q [by King] Now getting back to your samples listed on Exhibit 19, I believe, how many of those samples showed the presence of bentonite suitable for use in the well drilling industry as majored [sic] by the [American Petroleum Institute] specifications?

A [by Thayer] None of the samples met the minimum specifications.

Q How many of those samples showed bentonite that was suitable for the taconite industry based on tbe specifications in that industry which you are familiar with?

A None of the samples met the minimum specifications.

* * * * * * *

Q * * * Now is there anything that can be done to bentonite to enhance the quality and thereby meet the parameters of API and the water absorption standards?

A Oftentimes bentonites are blended to improve their quality and oftentimes chemicals are added to improve the quality of the bentonite.

* * * * * * *

Q * * * How many of the samples were suitable for use in the oil well industry eitber in its original state or by treatment?

A I never actually went to the extent of adding pelymer to all of these samples to see if the barrel yield could be raised. I didn't do that because I felt that in all cases adding polymer would help the samples so I relied on the fact that polymer can only be used within certain economic levels.

Therefore, when I compare it to samples that are of too low quality initially I determine that pelymer cannot be successfully added or economically added but in samples where the quality was high enough initially 1 assumed pelymer would be adequate in all instances and economical such that four or five of the total number of samples had sufficient initial quality I feel that they could be economically treated up to oil well specifications.

Q Four or five of the –

A Of the 60.

Q Four or five of the 60 samples?

A Yes.

Q What percentage would that be?

A I guess my mathematics aren't that good.

Q Based upon your analyses of tbe original quality and also the treatability of these samples how many samples show bentonite which at least with treatment could be suitable for use in the taconite industry?

A I feel that none of the samples would be suitable for that end use in view of the fact that the amount of soda ash that I added was probably at the economic limit and none of the samples would meet the specification even after treatment.

(Tr. II, 55-58). Hentz testified in general that F-bed clay probably could not satisfy foundry specifications, but did not specifically relate his testimony to the "L" claim material (Tr. II, 178-85). However, Hentz later testified Thayer's test results indicated the sampled bentonite material would not meet the standards for any of the markets supplied by Federal Bentonite (Tr. III, 11). He stated that it would not be his company's policy under present market conditions to blend or treat F-bed material even where they could possibly achieve those standards (Tr. III, 11-12, 24-26).

When questioned on cross-examination, Hentz testified to the effect that the established standards and specifications are not strictly enforced by the industries. With regard to the standard for the foundry industry, Hentz agreed that where a customer is satisfied with a beneficiated or blended material, the supplier will continue to market it. He acknowledged the API standard specifies unadulterated or unbeneficiated bentonite clay but the industry practice is to add necessary elements to the clay to comply with the specifications (Tr. III, 30-38).[10]

Regarding the purported inability of the F-bed clay to comply with industry standards, Odom testified:

Q [by Brorby] Is it your opinion, sir, that the F-bed bentonite located on the L Claims can be marketed at a profit in a down cycle as well as in an up cycle?
A Yes, it is my opinion that it can.
Q Do you have any problems fulfilling the various API standards that we have been talking about here in this trial with F-bed bentonite?
A No.
Q Is this a trade secret which American Colloid guards as a means of doing this?
A Yes.
Q You heard Mr. Hentz's testimony concerning his judgement it would be a waste of everyone's time to do much with F-bed. Are you in agreement with that testimony?
A Absolutely not.

(Tr. III, 129-30). Odom explained F-bed material has unique properties which enable it to become very marketable if processed correctly (Tr. III, 130-31). Contestees responded to nonmarketability of F-bed material as alleged by contestants with the following testimony on development of other F-bed mines for American Colloid:

Q [by Brorby] * * * Mr. Ballenger, there has been some discussion concerning the Ramey Claims?
A [by Ballenger] Yes.
Q What are those?
A The Ramey property. It is 15 miles from our Belle Fourche plant site where we are mining F-bed.
Q Is that in South Dakota or Wyoming?
A South Dakota.
Q What is the royalty that you are paying on the Ramey Claims?
A Eighty cents per ton.
Q And that is F-bed bentonite, is that correct?
A That is correct.
Q Do you know approximately how many tons of F-bed bentonite has been mined by American Colloid?
A In excess of a million tons.
Q Do you know whether or not that F-bed bentonite has been sold?
A Yes, it has.
Q Have you on behalf of American Colloid patented mining claims?

[10] In *United States* v. *Kaycee Bentonite Corp.*, *supra*, the Board held the deposit of bentonite under review, shown to be marketahle for special uses, was an exceptional clay under the mining laws, even though blending and additives were necessary to make the deposit suitable for the stated uses.

A Yes.
Q Have you achieved patents on F-bed bentonite from the BLM?
A Yes.
Q Do you know approximately how many?
A We have received several near the Ramey property.
Q Have there been others as well?
A No.
Q Okay. The patents which you have received from the BLM on the F-bed bentonite, have they differed in quality from the L Claim bentonite that we are talking about?
A Not to my knowledge.
Q Have they differed in quantity?
A No.

(Tr. III, 85-87). Ballenger also identified an F-bed mine which was in current operation about 8 miles north of the contested claims (Tr. I, 86-89).

A mining claimant is justified in initiating a claim on mineral showings which are the same as those where actual mining operations have been successfully brought to fruition. *See United States* v. *Winegar, supra* at 126, 81 I.D. at 376. However, specific information on marketing the F-bed material previously mined by American Colloid was not provided and, as a consequence, a conclusion cannot be drawn with absolute certainty about the potential success of the contested claims.

For contestant, Hentz testified about Federal Bentonite's experience with an F-bed mine, the Geisinger Pit, where 95,000 tons of F-bed material were purportedly mined and stockpiled from that operation. Hentz estimates that only 85,000 tons of the material had been marketed between 1978 and the time of the hearing by blending it with higher-quality clays. He attributed the poor marketing performance to the substandard quality nature of the F-bed material and did not feel the remaining 10,000 tons could be marketed under present market conditions (Tr. III, 176-78, 182-84).

Contestees have challenged the accuracy of the samples obtained by Thayer. Most of Thayer and Hentz's testimony was based upon an evaluation of those samples. However, Thayer could not support the accuracy of the methods by which the samples were obtained. Sample test results have limited probative value concerning the existence of valuable materials on a mining claim when they are not supported by sufficient evidence te show how and where they are taken. *United States* v. *Parker*, 82 IBLA 344, 91 I.D. 271 (1984). On the other hand, Hentz attempted to impeach American Colloid's sampling of the contested claims in the following exchange:

Q Okay. And out of that 194 actual samples [taken by American Colloid] how many would generate some interest in Federal Bentonite?
A About 43.
Q Abeut 43. So, that's what about?
A About a fourth or so.

(Tr. III, 13). Hentz did not identify the claims which were among those which showed potential value. Whether or not the 16 contested claims remaining under consideration are included among the group showing a potential value remains a question of speculation in the record.

Contestants did not present specific data on the costs of developing and marketing a bentonite operation. Testifying for contestees, Odom discussed a detailed cost estimate and analysis prepared by American Colloid for mining, processing, and marketing F-bed clay from the "L" claims (Tr. III, 132-35). The analysis assumed mining of the claims would take place in two groups and accepted as stated the existence of current market conditions described by American Colloid (Tr. III, 133). The data was shown to contestants and their expert witnesses, but was not offered into evidence because of the existence of purported trade secrets disclosed by the data. Where a party is reluctant to introduce purported evidence into the record to clarify crucial elements in his position, the probative value of the evidence is greatly diminished. *See United States* v. *Chapman*, 87 IBLA 216, 221 (1985). Odom concluded his testimony with the following observations:

Q And the testimony, attempting to summarize it, is that any individual claim you could not mine, process and market at a profit, if you look only as an individual claim, is that true?

A True, of any other company teo.

Q But your testimony is taking the south group of the claims and operating those in a joint fashion when those claims could be mined, processed and marketed at a profit?

A Yes.

Q And the same thing would be true of the north group?

A Yes.

Q And that is how you based your economic summaries and forecasts?

A Yes.

(Tr. III, 135). Both Odom and Ballenger testified not only as employees of American Colloid, but also as experts concerning the processing and marketing of F-bed bentonite. Ballenger was American Colloid's exploration and mine development supervisor for the 3 years preceding hearing on the contest (Tr. I, 3). Odom was an employee with advanced academic degrees in geology, and a specialist in clay and industrial materials (Tr. III, 123). The testimony of these men was grounded not only in a knowledge of the proprietary process used by American Colloid to treat F-bed bentonite, but more importantly, as experts in the field their testimony was based upon the totality of their work experience, education, and training. Their qualifications to give expert testimony at hearing were not questioned or denied. It is axiomatic that opinion evidence, such as they supplied, may be given by expert witnesses. *See, e.g.*, 32 C.J.S., *Evidence* § 457 (1964); II *Wigmore on Evidence*, § 557 (3rd ed. 1940). While such testimony may be tested, as was done here, by showing that some element of the basis for the opinions expressed was not fully disclosed or cannot be explained without disclosure of proprietary information, that circumstance is not enough, alone, to totally discredit their proof. *Id.* While under such circumstances the weight of the evidence is diminished, the expert opinions expressed may be relied upon, absent a showing the expert has been impeached. Since there is nothing in the record to suggest the testimony of these men is not entitled to some weight, it would be error to totally discount their opinions in the manner and for the reasons given by the dissenter, simply because part of the background comprising their expert knowledge which included the American Colloid process for treating bentonite was not disclosed. To do so would not only be legal error, it would be gross exaggeration of the importance of this single circumstance. Moreover, nowhere in the record is there a suggestion that contestants were not in fact aware of the nature of the beneficiation process used by American Colloid. What *does* appear is that American Colloid was not willing to publish information concerning the process formula as part of the record.

The preceding quotations from the record and summarization of the evidence offered by the parties demonstrate the failure by both parties to prove their cases by a preponderance of the evidence. Major flaws are found in the essential elements of both contestants' proof and contestees' rebuttal evidence. Although contestees have not conclusively proved discovery of a valuable deposit for the two groups of claims, contestants have not convincingly shown the F-bed clay from the "L" claims to be either unlocatable or unmarketable. Because of the allocation of burden of proof in a private contest, contestants bear the responsibility to present evidence which preponderates on the issues and demonstrates the invalidity of the contested claims. They have not done so as to these 16 remaining claims. They have not satisfactorily shown the portions of the 16 contested claims at issue here do not possess a deposit of bentonite capable of being mined, removed, and marketed at a profit. Therefore, the Board finds the 16 contested claims, minus the described 10-acre portions found to be nonmineral in character, are not shown to be invalid by this record contest.[11] However, this conclusion does not imply there is a discovery

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[11] The dissent, by adopting the contestants' arguments concerning the analysis to be given the evidence received at hearing, falls into a double error. First, the dissent accepts at face value general statements and conclusions hy contestants' witnesses concerning the alleged low-grade and lack of marketability of F-bed bentonite. Apparently aware of the danger inherent in this approach, the dissenter seeks te avoid the obvious logical consequence of his stated position by noting that his opinion concerning the F-bed should not be considered proof in future cases of the valuelessness of F-bed bentonite. *See* Dissent footnote 2. Second, and more importantly, the dissent focusses upon contestees' reluctance to disclose information concerning their secret processing methods used for preparing F-bed bentonite for market, and decides contestees should be punished for this reticence. This has the effect of shifting the burden of proof on the marketability issue onto contestees. While this would be propar in a Government contest proceeding, in the context of this private contest it is error. As previously explained in this opinion, the general nature of contestants' evidence on this issue, considered in the light of the undisputed proof that American Colloid has successfully marketed F-bed material, requires dismissal of the contest complaint. Ultimately, given the state of the record in this contest, the acceptance of contestants' arguments to the extent given by the dissent must logically rest upon a tacit acceptance of the "independent mine requirement," which is a legally untenable position. Only such a conclusion, however, would permit a finding there was proof by contestants that F-bed bentonite from contestees' claims is unmarketable, for only reliance upen the "independent mine requirement" can entirely foreclose the possibility that contestees' claims could be marketed at a profit in the face of evidence that other sales of F-bed material have been made. As the dissenter points out, contestees have offered to deliver to this Board Exhibit "U," their withdrawn evidence which is claimed to contain proprietary data. Were this single exhibit as important as the dissenter believes it to be, there would be nothing wrong with such an approach which substantially conforms to current Board practice in cases involving proprietary data received in oil and gas leases found to be located within a known geologic structure.

of a valuable bentonite deposit present on the claims, nor does it provide immunity for the claims from other possible contests.

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 is affirmed as to these 39 claims which concededly have not been shown to have discovery of minerals, and reversed as to the 16 claims remaining, except for 10-acre parcels shown to be nonmineral. This private contest is ordered dismissed as to those 16 claims.

FRANKLIN D. ARNESS
Administrative Judge

I CONCUR:

GAIL M. FRAZIER
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE HORTON CONCURRING IN PART AND DISSENTING IN PART:

This private mining claim contest now concerns whether contestees' 16 bentonite "L" claims satisfy the discovery requirements of the 1872 Mining Law. Contestants first allege the claims do not contain mineral locatable under the mining laws on grounds that F-bed bentonite has no greater value than common clays, which the Board has recognized are not locatable. *United States* v. *Peck*, 29 IBLA 357, 84 I.D. 137 (1977). Contestants also allege that whether the 16 L claims are mined independently or as a group venture, the evidence shows they cannot be mined and marketed at a profit.

I agree with the majority that contestants have not proved that F-bed bentonite is not a valuable mineral. The record merely establishes, although the Administrative Law Judge did not so find, that it is a lower-quality bentonite than that found in the New Castle Bed or Clay Spur Bed. Contestants' own expert witness, Hentz, employed by Federal Bentonite, who testified that his company is not interested in and does not currently mine F-bed bentonite, acknowledged that approximately 25 percent of the samples taken from the L claims "would generate some interest in Federal Bentonite" (Tr. Vol. III, 13). In addition, contestee American Colloid has obtained patents for other F-bed bentonito claims (Tr. Vol. III, 85-87).

For the reasons given in the majority opinion, I also agree that it was error for the Administrative Law Judge to require that each of contestees' claims independently satisfy the marketability test for discovery without regard to adjacent claims in the claim group. The presence of adjacent reserves on contiguous mining claims containing large, low-grade deposits of bentonite is properly considered in determining whether the bentonite in a particular claim is valuable.

What the Administrative Law Judge should have held in this case and the majority errs in not discerning from the evidence of record is that the L claims were shown to be unprofitable even if mined as a group operation. More precisely, contestants made a prima facie showing of lack of marketability which contestees failed to rebut.

Contestants adduced through expert testimony and documentary evidence that the F-bed bentonite from the L claims fails to meet industrial specifications for the major consuming industries. The evidence presented on this point is summarized in the majority opinion but no conclusions are drawn.

In contrast to the specific testimony of contestants' expert witnesses, Thayer and Hentz, to the effect that the F-bed bentonite on the L claims does not satisfy accepted industrial specifications in either a natural or treated condition, contestees offered opinion testimony that the F-bed bentonite on the L claims was similar in quality to F-bed bentonite owned on other claims which had been successfully marketed. Nonetheless, American Colloid Co. has never marketed the bentonite on the L claims and contestees' claim of marketability was left "totally unsupported by the submission of any actual industrial specifications maintained by customers of American Colloid Co. or by any other industrial consumer" (Answer at 23).

Contestants put on considerable evidence that because of its inferior quality, F-bed bentonite is shunned by the major companies, except American Colloid Co. (Tr. Vol. II, 61-64, 135-40, 175-86; Tr. Vol. III, 126-27). Bare assertions by American Colloid Co. without supporting evidence that it successfully markets F-bed bentonite and that the F-bed bentenite before us can also be so marketed should not be allowed to overcome contestants' prima facie showing that the mineral is not considered marketable.

Contestants' showing that F-bed bentonite is not marketable is based in part on the declining market for bentonite that has been occurring since 1981:

> This decline is attributable to several factors, including the general state of the domestic econoiny, competition from foreign sources of steel and reduced usage of steel in automobiles leading to a resultant decline in domestic iron and steel production, and decreased domestic drilling activity. Tr., Vol. 1, 6; Vol. II, 145-146, 172-175, 197-200; Vol. III, 128-129; Contestants' Exhibits 11, 12, 13, 14, 15, 38, 39, and 41-48 (inclusive). At present, the bentonite producing industries are utilizing only about one-half of available production capacity and producing only about one-half of the volume of bentonite produced in 1981. Contestants' Exhibits 11, 12; Tr., Vol. II, 133, 198-199. Before 1981, it was a "seller's market"; after 1981, it became a "buyer's market" and producing companies are willing to sell higb quality clays for low prices in competition with lower quality clays. Tr., Vol. II, 173-175.

(Answer at 6).

Contestees' response to this private contest has been that we accept the unsubstantiated claims of two American Colloid Co. employees, Ballenger and Odom, that the company can make a profit mining F-bed bentonite. On grounds they did not desire to disclose trade secrets on how American Colloid Co. can accomplish this, contestees chose not to place in evidence an exhibit purportedly corroborating this position:

The Contestees also called as a witness Dr. Odom who is in charge of American Colloid's F-Bed utilization program. [Tr. Vol. III, p. 131] Dr. Odom has a Ph.D. in geology and was formerly a professor at Northern Illinois University teaching mineralogy and industrial minerals. [Tr. Vol. III, p. 123] Dr. Odom testified that he had made a detailed cost analysis concerning development of the F-Bed bentonite on the sixteen "L" claims at issue. This economic summary or cost analysis was based on "teday's business conditions" to reflect "today's marketplace." The economic summary includes selling price, access fees, equipment costs, depreciation costs, stripping costs, and the various costs involved in determining a final production cost and profitability of the mining operation [Tr. Vol. III, pp. 132-137]

Based on the lab tests performed on the samples from each of the sixteen claims, Dr. Odom testified that the F-Bed bentonite from the claims can meet the industrial specifications and be marketed at a profit for all of the major uses for bentonite, including uses in the taconite, oil well and foundry industries[4] [Tr. Vol. III, pp. 126-130]

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[4] It is a trade secret how American Colloid processes the F-Bed bentonite. [Tr. Vol. III, p. 130] In order to maintain the confidentiality of American Colloid's mining, processing and marketing of F-bed bentonite from its competitors (which are directly involved in the present contest), the economic summary, Contestees' Exhibit U, was not put in the record altbougb it was used at tbe hearing in connection with Dr. Odom's testimony and shown to opposing Counsel.

(Statement of Reasons at 8).

Initially, it sbould be noted that "Exhibit U" is described by contestees as an "economic summary or cost analysis" for F-bed mining frorn the L claims. This economic analysis is said to depict "selling price, access fees, equipment costs, depreciation costs, stripping costs, and the various costs involved in determining a final production cost and profitability of the mining operation." It is *not* specifically described as containing American Colloid's purported trade secret as to how it processes F-bed bentonite. The majority's characterization of Exhibit U that it sets forth American Colloid's "process formula" (opinion at 235) and its "secret processing methods" (opinion at 235, n. 11) is purely speculative. It is more reasonable to speculate that it merely sets forth what contestees specifically recite. What is clear is that contestees did not desire to have its economic summary subjected to cross-examination.

I am in complete agreeement with counsel for contestants that contestees' defensive strategy cannot be rewarded. Contestants state:

In conclusion, it should be emphasized that in distinction to *failing* to submit any specific cost or pricing evidence in support of their "group discovery" opinions, here the Contestees actually *refused* to submit that evidence even though it was apparently in hand. There is only one reasonable inference to be drawn from that refusal. If an entire group of mining claims could be found valid on the basis of a supposedly expert opinion of "group profitability" in the very face of strong countervailing evidence *and* the same expert's actual refusal to disclose available cost and pricing data which might suppert his opinion, then the entire administrative private contest procedure would be an absolute mockery. [Italics in original.]

(Contestants' Final Brief at 33-34).

The Department and the courts have long regarded mining claim contests as formal adjudicatory proceedings properly governed by the strictures of the Administrative Procedure Act (APA), 5 U.S.C. §§ 554-557 (1982). *United States* v. *O'Leary*, 63 I.D. 341 (1958); *Adams* v.

Witmer, 271 F.2d 29 (9th Cir. 1958). As adversary adjudications, parties are expected to make their own case.

While the APA generally prohibits the receipt of *ex parte* evidence or communications on the merits of a case, 5 U.S.C. § 554(d), 5 U.S.C. § 557(d)(1)(A) (1982), these provisions contain the caveat "except te the extent required for the disposition of ex parte matters as authorized by law." Numerous federal agencies have well-defined procedures to govern Administrative Law Judges or the agency in the conduct of *in camera* proceedings and the receipt of *ex parte* communications authorized by law. See, for example, 16 CFR 3.45 (Federal Trade Commission); 29 CFR 18.46 (Department of Labor). The Department of the Interior is currently studying draft rules in this regard. However, the mere absence of such procedural rules has never precluded the right of any party to assert entitlement to *in camera* or *ex parte* review of evidence otherwise authorized by law. In this case, there does not appear to have been any attempt by contestees te have "Exhibit U" received in evidence at the hearing under means that would protect its alleged confidentiality.[1]

The proper disposition of this appeal would be to affirm contestees' claims as invalid based on a showing that the F-bed bentonite on the L claims is not marketable even if mined as a group operation.[2]

WM. PHILIP HORTON
Chief Administrative Judge

MOUNTAIN STATES RESOURCES CORP.

92 IBLA 184 Decided *June 12, 1986*

Appeal from a decision of the Utah State Office, Bureau of Land Management, denying a petition for waiver of rents, suspension of operation and minimum production requirements, and reduction of royalties on coal leases U-5135 and U-5146.

Affirmed as modified.

1. Coal Leases and Permits: Diligence--Coal Leases and Permits: Suspension of Operations and Production

[1] Contestees advise, however: "Exhibit 'U' contains confidential proprietary information and therefore was not made of public record in the proceeding. American Colloid will make Exhibit 'U' available for inspection by the Board at any time upon request" (Contestees' Brief in Response to Statoment of Intervenor BLM). Contestees misperceive the function of the Board in a mining claim contest appeal. Our task is to review the decision made by the Administrative Law Judge based on the record made before him during the evidentiary bearing. In accordance witb 5 U.S.C. § 556(e), the "transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision" by the Administrative Law Judge. While tbe Board possesses *de novo* review authority under 43 CFR 4.1, that simply means it "has all the powers which it would have in making the initial decision" 5 U.S.C. § 557(b) (1982). *De novo* review autbority in an APA proceeding does not mean a party may forego the introduction of evidence before the Administrative Law Judge in favor of its suhmission to the appellato tribunal.

[2] Such a result in this case would not bar a demonstration in another case tbat F-bed bentonito can be mined and marketed at a profit.

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1982), requires that any coal lease not producing in commercial quantities at the end of 10 years be terminated. No suspension of this obligation to commence production is authorized by statute or regulation.

2. Coal Leases and Permits: Rentals--Coal Leases and Permits: Royalties--Mineral Leasing Act: Rentals--Mineral Leasing Act: Royalties

A petition to waive rentals and reduce preduction royalties required by a coal lease shall contain the information set forth at 43 CFR 3485.2. The authorized officer may either reject a petition not meeting the criteria set forth in the regulation or request additional data.

3. Coal Leases and Permits: Rentals--Coal Leases and Permits: Royalties--Mineral Leasing Act: Rentals--Mineral Leasing Act: Royalties

A lessee seeking the waiver, suspension, or reduction of rental or minimum royalty, or the reduction of production royalty must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under the lease terms.

APPEARANCES: George A. Hunt, Esq., R. Scott Howell, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

Mountain States Resources Corporation (MSRC) has appealed from a decision of the Utah State Office, Bureau of Land Management (BLM), dated April 30, 1984, denying a petition for waiver of rents, suspension of operation and minimum production requirements, and reduction of royalties for coal leases U-5135 and U-5146. Each lease was issued pursuant to 43 CFR Subpart 3430 as a preference right lease and bears an effective date subsequent to the enactment of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. §§ 201 - 209 (1982).[1]

BLM's decision states in part:

> It is our pesition that the petition filed by Mountain States would in effect allow the leases to he held without remuneration te the Federal Government until such a time as economic or other conditions would be favorable for development of the coal resource. This is not consistent with the intent of the Federal Coal Leasing Amendments Act of 1976 and Interior Department policy. Therefore, the potition is hereby denied for the following reasons:
>
> 1. Waiver of Rents
>
> It is determined that to waive or reduce the rental payment on undeveloped Federal leases U-5135 and U-5146 at this time would not encourage *"the greatest ultimate recovery of the coal * * * or promote development."* Existing coal mines in the area are currently operating at well below capacity and it is apparent that markets do not now exist which would justify additional coal development at this time. It is acknowledged

[1] The effective date of lease U-5135 is May 1, 1977; the effective date of lease U-5146 is Apr. 1, 1983. FCLAA was enacted on Aug. 4, 1976, as P.L. 94-377, 90 Stat. 1083.

that current market conditions might not justify the capital expenditures to develop the leases at this time, but waiving or reducing the rent would not alter this situation.

2. Suspension of Operations and Minimum Production

As stated above Federal coal leases U-5135 and U-5146 are undeveloped and, therefore, the question of suspension of operations is not germane. Continued operation, which requires the production of 1 percent of the recoverable reserves, or payment of advanced royalty in lieu of continued operation, is required only after diligent development has been achieved (43 CFR 3483). Diligent development and continued operation requirements are mandated by Section 6 of the Federal Coal Leasing Amendments Act of 1976 and cannot be waived "*except where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee.*"

3. Royalty Reduction

The petition being considered does not meet the regulatory requirement or current department policy for royalty reduction consideration. Royalties on Federal coal leases may be reduced in accordance with the requirement of 43 CFR 3485.2. An application for royalty reduction is te be filed in triplicate with the authorized officer and must meet the requirements of the regulations. [Italics added.]

The underscored quotations set forth in BLM's decision are statutory in origin. Section 6 of FCLAA, 30 U.S.C. § 207 (1982), and section 39 of the Mineral Leasing Act (*as amended by* section 14 of FCLAA), 30 U.S.C. § 209 (1982), are their sources. 30 U.S.C. § 207 (1982) provides:

(a) *Term of lease; annual rentals; royalties; readjustment of conditions*

A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated. The Secretary shall by regulation prescribe annual rentals on leases. A lease shall require payment of a royalty in such amount as the Secretary sball determine of not less than 12-1/2 per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations. * * *

(b) *Diligent development and continued operation; suspension of condition on payment of advance royalties*

Each lease shall be subject to the conditions of diligent development and continued operation of the mine or mines, except where operations under the lease are interruptod by strikes, the elements, or casualties not attributable to the lessee. The Secretary of the Interior, upon determining that the public interest will be served thereby, may suspend the condition of continued operation upen the payment of advance royalties. Such advance royalties shall be no less than the production royalty which would otherwise be paid and shall be computed on a fixed reserve to preduction ratio (determined by tbe Secretary). * * * Nothing in this subsection shall be construed to affect the requirement contained in the second sentence of subsection (a) of this section relating to commencement of production at the end of ten years.

30 U.S.C. § 209 (1982) provides:

The Secretary of the Interior, for the purpose of encouraging the greatest ultimate recovery of coal, oil, gas, oil shale, gilsonite (including all vein-type solid hydrocarbens), phosphate, sodium, potassium and sulphur, and in the interest of conservation of natural resources, is authorized to waive, suspend, or reduce the rental, or minimum royalty, or reduce the royalty on an entire leasehold, or on any tract or portion thereof segregated for royalty purposes, whenever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully oporated under the terms provided therein. * * * In the event the Secretary of the Interior, in the interest of conservation shall direct or shall assent to the suspension of operations and production under any lease granted under the terms of this chapter, any payment of acreage rental or of minimum royalty prescribed by such lease likewise shall be suspended during such period of suspension of operations and production; and the term of such lease shall be extended by adding any such suspension period thereto.

In a letter to the State Director dated April 13, 1984, appellant explained that the "most important part" of MSRC's petition is its request for "suspension of operations, which suspends the lease *and diligent development requirements* of the lease." (Italics added.) Appellant seeks this suspension to allow the coal industry to "come out of its depression." *Id.* In its statement of reasons, MSRC refers to the legislative history of section 39, 30 U.S.C. § 209 (1982), which was enacted, appellant states, at a time when the supply of oil and gas far exceeded demand. By enacting section 39, Congress established a means of entitling an oil or gas or mineral lessee the benefit of the full term of the lease by extending the lease period if production was suspended in order to conserve resources, MSRC contends. Appellant maintains Congress also provided a basis for a lessee to request that production be suspended if development of the resources under current market conditions would lead to economic waste of the resources (Statement of Reasons at 4).

As BLM's decision points out, no development has taken place on the two leases at issue. Because there are no operations taking place, appellant's request for a suspension of operations is actually a request for suspension of its diligent development obligation and the statutory 10-year period required for its satisfaction. "Diligent development" is defined at 43 CFR 3480.0-5(a)(12) to mean "the production of recoverable coal reserves in commercial quantities prior to the end of the diligent development period." For the leases at issue, the diligent development period is the 10-year period beginning at the effective date of each lease. 43 CFR 3480.0-5(a)(13). "Commercial quantities" is one percent of recoverable coal reserves. 43 CFR 3480.0-5(a)(6).

[1] The language of FCLAA, its legislative history, and the Department's regulations all foreclose a suspension of the diligent development requirement. 30 U.S.C. § 207(a) (1982) provides, in its second sentence, that "[a]ny lease which is not producing in commercial quantities at the end of ten years shall be terminated." 30 U.S.C. § 207(b) (1982) provides, in its last sentence, that nothing in that subsection "shall be construed to affect the requirement contained in the second sentence of subsection (a) of this section relating to commencement of production at the end of ten years." Thus, the first sentence of section 207(b) subjecting each lease "to the conditions of diligent development and continued operation of the mine or mines, except where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee" must be interpreted as allowing an exception only from the continued operation condition, and then only under the specified circumstances.

In enacting the requirement that a lease not producing in commercial quantities at the end of 10 years shall be terminated, Congress was responding to the widespread speculation that pervaded the coal leasing program prior to 1976. Geological Survey reported that of the 533 leases outstanding at that time only 59 were currently producing coal.[2] The House report noted that the then current law specified that a coal lease shall be subject to the conditions of "diligent development" and "continued operation" and "except for the 59 leases currently in production, all of the remaining 474 Federal leases are being held under a waiver of the condition of continued operation issued by the Secretary of the Interior."[3] "The problems of speculation are addressed directly by the bill," the report stated, "which requires termination of any lease which is not producing in commercial quantities at the end of 15 years."[4] Each lease would be subject to diligent development and continued operation, the report continued, and "[a]s under current law, the condition of continued operation [but not of diligent development] may be suspended in favor of an advanced royalty payment."[5]

When Congress was considering FCLAA it was also aware of the meaning of the terms "diligent development" and "continuous [sic] operation" employed in 30 U.S.C. § 207 (1982) published as proposed rules by the Department in part to "remedy * * * the problem of speculative holding of leases."[6] "Continuous operation" was defined as "extracting, processing, and marketing of coal in commercial quantities * * * subject te the exceptions contained in 30 U.S.C. 207."[7] The exceptions were not mentioned in the proposed definition of diligent development. Thus, the legislative history of FCLAA demonstrates that Congress was aware of and confirmed the view that the diligent development condition could not be suspended.

This congressional intent is carried out in the Department's regulations promulgated after enactment of FCLAA and in the accompanying preamble.[8] One comment proposed that payment of advance royalty should be allowed in lieu of diligent development, as well as continued operation. The comment was rejected because the language of section 207(b) only provides that the Secretary may suspend the condition of continued operation upon payment of advance royalties and states specifically that subsection 207(b) is not to be construed to affect the requirement set forth in the second sentence of subsection 207(a), quoted above.[9] Another comment on the proposed

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[2] H.R. Rep. No. 681, 94th Cong., 2d Sess. 9, *reprinted in* 1976 *U.S. Code Cong. & Ad. News* 1943, 1945.

[3] *Id.* at 15; *see* 1976 *U.S. Code Cong. & Ad. News* 1950.

[4] *Id.*; *see* 1976 *U.S. Code Cong. & Ad. News* 1951. As enacted the law requires production in commercial quantities at the end of 10 years.

[5] *Id.*

[6] *Id.* at 12-14; *see* 1976 *U.S. Code Cong. & Ad. News* 1948-49. The proposed rules were included in the House report "[b]ecause of their importance to this legislation." *Id. See also* 39 FR 43229 (Dec. 11, 1974).

[7] *Id.*

[8] *See generally* 47 FR 33114-51, 33154-95 (July 30, 1982).

[9] 47 FR 33156 (July 30, 1982).

regulations "was in favor of suspensions of diligent development. The DOI had determined that such extensions are not provided for by MLA [Mineral Leasing Act]. Several comments stated that suspensions should not extend the 10-year diligent development period. The MMS [Minerals Management Service] agrees and this final rulemaking has been revised accordingly."[10]

The Department also considered appellant's concern that market conditions could make compliance with the diligent development requirement difficult:

> Several comments opposed the 10-year deadline for achievement of diligent development because the deadline is set without consideration of market conditions or amount of recoverable coal reserves. This deadline is based upon tbe explicit requirements of MLA which, in Section 7(a), specifies that any Federal lease "not preducing in commercial quantities at the end of ten years shall be terminated."[[11]]

These comments explain why the Department's regulations provide (in 43 CFR 3475.5) that each coal lease shall require diligent development *and* either continued operation (except when interrupted by strikes, etc.) or payment of advance royalty, and provide (in 43 CFR 3483.3(b)(1)) that a suspension of operations and production of a Federal coal lease "suspends all other terms and conditions * * * *except* the diligent development period." (Italics added.)

Paragraph 2 of BLM's decision of April 30, 1984, quoted above, focuses primarily on the lessee's obligation of continued operation.[12] As correctly explained in the decision, this obligation arises *after* diligent development has been achieved. 43 CFR 3480.0-5(a)(8); 43 CFR 3483.1(a). Because it did not address appellant's request to suspend the condition of diligent development, BLM's decision may be affirmed, but as modified by the discussion above.

[2] Appellant also sought a "waiver of rents due April 1, 1984, May 1, 1984, and in subsequent years" and a reduction of royalties. In support thereof, appellant again points to the depressed condition of the coal industry. Utah coal production dropped 34.29 percent in 1983, appellant notes, a figure three times the national average. Two to three million tens of unsold coal are stockpiled in Carbon and Emery Counties, Utah, and in appellant's view, the outlook for the coal

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[10] 47 FR 33171 (July 30, 1982).

[11] 47 FR 33157 (July 30, 1982). The rest of the comment explains the relationship between the definition of "commercial quantities" and the diligent development requirement:

"By defining 'diligent development' in terms of 'commercial quantities,' DOI thus allows operators/lessees the maximum flexihility to tailor the timing of the operations while still complying with the statutory mandate. Another alternative considered by DOI to implement this statutory requirement was to establish uniform, nationwide milestones for every operation to meet in ensuring that an operation would be preducing commercial quantities at the end of 10 years. However, DOl believes that the methods for development of operations should be left to the individual operators/ lessees under an approved permit and should not be mandated by DOI. For this reason, DOI decided that the 10-year requirement for producing commercial quantities was equated with the definition of diligent development, leaving the method for achieving this amount of production to the individual operators/lessees. It should be noted that in tbe second sentence of Section 7(a) of MLA, the term 'producing' implies a continuing obligation; therefore, this final rulemaking defines the statutory production requirement of 'continued operation' as 1 percent every year thereafter based on a 3-year average. This will allow the operator/lessee additional flexibility in meeting this production requirement." *Id.*

[12] "Continuod operation" means the production of not less than commercial quantities of recoverable coal reserves in each of the first 2 continued operation years following the achievement of diligent development and an average of not less than commercial quantities thereafter. *See* 43 CFR 3480.0-5(a)(8).

market into 1990 is substantially reduced. The leases at issue have been rendered uneconomical for the present time, appellant contends, by a lack of market (including the Pacific Rim), high transportation costs, a drop in electric utility demand, overproduction, and high royalty rates. Appellant, accordingly, seeks a waiver of rentals and a reduction of royalties until such time as a sufficient market can be established to allow MSRC to arrange the necessary contracts and commitments of capital for development of these leases in an orderly fashion and to maximize the resource.

Paragraph 3 of BLM's decision addressing MSRC's request for a reduction of royalties is an adequate answer not only to MSRC's request for royalty reduction, but also for its request for waiver of rentals. That decision refers to 43 CFR 3485.2, a regulation setting forth in some detail the information to be contained in any petition for royalty reduction or rental waiver. Among the data required by regulation, but missing from appellant's petition, are: A map showing the extent of existing, proposed, or adjoining mining operations; a tabulatod statement of the Federal coal mined, if any, and subject to Federal royalty for the existing or adjoining operation; a detailed statement of expenses and costs of operating the entire mine; and full information as to whether royalties or payments out of production are paid to parties other than the United States. *See* 43 CFR 3485.2(c)(2). Although appellant appears to have been unaware of these requirements, BLM could properly reject MSRC's request for royalty and rental relief pursuant to 43 CFR 3485.2(c)(3), rather than return the request for supplemental information. *See Sheridan-Wyoming Coal Co.*, A-25845 (June 27, 1950).

Addressing the waiver of rentals, BLM noted in paragraph 1 of its decision that a waiver or reduction of the rental amount would not encourage the greatest ultimate recovery of coal or promote development in an industry characterized by poor markets and below-capacity operations. In reply, MSRC states that BLM overlooks or de-emphasizes the statutory language authorizing waiver or reduction of rents and royalties in the interest of conservation or whenever the leases cannot be successfully operated. MSRC construes the statutory phrase "greatest ultimate recovery of coal" to mean the greatest *economic* recovery of coal and contends that production of coal in the present market would reduce the economic recovery of coal, deprive the lessee of a reasonable profit, and diminish tbe Government's royalty.

[3] Under 30 U.S.C. § 209 (1982), any relief in the form of waiver, suspension, or reduction of rental or minimum royalty, or reduction of production royalty[13] must encourage the greatest ultimate recovery of

[13] *Solicitor's Opinion*, 87 I.D. 69, 70 n.2 (1979), explains the distinction between "minimum production royalties" and "minimum royalties."

coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under present lease terms. *Accord, Monsanto Chemical Co.*, A-27132 (Nov. 1, 1955). Appellant has not shown how a waiver of rentals (or a reduction of royalties) will encourage recovery or promote conservation of natural resources even assuming, *arguendo*, that its leases cannot be successfully operated or that a waiver would promote development. No demonstration is made, for example, that coal will be bypassed and thus lost if the desired relief is denied. Eliminating the bypass of coal is one method of encouraging the greatest ultimate recovery of coal and advancing the interest of conservation. Likewise, there is no attempt to demonstrate that the greatest *economic* recovery of coal will result from granting a waiver of rental (or reduction of royalty) at this time, even assuming this is a proper interpretation of the statutory requirement that relief must encourage the "greatest ultimate recovery" of the resource. Royalty reductions are not intended to subsidize marginal or poorly run operations or to permit profitable extraction of coal that would be uneconomic to produce without a reduction. 47 FR 33175 (July 30, 1982). Appellant's suggestion that, in the absence of rental waiver, it might be forced to mine coal in the current market in order to pay the lease rental is impractical; if it cannot profitably develop these leases it may simply let them terminate. BLM's denial of a waiver of rental was proper.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Utah State Office is affirmed as modified.

WILL A. IRWIN
Administrative Judge

WE CONCUR:

R. W. MULLEN
Administrative Judge

FRANKLIN D. ARNESS
Administrative Judge

ANADARKO PRODUCTION CO.

92 IBLA 212 Decided *June 16, 1986*

Appeal from decisions of the Wyoming State Office, Burean of Land Management, segregating noncompetitive oil and gas lease W-21220 and W-89855.

Reversed in part and remanded.

June 16, 1986

1. Oil and Gas Leases: Extensions--Oil and Gas Leases: Unit and Cooperative Agreements

Where an oil and gas lease is in its extended term by reason of production at the time the lease is segregated by commitment in part to a unit agreement in accordance with 30 U.S.C. § 226(j) (1982), the segregated nonunitized lease will continue in effect by virtue of that production, but for not less than 2 years from the date of segregation.

APPEARANCES: Laura L. Payne, Esq., Carleton L. Ekberg, Esq., Denver, Colorado, for appellaut.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

The Anadarko Production Co. has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated October 19, 1984, noting the segregation of noncompetitive oil and gas lease, W-21220, by reason of its commitment in part to a unit agreement. Specifically, appellant objects to the holding that the term of the nonunitized segregated lease is extended to August 1, 1986.

Appellant's oil and gas lease was issued effective November 1, 1969, for a term of 10 years and so long thereafter as oil or gas is produced in paying quantities. The lease was originally issued for 2560.72 acres situated in Campbell County, Wyoming. Effective June 1, 1975, a portion of the land in appellant's lease, totalling 1,600 acres, was included in the Heldt Draw unit agreement (No. 14-08-0001-13746). The lease was thereby segregated and the nonunitized portion was designated lease W-51703. We are not concerned in this appeal with the lands in lease W-51703.

It appears from the record that lease W-21220 was subsequently extended by reason of production within the Heldt Draw unit.[1] A memorandum in the case file dated July 27, 1984, states the Culp Draw (Shannon "B" Sand) unit agreement (No. 14-08-0001-21076) was approved effective August 1, 1984, embracing lands included within W-21220 and other leases. The memorandum further states that, pursuant to the terms of the new unit agreement, the Heldt Draw unit agreement will terminate as to certain lands and formations and "the Shannon 'B' Sand under the lands committed thereto shall be deemed to be simultaneously merged into [the Culp Draw (Shannon 'B' Sand)] unit agreement."

On the basis of the memorandum, BLM issued two separate decisions dated October 19, 1984, affecting lease W-21220. The first decision recognized the partial termination of the Heldt Draw unit agreement effective August 1, 1984, and held that the term of the leases formerly committed thereto was extended through August 1, 1986, and so long

[1] Counsel for appellant asserts the lease was also held by production on lands coverod by a communitization agreement to which the lease (W-21220) was committed in part. Appellant states the Knight State No. 1-21 well on the communitized tract was not committed to the Heldt Draw unit agreement.

thereafter as oil or gas is produced in paying quantities. This BLM decision cited the regulation at 43 CFR 3107.4 as authority for the holding. The second decision recognized the commitment in part of lease W-21220 to the new Culp Draw (Shannon "B" Sand) unit and segregated the lands not committed into lease W-89855. In addition, the second decision held that W-89855 will continue in effect through August 1, 1986, and so long thereafter as oil or gas is produced in paying quantities.

In its statement of reasons for appeal, appellant contends BLM improperly concluded that segregated nonunitized lease W-89855 was limited to a term of 2 years from the date of segregation and so long thereafter as oil or gas is produced in paying quantities. Appellant argues that, at the time of segregation of the lease, the lease was in its extended term by reason of production pursuant to the Heldt Draw unit and from the communitized Knight State No. 1-21 well. Hence, both the unitized and nonunitized portions of the lease were entitled to an indefinite extension based on that production. Appellant contends the nonunitized lease W-89855 retains the term which lease W-21220 had at the time of unitization and segregation, and that to hold otherwise would be inconsistent with congressional intent to encourage unitization.

[1] Section 17(j) of the Mineral Leasing Act, *as amended*, 30 U.S.C. § 226(j) (1982), provides that where a portion of the land in a lease is committed te a unit agreement, the lease "shall be segregated into separate leases as to the lands committed and the lands not committed as of the effective date of unitization." *See* 43 CFR 3107.3-2. In addition, the statute provides that "any such lease as to the nonunitized portion shall continue in force and effect for *the term thereof* but for not less than two years from the date of such segregation and so long thereafter as oil or gas is produced in paying quantities." 30 U.S.C. § 226(j) (1982) (italics added); *see* 43 CFR 3107.3-2.

Appellant argues that the statutory phrase "the term thereof" means the "term of the lease as it exists at the time of the segregation, whatever that 'term' may then be," citing *Solicitor's Opinion*, 63 I.D. 246 (1956),[2] and that its lease was in its extended term by reason of production at that time.

In *Solicitor's Opinion*, M-36543 (Jan. 23, 1959), at page 1, the Solicitor held that the period of extension of the nonunitized portion of a lease, "whether that was a term of years or 'so long as oil or gas [is] produced from the lease,' " would be determined, at the time of segregation, by "whether [the lease] is * * * within a term of years or whether the length of its present term is to be measured by the life of production." In that case, the Solicitor concluded that the lease, at the time of

[2] The headnote to the *Solicitor's Opinion, supra*, entitled "Extension of the Portion of a Lease Outside of and Segregated as a Result of the Creation of a Unit Plan," explains that the term of the nonunitized lease shall be the "entire term of the lease or the peried that the lease had te run, whether that peried was definite *or indefinite*, as it existed on the date of the segregation." 63 I.D. at 246 (italics added).

segregation, was within an extended 5-year term and, thus, the extension of the nonunitized portion of the lease was for that fixed term, despite the fact the lease was producing and might be held by preduction at the expiration of the 5-year term. The Solicitor stated that the preduction "[did] not convert the fixed term inte an indefinite 'so long as' term." *Id.* at 2; *see Conoco, Inc.*, 80 IBLA 161, 91 I.D. 181 (1984). However, if the lease was in its extended term by reason of production at the time of segregation by partial commitment to a unit agreement, then both the unitized lease and the segregated nonunitized lease would be subject to extension for the duration of production. *Ann Guyer Lewis*, 68 I.D. 180 (1961); *Solicitor's Opinion*, M-36592 (Jan. 21, 1960); *see Solicitor's Opinion*, 63 I.D. at 246.

The decision of BLM recognizing the partial termination of the Heldt Draw unit cited the regulation at 43 CFR 3107.4, which provides that any lease eliminated from a unit shall continue in effect for the original term of the lease or for 2 years after elimination from the unit and so long thereafter as production is had in paying quantities. Thus, BLM apparently regarded lease W-21220 as having an interval of nonproducing status between elimination from the old unit and formation of the new unit which would justify a 2-year term for the segregated nonunitized lands.

However, this approach has been rejected by the Board when it had occasion to rule on the effect of the simultaneous termination of a producing unit and the commitment of a part of the lands in a lease in the unit to a new producing unit. The Board held the effect of the simultaneous termination of a producing unit and the partial commitment of a lease in its extended term by reason of production within the unit to a new producing unit is to cause the segregated nonunitized lease to have a term coterminous with the producing unitized lease, but not less than 2 years from the date of segregation, and so long thereafter as oil or gas is produced in paying quantities on the nonunitized lease. *Conoco, Inc.*, 90 IBLA 388 (1986). This holding is dispositive of the outcome of the present appeal.

Indeed, appellant's lease was apparently in a producing status by virtue of its commitment to the communitization agreement embracing the producing Knight State No. 1-21 well apart from its commitment to the Heldt Draw unit. Hence, the segregated nonunitized portion of the lease would also be subject to extension for the duration of production from the communitized well.[3]

Accordingly, the decisions of BLM must be reversed to the extent they hold that the segregated nonunitized lease has a term expiring August 1, 1986, rather than so long as oil or gas is produced on the unitized lease, but not less than 2 years from the date of segregation

[3] Counsel for appellant states on appeal that the communitized well has now been committed to the new Culp Draw (Shannon "B" Sand) unit.

and so long thereafter as oil or gas is produced in paying quantities on the nonunitized lease.

Therefore, pursuant to the authority delegated to the Board of Land Appeals hy the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are reversed in part and the case is remanded to BLM for further action consistent herewith.

C. RANDALL GRANT, JR.
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

GAIL M. FRAZIER
Administrative Judge

APPEAL OF SALISBURY & DIETZ, INC.

IBCA-2090 Decided: *June 20, 1986*

Contract No. SO 134031, Bureau of Mines.

Government Motion to Dismiss for Lack of Jurisdiction denied.

Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Contract Disputes Act of 1978: Interest

A Government motion to dismiss an appeal for lack of jurisdiction on the ground that the contractor had failed to certify the claim to the contracting officer as required by the Contract Disputes Act is denied where the Board finds that after the appeal was taken appellant did substantially comply with the requirements of the Act by certifying the claim in the manner required and presenting the claim so certified to the contracting officer in the course of settlement discussions who advised appellant that it was only entitled to the amount found te be due in the decision previously rendered on the uncertified claim. lnterest on any amount determined to be due appellant on its claims is te be computed from the date the claims were found to have been properly certified to the contracting officer.

APPEARANCES: William Perry Pendley, Attorney at Law, Comiskey & Hunt, Fairfax, Virginia, for Appellant; Alton Woods, Department Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE CHIEF JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss the instant appeal for lack of jurisdiction on the ground that appellant has failed to certify its claim to (41 U.S.C. § 605(c)). Appellant's counsel has filed a memorandum in opposition to the motion to dismiss. Counsel for both parties have cited numerous precedents in support of their respective positions.

The cost-plus-fixed-fee contract with which we are here concerned was entered into on May 24, 1983, in the estimated amount of $1,199,222. Subsequently, the contract was modified on three different occasions, resulting in a total estimated cost-plus-fixed-fee of $1,499,377. Under the terms of the contract the contractor was required to make a study and submit a report covering the mineral potential of the Kantishna Hills and Dunkle Mine area within the newly created Denali National Park and Preserve in Alaska.

On January 28, 1984, appellant notified the contracting officer that the total estimated cost of the contract was $1,626,635. By Modification III, dated February 9, 1984, the total contract amount was increased to $1,499,377. The final report called for by the contract was delivered on May 4, 1984.

The contracting officer advised appellant on May 2, 1984, that its claims for additional costs would be considered only after receipt of the final audit report on the Contract from the Defense Contract Audit Agency (DCAA). The audit by DCAA did not begin until July 17, 1984. On April 8, 1985, the DCAA delivered the audit report "verifying unquestioned and payable costs to the Appellant of an additional $162,964" (Memorandum in Opposition at 6). On May 30, 1985, in order to expedite the payment process and notwithstanding unreimbursed costs in excess of $433,000, appellant sought a final payment of only the $162,964 amount in accordance with the audit conducted by DCAA. The contracting officer notified appellant on July 29, 1985, that his determination and his final offer of payment was for $64,848 (Memorandum in Opposition at 5-7).

In presenting its claim to the contracting officer on May 30, 1985, appellant's president states at page 3 of the claim letter:

> The contract was completed in good faith and the Bureau has been delivered a quality final product. We are not in a financial position to undergo a costly and additionally time consuming formal appoal, but if we are not reimbursed for costs spent to complete the contract we will probably not survive. [[1]] Our subcontractors will also be negatively impacted and they too may not survive.

(Memorandum in Opposition, Exh. 1 at 3).

By the amended complaint received in the Offices of the Board on February 10, 1986, the total amount claimed was increased from $162,964 to $433,299.80. Transmitted with the amended complaint[2] was

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[1] In an affidavit dated Jan. 22, 1986, and transmitted to the Board by lettor from appellant's counsel dated Feb. 7, 1986, Mr. William G. Salihury states at pages 5-6:

"On October 28, 1985, Washington Trust Bank of Spokane, Washington, withdrew financing from Salisbury & Dietz and took possession of all of the assets of the corporation. As a result of this action approximatoly 40 people have become unemployed. The secured debt owed to Wasbingon Trust Bank is approximately $1,800,000. The liquidation value of the assets is approximately $900,000. In addition tbere exists approximately $270,000 in unpaid trade accounts and as a result of the bank's foreclosure, I have personally lost more than $100,000. The aggregate sum of the loss will be in excess of $1,250,000. I believe and, in fact, the Bank attorney has indicated that the bank would not have foreclosed if the Bureau of Mines had paid the $162,964 claim submitted on May 30, 1985."

[2] In the transmittal letter to the Board of Feb. 7, 1986, appellant's counsel states: "I bave this date caused to be delivered to * * * the Contracting Officer, Mr. A. G. Young a copy of the amended complaint and affidavit."

an affidavit executed by William G. Salisbury (note 1, *supra*). After listing what is described as total uncoinpensated costs in the amount of $433,299.80, the affidavit states at page 5:

> k. This listing of costs incurred by Salisbury & Dietz is certified by me to be asserted in good faitb, that supporting data on which this assertion is based is accurate and complete to the best of my knowledge and belief and that this amount accurately reflects the amount for which I believe the government to be liable.

Referring to a meeting between the parties which occurred over 2½ months after Mr. Salisbury's affidavit had been filed with the Board, appellant's counsel states: "[O]n May 6, 1986, when counsel for Appellant met with Government counsel and the Contracting Officer, the Contracting Officer specifically and affirmatively rejected Appellant's claims of both $433,299.80 and $162,964.00, indicating * * * that he would not offer more than the original $64,848" (Meinorandum in Opposition at 9, 18-19).

ln its motion to dismiss for lack of present jurisdiction in the Board over the claims asserted, the Government citos and quotes from the decision of the Court of Appeals for the Federal Circuit in *Fidelity Construction Co.* v. *United States*, 700 F.2d 1379 (1983). The Board does not consider that *Fidelity* is to be interpreted in the manner suggested by the Government, however, since in that case the Court accepted as adequate a certification made by the contractor in a letter addressed to the contracting officer after an appeal had been taken to the Transportation Board of Contract Appeals (700 F.2d 1382); nor are the other cases cited by the Government considered to be dispositive of the jurisdictional question presented.

In the memorandum in opposition, appellant offers a number of arguments in support of its position including the argument that a cost-reimbursement-type contract, such as exists in the instant case, does not require any certification of routine vouchers. Cited in support of this position is the decision in *General Dynamics Corporation Electric Boat Division*, ASBCA No. 25919 (Jan. 25, 1982) 82-1 BCA par. 15,616. The rationale for the decision reached in that case, however, was premised principally upon the fact that the claims there involved were found to be Government claims to which the certification requirement would not apply. In the instant case appellant has not even alleged that the claims covered by the appeal are Government claims; nor has it undertaken to show how the vouchers (or invoices) submitted could be classified as "routine vouchers" since it is undisputed that paying them would have resulted in the total estimated cost of the contract, as amended, being exceeded.

In support of its position, appellant relies principally upon the following arguments: (i) the certification contained in the letter from appellant's president of May 30, 1985, is in substantial compliance with the certification requirement of the statute; (ii) even if the claim submitted by appellant on May 30, 1985, was not certified, appellant subsequently certified the claim by causing to have delivered to the contracting officer a copy of an affidavit filed by appellant's president,

June 20, 1986

William G. Salisbury, delineating the nature of the claim of appellant and containing the certification language of the statute; and (iii) in any event, the claim was received by the contracting officer and was considered and responded to by him, when, in settlement discussions with counsel for appellant on May 6, 1986, the contracting officer–in the presence of Government counsel–affirmatively and specifically rejected appellant's claim for $433,299.80, as well as appellant's claim for $162,964, in the course of advising appellant's counsel that the contracting officer would offer appellant no more than he had on July 29, 1985, *i.e.*, $64,848 (Memorandum in Opposition at 9, 17-19).

As to item (i), the Board finds that the statute requires the contractor to certify that "the claim is made in good faith" (41 U.S.C. § 605(c)) and that in the claim letter of May 30, 1985, Mr. Salisbury certified that "the contract was completed in good faith" (text, *supra*). The variance between what was required to be certified and what was certified is fatal to appellant's case, insofar as accepting the letter of May 30, 1985, as containing a valid certification of the claim. *See LaCoste Builders, Inc.*, ASBCA No. 31209 (Apr. 21, 1986), 86-2 BCA par. ______.

Concerning item (ii) the Board notes that the statute contemplates that any claim in excess of $50,000 will be certified to the contracting officer (41 U.S.C. § 605(c)). The Board finds that the statutory requirement to certify the claim to the contracting officer is not satisfied by merely furnishing the contracting officer with a copy of Mr. William G. Salisbury's affidavit containing the certification (text, *supra*) at the time the amended complaint and the accompanying affidavit were transmitted to the Board on February 7, 1986 (note 2, *supra*).

With respect to item (iii), however, the Board finds that a properly certified claim was presented to the contracting officer in the settlement discussions conducted on May 6, 1986, and that as of that date[3] appellant was in substantial compliance with the certification requirements of the statute. *United States* v. *Hamilton Enterprises, Inc.*, 711 F.2d 1038, 1043 (Fed. Cir. 1983). By reason of the decision the Board has reached, it has not been necessary to weigh what consideration, if any, should be given to the delay and expense attendant upon a remand (Memorandum in Opposition at 15-18).[4]

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[3] Interest is only payable on the amount found to be due a contractor from the date the claim is certified pursuant to the Contract Disputes Act of 1978. *Essex Electro Engineers, Inc.* v. *United States*, 702 F.2d 998, 1003-1004 (Fed. Cir. 1983).

[4] *Cf., Computer Sciences Corp.*, ASBCA No. 27,275 (Mar. 23, 1983), 83-1 BCA par. 16,452 at 81,844 ("Since the appeal is already on our docket * * * no useful purpose would be served hy our dismissal of the appeal and requiring appellant to retravel the time-comsuming and costly road from the contracting officer te this Board.")

For the reasons stated and on the basis of the authorities cited, the Government's motion to dismiss the appeal for lack of jurisdiction in the Board is denied.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

APPEAL OF C. G. NORTON CO., INC.

IBCA-2068 Decided: *June 24, 1986*

Contract No. 14-16-0004-82-029, U.S. Fish & Wildlife Service.

Appeal dismissed.

1. Contracts: Contract Disputes Act of 1978: Jurisdiction

Where a contractor files a notice of appeal with the Board, from a decision of a contracting officer terminating the contract for default, more than a year after the decision was received by the contracter, the Board holds that the appeal is not within its jurisdiction to consider because of failure to comply with the 90-day rule for filing appeals to Boards of Contract Appeals, as provided in sec. 7 of the Contract Disputes Act of 1978.

2. Res Judicata

Where a contractor had the opportunity to include in previous appeals to the Board a challenge to the validity of retainage of funds by the contracting officer, but failed to do so, the Board holds the current appeal, challenging the validity of retainage of funds by the contracting officer under the same contract, to be suhject to dismissal under the doctrine of res judicata.

APPEARANCES: C. G. Norton, President, C. G. Norton Co., Inc., Huntsville, Alahama, for Appellant; Donald M. Spillman, Department Counsel, Atlanta, Georgia, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

On March 11, 1986, we issued an Order to Show Cause why this appeal should not be dismissed for lack of jurisdiction, since the Notice of Appeal was filed over a year after receipt of the contracting officer's notice of termination for default, dated July 18, 1984. The default notice stated that it was a "final decision" of the contracting officer (CO) and advised appellant that it had 90 days within which to file an appeal to the Board. The letter from appellant, which the Board had treated as a Notice of Appeal, was dated July 25, 1985, and was actually received by the Board on August 2, 1985.

June 24, 1986

By its complaint, appellant alleged: The contracting officer withheld $500 from payment to the appellant/contractor; informed appellant that repurchase of the painting work would be accomplished and also excess costs involved in the repurchase would be imposed on appellant; appellant relied on the statement that repurchase would be made; the repurchase was not made; and the CO said she would keep the $500. In the complaint, appellant contended the refusal to pay the sum withheld was a violation of the contract, procurement regulations and applicable statutory provisions, and requested a ruling by the Board.

By its answer, the Government admittod the withholding of $500 pending completion of two punch-list itoms, namely repainting of doors and placing a second coat of paint on door jambs; and alleged appellant was informed that refusal to complete the punch-list items would result in a termination for default, the work reprocured and any reprocurement costs in excess of $500 asserted against appellant. In the answer, the Government also alleged appellant did not complete the work and the contract was therefore terminated for default by notice, dated July 18, 1984. The Government noted that the Board twice held, on November 14, 1983, and on reconsideration, April 23, 1984, that appellant was obligated to perform the two punch-list items of work; and that appellant had further appealed the default termination by letter dated August 9, 1984, which appeal was dismissed, as res judicata, by the Board's decision of January 10, 1985. The Government's answer also admits the punch-list items were not reprocured and states that by letter, dated April 26, the CO notified appellant the $500 would not be sufficient to reprocure the work.

The Government's position, as stated in the answer, and which precipitated our Order to Show Cause, is that it not only had the right to withhold the $500 but that appellant failed to appeal that determination within 90 days after the default termination and is, therefore, precluded from doing so by virtue of the Contract Disputes Act of 1978 and subparagraph (d) of the Disputes Clause of the contract. Finally, in its answer, the Government denies that its refusal te pay the sum withheld is a violation of the contract or a governing procurement regulation or a statutory provision.

Appellant contended in its response to our Order to Show Cause, in substance: The letter of July 18, 1984, notice of termination for default, was not a "final decision" and is fatally flawed because it does not meet the mandatery requirements of the F.A.R. in 33.011(a)(4)(i), (ii), (iii), and (iv); that since no repurchase was made, it follows that no excess costs were incurred, and the keeping of the $500 equates to penalty and is not a fair and just collection of excess costs; "there was no dispute in existence on July 18, 1984, concerning the wrongful action to keep the $500; it is the gospel truth that the subject had never been mentioned to the contractor prior to delivery of the 18 July 1984 letter. There was no disagreement for the reason that the keeping of the money was a unilateral and arbitrary function by the Contracting Officer, and it was wholly unexpected by the contractor," and for such reasons the Board does have jurisdiction to process the dispute and the contractor has a right to seek resolution at the Board level.

We note, however, that Tab 17 of the Appeal File shows that a letter, dated June 1, 1984, was sent to appellant by the CO which was more than a month before the termination for default letter of July 18, 1984, was issued. The June 1 letter, actually a cure notice, referred to the Board's denial, by decision and reconsideration of appellant's appeal with respect to appellant's responsibility for the two punch-list items, and, among other things, stated:

> We have retained $500 pending the completion of these two items. We will now allow you thirty (30) days (until July 1, 1984) to complete. If you refuse to complete, we will terminate the contract for default. The two uncompleted items will be reprocured. Any reprocurement costs above $500 will be asserted as a claim of United States against you in accordance with 41 CFR 1-8.602-6.

Discussion

[1] It is clear appellant has failed to show cause why this appeal should not be dismissed for lack of jurisdiction. Appellant did not address the central issue of the 90-day time period within which an appellant must file an appeal from a CO's decision, in accordance with section 7 (41 U.S.C. § 606) of the Contract Disputes Act of 1978. Having filed the Notice of Appeal with the Board on August 2, 1985, probably mailed July 25, 1985, we hold that appellant's attempted appeal from a Notice of Termination for Default, dated July 18, 1984, is more than 9 months late and thus, the appeal is not within the Board's jurisdiction. We cited case authorities for this ruling in the Order to Show Cause and repeat them here. *Cosmic Construction Co.*, ASBCA No. 26537 (Dec. 30, 1981), 82-1 BCA par. 15,541, *aff'd*, Appeal No. 23-82, 697 F.2d 1389 (Fed. Cir. 1983); *Tibbals Construction Inc.*, IBCA-1618 (Nov. 4, 1983), 84-1 BCA par. 16,920; *Nicholson Construction Co.*, IBCA-1711 (Nov. 30, 1983), 84-1 BCA par. 16,966; *Columbia Engineering Corp.*, IBCA-1776 (Feb. 29, 1984), 84-1 BCA par. 17,165.

[2] It is also apparent appellant does not understand the principle of the doctrine of res judicata, since on January 10, 1985, we dismissed an appeal, docketed as IBCA-1823, on that ground involving the same two punch-list items, the painting of doors and door jambs, and involving the same termination for default by the CO's letter of July 18, 1984, as are involved in this proceeding. Appellant timely appealed from the same notice of termination for default but only on the basis it was not responsible for the two painting punch-list items, despite the fact the items were considered on the record before the Board on two previous occasions. In the previous proceedings, appellant had the opportunity to challenge the validity of the withholding of funds by the CO, but

failed to do so. This appeal is, therefore, subject to dismissal on the additional ground of res judicata.

This Board, in 1963, denied a contractor's claim for extra work presented more than 5 years following the completion of the contract and 2 years after a hearing on an appeal involving time extensions and liquidated damages because, insofar as it would have been proper to submit the claim at all, it should have been presented in connection with the previous appeal, and the Board held the claim barred by res judicata. *R. G. Brown, Jr. & Co.*, IBCA-356 (July 26, 1963), 1963 BCA par. 3799.

Res judicata is a rule of universal law pervading every well-regulated system of jurisprudence, and is put on two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the state that there should be an end to litigation; the other, the hardship on the individual that he should be vexed twice for the same cause. The sum and substance of the whole doctrine is that a matter once judicially decided is finally decided. 50 C.J.S. *Judgments* § 592. A judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction operates as a bar not only as to every matter which was offered and received to sustain or defeat the claim, *but as to every other matter which might with propriety have been litigated and determined in that action*. In other words, a litigant must present his whole case, extending his claim so as to embrace everything which properly constitutes a part of his cause of action or defense, and cannot bring a new suit to recover something more on the same cause of action. 50 C.J.S. *Judgments* § 657.

Decision

It is the decision of this Board that appellant having failed to timely file the above-captioned appeal, the same is dismissed for lack of jurisdiction. This appeal is dismissed on the additional ground of res judicata.

DAVID DOANE
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

RAYMOND G. ALBRECHT, FRED L. ENGLE d/b/a RESOURCE SERVICE CO.

92 IBLA 235 **Decided *June 25, 1986***

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, giving notice of intent to sue for cancellation of overriding oil and gas royalties. W-50394.

Affirmed.

1. Oil and Gas Leases: Applications: Sole Party in Interest--Oil and Gas Leases: First-Qualified Applicant--Oil and Gas Leases: Offers to Lease

The failure to disclose an interest in a lease offer as required by 43 CFR 3102.7 (1974), as well as any other substantive violation of the regulations governing lease offers, renders an offer defective and precludes the person or entity applying from being a qualified applicant as required by 30 U.S.C. § 226 (1982). If a lease is issued pursuant to such an offer, it is voidable and subject to cancellation.

2. Oil and Gas Leases: Applications: Sole Party in Interest

A filing service contract which includes a provision under which the filing service will sell its client's rights in oil and gas leases obtained by them is an agreement covering interests in oil and gas leases and itself constitutes an intorest in oil and gas lease offers as defined at 43 CFR 3100.0-5(b) (1974).

3. Oil and Gas Leases: Applications: Sole Party in Interest

A filing service contract which grants the filing service a percentage of the sales price and royalties due on any leases obtained by the client and sold by the filing service, gives the filing service a prospective or future claim to benefit from its client's leases and a right to share in the profits accrued from such leases as defined at 43 CFR 3100.0-5(b) (1974).

4. Oil and Gas Leases: Applications: Sole Party in Interest

The regulatory definition of interests is not limited to the standard interests in oil and gas leases commonly recognized within the industry, but encompasses a broad range of methods of benefiting from a lease. It does not matter whether the benefit a filing service receives is enforceable against the lease itself, specific proceeds, or the client personally, or even if its claim could not ultimately be successfully enforced. Nor does it matter that it might not ultimately benefit because no lease is obtained, no buyer is found for a lease, or the lessee rejects all purchase offers.

APPEARANCES: Thomas W. Ehrman, Esq., et al., Milwaukee, Wisconsin, for appellant Fred L. Engle d.b.a. Resource Service Co.; Gregory J. Smith, Esq., Denver, Colorado, for appellant Raymond G. Albrecht; Howard J. Baer, Jr., Esq., Office of the Regional Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

By a decision dated July 21, 1980, the Bureau of Land Management (BLM) gave appellants Raymond G. Albrecht and Fred L. Engle d.b.a. Resource Service Co. (RSC) notice of intent to sue for cancellation of their interests in lease W-50394.[1] The decision found, based on previous decisions of this Board, that RSC's service contract with Norbert F. Albrecht, under which he had obtained services from RSC and filed his noncompetitive oil and gas lease offer, created an interest in RSC in his offer and the lease ultimately awarded to him, which, in violation of Departmental regulations, had not been disclosed at the time the offer was filed. Through separate counsel both parties filed timely notices of appeal.

While the relevant facts concerning BLM's decision and the issues before this Board are not complex, the factual history of the lease and the procedural events which have delayed our consideration of this appeal are extensive. We here address only those matters pertaining to our consideration of the appeal before us.

A simultaneous oil and gas drawing entry card (DEC) for Wyoming parcel 484, signed by Norbert F. Albrecht and bearing a stamped date of March 18, 1975, was submitted to BLM. In the drawing for the parcel, this card was selected with first priority from among 2,684 cards, and, in due course, Norbert Albrecht's lease offer was accepted by BLM and lease W-50394 was issued to him with an effective date of June 1, 1975. The lease embraced 779.19 acres of land in Campbell County, Wyoming.[2]

By instrument dated June 2, 1975, Norbert Albrecht transferred his entire record title interest in W-50394 to J. S. Harrell, retaining a 5 percent overriding royalty. The transfer was approved by BLM, effective July 1, 1975. Norbert Albrecht died in 1979 and his retained royalty in W-50394 vested in his brother and sole legatee and devisee, Raymond G. Albrecht, one of the present appellants. All documentation necessary to change BLM records was filed with BLM by the attorney conducting ancillary probate of the Wyoming portion of the estate.

A series of partial conveyances of interests from J. S. Harrell resulted in various title interests, working interests, and royalty interests being vested in a number of companies and individuals. None of the interests held by these transferees is the subject of the BLM decision at issue in the present case. One subsequent transfer, however, is central to this appeal. Under cover letter dated October 18, 1977, signed by Fred L. Engle, an "Assignment of Royalty Payment" dated and signed by Norbert Albrecht June 14, 1977, was filed with BLM. Drafted by RSC's attorney, it stated in relevant part,

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[1] Notice was sent to, and appeals were filed by, Raymond G. Albrecht and Resource Service Co., Inc. The records of the Wisconsin Secretary of State's office show that Resource Service Co., Inc., has been registered as a corporation since Mar. 30, 1978. Because, as described more fully in the opinion, the interests which would be subject to cancellation in the proposed judicial suit are shown by BLM records to be held by Raymond G. Albrecht and by Fred L. Engle d.b.a. Resource Service Co., we view the appellants as those indicated by the BLM record.

[2] The lease is for the SW 1/4 sec. 2; the SE 1/4 sec. 4; lots 1 and 2 and the SW 1/2 NE 1/4 and SE 1/4 sec. 5; and the N 1/2 S 1/2 sec. 11, all in T. 44 N., R. 75 W., sixth principal meridian.

FURTHER WHEREAS, the undersigned has previously agreed to pay FRED L. ENGLE, d/b/a Resource Service Company, upon the successful negotiation of a sale, assignment or sub-lease of the undersigned's lease rights, a portion of any royalty payments to be received by the undersigned according to the following schedule:

16% of the 5% overriding royalty due the undersigned out of the first *$100,000.00* or any lesser amount due the undersigned annually.

12% of the 5% overriding royalty due the undersigned for all overriding royalty in excess of the 16% on the first *$100,000.00* annually referred to above.

NOW THEREFORE, the undersigned does hereby grant, assign, transfer and convey to FRED L. ENGLE, d/b/a Resource Service Company, his heirs, legal representatives or assigns, the unconditional right and privilege to receive in his own name royalty payments, due to the undersigned pursuant to the agreement between the undersigned and *J. S. Harrell,* dated *June 2, 1975,* to the extent of the following schedule:

16% of the 5% overriding royalty due the undersigned out of the first *$100,000.00* or any lesser amount due the undersigned annually.

12% of the 5% overriding royalty due the undersigned for all overriding royalty in excess of the 16% on the first *$100,000.00* annually referred te above.

An accompanying BLM form request for approval of assignment signed by Engle noted that the assignee was an individual.[3] The asserted right to receive a percentage of royalties due to Norbert Albrecht, now due to Raymond Albrecht, is the subject of the proposed judicial suit by BLM and thereby is also at issue in this appeal.

The lease at issue, W-50394, had been the subject of two protests, both of which alleged that the lease had been obtained in violation of Departmental regnlations requiring disclosure of interests. The first was filed January 25, 1979, by Alvin Abrams on behalf of Geosearch, Inc., claiming to represent individuals who had filed in the drawing for parcel 484. This protest was dismissed by BLM on several grounds, including that the subsequent transferees were bona fide purchasers and that production on the leased land meant the lease could be cancelled only by judicial action. BLM's decision was appealed to this Board and docketed as IBLA 79-270, but the appeal was subsequently dismissed under 43 CFR 4.402 when no statement of reasons was filed. On September 19, 1979, a second protest was filed by Alvin Abrams, this time as president of Naartex Consulting Corp., claiming again to act on behalf of unsuccessful applicants. Referring to its previous decision, BLM dismissed this protest for the same reasons. An appeal was again taken to this Board and by decision dated June 9, 1980, we upheld the dismissal of the protest. *Naartex Consulting Corp.*, 48 IBLA 166, 172 (1980).

An appeal from our decision was filed in the United States District Court for the District of Columbia. Pending its outcome, we suspended consideration of the present appeal. The suit was dismissed by the district court, and its dismissal was affirmed by the Court of Appeals for the District of Columbia. *Naartex Consulting Corp.* v. *Watt*,

[3] Departmental regulations required that transfers of royalty interests be recorded with BLM, but, unlike transfers of otber interests, no formal approval was issued. 43 CFR 3106.4 (1977).

722 F.2d 779 (1983), *aff'g*, 542 F. Supp. 1196 (1982). Certiorari was denied by the United States Supreme Court. *Naartex Consulting Corp.* v. *Clark*, 467 U.S. 1210 (1984). In May 1985, the case files were returned to the Board. Subsequently, on June 28, 1985, and again on Septomber 17, 1985, we issued an order permitting the parties, in light of the time elapsed since the issues were first briefed, to advise the Board how best to proceed. The time for their response has now elapsed and this case is ripe for decision.

Since its enactment in 1920, the Mineral Leasing Act has restricted the issuance of both competitive and noncompetitive leases to qualified applicants. Act of February 25, 1920, ch. 85, §§ 13, 17, 41 Stat. 437, 441, 443; *see* 30 U.S.C. § 226(b), (c) (1982). Similarly, the Act's broad grant of authority to the Secretary of the Interior 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 [Act] * * *" has continued unchanged. 30 U.S.C. § 189 (1982).

[1] The regulations found at 43 CFR Part 3100, cited by BLM in its notice to appellants, were promulgated under this authority.[4] *See Thor-Westcliffe Development, Inc.* v. *Udall*, 314 F.2d 257, 259 (D.C. Cir.), *cert. denied*, 373 U.S. 951 (1963). Included in these regulations was the requirement of 43 CFR 3102.7 (1974) to disclose the parties in interest to a lease offer. It required:

> A signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued; if not he shall set forth the names of the other interested parties. If there are other parties interested in the offer a separate statement be signed by them and by the offeror, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written. All interested parties must furnish evidence of their qualifications te hold such lease interest. Such separate statement and written agreement, if any, must be filed not later than 15 days after the filing of the lease offer. Failure to file the statement and written agreement within the time allowed will result in the cancellation of any lease that may have been issued pursuant te the offer.

For the purpose of the regulations, an "interest" in an oil and gas lease offer was also defined:

> An "interest" in the lease includes, but is not limited te, record title interests, overriding royalty interests, working interests, operating rights or options, or any agreements covering such "interests." Any claim or any prospective or future claim te an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant te any agreement or understanding existing at the time when the offer is filed, is deemed te constitute an "interest" in such lease.

43 CFR 3100.0-5(b) (1974).

[4] Because all events relevant to the issuance of W-50394 occurred in March, April, and May of 1975, our decision is made under the regulations then in effect. Substantial changes in the regulations governing oil and gas leasing in general, and simultaneous oil and gas lease offers in particular, were implemented by revised regulations effective June 16, 1980. 45 FR 35156-66 (May 23, 1980). We note that BLM's notice to appellants cited the 1979 edition of the CFR. A comparison reveals that no substantive changes affecting the issues in this case were made.

Under applicable law, the failure to disclose an interest in a lease offer as required by the regulation, as well as any other substantive violation of the regulations governing lease offers, renders the offer defective and precludes the person or entity applying from being a qualified applicant as required by statute. *McKay* v. *Wahlenmaier*, 226 F.2d 35, 39-41 (D.C. Cir. 1955). *See* 43 CFR 3112.5-1 (1974). If a lease is issued pursuant to such an offer, it is voidable and subject to cancellation. *See Home Petroleum Corp.*, 54 IBLA 194, 211, 88 I.D. 479, 488 (1981), *aff'd sub nom. Geosearch, Inc.* v. *Watt*, Civ. No. C81-0208 (D. Wyo. Aug. 7, 1981), *rev'd on other grounds*, 721 F.2d 694 (10th Cir. 1983). It may be cancelled by action of the Secretary of the Interior, unless the leased lands are "known to contain valuable deposits of oil or gas," in which case judicial action to cancel the lease is necessary. 43 CFR 3108.3 (1984).[5]

In accordance with the requirements of 43 CFR 3102.7 (1974), the DEC submitted by Norbert Albrecht stated in part that the signer certifies that the "applicant is the sole party in interest in this offer and the lease if issued, or if not the sole party in interest, that the names and addresses of all other interested parties are set forth below." It further noted that other parties in interest "must furnish evidence of their qualifications to hold such lease interest," and it contained a space for supplying the names of "other parties in interest." Thus, by his signature and failure to indicate there were other parties in interest, Norbert Albrecht informed BLM that no other person or entity was a party in interest to his offer. The contract between Norbert Albrecht and RSC provided that:

> If I am successful in a drawing, I hereby authorize you to act as my sole and exclusive agent to negotiate for me and on my behalf with any party, firm or corporation for sublease, assignment or sale of any rights I obtain by reason of being successful in a drawing for the best price obtainable by you. *Any final negotiated price is subject to my approval.* If you have successfully negotiated a sale, assignment or lease of my rights by reason of a successful drawing or if I do so during the term of this agency, I hereby agree to pay you for your services in accordance with the schedule detailed below. This agency to negotiate shall be valid for a period of five (5) years.
>
> The payment to you shall forthwith upon closing of the sale or in the case of a Royalty Agreement, upon receipt of the royalty payment be as follows:
>
> *OUTRIGHT SALE OF OIL & GAS RIGHTS*
>
> $1.00 to $100,000.00 ——— Service fee to R.S.C. 16%
>
> Over $100,000.00 ———— Service fee to R.S.C. 12%

[5] In *Lee Oil Properties, Inc.*, 85 IBLA 287, 290 n.2 (1985), we noted that apart from this regulation it was arguable whetber recourse to judicial proceedings to cancel a lease for lands known to be valuable for oil or gas was necessary when the cancellation was based on pre-lease errors. In the present case, BLM proposes to undertake judicial proceedings to cancel retained overriding royalty interests arising from assignment of the lease rather than a lease itself. Presumably its decision to act only in regard to these royalty interests was based on a determination that the present leaseholders are bena fide purchaser s protected under 30 U.S.C. § 184(h)(2) (1982). Whether in sucb circumstances the agency was limited either by its regulation or as a matter of law to pursuing judicial action to cancel the royalty interests is not a question whicb is before us. We note that an answer te this question would, in part, require determining tbe scopo of 30 U.S.C. § 184(h)(1) (1982) pertaining to the cancellation of "interests" in leases. *See also* 43 CFR 3112.5-3 (1984).

June 25, 1986

IN EVENT OF ROYALTY PAYMENTS

$1.00 to $100,000.00 Annually — Service fee to R.S.C. 16%

Over $100,000.00 Annually —— Service fee to R.S.C. 12%

(Italics in original.) This contract, in effect, granted RSC a sole and exclusive agency for the sale of any interest in such lease as might issue to Albrecht.

In *Lola I. Doe*, 31 IBLA 394 (1977), we examined whether the identical language in another RSC contract created an interest in RSC and found that it gave RSC an enforceable right "to share in the profits of any sublease, assignment or sale of a lease, whether such sublease, assigument or sale is negotiated by RSC or by the offeror." *Id.* at 398. In addition, we concluded that under 43 CFR 3100.0-5(b), RSC held "a prospective claim to a benefit from a lease" and "a defined share of *any* profits which may be derived from the lease pursuant to the agreement which was in existence at the time the offer was filed." *Id.* (italics in original). Consequently, we held in *Doe* that the contract created an interest in RSC in any lease issued to its client, that the applicant was not the sole party in interest to her offer, that the outstanding interest was not timely disclosed, and that failure to disclose required rejection of the offer for violation of 43 CFR 3102.7 (1974), thereby affirming BLM's decision.

A number of decisions were then issued rejecting other lease offers made by RSC clients.[6] *See, e.g., Frederick W. Lowey*, 40 IBLA 381 (1979);[7] *Alfred L. Easterday*, 34 IBLA 195 (1978);[8] *Sidney H. Schreter*, 32 IBLA 148 (1977). We also followed *Doe* in affirming BLM's rejection of lease offers in which other filing services held similar undisclosed interests. *E.g., Gertrude Galauner*, 37 IBLA 266 (1978), *Marty E. Sixt*, 36 IBLA 374 (1978). In addition, since appellants originally submitted their briefs, we have affirmed our conclusions in numerous decisions

[6] Although the illegal language was present in numerous contracts made between RSC and its clients, not all clients of RSC signed identical contracts. *See Lloyd Chemical Sales, Inc.*, 49 IBLA 392 (1980); *Ervin J. Powers*, 45 IBLA 186 (1980); *Geosearch, Inc.*, 39 IBLA 49 (1979).

[7] Our decision in *Lowey* was reversed on the basis of an "amendment and disclaimer" to the RSC service contract filed hy RSC with the BLM Wyoming State Office on Jan. 13, 1977. *Lowey* v. *Watt*, 684 F.2d 957 (D.C. Cir. 1982). Our holding that RSC's contract gave it an interest which was not disclosed in violation of the regulations was not appealed. *Lowey* v. *Watt*, 517 F. Supp. 137, 142 (D.D.C. 1981). Because the lease in the present case was issued effective July 1, 1975, neither the "amendment and disclaimer" nor the court's decision are relevant in deciding the present appeal. *See also Mark Woods*, 79 IBLA 129, 137 (1984).

[8] Our decision in *Easterday* was appealed to the Federal District Court for Wyoming which, due to problems with the record before it, ordered a hearing. Its order stated in part that "having fully and carefully reviewed the record on appeal, [the court] finds the following facts are not in dispute: plaintiff Coyer has an agreement with a leasing service known as Fred L. Engle, d/h/a Resource Service Company; the agreement creates an undisclosed interest violative of the regulations * * *." *Donald W. Coyer (On Judicial Remand)*, 50 IBLA 306, 340 (1980) (appendix to decision of Administrative Law Judge). The proposed findings and conclusions of the Administrative Law Judge who conducted the hearing were submitted to us and we adopted them in full. *Id.* Our decision was affirmed by the Federal district court but reversed by the Tenth Circuit Court of Appeals based on a prior holding as to the effect of an "amendment and disclaimer" filed by RSC with the Wyoming State Office. *Coyer* v. *Watt*, 720 F.2d 626 (10th Cir. 1983), *cert. denied sub nom. Easterday* v. *Coyer*, 466 U.S. 972 (1984). The court did not address our basic holding that the contract provision created an undisclosed interest in RSC in violation of the regulations. *See* noto 7, *supra*.

concerning RSC clients.[9] Thus, short of reversing our findings in these cases, there is no basis on which we can do other than affirm BLM's decision and hold that it correctly determined that judicial action to cancel appellants' intorests in lease W-50934 is appropriate.[10]

Neither appellant directly challenges our holding in *Doe* and the cases which followed it.[11] Instead, RSC construes *Doe* as "holding for the first time that sales agency provisions in a service agreement between a service company such as RSC and its clients constituted an 'interest' in the lease [sic]" (RSC Statement of Reasons at 11). It then argues that the "*Doe* doctrine" should be given prospective effect only. Appellant Raymond Albrecht also argues against retroactive application of *Doe* and in addition argues that he is protected from cancellation of his royalty interest by the bona fide purchaser provision of 30 U.S.C. § 184(h)(2) (1982) and further protected by the 2-year inheritance protection provision of 30 U.S.C. § 184(g) (1982).

While both appellants seek to characterize the central issue presented by the case as one of retroactive application of a "rule" created by this Board, we find no basis on which to conclude that such is the case. As described above, our finding in *Doe*, as well as in subsequent RSC cases, was that the sales and payment provisions of RSC's contract with its clients created, under the definition at 43 CFR 3100.0-5(b) (1974), an interest in RSC in its clients' lease offers and in any leases subsequently awarded to them. Applying the law, we held that such interests were required to be disclosed under 43 CFR 3102.7 (1974), and that failure to disclose disqualified the offerors. There is no question of retroactive application of a new legal rule because no new rule was created in *Doe*. Rather, the law requiring the disclosure of interests was applied to find that an interest created by RSC's contract was not disclosed. It does not matter whether that interest is termed a "sales commission," as RSC calls it in this appeal, or given some other name; the regulations required disclosure of interests in lease offers, and by the substantive provisions of its contract RSC held such an interest as defined in the previously promulgated regulations. Nor was there ever a rule, regulation, or other Departmental authority which sanctioned the failure to disclose the type of interest held by RSC under its contract with its clients. As we discuss *infra*, the failure to

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[9] *Michigan Wisconsin Pipeline Co.*, 64 IBLA 247 (1982); *Robert Semanko*, 58 IBLA 340 (1981); *Floyd O. Lochner*, 56 IBLA 271 (1981); *David Burr*, 56 IBLA 225 (1981); *Jack Zuckerman*, 56 IBLA 193 (1981); *Nancy Stewart*, 56 IBLA 122 (1981); *Alex Sachen*, 56 IBLA 116 (1981); *Richard E. McDonald*, 56 IBLA 12 (1981); *Woods Petroleum Corp.*, 55 IBLA 348 (1981); *Resource Service Co.*, 55 IBLA 343 (1981); *Robert E. Belknap*, 55 IBLA 200 (1981); *Wilbur G. Desens*, 54 IBLA 271 (1981); *Inexco Oil Co.*, 54 IBLA 260 (1981); *Home Petroleum Corp.*, 54 IBLA 194, 88 I.D. 479 (1981); *Estate of Glenn F. Coy*, 52 IBLA 182, 88 I.D. 236 (1981); *D. R. Weedon, Jr.*, 51 IBLA 378 (1980). Subsequent appeals of many of these decisions were consolidated and reached the Tenth Circuit Court of Appeals under the caption *Geosearch, Inc.* v. *Watt*, 721 F.2d 694 (10th Cir. 1983), *cert. denied sub nom. Geosearch, Inc.* v. *Clark*, 466 U.S. 972 (1984). The court reversed the outcomes based on its decision in *Coyer, supra* note 8, concerning the effect of the "amendment and disclaimer" filed by RSC.

[10] By this statement we do not intend to limit BLM's authority to pursuing judicial action only. *See supra* note 5. In addition, while the case file indicates that as of 1979 there were several producing wells on the leased land, we have no information as to its current status or whether it is still known te be valuable for oil and gas. Given the time which has elapsed, BLM may wish to assure itself that such continues te be the case.

[11] We also note that this case does not present any question as to the application of the "amendment and disclaimer" ultimately filed by RSC with the Wyoming Stete Office and ruled upon in *Lowey* v. *Watt, supra* note 7, *Coyer* v. *Watt, supra* note 8; and *Geosearch, Inc.* v. *Watt, supra* note 9.

disclose the interest created by RSC's contract violated not only the regulations but also longstanding rules of this Department. Our finding in *Doe*, in short, did not entail the creation of a new legal rule.

Nevertheless, we will address the arguments appellants have presented to us. We turn initially to those made on behalf of RSC and will subsequently address those additional points raised on behalf of Raymond Albrecht. Because RSC's arguments concerning retroactive application of rules assume that a new rule as te "sales commissions" was created in *Doe*, we first consider its arguments as to its "sales commission."

RSC's first argument is that "[i]t was reasonable for RSC's attorney to conclude at that juncture that a 'sales commission' did not fall within the definition of an 'interest' under 43 CFR 3100.0-5(b)" (RSC Statement of Reasons at 19).[12] In support of its position, RSC notes that the regulations did not expressly mention "sales commissions," and it argues that the rule of construction of *ejusdem generis* applies to the regulation. In particular, RSC seeks to apply this rule of construction and distinguish its contract provision as follows:

> The definition specified "record title interests, overriding royalty interests, working interests, operating rights or options ... increments, issues, or profits, ..." *from* the "lease" as those items which would constitute "interests" within the meaning of the regulation. Nowhere does the regulation address those monetary benefits which can arise solely and entirely upon *disposal* of a lease and which are in no way taken from the "lease" itself; the regulation speaks only to benefits which come from the "lease" itself. On the other hand, the RSC sales commission (1) can *only* arise upon transfer or assignment of the lease, and *then* only if it occurs during the time period in which the sales agency exists and (2) nowise comes from the "lease" itself. [Italics in original.]

(RSC Statoment of Reasons at 21).

[2] RSC's argument as to *ejusdem generis* is based on a strained reading of the regulation that ignores much of its substantive content. The first sentence of the definition of "interest" in 43 CFR 3100.0-5(b) (1974), quoted in part by RSC, does indeed list as interests a number of standard rights in oil and gas leases broadly recognized within the oil and gas industry. However, it also expressly includes "any agreements covering such 'interests.' " RSC's contract with its clients was an agreement by which it would sell its clients' rights in their oil and gas leases. Thus, RSC's contract provision was an agreement covering

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[12] Rather than directly attacking our holding in *Doe*, RSC frames many of its arguments in terms of the propriety of the conclusions allegedly reached by its attorney. We are not concerned with the reasonableness of the assumptions made by RSC in preparing its contract. Nor is the competency of RSC's attorney a matter for decision by this Board. Questions of competency and malpractice are within our jurisdiction only to the extent they pertain te the exercise of our authority to determine who may practice before us. *See* 43 CFR Part 1 (1984). We therefore treat all such arguments as being raised as te the contract itself. In doing so we do not overlook RSC's apparent attempt in framing its argument in this manner to pertray its peculiar reading of the regulations and Departmental decisions as a reasonable and good faith "interpretation" of the law which it claims we changed by our opinion in *Doe* and which it argues should not be retroactively applied to its clients. We believe that the matters at issue are best dealt with as objective questions of law, and we address the matter of the reasonahleness of RSC's position in considering the question of retroactivity subsequently in the text.

interests in oil and gas leases and, itself, constituted an interest as defined by the regulation. *See Marty E. Sixt, supra* at 376.

[3] Nor is the regulatory definition of interests limited to its first sentence. The regulation's next sentence goes on to define as an interest any "prospective or future claim to an advantage or benefit from a lease" as well as any participation or share "in any increments, issues, or profits" deriving or accruing from a lease when either is based upon an "agreement or understanding existing at the time when the offer is filed." As determined in *Doe* and as a simple reading of the contract provision previously quoted makes clear, RSC would receive a percentage of the sales price and royalties due on any leases obtained and sold under its contracts with its clients. It is difficult to imagine how RSC's "sole and exclusive" right to negotiate for the assignment or sale of leases and to receive a percentage of both the sales price and royalties retained does not constitute, in the plain terms of the regulation, a prospective or future claim to benefit from its clients' leases and a right to a share in the profits its clients would accrue from their leases. Thus, whether or not a "sales commission" is mentioned in the first sentence of the regulatory definition, and whether or not the doctrine of *ejusdem generis* applies or includes or excludes a "sales commission" from the types of interests listed in the first sentence, is of no consequence. RSC's contract provision is clearly covered by the second sentence of the definition of "interests." Any question as to whether RSC held such a prospective claim in the present case was resolved by the fact of its filing, on the basis of its contract with Albrecht, the document previously quoted in which Fred L. Engle d.b.a. Resource Service Co. asserted a right to be paid a percentage of royalties due under Albrecht's retained royalty.

[4] The other factors pointed to by RSC in support of its argument do not change the application of the regulation. In particular, in terming its income from its clients' leases a "sales commission," RSC claims that it is a payment for services which comes from the "disposal" of a lease, in contrast to the regulation which it claims "speaks only to benefits which come from the 'lease' itself." From this, RSC concludes that it "had no legally enforceable right to any portion of its clients' 'leases' nor to share in the proceeds coming therefrom" (RSC Statement of Reasons at 22).[13] Precisely what the distinction is between benefits arising from the disposal of a lease and those which come from the lease itself and its proceeds RSC does not explain. In any event, the distinction is irrelevant. As we have already discussed, the regulatory definition of interests is not limited to standard interests in oil and gas leases commonly recognized within the industry, but by its second sentence encompasses a broad range of methods of benefiting from a lease. That under its contract RSC is due money only upon the "disposal" of a client's lease within a 5-year

[13] RSC's assumption that its contract must give it a "legally enforceable right" to qualify as an interest under the regulation and its emphasis on the "proceeds" of a lease is apparently derived from *John V. Steffens*, 74 I.D. 46 (1967). We discuss this case and RSC's misconstruction of it, *infra*.

period does not eliminate RSC's interest, hut rather qualifies it under the regulation as a "prospective or future claim to an advantage or benefit from a lease" and a share in the profits "which may be derived from or which may accrue in any manner from the lease."

The same alleged distinction between "disposal" of a lease and benefits accruing from it is also the basis of RSC's denial of a legally enforceable right to share in the proceeds of its clients' leases. While we view this denial with skepticism, particularly since the document filed by Fred L. Engle d.b.a. Resource Service Co. claims such a right, even if such is the case, it has no bearing on the application of the regulation. Just as the regulatory definition is not limited to standard leasehold intorests, it is also not restricted to payment from any specific proceeds. *See Joshua Basin Partnership*, 87 IBLA 179, 185-87 (1985). Rather, it also addresses *claims* to an advantage or benefit from a lease or to share in profits deriving or accruing from a lease. *See H. J. Enevoldsen*, 44 IBLA 70, 86 I.D. 643 (1979), *aff'd, Enevoldsen* v. *Andrus*, Civ. No. 80-0047B (D. Wyo. June 24, 1981). That, under its contract with Albrecht, RSC held a prospective right to benefit from the sale of leases obtained by its clients is sufficient for the regulation to apply. It does not matter whether RSC's benefit is derived from a claim enforceable against the lease itself, specific proceeds, or the client personally, or even if its claim could not ultimately be successfully enforced. *See H. J. Enevoldsen, supra* at 83-84, 86 I.D. at 649-50. Nor does the possibility that RSC might not ultimately benefit because no lease is obtained, no buyer is found for a lease, or the lessee rejects all purchase offers change the fact that RSC's potential benefits constitute an interest in the lease under the regulation. *See Joshua Basin Partnership, supra; Rosita Trujillo*, 60 IBLA 316 (1981); *H. J. Enevoldsen, supra; Marty E. Sixt, supra.* While the ultimate enforceability of the provision is a matter between RSC and its clients to be decided by a local court, for our purposes it is sufficient to find that, at the time Norbert Albrecht filed his lease offer under Departmental regulations, RSC held an interest which was not disclosed to BLM as required by 43 CFR 3102.7 (1974).

After contending that its "sales commission" is not an interest under the regulations, RSC goes on to argue that "[u]nder prior Departmental decisions, a sales commission could be reasonably deemed not te be an 'interest' within the meaning of the regulations" (RSC Statement of Reasons at 23). In support of tbis claim RSC discusses three Departmental decisions which it believes were "the only Departmental decisions providing guidance as to whether these provisions in RSC's service agreement constituted an 'interest' in a 'lease' " (RSC Statement of Reasons at 25).[14] In this, RSC is simply

[14] The three decisions are *R. M. Barton*, 4 IBLA 229 (1972); *John V. Steffens, supra*; and *B. F. Sandoval, Jr.*, A-29975 (June 12, 1964). They are discussed *infra*.

wrong. Both specific decisional authority and general principles established by Departmental precedent clearly encompass the arrangement in RSC's service contract. Before reviewing Departmental precedent, however, it is important to note the principles which have been the focal point of both Departmental regulations and adjudicatory pronouncements over the years.

Since early in the leasing act program, limitations have existed on the number of leased acres an individual may hold, and, in order to enforce these limitations and defeat schemes to circumvent them, the Department has required lease offerors to disclose their holdings. Likewise, since the advent of the use of drawings to select among applicants for a particular parcel, methods have been devised to increase the odds of obtaining a lease and to control or benefit from leases issued to others. Any review of Departmental decisions necessarily reveals a long history of schemes devised to obtain unfair and illegal advantage by persons seeking to enrich themselves and underscores the Department's consistent attempts to thwart such abuses.

The original sole-party-in-interest disclosure requirement was premised on such concerns. Inasmuch as lands held under an oil and gas permit were available to the first-qualified applicant after the permit's cancellation was noted in the tract books, *see* Circular No. 915, 50 L.D. 299 (1924), complaints about the system soon led to the establishment of a drawing to select the new permittee, *see* Circular No. 929, 50 L.D. 387 (1924).

By 1926, the Department had formally adopted procedures which required applicants to state "that the applicant files the same in good faith for his or its own benefit, and not directly or indirectly in whole or in part in behalf of any other person or persons, association, or corporation," or, if another party held an interest, to fully disclose that fact and accompany the application with a showing of the qualifications of all interested parties. Circular No. 1084, 51 L.D. 504 (1926). The penalty provided was that any applicant failing to disclose any interest "which shall tend to give an advantage in the drawing" would forfeit any moneys tendered with his application and would "subject the permit, in the event that one is awarded to him, to cancellation for fraud." *Id.* at 505.

Cases decided within the Department have consistently held that any scheme desigued to obtain an advantage in a drawing is a fraud upon the system. In *Clifton Carpenter*, A-22856 (Jan. 29, 1941), 14 applications had been filed for a parcel of land. Following a protest by an individual drawn with subsidiary priority, the Department conducted an investigation and found that 12 of the applications had been filed by persons employed by a real estate company engaged in the oil and gas leasing business and their relatives. All 12 denied that there was any agreement as to the disposition of the lease or that any arrangement existed for the real estate company to act as agent in its sale. The applications of all 12 had also contained the statement required by the 1926 Instruction Circular quoted above. Inquiring whether the circumstances surrounding the filing of the applications at issue "constitute a plan designed to afford appellant an unfair advantage over other applicants and thus deprive them of the right to an equal opportunity to be successful in the drawing," Assistant Secretary Chapman concluded that there was no doubt that the real estate firm would handle the lease if one of the 12 were successful and that, consequently, the applications were not made in good faith for the sole benefit of the individual applicants. He also reiterated that "the Department will not give its approval te a practice which even tends te deprive any claimant of the right to fair and impartial treatment in matters over which it has control * * *." *Id. See also Victoria Cuccia*, A-27074 (Apr. 5, 1955); *Edward A. Kelly*, A-22856 (Aug. 26, 1941).

In *Annie L. Hill*, A-26150 (Aug. 13, 1951), the Department considered the effect of competing applications by a corporation and its two major shareholders who were also its president and vice-president. The opinion reviewed the early Departmental circulars and the *Clifton Carpenter* decision and concluded that "it has long been the policy of the Department reflected in formal rulings, that each applicant should have an equal chance with every other applicant in the case of simultaneous applications for a noncompetitive oil and gas lease." *Id.* Although the opinion found that the multiple chances created by the multiple applications in the case were "unfair," it declined to cancel the lease because it found no clear violation of a statute or regulation. On appeal to Federal district court, the court ordered the decision set aside and the lease cancelled. The Court of Appeals for the District of Columbia affirmed, *sub nom. McKay* v. *Wahlenmaier, supra.* It found that three independent grounds justified cancellation of the lease: failure to disclose an interest in violation of the regulations, the inherently unfair situation created by secretly obtaining more than one chance in the drawing, and the false statement in the application that it was made only on behalf of the applicant. *Id.* at 40-46. *See also Schermerhorn Oil Corp.*, 72 I.D. 486 (1965).

In *Antonio DiRocco*, A-26434 (July 11, 1952), the Department reviewed a decision to cancel 15 noncompetitive leases and reject 8 lease applications. While the relationships among the parties involved were somewhat complex, in brief, the lease applicants were recruited by an association of "managers" (including two geologists) who, under powers of attorney, would have the right to assigu or sell rights in any leases awarded. If the applicants obtained a lease, they would receive back any money advanced by them for filing and rental fees and also receive a one-half of one percent royalty. The opinion found "the nominal applicants were merely used as 'fronts' for the purpose of effectuating the arrangement that had been worked out in advance by the real parties in interest." It recognized "that an applicant may need the assistance of a geologist in determining what land to apply for, or he may desire other help in preparing or in prosecuting his application," but noted that "[s]uch assistance can be obtained and the applicant nevertheless remain the real party in interest." Based on principles enunciated in coal leasing cases, the Department found that "a plan or scheme as that involved in this proceeding is incompatible with the proper administration of the law, because it conceals from the Department the identity or identities of the real party or parties in interest." Because the facts were not disclosed to the Department, and, if disclosed, the leases would not have been issued, it was held that the leases had been fraudulently obtained and were subject to cancellation.

In *Evelyn R. Robertson*, A-29251 (Mar. 21, 1963), the Department reviewed the rejection of seven noncompetitive oil and gas lease offers. A protest filed with the Department had led to an investigation which revealed that, in carrying out a scheme devised by an individual, the applicants had been solicited by a company which would act as agent in filing offers and selling any leases acquired. Under the terms of the applicants' agreements with the company, if a client obtained a lease, he would receive back any amounts paid for filing fees and the first year's rental and in addition receive half of any profits from the sale of the lease and half of any royalties retained in the sale. If the client obtained more than one lease, the company would pay the rental for the additional lease, and the client would receive his benefits from only the lease selling for the highest price, although a rider on most of the agreements extended the 50/50 sharing of profits and royalties to all leases obtained. The company filed 59 offers on behalf of its clients for each of 39 tracts. The opinion upheld the cancellation of the leases on the grounds that copies of the agency and agreement documents were not filed with BLM as required by regulation. It went on, however, to find that both the individual initiating the plan and the company involved were parties in interest to the offers and had violated the rule "that a party in interest can submit only one offer for participation in a drawing." *Id.* In a subsequent suit in Federal court the Department was granted summary judgment and this judgment was affirmed on review. *Robertson* v. *Udall*, 349 F.2d 195 (D.C. Cir. 1965).

In *John V. Steffens, supra*, two noncompetitive oil and gas lease applications filed through a corporation operating as a filing service had been rejected by the BLM because it found the corporation to be an undisclosed party in interest. In addition to selecting parcels and filing offers on behalf of its clients, the corporation's agreement with the applicants authorized it to advance funds for first year rentals. By separate agreements the corporation agreed to purchase leases from its clients, in one case by an agreement made after the lease offer had been filed but prior to the drawing for the parcel. On appeal, BLM's decision rejecting the offers was reversed. The opinion noted that in prior decisions:

[T]he Department found either an express agreement or an understanding among certain lease offerors or a business relationship or financial interest of one offeror in the offer of another offeror which, even in the absence of any agreement, precluded a finding that each offeror was, in fact, the sole party in interest in the lease offer which he filed, or it found that the interest which one offeror held in the offer of another offeror resulted in an improved likelihood that the first offeror would obtain an interest in a lease issued pursuant to a drawing of simultaneously filed offers.

Id. at 52. Due to the absence of a binding agreement between the filing service and its clients in the cases before it, the opinion found that although the filing service undoubtedly hoped to obtain an interest in or a share of the profits from leases obtained:

A bope or expectation of sharing in the profits of a lease issued te any one of a number of lease offerors . . . is not the same as the right to share in such a lease, and in this respect the present case differs from those cited, for in eacb of the former the interest which one party claimed in the lease offer of another was of such a nature as to be enforceable in law or in equity.

Id. at 53. Thus, it was found that while the arrangement used by the filing service gave it a "practical advantage over competitors in securing an interest in the client's lease," there was "no basis upon which it could successfully assert a claim of interest in a lease in the event a client elected not to accept its offer to purchase the lease." *Id.* Consequently, the opinion declined to find that under the regulatory definition the filing service held an interest in its clients' lease offers.

Following *Steffens,* a series of cases was brought to this Board in which protests had been filed based on the successful offeror's use of a filing service. Based on *Steffens,* we refused to find that the use of a filing service was improper per se. For example, in *Georgette B. Lee,* 3 IBLA 272, 274 (1971), we stated:

There is nothing in the Department's regulations that specifically prevents an offeror from using a filing service. Contrary to appellants' implication, the fact that a filing service is involved in filing an oil and gas lease offer does not raise a presumption that some form of collusion exists between the offeror and the service. An offeror may properly participate in a simultaneous oil and gas drawing through a service if there is no scheme, plan or agreement between the parties wherein the service obtains an "interest" in the resultant lease as defined in 43 CFR 3100.0-5(b), and in the absence of any other demonstrable legal or regulatory impediment. *John V. Steffens et al.,* 74 I.D. 46 (1967), and cases cited therein. [Footnoto omitted.]

Similarly, in *R. M. Barton,* 7 IBLA 68, 70 (1972), we said:

This Department, in *John V. Steffens et al.,* 74 I.D. 46 (1967), held that the use of a filing service company did not result in removal of the offeror's sole party status. This decision was reaffirmed in *R. M. Barton,* 4 IBLA 229 (1972), and *R. M. Barton,* 5 IBLA 1 (1972). The rule remains that so long as there is no enforceable agreement entered into whereby the offeror is obligated to transfer any interest in the lease to the filing service, the offeror will not, on account of merely employing a filing service, be treated other than as the sole party in interest.

See also R. M. Barton, 9 IBLA 243 (1973), 9 IBLA 70 (1973).

Nevertheless, we continued to scrutinize the business arrangements established by filing services through their contracts with their clients for violations of the Department's regulations, including the creation of an interest in the filing service and the possibility that offers on behalf of more than one client had been filed for a parcel, creating multiple interests in the filing service in applications for the parcel.

BLM's review of simultaneous oil and gas lease applications also brought before this Board a variety of issues pertaining to the requirement to disclose parties in interest. While not all such cases are germane, one is of particular importance. In *Thomas Connell*, 7 IBLA 328 (1972), nine lease offers had been rejected by BLM for violation of 43 CFR 3102.7 (1972) relating te disclosure of interests. BLM's written decision, however, failed to specify in what respect the regulation had been violated. The agreement between the appellant and the individual providing filing assistance stated that the latter would select parcels and file offers and in return receive 25 percent of "all profit in bonuses or overriding royalty as might be obtained after deduction of rentals and expenses." *Id.* at 329. The lease offer forms for the parcels were marked to show that the applicant was not the sole party in interest, and a copy of the agreement letter was submitted with each offer to show the additional interest. However, the individual providing the assistance failed to submit a separate statement establishing his qualifications to hold a lease.

On appeal to the Board, appellant argued that 43 CFR 3102.7 (1972) had not been violated because the individual who performed the filing services did not have an interest in the lease offer within the contemplation of the regulations. In reviewing the matter we found:

> First, appellant declared on the offer forms that he was not the sole party in interest, which made mandatory his compliance with the regulation, a fact carefully explained by the form itself. Moreover, while the agreement made the realization of pecuniary benefit to Swanson dependent upen certain contingencies (the receipt of payments from benuses from overriding royalties in amounts in excess of rentals and expenses), Swanson's right to receive such benefits had already vested by virtue of the agreement and the filing of the offers. This was sufficient to invest Swanson with a definite interest in the offers and any leases issued pursuant thereto, a fact which confirmed appellant's declaration that he was not the sole party in interest.

Id. at 330.

Thus, the policies and holdings of a long line of Departmental decisions require the rejection of all lease offers and cancellation of any leases obtained by RSC clients who did not disclose RSC's interests in their offers. The working structure created by RSC's contract differs only in degree and not kind from those condemned by the Department in *Antonio DiRocco* and *Evelyn R. Robertson*. In *DiRocco* the bulk of the value of the benefits of leases went te the "managers" who devised the scheme and the parties who were awarded the leases received only their money back and a small percentage royalty. In *Robertson* the applicants fared better, splitting the profits from at least the first lease with those who had devised the scheme. The latter would, of course, benefit most because they would receive their portion if any of the 59 offers filed on each parcel was selected to receive a lease. In the present case, RSC exercised comparative restraint in receiving under its contract only 16 percent of the first one hundred thousand dollars and 12 percent thereafter of the sale and royalty income of its clients, though, of course, it would be so enriched by every lease obtained by its clients sold within 5 years. Such restraint, however, does not serve to redeem RSC's scheme any more than does the fact that the leases are sold to third parties rather than being purchased outright by RSC. Just as denominating its rights under its contract a "sales commission" does not change the application of the regulatory definition, so also the fact that RSC structured its contract to receive its benefits from its clients' leases as an undisclosed "sales commission" does not make that structure any less a plan or scheme which is "incompatible with the proper administration of the law, because it conceals from the Department the identity or identities of the real party or parties in intorest." *Antonio DiRocco, supra.*

Any question whether the arrangement used by RSC constituted an interest under the regulations not settled by *DiRocco* and *Robertson* was resolved by the rule established in *Steffens* and our finding in *Connell.* In the latter, payment of a percentage of the profits from a lease was found to meet the regulatory definition of an interest. In *Steffens,* the distinction between a hope or expectancy of sharing in a client's lease and the right to share in it was made on the basis of whether any agreement as to the disposition of the lease existed *when the lease offer was filed. See* 43 CFR 3100.0-5(b) (1974). In the present case, RSC's contract both existed when Albrecht's lease offer was filed and required payment of a percentage of the profits. Accordingly, on the basis of the regulation and the cases discussed, we find that RSC held an interest in the lease offer filed by Norbert Albrecht.

On appeal, RSC claims that the distinction made in *Steffens* applies te its contract because its sales agency provision "constituted a unilateral offer to act as sales agent for the client" which could be accepted by the client agreeing to sell the lease within the 5-year period, and that, therefore, RSC "had a mere hope or expectation to receive a sales commission" (RSC Statement of Reasons at 23-24). In addition to ignoring the plain language of its own contract by which RSC's client statod "I hereby authorize you to act as my sole and exclusive agent" and negating basic principles of contract law, this argument distorts the basis and application of the *Steffens* decision. As discussed above, in *Steffens,* since no enforceable agreement to sell a lease to the filing service existed at the time the lease offers were made, it was found that the filing service could have only a hope or expectancy of obtaining an interest in its clients' leases. In contrast, RSC's contract existed when Albrecht's lease offer was made. A client's right under the provision was not to accept or reject an offer by RSC to act as agent in soliciting lease offers, but to accept or reject an offer obtained by RSC. Thus, there can be no question as to whether RSC had only a hope or expectation, the only possible issue is whether the rights held by RSC constituted an interest as defined by the regulation.

Contrary to RSC's belief, the Board bas never held that a pre-existing right to recoup rental payment from the proceeds of the lease does not constitute an interest which must be disclosed. In *Joshua Basin Partnership, supra*, we examined this contention in depth. *Id.* at 183-88. As was noted therein, there is a critical distinction between "a general right of repayment from funds not traceable to the proceeds of a lease" and repayment "to be made from those proceeds." *Id.* at 184. As we held, the latter clearly constitutes an "interest" in the lease within the purview of the regulations, and, as such, must be disclosed if it arises prior to the filing of the lease offer. *See also Wayne E. DeBord*, 50 IBLA 216, 87 I.D. 465 (1980), *aff'd sub nom., Landis* v. *Clark*, Civ. No. CV-81-74 BLG (D. Mont. May 10, 1984).

Finally, RSC compounds its confusion as to this Department's holdings by claiming that, in *B. F. Sandoval, Jr.*, A-29975 (June 12, 1964), the Department "implicitly held that an exclusive sales agency agreement which would provide the agent with a sales commission did not constitute an 'interest' in the agent" (RSC Statoment of Reasons at 25-26). The total lack of a basis for this description of the case should be apparent to anyone reading the opinion.

Sandoval had made an oil and gas lease offer under an agreement with a petroleum geologist who would select parcels, prepare lease offers, and sell any leases obtained in exchange for a 10-percent "broker's fee." The agreement was not in writing, and there was some question as to whether the sales arrangement was intended to be exclusive. BLM had cancelled the lease because it found that the geologist had acted as agent for the applicant and that the agency was not disclosed as required by the regulations. On appeal, Sandoval attempted to extend the uncertainty as to whether or not there was a sales agency agreement creating an interest to generate uncertainty as to whether the geologist had acted as an agent in filing the lease offer. The opinion saw through the attempt and declared that the argument was "irrelevant and premised upon the false assumption that [the agency disclosure] regulation * * * pertained only to that relation termed in law as an agency coupled with an interest rather than a straight agency relation" (citation omitted). Noting that the regulation required the disclosure of agency relationships whether or not coupled with an interest, it stated "an agency is no less an agency because it is not a specialized type coupled with an interest." *Id.* Thus, the issue in the case was the existence of an agency relationship, and the legal rule applied was that if one existed and was not disclosed, the lease was properly cancelled. There was no need to decide whether an interest in the lease existed because whether it did or not was irrelevant. RSC errs both in its reading of the issue on appeal in that case and in construing the absence of any condemnation of the interest as approval of such an interest.

As the foregoing discussion establishes, at the time Norbert Albrecht sigued his contract with RSC and filed his lease offer, no prior decision or interpretation of the regulations sanctioned the arrangement devised by RSC. To the contrary, it is evident that under the holdings and policies of the cases, *Thomas Connell* in particular, such an arrangement created an interest in RSC that was not disclosed to BLM. RSC, like any filing service, was, of course, not barred from holding interests in its clients' lease offers. The regulations, however, required disclosure of all interests in lease offers, and provided that leases would be cancelled when obtained without disclosure of such interests.

In addition, at the time Norbert Albrecht's offer was filed, 43 CFR 3112.5-2 (1974) prohibited filing multiple offers for the same parcel. For filing services, this prohibition posed practical problems. If they were to benefit from their clients' leases, only one client's offer could be filed for each parcel. On the other hand, they could service the most clients and avoid conflicting duties to clients in choosing which to file for the best parcels only by giving up the possibility of enriching themselves through their clients' lease offers. Only by violating both the regulation against multiple filings and the regulation requiring disclosure of interests could they hold interests in their clients' offers and also file on behalf of multiple clients for the same parcels. While the record in the present case has not preserved any information by which to determine whether other of the 2,684 DEC's filed for Wyoming parcel 484 were filed by RSC clients under the same contract as Norbert Albrecht, if such were the case, all of its clients' offers would be improper because of the interest in each held by RSC. To affirm BLM's decision to pursue cancellation of the retained royalty interests held by appellants, however, it is sufficient for us to find that RSC held an interest in the offer by Norbert Albrecht which was not disclosed as required by the regulations, without awaiting any further inquiry as to existence of multiple filings.

Based on its argument that under neither the regulations nor Departmental decisions was its "sales commission" an interest, RSC next argues that "[u]nder general state common law principles relating to sales agency, RSC did not possess an 'interest' in its client's lease" (RSC Statement of Reasons at 26). RSC's first point in this regard is that "[i]t is a well settled principle of statutory construction that where a statute is ambiguous, it should be construed in harmony with the common law" and that the same should apply to federal regulations (*Id.* at 26-27).

RSC's chief error is to assume that the regulation is ambiguous. It does not point to any language in the regulation which is unclear, uncertain, or subject to more than one interpretation. Rather, RSC's only claim as to ambiguity is that "nowhere did the regulation address the question as to the type of 'interest,' if any, of an agent in the underlying property (i.e., lease) which would arise upon the granting of an exclusive sales agency" (RSC Statement of Reasons at 27).

That the regulation does not expressly address an "exclusive sales agency," or for that matter a "sales commission," does not render it ambiguous. The regulation, by its express terms, broadly covers any interest that a party may have in the application of another. Appellants are, of course, free to denominate the interests they have created as a "sales commission" or any neologism they desire. But, just as a rose by any other name would smell as sweet, so is an interest, by any other descriptive term identified, subject to disclosure.

RSC could have legitimately performed services for its clients in providing assistance in selecting parcels for which to file applications. It could also, subsequent to the filing of a lease offer, have approached its client witb an offer to represent him in selling or assigning the lease if awarded, and it would have been legitimately entitled to a fee for its services. *See John V. Steffens, supra* at 55. It could even have made such arrangements prior to its clients making any lease offers so long as the fact that RSC thereby held a prospective claim to benefit from a lease and a right to share in the profits derived from a lease was disclosed to the Department, and so long as only one client was filed on each parcel. 43 CFR 3100.0-5 (1974). Thus, the issue, if there is one, is whether the business arrangement established by RSC's contract with its clients created an "interest" under the regulatory definition. As found in *Doe* and in this opinion, it did. There was no ambiguity in the regulation's application to the RSC contract.

RSC, nevertheless, goes on to argue that under common law principles it did not have an interest in its clients' lease offers. It does so based on standard rules within the law of agency that an agency, or power, coupled with an interest in the subject matter of the agency makes the delegation irrevocable without the agent's consent, and that a sales agent receiving a commission on a sale does not have an interest in the property of the sale, quoting from 2A C.J.S. *Agency* §§ 114, 118 (1972). There is nothing wrong in RSC's statement of these rules. They apply to determine the circumstances in which a delegation of agency authority may be revoked by a principal. However, they are simply inapposite in determining the interests in oil and gas lease offers which must be disclosed to the Department under its regulations. The regulatory definition concerns potential rights to receive benefits or profits from a lease when awarded, not the circumstances under which a delegation of agency authority is revocable. Because the regulations' concern is different, its definition of "interest" is broader than that used in agency law. Additionally, the rigbts held by RSC to benefit from its clients' leases arose from its contracts with them and not a simple delegation of agency authority. We therefore find no merit in RSC's argument.

Having considered RSC's arguments by which it construes its "sales commission" as falling outside of the regulation and prior Departmental decisions, we turn to its chief argnment, that "[t]he Board's *Doe* decisional rule should not be given retroactive effect so as to divest innocent RSC clients, who acted reasonably and in good faith, of their interests" (RSC Statement of Reasons at 11). Initially, we note that regardless of any validity that this argument may have as to RSC's clients, it clearly is not applicable to the interests of Engle, who obtained the benefits of his undisclosed interests. This argument, moreover, is based upon the assumption that our decision in *Lola I. Doe* represents a new legal rule, and this assumption depends upon the contention that as a "sales commission" the benefit RSC would receive under its contracts with its clients was not within the regulatory definition of interests and also not governed by Departmental precedent. As we have discussed, this contention is demonstrably incorrect. What matters is the substance of the business arrangement established by RSC's contract, not the name RSC now chooses to apply to it. The descriptive language of the regulatory definition clearly encompasses the benefits RSC receives under its contract. Moreover, the arrangement used by RSC is similar te those condemned in *Antonio DiRocco, supra*, and *Evelyn R. Robertson, supra*, and even more closely akin to the profits expressly found to constitute an interest in *Thomas Connell, supra*. In addition, longstanding Departmental policies require condemnation of any and all schemes devised hy those who seek to enrich themselves through unfair advantage in the simultaneous oil and gas leasing system.

Because our decision in *Doe* required only the application of the language of a Departmental regulation to the facts of RSC's contract consistent with Departmental precedent, our opinion did not establish a new legal principle. Application of a statute or regulation to a set of facts for the first time does not entail the creation of a new legal rule. Any other conclusion would render the process of adjudication and appellate review meaningless and make it impossible for the Secretary of the Interior to carry out his duties and responsibilities regarding the public lands. Each initial violation of a statute or regulation would be protected, as would each subsequent violation occurring under an arguably different set of facts. As Judge Stuebing noted: "To hold that, upon a finding of violation, the Department must forego remedial action until a similar violation is discovered in the future would be to hold that a person may violate the regulations with impunity until discovered, but not thereafter." *D. R. Weedon, Jr.*, 51 IBLA 378, 384 (1980).

Because no new rule was created in *Doe*, there is no legitimate question as to whether the application of our finding in *Doe* to RSC's contract with Norbert Albrecht in a judicial suit for cancellation of his retained royalty interest entails retroactive application of a new legal rule. We therefore find no merit to appellants' arguments that we should not apply such a "rule" retroactively, but only prospectively. Even assuming, however, that there is an issue as to retroactivity, we nevertheless conclude that the matter presents no basis on which to preclude BLM from seeking judicial cancellation of the interests held by Raymond Albrecht and Fred L. Engle d.b.a. Resource Service Co.

In the still leading case on retroactive application of adjudicatory administrative decisions, *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947), the United States Supreme Court established the general rule governing retroactive application:

> Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greator than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law. See *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 620.

More precise criteria by which to weigh the ill effects of the retroactive application of a new legal rule against the harm of a result contrary to statutory design and equitable principles were established by the D.C. Circuit Court of Appeals in *Retail, Wholesale & Department Store Union, AFL-CIO* v. *National Labor Relations Board*, 466 F.2d 380, 390 (D.C. Cir. 1972) [hereinafter *Retail, Wholesale*]. The court stated:

> Among the considerations that enter into a resolution of the problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attompts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despito the reliance of a party on the old standard.

RSC does not argne directly from these decisions but from similar standards which have long been applied by this Department. In *A. M. Shaffer*, 73 I.D. 293, 298 (1966), the Department adopted the general rule that:

> In considering whether regnlations should be interpreted to the detriment of persons seeking oil and gas leases who would have a statutory preference te a lease, it is true, as appellants have contended, that the regulations should be so clear that there is no basis for the applicants' noncompliance, and if there is doubt as to their meaning and intent such doubt should be resolved favorably to the applicants. See *William S. Kilroy et al.*, 70 I.D. 520 (1963); *Donald C. Ingersoll*, 63 I.D. 397 (1956).

RSC also points to the court's acknowledgement of Departmental policies in *Safarik* v. *Udall*, 304 F.2d 944, 949 (D.C. Cir. 1962), *aff'g*, *Franco Western Oil Co.*, 65 I.D. 316, (Supp.) 65 I.D. 427 (1958):

> Where the Department of the Interior has decided that a statuto should be given a *different interpretation* than tbat reflected by its earlier decisions and that such decisions should be *overruled*, it has been a rule in the Department since at least as far back as 1917 not to give its lator decisions retroactive effect, especially when to do so would adversely affect actions taken and rights and *interests acquired* by private persons *on the faith of the earlier decisions* and would inure te the benefit of other privato persons. [Footnote omitted, italics supplied.]

In discussing these cases RSC's reliance on these articulated principles is misplaced. As emphasized in the quotation from *Safarik*, the Departmental rule applies only when an earlier decision is being overruled and affects rights acquired "on the faith of the earlier decisions." Similar language in *Retail, Wholesale*, speaks of abrupt departures from prior procedures and reliance on former rules. In the present case, of course, no prior rule or procedure could have been relied upon by RSC and none was overruled by *Doe*.

RSC claims that "tbere was a longstanding BLM practice by that date of awarding leases to RSC clients which [sic] had entered into RSC service agreements containing such provisions" (RSC Statement of Reasons at 18). The reality behind this assertion, however, is that while BLM issued leases to RSC's clients between its commencement of business in November 1973 and the rejection of Lola Doe's lease offer, drawn in November 1976, their issuance was not based upon any approval of RSC's contract. Rather, the DEC cards submitted by RSC's clients, like tbose of Lola Doe and Norbert Albrecht, undoubtedly gave no indication that a filing service was involved in the offers, let alone that it held an interest in them. To the contrary, they asserted that the offeror was the sole party in interest. Only as the result of a protest filed with BLM was the fact of RSC's involvement and the terms of its contract brought to BLM's attention. BLM's ignorance of violations of its regulations cannot be distorted to constitute approval of them, let alone a practice on which the appellants in the present case can rely. As was noted in a different context: "Having failed to inform the Government of the totality of their arrangements, appellees cannot be heard to argue that the Government's failure to warn them of their illegality supports the invocation of estoppel." *United States* v. *Morris*, 19 IBLA 350, 378, 82 I.D. 146, 159 (1975), *aff'd*, 593 F.2d 851 (9th Cir. 1978).

Similarly, the Department's statement in *Shaffer* assumes that the language of a regnlation will be read in a fair and reasonable manner. In that case, it was determined that no regulation required an agent filing an offer in his own name and disclosing the name of the party who would hold full interest in a lease if awarded to also file a statement of agency authority. The regulation at issue expressly applied only to offers signed and filed by an agent in the name of his principal. Unlike that case, any fair reading of the regulatory definition of "interest" should have indicated to RSC that its contract provision was an agreement covering interests in oil and gas leases and that the payments it would receive were a prospective claim to an advantage or benefit from a lease as well as a share in the profits from a lease. Consequently, it should have been clear that casting its benefit as a rigbt to receive a percentage of the money received by its client rather than an ownership intorest in the lease would not be sufficient to avoid the regulatory proscription. Assuming that the regulation could have genuinely been found to be unclear as to a "sales commission," examination of *DiRocco* and *Robertson* and particularly *Connell* should have led RSC to the conclusion that the receipt of such percentages was included within the purview of the regulation by virtue of Departmental precedent. Only by the gambit of searching for a reference to a "sales commission" or "sales agency" within the regulatory definition and finding none does RSC claim that the regulation was lacking clarity.[15]

RSC also argues that the rationale of the court in *Runnells* v. *Andrus*, 484 F. Supp. 1234 (D. Utah 1980), "mandates prospective application of the *Doe* doctrine" (RSC Statement of Reasons at 18). *Runnells* concerned a filing service's use of rubber stamps to impress their clients' siguatures on lease offers and whether such practices required submission of statements of agency authority. The court applied the standards set forth in *Retail, Wholesale, supra.* It noted that the decision being appealed had been one of first impression before the Board and that the BLM practice on which the appellant had relied was based on this Board's decision in *Mary I. Arata*, 4 IBLA 201, 78 I.D. 397 (1971), in which we had approved the use of stamped signatures by offerors when intended as their signature. Regarding the fourth criterion in *Retail, Wholesale*, the court stated that the burden imposed by the Board's decision being appealed amounted te a "penalty for failing to anticipate that the IBLA would overrule prior BLM practice." *Id.* at 1238. The court also distinguished the case before it from *Robertson* v. *Udall, supra*, on the basis that in *Robertson* "there was much more than technical non-compliance with lease offer regulations; there was an attempt to rig the public drawing for simultaneous lease offers with collusive filings." *Id.* at 1239. In contrast, the court noted, *Runnells* involved no allegation of bad faith, no dispute whether the siguature had been affixed with the consent of the appellant, and no question whether he was the sole party in interest te his offer. *Id.*

The present case is quite different. Even assuming that *Doe* was a case of first impression in that a "sales commission" had not been previously ruled upon, the result was not an abrupt departure from, or overturning of, any prior rule, but rather the application of previous rules to cover the device created by RSC in establishing a business arrangement by which it received a share of its clients' income from their leases rather than an ownership interest in their leases. Under the guise of a fee for its services, RSC effectively obtained a chance to win a percentage of the value of leases awarded while using its clients' money for entry fees. If it entered several of its clients' names for the

[15] RSC points to the promulgation of 43 CFR 3112.6-1(c)(1) (1981), now 43 CFR 3112.5-1(b)(1) (1984), as finally providing the "express guidance * * * which would have justified retroactive application of the *Doe* doctrine" (RSC Statement of Reasons at 13). The entire regulation is a cedification of numerous decisions of this Board pertaining to qualified applicants and multiple filings, although citations to specific decisions were not generally noted in the preamhles when the proposed and final regulations were published. *See* 44 FR 56176 (Sept. 28, 1979); 45 FR 35156, 35160 (May 23, 1980). Given that the particular provision appears to be in part based on our decisions concerning RSC clients, RSC's point regarding the regulation begs the question. It essentially asserts that the decision in *Doe* could not be applied te any RSC client until promulgated in a regulation. The issue in *Doe* was whether the sales agency and commission provision of the RSC contract was within the language of the regulation then in effect. As we have discussed, the same issue is implicitly part of the present appeal. Any issue as to "clarity" concerns the language of that regulation. Just as we found in *Doe* that RSC held an interest in its client's oil and gas lease offer as that term was defined by a previously promulgated regulation, so also we have found that the same provision in RSC's contract with Norbert Albrecht gave it an interest in his lease offer.

same parcel, it would increase its chance of ultimately receiving a "sales commission." Furthermore, the fact that a parcel, such as the present one, was highly desirable and would receive numerous offers because of the likelihood of striking oil or gas encouraged the filing of as many clients' names as possible, each entry increasing RSC's chances of benefiting while necessarily decreasing those of the individual clients. Such a system of benefits was precisely the purpose of the schemes discussed earlier, only in those cases the aim was to acquire ownership of the lease itself so that profit could be more directly derived from its sale.

Nor, as already discussed, was there any practice, procedure, rule, or decision on which RSC could have relied. RSC, nevertheless, now seeks to portray itself as having operated under a reasonable and good faith intorpretation of the regulations and Departmental decisions and, as previously noted,[16] reasonable and good faith conclusions reached by its attorney. We have, of course, no way of knowing the research or thought processes engaged in by RSC's attorney, or what advice he gave his client, or whether it was followed. Nor is it relevant. It is not our concern whether RSC's contract was drafted and the decision made not to indicate RSC's interest on its clients' DEC cards based on an inaccurate, and perhaps naive, sincere opinion that the regulation and Departmental decisions did not apply, or out of a desire to enrich itself by circumventing Departmental controls to hide its interest in order to pursue the type of scheme at which others had failed. Questions of reasonableness and good faith must be dealt with in an objective manner in which we assume that the reasoning presented to us in arguing that RSC's contract provision was outside of the regulation and Departmental decisions was also its justification for acting as it did at the time. We have found these arguments to be woefully inadequate. Other than the fact that a "sales commission" or "sales agency" is not expressly mentioned in the regulatory definition, RSC has not pointed to any language in the regulation that is ambiguous or unclear or otherwise supports its claim that the benefits it received from its clients were not encompassed within the definition. Its presentation of Departmental decisions has ignored many of the relevant precedents, and it has distorted the holdings and analysis in the decisions it has discussed. Consequently, we can find no basis on which to conclude that RSC operated under a reasonable and good faith interpretation of the regulations.

Nor can RSC's clients be considered innocent parties who would be unfairly burdened by the judicial cancellation of their leases. RSC's clients, like all citizens, are chargeable with knowledge of duly promulgated regnlations. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947). In addition, final Departmental decisions,

[16] *See* note 12, *supra*.

including the decisions of this Board, are published and indexed and members of the public are properly charged with constructive notice of them. *See* 5 U.S.C. § 552(a)(2) (1982). RSC's clients knowingly and willingly executed a contract with RSC which created an interest in RSC in each lease obtained by them pursuant to an offer filed by RSC in their name. Each, in addition, signed or authorized RSC to sign on their behalf the statement on the DEC by which they asserted they were the sole party in interest in the offer and any resultant lease. Thus, each client, having created an interest in RSC, is cbargeable with knowledge that the representation they certified to BLM was false, and they cannot disavow the consequences of their acts. *See Antonio DiRocco, supra.* If, in fact, they have been misled by representations made by RSC, they must look to RSC to make them whole and not expect the Department to be the guarantor of their private relationship.

The burden placed on RSC's and Raymond Albrecht's interests will, of course, be that, if a judicial suit is successful, their interests will be cancelled. However, this consequence will not be a judicially imposed burden, but rather the consequence of knowing violations of the regulations requiring disclosure of interests. Appropriately, in this case the burden will fall upon only the interests of RSC and its client. Any bona fide purchaser of interests from Albrecht would be protected by application of 30 U.S.C. § 184(h)(2) (1982). Thus, claims by RSC as to the chaotic effect and uncertainty of clouds on titles of leases created by "retroactive" application of *Doe* are specious. Only RSC and its clients will be affected.

Equally specious are claims that, contrary to the language in *Safarik*, the result of a judicial suit te cancel interests will be the forfeiting of RSC's and its clients' interests to the benefit of other private parties. To the contrary, under the controlling statute, 30 U.S.C. § 184(h)(2) (1982), the cancelled interests must be competitively sold to the highest bidder. Since the winning bidder will presumably pay fair market value for the cancelled royalty interests, they will not receive a windfall. Rather, the real beneficiary will be the Federal Government from which the interests were fraudulently acquired in violation of the law.

Because we have determined that questions of retroactive application of legal rules provide no basis for restraining BLM from pursuing its proposed judicial action, we turn to the arguments presented on behalf of Raymond Albrecht that his interest should not be subject to cancellation. They are, first, that under 30 U.S.C. § 184(h)(2) (1982) he is a bona fide purchaser and, second, that even if not a bona fide purchaser, under 30 U.S.C. § 184(g) (1982), the interest he holds is not subject to cancellation for 2 years. Due to the 5-year delay caused by the protests and appeals described above, any issue presented in regard to the latter statute is now moot. Therefore we will address only the issue of whether Raymond Albrecht is entitled to protection under the bona fide purchaser provision.

In relevant part, the statute provides that the Government's right to cancel or forfeit leases "shall not apply so as to affect adversely the title or interest of a bona fide purchaser of any lease, [or] interest in a lease * * * which * * * was acquired and is held by a qualified person" (30 U.S.C. § 184(h)(2) (1982)). No definition is provided for determining who qualifies as a bona fide purchaser, but, in the controlling case on the statute, it was found that the legislative intent was "to apply the general common law definition of bona fide purchaser." *Southwestern Petroleum Corp.* v. *Udall*, 361 F.2d 650, 656 (10th Cir. 1966), *aff'g, Southwestern Petroleum Corp.*, 71 I.D. 206 (1964). Consequently, it was held that for a party to qualify as a bona fide purchaser under the statute "he must have acquired his interest in good faith, for valuable consideration, and without notice of the violation of the departmental regulations." *Id. See Winkler* v. *Andrus*, 614 F.2d 707 (10th Cir. 1980).

The chief issue regarding application of the bona fide purchaser statute to Raymond Albrecht is whether, because he inherited his current intorest, he qualifies as a "purchaser." Appellant argues that the use of "acquired" in the above quotation from *Southwestern Petroleum Corp.* and in *Winkler* v. *Andrus, supra*, as well as in 43 CFR 3108.4 (1984), indicates that the application of the statute is not limited to those who purchase their interests. We do not find that the use of "acquired" in these contexts was intended to expand the application of the statute. The standard rule is that heirs and devisees are not "purchasers" within the application of bona fide purchaser statutes but are "volunteers" to their interests. *See Lykins* v. *McGrath*, 184 U.S. 169, 173 (1902) (quoting *Devlin on Deeds* § 813); IV *American Law of Property* § 17.10 at 563 (1952). Therefore, we find that the bona fide purchaser provision of 30 U.S.C. § 184(h)(2) (1982) does not apply to Raymond Albrecht. The interest presently held by Albrecht is properly subject to cancellation.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1 (1985), the decision appealed from is affirmed.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

WILL A. IRWIN
Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

BLACKHAWK COAL CO. (ON RECONSIDERATION)

92 IBLA 365 **Decided *July 1, 1986***

Request for reconsideration of au order dated February 25, 1986, and for a supplemental order directing a refund.

Petition granted; refund ordered.

1. Accounts: Refuuds--Federal Oil and Gas Royalty Management Act of 1982: Generally--Mineral Leasing Act: Royalties

If the Director, Minerals Management Service, erroneously refuses to suspend a decision regarding payment of additional royalties and requires a mineral lessee to pay the disputed royalty instead of furnishing a bond, the amount actually paid was "not required * * * by applicable law" under 43 U.S.C. § 1734(c) (1982), and may bo refunded under authority of that provision.

2. Appeals--Rules of Practice: Appeals: Dismissal

An appeal does not become moot simply because the appellant has complied under protest witb tbe decision from which the appeal was taken. An appeal is properly dismissed as moot only if the Board can provide no effective relief.

APPEARANCES: Hugb C. Garner, Esq., Salt Lake City, Utah, for appellant; Peter J. Schaumberg, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

On May 7, 1985, the Director, Minerals Management Service (MMS), denied a request by Blackhawk Coal Co. (Blackhawk), that a demand letter for payment of royalty with respect to coal leases U-058184 and SL-029093-046653 be suspended pending appeal. Blackhawk had offered to post a bond in lieu of payment pending a final determination of the issues on appeal. By order dated February 25, 1986, this Board reversed the Director's decision, citing *Marathon Oil Co.*, 90 IBLA 236, 93 I.D. 6 (1986). That decision articulated the principles which govern the exercise of the Director's discretion under Departmental regulation 30 CFR 243.2, which authorizes him to suspend compliance with an order when an appeal is taken, and states that this may be done "upon determination, at the discretion of the Director * * *, that such suspension will not bo detrimental to the lessor and upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage." In *Marathon*, the Board concluded that the Director erroneously denied a stay under the above-quoted regulation because he made no reasoned finding that the stay would be detrimental to the lessor. Further, it was found that a stay should be granted where the lessee is faced with a threat of a irreparable injury if the stay is not granted, and where it appears that the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and it does not appear from the record that a stay is contrary to the public interest. In our February 25 order in Blackhawk's appeal, we found the record did not show that an indemnity bond would be inadequate to protect the public interest.

On March 13, 1986, Blackhawk requested this Board to issue an order entitling it to an immediate refund of the amount already paid, conditioned upon the posting of a bond in that amount. When appellant filed this request, further action seemed unnecessary, because no other action would be consistent witb this Board's reversal of the Directer's order. It had already been determined that the Director erroneously denied appellant's request for a suspension. From this ruling, it necessarily follows that the Director had erroneously collected appellant's money. His duty to refund that money became executory upon issuance of our order.

However, more than one month after the issuance of our order, MMS filed a request for reconsideration, and stated its opposition to appellant's request for a supplemental order. MMS states that Blackhawk's money has been deposited into the treasury as miscellaneous receipts and distributed to the State and the reclamation fund in accordance with 30 U.S.C. § 191 (1982). MMS correctly observes that once money is so deposited, an agency must have authority from Congress to withdraw it. MMS contends that no such authority exists. Because this new argument raises an issue as to the Director's authority te comply with our previous order, we find that reconsideration is warranted under 43 CFR 4.21(c) in order te consider this issue.

[1] MMS acknowledges that specific statutory authority governing the "refund of disputed royalties deemed to be overpaid" is set forth at 43 U.S.C. § 1734(c) (1982), which provides as follows:

> 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 dispesition 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, upen application or otherwise, may cause a refund to be made from applicable funds.

Contrary to MMS' argument, however, this provision undeniably authorizes MMS te refund Blackhawk's money. Our order dated February 25, 1986, constituted the Department's final determination that the Directer's denial of a suspension was improper, and from this ruling, it follows that the collection of appellant's royalty was not proporly required by any applicable law or Departmental regulation at that time.

MMS contends that no refund can be made until the Department finally determines whether appellant is liable for the disputed royalties. In making this contention, MMS confuses two discrete issues. The issue before us is not whether appellant is liable for the royalty; the issue is whether appellant was properly required to pay the disputed amount instead of posting a bond. We clearly ruled that this collection was improper. We therefore hold a refund is authorized by 43 U.S.C. § 1734(c) (1982).

[2] MMS seeks te distinguish Blackhawk's appeal from *Marathon*, arguing that Blackhawk has already paid the disputed amount while Marathon has not. MMS contends that since appellant has paid the disputed royalties, the "pay pending appeal" issue is moot. This argument miscomprehends the concept of mootness in the consideration of an appeal. An appeal does not become moot simply because the appellant has complied under protest with the decision from which the appeal was taken. An appeal is properly dismissed as moot only if the Board can provide no effective relief. For example, in *Utah Wilderness Association*, 91 IBLA 124 (1986), the Board dismissed an appeal as moot because the drilling activity against which the appeal was directed had already taken place. Reversal of the decision under appeal would have provided no relief and any action by the Board would have been "an exercise in futility" *Id.* at 130. The circumstances of this case are quite opposite.

Next, MMS cites the hardship it would suffer in refunding appellant's royalties. Because the royalty has been deposited in the Treasury and distributed pursuant to 30 U.S.C. § 191 (1982), MMS contonds that a refund would require recouping from the State of Utah its 50-percent share of these royalties. If MMS is required to take similar action in other cases where royalties have been paid under protest, "many more millions of dollars" would have to be recouped from both Federal and State treasuries as well as from Indian tribes and allottees.

MMS' characterization of these difficulties cannot be taken at face value. MMS makes no effort to quantify the number of like refunds which would have to be granted, but the number of appeals to this Board has not boen overwhelming. Unappealed decisions of the Director denying stays constitute final action on that issue, even though the action might be erroneous. *See* 43 CFR 4.410. No refunds are required for unappealed cases. *See Shaw Resources, Inc.*, 79 IBLA 153, 180, 91 I.D. 122, 137 (1984). Furthermore, these foreseeable difficulties could have been easily avoided if MMS had made its determination consistent with 30 CFR 243.2. In weighing the harm to the lessee against that to the lessor as required by *Marathon Oil Co., supra*, we may properly discount the harm that MMS has caused itself through its failure to properly interpret or administer regulations it has promulgated.

Therefore, pursuant to the authority delegated te the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, MMS' petition for reconsideration is granted, our prior order sustained, and MMS is ordered to immediately refund $4,639,939.95, conditioned upon

Blackhawk's posting a bond in such amount, pending resolution of all issues presently on appeal before the Director.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

R. W. MULLEN
Administrative Judge

UNITED STATES *v.* ELMER H. SWANSON, LIVINGSTON SILVER, INC.

93 IBLA 1 Decided *July 14, 1986*

Appeal from a decision of Administrative Law Judge Robert W. Mesch declaring 16 millsite claims valid in part and void in part in mining contest ID 13351, consolidated with judicial remand of United States v. Swanson, 34 IBLA 25 (1978) (supplementing United States v. Swanson, 14 IBLA 158, 81 I.D. 14 (1974)).

Administrative Law Judge's decision affirmed as modified in part and reversed in part; United States v. Swanson, 34 IBLA 25 (1978), modified.

1. Millsites: Generally--Mining Claims: Millsites--Rules of Practice: Appeals: Burden of Proof

Where the Government has presented evidence that various dependent millsites are not being used or occupied for mining and milling purposes, the Government has established a strong prima facie case of invalidity, as such use or occupancy is a prerequisite te the validity of a millsite claim under 30 U.S.C. § 42 (1982). Upon presentation of such evidence, the burden shifts to the millsite claimant to affirmatively establish that the claim is used or occupied for mining and milling purposes.

2. Millsites: Generally--Millsites: Dependent--Millsites: Determination of Validity--Mining Claims: Millsites

In order to determine whether a dependent millsito, which has not been actually used for mining and milling purposes for a significant period of time, has been "occupiod" within the meaning of 30 U.S.C. § 42 (1982), a number of factors must be considered, including the validity of any associated unpatented mining claim, the extent of the reserves on any patonted claim, the length of time the claim has not been used and the claimant's explanation for the failure to use the claim for mining or milling purposes during this period.

3. Millsites: Generally--Millsites: Determination of Validity--Mining Claims: Millsites

While the existonce of pumping stations and other works necessary for use in connection with either mining or milling operations shows a valid appropriation under 30 U.S.C. § 42 (1982), a millsite claim which contains only ditches or pipes for conveyance of water is not a valid appropriation of the land under the millsite law. Prior to the adoption of the Federal Land Policy and Management Act of 1976, such use would establish a right-of-way under 30 U.S.C. § 51 (1970), but is not a qualifying use under 30 U.S.C. § 42 (1982).

4. Millsites: Generally--Millsites: Determination of Validity--Mining Claims: Millsites

Where dependent millsites are claimed as a repository of tailings, it is necessary for the claimant to show that the tailings possess economic value and have a direct relationship with the vein or lede with which the millsites are associated.

5. Millsites: Generally--Millsites: Determination of Validity--Mining Claims: Millsites

While the United States has the authority to limit a millsite claimant to the land actually used for mining and milling purposes, examination as to actual use should generally be limited to each 2-1/2 acre aliquot part of the location.

APPEARANCES: Erol R. Benson, Esq., Ogden, Utah, for the Forest Service, U.S. Department of Agriculture; L. J. Ettinger, Esq., Challis, Idaho, for Livingston Silver, Inc., and Elmer H. Swanson.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

This decision involves two separate proceedings relating to 23 millsites owned by contestees Livingston Silver, Inc., and Elmer H. Swanson within the exterior boundaries of the Sawtooth National Recreation Area (SNRA), established by the Act of August 22, 1972, 86 Stat. 612, 16 U.S.C. § 460aa (1982). In order to correctly understand the origin of the proceedings involved we will, initially, briefly review the chronology of events leading to this decision.

The original decision in *United States* v. *Swanson*, 14 IBLA 158, 81 I.D. 14 (1974), involved an appeal by the Forest Service, Department of Agriculture, from a decision of Administrative Law Judge Robert W. Mesch dismissing a contest complaint filed against seven millsites.[1] These were denominated as the High Tariff, Clara, Little Falls, Livingston, May, Trensvalle, and Deadwood, and formed the core millsites in a total group of 23, on which Swanson and Livingston Silver, Inc., had constructed substantial improvements. In Judge Mesch's decision of March 7, 1973, he had concluded that the High Tariff, Clara, and Little Falls millsites were valid,[2] and further dismissed the contests against the other four millsite claims even though he was unwilling to make an affirmative finding that they were valid with respect to all of the land included therein because of

[1] While this decision also dealt with an unsuccessful cross-appeal filed by Swanson from a determination that three lode mining claims were null and void, this aspect of the case is not relevant to the proceedings herein.

[2] Whether or not it is proper to declare a millsite "valid" as opposed to merely dismissing the complaint is a matter which is examined later in the text.

inadequacies in the evidence presented by both sides.[3] The Forest Service appealed as to all seven millsites.

In its decision, the Board rejected the Forest Service's contention that all of the millsite claims were invalid under the rule enunciated in *Charles Lennig*, 5 L.D. 190 (1886), viz., in the absence of actual use of the land for mining or milling purposes, the claimant must show "an occupation, by improvements or otherwise, as evidences an intended use of the land for mining or milling purposes." *Id.* at 192. After recounting Swanson's testimony that he and other workmen had lived on the millsites while work was done to recondition the patented Livingston Mine and stockpile ore from the mine onto the millsites, the Board concluded:

> While there was testimony indicating that various non-mining activities were being engaged in and that only a minor amount of ore had been withdrawn from the Livingston Mine, there was still adequate evidence of mining and storage activity demonstrating good faith use and occupation for mining and milling purposes.
>
> Appellant invested a considerable sum of money in acquiring his mining and milling properties and spent a number of years devoting labor and means to reconditioning the Livingston Mine and extracting and stockpiling millable ore. In 1972, appellant entored into a lease-purchase agreement with Mine Developers, Inc., in order to further exploit the worth of his mine and millsites. The Livingston Mine is now operative and the flotation mill above Jim Creek on the Trensvalle millsite has been put into production. The Judge concluded, and we agree, that the evidence demonstrated a good faith intention to use *some* of the land within the contested millsites for mining and milling purpeses. [Italics in original.]

14 IBLA at 170-71, 81 I.D. at 20.

The Board did, however, reverse Judge Mesch's decision to the extent that he had dismissed the complaint as to all millsite claims because of the Board's conclusion that the seven claims encompassed an area substantially in excess of what was needed for mining or milling purposes given the evidence of record. The Board noted:

> While all of the claims may not be held valid as presently located, we do not believe that they should bo invalidated *in toto* since there are areas within each of the millsites that have been used or occupiod for mining and milling purposes. Neither do we deem it feasible to select the millsite areas that the contestee may properly retain. The contestee is therefore allowod 90 days from receipt of this decision within which to amend his millsite locations te bring them into compliance with the law as we have discussed it.

14 IBLA at 181, 81 I.D. at 25.

Swanson failed to submit any proposed amendment of his millsite locations.[4] Eventually, on February 14, 1977, the Forest Service submitted its recommendation that the Higb Tariff, Clara, Little Falls, and Livingsten millsites be declared invalid in their entirety and that

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[3] Thus, Judge Mesch found:

"I am not willing, however, to conclude that the Livingston, May, Trensvalle and Deadwood mill sites are valid with respect to all of the land included within the mill sites. The evidence presented hy the Forest Service does not support the assertion that more land is included within these four mill sites than is necessary for the storage of ore. However, the evidence as a whole is not adequate to sustain the conclusion that all of the land within the four mill sites is necessary for mining or milling oporations." (Decision at 13).

[4] Swanson did, however, attempt to obtain judicial review of the 1974 Board decision. This suit was dismissed by the District Court for the District of Idaho on the grounds *inter alia*, that the Board decision was not final by its own terms. *See Swanson* v. *Morton*, Civil No. 4-74-10 (Dec. 23, 1975).

the May, Trensvalle, and Deadwood millsites be declared invalid as to the south 620 feet of each. Swanson filed no response to this recommendation. Accordingly, by supplemental decision of February 14, 1978, reported at 34 IBLA 25, the Board adopted the Forest Service's recommendation. Swanson then sought judicial review of this decision.

While the Board was considering the Forest Service's recommendation, the Forest Service caused another contest complaint to be issued seeking a declaration that the remaining 16 millsito claims were invalid. *See* Contest IDAHO 13351. While we will examine this contest proceeding in some detail *infra*, suffice it for the present to note that by decision of April 27, 1982, Administrative Law Judge Mesch dismissed the contest as to various parts of 15 of the 16 millsites challenged, and found the remaining millsite null and void. The Forest Service duly appealed to this Board. In addition, Livingston Silver, Inc., and Swanson filed cross-appeals, contending that to the extent Judge Mesch failed to grant them all of the acreage in all of the millsites, the decision was in error.

On June 3, 1982, Chief Judge Marion J. Callister of the U.S. District Court for the District of Idaho issued his decision on the Swanson appeal pending before him. *Swanson* v. *Andrus*, Civil No. 78-4045. While Judge Callister agreed with the Board that it appeared that excess lands had been included in the original seven millsite locations, he disagreed with the supplemental opinion which granted Swanson only the area immediately adjacent to the mill (which was located in the north part of the May, Trensvalle, and Deadwood millsites). Thus, he noted:

> In accepting the Forest Service's proposal which reduced the mill sites to immediately around the mill, it appears that no consideration was given to or provision made for living quarters, offices, etc., clearly propor uses for mill site claiins. The report of the Forest Service mining engineer was to the effect that "the level of legitimate mining and milling activity conducted by E. H. Swanson since 1972 cannot justify the current size and shape of the High Tariff, Clara, Little Falls, Livingston, May, Trensvalle and Deadwood millsites." While there might be some merit to that statement, the proposal submitted left no provision for structures other than the mill itself. Such a complete deletion of the mill sites which have existing structures which would provide for the work force for the mill is clearly improvident. The Court would conclude that the complete invalidation of the High Tariff, Clara, Little Falls and Livingston mill sitos was arbitrary, capricious and unsupported by substantial evidence considering tbe record as a whole. The Board's decision should be reversed and remanded for a finding as to what area is necessary for use from those mill sites.

Memorandum Op. at 5. Judge Callister did, however, agree with so much of the Board's decision as rejected the south 620 feet of the May, Trensvalle, and Deadwood millsites, finding that adequate provision had been made for the storage of ore for winter use. *Id.* Accordingly, he affirmed the Board's determination as to these three millsites, but remanded the case "for a finding of the amount of land actually necessary for milling operations within" the High Tariff, Clara, Little Falls, and Livingston millsites.

Thus, at the present juncture, the Board has under consideration the remand by Judge Callister involving the High Tariff, Clara, Little Falls, and Livingston millsites, the appeal by the Forest Service of Judge Mesch's decision dismissing the contest against parts of 15 of 16 additional millsite claims, and the cross-appeal filed by Swanson and Livingston Silver. For purposes of our consideration, we will first examine the appeals from Judge Mesch's 1982 decision.

At this point, it is helpful to the understanding of the factual background of this case to quote from Judge Mesch's summary of the testimony adduced in 1981. Thus, Judge Mesch noted:

> Three of the claims, i.e., the Tram Terminal, Livingston [5] and Jim Creek, were located in 1924 by a predecessor-in-intorest to the present claimants. Seven of the claims, i.e., the Annex, Tramway, Tramway No. 2, Tramway No. 3, Tramway No. 5, Tramway No. 6 and Tramway No. 7, were located in 1963 by Elmer H. Swanson, one of the contestees. Three of the claims, i.e., the Tramway No. 8, Tramway No. 9 and Tramway No. 10, were located in 1968 by Swanson. The remaining three claims, i.e., the Park, Parker and Rene, were located in 1971 by Swanson.
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> * * * * * * *
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> By a receiver's deed executed in 1960, Swanson obtained title to seven patented lode claims, 28 unpatented mining claims, four millsite claims, and a tunnel site claim; together with all dwelling houses, buildings, tramways, powerplants, transmission lines and other improvements used in connection with mining and milling operations on the conveyed claims. The deed recites that Swanson paid $51,500 for the conveyance of the property. Three of the four millsite claims named in tbe deed are involved in this proceeding, i.e., the Tram Terminal, Livingston and Jim Creek. Following his acquisition of tbe property, Swanson located the other 13 millsite claims involved in this proceeding and seven other millsite claims that were involved in a previous contest proceeding. The previous proceeding will be discussed later. The 20 new millsite claims were located to cover the dwelling houses, other buildings and improvements, and tailings pends; all of which had been placed on unappropriated public domain by the previous owners of the property. Swanson asserts that the millsite claims were located because the Forest Service cancelled a permit authorizing the use and occupation of the land. In 1975, Swanson executed a deed, that bas not been recorded, conveying the property he acquired in 1960 and tbe claims he subsequently located to Livingsten Silver, Inc., one of the contestees. Swanson is a shareholder and president of the corporation.
>
> The improvements on the property are commonly known and referred to as the Livingston Mill. They were used in connection with a group of lode claims covering what is known as the Big Livingston Mine, and pessibly in connection with a group of lode claims covering what is known as the Little Livingston Mine. The claims covering tbe Big Livingsten Mine were located in 1882. Some rich lead and silver ore was repertedly shipped from tbe mine by packtrain. In 1922, a road was constructed te the mine and a 200-ten per day mill, a 3-mile aerial tram, and a hydroelectric powerplant were installed. By 1923, the property was in production. Production was fairly continuous until 1930. After 1930, the mine changed ownership several times; mining and milling equipment was removed, reinstalled, and some of it removed again. While preduction figures are not available for all years, it appears that between 1931 and 1951 the property preduced at least 4,763 tens of ore. In 1951 and 1952, 60,000 tons of old mill tailings were rerun through a new mill on the property. Again, while production figures are not available for all years, it appears that there was little production from the property after 1952. The

[5] This "Livingston" millsite is occasionally referred to as the "Big Livingston" to distinguish it from the other "Livingston" millsite, occasionally referred to as the "Little Livingston" which was the subject of the 1974 decision.

claims covering the Little Livingston Mine were located in 1884. Production records do not differentiate between the Big and Little Livingston Mines. It has been assunod that part of the early ore shipments credited to the Big Livingston prohahly came from the Little Livingston Mine.

There are two mills on the property. One is the old mill and it is essentially nonexistent. It is situated on the Tram Terminal claim, which is involved in this proceeding. The other is the "new" mill and it is in operating condition. It was apparently constructed to process the tailings in 1951 and 1952. It is situated principally on the Trensvalle claim with a small portion extending onto the Deadwood claim. These two millsite claims were involvod in the previous contest proceeding. Since Swanson acquired the property in 1960, the "new" mill has not been operated except for a 30-day test run in 1972. Swanson does, however, have 1,500 tons of ore on the property waiting to be milled. He does not want to mill it until he has resolved environmental disagreements with the Forest Service as to where the tailings should be deposited.

Swanson has been involvod with the property since at least 1951 and 1952 when the tailings were run through the "new" mill. He was on the board of directors of the company that held the property and was at one time the president of the company. He had been putting up about 25 percent of the cash for the company to operate. The company encountered severe financial problems when he withdrew because of disagreements over methods of operation. This apparently resulted in Swanson's obtaining title to the property by the receiver's deed in 1960.

Swanson's efforts over the past 22 years have been directed to the location of new or protective claims, the rehabilitation of some of the workings in the Big and Little Livingston Mines, the exploration for and development of mineralization in and around the two mines, the improvement of roads used in connection with the mines and the millsite area, the repair and reconstruction of some of the improvements on the millsite claims, the negotiation of agreements covering the operation of the property by various mining companies, and the fighting of adverse actions by tbe Forest Service. It is clear that Swanson has invested a good deal of time and money in attempting to place the mines and the millsite area in operating condition.

Swanson holds 23 millsite claims that are allegedly necessary for mining and milling operations in cennection with the Big and Little Livingston groups of mining claims and for the reprocessing of old tailings found on certain of the millsite claims. Each of the millsite claims covers approximately 5 acres of land. Seven of the millsito claims were involved in the previous contest proceeding. Sixteen are involvod in this proceeding. There is some disagreement between Swanson and a Forest Service mineral examiner as to which improvements are on which claims. I accept a map prepared by the Forest Service mineral examiner (Ex. No. 4) as correctly depicting the location of the improvements. The presently contested millsite claims, running from west to east, contain the following improvements and/or will serve, according to Swanson, the following functions in mining or milling operations:

The Park claim has a small concrete dam across Jim Creek, which was constructed about 7 or 8 years ago by Swanson. It replaces an earlier earthen and timber dam. There is a wooden bex about 20 feet long to catch gravel bofore it goes through a pipeline into a turbine. The pipeline to tbe turbine is in the process of being constructed. It will replace an earlier dilapidated wooden pipoline. Swanson anticipates that the turbine will be used to develop hydroelectric pewer as a supplement for the present diesel pewer at the "new" mill. The improvements cover a fractional pertion of the millsite claim.

The Parker claim has a ditch for the new pipeline from the dam on the Park claim to tbe Turbine on the Rene claim. The improvements cover a fractional pertion of the millsite claim.

The Rene claim has an old turbine, a generator and a control box. The equipment has not been operated since Swanson acquired the property. There is a ditch for the new pipeline from the dam on the Park claim to the turbine. There is an old powerline running from the generator to dwelling houses on previously contested millsite claims. There is a road that provides access to the turbine. There are springs and a ditch to carry water from the springs to an earthen dam on the Tramway No. 6 claim. The improvements cover a fractional portion of the millsite claim.

The Tram Terminal claim has the old mill and a portion of a small tailings pile. The tailings came from oporations at the old mill. The old mill is virtually non-existent. It does, however, have functional wooden storage bins that can hold about 500 tens of ore. There is salvageable lumber in the mill. Swanson anticipates that the bins will be used te store high grade ore. He also anticipatos that the tailings will be run through the "new" mill. The mill and the tailings cover a fractional portion of the millsite claim.

The Tramway No. 7 claim has a small pond formed by an earthen dam on the Tramway No. 6 claim that holds culinary water for the houses. The claim also has the old powerline from the generator to the houses, a portion of the small tailings pile foimd on the Tram Terminal claim, another even smaller tailings pile, the ditch from the springs on the Rene claim to the dam on Tramway No. 6 claim, and a road to the turbine. Swanson anticipates that the water from the pond will be used for both culinary purposes and as a source of warmer water for use in the mill during the wintertime. He also anticipates that both tailings piles will bo run through the "new" mill. The improvements and the tailings cover a fractional portion of the millsite claim.

The Tramway No. 6 claim has a small earthen dam that fonns the pond on the Tramway No. 7 claim, a pipoline that goes to the houses, a pipeline that goes to the "new" mill, presumably, the old powerline from the generator to tbe houses, a road that provides access to the turbine, another unidentified road, and a corner of one of the houses. The improvements cover a fractional portion of the claim.

The Livingston and Jim Creek claims are covered in part by a tailings pond and an unidentified road. The tailings pond resulted from oporations at the old mill. Swanson anticipates that the tailings will be run through the "new" mill. He also anticipates that portions of the two claims will be used to leach material from the Deadwood mining claim which is a part of the Little Livingston group of claims. The tailings pond covers less than one-half of the Livingston claim and about two-thirds of the Jim Creek claim.

The Tramway No. 10 claim contains a road from the "new" mill. There are about 20 tons of ore stored on the claim. The improvements cover a fractional portion of the claim.

The Annex, Tramway, Tramway No. 2, Tramway No. 3 and Tramway No. 5 claims are covered in part by a tailings pond and an unidentified road. The tailings pond resulted from running a portion of the tailings on the Livingston and Jim Creek claims through tbe "new" mill in 1951 and 1952. Swanson anticipates that the tailings will again be run through the "new" mill. The tailings pond covers about one-half of the Annex claim, about two-thirds of the Tramway claim, about one-half of the Tramway No. 2 claim and about one-third of the Tramway Nos. 3 and 5 claims.

The Tramway No. 8 and Tramway No. 9 claims are covered in part by a small tailings pond that apparently resulted from an overflow of the larger tailings pond on the Annex, Tramway, and Tramway Nos. 2, 3 and 5. There is also an unidentified road crossing the claims. Swanson anticipates that these tailings will again be run through the "new" mill. The tailings pond covers about one-third of the Tramway No. 8 claim and a small fraction of the Tramway No. 9 claim.

Swanson's present plans are te have the tailings on the Livingston and Jim Croek claims and the tailings on tbe Tram Terminal and Tramway No. 7 claims processed through the "new" mill with the resulting tailings boing deposited in a cleared area on the lower claims, i.e., the Annex, Tramway and Tramway Nos. 2, 3, 5, 8 and 9. He then wants to process the present tailings on the lower claims through the mill and return the material te the lower claims. After processing the tailings, he wants to mine and mill ore from the associated mining claims and deposit the resulting material on the lower claims.

Swanson does not have the financial resources to oporate the proporty and he has been attempting tbrough the years to negotiate an agreement with a mining company to process the tailings and mine and mill ore from tbe associated mining claims. He has not had any success, at least in recent years, in interesting a mining company in the operation of the property. He attributes this to the fact that the Forest Service has been contesting his claims since 1968 and to the fact that environmental problems have been encountered and are anticipated with the Forest Service and State agencies.

In 1967, Swanson filed an application for a patent covering seven of his millsite claims, i.e., the High Tariff, Clara, Little Falls, Livingsten, May, Trensvalle and Deadwood. The earlier Livingston claim is not the same as the Livingsten claim involved in this proceeding. The seven millsite claims are contiguous and are virtually surrounded on three sides hy the 16 millsite claims in this proceeding. They contain the "new" mill, the dwelling houses or camp, other buildings, a small portion of the tailings pond on the Livingston and Jim Creek claims and a small portion of the larger tailings pond on the lower claims, i.e., the Annex, Tramway and Tramway Nos. 2, 3, 5, 8 and 9.

Decision at 2-8.

As Judge Mesch recognized, it was unquestioned that if the mining claims associated with the millsites or the tailings ponds found on some of the millsites contained sufficient mineralization at the time of the withdrawal effected by SNRA and at the time of the hearing, at least some of the millsites were valuable and necessary for mining and milling operations. Accordingly, Judge Mesch reviewed, *in extenso*, the testimony relating te mineral values.

Government mineral examiner James J. Jones testified that he had taken a number of samples from two tailings deposits. On the extensive tailings deposit located on the Jim Creek and Livingston millsites a total of 27 samples were taken, while three more were taken from a much smaller area on the boundary between the Tram Terminal and Tramway No. 7 millsites. *See* Tr. 80–81, 103-04, Exh. 10. The samples taken from the Jim Creek and Livingston millsites averaged 2.63 ounces of silver and 3.24 percent lead per ton.[6] The three samples from the tailings found on the Tram Terminal and the Tramway No. 7 averaged 1.46 ounces of silver and 2.41 percent lead per ton. As Judge Mesch noted, Swanson admitted that because of oxidation only 50 to 60 percent of the values could be recovered (Tr. 13). At the average metal prices for July 1981 ($8.63114 per ounce silver, 40.985 cents per pound lead), each ton of tailings on the Jim Creek and Livingston millsites would have been worth $24.62, assuming 50-percent recovery. The samples from the Tram Terminal and Tramway No. 7 had a value of $16.17, assuming the same 50-percent recovery rate.[7]

A very large old tailings depesit is also found extending from tbe Annex, through the Tramway, Tramway No. 2, Tramway No. 3, Tramway No. 5, Tramway No. 8, and slightly impinging on the Tramway No. 9. Five samples were taken from this pond (Exh. H).

[6] Judge Mesch aggregated all 30 samples in his decision, with the result that the average values which he found where 2.526 ounces of silver and 3.16 percent lead per ton. *See* Decision at 12. Inasmuch as the deposits in question are clearly discrete, we feel that this was in error. The effect of Judge Mesch's approach was to understato slightly the values shown te exist on the Jim Creek and Livingston millsites and also to overstato the values present on the Tram Terminal and Tramway No. 7 millsites.

[7] Actually, there are two tailings deposits involved here. One is relatively substantial and straddles the boundary of the Tram Terminal and Tramway No. 7. The other deposit, quito limited in areal extent, is totally located on the Tramway No. 7. Paradoxically, the highest values of the three samples were found in the one sample taken from the small deposit, viz., 1.8 ounces silver and 3.25 percent lead per ton. However, inasmuch as that little deposit would clearly bo an insufficient basis upon which to show that the millsite was valuable for milling purposes, we have aggregated the values of the three samples (thereby effectively increasing the values for the larger deposit) for purposes of our analysis.

Reviewing the assay results, contestees' witness David Aro, a mining engineer, testified that, assuming the values were consistent throughout, the ore value would be approximately $15 per ten gross value (Tr. 149). Aro noted, "At that point you would have to review your milling costs very carefully and the nature in which those values were occurring, whether those mineral particles were oxidized, just how they occurred" (Tr. 149-50). Aro peinted out, however, that since milling the tailings would not require crusbing and grinding, costs would approximate between $5 and $7 per ton (Tr. 150).

With respect to milling costs, Swanson testified that, based on 21 years experience, they would be approximately $15 a ton for mined ore (Tr. 12). Judge Mesch noted, however, that there was no evidence in the record as to the costs of loading the tailings, transporting them to the mill, and marketing them. Decision at 13.

Finally, Judge Mesch took note of the values reputed to exist in the Big Livingston mine. Thus, an environmental assessment prepared in 1979 by a Forest Service mineral examiner had estimated that a 50,000 ton ore reserve existed on the Big Livingston mine with an estimated gross value of $3,750,250 at 1979 values (Exh. C at 11). Using July 1981 prices, the gross value had risen to $4,787,368. The average value would be $95.75 per ton. Noting that the evidence established that it would cost $20 a ton to mine and $15 a ton to mill, Judge Mesch computed the present net value of the 50,000 ton ore body at $3,037,500.

It is, of course, true that the Big Livingston mine is on patented ground. The importance of the Big Livingston mine to the instant case resides in the fact that, as Judge Mesch found, the best place to deposit the tailings would bo on the large tailings ponds stretching from the Annex to the Tramway No. 9.

We have recited at length the facts relied on by Judge Mescb, even though they are not in substantial dispute, because they are critical to our ultimate resolution of the appeal. At this point, however, it is helpful if we focus on the primary aspect of the Government's case and the basis for its appeal, *namely*, the failure of contestees to commence actual commercial milling operations over a period of the last 21 years.

[1] Judge Mesch notod that nonuse through the years was virtually the sole basis of the Forest Service's case. He recognized tbat such nonuse can constitute a prima facie case, citing *United States* v. *Zweifel*, 508 F.2d 1150 (10th Cir. 1975); *United States* v. *Hooker*, 48 IBLA 22 (1980); *United States* v. *Hess*, 46 IBLA 1 (1980). But, Judge Mesch apparently felt compelled by past Board precedents to treat such a prima facie case as inherently weak. Tbus, he quoted from *United States* v. *Hooker, supra*:

> "A case which is totally dependent upon the failure of a mining claimant to develop a claim [or presumahly to use a millsito], is, a weak case at best", and little evidence is required to overcome the presumption which arises from non-development or nonuse.
>
> The millsite claimants had the burden of overcoming the prima facie case created by the presumption. As I read *Hooker*, this could have been done by virtually any evidence

explaining the reasons for the nonuse of the millsites. The millsite claimants did not, as explained in *Hooker*, have the burden of establishing that the requirements of the law had been met and the millsite claims were valid at the time of the withdrawal and the time of the hearing, i.e., that a person of ordinary prudence would have been justified at both periods of time in occupying a part or all of the contested millsite claims with a reasonable expectation that the land was valuable and necessary for mining or milling operations.

Decision at 12. We believe that Judge Mesch has erred in this analysis as it applies to the facts of this case.

It is obvious that this Board's decision in *United States* v. *Hooker, supra*, has proved vexatious to a number of the Department's administrative law judges. In *Hooker*, the Board examined a statement of an administrative law judge advising a mining contestee tbat "[y]ou not only have to overcome whatever case they have, but even if you overcome the government's case, in addition to that you have to show that this is a valid, good claim, that you have a valid discovery under the mining laws." *Id.* at 26. The Board expressly rejected this statement as not in accord with the law. The Board declared:

[D]ismissal of a contest complaint does not determine tbe *validity* of the claim, but merely establishes that, as to the issues raised in the hearing, the mineral claimant has preponderated. Thus, in a hearing on a Government contest complaint, there is no requirement that a mining claimant show that the claim is *valid*; rather, the mineral claimant's burden is to preponderate on the issues raised by the evidence. [Italics in original.]

Id. at 26-27.

The Board's decision was premised on the distinction between a finding that a discovery exists and a finding that the claim is valid. In the normal Government contest which alleges that a mining claim is invalid by reason of the lack of discovery of a valuable mineral deposit, the factual dispute turns on the question of discovery. If the Government is successful and establishes that no discovery exists, the claim is *necessarily* invalid, since discovery is a prerequisite to claim validity. The converse, however, does not obtain. In other words, the fact that a discovery has been shown to exist does not *necessarily* establish the validity of the claim, since discovery is merely one element of a claim's ultimate validity.

This is particularly true where the issues joined at the hearing involve merely one aspect of discovery, *e.g.*, locatability or marketability. A case involving a 1980 placer location of pumice might well be initiated solely on the charge that pumice is a common variety mineral and as such was removed from location by the Common Varieties Act, § 3 of the Act of July 23, 1955, 69 Stat. 368, *as amended*, 30 U.S.C. § 611 (1982). If, at the hearing, the contestee showed by a preponderance of the evidence that the located pumice was actually "block pumice," and, as such, expressly excepted from the Common Varieties Act, the correct course of action would be to dismiss the contest complaint. It would *not* be proper te declare the claim "valid." Whether or not the block pumice was marketable or whether a prudent man would be justified in expending his time or effort in developing a paying mine had not even been examined. One could say that the claim was not invalid based on the evidence presented, but one could not say that the evidence demonstrated that the claim was valid.

Indeed, this was the essential holding of *United States* v. *McElwaine*, 26 IBLA 20 (1976), where we held it improper to invalidate a claim on the basis of the existence of excess reserves[8] where the contost complaint had only charged that there was insufficient quantity and quality of the mineral located to constituto a discovery. In that case, which involved a patent application, the Board did not find the claims valid but rather afforded the Forest Service 60 days in which te file an amended complaint.[9]

In retrospect, it is now clear that the sentence which we expressly rejectod in *Hooker* may have contained the seeds for subsequent confusion. As noted, it required a claimant to "show that this is a valid, good, claim, that you have a valid discovery under the mining laws." Our objection was focussed on only the first part of this analysis: the statement that a contestee must show that he had a valid, good claim. Unfortunately, it seems apparent that our decision was amenable to the interpretation that a claimant need never show that a discovery exists. This, we did not intend.

If the Government presents a prima facie case of no discovery, a claimant must overcome this showing by a preponderance of the evidence. But, as a matter of evidence, if the Government's case is solely dependent upon one element of discovery, *e.g.*, the locatability of the claimed mineral, the burden of preponderating is carried where the contestee presents probative evidence that the mineral is locatable under the mining laws sufficient to overcome the evidence presented by the Government. In such circumstances, the contestee need present no evidence that the mineral exists in sufficient quantity and quality to justify future labor and expenditures *unless* the Government has, itself, presented sufficient evidence on this point to put the matter in controversy. *See United States* v. *Pool*, 78 IBLA 215, 220 (1984).[10] But we never intended that, where the evidence puts the question of discovery in issue, the contestee need not overcome that showing.

This problem relating to the proper interpretation of *United States* v. *Hooker, supra*, was exacerbated in the instant case by the fact that claims involved herein were millsite claims. Judge Mesch adverted te

[8] The viability of a contest complaint based on a charge of excess reserves or, alternatively, on the charge that the land is not mineral in character is examined at length in *United States* v. *Oneida Perlite Corp.*, 57 IBLA 167, 88 I.D. 772 (1981).

[9] It should, of course, be noted that this Board has distinguished between the practical consequences which flow from a dismissal of a contest complaint which does not involve a patent application and one which does. *See United States* v. *Taylor*, 19 IBLA 9, 82 I.D. 68 (1975). Had no patent application been present in *McElwaine*, the Board would merely have dismissed the contest. It would not, however, have found the claims te be valid.

[10] It must be pointed out, however, that should the contest complaint allege the absence of sufficient mineralization and the contestee present sufficient evidence to show that the mineralization is, indeed, insufficient, the claim will be declared invalid even though the Government has presented no evidence at all on this point. *United States* v. *Pool, supra*.

this Board's holding in *United States* v. *Hess, supra,* that while evidence of nonproduction from a mining claim over a sufficient period of time is sufficient, by itself, to establish a prima facie case, such a case "is the weakest that the Government can establish" and "the assertion by a mining claimant of a reasonable justification for a nondevelopment would defeat the presumption." 46 IBLA at 9. The problem is that Judge Mesch implicitly assumed that the same analysis could be applied to millsite claims and accordingly held that little evidence was needed te overcome the presumption which arises from nondevelopment or nonuse of a millsite. Decision at 11-12. This is not correct.

The critical distinction between a mining claim and a millsite on this point arises from the nature of these disparate claims. By statute, a mining claim generally can be said to be valid when it embraces a discovery of a valuable mineral deposit. Having once made such a discovery, the claim can be held indefinitoly against the world so long as the annual assessment work is performed (30 U.S.C. § 28 (1982)), the recordation provisions are complied with (43 U.S.C. § 1744 (1982)), and a valuable mineral deposit continues to exist. The continued validity of the claim is, thus, not dependent upon actual production from the claim. This being the case, when the Government's prima facie case is based solely on the lack of production over an extended peried of time, little evidence is necessary to overcome the presumption of invalidity.

Millsites, however, proceed upon a substantially different legal basis. The statutery grant of nonmineral lands for millsites is expressly limited te land "used or occupied * * * for mining or milling purposes." 30 U.S.C. § 42 (1982). The essence of the millsite appropriation is *use* or *occupancy.* When the Government presents a prima facie case that the millsite has not been used or occupied for a significant poriod of time, this is not a weak prima facie case. Rather, it is akin to a prima facie case in a mining contest wherein the Government has presented substantial probative evidence that no valuable mineral deposit exists within the challenged location. This is a prima facie case which goes to the core of the claim's validity.

So, too, in the case of a millsite contost where the evidence presented by the Government is sufficient to establish a prima facie case that the land has not been used or occupied for mining or milling purposes, such evidence goes to the very heart of the millsite's validity. It goes without saying that such a prima facie case might be overcome by evidence presented by a contestee. But, when such a prima facie case has been presented, the contestee has an affirmative obligation to establish by a preponderance of the evidence that the challenged millsite claims are either used or occupied for mining or milling purposes. *See, e.g., United States* v. *Swanson,* 14 IBLA at 180, 81 I.D. at 25.

[2] A more difficult situation arises, however, where the Government's evidence merely establishes that the millsites were not used but arguably were, either in whole or in part, occupied for mining and milling purposes. While "use" under 30 U.S.C. § 42 (1982) necessarily implies present mining or milling activities, it has long been noted that land may be "occupied" under the statute even in the absence of present "use" of the land for mining or milling purposes. The question, of course, is how to determine the validity of a millsite claim if there is no present use.

As far back as *Charles Lennig, supra*, the Department held that, in the absence of actual use of the land for mining or milling purposes, the claimant must show "an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes." However, other Departmental decisions have also noted that "the mere intention to use land for mining and milling purposes some time in the future is not sufficient to validate a location." *United States* v. *Herron*, A-27414 (Mar. 18, 1957). As the Board suggested in *United States* v. *Cuneo*, 15 IBLA 304, 81 I.D. 262 (1974), "The concept of time also comes into play in considering the nonuse of the millsites." *Id.* at 324, 81 I.D. at 271. The Board continued:

> In considering the issue of occupancy of a millsite which is not being used, we must apply a test of reasonahleness to determine whether the period of nonuse demonstrates invalidity. Within this concept of reasonableness, factors in addition to time of nonuse are relevant, namely: the condition of the mill; the potential sources of ore to be run through the mill; the marketing conditions; the costs of operations, including labor and transportation; and all factors bearing upon the economic feasibility of a milling oporation being conducted on the site. [Footnote omitted.]

Id. at 326-27, 81 I.D. at 272-73.

Admittodly, since *Cuneo* involved an independent millsito the elements listed were directed primarily te that type of situation, and different elements would, we believe, properly be considered relevant for a dependent millsite: the validity of the claim, if unpatented (*United States* v. *Larsen*, 9 IBLA 247 (1973)); the extent of mineral reserves on a patented claim (*cf. United States* v. *Skidmore*, 10 IBLA 322 (1973)); the length of nonuse and the amount of time that might reasonably be expected to be consumed in putting the millsites to use. Included herein would be the reasonable extent of use consistent with the scope of foreseeable activities. *United States* v. *Swanson, supra.* A claimant's stated intent or his mere willingness to expend time and effort in developing one or more millsites cannot substitute for objective evidence that the purposes of the millsite law have been accomplished.

The dissent, while ostensibly bowing in the direction of weighing a multitude of factors, essentially argues that all of the millsites in issue are invalid solely because of the fact that in the 21 years which Swanson has owned the claims production from the mill has never occurred, save for a single 30-day test run in 1972 (Tr. 11-12). While we agree that such a period of time is a propor component of the test we must apply, we cannot accept the view that it should be, by itself, conclusive, particularly in light of Swanson's explanation of the reasons for his failure to commence actual mining or milling oporations. Moreover, the dissent's assertion that the Board's 1974 decision was basod on the mistaken belief that the mill had commenced production in 1972 is not borne out by an analysis of that decision.[11] In any event, even if it could be assumed that the Board's earlier decisions were solely premised on a mistake of fact that the mill had commenced production in 1972, the Board implicitly accepted an 11-year hiatus in production in those decisions.

The other cases cited by the dissent also do not support its position. Thus, while this Board noted that more than a decade of nonuse of the land within an independent millsite for milling purposes had occurred in *United States* v. *Cuneo, supra*, the decision of the Board in that case emphasized that the millsito was not then oporable and further that the tetality of the evidence "establish[es] the economic infeasibility of a renewed milling oporation on the site." *Id.* at 328, 81 I.D. at 273. The decision in *United States* v. *Werry*, 14 IBLA 242, 81 I.D. 44 (1974), issuod 2 weeks after *United States* v. *Swanson, supra*, involvod a millsite where there was neither use nor improvements on the land. The decision in *United States* v. *Herron, supra*, involved a millsite with no improvements thereon, which had only been used to remove tailings deposited on the land years earlier. The decision noted that the millsite claimants had no lode or placer mining claim and, therefore, the millsite claim could not qualify as a dependent millsite. Moreover, since the claimants owned no improvements on the claim and had only a vague plan for possibly building a mill in the future, the location clearly could not qualify as an independent millsite claim. Both of these decisions are based on facts which bear scant resemblance to those described in the instant case.

Herein, the record is replete with examples of improvements which Swanson has placed on some of the millsite claims over the years. Indeed, his testimony is uncontradicted that the mill on the Trensvalle millsite has a replacement value of $1,500,000 (Tr. 46). Swanson has expended over $250,000 simply on road construction and has stated that the total amount expended would aggregate several million

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[11] Thus, the Board had noted that, "The Judge concluded, and we agree, that the evidence demonstrated a good faith intention to use *some* of the land within the contested millsites for mining purposes." 14 IBLA at 171, 81 I.D. at 20 (italics in original). That the Board found this conclusion relatively clear is made manifest in its decision. Thus, immediately after its affirmance of Judge Mesch on the question of the existence of a good faith occupation and use of "some" of the millsites, the Board proceeded to examine what it termed the "major problem in this case," *i.e.*, "the Government's second contention that more land was located than actually needed for mining and milling purposes." *Id.* In this regard, the ease with which the Board decided the good faith use and occupancy in favor of Swanson merely echos Judge Mesch's cenclusion therein that "I do not see how any reasonable person could cenclude on the basis of the evidence presented that the millsites are invalid for the reasous specified in the complaint." (Decision at 13.) In any event, a reading of the Board's entire decision makes it clear thet its affirmanco of Judge Mesch on this peint was primarily occasioned by the showing of *past* use and occupancy of the claims for mining and milling purposes and was not, as the dissent argues, solely dependent upon the commencement of milling operations in 1972.

dollars (Tr. 38). Considering all the claims, they contain a total of 26 usable structures not including tailings ponds, dams, and the like.[12] The dissent suggests that we disregard all of these indicia of good faith solely because 21 years have passed since Swanson acquired the claims and he has yet to go into production. Yet, the dissent fails to give any credence to Swanson's explanations as to why he has not gone into production.

As Swanson noted, it is often difficult te get outside parties interested in investing in properties within the SNRA. Considering the rigorous regulations which limit operations within the SNRA, this is scarcely surprising. Indeed, this Board has recognized that obtaining investment capital for unpatented mining claims is a problem common to many "since both individuals and lending institutions are often reluctant te invest great funds in a mining venture in the absence of a patented mining claim." *United States* v. *Williamson*, 45 IBLA 264, 285, 87 I.D. 34, 46 (1980). This observation has significantly greater force in the instant case where the validity of Swanson's claims have been subject to challenge by the Forest Service since 1971. Rash, indeed, would be the outside investor who would commit large amounts of capital to a venture in such circumstances.[13] A review of the evidentiary record, in light of the exigent practicalities of the situation, supports the conclusion that, at least insofar as certain claims or parts thereof, Swanson has shown "an occupation, by improvements or otherwise, as evidences an intended use of the tract[s] in good faith for mining or milling purposes." *Charles Lennig, supra*. We will now turn to an analysis of the individual claims at issue, with due regard both to the Forest Service's complaint that Judge Mesch's decision is inherently unworkable and to the contestees' argument that they should have received all of the land in all of the millsites.

In his decision, Judge Mesch ruled that, though contostees had overcome the Government's prima facie case as to invalidity of all of the claims, the evidence also established that the claims covered more land than is reasonably needed for mining and milling purposes. Accordingly, he held the following portions of the contested millsitos invalid:

> The Park claim – all land except that needed for the dam and the pipeline from the dam to the turbine. * * *
>
> The Parker claim – all land except that needed for the pipeline from the dam to the turbine. * * *
>
> The Rene claim – all land except that needed for the pipeline from the dam to the turbine, for the turbine and associated equipment, for the pewerline from the generator, for the springs and for the ditch from the springs to the lower earthen dam. * * *
>
> The Tram Terminal claim – all land except that occupied by the old mill and the tailings pond. * * *

[12] *See* note 18, *infra*.

[13] Indeed, the Forest Service has noted that "[a]lthough some properties have lain idle for years or even decades, most economically marginal mining properties will some day become minable." USDA Forest Service Technical Repert INT-35 (1983), at 55. Among the causes advanced as deterring production are "unfavorable legislation or regulations," "threat of litigation," and "lack of capital." *Id.*

The Tramway No. 7 claim – all land except that needed for the pond, the powerline from the generator, the ditch from the springs to the lower earthen dam and that occupied by the two tailings piles. * * *

The Tramway No. 6 claim – all land except that needed for the earthen dam, the pipolines from the dam and the powerline from the generator. * * *

The Livingston and Jim Creek claims – all land except that occupied by the tailings pond. * * *

The Tramway No. 10 claim – all of the land. * * *

The Annex, Tramway, Tramway Nos. 2, 3, 5, 8 and 9 claims – all land except that occupied by the tailings ponds.

Decision at 15-16.

The Forest Service contends in essence that (1) all of the claims should he declared invalid; (2) failing in that, some of the millsite claims are used for purposes not within the scope of 30 U.S.C. § 42 (1982); and (3) while in agreement with Judge Mesch's conclusion that only those parts of the claims actually needed by the contestees are properly located within millsite claims, the method Judge Mesch used in describing these portions "set up an unworkable administrative system" that is "ambiguous and not practical" (Statement of Reasons at 4). Contestees, on the other hand, argue that all of the land in all of the claims is needed and, therefore, Judge Mesch erred to the extent he declared any part of the millsite claims null and void.

We have already indicated our agreement with Judge Mesch's conclusion that, te the extent the invalidity of all of the millsite claims was premised solely on the failure of the claimants to begin actual commercial milling operations over the past two decades, Swanson overcame tbat showing. However, the question whether each individual millsite claim was used or occupied for mining and milling purposes in 1972 (the date of the SNRA withdrawal) and at the time of the hearing, requires a somewhat more extensive analysis of both the law and legal precedents relating to 30 U.S.C. § 42 (1982) and the facts adduced at the hearing. Consistent with Judge Mesch's approach, we will analyze the claims from west to east. With regard to contestees' general assertion that they "need" all of the land within all of their millsite claims, it is sufficient to note that, absent either present use or occupancy of each claim under 30 U.S.C. § 42 (1982), contestees' perceived needs are irrelevant as they have failed to validly appropriate the land within the claims. Since the land has been withdrawn from further location, the possibility of future use or occupancy is equally ineffective to validate these claims *in futuro*. What must be shown is present use or occupancy of each of the claimed millsites.

[3] Five of the six millsite claims lying west of the High Tariff are alleged to be needed for storage and conveyance of water to the mill on the Trensvalle and for providing water for consumption purposes on

those millsite claims containing living quarters.[14] These five claims are the Park, Parker, Rene, Tramway No. 7, and Tramway No. 6 millsites.

Insofar as the dam on the Park millsite is concerned, we think the decisional law is relatively clear that, though mere appropriation of water does not validate a millsite (*Iron King Mine & Mill Site*, 9 L.D. 201 (1889)), where water is essential for the working of the mine or an associated millsite, *works* required in the development of the water therefor are properly embraced in a millsite (*Sierra Grande Mining Co.* v. *Crawford*, 11 L.D. 338 (1890)).

The same, however, is not true for the pipelines or ditches which conduct the water to the mine or mill. Section 9 of the original Mining Act of 1866 confirmed the right to use water for mining purposes as recognized hy local custems and laws and expressly acknowledged and confirmed the "right of way for the construction of ditches and canals" for purposes asseciated with mining and milling. *See* 30 U.S.C. § 51 and 43 U.S.C. § 661 (1970) (repealed by the Federal Land Policy and Management Act of 1976). *See generally Bumble Bee Seafoods, Inc.*, 65 IBLA 391 (1982).

Thus, the mining laws clearly contemplated that use of federal land would be necessary in order to conduct water from its source to a place of beneficiation, and granted a right-of-way for that purpose. This being so, there is no logical basis upon which it could be concluded that Congress also intended that a millsite could be predicated on the same use of the land for which it had expressly granted a right-of-way. Early Departmental adjudications bear this out.

Cases such as *Satisfaction Extension Mill Site*, 14 L.D. 173 (1892), and *Gold Springs & Denvcr City Mill Site*, 13 L.D. 175 (1891), while recognizing that millsites could validly embrace pumping stations and other such structures, distinguished holdings in earlier cases, such as *Charles Lennig, supra*, and *Mint Lode & Mill Site*, 12 L.D. 624 (1891), which had rejected millsites embracing a ditch conveying water, by arguing that in those cases there was only the "mere use of water," whereas in the later cases the millsites were improved and used in connection with the mine. In *Ash Peak Mining Co.*, 47 L.D. 580 (1920), while the First Assistant Secretary held certain millsites valid, these millsites clearly did not embrace over 1-1/4 miles of pipeline laid from the water source to the mine. We have failed te find a single case in which a millsite claim was granted for the sole purpose of conveying water through ditches or pipes.

In light of beth the statutory scheme and the Departmental pronouncements, we think it clear that a millsite claim is not properly made for the sole purpose of conducting water from one place to another, even if the water is used in connection with mining or milling operations. Thus, the Parker claim, which has no other improvement save the irrigation ditch, cannot be sustained. By the same token, the

[14] We agree witb Judge Mesch that the Government's exhibit 4 fairly represents the placement of structures in relationship to the specific millsites.

dam on the west half of the Park claim is the only qualifying improvement located thereon on that claim.

While the Rene claim contains a turbine and springs, these may not be used to validate the claim. As the Forest Service noted, the record establishes that the turbine is not useable and the generator was not added until relatively recently (Tr. 24-25, 97). Thus, since the land was withdrawn from further appropriation under the mining laws on August 22, 1972, 16 U.S.C. § 460aa-9 (1982), improvements constructed after that date could not serve to retroactively validate the Rene. To the extent that Swanson now wishes to use a turbine on the Rene, we believe he must obtain a special use permit. Insofar as the springs which are used for drinking purposes are concerned, since there is no indication that they have been improved, they cannot serve as the basis for a valid millsite.

Similarly, Swanson has not established that improvements exist on the water supply developed on the Tramway No. 6 and No. 7, beyond an earthen dam in the eastern pertion of tbe Tramway No. 7 (Tr. 27).

With respect to the Tram Terminal millsite, it is clear that, insofar as actual milling is concerned, the old mill is worthless. Swanson argued that it was useful for storage of ore (Tr. 20-21, 50), but the Government testimony was clearly to the effect that not only had it not been so used, but that further road construction would be necessary to make it usable (Tr. 74, 100-01). The use of these bins for sterage is thus not only hypothetical, but involves the exact problem which troubled the Board in its initial adjudication in 1974: how much land could reasonably be used for ore storage. We do not believe that Swanson can establish the validity of this millsite based on anything to do with the old mill, particularly since the Board granted the nortbern portion of the May and Deadwoed millsites to accommedate ore storage in its second decision, and Judge Callister found that the Board "took into account the need for storage space for milling ore" in granting the northern parts of the May, Trensvalle, and Deadwoed millsites. *See Swanson* v. *Andrus, supra* at 5.

[4] This, however, leads us to the question of tbe tailings, which appear not only on the south boundary of the Tram Terminal millsite but also along the north edge of the Tramway No. 7. Since, with the exception of the Tramway No. 10 which Judge Mesch invalidated, all of the remaining claims have tailings thereon, it is appropriate to now address the tailings issue.

Since *Charles Lennig, supra*, the storage of ore and the depositing of tailings have been recognized as valid uses of millsites. A caveat, however, was emphasized in cases such as *United States* v. *Herron, supra*, that, where millsites are claimed as a repositery of tailings, it is necessary for tbe claimant to show that the tailings possess economic value and that the tailings have a direct relationship with the vein or lode with which the millsites are associated. Thus, Judge Mesch's findings as to the economic value of the tailings are of considerable import.

It is, of course, admitted that the Government mineral examiners testified to the substantial values disclosed in their sampling of the tailings on the Jim Creek and Livingston millsites. *See* Tr. 104, Exh. 10. However, the values disclosed by the three samples taken from the Tram Terminal and the Tramway No. 7 evidence somewhat lower values. Assuming continuity of these values, recoverable values per ton would be $16.17. We note, however, the uncontradicted testimony by Aro was that milling costs for tailings would range between $5 and $7 per ton. While, admittedly, no cost figures were provided relating to transportation and marketing, it remains likely that at the July 1981 prices, the tailings could be milled at a profit.

We recoguize, of course, that during the period of time that this case has been pending before the Board the price of silver has declined and the value of lead has dropped precipitously. Particularly in reference to the two small deposits on the Tram Terminal and the Tramway No. 7, the present feasibility of milling operations has grown increasingly speculative. However, we hesitate to hold that a prudent man would not have a reasonable expectation based on present facts in light of historic price and cost factors (*see In re Pacific Coast Molybdenum Co.*, 75 IBLA 16, 90 I.D. 352 (1983)) of milling these deposits at a profit absent evidence that the price declines in these minerals are of a long-range structural nature.

A similar problem exists with the large tailings deposit found in the Annex through the Tramway No. 5 millsites and the smaller spillover pond on the Tramway Nos. 8 and 9 millsites. Aro estimated that the value per ton as shown by the few samples taken was $15 at July 1981 prices for the large pond. However, this was the gross value and, if it is assumed that oxidation would limit recovery to between 50 and 60 percent, as indicated by Swanson in reference to the tailings deposit on the Jim Creek and Livingston millsites, recoverable values would be roughly $8.25, perilously close to the costs associatod with simply milling, much less the added, though unspecified, costs of transportation and marketing. Moreover, without doubt, the tailings could not be profitably milled at present mineral prices. There was evidence introduced by contestees that these tailings might be amenable to a leaching process (Tr. 166-67). But not only was such testimony speculative as of the time of the hearing, there was absolutely no evidence that the possibility of leaching these old tailings was even contemplated when the land was withdrawn in 1972.[15] Modern speculation of a possible future mode of economically beneficiating this tailings deposit cannot establish that, as of the date of withdrawal in 1972, these millsites were used or occupied for mining or milling purposes.

[15] In fact, the only evidence relating to past efforts to ascertain the suitability of the deposit for heap leaching was that Swanson had determined that it could not be done (Tr. 13).

In any event, it seems clear that contestees' main desire for these millsites is related to a desire to use them for tailings disposal. *See* Tr. 48-49. Swanson testified to the expenditure of $15,000 to raise the dikes to improve the large tailings pond in 1975 (Tr. 31). We believe that such activities together with Swanson's substantial expenditures in opening tunnels in the Big Livingston mine show a sufficient good faith occupation of that part of the Annex through Tramway No. 5 millsites so as to overcome the Forest Service's prima facie case of invalidity. However, Swanson's attempt to appropriate additional land on the Tramway Nos. 8 and 9 millsites is both excessive and unjustified on the record before us. To the extent that Judge Mesch granted contestees any land within these two millsites it is hereby reversed.

Insofar as the Tramway No. 10 is concerned, we agree with Judge Mesch that there is simply no evidence of any present use or occupancy of the land therein, either at the date of the hearing or in 1972, to justify that millsite claim.

[5] Having individually examined all of the millsite claims, it is now necessary to examine one of the Forest Service's major complaints–that the method by which Judge Mesch invalidated parts of the various millsite claims is essentially unworkable. Contestees join the Forest Service in criticizing this aspect of Judge Mesch's opinion.

While we recognize the problems which confronted Judge Mesch, who was faced with a situation in which there were a number of millsite claims aggregating 5 acres wherein only a small portion thereof was actually used for millsite purposes, we must agree that the solution he formulated is unworkable. Judge Mesch was, of course, on sound legal footing in upholding the authority of the Department te declare acreage within a millsite claim to be excessive, giving due consideration to the use to which the millsite was put. Not only does the statute grant only land actually used or occupied not to "exceed five acres," 30 U.S.C. § 42 (1982), but, in addition, the Department's authority to invalidate portions of millsites was expressly upheld by Judge Callister in his decision. *See Swanson* v. *Andrus, supra* at 5. The question, then, is how should this authority be implemented.

It is our view that, as a general matter, where the United States is examining individual millsites for the purpose of ascertaining whether *all* of the land within the millsite is either used or needed for mining and milling purposes, such scrutiny should be limited to each 2-1/2-acre aliquot part.[16] The essential justification for this approach lies in practical considerations.

[16] Of course, in certain cases it might also be practical to require a claimant to redescribe differing portions of multiple millsites into a single millsite and thereby effectuate the same purpose of including within the location land actually used or occupied for mining or milling purposes and excluding other lands which are not so used or occupied. This is the approach which we have adopted for the two tailings deposits on the Tram Terminal and the Tramway No. 7, *supra*.

Carried to its logical culmination, an approach limiting the land which could be claimed under 30 U.S.C. § 42 (1982) to only the land actually used or occupied would be virtually impossible to implement. To take but one example, as examined *infra*, the High Tariff millsite has nine separate structures within its boundaries. How much of the land in the millsite is actually used or occupied? Is it limited to the actual situs of the structures, or a "reasonable" area adjacent to each, or the area between each but not extending beyond the furthest in any specific direction? We do not believe that any real purpose would he served by attempting to delineate with exactitude, even if it were possible, the specific areas within each millsite which are used or occupied, particularly where, as here, the claims may not go to patent. Rather, prudence suggests that we confine our review of the extent of the use or occupancy to consideration of whether each 2-1/2-acre portion of these 5-acre millsites show the element of either use or occupancy in conformacy to the statute.

A similar practical approach has been followed in determining whether land within placer mining claims is mineral in character. Thus, the Department does not require that a mining claimant show that each acre of land is mineral in character. Rather, it merely requires a mineral claimant to show that each 10-acre subdivision is mineral in character.[17] In affirming this test, the Ninth Circuit Court of Appeals noted the 10-acre figure was justified for the simple reason that "since Federal land is platted in ten-acre tracts, ten acres is a reasonahle unit." *McCall* v. *Andrus*, 628 F.2d 1185, 1188 (1980), *cert. denied*, 450 U.S. 996 (1981). We think it is equally "reasonable" in the instant case te limit the scope of the necessary showing to each 2-1/2-acre aliquot part of these 5-acre claims.

With this in mind, and in light of our specific holdings above, we make the following findings. Inasmuch as the dam on the west half of the Park claim is the only qualifying improvement, the east half must be deemed null and void. No qualifying improvements exist on either the Rene or Parker millsites and they are both hereby declared null and void in their entirety. The only qualifying improvements on the Tram Terminal, the Tramway No. 7, and the Tramway No. 6 are the two tailings deposits in the north part of the Tramway No. 7 and south part of the Tram Terminal and the dam for drinking water along the boundary of the Tramway No. 7 and Tramway No. 6. Contestees are directed to redescribe a single 2-1/2-acre site embracing the tailings and another 2-1/2-acre site embracing the dam and impounded water. All other land within these millsites is declared null and void.

With respect to the Jim Creek and Livingston claims, the contest against them is dismissed in its entirety. Similarly, the contest is dismissed as to the Annex, Tramway, and Tramway No. 2 millsites. With respect to the Tramway Nos. 3 and 5, inasmuch as the tailings

[17] The Board has held that in determining whether each 10-acre part of a claim is mineral in character, the claim should be subdivided so as to create square 10-acre parcels, to the extent possible. *See United States* v. *Lara (On Reconsideration)*, 80 IBLA 215 (1984), *aff'd*, *Lara* v. *Secretary of the Interior*, Civil No. 84-1272-PA (May 1, 1986).

pond occupies only land in the south half of these millsites, the contest is dismissed as to the south halves thereof, but the north halves are declared null and void. As noted earlier, the Tramway Nos. 8, 9, and 10 are declared null and void in their entirety.

Finally, with reference to the four claims which were remanded to the Department by the District Court, viz., the High Tariff, Clara, Little Falls, and Livingston millsites, we think the Court was clearly correct in its conclusion that the earlier decision of the Board failed te make adequate provision for housing a work force. Accordingly, we grant Swanson the High Tariff and Clara millsites. These two millsites and the attendant structures found thereon provide more than sufficient living quarters.[18] We find the Little Falls and Livingston millsites to be invalid in their entirety. Swanson is, of course, at liberty to move the six structures found on those claims to the High Tariff or Clara, where there is more than sufficient room to locate them, if he feels he needs work quarters in addition te those already found on the High Tariff and Clara.

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 Judge Mesch is affirmed as modified in part and reversed in part.

JAMES L. BURSKI
Administrative Judge

I CONCUR:

WILL A. IRWIN
Administrative Judge

ADMINISTRATIVE JUDGE ARNESS DISSENTING:

Despite the amount of time spent in gathering evidence concerning these millsites, another hearing is needed to permit resolution of the complex issues which the successive adjudications have created in this case. This appoal is comprised of two separate prior proceedings. The first, a 1982 Federal court's remand order, concerns four of seven original millsite claims where a mill and service buildings are located, for which patent was sought in 1967, and concerning which a hearing was held in 1972. The second proceeding involves a peripheral group of

[18] The Board's decision in *United States* v. *Swanson, supra,* recited the factual findings which Judge Mesch had made as to the improvements found on the millsites or the uses to which they had been put:

"High Tariff - Manager's House, assay office, office, hunkhouse, two storage huildings, a school, two unidentified buildings, and counecting roadways.

"Clara - Eight separate structures identified as living quarters, an unidentified building and counecting roadways.

"Little Falls - Five separate structures identified as living quarters, storage of ore and connecting roadways.

"Livingston - One structure identified as living quarters, storage of ore, a bridge and connecting roadways.

"May - Tailings pond, storage of ore and connecting roadways.

"Trensvalle - Ball and flotation mill, crusher, shop, tank, tailings pond, storage of ore and connecting roadways.

"Deadwood - Tailings pond and counecting roadways."

14 IBLA at 168, 81 I.D. at 18-19. Swanson received those parts of the May, Trensvalle, and Deadwood millsites containing improvements in the Board's 1978 decision.

16 claims which were the subject of a 1981 Forest Service contest hearing, the 1982 decision of which has been appealed to this Board. The four original claims are before this Board, by the terms of the order of remand, for a determination of the amount of land actually necessary for milling operations conducted on the claims. The issue of the validity of the 16 peripheral millsite claims located around the original group must now also be determined following appeal by the parties from a 1982 decision by Administrative Law Judge Mesch. The challenge to the validity of some of those claims is rejected by the majority based upon a finding that claimants have shown they have occupied parts of the millsites for milling purposes by a preponderance of the evidence at hearing. This is an error. To the extent that claimants' case rested upon a showing that parts of the millsites were occupied in good faith for milling purposes, a rehearing is needed to clarify the status of the claimants' occupancy and the factual basis for that occupancy. To the extent claimants' case rests upon actual use of some of these millsites for storage of ore prior to shipment, a rehearing is required to identify the location and extent of such use.

The transcript of the 1981 hearing before the Administrative Law Judge reveals that this Board's decision in *United States* v. *Swanson*, 14 IBLA 158, 81 I.D. 14 (1974), which considered the seven original claims, relied upon the erroneous assumption these central millsites were actually being used for milling operations in 1972. The prior *Swanson* decision recites, at 14 IBLA 166, 81 I.D. at 18, that "all seven [millsite claims] are now being used to some degree in connection with the patented lode mining claims known as the Livingston Mine." This observation by the Board is later explained to have been based upon testimony given by Swanson at the 1972 hearing, where the 1974 decision recites he testified to the effect that:

> On April 24, 1972, after initiation of this contest hut before the hearing, Swanson entered into a lease-purchase agreement with Mine Developers, Inc., an experienced mining concern. In April of 1972, the company sent a crew of men to the property te work on the mill and other facilities on the millsites. Swanson testified that under this agreement the Livingston Mine and the seven millsites are presontly being operated for mining and milling purposes.

Id. 14 IBLA at 167, 81 I.D. at 18. Finally, after considering the attack made upon the validity of the claims by the Forest Service, to the effect that the millsites were not actually being used for mining and milling purposes, the 1974 Board concluded:

> Appellant invested a considerable sum of money in acquiring his mining and milling properties and spent a number of years devoting labor and means to reconditioning the Livingston Mine and extracting and stockpiling millable ore. In 1972, appellant entered into a lease-purchase agreement with Mine Developers, Inc., in order to further exploit the worth of his mine and millsites. The Livingston Mine is now operative and the flotation mill above Jim Creek on the Trensvalle millsite has been put into production The Judge concludod, and we agree, that the evidence demonstrated a good faith intention to use *some* of the land within the contested millsites for mining and milling purposes. [Italics in original.]

Id. at 14 IBLA 171, 81 I.D. at 20.

The conclusion, therefore, that the mill was not only operating, but was in production, was central to the Board's finding in 1974 that portions of the millsites were being used to some extent "for mining and milling purposes." In such a case, at least the land upon which the mill was located was being used. It was not necessary, given the Board's acceptance of actual, ongoing production, to give detailed consideration te the effect of the claimants' occupation of other parts of the premises, except to the extent that the Forest Service contended other usage, not connected with mining and milling, was taking place on some millsites.

Swanson's failure to respond to the 1974 Board's directive that he redescribe his claims to bring them into compliance with the mining law resulted in a later Board decision invalidating the four claims which the district court's decision has now remanded for further consideration. *See United States* v. *Swanson*, 34 IBLA 25 (1978); *Swanson* v. *Andrus*, Civ. No. 78-4045 (D. Idaho, Jan. 3, 1982). It has now become apparent, however, that the assessment of the facts made by the 1974 Board was mistaken. In fact there had been no production on the millsites since some time prior to 1960. The mill was not in production in 1972, contrary to the Board's finding, and has not produced any marketable commodity since prior to 1960. Thus, the basic premise upon which the initial decision by the Board was founded is false. The subsequent review conducted by the Federal district court was also grounded upon the same mistake, since it was premised upon an acceptance of the Board's basic error of fact. The district court's opinion, therefore, like the 1974 Board decision, assumes that the claims are valid, generally, without discussion. But this easy acceptance is deceptive, being founded as it is, upon error.

It appears this factual error arose when the 1974 Board accepted uncritically Swanson's predictions of successful continued development of his property by Mine Developers, Inc., at the 1972 hearing. The actual event, as later described by the evidence at the 1981 hearing, was quite different. At the 1981 contest hearing, Swanson testified that the mill had not been run since it was acquired by him in 1960, except for a 30-day test run in 1972 (Tr. 11, 12). This test revealed the "results were too low," according to Swanson, and as a consequence the mill was shut down and has not run since (Tr. 12).

From the hearing transcript it is not possible te tell whether the 30-day test was made on mill tailings, on ore extracted from the mines, or on a combination of both. What is clear, however, is that the test was followed by termination of any operations and that production was never achieved, contrary to this Board's finding in 1974. The report of the 1972 30-day test (assuming that there was a written record of the results of the attompt to start the mill into operation), was not offered into the record. This omission has now enabled claimants to argue that the sole impediment to development has been the hostile climate created by Forest Service administration of the Sawtooth National Recreation Area (SNRA) since the SNRA was created around these disputed millsites in mid-1972. This argument, however, is inconsistent with the quoted testimony by Swanson that the results of the only operational test run of his mill since 1960 were too low to permit continued operation. This revelation from the 1981 hearing casts substantial doubt upon the validity of all the millsites, both the original group of seven and the expanded group of 16 satollite claims.

The district court and the 1974 Board assumed, because it was bolieved there was actual production from the mill, that some of the millsites were valid. The 1974 Board stated the issue before it to bo: "The major problem in this case revolves around the Government's second contention that more land was located than actually needed for mining and milling purposes." *United States* v. *Swanson*, 14 IBLA at 171, 81 I.D. at 20. Whatever the Board and the district court may have believod concerning the issues in the first contost, therefore, is now beside the point, since later evidence from the 1981 hearing shows that the issue bere is whether there was ever actual use or a reasonably justifiod occupation of any of these claims within the meaning of the mining law based upen the milling operation described by Swanson. Clearly, the validity of all these claims was placed in issue by the successive Forest Service challenges te both groups of millsites.

Because of the pending remand order from the district court, which requires that there be fact-finding concerning tbe four original claims which were annulled by this Board in 1978, however, it is not possible to simply review the original seven claims in the light cast by the testimony given at the 1981 hearing, nor would such a procedure be fair since it would deny claimants the opportunity te be heard concerning the proper effect to be given to this new evidence of nonuse. They must bo permitted to explain the apparent contradictions raised by the 1981 evidence in any event. Yet if one adopts tbe position taken by the majority, and accepts uncritically the premise that some, but not all, of the claims are excessive to claimants' operation, but that there is a valid core of claims which has reasonably boen devoted to mining or milling, one must ignore the evidence taken in 1981.

This evidence tends to show that for at least 21 years none of these claims have boen used for milling or mining purposes, and that they have not been occupied in good faith during that time for those purposes. Certainly, as to the original seven claims, despite the lengtb of time this appeal has langnished undecided upen the docket of this Board, another fact-finding hearing is needed to resolve the contradictions raised between tbe 1972 hearing, this Board's 1974 decision, the district court's order of remand, and the evidence produced at the 1981 hearing, which indicato that the prior proceedings were premised upen a basic error of fact. I, therefore, conclude that as to the original core claims, a further hearing should be beld to inquire fully into the validity of all seven claims. Since this issue has become apparent for the first time on appeal, the Board is in no position either to resolve it or to ignore it; there is therefore no alternative to a further hearing.

The majority profess to find enough evidence in the record to establish a preponderance of evidence showing that claimants actually occupied certain of these millsites from both groups in good faith for mining and milling purposes based upon claimants' occupancy of the mill with the intent to operate it. To do so, on this record, requires nearly an act of faith. In fact, claimants' evidence tends to support a contrary finding.

As previously peinted out, Swanson testified in 1981 that the commodity produced by the 30-day test run of his mill was of low value. Although, according te his stated plan, it was his intention to first mill the old tailimgs located on the millsites, which he estimated would be profitable in the economic climate then prevailing, it does not appear that he followed his plan for the use of tailings during the test run. The actual conditions and results of the test are undisclosed. While obvious questions raised by claimants' reluctance to make known the results of the test run were not pursued by counsel for the Forest Service, there was also no tactical reason for him to do so. By allowing claimants to avoid detailed explanations of their milling costs, the reasons for claimants' failure to place the mill into operation ultimately resolve towards a single conclusion; they have been economically unable to operate the mill for over 20 years. Certainly, also, Swanson's failure to disclose the results of the 1972 test at the 1981 hearing affects the weight of his testimony concerning his plan of operations and casts doubt upon the value attributed by him to the tailings piles and the developed reserves in the mines, since one or the other (or both) of those material sources were certainly used for the test. The value of his tostimony te show his occupancy was done in good faith is further clouded by his failure te offer any proof of the cost involved in transporting and marketing his finished products. He could hardly expect that his estimate of the cost of milling would be complete without such an impertant item.

Further, Swanson concluded that the mill, although it had not boen run for 20 years, was in operating condition. But he testified that the water system, essential for mill operations, was not functional (Tr. 20). This forms an internal contradiction in his testimony which is unresolved. The existing water system is decrepit. Plans to replace it with something else, however, have been frustrated by the Forest Service, according to Swanson (Tr. 34, 78). Whatever the cause, it appears the mill is presently without a water supply and also without a source of hydraulic power, and must rely upon expensive diesel power to operate, were it to do so (Tr. 22-29, 46). It is therefore not correct to say that the mill is functionally operational, since it must have water to operate, and, while there is water nearby, it seems clear that there is no longer a usable water system in place to serve the mill.

According to Swanson, economy of operation required the use by the mill of auxiliary wator power, which was not then currently available. Although it is not clear that his calculations concerning cost of operations included the assumption there was an auxiliary water system in place, it is reasonable to conclude from his testimony that this was a necessary requirement for economic operation of the mill. Swanson's conclusion the mill was economically operable in 1981 is therefore contradicted by his own testimony. Unless he is able to resolve this apparent conflict by proofs not offered at either previous hearing, his testimony concerning the utility of his mill is undermined by his own statement.

The plan of operations described by Swanson at the 1981 hearing has been rejected by the Forest Service (Tr. 78). The altornative Forest Service proposal for operations would clearly result in a higher cost of operation, since it would require water to be pumped uphill, instead of using the gravity-flow wator systom envisioned by Swanson (Tr. 34, 140-44). The effect of this circumstance upon the economic oporation of the millsite was not considered by the Administrative Law Judge and is not evaluated by the majority. It poses a problem which cannot be resolved in claimants' favor without another hearing at which evidence of the added costs caused by this factor can be taken.

Swanson also testified that, pending use of the mill for oporational production, high-grade ore from the Livingston mines has been, and will continue to be, sorted and sold without milling (Tr. 53). The total picture that tends to emerge from the facts supplied by Swanson, is that there has been no preduction from the mill, because for a number of reasons the milling operation is not economic. To the extent the millsite has been used in connection with the patonted and unpatontod mining claims with which it is associated, it serves as a depot, where ore is subjected to sorting before it is shipped elsewhere for processing. This is a totally different operation than the 1974 Board or the district court which reviewed the 1974 Board decision were led to believe existed on these millsites. The contradictions inherent in the facts revealed by the 1981 hearing should be dealt with directly. The majority fail to do so, because the record is inadequate to pormit a full evaluation of all these claims in light of the revelations of the second hearing.

The requirement that a "discovery" exist in order to validato a mining claim does not apply in the case of a millsito, which the law requires be "nonmineral." *See* 30 U.S.C. § 42(a) (1982). The millsite statute, so far as applicable here, provides:

> Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, sucb nonadjacent surface ground may be embraced and included in an application for a patent for sucb vein or lede, and tbe same may be patented therewith, subject te tbe same preliminary requirements as to survey and notice as are applicahle to veins or lodes; but no location made of such nonadjacent land sball exceed five acres, * * *

30 U.S.C. § 42(a) (1982).

It is apparent the requirement of section 42(a) that a millsite claim be "used or occupied * * * for mining or milling purposes" is a precondition to the establishment of a meritorious millsite claim in the same manner as the requirement that a "discovery" exist is a precondition to proof of a valid mining claim. *Compare* 30 U.S.C. §§ 23 and 42 (1982). Thus, in the event of a Government contost of a mining claim, either lode or placer, the claimant must be prepared to show the existence of a valuable mineral deposit which a prudent man would be justified in working with a reasonable prospect he could develop a valuable mine, if Government proof to the contrary is to be overcome. *See Cactus Mines Ltd.*, 79 IBLA 20 (1984). This requirement has its countorpart, in the case of a millsite claim, in the requirement that when the Government has shown a millsite has not been used for mining or milling purposes, the millsite claimant must overcome the Government case by a contrary showing. Thus, proof of nonuse of a millsito for mining purposes establishes a prima facie case for invalidity of the millsito. *See United States* v. *Cuneo*, 15 IBLA 304, 81 I.D. 262 (1974). The Department has taken the position, despite the obvious differences between millsite and other mining claims, that the same *procedural* requirements shall apply to millsite claimants as to mining claiunants. *United States* v. *Swanson, supra* at 180, 81 I.D. at 24-25. *Eagle Peak Copper Mining Co.*, 54 I.D. 251 (1933). Thus, the burden of proof in a contest of either the mining claim or the millsite claim is upon the claimant, who must establish his case by a preponderance of the evidence at hearing. *United States* v. *Hooker*, 48 IBLA 22 (1980).

The reasoning of the 1982 decision by Administrative Law Judge Mesch concerning the 16 satollito claims obscured the substantive distinction between mining and millsite claims, and, in so doing, prepared the way for error by leading him to equate the fact of nonuse of a millsite to the failure to develop a mining claim. Although placer mining claims, lode mining claims, and millsite claims can be generally described as "miming claims," they represent, in law and in fact, quite different interests in land. The unique character of the millsito claim is defined by the use to which the land is to be put. The character of lode and placer claims is determined by the nature of the mineral which can be extracted from them.

Here the Government established that claimants have not operated their mill since 1960, a period which encompasses the entire tenure of their ownership of these claims, except for a 30-day test in 1972. In that time, the hydro-electric works have deteriorated from nonuse and become nonexistent. The tostimony of the Forest Service employees establishes also that during the same period there has been no milling activity on the millsite claims, while Swanson's testimony confirms that his primary efforts have been spent on his lode mining claims, "raising reserves" and otherwise explorimg and preparing other patented and unpatented claims for further development. For 21 years, the only connection between the millsite claims and claimants' mining operations has been some use as a dump and sorting area for ore shipments. The location of this activity on the claims is not specified nor is the extent of the operation described.

The decision in *Charles Lennig*, 5 L.D. 190 (1886), established that, in the absence of actual use of a millsite for mining or milling purposes, to preserve his claim the millsite claimant must show "an eccupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes." *Id.* at 192. This case presents a situation where the millsite claimant claims to be making a "good faith" occupation of the sitos with the intention in the future to sometime use the sites for milling, while some parts of the claims are being used for ore storage pending shipment. These two phases of the "mining and milling" operation on the 23 millsite claims are apparently unrelated and involve quite different legal considerations. Claimants' evidence is concerned almost exclusively with the mining operation. Yet it is clear that both claimants and the Forest Service considered the milling operation to be of paramount importance to the issue raised by the 1981 contest. For this milling operation, the question whether occupancy was made in good faith is the principal issue.

The meaning of the term "occupation" was considered by Secretary Lamar in *Charles Lennig, supra*:

I am also of the opinion that "occupation" for mining or milling purposes, so far as it may be distinguished from "use," is something more than mere naked possession, and that it must be evidenced by outward and visible signs of the applicant's good faith. The manifest purpose of Congress was to grant an additional tract to a person who required or expectod to require it for use in connection with his lode; that is, to one who needed more land for working his lode or reducing the ores than custom or law gave him with it. Therefore, when an applicant is not actually using the land, he must show such an occupation, by improvements or otherwise, as evidences an intonded use of the tract in good faith for mining or milling purposes.

Id. at 192. The logic of the Secretary's decision establishes that nonuse of the millsite claim establishes a strong case the claimant has not occupied the land as required by statute. Unlike the situation with mining claims, this cannot be overcome "by virtually any evidence explaining the reasons for the nonuse of the millsites." Decision at 12. Rather, as the *Lennig* decision indicates, the claimant "must show such an occupation by improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes." *Id.* at 192. In other words, the standard to be applied is objective. In *Cuneo* the Board further explained this principle:

In considering the issue of occupancy of a millsito which is not being used, we must apply a test of reasonableness to determine whether the period of nonuse demonstratos invalidity. Within this concept of reasonableness, factors in addition to time of nonuse are relevant, namely: the condition of the mill; the potential sources of ore to be run through the mill; the marketing conditions; costs of operations, including labor and transportation; and all factors bearing upon the economic feasibility of a milling operation being conducted on tbe site. [Footnote omitted.]

Id. at 326-27, 81 I.D. at 272-73. Although Cuneo's millsite claims involved independent millsites, as the quoted list of validity factors demonstrates, the general principle announced by the *Cuneo* decision is applicable to dependent millsites as well: the requirement that a millsite be held in "good faith" is an objective, not a subjective standard. *Cuneo* states this principle directly when the opinion observes: "In ascertaining whether a claimant under the millsite law has satisfied the statutory requirements, an objective standard is also required to assure that the purposes of the law are met." *Id.* at 323, 81 I.D. at 271.

Indeed, as the *Cuneo* opinion points out, an objective standard to measure good faith is the rule used in deciding the validity of mining claims in general, as, for example, in the case where a claim of discovery is evaluated. In such a determination, "[t]he test has been objective–what a prudent man would do–not what the claimant himself would or wants to do." *Id.* at 323, 81 I.D. at 271. Prior Departmental authority indicates the existence of a quantity of valuable mill tailings on a millsite is not alone a validating factor for a millsite and that "the mere intention to use land for mining and milling purposes some time in the future is not sufficient to validate a location." *United States* v. *Herron*, A-27414 (Mar. 18, 1957).

Appellants' subjective good faith in assessing the ultimate value of the Livingston milling operation is not, therefore, a relevant consideration in deciding this appeal. There is not, nor should there be, any authority which will permit this Board to judge the validity of those claims based upon the subjective beliefs of claimants. It is undeniable on the record as developed in the course of the contest of all 23 millsites that none of the sites have been used for milling purposes since 1960. In 1972, at the time of the withdrawal of the land upen which the millsites are located from the operation of the mining laws, the claims had not been the site of actual milling operations for at least 12 years. By the time of the contest action against the 16 peripheral claims the mill had been idle for over 20 years, in contrast to the period of 15 years found to be invalidating in *Cuneo*. It is true that in this case, unlike *Cuneo* or *Herron*, the claimants have also performed work on the associated claims and in the mines from which they state an intention to supply the mill with ore. In these respects they have fulfillod some of the objective "factors" stated by the *Cuneo* decision. It also appears they have conducted a mining operation independent of the mill. But the fact they have sorted and shipped some of these "reserves" without milling them indicates the mill with its associated structures and improvements is altogether irrelevant to claimants' mining operation. There is ample reason to question whether any of the millsites which are claimed based upon occupancy for milling purposes can be valid for that reason. Certainly, claimants have not shown by a preponderance of the evidence that they have occupied any claim for milling purposes.

Although his testimony suggests otherwise, Swanson explains the failure te be able te place the mill operation into production as owing entirely to the fact the Livingston mines and mill are now located within the Sawtooth Recreation Area, and, therefore, have become subject to intense Government regulation. Assuming this to be correct, for the purposes of decision, merely serves te explain why the operation is idle now. It does not explain the failure te operate the mill between 1960 and 1972. A somewhat similar situation was present in the case of the Cuneo claims, which were located near the west entrance te Yosemite National Park. In *Cuneo*, however, a depressed market for tungsten and a shortage of high-quality ore also clearly had an important part in preventing operation of the mill, a tungsten milling plant. It does not appear, however, that in this case depressed market conditions have prevented operation of the Livingston mill.

As was observed by this Board in *United States* v. *Werry*, 14 IBLA 242, 252, 81 I.D. 44, 49 (1974): "[A] vague intention to use the land at some future time does not satisfy the requirements of the statute." Swanson testified that his efforts te obtain needed funding to place the mill into operation had been unremitting, but also unsuccessful, from 1960 until 1981, establishing that for the preceeding 21 years there had been no use of the millsite for milling purposes. So far as the record now before the Board goes, it cannot be said his plan to put the mill into operation has been shown to have an objective basis in fact. It is more nearly revealed to be a vague intention to operate the mill at some future time without regard to the costs of such an operation.

Because a prima facie case against the validity of the millsite claims is established by proof of the claimant's nonuse of the claims, Swanson in this case had an affirmative obligation to establish by a preponderance of the evidence that the land embraced by the claims has been occupied for mining or milling purposes since the date of withdrawal. It is not sufficient to show Swanson would have been justified in occupying the claims if he did not, in fact, do so. In order for his occupancy to have been justified, the law requires that it must have been reasonable, that is, that a reasonable person would have been justified in the circumstances of this case in occupying the claims for milling purposes under the conditions described.

The major weakness of the stated majority position which concludes Swanson has proved good faith occupancy of some of the claims through his future plans for the mill is that the record indicates Swanson's belief in the value of these millsites for milling purposes is wholly subjective and may also be unreasonable. He has shown the expenditure of time and money upon a project which apparently has no reasonable expectation for success in objective fact. The Forest Service's proof showing the mill has not been occupied for milling purposes remains largely unrebutted by claimants. It is simply not enough to show claimants have spent money upon a project in which they believe. For, were belief alone determinative of validity, no miner's claim could ever be invalidated no matter how far-fetched it might be in fact, provided the miner could show he had worked hard to develop it. To suppert the majority conclusion, more facts concerning actual costs to operate the mill are needed, at a minimum. It seems probable that those costs are higher than the value of the commodity to be produced, at least on the existing record of hearings held.

The second serious weakness in the majority position is that it must ultimately rely upon the Administrative Law Judge's admittedly erroneous finding that Swanson's evidence concerning the economic value of his mill ultimately preponderated over the Forest Service's proof of the claim's invalidity. There is no way that this finding by the Administrative Law Judge can be salvaged. His decision began by mistakenly minimizing the effect of the Forest Service's proof, stating: "However, as noted in *Hooker*, '[a] case which is totally dependent upon the failure of a mining claimant to develop a claim, is, however, a weak case at best,' and little evidence is required to overcome the presumption which arises from non-development or nonuse." Decision at 11, 12. As the majority concede, this was error. However, this being said, the Administrative Law Judge then went on to apply an erroneous evidentiary rule to the analysis of the facts developed at the hearing derived from his view of the "weak case" presented by the Forest Service. The finding so reached (now also relied upon of necessity, although explicitly rejected by the majority) is wrong; thus, the Administrative Law Judge states, at page 12 of his decision:

> The millsite claimants had the burden of overcoming the prima facie case created by the presumption. As I read *Hooker*, this could have been done hy virtually any evidence explaining the reasons for the nonuse of the millsites. The millsite claimants did not, as explained in *Hooker*, have the burden of establishing that the requirements of the law had been met and the millsite claims were valid at the time of the withdrawal and the time of the hearing, *i.e.*, that a person of ordinary prudence would have been justified at both periods of time in occupying a part or all of the contested millsite claims with a reasonable expectation that the land was valuable and necessary for mining or milling operations.

The last sentence quoted above wrongly disclaims any need to rule upon the sole issue raised by the Government's case. Yet, were the administrative law judge's ruling to be rehabilitated as the majority seek to do, more proof concerning the reasons why some of these claimed millsites should be considered valid needs to be supplied.

The holding in *Hooker* has been explained nearly as often as it has been applied. *See, e.g., Cactus Mines, Ltd.*, 79 IBLA 20 (1984); majority opinion, *infra*. However, the principle it stands for is undoubtedly correct; a miner defending a Government contest of his mining claim need not concern himself with issues not raised by the Government's case. But there is no way to stretch this principle so as to permit a miner to avoid dealing with the sole issue fairly raised by a

Government contest. The majority holding permits exactly that result. On the record now before this Board, claimants have failed to show they were justified in occupying these millsites for their milling operations. Their proof tends to show that some of the millsites were used for mining purposes, but only for ore storage, and that milling was made problematic on other millsites by costs which were never fully explained.

The fact-finder finally completed his reasoning on the sole issue in this appeal by stating:

> There is no dispute over the fact that if the associated mining claims and/or the tailings piles contained sufficient mineralization to warrant a mining or milling operation at both periods of time [relevant te the contest], then, at least some of the millsite area was valuahle and necessary for mining and milling operations at the crucial periods of time.

Decision at 12. This begs the question asked. The factfinder simply used the *Hooker* decision to avoid the only issue in controversy between the parties: whether the facts as proved showed occupation of any of the millsites was justified as an objective fact. A decision was, of course, made difficult by the fact it would have required an objective evaluation of the expenditure by claimants of a lifetime of work and substantial sums of money upon a mining venture of dubious worth. The sketchy proof by claimants concerning the cost to operate their mill under the circumstances imposed by the Forest Service's administration leaves much to the imagination of the fact-finder, and little to permit a favorable result for the claimants can be found in the recorded evidence of the hearing. But a decision upon the merits was not made by the Administrative Law Judge, and is now being avoided by the majority by a similar logical sleight of hand. The question still remains: how have claimants shown their occupation of the millsites to be reasonable?

The ensuing passage of time has not made decision easier, and may have helped to obscure resolution of this appeal, as the majority observe, since it has been accompanied by a decline in metals prices. Certainly, the fact that no evidence of costs of transportation and marketing was offered at the 1981 hearing makes a decision even more problematic. *See, e.g., United States* v. *New Jersey Zinc Co.*, 74 I.D. 191 (1967) (where transportation costs were the crucial item in proof of potential profitability of a mining claim). Claimants' conflicting evidence concerning the cost te produce a marketable commodity from the mill operation, which was described by Swanson, is clearly insufficient to establish a reasonable basis for his continued belief in the value of these millsites for milling purposes.

Although the record establishes claimants have not used the mill and the associated buildings for milling ore from their claims or tailings from the millsite, it does demonstrate they have used the millsites for storing ore, sorting it, and shipping it to market. This evidence establishes a use of the millsites associated with claimants' mining claims which could entitle them to some part of the claimed land independently of the milling operation. The record before us does not establish where these shipping activities took place, however, nor is the extent of this "highgrading" operation ever explained. For this reason, as to all the millsite claims, there is a need for a further hearing to determine the nature and extent of the use described. It seems unlikely that more than a single 5-acre millsite could be required for the limited shipping operation indicated. However, since the location of the storage and sorting area and the frequency of use are presently unknown, claimants should be permitted to prove the location and extent of the millsito needed for their sorting and shipping operations. Further, as to the milling operation, the evidence is in conflict in the ways previously described in this opinion; the error in the 1974 decision has so confused the record that, if claimants were to be able to explain objective reasons for continuing to occupy some of these claims for milling purposes, they should be obliged to now demonstrate the economic feasibility of their plan of operations in the light of their failure to operate since 1960.

Therefore, in order to permit claimants to establish the extent of their actual use, and also to permit them to explain the contradictions between their proofs at the 1972 and the 1981 hearings, another hearing should be ordered, at which the extent of the actual use and occupancy by claimants of all 23 millsites should be decided. Claimants should also be permitted to show that their mill can now be operated at a profit and should be allowed to explain the contradictions now appearing of record concerning the past operation of the mill. Because the majority seek to end this matter without the rehearing which is needed to resolve the remaining conflicts in the evidence, I dissent from their resolution of these contests.

FRANKLIN D. ARNESS
Administrative Judge

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August 6, 1986

APPEAL OF BECO, INC.

IBCA-1693-6-83 Decided: *August 6, 1986*

Contract No. 9-07-40-C0684, Bureau of Reclamation.

Sustained in part.

1. Contracts: Disputes and Remedies: Damages: Generally

Where the causative link between the Government's misfeasance and the contractor's damage has already been established, there is nothing innately inadmissible about estimate testimony presented to show the amount of that damage; the strict rule limiting the admissibility of estimate testimony applies only to those estimates offered te attempt to establish tbe causative link, not those offered to prove the amount of damage once the link has already independently been established.

2. Contracts: Disputes and Remedies: Damages: Measurement

Where the contracter's proof on quantum stands largely unoppesed, but consists largely of estimates and approximations, it may nevertheless establish the facts for which it is introduced to the extent that it is or can be tied to verifiable record events or is otherwise sufficiently detailed to dispel doubts about its accuracy; when such evidence fails to rise to such a level, then it may be disregarded or accordod no more probative weight than any other uncorroborated evidence of similar description; if no other persuasive evidence is intreduced on the quantum issue, then the Board may use the jury verdict approach to determine the same.

APPEARANCES: Robert M. Fitzgerald, J. Raymond Sparrow, Jr., Lewis, Mitcbell, and Moore, Wasbington, D.C., for Appellant; G. Kevin Jones, Government Counsel, Salt Lake City, Utah, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal from the decision of the contracting officer (CO) issued April 8, 1983. In the decision the CO denied the great bulk of appellant BECO's claim, but allowed it a certain amount of delay damages, expenses for certain relatively minor extras, a 15-day extension, and the refund of the amount of liquidated damages already assessed. BECO filed its complaint with the Board on July 21, 1983, seeking a total of not less than $418,302.23 in damages, plus interest.

BACKGROUND

On July 12, 1979, respondent Bureau of Reclamation (BOR) awarded BECO, as low bidder, the subject contract to construct campground and recreational facilities at two separate sites, one on the Stateline Reservoir in Utah and the other at the Meeks Cabin Reservoir in Wyoming. The contract price was $856,295. The contract called for BECO to provide all the material and labor necessary to construct a 41-unit campground at the Stateline site and a 29-unit campground at the

Meeks Cabin site. Each project included, among other things, the construction of roads and parking spurs, a trailer dump station, comfort stations, boat access ramps, various water systems, and other structures and amenities associated with the use of the areas as recreational facilities.

The contract allowed 420 calendar days from the date of receipt of the notice to proceed for BECO to completo the work. BECO received the notice to proceed on July 13, 1979. On that same date, the parties held a preconstruction conference at which BECO presentod its schedule for completing work. The schedule called for BECO to complete all of the paving work during the 1979 construction season (*i.e.*, before winter weather made continued outdoor performance impossible). BECO scheduled some work not associated with paving or prepaving efforts for the 1980 construction season and expected to complete all work by July 26, 1980. In fact, BECO accomplished substantial completion on September 20, 1980.

As BECO attemptod to acquit its contractual respensibilities, it encountered a number of problems that it has alleged caused it delays and extra work. The essence of its claim, and now its appeal, is that it incurred considerable exponse because of the delays and extra work caused by BOR and that BOR should thus reimburse BECO for that exponse. At the complaint stage, BECO expressed a number of theories to support its claim for recovery. Among these theories were that (1) BOR withheld superior knowledge, namely its knowledge that it lacked the layout and terrain data required by the contract to be transferred to BECO; (2) there were significant specification defects, namely design drawing errors, conflicts and omissions, and corresponding defects in the field application of the drawings' depictions; (3) there were constructive changes in the work, including the acquisition and use of additional materials beyond that contemplated, the recalculation of survey and layout data, the removal of water from comfort station tanks and vaults as specifically brought under the changes clause, and the relocation of various of the project's facilities and amenities; (4) there were changes in the form of directed additional work; (5) there were differing sito conditions in (a) the lack of sufficient construction matorials at a designated borrow area and (b) abnormal ground water from an underground spring at the sito of the Stateline comfort station; and (6) BOR breached its contract obligation to pay for (a) backfill material required to be imported because of BOR's improper computations of the quantities required and (b) the actual amount of liquid asphalt applied over all pavement where required.

DISCUSSION

I. The Stipulation

Apparently because there were extensive prehearing discovery and issue-narrowing negotiations between the parties, there has been a practical change in the theoretical approach to the case from that disclosed by the foregoing description of BECO's theories. At the hearing, the parties entered inte a stipulation which effectively eliminated a number of issues and cast all factual and legal issues in terms of delay and delay damages. They also stipulated the amount of per-day damages at $2,941.09 to be paid to BECO for each day it was delayed by reason of some fault or other on the part of BOR.

The existence of the stipulation has anchored a rather extensive argument in the briefs about what was proved and what was needed te be proved. Although the argument is largely a procedural one, it involves burden of proof, among other things, and thus touches on substantive matters. Ultimately, the stipulation affects and colors much of the case or much of what the case would have been were it not for the presence of the stipulation, so we believe it important to set out our understanding of it here.

There once appeared to be a nunber of potential issues which the stipulation eliminated. For instance, te the extent that BOR might have objocted to BECO's assertion that the latter is entitled to recover based on its reasonable schedule for completion, we deem BOR to have waived that objection by reason of the stipulation. We will acknowledge as they arise other instances where we deem one or the other of the parties by joining in the stipulation to have waived an opportunity to litigate an issue. We recognize that the parties may not stipulate to the law nor to legal conclusions and that it may appear that parties are doing that when, as here, they entor a wide-reaching, general stipulation with few details. We view this stipulation rather as establishing the facts which provide the basis for drawing certain legal conclusions and thereby limiting objections to certain legal arguments.

In this latter regard, we have noted that the stipulation has a very precise daily delay figure, and the size of the figure initially gave us pause, ospecially insofar as the daily rato for the contract, as originally written, is lower. (An $856,295 full performance contract amount when divided by 420 days of performance as allowed in the contract yields a daily rate of approximtoly $2,038.80, or $902.29 lower than the stipulation amount.) When we also considered that some of the delay claimed related to delay not for the entire BECO crew but only for the surveying crew (which was a subcontractor, anyway), for instance, the size of the stipulated amount caused even greater concern. (Whenever there were delays te the surveying crew, there were, presumably, resultant delays to the work crews, but the record clearly discloses that BECO made no consistent, serious attompt to show what those resultant delays were. The record does show that there was work to be done, however unproductively or inefficiently, that need not have been put off because of surveying difficulties, but there has been little direct proof abeut the extont of the lack of preductivity caused to the work crew by the delay to the survey crew. Our only definite information on the effect of a day's delay to the survey crew, therefore, is the cost of the surveying crew, which on a daily basis is lower than the stipulation amount; to that we could add only a guess in most circumstances as to the costs associated with inefficient use of the work crew, but we know that such costs, in the absence of proof to the contrary, should certainly be less than the full day costs that would result if the work crew were totally idled. BECO's failure to provide proof on this issue and some others could be tied to the stipulation, *i.e.*, BECO believed that the lattor obviatod the necessity for proving certain facts. That explanation would suffice in these circumstances were it not for the fact that the stipulatod amount appears to be considerably higher than the apparent daily rate based on the contract amount; our concerns persisted.)

We were able to allay our concerns when we considered the whole record and all of the circumstances. The single most important factor in that consideration was BECO's projected work schedule as disclosed in the preconstruction conference. According to its schedule, BECO expected to spond little more than half the contract-allotted days on the project. This would, of course, affect the por-day contract rato by a factor of approximately two, reaching a figure well in excess of the stipulation amount. This figure is a more realistic reflection of actual costs to BECO, because during the 420 calendar days allottod, BECO would have no costs associated with the contract after the dato of its projected completion, to the extent that that date is reasonable, and would have greatly reduced costs during the winter season when direct labor and materials costs would be nil or close to it.

Other considerations included that some of the original items for which recovery is sought, being change items, involved BECO's providing certain materials. As organized under the stipulation, BECO's claim no longer requires reimbursement for extra material but translates all damages into delays. (Clearly, extra work can cause delays to the completion of a contract as originally contomplated in which case there would be two possible methods of measurement for the damages–one the value of the change and the other the value of the delay. Applying either of the methods should yield the same result on a daily basis, but it is clear that the cost of extra matorials would be reflected in the change method result while that is not so clear, at least intuitively, in the delay method result. What we discern here is that the parties intended to use the delay valuation method in quantifying all damages and intended that costs for materials and for other factors, including the risks of litigation, be included in the daily delay rate.)

As our understanding of the meaning of the stipulation thus begins to take shape, we next contemplate the fact that the daily figure of the stipulation is far higher than the full-term (420-day) daily contract cost rate but far lower than the daily cost rate of the BECO schedule. That fact leads us to a better understanding of the stipulation. It is reasonably clear that the parties have negotiated the stipulation and the part of the stipulation which is expressed by the daily delay rate. (We do not mean to imply that daily rates, derived by dividing the contract amount of a fixed-price contract by the number of allotted or scheduled contract days, is the only or even a necessarily proper starting point for determining delay damages; to the contrary, we recognize that realistically the cost of a day's delay or of a day's extra work probably will be significantly different from a daily rate based on the fixed-price contract amount because of the variability of the factors which were considered in bidding the fixed-price amount. Not the least of these is under- or overbidding as a matter of poor judgment or for intended purposes having little te do with current profitability; others are changes in costs of a variety of items like labor, materials, overhead, etc., whether resulting from inflation generally, union contract negotiations, legislative changes, or any other circumstances. The daily rates thus probably have little direct correspondence with the cost of a delay or extra encountered during performance. They do, however, provide us with a benchmark in this case for measuring the expected daily delay rate, especially since there is no evidence of a major shift in the factors, just mentioned, which comprise costs at the bid stage as compared to the performance stage.) We infer that the fact that the stipulation amount is between the two extremes of potential daily cost rates based on the contract amount is a reflection of a negotiation between the parties that accounted for many of the factors and issues which were originally in dispute but which no longer concerned the parties in their proof, nor this Board in its decision. We are not unmindful that in expressing the stipulation, BECO's counsel disclosed an antecedent for the stipulated amount, namely the CO's decision which essentially awarded 15 days' delay damages at an amount identical to the stipulation amount. That antecedent does not deter us from our conclusion that the amount was part of the negotiation which led to the stipulation, because BECO claimed an amount that was far different from that awarded by the CO even after taking account of the proportionate difference in days of delay claimed and days of delay awarded. We thus see that the parties agreed on the figure used by the CO in his decision as the figure to be used by the Board.

What the parties have negotiated thus provides the final data necessary to a preliminary understanding of the stipulation. By measuring all damages in terms of delay and using a daily rate, BOR has waived its possible objections te, for instance, (1) using BECO's reasonable performance schedule to measure delay, (2) the absence of strict proof of full-crew delay when, for instance, BECO's proof fails to account for every worker's productivity for an 8-hour period, and (3) failure to prove the legal elements of the various complaint counts as originally constituted. By the same process, BECO has waived any entitlement it had te, for instance, (1) separate materials payments on extras, (2) reimbursement for delay days at a rate consistent with its scheduled performance period, and (3) reimbursement for calendar days delay rather than actual performance days delay. Thus, our view of the stipulation is that each party calculated the relative strengths and weaknesses of its case, including a factor reflecting its perception of the likelihood of proving every part of its position, and then struck a deal that each party could live with based on its separate calculation. That deal means that for each day of delay BECO can prove BOR caused it, BECO will recover $2,941.09. It means that BECO's proof need not be as particular nor as strict as it would have to be if we were viewing the case in the context of the original theories of the complaint. It does not mean, however, that mere proof of delay will translate into dollars of recovery. BECO must prove that there was a delay and that BOR caused it in circumstances which would tend to make us attach something like fault to the latter. BOR has available to it all of the defenses that it normally would, factual and legal, including that any delay proved was BECO's responsibility rather than BOR's. Because of that availability, any argument we will see may well be effectively indistinguishable in substance from the argument we would see in the absence of the stipulation. Perhaps the impertant difference spelled by the stipulation to our consideration and decision of the case is that potentially we can proceed without reference to technicalities and complexities that otherwise would be present; if BECO convinces us that it was delayed as the result of a BOR blameworthy action or inaction, then we will order the latter to reimburse the former therefor in an amount measured by the amount of delay proved multiplied by the stipulated rate. We believe that the parties intended that by the stipulation, that they have negotiated what could result in a decrease in the potentially enormous factual and legal complexity of the case, that they have mutually and separately calculated the risks involved in their respective cases and that they have struck a deal that each is prepared to live with for good or ill. We find nothing legally objectionable about the stipulation and therefore intend to enforce its terms as we perceive them to be.

However, we must explain our way around a major obstruction to the implementation of our understanding of the stipulation thrown up by BECO. In its pesthearing memoranda, BECO has consistently called for payments to compensate for delays caused the survey crew and, separately, for delays caused the construction crew. Our understanding of the stipulation does not logically contemplate payment for beth. Our understanding would not allow compensation based, loosely if not strictly, on the daily cost for the entire operation to BECO for delay caused to what is so clearly a small part of the entire operation. As we noted, the surveyor was a subcontractor with very clearly defined costs to BECO, costs which were a small fraction, on a daily basis, of the stipulation amount. Allowing the stipulation amount for each day of survey crew delay proved would challenge the underpinnings of our understanding. We believe that our understanding of the stipulation would not allow the recovery of the stipulated amount for each day of delay to the survey crew unless such delay could be directly linked with some measure of delay to the entire operation; yet BECO consistontly calls for separate recovery for surveying and construction delays in its posthearing submittals.

Two matters influence our perception on this matter and help us resolve the dilemma in favor of our original understanding as detailed above and against the BECO formulation which allows recovery for both surveying and general performance delays. The first is that there is a finite limit to the number of days that BECO could have been delayed. We look to BECO's schedule (sometimes referred to as the "but for schedules") and discover that by comparing the actual completion period against BECO's projection, there is potontially a 12-week delay associated with the Meeks Cabin portion of the job and potentially an 11-week delay associated with the Stateline portion of the job. (At Stateline, BECO intended te begin work in the 1979 season on July 9 and did; it intendod to end work on November 3 and did. During the 1980 season at Stateline, BECO intended to bogin work on June 2, but was allegedly unable to bogin until June 23, a delay of 3 weeks and scheduled work te end on July 26 while it accomplished substantial completion on September 20, a delay of 8 weeks for an 11-week total. Similar comparisons te the Meeks Cabin site's scheduled starts and finishes and the actual starts, finishes, and substantial completion date result in the 12-week period mentioned (AF, Exh. 3, Tab 23).) Discounting the argument that any delay during the first 3 weeks of the 1980 season could not result from any BOR conduct and would bo duplicated in the first 3 weeks of the post-schedule period we contemplate a natural limit on the days delayed of 77 te 84 calendar days. BECO did not show that it increasod its workforce substantially during any of this period, and that failure leaves as the only logical explanation for BECO's claim for compensation of 127 calendar days' delay that there must be some duplication, *i.e.*, that for a particular day BECO is claiming some delay for the survey crew while also claiming some overlapping delay for its construction crew. We may not allow recovery basod on such duplication and therefore will allow recovery for delays to the survey crew only where there is shown a direct link botween such survey delay and a delay to the performance crew, and where BECO has not separatoly proved the same performance delay under the heading of construction delays.

The other mattor influencing our perception bolsters our conclusion that BECO's claim must include duplicative showings of delay. During his explication of the nature of the stipulation at the hearing, BECO's counsel used the following expression: "[The] parties agree that the sole issue for resolution at this hearing on this appeal is the number of days BECO, Inc.'s *construction operations* were delayed through the owner's fault" (Tr. 3, italics supplied). Given our understanding of the reason for the size of the daily recovery amount, as detailed above, the only logical type of delay which would support recovery of such an amount would be a delay to essentially the entire operation and not to some small fraction thereof. As we have stated, we believe that the parties have negotiated a daily delay figure which allows them to ignore the delays to fractional portions of the operation, believing that any full-operation delay proved, requiring compensation at the relatively high stipulation amount, adequately covers any such fractional delays. We believe the parties intended this by their stipulation, that the expression by BECO's counsel at the hearing about delays to the "construction operations" confirms this view, and that the hearing was conducted with that understanding in mind. It is too late now to change the rules of the game, and we will decide the appeal based on this lengthy exposition of our understanding. We believe that the recovery allowed, measured by delay to construction operations at the stipulation amount, adequately compensates BECO for the various delays it endured.

It is our intention to follow that stipulation and its implications in deciding the appeal. There are a siguificant number of delay items of two classifications–survey-related delays and construction delays. For the most part, we are unconcerned with survey-related delays for the reasons just disclosed. For construction items and for survey items, to the extent the latter remain for decision, we treat each individually in the following pages, according to the stipulation's guidelines. (Our view of the effect of the stipulation, as expressed above, does not logically allow strictly for recovery for survey-related delays. That BECO spent much hearing time and effort and much posthearing brief space on the subject is puzzling enough to cause us to question our understanding of the stipulation. Nevertheless, no other understanding appears such as would allow recovery based on the record showings. We note that BOR also takes posthearing positions which appear to be contrary to the thrust of the stipulation. In the absence of a logical alternative to our view of the stipulation and the case, we attempt to fashion a legal and equitable conclusion from what we have and must dismiss the parties' various assertions and instances of conduct which are inconsistent with that view as being products of an excess of adversarial zeal.)

II. The Notice Defense

First, however, there is one issue of general or nearly general application which we may decide before discussing the individual items. That issue is BOR's contention that BECO failed to give adequate and timely notice to the CO of a claim as to a number of the individual items. We think this contention is not worthy of serious consideration for a number of reasons. BOR has admitted in its answer receipt of documents that at least arguably constitute notice for some of the claim items (Answer, pars. 35 and 36). It did not separately raise lack of notice in its answer or at the hearing. Some of the claim items are not easily classified as changes, such as would invoke application of notice provisions. The stipulation essentially reads the notice defense out of the case. Finally, the CO considered all of the current claim items as they were constituted before the stipulation and not only did not raise the notice issue but arguably acknowledged that adequate notice had been given (Appeal File, Exh. 2, Modification No. 1 at 2 of 6). If we were to consider this issue now, we would effectively be allowing BOR to spring a defense on BECO when it would be impossible for BECO to dispute it. The least that can be said about these circumstances is that BOR waived any notice defense it may have had and that we will not allow it to revive it after the entire case has been tried in reliance on that waiver.

Discussion on specific disputed items follows.

III. Survey-Related Delays

BECO has claimed that there were 14 separate instances of delay caused its survey crew plus one other item for compensation, being a general inefficiency caused the survey crew by the disruptions of more particular instances of delay. The tetal delay claimed under all of these items amounts to 70 days (Appellant's Brief at 13-14). Because of our understanding of the nature of the stipulation (*see* "The Stipulation," above and note 2 *infra*), however, we conclude that only three of the incidents are eligible for consideration as compensable at the stipulation's daily rate of $2,941.09. (It is reasonable to say that BECO presented at least a prima facie case of BOR-caused delay in each of the instances mentioned. Because our analysis in "The Stipulation" led us te believe that the parties did not intend for nearly $3,000 to be paid whenever BECO showed a day's delay to its surveying subcontractor only, we have decided to compensate BECO for such delays, however, only where there is a connection between such and delays to the BECO construction work crew. All of the asserted delay instances except the three mentioned display no such connection.) The three incidents which are eligible are described by BECO in its brief as "Stateline Waterline Alignment Errors" (Appellant's Brief at 10), "Primary Control" (Appellant's Brief at 5-7), and "Reestablish Primary Control at Stateline and Meeks Cabin (1980)" (Appellant's Brief at 13).

A. Stateline Waterline Alignment Errors

The "Stateline Waterline Alignment Errors" were two in number. The first had to do with an error of 30 feet in the location of the line under which one of the waterlines was to lie as it tracked one of the curves in the Stateline campground road. This error concerns us little because it was discovered and corrected at a time in September 1979 before construction crews were working in the area (Tr. 208-09). The second area, discovered a little later in the month, had a direct effect on the work crews which were pursuing their efforts in the area simultaneously with the discovery and correction of the error. The problem was that BECO found a culvert in the field where the plans failed to show any. The surveyor had already set the grade for the waterline in ignorance of the existence of the culvert and then had te change the grade to conform to the general design policy of setting all waterlines below culverts. There is sufficient testimonial confirmation of the involvement of the work crews for us to conclude that the crews were delayed as the surveyor corrected the error (Tr. 209-10).

While essentially admitting that there was a delay, BOR nevertheless defends on the grounds that the drawing errors leading to the delay are insignificant and, relatedly, that BECO was contractually on notice that such minor discrepancies would exist, would require field modification, and would be the responsibility of the contractor for purposes of detection and correction. BOR relies on "General Notes No. 5" to the drawing depicting the work in question as the source of that contractual notice. It announces that "GRADES & ALIGNMENT SHOWN HEREON MAY REQUIRE FIELD MODIFICATION" (Respondent's Brief at 42-45; Appeal File Exh. 1, Vol. 2 at 29). BECO's countering argnment also refers to a contract provision, namely the specification which establishes a tolerance of one-tenth of a foot for compliance with drawings while simultaneously establishing that tolerance as the definitional touchstone for the "minor discrepancies" which BOR asserts are within the zone of contractor responsibility (Supplemental Notice No. 2, Specifications replacements sections 1.2.8.b and .e). We thus are presented with what appear to be two contradictory contract provisions. For us to conclude that BOR-supported provision controls the situation we must also conclude that the discrepancy was a relatively minor one such as would not take the description of the drawings outside the category of the "reasonably accurate." BOR has not provided us with any evidence, though, that the discrepancies were relatively minor and we have supporting its position only the argument in its brief. On the other side we have BECO's testimonial evidence of the extent of the discrepancy (Tr. 209-10) and BECO's argument that the tolerance specifications, being strict requirements, provide the definition of "reasonably accurate" and "minor discrepancies" in the context of this contract. Following BECO's suggested approach, as we are inclined to do, would eliminate the perceived contradiction between the purportedly competing contract provisions. It would allow us to give effect to the intent of the minor discrepancie s provision as BOR desires while not necessarily applying it every time the Government merely argues that a particular instance of extra work results from a minor discrepancy. We do not intend to limit the Government strictly from prevailing in a situation where it does not present evidence on the magnitude of the discrepancy, but if it does not so present evidence, we cannot fairly allow it to prevail unless the case shows the discrepancy to be minor per se. We cannot reach that conclusion here, especially where BECO has shown that the survey crew's efforts to correct the discrepancy consumed a half-day; we believe that a minor discrepancy would take considerably less than a half-day for a survey crew to correct (Tr. 210; BOR's brief admits that the surveyor's correction efforts were efficient, Respondent's Brief at 43). We conclude that BECO is entitled to compensation for one-half day's delay to its construction crew because of the grading error on the Stateline waterline.

B. Primary Control

The other two survey delay items which we believe to be eligible for compensation under the stipulation involve the establishment of primary control at the outset of the BECO effort and the re-establishment of such primary control as was required at the beginning of the 1980 season (the second construction season). For these preliminary purposes, BECO's case relies on the circumstantial establishment of the delay caused the construction crew by the delay caused the survey crew at the beginning of each construction season. The establishment of primary control, being the first step in all of BECO's performance, logically needed to be substantially complete before the construction crew could begin its performance. If the survey crew were delayed in this performance, there would necessarily be delays to the construction crew. We believe that the record establishes that fact fairly well, if circumstantially. What it does not establish with any reasonable degree of accuracy is the amount of that resultant delay, an issue we treat after the current entitlement discussion.

The showing of the connection between the respective types of delay attaches as well to the re-establishment of primary control in 1980 as it did to the establisliment thereof in 1979. What is different about the 1980 delay is that it requires greater reliance on the reasonableness of BECO's construction schedule and BECO's right, in following that reasonable schedule, to have the benefit it would acquire by finishing the project earlier than allowed by the contract and in conformity with its own schedule. If BECO were deterred from following its reasonable schedule by BOR-caused delays and as a result of that deterrence BECO could not, as expected, complete paving activities before winter weather disrupted the placement of much of the primary control established earlier, then the delay encountered because the survey crew was re-establishing control would be the responsibility of BOR. We have already discussed BOR's waiver of the opportunity to argue the reasonableness of BECO's schedule (under "The Stipulation," abeve) and the causative track of the foregoing discussion does not fail as a matter of logic, so we perceive that the reasons for preliminarily eliminating the other survey crew delays from consideration because of our understanding of the stipulation are not present for the primary control claims. We move on then to the substantive entitlement issues raised by those claims.

Paragraph 1.2.8 of the Specifications' General Requirements (as supplemented) provides that BOR "will establish the primary control to be used for establishing lines and grades required for the work" and that "[f]rom the primary control points, the contractor shall lay out the work by establishing all lines and grades * * * necessary to control the work * * *." It also requires BOR to "provide the contractor with complete information concerning the listing and identification of the primary control system following receipt of notice to proceed."

BECO contends that BOR did not provide the "primary control" required, that that failure caused BECO to undertake additional surveying activities resulting in delays to the work crews in the amount of the days claimed. BOR contends that it provided the primary control required. The dispute revolves around the interpretation of "primary control."

BECO's case for its version of the meaning of "primary control" begins with the testimony of its surveyor, James Burcham, who was also qualified as an expert witness on surveying. He testified that BOR's obligation to provide primary control included setting monuments in the field at "primary control points," namely points of curves ("PC's," or the beginning and end points of curves along a line), points of tangency ("PT's," or points where the straight line of a road or camping spur meets a curve on the line of another road, for instance), and points of intersection ("PI's," or points where the line of one road or spur crossed the line of another). Each point thus described appeared as a circle on one or another of the graphic plans that were part of the bid package presented to prospective bidders (with certain exceptions described below). Thus, according to BECO's position, BECO expocted to find monuments in the field to correspond to each of the circles on the plans; when it did not, it was compelled to undertake a surveying effort it did not anticipate, leading to the delays for which it currently seeks compensation.

BOR contends that, reading the contract as a whole, the only reasonable interpretation of the crucial term is *its* interpretation. We treat each of the constituent parts of that contention individually.

First, BOR argues that BECO's construction "fails the test of reasonableness" (Respondent's Brief at 6). Apparently, that failure results from the asserted open-ended nature of BECO's interpretation. BOR contends that that open-endedness is best exemplified by BECO's insistence that all PI's, PT's, and PC's are primary control points even if they are not denoted by circles on the plans. (BECO's Mr. Burcham testified that he expected such points to be located on the ground though they were not circled on the drawing for one of the campground loops (Tr. 165) (Respondent's Brief at 6-7).)

The emphasis of BECO's contontion, however, is not on circles, as BOR appears to believe, but on the various kinds of points as defined. Contrary te BOR's assertion, for instance, the points of those descriptions are indicated on all drawings, some by numerical location description with an arrow and others by such designation plus a circle.

There is nothing open-ended about BECO's interpretation; it maintains consistency in claiming that all PI's, PC's, and PT's should have been located on the ground whether or not a circle accompanied their depiction on the drawings. The presence of circles on the drawings is irrelevant te BECO's position.

BOR next attacks BECO's position by directing attention to the qualifier in the phrase "primary control." BOR contends that although it agrees that the BECO points are "control" points, they are nevertheless not *primary* control points. There are several prongs to its attack. First, it argues that since the specifications require BECO to "place and establish such additional [to primary] stakes and markers as may be necessary for control," then obviously there are control points contemplated by the contract other than *primary* control points and that the peints BECO argues BOR should have located on the ground are in the former category and not the latter. We note that the absence of a cogent definition of "primary control" (other than BECO's) hampors us in accepting this argument, because although the language suggests a hierarchy of classes of control points, that absence means that we have no rational means of differentiating amongst the classes. Also, the possible existence of subsidiary control points does not destroy the logic of BECO's interpretation, as will be seen when we discuss that in a more detailed manner later.

The second prong of BOR's "primary" attack strikes at the language used by Mr. Burcham in the "Survey Plan" submitted to BOR on July 17, 1979 (Appellant's Exh. 1; Respondent's Brief at 7-8). BOR feels that when Mr. Burcham stated therein that "P.I.'s and other control points will be set from R.P.'s [reference points] located by Government Surveyor," he necessarily admitted that PI's and similar points, though "control" points were not "*primary* control" points and that BOR's obligation, to locato primary control, was acquitted by locating "reference points." To support its point, BOR emphasizes Mr. Burcham's negative response at the hearing to a question about whether the specifications contain any information on what BOR was to provide in the field beyond the bare usage of the term "primary control." BOR asserts that these two statements "severely damage the credibility of [Mr. Burcham's] testimony" (Respondent's Brief at 8).

We consider first Mr. Burcham's tostimony that the specifications contained no clarifying information on the meaning of "primary control" and note that that absence of information should not be surprising; if there were clarifying or additional information in the specifications on the meaning of "primary control," presumably either we would not now be embroiled in a controversy over the torm's meaning or the scope of the dispute would be considerably narrowed. Similarly, the "Survey Plan" does not seem so sinister as BOR would have us believe. We would find interesting, if not conclusive, on the question of credibility a witness's earlier written expression of a position clearly and directly contrary to the position of his testimony. Where, however, the earlier expression is equivocal on the issue of contradiction, and especially where the party currently citing the earlier expression as evidence of incredibility did not use it in cross-examining the witness at the hearing, we are more inclined to look for a way of reading that expression as consistont with the later testimony than we are flatly to accept the opposing party's conclusion of incredibility based thereon. Here, that consistency is relatively easy to fmd just from the circumstances and timing. The date of the Survey Plan was after the date of contract award and the expression BOR relies on is *more* likely, if anything, of being a report of a BOR statement to Mr. Burcham of what BECO would get in the way of BOR-provided control, than it is of Mr. Burcham's unaided reasonable expectation of what BECO would get based on what his experience and expertise told him "primary control" means. Moreover, lator tostimony confirms that that is essentially what did happen and what the expression in the Survey Plan therefore meant (Tr. 178-80). Finally, even if BOR were correct about that expression, for purposes of the ultimate issue it would tend to prove that BOR should have located the "R.P.'s" (reference points) in the field. The problem is that with few exceptions BOR did not locate such RP's on the ground. (From the testimony of BOR's Mr. Schofield, it appears that BOR flagged or staked RP's that referred to PC's, PI's, and PT's on one of the drawings (Appellant's Exh. 5), but as a general mattor BOR did not so designate RP's in the field (Tr. 736-37). It would appear that BECO would have been satisfied with such RP's to each of the points it considered primary control, since Mr. Burcham testified that his normal operation included setting up something like RP's for primary control points because the primary control points would often be lost during the substantive performance phase (Tr. 248, 369-71).) We conclude that there are no circumstances where BOR says there are, such as would rationally lead to the notion that the credibility of Mr. Burcham's testimony has been severely damaged.

The next prong of BOR's "primary" attack begins with the dictionary definition of "primary" and then follows a line of reasoning which we have interpreted as follows: Because "primary" means "first," "original," "initial," then "primary control" in the surveying business is established essentially by the flagging or marking of any point in the field from which a contractor would be able to lay out the entire project using other information provided in the specifications and drawings (Respondent's Brief at 8-10). BECO does not contend that it is impossible for a surveyor working from as few as one point located in the field to survey and lay out the entire project using that point, other information that could be provided, and the surveyor's art and craft. Indeed, we have seen that Mr. Burcham's crews laid out the project from the points provided, even though BECO contends that those points did not rise to the dignity of or were not all of the primary control points. Thus, according to this prong, if the points provided are "enough" from which the project may be laid out, then BOR has acquitted its responsibility to provide primary control. We are unwilling to accept this construction, however, because it is, to berrow BOR's characterization of BECO's interpretation, far too open-ended; the logical end of that position would be that the Government has met its obligation by flagging one point, even the zero milestene, and providing enough information otherwise to get from that point to the layout of the project. We do not believe that the parties intended such a scenario by their use of the terms and provisions under scrutiny.

BOR's attacks on BECO's position thus fail, largely, as mentioned, as a consequence of BOR's failure to announce its own cogent interpretation of the phrase "primary control" such as rationally and logically applies in all of the circumstances presented. By contrast, BECO's position *is* of that description, and we accord it that status principally as a matter of following the interpretive line purportedly embraced by BOR, looking at the subject term in context–as it relates to the contract as a whole.[1] Remembering that the contract paragrapb under review assigns responsibility for some of its constituent tasks to BOR and for some to BECO, we review the scheme of differentiation for clues to the meaning of primary control.

Subparagraph 1.2.8.a requires BOR to establish the primary control "te be used for establishing lines and grades required for the work." Subparagraph 1.2.8.b requires BECO to "lay out the work by establishing all lines and grades necessary to control the work * * *, [f]rom the primary control points." That subparagraph also requires BECO to "place and establish such additional stakes and markers as may be necessary for control and guidance of his construction oporations." The quoted language suggests to us a certain logical progression to the surveying function that places primary control one logical and operational step before the layout of the lines and grades for which BECO was responsible. The progression suggested supports the validity of BECO's version of "primary control." If BECO is to lay out lines, for instance, and BOR is to provide the points BECO needs te lay out those lines, then as a minimum BOR should be providing the beginning and end points of curves, points of tangency, and points of intersection. It is difficult to conceive bow a surveyor can lay out such *lines* from a single point without some intermediate steps, and the language quoted appears to contemplate layout directly from control points.

To aid in understanding our conception of this, we have constructed a medel of the logical progression to whicb we refer, using the various

[1] BOR asserts that tbe Court of Claims found an interpretation as "strained * * * as Appellant's" unreasonable and cites *Bishop Engineering Co.* v. *United States*, 180 Ct. Cl. 411 (1967), in support of that assertion. We have reviewed that case and discovered that the Court there, reviewing purportedly conflicting specifications having nothing to do with surveying, refused to allow a party to strain at the meaning of contract language to arrive at an alternative construction which creates an ambiguity. In the present case we are not dealing with alternative constructions which create an ambiguity hut a straight conflict over the meaning of a torm of art. The case cited therefore is not helpful.

items to which the parties have referred in their argument. At the highest level in this model are the lines and grades which are the end product of the surveying operation. At the lowest level would be that point or those points (of the zero milestone variety) from which the layout could eventually be accomplished and which BOR (altornatively) claims are primary control. Next above those are the PC's, PI's, and PT's which BECO claims are primary control. And between that level and the lines and grades level are those intermediato points hetween one PC, PT, or PI and another which give greater definition to the line or grade. It is the points of this last-mentioned category to which we understand subparagraph 1.2.8.b refers when it mentions "additional stakes and markers [which] may be necessary for control and guidance of [the] construction operations." The argument centers around BOR's promotion of the first (lowest) group as being "primary control" because they are "enough" to do the job and BECO's promotion of the second (PC, PI, and PT) as being "primary control." As may be inferred from our discussion thus far, we favor the logic of BECO's position. As we have noted, simply being "enough" from which ultimately to complete the surveying project does not make a point a "control point." Moreover, if the apparent scheme of the specifications is applied to the model, that is that lines and grades should and can be laid out from "primary control points" with the assistance of certain intermediate points and markers which are the contractor's responsibility, then we see the validity of BECO's position.

When we consider what we believe to be BOR's alternative position, that RP's (reference points) are the "control," we reach the same practical result. When we plug RP's into the model, we find that their logical position is not a new, fifth level of the model but instead in a collateral position correlative to PI's, PT's, and PC's. We gather this from the cross-examination testimony of BOR's surveying witness and also from Mr. Burcham's testimony that BECO usually located what amount to RP's to guard against the consequences of "losing" PC's, PI's, and PT's during construction. The evidence appears to establish that BOR failed to locate any more than a few RP's in any event, so that even if we accepted its RP argument, that would have little practical effect on its case.

Based on the foregoing, we find and conclude that BECO's survey crew was delayed in its operations by BOR's failure to comply with specifications provisions requiring BOR to furnish BECO with primary control.

BOR takes the alternative position that even if there were a BOR failure to meet the contract requirement of providing primary control, BECO has nonetheless failed to prove the duration of the claimed delay caused thereby. The main objection to the adequacy of BECO's showing in this regard is that BECO's only proof is the testimony of its surveying subcontractor, Mr. Burcham, who referred te his daily log in estimating 14 calendar days' delay in 1979 and 3 days' delay in 1980.

BOR relies on a Court of Claims and a VACAB case in asserting that such evidence is insufficient to establish the amount of any delay.

The first of these cases is *Luria Brothers & Co.* v. *United States*, 369 F.2d 701 (Ct. Cl. 1966). BOR contonds that relying on Mr. Burcham's testimony to establish the amount of delay in this case is tantamount to relying on the "mere estimatos by a contractor's employee 'based upon his observation and experience' * * * unsupported by 'corporative [*sic* in BOR's brief; should be 'comparative'] data' or 'corroboration' " such as the Court found to be less than satisfactory proof in *Luria Brothers* (Respondent's Brief at 16, quoting from *Luria Brothers*, 369 F.2d 701 at 714). In fact, the *Luria Brothers* decision is hardly helpful to BOR's case at all. The Court there, in recounting the history of an earlier case, quotod the Supreme Court's opinion in that case at some length. The gist of the Supreme Court pronouncement quoted is that any strict rule regarding the use of estimates, approximations or guesses, however well-informed, applies to the establishment of the link between the breach or other contract illegality and the fact of damage (part of what we normally call entitlement) and not to the amount of damages (wbat we commonly call quantum). " 'The rule which precludes the recovery of uncertain damages applies to such as are not the result of the wrong, not to those damages which are definitoly attributable to the wrong and only uncertain in respect of their amount.' " *Luria Brothers*, 369 F.2d at 713 (quoting *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 562-63 (1931)). When the *Luria Brothers* Court got to the portion of the case which BOR has quoted, it reached a result consistent with the Supreme Court's admonitions for such cases and quito different from what one would expect from BOR's characterizations of its holdings.

In the *Luria Brothers* case, the contractor's witness testified to four different periods of lost productivity or efficiency resulting from Government action. For each, the witness estimated the lost productivity expressed as a percentage. (The Court acknowledged that loss of productivity, which is a compensable injury, is rarely proved other than by the opinion of an expert, so the basic underpinning of what BOR's position seems to be was not supported by the case it cites.) The testimony for each of the four periods was unrebutted, but the Court refused to grant compensation for one of the periods and granted it for the other three but in an amount that was less than that estimated by the witness. The reason for the refusal in the one instance was that the expert's estimate tostimony was the only evidence on the existence of the link between the wrong complained of and the alleged injury. On the other three poriods, there was independent evidence conclusively establishing the link, but the Court "reduced" the witness's estimate for a variety of reasons unrelated to the fact that the testimony was of the estimate variety. (Although the

Court noted that the testimony was "merely estimates based upon [the witness's] observation and experience," it also noted the probability of the witness's loyalty te the contracter because of his late employment relationship, the lack of "comparative data, * * * standards, and * * * corroboration [to] support his testimony" and, perhaps most importantly, the Court's own experience with similar cases.) The witness's estimates for the three periods were 33-1/3, 25, and 20 percent; the Court allowed 20, 10, and 10 percent, respectively. *Luria Brothers*, 369 F.2d at 713-14.

[1] The lesson of that case thus becomes more clear. An expert witness's testimonial estimate is rejectable as establishing the fact of damage when that testimony stands alone. When, however, the causative link has already been established, there is nothing objectionable about such testimony used to establish the *amount* of the damages. On the other hand the adducement of such testimony, even if unrebutted, does not conclusively establish as fact the matters testified te; the tribunal may and should consider other factors like bias, demeanor and its own experience in similar matters, just as the Court of Claims did in *Luria Brothers*.

Applying those lessons to our case, we discover that, if anything, *Luria Brothers* advances BECO's case rather than barring it. To begin with we are dealing with a more finite concept, delay time resulting from BOR misfeasance, than was the Court in *Luria Brothers*, loss of productivity. Also, the causative link was established by other record evidence and by testimony of Mr. Burcham other than the testimony BOR has characterized as "estimates." Finally, Mr. Burcham's testimony was supported by his contemporaneous memory of facts and times recalled by reference to his diary. Because of these factual distinctions from the *Luria Brothers* case and because the lesson from the case is different from that urged by BOR, we conclude that *Luria Brothers* is at least inapposite to the case at hand.

Similarly, BOR's reliance on *United Baeton International*, VACAB No. 1265, 78-2 BCA par. 13,252 (1978), is misplaced. There, the Board decried the appellant's apparent lack of interest in the case and its failure to submit any evidence te support its claim after submitting its claim letter to the CO. In the current case, BECO's performance is far from that of United Baeten. While BOR may argue with the quality or the probative value of Mr. Burcham's delay testimony, it cannot reasonably say that that and other evidence adduced is equivalent to the tetal lack of evidence in *United Baeton*. To the contrary, we conclude that not only is BECO's evidence sufficient te survive BOR's attack on it as being rejectable but, untroubled by the facters which caused the *Luria Brothers* Court to "reduce" the estimates there, we accept Mr. Burcham's testimony as establishing the same amount of delay as it stated. In this latter regard, we are not inconsequentially affected by BOR's failure to produce conflicting evidence and by its failure te establish any cognizable notion of invalidity of Mr. Burcham's testimony contemporaneously with its offering, *i.e.*, through cross-examination. We do not read *Luria Brothers* as precluding consideration of this factor.

We thus accept BECO's proof that establishing and re-establishing primary control delayed the survey crew 13 work days (10 in the 1979 season, Tr. 175; 3 in the 1980 season, Tr. 241-42). As notod, however, that does not prove with any precision the resultant delay to the construction crew, which is the operative factor for recovery. The circumstances establish that the survey crew delay in establishing primary control inevitably meant delay to the construction crew, something absent in the other instances of survey-related delay. Since we know there must have been construction delay but cannot tell how much with any assurance, we adopt the jury verdict approach for determining damages and declare that BECO is entitled to recover for 8 days' delay at the stipulation rato because of the BOR primary control failures. Adding the one-half day for the Stateline waterline error results in a total recovery of 8-1/2 days for survey-related delays.

IV. Construction Delays

There are seven individual recovery items classified by the parties under the heading of "Construction Delays." We follow the parties' treatment of these items despito the fact that four of them fit more logically under our understanding of the survey-related delay category. (In any event, BECO has consistontly since the stipulation tried to collect for (1) delays to the surveying crew and for (2) delays to the construction crew whether caused by survey deficiencies or other circumstances. Given that posture of BECO's on recoverability, taken in disregard of what we *later* declared to be the clear meaning of the stipulation, it is probably unreasonable to expect BECO (a) to anticipate our view that survey crew delays are compensable only when directly relatod to construction crew delays and (b) to structure its case according to that view.) We first treat those four of the construction delay items allegedly caused by survey omissions and deficiencies.

A. Stateline Trailer Dump Station

The first has been described by BECO as "Curve Data Error at Stateline Trailer Dump Station." The surveyor, Mr. Burcham, testified that the drawing for the trailer dump station area omittod data which was necessary for him to locate lines and grades to allow construction of the roadway area around the dump station. He further testified that it took him 2-1/4 days to develop the missing data, address the problems created by the omissions, and otherwise correct the errors presentod by the omission. (His testimony was that of the 2-1/4 days he spent, one was on a weekend when there could not have been a delay to the work crews which were not scheduled to work on weekends (Tr.

195-204).) BECO's project manager, Mr. Jackie Lee Grebb, testified that the omissions delayed the work crews for 15 days (Tr. 423-24).

BOR attacks the proposed award for delay damages on a number of grounds. First, BOR contends that any delay te the construction crew did not result from inadequate drawings; obviously, the drawings were adequate, because the surveyor was able to lay out the lines and grades using them (Respondent's Brief at 34-36). We saw a similar argument applied to the primary control issue and give it similar treatment here. There clearly was a difference in the level and quality of information given on the drawing in question and the other drawings of the contract. If it takes the surveyor 2-1/4 days longer to lay out the facilities depicted on the drawing in question than it does to perform a similar function with respect to other drawings, then we believe the appellant has identified a drawing which lacks the information the parties contemplated to be presented. Any delay caused the construction crew in these circumstances, to the extont it can be traced to the surveyor's delay in laying out lines and grades, was caused by omissions in the drawing, a responsibility of BOR's.

A second argument is that the omission was obvious and that BECO therefore should have inquired about it before submitting its bid; having failed to do so, BECO may not object about the omission now. While this position held some initial surface appeal, we heeded BECO's countor-argument–essentially that there is no evidence to the effect that the omission was an obvious one such as would require notice to the CO and that BOR's declarations that there is such evidence are fabrications. Indeed, BOR relies only on Mr. Burcham's testimony, even torming it an admission at one point, that there was no curve data on the drawing as to the five curves depictod, as proof that the omissions were obvious (Respondent's Brief at 38-40). In the absence of more tostimony on the surveyor's art, we are unwilling to agree with BOR that Mr. Burcham's testimony (plus our review of the great number of contract drawings) establishes that obviousness, especially when we consider other record itoms BECO points out, namely testimony from BOR's field engineer that he reviewed the plans and the sites and found no obvious omissions (Tr. 584-87), and tostimony from BOR's supervisor/construction representative and surveying expert that he had pre-reviewed the plans and found some errors but did not know anything about this particular omission until Mr. Burcham told him about the latter's late discovery of it (Tr. 657, 678, 683, 691-92).

[2] Having thus found BOR's two arguments on entitlement lacking, we move on to its last argument against BECO's recovery for the trailer dump station omissions. The argument is one of quantum, namely that BECO failed to prove the 15 days' delay it claimed. BECO points out that the tostimony of its project manager, Mr. Grebb, was to the effect that the work crews had to be diverted te other work not critical to paving while the omission was resolved, that the time from recoguition of the problem to its resolution was 19 or 20 days, and that

the delay to the work crew in that period was 15 days (Tr. 422-24). We have already discussed how the delay might be established, how BECO's schedule for performance was important to the claim, and how there is an expectation of loss of efficiency to BECO's operation from switching work crews from scheduled paving work to noncritical "second season" work. We thus could contemplato a situation where a delay to the survey crew could result in a delay to the construction crew of equal or even greater duration because of lost efficiency plus the effect of winter's intervention. We will not supply those factors, however, and as a result are skeptical of Mr. Grebb's testimony. He did not explain, in the terms just suggested, how a 2-1/4-day surveying problem became a 15-day construction problem. Moreover, Mr. Grebb's tostimony that the problem was not resolved until August 24, 1979 (almost a full month after Mr. Burcham's discovery of the problem), does not square with Mr. Burcham's tostimony that he had developed the corrected data by July 29. (Although Mr. Burcham testified that he did not perform the layout using his supplied data until August 24, we will not find that the delay from July 29 until August 24 in applying the data developed was caused by BOR. It would be BECO's burden to prove such an inevitable causative route, and it has not.) We are thus left once again with a finding that BOR's omission caused a delay to BECO but without sufficient precise evidence to know how long that delay lastod. We again adopt the jury verdict approach and decide that the Statoline trailer dump delay was 1-1/4 days.

B. Stateline Wastewater Line

The second alleged construction delay caused by errors in the survey plans is the "Stateline Wastewator Line Elevation Errors." Mr. Grebb tostified that there was no correlation between the elevations for the roadways and the elevations for the wastewater lines that were to run alongside the roadways. That failure, according to Mr. Grebb's tostimony, caused a delay of 5 days to the construction crew (Tr. 424-26).

BOR objects to granting BECO any compensation for this alleged delay on two grounds. First, BOR highlights the same argument it has used before that the drawings were adequato for Mr. Burcham to lay out the work in the field (Respondent's Brief at 45-51, 106-07). Our reaction to this argument is the same as our reaction to similar arguments on other items. The drawings involved lacked the type of information that was provided on other drawings and tbe presentation of which we believe was contemplatod by the contract. That BECO was able ultimately to lay out the work does not establish that the drawings were adequate as contemplated by the contract, and BOR presents only a purported logical argument without reference to testimonial evidence to support its case that the drawings were adequate (Respondent's Brief at 49-51, 106-07). We conclude that BECO has established a prima facie case of delay caused by drawing error on wastewater line grades and that BOR's counterargument, based on self-supplied logic and reference to drawings on which no testimonial evidence was offered, was inadequate to overcome it.

[2] Following a pattern established for other items, BOR advances as its second ground for objection that BECO failed to prove the quantum of damage (Respondent's Brief at 107-10). BOR correctly points out that when asked about the background to his assertion that the wastewater line elevation error cost his construction crew 5 days' delay, Mr. Grebb referred to an appeal file document which by referring to another appeal file document established the duration of the poriod when the error remained unresolved but makes no mention of the activities of the construction crew or the inefficiencies thereof (Tr. 425; Appoal File Tab "Declaration of Facts" at 13; Tab 18 at 3-6).[2] BOR is thus correct about the failure to prove the precise amount of damages, but that does not mean, as BOR suggests, that there must be no recovery. Instead, we employ the jury verdict approach and conclude that BECO is entitled to compensation for 3 days' delay at the stipulation rate because of the elevation errors on the Stateline wastewater lines.

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[2] Part of the cross-examination of Mr. Grebb is illuminating on the subject of the meaning of the stipulation (*see* text under "I. The Stipulation"). It is clear from Mr. Grebb's answers to counsel's questions that BECO believed that by showing delays to progress of the job measnred against BECO's "bnt for" schedule, it had established entitlement to a proportionate amount of the daily rato regardless of what the work crew accomplished during the resolution poried for the particular error. (This provides at least a partial answer for why BECO has insisted on being reimbursed for survey crew delays *and* for work crew delays.) It is equally clear from the same exchange that BOR had a different understanding of the stipulation. BOR's counsel obviously believed, similarly to our understanding, that the stipulation did not completely obviate the need for BECO to establish with some precision the amount of construction crew delay in order to recover *that amount* (Tr. 504-10).

The apparent understanding of BOR counsel as contrasted with that of Mr. Grebb during that hearing passage provides us with an opportunity to clarify tbe stipulation's meaning. BECO believed that the stipulation allowed it to recover whenever a BOR failing caused BECO to pnt off activities scheduled in ite "but for" line-up and in an amount equal to the time it was forced to put the delayed activity off, regardless of what the crew was doing during the delay poriod. Thus, if a drawing error affecting performance of the paving work took 5 days to correct, then by BECO's view, it should collect for 5 days' delay at the stipulation amount even though its crew was working on nonpaving projects dnring the correction period. Our view, and that of BOR apparently, is that all else being equal, if BECO's work crew is working on second season projects for 5 days then that is 5 days' work it saves and need not do in the second season. BECO has shown us that all things are seldom equal, however, and that there are certain losses of time which cannot be made up. For instance, there are certain inefficiencies produced when a crew, fully geared up to do one job, is transferred to a different function possibly at a different site probably using different equipment and materials. Another loss may result from the fact that the delay caused the failure to meet the paving schedule in the first season which in turn meant a certain amount of unexpected damage during the intervening winter ultimately resulting in the necessity of doing corrective work in the second season which was not originally contomplated. We can even comprehend that the total effect of the inefficiencies and the intervening damage would be great enough to equal or even eclipse the amount of the original delay. That comprehension, however, does not obviate the need for BECO te prove just how much dalay to its entire oporation was caused in each instance when there was a peried where an error or omission meant a delay in starting or completing a particular function according to schedule, especially given our view of the meaning of the stipulation's daily rate as expressed in the text. BECO apparently thought that the stipnlation covered its burden on this point. That we disagree emphasizes the danger of relying on stipulations for the purpose of establishing damages. We encourage the use of stipulations and admissions as a means of eliminating unnecessary conflict on facts and issues and as a means of minimizing the amount of effort all of the actors must put into the process, but the use of a stipulation in these circumstances, unaccompanied by a painstaking revelation of the parties' understanding thereof, has, we fear, caused a good deal of work and may have saved little on a net basis. Moreover, we believe its use has caused a situation with which no one will be satisfied: the pattern is that BECO proves entitlement, fails to prove the quantum of damage with any precision, and we award compensation using an educated guess under the jury verdict approach–all, we believe, because of the stipulation. BOR is dissatisfied because it believes that if BECO fails to prove the extent of damage then the latter is entitled to recover nothing. BECO is dissatisfiod because it believes that the stipulation means thet it should recover for every peried that BOR's failures or errors caused diversion of its crew from BECO's schedule despite its use, however relatively unproductively, on other constituent parts of the project.

August 6, 1986

C. Meeks Cabin Boat Ramp

The next survey-related construction crew delay is described by BECO as "Reslope Boat Ramp at Meeks Cabin" (Appellant's Brief at 14). This problem presents an interesting and rather complicated history. The drawing depicting the plan for the boat ramp at the Meeks Cabin site presented two messages important to the resolution of this issue. One is a designation that the boat ramp slope should be "2:1 *or* 1-1/2:1 as staked." (Italics added.) The second is an admonition not to disturb four BOR brass caps, also depicted, which were impertant for the purpose of measuring any movement of the Meeks Cabin Dam (Appeal File, Exh. 1, Vol. 2, Drawing No. 145-0A-400-67 at 74). Mr. Burcham testified that his crew followed the 2:1 slope-staking alternative and found that that slope interfered with the monuments. After discussing the problem with BOR "over a period of time," he followed BOR's direction to eliminate a drainage ditch above the ramp and change the ramp slope to 1-1/2:1. Mr. Burcham testified that the resolution process and the changes caused a survey crew delay of one day (which by itself is, of course, not compensable) (Tr. 228-31). Mr. Grebb later related that after the slope was restaked it was discovered that the ramp still interfered with the monument markers, so BECO was obliged to expend effort in constructing a protoctive barrier around each marker so that construction of the ramp would not disturb them. Mr. Grebb attributed two days' delay te gathering materials te construct the barriers (Tr. 425-27). (Interestingly, BECO has claimed only two days' delay to the construction crew, despite a claimed one-day delay to the survey crew, a two-day "hold-up" te the construction crew while it waited for materials to construct the barriers and testimony from Mr. Grebb that the boat ramp slope problem indirectly caused additional delays to the rest of the paving performance.)

The foregoing establishes a prima facie case of BECO's entitlement to compensation for delay to its construction efforts as a result of delay to both the survey crew and directly to the construction crew as it constructed the barriers. BOR presents its case against recovery, however, in three parts. The first two propose that there was no error in the drawings, that any delay caused by restaking the slope resulted from the surveyor's faulty performance or erroneous interpretation. First, BOR asserts that Mr. Burcham should have known by reviewing the drawings that the 2:1 slope alternative would result in interference with the monuments. Therefore, by the BOR argument, Mr. Burcham should have read the drawing to require the 1-1/2:1 slope, and his proceeding in disregard of that proper reading should mean no recovery for the period of time it took to do the staking job properly later. In coming to this conclusion BOR relied on the testimony of its witness, Mr. Meunier, the office engineer for the contract, which BOR characterizes as specifically pointing out that the nondisturbance requirement with respect te the markers mandated that the 1-1/2:1 slope alternative be used (Respondent's Brief at 94-99, 111-15).

We cannot agree with BOR's assertion. To begin with, we cannot attribute to Mr. Meunier's testimony the conviction on the issue that BOR does. Although Mr. Meunier did testify that "[t]o clear those [monuments] and not disturb them, the one and a half-to-one would have to be utilized," he did not say that the mere presence of the requirement on the drawing would put the contractor on notice that only the steeper slope would suffice. In fact, in answering a question about how the contractor would know which of the alternatives was the proper one, Mr. Meunier stated, "I assume he'd be directed" in the field (Tr. 830-33). Also, if it were so obvious to the reader of the plans as to which of two alternatives would work and which would not, then it follows that it would be equally obvious to the designer of the plans who would then avoid setting out two alternatives and would present only the proper one on the drawing. Finally, the asserted clarity of the propriety of the 1-1/2:1 altornative loses luster when we consider the testimony that use of that slope also resulted in interference with the monuments (Tr. 426). It would appear that even the alternative BOR argues for was not entirely proper, and we conclude, in the absence of more convincing evidence, that there was nothing in the drawings that would lead BECO as inexorably as BOR argues to the determination of which of two alternatives, suggested by BOR in the first place, is the proper one for a particular purpose.

The second part of BOR's attempt to counter BECO's prima facie case by shifting the fault for the delay to BECO presents a testimony contest of considerable difficulty. BOR asserts that its agents *directed* Mr. Burcham te use the 1-1/2:1 slope and that Mr. Burcham staked the slope at 2:1 in direct disregard of that direction (Respondent's Brief at 97-98). BOR advances in support of its case that its witness, Mr. Schofield, testified that prior to any staking, BOR determined the proper slope and communicated that information to Mr. Burcham (Respondent's Brief at 97-98; Tr. 706). Mr. Burcham's testimony is clearly contradictory; he stated that he discovered the interference after 2:1 staking and that *he* then notified BOR, after which the individuals jointly reached a decision on solving the problem (Tr. 239).

Bearing the burden of going forward and of ultimate persuasion on this issue, BECO has established its entitlement by presenting a prima facie case based on Mr. Burcham's testimony but only if BOR's case, in this instance purportedly in direct factual contradiction, does not overcome that prima facie case or equal it in persuasiveness. We conclude that BOR's case does neither and that BECO should prevail. Mr. Burcham's testimony is clear, simple, and direct. Countering that is Mr. Schofield's testimony which, despite BOR's protestations to the contrary, does not display those attributes to the same degree. BOR asserts that Mr. Schofield determined with Mr. Burcham the proper slope and that that took place before any layout work, according te

Mr. Schofield's testimony at Tr. 706. Reviewing Mr. Schofield's entire testimony on the subject we discover the following:

> If we *stuck* to a two-to-one side slopes on this boat ramp, it would wipe out these brass caps–destroy them. It was discussed with Mr. Burcham that if he would stake a one-and-a-half-to-one side slope trying to avoid these brass caps–. [Italics supplied.]

(Tr. 705-06. Although the second sentence *could* be read to suggest a discussion between Mr. Burcham and someone before layout, the emphasized word in the first sentence suggests that the 2:1 staking had at least begun at the time of any such discussion):

> I told him - - - He said it [the 1-1/2:1 staking] might be extra work; and I told him to keep track of his time and I would do the same. And we would try to make some kind of arrangement with the [CO] to pay for it if it took extra * * *.

(Tr. 706. If 1-1/2:1 staking were a permissible reading of the plans and BOR directed it, then there would be no extra work to talk about. On the other hand, if the 2:1 staking had already been done, there would be no "if" to whether the 1-1/2:1 staking, subsequently, would be extra).

> Well, around that time I was called back to Utah for a few days.
>
> Q. [by BOR counsel] All right. What–How far did he *change* the slope stakes?
>
> * * * Well, myself and Lohn Finley had to go back to Utah to bogin checking some more specifications on some more campgrounds that was upcoming. And when I got back–This is from memory. I could be off a day or two, but it seemed like the day I got back they were a–Jim [Burcham] was slope staking still on the *road*. He had–For some reason he was two-to-one right through that area.
>
> He had started with a one-and-a-half-to-one, but then it went to two-to-one through the brass cap areas. [Italics supplied.]

(Tr. 706-07. Counsel's question seemed to assume that some staking had already been done, by use of the verb emphasized, "change." Mr. Schofield's answer, however, disregarding for the moment his self-admitted problem with his memory, appears to express surprise that Mr. Burcham was using the 2:1 slope, despite having "started" with the 1-1/2:1 ratio. It is not clear, on the other hand, that the witness is talking about slope staking on the boat ramp).

(Passages over the next three transcript pages suggest that Mr. Schofield's surprise as expressed in the last transcript quote had nothing to do with staking the boat ramp slope. In particular he testified (1) that he was "[i]rked * * * a little bit," not by Mr. Burcham's failure to follow a direction or an agreed mode of procedure but by the latter's apparently surprising decision to proceed as he did on whatever phase of the work Mr. Schofield was testifying about and (2) that the irksome performance was "no big thing" and "didn't have any adverse effect right then" (Tr. 707-09). That those passages did not refer to the boat ramp becomes clear after consideration of the next transcript passage).

I can't remember whether he had staked this boat ramp road–I was gone for while–as he was restaking it. I cannot remember if he'd staked through that and he was restaking it.

(Tr. 709. It becomes somewhat apparent that the passage BOR relies on to establish pre-layout direction to Mr. Burcham at Tr. 706 is not related te the boat ramp slope staking problem). The least that can be said is that any relation is not as clear as Mr. Burcham's testimony on his own recollection. That Mr. Schofield's testimony on this issue was confusing is reinforced by this exchange a moment after the last transcript excerpt:

The Board: Unless you know what you are driving at, this is a waste of time.

BOR Counsel: All right. I agree. We'll move on.

We thus must conclude that, despite BOR's contention that there was a direct testimonial contradiction to BECO's prima facie case, BOR has nevertheless not interposed a cognizable bar to BECO's case on entitlement. BOR is not deterred and once again presents the familiar argument that BECO failed to prove quantum with any precision. We agree for the same reasons developed with regard to the earlier instances when BOR advanced this argument and therefore, using the jury verdict approach, determine that BECO is entitled to 1 day's damages at the stipulated daily rate for delay associatod with the Meeks Cabin boat ramp slope staking problem.

D. Meeks Cabin Main Access Road

The last of the survey-related construction crew delays is called "One Foot Elevation Error at the Meeks Cabin Main Access Road" (Appellant's Brief at 15). After the survey crew had finished nearly the entire layout of the main access road at Meeks Cabin, Mr. Burcham discovered that there was a one-foot elevation error on the layout for the road at a particular culvert, that is the road as staked was one foot lower than was necessary to accommodate the culvert properly. He then scrutinized the drawings and discovered that the error prevailed throughout the campground wherever the road went. Mr. Burcham and BOR personnel conferred on the problem and decided to change the road grade by one foot through the entire campground. Since Mr. Burcham had already staked the entire road and campground slope, this meant that the survey crew had te undertake a significant duplicative effort which, Mr. Burcham testified, consumed 3 days (Tr. 232-34). In addition, Mr. Grebb tostified that at the time that the error was discovered, the work crew had already graded the "major portion" of the nearly 4,000-foot road that was affected. The error and its prescribed solution meant that the work already done had to be redone te raise the road level one foot. Also, BECO had already placed along the road a portion of the pipeline (approximately 300 to 400 feet) that was to serve the campground. The error meant that the rest of the pipeline to be laid had to be laid a foot deeper. Mr. Grebb testified that the additional work on the road caused 4 days' delay and that for the pipeline caused 3 days' delay (Tr. 429-37).

BOR's resistance on this issue is characteristically extensive and vigorous. First it argues that BECO failed te prove that there was any elevation error on the drawings. It notes that the only testimony favoring that conclusion was Mr. Burcham's testimony to that effect and it intimates that that testimony rises no higher than the level of mere allegation. It also attacks BECO's case on the ground that the one-foot elevation discrepancy resulted from "the indiscriminant [sic] excavation activities of the Contractor's construction crew prior te Mr. Burcham's measurements" (Respondent's Brief at 56-57). BOR bases its argument on a shaky foundation that:

> for Appellant to affirmatively prove that an elevation error existed in the drawings the surveyor would have had to have taken elevation measurements of the undisturbed existing ground along the route of the access road, prior to any earthwork that might remove earth making up an extra foot of elevation.

(Respondent's Brief at 57). This statement is of suspicious validity as an intuitive matter; that BOR makes it without record citations to support it leads us to believe that BOR is attempting to testify about a crucial fact in the case after the record has been closed. Moreover, the record entries BOR does call up te support its assertion that "unwise and premature" excavation had taken place before Mr. Burcham discovered the error do that job well enough but are equivocal at best on the underlying question of whether a surveyor could identify a problem proporly only by staking on undisturbed ground. The record entries cited also do not come close to eliminating the logical possibility that some staking had been done before the excavation BOR identifies as the cause (Respondent's Brief at 58). In short, the entries citod are not as porsuasive to us as they are to BOR.

On BOR's position that Mr. Burcham's testimony by itself was inadequate to prove the error of the drawing, we basten to make two points. First, Mr. Burcham's testimony, being clear, recited from porsonal exporience, and related to verifiable events, is perfectly adequate to establish a prima facie case that there was an error, and, second, Mr. Burcham's testimony was not the only evidence on the matter. A BOR witness gave testimony which we believe fortifies BECO's case. Mr. Lohn Finley, the BOR lead inspector, testified that the elevation rise would "make the whole thing fit–in the campgrounds–make them fit a lot better to the terrain" and "it would also make a better-looking job for us" (Tr. 757, 758). It is this same testimony that BOR argues establishes that BECO requested the rise to make its job easier and that the approval thereof in fact shortened BECO's construction effort. Although in answer to a leading question to the effect that BECO made the request for its own benefit, Mr. Finley answered affirmatively, the essential thrust of his testimony was that there was extra work created by the elevation discrepancy, but that he did not believe that it amounted to 10 days' worth, and that there should have been separate benefits to BECO from the correction but he did not know how much (Tr. 759-60). In other words, the testimony is hardly a model of conviction on the question for which it is cited, and, in any event, that question has nothing to do with whether or not there was an error. On that score, Mr. Finley testified unequivocally on cross-examination that there was an error in the plans; moreover, he re-characterized Mr. Burcham's notice to BOR of the problem as a "suggestion" rather than a request (Tr. 775, 776). In the circumstances, we believe that BECO's case that there was a plan error is a very strong one and that BOR's attempt to discredit it on the weak record entries cited is unconvincing.

[2] BOR also objects on the familiar ground of failure to prove the quantum of delay, but in this instance finds a less receptive audience than in other places. Unlike some of the previous BECO failures on quantum, this item is substantiated by Mr. Grebb's reference to the nature and the amount of additional work that was caused the construction crew by the elevation error (Tr. 430-37). BOR suggests that Mr. Grebb's quantification was no more than a mere estimate, but, while the language of Mr. Grebb's testimony is closer in characterization to estimate than to rock-hard recollection, the *Luria Brothers* case, discussed above, teaches that in quantum matters of this type estimates are not innately invalid when supported by other testimony which relates the estimate to verifiable events, as here.

As a final assault on the BECO position, BOR cites a Daily Progress Report (DPR) entry as an indication "that part of the time [Mr. Grebb] has testified that the construction crews were making adjustments they may have very well been over adjusting." BOR uses the same DPR as support for its statement that "if anything, the record shows that the construction crews performed unnecessary work resulting in an excessive increase in the elevation of the road" (Respondent's Brief at 117). The report to which BOR has reference was written by BECO's foreman and contains this language: "[E]levations around road is about 2 ft. high–300-400 yds. excess material" (DPR 873). BOR has throughout its argument presented a number of quotes from such reports to establish the validity of this or that counterargument. For the most part, they have been ambiguous or equivocal on the notion for which they were offered or they raised more questions than they answered, especially given the fact that they were offered in counterpoint to direct, reasonably cogent testimony. The excerpt offered here is different from those. While the others had some apparent, at least arguable, connection to the issue for which they were cited, this excerpt, in the contoxt or lack thereof of the issue and in the manner presented, is essentially meaningless to us. We dare not even guess what it means, to say nothing of according it the meaning BOR seems to think it has. All of the various excerpts presented in the brief including this one, have something in common, however, and that is the mode of usage BOR has employed for them. BOR did not bring them out on direct examination of its witnesses. Instead, it uses them to attempt to contradict fairly clear, fairly logical testimony of BECO's witnesses adduced months earlier. Putting aside our perceptions that the excerpts are generally ambiguous or equivocal, or raise more questions than they answer, we would be wary of any such excerpts which apparently directly contradicted BECO testimony if BOR did not use them te challenge the witnesses at the hearing. BOR has given us no reason to reject BECO's prima facie case on the elevation error at Meeks Cabin, and we, accordingly, decide that BECO is entitled to 7 days' delay damages in respect thereof.

E. Stateline Waterline Damage

The first of the three alleged construction delays which are unconnected te survey errors is called "Waterline Damage at Stateline."

BECO claims that it is entitled te one day's delay damages for repairs it performed to the waterline at the Stateline site. According to BECO's brief, the damage to the waterline occurred during the wintor of 1979-80 after BECO had installed the line and, the damage not being caused by BECO, its repair is compensable (Appellant's Brief at 50; Reply Brief at 63-65). BOR's response is that the damage took place in the 1980-81 winter, that the repair therefore took place in 1981 and that BECO was responsible for the repair since the work had not been accepted even if the damage was not BECO's fault which BOR seems to concede (Respondent's Brief at 119-20). BECO acknowledges its error in reporting the timing of the damage and the repair (Reply Brief at 64).

This debate is puzzling. BOR rejects liability on the ground that the responsibility for the repair was BECO's because the project had not been acceptod at the time of the damage, yet two things make that position surprising: (1) BOR had accepted performance as substantially complete on September 20, 1980, long before the 1980-81 winter weather could have caused damage to the waterline; and (2) the CO conceded liability on the issue in the final decision (AF, Exh. 2, Modification No. 1 at 5 of 6). On the other side, BECO demands payment for one day's *delay* even though the work involved took place in the year following the dato of acceptance of performance as substantially complete. Also, the final decision appears to have accounted for this item and to have allowed BECO everything it requested in its claim in respect thereof.

We attempt to sort this out by concluding the following: First, the reason advanced by BOR te reject this item, that the damage was BECO's responsibility because BOR had not accepted ownership of the performance, does not stand as a bar to recovery, for BOR had accepted performance as substantially complete earlier and because the CO had conceded as much in the final decision; second, the fact that the "delay" occurred after the date of substantial completion does not stand as a bar te recovery on the ground that no "delay" can occur after such date, because the stipulation has resultod in the transformation of every claim item, whether of the delay type to begin with, or change or extra or whatever, into an item of delay for purposes of this case and decision;[3] finally, we conclude that in any event, BECO's appeal on this item must be denied because it has already heen paid. In its claim, BECO set out its costs, including overhead, for doing this particular item of work. The total amount claimed was $668.30 (Appeal File, Exh. 3, "Cost and Pricing Data" at 28). The CO found the claim on this item and the amount thereof to he reasonahle and granted $668.30 in respect thereof (Appeal File, Exh. 3, Modification No. 1 at 6 of 6). We recognize that BECO has changed its essential theory of recoverability from the time of the claim to the time of the hearing, but it has not explained how the CO's decision to award the full amount claimed for this item was faulty or should be ignored in favor of granting a day's delay damages under the later formulation. We therefore deny the appeal in respect of this item.

F. Stateline Comfort Station

The second construction delay item is described as "Water in the Comfort Station at Stateline." Pointing out that the specifications, paragraph 5.1.3.C.(2), require efforts to relieve the effects of water entering the tank of a comfort station to be treated as a change, BECO contends it is entitled to 10 days' delay damages for such efforts it undertook at the Stateline comfort station (Appellant's Brief at 51; Tr. 442-46).

BOR's first line of attack on this item is procedural. It notes that the contract provision cited, requiring treatment of the claim as a change logically precludes its being treated as a delay and that what BECO proved was very near to the model for a change or an extra and out of

[3] Our understanding of the stipulation, as revealed in the text and note 2 depends to a significant extent on the relative ease with which a claim item not normally or substantivoly a delay can be characterized as a delay. Thus, if BOR ordered a change or an extra, then that change or extra would normally be reimhursed as a change or an extra; but, under the stipulation, if that change or extra took a particular amount of time to accomplish and the prescribed work of the contract was delayed as a result, then in this case that change or extra would be paid for by characterizing it as an itom of delay and awarding BECO the stipulated rate times the amount of delay so determined expressed in days.

If an extra took place after the date of acceptance of the project as substantially complete, however, the initial reaction is te question whether a delay can be caused to completion of the project at a time after substantial completion. Further consideration, though, reminds us that the "delay" we are talking about in the context of the stipulation is an artificial concept, at least partly, and that the parties intended to use the delay basis for recovery whenever an injury to BECO involving tine was proved thereby regardless of where on the calendar the incidant giving rise to that injury fell. It was that consideration that resulted in the text's last sentence regarding transformation of every claim itom into an item of delay.

There is another factor in our earlier-announced understanding, however, which appears te challenge this analysis. In concluding that the number of delay days which BECO might prove was limited (and that there therefore must have been overlapping accounting for survey crew delays and construction crew delays to total a number of days in excess of that limit), we adopted as a beundary to establish the limit the date of substantial completion. If we now allow the establishment of delay at a time after that date, then logically we must be saying that that dato set up no such limit, after all. Noting, however, that this is the only item presenting this post-substantial completion problem and that it is purportedly for an extra, we think in the final analysis that the integrity of neither our original understanding nor the portion thereof that found a limit on the number of delay days that could he proved is particularly damaged by allowing the hypothetical recoverability under a delay theory for an extra done after substantial completion. (Indeed, to the extent that the importance of our understanding of the stipulation is that it purports to reflect the intent of the parties, the relative lack of impertance they accorded this itom from claim through decision to complaint could suggest that they did not even have it in mind as they hammered out the stipulation, and the current fuss over this orphan is unnecessary.) If necessary, we would even modify our limit reasoning to allow a definition of the boundary to be the calendar date of substantial completion plus any amount of tine spent on extras thereafter without doing injustico to our original scheme.

touch with the notion that the problem caused a delay to the progress and completion of the job (Respondent's Brief at 121-22). Also, the CO's final decision treated the claim as a change and, in fact, made a monetary award in respect of it (Respondent's Brief at 122). The BOR argument, having established for its purposes that BECO cannot succeed on this item if characterized as a delay claim, then also denies that it is compensable as a change for BECO's failure to comply with the change clause procedural prerequisites (presumably the notice provisions) (Respondent's Brief at 121). BOR also has arguments against BECO recovery if the item is based on a constructive change theory or differing site conditions theory (Respondent's Brief at 122-27).

Our response to this disagreement is to draw on what we have written on issues already resolved. BOR is deemed to have waived objection because of any procedural irregularities on the basis of the CO's consideration of the issue, if for no other reason. It is disingenuous to complain about lack of notice and other procedural irregularities while simultaneously arguing the disposition of the claim by the CO as another defense.

In any event, we believe that the stipulation allows BECO to recover under the stipulation's standards (that is to be recompensed *as if* the harm were a delay) regardless of the original theory for the claim as long as BECO shows something akin to BOR fault under some theory even if that showing also does not strictly fit within the normal definitional limits of "delay" (*see* note 3 and accompanying text). This terse dismissal of the great bulk of BOR's extensive argument does not take account, however, of that portion of the argument which focused on the CO's decision on the claim–the same argument which caused us to deny the appeal as to this decision's preceding item "Waterline Damage at Stateline."

There is a crucial distinction between this item and the last regarding the effect of the CO's considering them in his decision. As we noted earlier, BECO treated the "Waterline Damage" issue as an extra work item in its claim, asked for a precise amount of compensation therefor, and was awarded that amount in respect thereof in the CO's decision. BECO did not show why there was anything objectionable about that disposition, and we accordingly denied the appeal for that item of the claim. The instant item presents a different procedural history. When BECO made its claim, it presented BOR with a voluminous collection of statements, arguments, and backup materials (Appeal File, Exh. 3). In the tab entitled "Declaration of Facts" in that collection, BECO mentioned the instant item specifically (page 11, paragraph 6) but did not mention the "Waterline Damage" item at all. Under the tab "Basis of Entitlement" in the same appeal file exhibit, BECO again mentions the instant comfort station item specifically but mentions the "Waterline Damage," if at all, only generally as part of "extra work" (at page 8). Under yet another tab, "Cost and Pricing Data," BECO referred to the "Waterline Damage" item specifically, as previously noted, while making no specific mention of the comfort station itom. The organizational scheme for this last tab defines the critical difference. While the "Waterline Damage" item gets its own subparagraph for expression of damages claimed under paragraph D, "Extra Work" (page 28), the organization of the remainder of the tab forces us to infer that the instant item was included in the general section of the tab which claimed nearly $387,000 in damages (pages 24-26) (BECO explained under the "Pricing Data" tab that "an attompt to determine the cost impact on the individual items of work would not be practical" and that therefore it claimed its actual costs of "manpower," equipment, overhead, and "extended overhead" as affected by the various BOR failures to meet its contract obligations (page 23). It is clear from the other tabs that BECO considered the comfort station problem to be catogorized properly with the other items of damage caused by the faulty plans and specifications (pages 6, 9, and 11). Thus our inference was inevitable.) Therefore, it was entirely consistent with BECO's statement of its case for BOR to treat the "Waterline Damage" item as an extra and proper for us to deny BECO the opportunity to convert the item to one of delay without showing what was incomplete or otherwise incorrect about BOR's treatment of it in the CO's decision. BOR's treatment of the instant itom, on the other hand, was inconsistent with the position BECO took on it in the latter's claim. BECO grouped it with all of the other items for which it claimed "actual costs" ("manpower," equipment, etc.), as has been noted. (This grouping was the philosophical predecessor of the stipulation's delay notion for nondelay items.) The CO, ignoring BECO's treatment, awarded damages for the grouping but separated the instant comfort station itom out and awarded componsation for it as an extra (Appeal File, Exh. 2 Modification No. 1 at 5 of 6). (The decision's determination of the amount to compensate BECO for the "actual costs" grouping, of which the instant item was originally a part, along with the decision's granting of 15 days in extensions for BOR-caused delays apparently formed the antecedent for the daily rate of the stipulation.) There was not necessarily anything improper with the CO's treating this item as he did, but the contrast between both parties' treatment of this item on the one hand and their treatment of the "Waterline Damage" item on the other provides the rationale for our allowing BECO to challenge the amount the decision awards on this item while preventing any such challenge on the prior item. BECO got what it asked for on the "Waterline Damage" and failed to show what was wrong with that; it got something on the comfort station itom but not what it asked for. Therefore, by merely raising the issue in the appoal BECO has sufficiently objected to the CO's treatment of the item to allow consideration of the item under the delay theory now. Naturally, any amount to which we conclude BECO is entitled on this itom is subject to offset in the amount accorded to it in the CO's decision ($1,265.70).

To review, BOR's objections are (1) tbat BECO may not recover for delay by relying on a contract provision that requires treatment of an itom as a change, (2) that it may not recover for a change because the CO's decision awarded compensation for a change and BECO's case displayed procedural impediments to a recovery for a change in any event, and (3) tbat BECO's case under alternative theories raised in BOR's brief fails for the reasons stated therein (Respondent's Brief at 121-27). Our response is that BECO has statod a case for recovering "delay" damages under the stipulation and that the contract provision requiring change treatment forms the predicate for that recovery as we have viewed the nature of the stipulation and that the CO's granting of compensation under the change theory does not preclude recovery for the "delay" to the extent consistent with the claim. Having concluded thus, we believe there is no need for discussion of the alternative theories.

BOR states its familiar argument that BECO has failed to substantiato the quantum of the alleged delay. Some of the subarguments raised are that BECO failed to prove that water bailed on a certain date in 1979 was the result of seepage rather than rainfall (Respondent's Brief at 128), and that BECO was partially responsible for any delay that occurred because (a) one Daily Progress Report entry contained language on "over excavation" (Respondent's Brief at 129-30), (b) BECO's foreman ignored advice from BOR personnel which may have solved the problem (Respondent's Brief at 130-31), and (c) the foreman neglected to work on the problem for long periods of time (Respondent's Brief at 131-32). If BOR had raised the evidence behind these arguments at the hearing in counterpoint to the direct evidence of BECO on the comfort station item, we might have something serious to consider in the adversarial context. As it is, though, we treat these mattors consistent witb what they are, mere pickings scoured from an enormous appeal file that hint at sometbing contradictery to BECO's case, are, in fairness, equivocal and ambiguous, raising more questions than they answer, and are unfairly raised at a time when BECO can no longer rebut tbem tostimonially or countoract them evidentially. We reject the BOR argument that relies on them.

[2] That disposition does not account for the whole of BOR's failure-to-substantiate-quantum position, bowever, for BECO also attacks as lacking in accuracy the quantum testimony of Mr. Grebb, a ploy that has been partially successful on some prior items in this decision as we agreed with BOR and were forced to use the jury verdict approach in quantifying damages and invariably awarded an amount less than that claimed by BECO (Respondent's Brief at 127-28). At first perusal of the record, however, it appeared tbat BOR would not be successful witb

the argument on this item, because Mr. Grebb's testimony this time was apparently less vague, more forthright, and better connected to verifiable parts of the contract histery than it typically had been on other items. No small part of that appearance was that, after all, Mr. Grebb was describing work that had te be done to correct a similarly well-described problem. On other items he had been estimating the amount of delay caused by a problem that had little direct connection with the work that was performed because that work was for the most part to be performed quantitatively the same regardless of the existence of the problem, just later in tiine. His estimate of 10 days of work to correct the comfort station problem thus appeared reasonable and better justified than many of his other estimates (Tr. 442-46). Despite those early indications, however, we are obliged te continue paying heed te BOR's objections because of a feature of its argument different from the similar quantum argument on other items. In its brief, BOR takes issue with many of the DPR entries that BECO listed in support of its case on quantum (Respondent's Brief at 128-29). One of BOR's peints is well taken–that some of the entries reported only pumping while the work crews were busy with a number of other activities, and thus, we infer, cannot suppert full-crew utilization on the comfort station problem (Respondent's Brief at 12). In a footnote (Respondent's Brief at 129), BOR lists what it contends is the exhaustive collection of DPR entries that relate to the comfort station problem. That caused us to review the DPR's searching for references te work caused by this problem. The results of that search are interesting. In some cases, we found mention of work on the problem in the "Report on Activities" portion of the inspecter's daily report but no time allotted in the "Laber-Equipment" portion thereof (*i.e.*, DPR's 830, 832 and 850, 851). We also found at least one case of under-reporting of work done (DPR 1283). Perhaps the most interesting revelation is that while BOR's brief appears to admit that there were 4-1/2 days of work performed by the BECO crew on the problem, the DPR entries BOR relies on in arriving at that conclusion establish only 4-1/2 *man*-days of work and thus considerably less than that number of days' work for the whole crew. Our review of the 1980 season DPR's disclosed that, arguably and based on a number of assumptions, the amount of work performed on the problem approached four crew days. That calls into question the reliability of Mr. Grebb's estimate. On the other hand, there is nothing particularly reliable about the DPR's either, given the discrepancies just noted; the lack of reliability of beth sources plus the confusion created by BOR's "admission" of 4-1/2 days' work, force us in the direction of using the jury verdict approach once again. Based on the entire record, we determine that BECO is entitled te compensation for 6 days at the stipulation rate for work done correcting the leak problem at the Stateline comfort station during beth construction seasons. There must be a deduction from that amoımt for the $1,265.70 already granted by the CO in respect of this item.

August 6, 1986

G. Stateline Water Meter Box

The final construction item is the "Relocation of Stateline Water Meter Box." Mr. Burcham testified that when he encountered the grade problem in the waterline for the Stateline main road, as previously discussed, it was necessary te move the water meter box (Tr. 208-10). Mr. Grebb testified that the delay caused by this unexpected work amounted to one day (Tr. 448).

BOR argues vigorously that BECO failed te prove the quantum of delay associated with the box relocation problem (Respondent's Brief at 132-35). Similar te its arguments on other items, however, BOR uses a cousiderable amount of briefing space in arguing its case without making a single citation te the 900-plus pages of hearing transcript. BOR makes numerous citations te the DPR's and other appeal file entries, however, while essentially asserting that the forcefulness of the entries is irresistible. We find them te be somewhat less forceful than that and are once again left te wonder why such powerful evidence was not used te devastate the BECO witnesses on cross-examination at the hearing. We find that the BECO proof already cited was sufficient te establish a prima facie case and when we consider that along with two other items of evidence, we find a sufficient case te overcome BOR's counterattack. Those two items are (1) the CO's decision which (a) allowed a day's extension for the box relocation problem and (b) awarded $2,266.01 in respect of the extra work and (2) testimony of BOR's lead inspector Lohn Finley te the effect that as a result of BOR's fault the box had to be moved three times and that the delay caused BECO amounted te one day (Tr. 769-70).

We therefore allow recovery for one day's delay at the stipulation rate but hasten to credit the $2,266.01 allowed for this item in the CO's decision. (The claim/decision histery parallels that of the comfort station item rather than that of the "Stateline Waterline Damage" item as discussed above. We therefore can allow BECO to recover on the meter box item despite the CO's allowance of some recovery on it but only to the extent that we also allow a credit for the CO's award thereon.)

V. Offset for Concurrent Delays Caused by BECO

BOR contends that BECO itself contributed te any delays it encountered and that therefore it cannot recover for any concurrent delays caused by BOR (Respondent's Brief at 147-60). BOR's contention suffers from a number of weaknesses. They bogin with the fact that the overwhelming majority of record entries BOR cites in its argument are DPR's. They have consistently been ambiguous, unpersuasive, and generally lacking in the forcefulness necessary te carry the day on an issue when considered alone and not as part of an integrated evidentiary whole coupled with testimonial evidence. Moreover, much of BOR's argument is directed at the survey crew portion of the case, which we are not considering in any event because of our understanding of the stipulation. Also, except for a single item which is inconsequential in our view of the case anyway (Respondent's Brief at 159-60), BOR's case fails to connect the delays it argues BECO caused to delays for which BECO has claimed compensation. The operative word in the current discussion is "concurrent." lf the proved contractor delays are not related to the proved Government delays, then the only way the former can be important is if the Government delays allowed are figured on a total time basis, a theory we bave not followed and one to the possible application of which BOR raised one of its heartiest and most persuasive objections (Respondent's Brief at 135-38). We reject BOR's defense based on concurrent delay.

Recapitulation

To summarize, we have determined that there were 8-1/2 days of "survey-related" delays, 12-1/4 days of construction crew delays which were relatod to inadequacies in the plans and design as they affected the surveying effort, and 7 days of construction crew delays, being careful to take account of two amounts already awarded by the CO's decision, $1,265.70 for the comfort station problem and $2,266.01 for the water meter box relocation problem. We also take into account the amount awarded by the CO's decision for what loosely translatos to delay recovery as the parties then understood it. That amount is $44,116.35. Thus, BECO's appeal is grantod in the amount of $33,967.19 (27.75 days at $2,941.09 per day or $81,615.25 less $47,648.06, being the total of the various fignres allowed by the CO's decision, $44,116.35, $2,266.01, and $1,265.70), plus interest thereon in accordance with the Contract Disputes Act of 1978.

DAVID DOANE
Administrative Judge

1 CONCUR:

RUSSELL C. LYNCH
Administrative Judge

APPEAL OF CLATERBOS, INC.

IBCA-1786-3-84 Decided *August 20, 1986*

Contract No. 2-07-5D-C7503, Bureau of Reclamation.

Denied.

Contracts: Construction and Operation: Contract Clauses--Contracts: Construction and Operation: General Rules of Construction--Contracts: Disputes and Remedies: Equitable Adjustments

August 20, 1986

A contractor was found not to be entitled to an equitable adjustment for additional costs of sand embankment material incurred when a Government-listed source upon which appellant had based its bid failed to preduce material meeting the quality requirements of the contract. The contractor's reliance on the source for such material was based on its unreasonable interpretation of the contract specifications which ignored portinent requirements, including: (1) that such matorial be "predominantly natural," (2) that it meet a specific gravity of 2.60 minimum, and (3) that the contractor was responsible for tbe specific quality of matorials contained in a list of Government-approved sources.

APPEARANCES: Pinckney M. Rohrhack, John H. Bright, Keller, Rohrhack, Waldo, Hiscock, Butterworth & Fardal, Seattle, Washington, for Appellant; Emmett M. Rice, Department Connsel, Amarillo, Texas, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

This appeal is timely filed by appellant, Claterbos, lnc., from the decision of the contracting officer dated February 15, 1984, denying appellant's claim for an equitable adjustment. Appellant claims that the Government, through the contract specifications, identified borrow pits where zone 2 sand filter material could be obtained and warranted that all material taken from those sources would bo approved for use in construction of a dam project. Subsequent te award of contract, however, appellant alleges that it attempted to utilize zone 2 material from one of the identified pits, but that use of that pit was disapproved by the Government. As compensation for obtaining suitable materials from another source, appellant claimed excess costs in the amount of $832,113.45. An evidentiary hearing was held in the matter at Oklahoma City, Oklahoma, on July 11, 1984.

Background

On May 14, 1982, the United States Department of the lnterior, Bureau of Reclamation (BOR/Government), awarded contract No. 2-07-5D-C7503 to appellant, Claterbos, Inc., for construction of the McGee Creek Dam Project, located near Farris, Oklahoma (Appeal File Exhibits 1, 17; Hearing Transcript at 24).[1] The total contract price was $27,859,897 (AF-1, 17; GX-1). The dam was to be an earthfill structure requiring certain types of materials to be placed in specific zones throughout the dam. Detailed specifications relative to the specific materials at issue in this proceeding were contained in Division 5 of the specifications entitled "Earthwork," and Division 8, entitled "Concrete" (AF-17, Amendment 3 at 5-1, 8-1; Tr. 63-67, 78).

On April 1, 1982, appellant received Solicitation/Specification Package No. 5D-C7503, and bogan te prepare a bid for the project,

[1] Hereinafter, references to the official record in this proceeding will be abbreviated typically as follows: Appeal File Exhibit 1 (AF-1); Hearing Transcript page 24 (Tr. 24); Appellant's Exhibit A (AX-A); Government's Exhibit 1 (GX-1).

which was estimatod hy the Government to be $40,981,601 (Tr. 24). Suhsequent to award of the contract, a dispute arose over matorial appellant proposed to use as zone 2 sand filtor material (Tr. 81-82). Specifically, the conflict centered on appellant's reliance and bid based on Amis Material Co. (Amis Pit, Amis), as a source for the zone 2 material.

Initially, appellant calculated a bid price of $31 per cubic meter for zone 2 earthfill (Tr. 27, 37-38, 48-49, 85), based on quotations from other sources of zone 2 matorial which had been tested and approved by the Government pursuant to paragraph 5.4.11 of the contract specifications, entitled "Zone 2 Sand Filtor" (AF-17 at 5-63; Tr. 27-28, 49-51). Amis Pit, however, did not furnish a quotation for zone 2 material te appellant (Tr. 38). Rather, upon viewing a large pile of crusher screenings matorial at the Amis Pit, which was a waste matorial of the company's crushing operation to produce railroad ballast (Tr. 29, 31, 34, 42), appellant contacted Amis Pit about purchasing the matorial for zone 2 purposes, even though Amis Pit was not listed as a source of zone 2 material in paragraph 5.4.11 (AF-17 at 5-63; Tr. 35, 40).

Although appellant had previously used such waste material on two other earth-fill dam projects (Tr. 31), it assumed that it could use material from the Amis Pit for zone 2 sand filter, because paragraph 8.3.7 of the specifications listed the Amis Pit as an approved source meeting the "quality requirements" for concreto sand and course aggregato, required by paragraph 5.4.11 for zone 2 material (AF-17 at 8-15; Tr. 55-56, 60-63, 67-68, 73, 78-79, 91-92). In addition, the Amis Pit was one of the material sources closest to the McGee Creek Dam site (Tr. 40, 103-107; AX-C). Appellant detormined that the Amis Pit matorial would meet zone 2 requirements, if further screening of unwanted materials could be conducted at the Amis site (Tr. 35-36, 53). Specifically, appellant planned on setting up a screening plant at the Amis site, and use the three ponds on the property to wash the screening material, make sand material and dump any waste into a settling pend (Tr. 41; AX-D). By screening the Amis material itself, appellant detormined that it could produce zone 2 sand at a faster rate and deliver such material to the project at less cost, than from other approved zone 2 sources for the finished product (Tr. 37, 39, 42). In relying upen the Amis Pit as a source of zone 2 material, appellant bid $16 per cubic metor for Bid Items 74 and 75 (zone 2 sand filter in dam and dike embankment) for a total of $1,008,000 (Tr. 30, 49, 69-70, 91-92), rather than $1,953,000 at the initial proposed rate of $31 per cubic meter (Tr. 10, 11, 27, 37-39, 85; GX-1 at 5, Abstract of Bids).

Notice to proceed on the contract was received by appellant on June 9, 1982. However, appellant became concerned about the gradation of the Amis material, and sought information from BOR on how to set up its propesed screening plant (Tr. 80-82). Appellant thereafter sent samples of the Amis material to the Government lab at the project, and was told that BOR needed additional information on the material of the Amis Pit (Tr. 82). After further analysis of the Amis material in Denver, the Government decided that the Amis Pit could not be used for zone 2 sand filter and rejected the source solely because it failed te meet the specific gravity quality requirement of 2.60 minimum as set forth in paragraph 8.3.5(b) of the specifications (Stipulation of the Parties at Tr. 9; Tr. 81, 83, 86-87, 89; Deposition of Errol McAlexander at 9, 29; AF-7, 10, 15, 16, 17 at 8-13).

As a result of the rejection of the Amis Pit, it was necessary for appellant to procure additional zone 2 material from a source known as the William Labor Pit, at Antlers, Oklahoma, located 26 miles from the project site (Tr. 84, 97, 104; AX-B,C; AF-4). Appellant's cost for the new matorial was $31.45 per cubic meter for which appellant sought reimhursement (Tr. 83-85; 97; AX-B; AF-4, 16). By letter dated Novembor 30, 1983, appellant submittod to the contracting officer a certified claim in the amount of $832,113.45, for additional costs incurred due to the rojoction of the Amis Pit as a source of zone 2 sand (AF-4).[2]

By final decision dated February 15, 1984, the contracting officer denied appellant's claim (AF-1). Pursuant to timely appeal, the parties stipulated at the hearing that only the issue of entitlement be presented for the Board's consideration, and if upon a favorable determination of appellant's claim, that the matter be remanded to the contracting officer for a final decision on quantum (Tr. 5-8).

Discussion

The parties in this proceeding are in agreement that samples of materials from borrow pits identified in Divisions 5 and 8 of the contract were tested by the Government, and that results of those tests indicated that the materials tested were judged to be acceptable for use under the contract. They do not agree as to whether materials tested under Division 8 were approved for use under Division 5 applications, nor do they agree that the contractor could use pits listed in the contract for all sand and aggregate applications without further testing and approval by the Government.

The issue before us involving a question of contract interpretation, it is nocessary that we review the pertinent provisions of the specifications. First, paragraph 5.4.11 of Division 5, "Earthwork," identifies the requirements for "Zone 2 Sand Filter," including sieve requirements and other criteria pertaining to density and moisture. Paragraph 5.4.11 stipulates that "the sand filter material shall meet the *quality requirements* for concrete sand given in paragraph 8.3.5" (italics supplied) (which is in Division 8 of the contract), and provides:

[2] Subsequent to its letter of Nov. 30, 1983, appellant on Dec. 6, 1983, specifically requested the contracting officer's decision on its claim (AF-3).

The Contractor shall obtain the zone 2 sand filter material from private sources as the Government has no borrow area in the vicinity of the work capable of supplying suitable zone 2 material. Sources of zone 2 material that have been tested and approved are as follows:

(1) Arkhola Sand and Gravel Co. of Muskogee, Oklahoma.

(2) Jeffrey's Sand and Gravel Co. of Gore, Oklahoma.

(3) Latimore Materials Co. of Ambrose, Texas.

Other sources of zone 2 material may bo used by the Contractor if approved by the Government. All zone 2 material must meet the requirements specified herein regardless of the fact that the source of the material has been approved.

(AF-17 at 5-63).

Division 8, entitled "Concrete," specifies all the requirements for furnishing and placing concrete under the contract. Paragraph 8.3.5 "Sand" describes general quality and grading requirements for sand used in concrete. Paragraph 8.3.5(a) "General," states that *"sand shall be predominantly natural sand * * *,"* and that *"all sand shall be furnished by the Contractor from any approved source as provided in paragraph 8.3.7."* (Italics supplied.) Paragraph 8.3.5(b) entitled "Quality," sets forth the various quality requirements for sand, *i.e.*, that it consist "of clean, hard, dense, durable uncoated rock fragments," and specifies, *inter alia*, a "specific gravity" requirement of 2.60 minimum (AF-17 at 8-12 and 8-13).

Paragraph 8.3.7, entitled "Production of Sand and Coarse Aggregate," describes requirements for sand and coarse aggregate to be used for concrete, mortar, and grout, and states that such matorial "may be obtained by the Contractor from any source approved by the Government." Zone 2 material is not mentioned in this paragraph. Rather, paragraph 8.3.7 sets forth the following pertinent information:

The approval of deposits by the Contracting Officer shall not bo construed as constituting the approval of all or any specific materials taken from the deposits, and the Contractor will be held responsible for the specified quality of all such materials used in the work.

Bureau of Reclamation tests performed on samples of sand and coarse aggregate obtained from sources in the following locations *indicate that these sources contained, when sampled, materials meeting the quality requirements of these specifications for sand and coarse aggregate*:

(1) Amis Material Co.- N 1/2 sec. 16. T. 1 S., R. 12 E., Indian meridian.

(2) H. D. Youngman Contractors, Inc.-Center sec. 14, T. 5 S., R. 18 E., Indian meridian.

(3) Choctaw Materials, Inc.-S 1/2 sec. 36, T. 5 S., R. 17 E., Indian meridian.

(4) Arkhola Sand and Gravel Co.-S 1/2 E 1/2 sec. 4 and 5, T. 15 N., R. 18 E., Indian meridian. [Italics supplied.]

(AF-17 at 8-15).

Finally, the specifications at Division 18 of the contract, entitled "Records of Construction Materials and Foundation Materials List" contains in paragraph 18.1.1, test data for construction and foundation materials for each of the four sources listed in paragraph 8.3.7, above. Paragraph 18.1.1 included tests on Amis (coarse aggregate only); H. D. Youngman (sand and coarse aggregate); Choctaw Materials, Inc. (sand and coarse aggregate); and Arkhola Sand and Gravel Co. (sand only) (AF-17 at 18-5 through 18-8).

August 20, 1986

In his final decision of February 15, 1984 (AF-1), the contracting officer concluded, *inter alia*, that Division 5 and Division 8 of the contract specifications contained separate requirements and appellant therefore had no basis to rely on a source listed in Division 8 (Amis), which met the quality requirements for concrete "sand and coarse aggregate," as also meeting the quality requirements for zone 2 filter material. It is appellant's position however, that paragraph 5.4.11(b) specifically incorporates the quality requirements of paragraph 8.3.5, which it contends are an inseparable part of the specifications for zone 2 sand filter material.

Specifically, appellant contends that the requirements for zone 2 sand filter in paragraph 5.4.11 are met by sand which meets the "Quality" requirements of paragraph 8.3.5(b). It argues that since the Government listed the Amis Pit in paragraph 8.3.7 as a source meeting the 8.3.5(b) quality requirements for "sand and coarse aggregate," that such sand meeting the quality requirements of 8.3.5, by direct reference from 5.4.11(b) of the specifications, also meets the quality requirements for zone 2 sand filter material. Thus, it asserts that its reliance on the Amis Pit for zone 2 sand filter material was justified, once it determined that the sand as crushed, would meet the gradation requirements of the contract. Moreover, appellant contends that by listing the Amis Pit as an approved source for "sand and coarse aggregate," in paragraph 8.3.7, the Government expressly warranted that the Amis Pit would provide acceptable material, and is thus responsible for any added costs due to the inability of material in the Amis Pit to meet the quality requirements of paragraph 8.3.5(b). As such, appellant asserts that when the Government lists a site as meeting these requirements, a reasonably prudent bidder can rely on the Government's declaration that material from the approved site meets the quality requirements of the specifications.

It is the Government's position that the Amis Pit was not listed as an approved source for zone 2 sand filter material in paragraph 5.4.11(b), because the test data contained in paragraph 18.1.1 of the specifications showed that the specific qravity of the material from the Amis Pit did not meet the 2.60 minimum. It argues that paragraphs 5.4.11 and 8.3.5 are the only pertinent paragraphs related to zone 2 material, and that the "quality requirements" of 8.3.5, as referred to by paragraph 5.4.11 include the requirement of 8.3.5(a), that such sand be "predominantly natural." Since test results indicated that Amis Pit furnished materials were crushed, it could not meet the quality requirements of 8.3.5 for zone 2 sand filtor materials. In addition, the Government argues that the language in 8.3.7 which listed Amis as one of four sources "meeting the quality requirements of these specifications for sand and coarse aggregate" meant that as a group, the four listed sources had material available for use, but required bidders to further refer to the test results in the specifications in order to determine which sources were approved for "sand" only, for "coarse aggregate" only, or for hoth.

The Government further asserts that paragraphs 8.3.5 and 8.3.6, and the test results contained in the specifications, clearly show that materials contained in the Amis Pit would not meet the requirements for sand, but would meet the requirements for coarse aggregate provided all other requirements were met. Thus, the Government disagrees with appellant's interpretation that the approval of "sand and coarse aggregate" in paragraph 8.3.7, indicated that *both* materials could be obtained from any of the four sources listed in that provision. However, the Government argues that if appellant's interpretation is upheld, then the specifications contain a patent ambiguity because the Amis Pit was neither a source of natural material, nor did it have a minimum specific gravity of 2.60, and clearly would not have been acceptable for concrete sand. In that event, it argues that appellant had a duty to seek clarification of the ambiguity which it failed to do, and therefore is not entitled to an equitable adjustment.

Thus, the major issues raised in this appeal are: (1) whether the contract specifications and test data were ambiguous with respect to the adequacy of the Amis Pit to provide material sufficient to meet the requirements for zone 2 sand filter as contained in paragraphs 5.4.11 and 8.3.5; (2) whether the ambiguities, if any, were patent, thereby requiring appellant to seek prebid clarification; and (3) whether appellant's interpretation of the contract was reasonable.

To resolve these issues, we must view the facts and language of the contract in light of the fundamental rules of contract interpretation. We start with the cardinal principal that the contract must be read as a whole and that all contractual language must be read together with all parts given effect if at all possible. *United Pacific Insurance Co.* v. *United States*, 204 Ct. Cl. 686 (1974); *Coronado Technology, Inc.*, ASBCA No. 31279 (Nov. 5, 1985), 86-1 BCA par. 18,548. A corollary of this general rule of law is the principle that an interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inoperative, meaningless, or superfluous; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible. *Hol-Gar Manufacturing Co.* v. *United States*, 169 Ct. Cl. 384 (1965); *P. T. Co-Electric Co.*, VABCA No. 1797 (Dec. 24, 1985), 86-1 BCA par. 18,636. Finally, we note the often stated rule that a contract is ambiguous only when it is susceptible to two or more different and reasonable constructions, each of which is consistent with the contract language. *Henry Shirek d.b.a. Shirek Construction Co.*, ASBCA No. 28414 (Nov. 13, 1985), 86-1 BCA par. 18,560; *George Bennett* v. *United States*, 178 Ct. Cl. 61 (1967).

When the contract test data and specifications relating to "Earthwork" and "Concrete" contained in Divisions 5 and 8 of the instant contract are read as a whole, a reasonable reading requires the conclusion that the Amis Pit was not approved by the Government as a source for concrete sand, and hence not approved for use as zone 2 sand filter material. We believe the general intent and principal purpose of the contract was clear and unambiguous. We conclude that appellant was required te construct the zone 2 sand filter with materials which (1) were "clean, hard, dense, etc.," and met the gradation requirements of Table 5H in paragraph 5.4.11(b); (2) met the "quality" requirements for concrete sand given in paragraph 8.3.5, which included, *inter alia*, the requirement that sand meet the specific gravity of 2.60 minimum; and (3) that such material (*i.e.*, sand) be "predominantly natural" sand which could be supplemented with crushed sand to make up deficiencies in the natural sand gradings.

Although the parties (and witnesses) disagree on whether the requirement that concrete sand be "predominantly natural" was a "quality" requirement of the contract (*see* Hart Deposition at 32-33; McAlexander Deposition at 7-8; Grey Deposition at 9), we need not make such a determination for purposes of this decision. Rather, we conclude that paragraph 5.4.11(b) authorized the contractor to "use sand meeting the requirements given in paragraph 8.3.5 for the sand filter material," but that such material must also meet *inter alia*, the quality requirements listed in paragraph 8.3.5 for concrete sand. One of the "requirements of 8.3.5" concrete sand, as clearly stated in subparagraph (A), was that such sand be "predominantly natural." Appellant was apprised that the material produced at Amis did not meet this requirement through the test data contained in paragraph 18.1.1, which indicated that the Amis Pit consisted of "Gravel (crushed)" (AF-17 at 18-5, Sheet 1 of 4). In addition, appellant could further determine from its visual observation of the Amis site that the material was not natural, but was "crusher screening material," a waste preduct which required further screening to meet gradation requirements (Tr. 29-31, 34-36, 42; AX-D). It is well established that a contractor is chargeable with knowledge of what could have been discovered by a reasonable prebid site investigation. *Maverick Diversified, Inc.*, ASBCA Nos. 19,838, 19,955, 20,091 (Aug. 26, 1976), 76-2 BCA par. 12,104. For these reasons alone, appellant's reliance on the Amis Pit as a source of zone 2 material was misplaced.

There are other equally compelling reasons for denying appellant's claim. Specifically, appellant argues that the Government expressly and impliedly warranted that the Amis Pit would yield sand meeting the requirements of paragraph 8.3.5(b), and that the contract contained no disclaimer of warranty. It relies on the propositions set forth in *Mann Construction Co.*, AGBCA No. 76-109 (Sept. 11, 1980), 80-2 BCA par. 14,674, in support of these assertions. Although appellant's general arguments are supported by the precedents set forth in *Mann*, they have no applicability to the circumstances of the instant case.

In *Mann*, the contract designated a Government borrow Pit from which the contract-specified gradations of aggregate could be obtained.

The source was suhsequently found to be unsuitahle for the work, failing to yield material of the gradation specified in the contract. The Government argued that use of the source was at the contractor's option and that the Government had not guaranteed that the material in the Pit would meet the gradation requirements without further processing. The Board rejected this reasoning and sustained the contracter's claim for an equitable adjustment reasoning, *inter alia,* that the contractor had no election as to other sources of borrow material, as no other sources were available within a reasonable distance from the project. Moreover, the Board held that the contract did not expressly state that the Government would not guarantee the adequacy of the borrow Pit material, or that the Government refused to take responsibility for the deficiencies of the borrow pit it desiguated (*Mann,* at 72,372).

ln the instant proceeding, the Government listed three private sources for zone 2 material, none of which were used by appellant. Rather, appellant argues that by listing the Amis Pit as an approved source of concrete "sand and coarse aggregate," the fact that no sand from the Amis Pit could meet the specific gravity requirements of paragraph 8.3.5(b) constituted an "unknown risk." Such argument is without merit. Reference to the test data in paragraph 18.1.1, sheet 1 of 4, clearly put appellant on notice that the specific gravity of material from the Amis Pit was less than 2.60 minimum, and therefore was not acceptable for use as concrete sand or zone 2 material.

More importantly, the instant contract, unlike that in *Mann,* did contain specific language that the Government did not guarantee the adequacy or quantity of the material contained in the Amis Pit. Paragraph 8.3.7, the same paragraph that lists Amis as a source of material, provides the following caveat: "The approval of deposits by the Contracting Officer shall not be construed as constituting the approval of all or any specific materials taken from the deposits, and *the Contractor will be held responsible for the specified quality of all such materials used in the work" (AF-17 at 8-15 (italics supplied)).*

Similarly, paragraph 1.3.10., entitled "Construction Materials Test Data," provides:

> c. Concrete aggregate test data.-Tests performed on samples of sand and coarse aggregate, results of which are given in the appendices, indicate only that the sources from which the samples were obtained contained, when sampled, materials of suitable quality that can be processed to meet the requirements of these specifications for sand and/or coarse aggregate. The fact that the samples tested indicate satisfactory quality of sand and/or coarse aggregate constitutes approval by the Government for obtaining sand and/or coarse aggregate from the source from which the samples were taken, but shall not be construed as constituting the approval of all or of any specific materials in or obtained from the sources, nor does the Government guarantee that sufficient quantities for use in the work are available within such sources, and the Contractor will be held responsible for the specific quality of all such materials used in the work.

(AF-17 at 1-26, 1-27).

The above-quoted disclaimers were clear and unequivocal and complied with the standards set forth in *Mann.* ln our opinion, all of the above contractual provisions gave fair notice that the Amis Pit was not an approved source for concrete sand, and consequently would not meet the requirements for zone 2 sand filter material. Indeed, appellant maintains that it relied upon all of the contract documents read together in arriving at its bid. If such is the case, however, it should have been obvious to a bidder that further reference to the contract specifications was necessary in order to determine the quality of matorials contained in the sources listed at paragraph 8.3.7.

Here, appellant chose to ignore pertinent provisions of the contract in relying upon the Amis Pit as a source of zone 2 material. Appellant's intorpretation not only eliminates the requirement in paragraph 8.3.5(a) that zone 2 matorial be "predominantly natural," but fails to acknowledge the contract indications at paragraph 18.1.1 that the Amis material was crushed and had a specific gravity of less than 2.60 minimum. Such an interpretation was not reasonable in light of the contract requirements, and did not relieve appellant from complying with the specifications and other terms and conditions of the contract. It is well settled that an interpretation will not be countenanced which simply ignores portions of a contract or selectively reads others out of context. *E.g., see Frank A. Kennedy, Inc.*, ASBCA Nos. 28448, 28475, 29507 (June 28, 1985), 85-3 BCA par. 18,230.

In summary, we conclude that the only reasonable interpretation is that of the Government. When all the contract data relating to sand and coarse aggregate is considered, only one reasonable conclusion can be reached. The facts clearly show that the Amis Pit was one of a group of four sources which contained, when sampled, materials meeting the quality requirements for sand and/or coarse aggregate. Reference to paragraphs 5.4.11, 8.3.5, and 18.1.1 was necessary in order to determine which sources produced acceptable sand, for use as zone 2 matorial. The test data in paragraph 18.1.1 put appellant on notice that the Amis Pit was only approved as a source of coarse aggregate, since it did not meet the contract requirements for concrete sand. Appellant's reliance on the Amis Pit as a source for zone 2 material therefore, was not based on the approval of a source listed in paragraph 5.4.11, but upon a misreading and an improper application of paragraph 8.3.7.

Having found that there is but one reasonable interpretation of the contract, we conclude that there was no ambiguity in the above-quoted language. Therefore, we need not consider arguments by the parties as to whether there existed a patent ambiguity.

Decision

Accordingly, the appeal is denied.

DAVID DOANE
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

U.S. GOVERNMENT PRINTING OFFICE : 1986 O - 166-658 : QL 3

APEX & EXTRALATERAL RIGHTS ISSUES RAISED BY THE STILLWATER MINERAL PATENT*

M-36955 *April 18, 1986*

Mining Claims: Extralateral Rights--Mining Claims: Lode Claims

The primary consequence of a lode mining claimant's failure to locato his mining claim boundaries according to the actual course of the lode or vein, whether by lack of care or lack of data, is that the mining claimant may be limited in his extralateral rights to the down-dip extension of the vein.

Mining Claims: Determination of Validity--Mining Claims: Lode Claims--Mining Claims: Patent

The actual course of a vein may materially deviate from the center line of a lode mining claim without adversely affecting the validity of the mining claim. The originally stakod mining claim boundaries need not bo adjusted to comport with the actual course of the vein, so long as the mining claim has been located in good faith for mining purposes. No portion of a lode mining claim shall be considered excessive where the statutory dimensions, 1500 feet by 600 feet, are not exceedod. 30 U.S.C. § 23.

Mining Claims: Determination of Validity--Mining Claims: Extralateral Rights--Mining Claims: Lode Claims--Mining Claims: Patent

The Department of the Interior has traditionally held that it generally has no duty or reason to require proof that an asserted mineral discovery was upon a veim that had its apex within the boundaries of a lode mining claim as an essential element in establishing the validity of the discovery. This rule will always be applicable when the same mining claimant holds both the mining claims covering the presumed apex and the mining claims located over the apparent down-dip of the lode.

Mining Claims: Determination of Validity--Mining Claims: Extralateral Rights--Mining Claims: Lode Claims--Mining Claims: Patent

An allegation that the discovery upon which a lode mining claimant relies is upon a vein that has its apex outside the mining claim for which patent is sought may only bo raised by a rival mining claimant asserting extralateral rights. The burden of proof in cases where inquiry is pertinent will be upon the party questioning the applicant's right to patent. In any event, the Department may, in its discretion, decline to adjudicate the issue.

Mining Claims: Determination of Validity--Mining Claims: Extralateral Rights--Mining Claims: Lode Claims--Mining Claims: Patent

The existence of an apex within a given lode mining claim is not essential to the validity of the lode mining claim, but only te the mining claimant's ahility to assert an extralateral right derived from that mining claim.

Mining Claims: Generally

The primary purpose of the Mining Law of 1872, 30 U.S.C. § 22 *et seq.*, is the dispesal of mines and minerals, and in the interpretation of the statute this primary purpose must be recognized and given effect.

* Not in chronological order.

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Washington, DC 20402

Mining Claims: Determination of Validity--Mining Claims: Extralateral Rights--Mining Claims: Lode Claims--Mining Claims: Patent

A lode mining claimant is not limited to appropriate a discovered mineral vein only by locating mining claims along the apparent apex. If there is a true apex witb an identifiable descending vein, the mining claimant may at his option rely solely on mining claims on the apex and the corresponding extralateral right to appropriate the vein. Alternatively, the locator may locate mining claims upon the dip of the vein, as well as upon the apex, so long as each mining claim is supported hy an exposure of the valuable mineral deposit discovered.

U.S. v. Alaska Empire Gold Mining Co., 71 I.D. 273 (1964), and dicta in *U.S. v. Curlee*, A-22301 (Dec. 22, 1939), overruled.

OPINION BY SOLICITOR TARR

OFFICE OF THE SOLICITOR

MEMORANDUM
TO: SECRETARY
FROM: SOLICITOR
SUBJECT: APEX & EXTRALATERAL RIGHTS ISSUES RAISED BY THE STILLWATER MINERAL PATENT

Introduction

Government mineral examiners have raised several questions concerning the validity of lode mining claims embraced in mineral patent application, M-55857, which Manville Products Corp. filed on July 14, 1982, with the Bureau of Land Management (BLM) Montana State Office. The mining claims are located on National Forest lands, open to mineral entry, in Sweetwater County, Montana. The claims, on which a discovery of platinum-group metals is asserted, are located along part of an ore-bearing horizon which is part of the layered igneous mineral complex known as the Stillwater Complex. The mineral deposit, which these claims partially encompass, is the largest known domestic deposit of platinum-group metals. Platinum-group metals are critical to United States industry, which consumes one-third of world mine production. Bureau of Mines, *Mineral Facts and Problems* 608 (1985). More than 90 percent of world production comes from the Republic of South Africa and the USSR. Current domestic mine production is negligible, although the United States has sizable undeveloped platinum-group metal resources. *Id.*

Manville's mining claims are located along the apparent general trend of the outcroppings of the dipping lode.[1] Manville has also located

[1] The term "lode" is used synonymously with the term "vein." A lode or vein is a "zone or belt of mineralized rock lying within beundaries clearly separating it from neighbering rock." Bureau of Mines, *A Dictionary of Mining, Mineral, and Related Terms* 1199 (1968). The term "[v]ein or lode does not mean merely a typical fissure or contact vein, but any fairly well-defined zone or belt of mineral bearing rock in place." *Id. See Iron Silver Mining Co. v. Cheeseman*, 116 U.S. 529, 534 (1885). A lode will normally have a dip or inclination.

mining claims over the apparent down-dip extension of the lode. Manville asserts that drilling on the "down-dip" mining claims has exposed mineralization of rock in place within the limits of each claim. The drilling results suggest, but do not confirm, that the mineral deposits on the "down-dip" claims are in fact an extension of the outcropping lode.

Forest Service mineral examiners acting pursuant to the Memorandum of Understanding[2] with the BLM have conducted a preliminary mineral examination of these mining claims. The Forest Service has tentatively advised Manville that the lode mining claims may be improperly located because the course of the lode, where exposed, deviates to varying degrees from the center lines of the claims. Additionally, Forest Service officials have tentatively advised Manville that only those claims which are located on the outcropping apex of the lode can be valid and that any mining claims located over the apparent down-dip extension of the lode are invalid. The Forest Service apparently asserts that "extralateral rights"[3] attached to the apex claim appropriate the down-dip extension of the lode so there is no discovery on the down-dip claims which can serve to validate them.

BLM has requested us to address the questions raised by the Forest Service to enable the BLM to take action on the mineral patent applications. The questions are:

1) Are lode mining claimants required to located their claims so that the center line of the long axis of a claim will exactly follow the actual course of the lode, or will a good faith attempt to locate a claim or group of claims along the general course of the lode constitute compliance with the law?

2) Must the lode claimant, to estahlish that each claim in a group is valid, show that the lode discovered has its top or apex within that claim and is not a down-dip extension of a lode having its top or apex on another claim?

In summary form our answers are as follows. First, the relationsbip between the actual course of the lode and the position of the mining claim's lateral boundaries and center line does not affect the validity of the claim. Original claim boundaries need not be adjusted, even where the lode materially deviates from the center line, so long as the claim has been located in good faith for mining purposes. Second, as a general matter, a lode claimant need not show that his mining claim is situated on the top or apex of the lode disclosed, rather than on a down-dip extension of the lode, to establish the validity of his mineral discovery, and this is always true where the same mining claimant

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[2] The Interior Department has the statutory rsponsibility to administer the Mining Law of 1872, 30 U.S.C. § 22 *et seq.*, on National Forest lands. *H. H. Yard*, 38 L.D. 59 (1909). Pursuant te the longstanding Memorandum of Understanding between BLM and the Forest Service, the Forest Service conducts mineral examinations on National Forest lands, and recommends any contest charges to BLM. The Forest Service prosecutes the contest BLM initiates before the Interior Department, which adjudicates adversary matters between claimants and the Forest Service. *See U.S. v. Bergdal*, 74 I.D. 245 (1967); *Estate of Arthur C. W. Bowen*, 18 IBLA 379 (1972).

[3] The extralateral right allows the claimant to mine the lode in its downward course as the lode departs from the down-dip sideline of the claim. See 30 U.S.C. § 26.

holds both the claims covering the presumed apex and the claims located over the apparent down-dip of the lode.

Discussion

1. *The actual course of a lode may materially deviate from the center line of a lode mining claim without affecting the validity of the mining claim.*

Section 2 of the Mining Law of 1872 provides that the length of a lode mining claim shall not exceed 1500 feet along the vein or lode and that the claim shall not extend more than 300 feet on each side of the middle of the vein. 30 U.S.C. § 23. The Supreme Court observed in *Iron Silver Mountain Co. v. Elgin Mining Co.*, 118 U.S. 196, 205 (1886) (hereafter *Iron Silver Mining*) that the "framers of the statute of 1872 evidently proceeded upon the theory that a claim on a lode, following its outcroppings on the surface for the distance allowed, with a definite extension on each side of the middle of the vein, would generally take the form of a parallelogram." Lindley referred to this as the ideal location but noted this "ideal is rarely encountered in the practical mining world." 2 *Lindley on Mines*, § 360, p. 823 (3d Ed. 1914). The surface boundaries of the location are critically important to the lode mining claimant because the end lines of the claim fix and limit the claimant's extralateral rights. Thus, it is usually to the claimant's benefit to stake the boundaries of his claim in strict conformance with the statute.

In the *Iron Silver Mining* case, Justice Field stated for the Court that even:

> with all the care possible, the end lines marked on the surface will often vary greatly from a right-angle to the true course of the vein. But whatever inconvenience or hardship may thus happen, it is better that the boundary planes should bo definitely determined by the lines of the surface location, than that they should be subject to perpetual readjustment according to subterranean developments made by mine workings. Such readjustment at every discovery of a change in the course of the vein would creato great uncertainty in titles to mining claims.

118 U.S. at 207.

The Court explained that when the locator "will not or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences. He can only assert a lateral right to so much of the vein as lies between vertical planes drawn through those [end] lines." *Id.* The primary consequence of a locator's failure to locate his claim boundaries according to the actual course of the lode, whether by lack of care or lack of data, is that the claimant may be limited in his extralateral rights to the down-dip extension of the vein.

This conclusion is supported by taking a closer look at the facts in the *Iron Silver Mining* case. This case involved the question whether the defendants, owners of the patented Stone claim, could assert extralateral rights under the peculiar, 14-sided, horseshoe-shaped claim. The claim's unusual horseshoe shape roughly corresponded with the course of the vein contained within it as shown by the plat introduced in evidence and reproduced in the Supreme Court's statement of the facts. 118 U.S. at 203. However, for approximately 300 feet from the north end line, the actual course of the vein materially deviated from the center line of the claim to such an extent that the vein crossed the north end line just inside of the side line, far from the center line. Although the Department's jurisdiction and legal authority to issue a patent in such a form were no directly in issue, the Court did state that it was a "fact of importance, that the Land Department has, since the act of 1872, followed the end lines as marked on the surface . . . Any decision that the Department erred in that respect, and that the rights of patentees were different, would disturb titles derived from such patents, and lead to great confusion and litigation." 118 U.S. at 207-08.

The *Iron Silver Mining* case was followed by Justice Field's opinion in *King v. Amy & Silversmith Mining Co.*, 152 U.S. 222 (1894). There the Court considered whether the patented Amy claim was located so as te contain extralateral rights. The claim was located in parallelogram form 1470 feet long with end lines 491 feet wide. The Amy vein ran diagonally from one side line to the other side line, as would be the case in an ideal location. 152 U.S. at 224-25 (claim plat with narrative description). The Court noted that "the lines are not drawn with the strict care and accuracy contemplated by the statute, and which could only have been done with more perfect knowledge of the true course or strike of the vein from further developments." 152 U.S. at 228. The Court therefore declared that the mining claim did not give the claimant an extralateral right to follow the vein outside the claim's surface boundaries. Justice Field explained the rationale, citing *Iron Silver Mining, supra*:

> The court cannot become a locator for the mining claimant and do for him what he alone should do for himself. The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give the miner such rights as his imperfect location warrants under the statute. It cannot relocate his claim and make new side lines or end lines.

152 U.S. at 228.

Once again the Court recitod the physical difficulty of ascertaining the true course of the vein and the need for certainty in claim surface boundaries. 152 U.S. at 229. Nothing in the opinion suggests in any way that it was improper for the Department to have patented the claim where the course of the vein so materially deviated from the center line.

An early Departmental decision on this point, consistent with the foregoing Supreme Court cases, is *Beik v. Nickerson*, 29 L.D. 662 (1900).

In this case a protest was filed against a patent application alleging in part that "the lode or vein does not follow the course shown on the official plat, but that it crosses the north side line . . ." 29 L.D. at 665. The Secretary noted this allegation was disputed by the applicant, and stated: "but even if it were true, it would not be material. The right of the locator to follow the strike[4] of the lode ceases at the point where the lode crosses the line of the location, and *it makes no difference, so far as the validity of the location is concerned, whether the lode crosses the side line as claimed or not.*" *Id.* (Italics and footnote added.) The Secretary dismissed the protest, allowing patent to issue for the entire claim as located and surveyed.

The issue was raised again in the case of *Star Gold Mining Co.*, 47 L.D. 39 (1919), where a patent application was rejected by the General Land Office because of a claimant's failure to show a discovery of the vein upon the projected center line of the claim. The two discovery points were 84 feet and 160 feet south of the lode (center) line shown on the plat. The Commissioner of the General Land Office had ruled that the north side line would have to be drawn in to within 300 feet of the discovery in order to comply with the statute. The Assistant Secretary reversed the Commissioner, stating, "Even where it may be demonstrated that the discovery vein deviates materially from a central course through the claim, the location as originally staked and marked in good faith will stand." 47 L.D. at 42-43. The decision cited *Harper v. Hill*, 113 P. 162 (Cal. 1911), for the rule that "one who locates a mining claim in good faith is protected in his possession of the surface marked out, although subsequent developments may show that his location of the apex of the vein was erroneous." 47 L.D. at 43. The decision then concludes that "the Department believes the asbestos location was made, marked, surveyed and applied for . . . should be respected and permitted to stand." *Id.*

In *Harper v. Hill, supra*, a case involving rival locators of unpatented mining claims, the Supreme Court of California[5] stated that the prescription found in section 2 of the Mining Law that "[no] claim shall extend more than three hundred feet on each side of the middle of the vein at the surface," if construed "strictly and literally, might seem to refer to the actual position of the apex, rather than to the

[4] The strike of a vein is the linear direction of the line of intersection of a dipping vein with a horizontal plane, usually the surface of the ground. The dip of a vein is the angle at which a vein is inclined from the horizontal, measured at right angles to the strike. Maley, *Mining Law* 44-45 (1985). The apex is the top or highest part of the vein. The apex is the "upper terminal edge of the sheet-like vein whether reaching the surface or not." 1 *Lindley on Mines* § 309, p. 684 (3d Ed. 1914). Although, mathematically speaking, an apex is not a line, because a line has no width, an apex is clearly linear in an ideal location.

[5] The Mining Law grants to state courts jurisdiction over two important classes of disputes: suits over rights of possession of unpatented claims (30 U.S.C. § 53); and suits between rival locators on adverse claims presented in response to a patent application (30 U.S.C. § 30). In such cases, the state courts have decided a substantial portion, if not the majority, of cases construing the Mining Law. These state decisions are not binding on the Department (except in the particular patent proceedings involved) but are entitled to substantial weight. The California Supreme Court in *Harper v. Hill* did state that the location as marked on the ground by the location "may" not be binding upon the United States in a patent proceeding. 113 P. at 164-65. The Department's decision in *Star Gold Mining, supra*, ended any doubt on this issue. It fully adopted the rationale of the court in *Harper v. Hill* in a patent proceeding.

place marked as such by the locator." 113 P. at 164. Rejecting this strict construction, the court said:

The reference is to the vein as honestly marked by the claimant at the time as the center of the claim of which he then takes possession. There are also practical reasons which forbid such literal construction. Lodes or veins frequently do not appear upon the surface except at intervals. The true apex or middle of the vein may not be accurately determinable except by extensive excavations . . . Such veins do not run in straight lines throughout their courses, but with many turns and angles. Detached masses projecting abeve the surface may be mistaken for the ledge or vein . . . If the construction contended for should prevail, a mining location which the law declares shall secure an immediate right of pessession to the surface within the marked lines would often be a mere float, a tentative location, to be changed and adjusted from time to time to the actual location of the vein, . . . as subsequent developments indicato.

Id.

An opinion of the Arizona Supreme Court is also consistent with the Department's *Star Gold Mining* decision. *Watervale Mining Co. v. Leach*, 83 P. 418 (Ariz. 1893). In considering the validity of a lode mining claim which was located across, instead of along, the actual course of a lode, the court stated:

The statute, as we understand it, only intends to prescribe the limit of extent along the course of the lede that the locator may claim, not that he shall locate so that the greatost dimension of his claim shall coincide with the course of the lode. It is provided that the extreme extont along the lede shall not exceed 1,500 feet. It may be less. And if the miner, in making his location, should mistake the direction of the lode upon which he locates, and, accordingly make the extreme dimensions of his claim in a direction other than that of the lode, that fact does not invalidate his claim, but only operates to diminish the extent of the lode . . included within the boundaries of his claim. Of course, Congress expected that the miner would avail himself of the privilege accorded him, and locate along the course of the lode, but it does not require him to do so. The only result of not so locating is that the locator gets less, in extent, of the lode, than he otherwise would have located. And that if the side lines, instead of the end lines, cross the course of the lode, in order to define the locator's rights to pursue the lode on its dip, the side lines will be treatod as end lines.

83 P. at 421.

Costigan, in his treatise on Mining Law, embraces the rule of *Watervale Mining Co.*, and says that the "whole history of American mining law is opposed to . . . a strict construction of that statute." Costigan, *American Mining Law* 200 (1908). Costigan explains as follows:

Anyone familiar with mining knows that it may take months, and often years to ascertain the true course of a vein. The framers of the federal mining law knew that, and, in consequence, it is impossible to impute to Congress the intention that acts of location, which require only superficial investigations, should be subject to partial defeat by the ascertainment, years after the location, that the vein located runs in a direction other than that supposed at the time of location.

Id. at 202-03.[6]

In concept, these authorities deal with this issue in the same manner as the Supreme Court resolved the question whether location could precede discovery without affecting the validity of the claim, notwithstanding the language of 30 U.S.C. § 23, which provides that "no location of a mining claim shall be made until the discovery of the vein or lode . . . " *Belk v. Meagher*, 104 U.S. 279 (1881); *Erhardt v. Boaro*, 113 U.S. 527, 536 (1885); *Creede & C.C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co.*, 196 U.S. 337, 351 (1905). Bearing in mind that the principal thought of the Mining Law is exploration and appropriation of mineral, the Court construed the law to mean simply that no location is complete until there is a discovery. The principle in the cited cases supports the *Iron Silver Mining* principle in fact as well–as it is clear that location may precede discovery, locations that precede discovery are those least likely to correspond with the true, later-determined course of the vein or lode. We believe that the rule of *Star Gold Mining* is sound and should be followed. The decision is consistent with the pronouncements of the Supreme Court in the *Iron Silver Mining* case and Departmental practice following the enactment of the Mining Law. If a strict construction was given to the Mining Law on this issue it is evident that the purposes of the Mining Law would be frustrated. The Supreme Court refused te give the law such a construction due to the practical realities of mineral deposits; it approved the Department's practice of patenting lode mining claims according to their marked surface boundaries, irrespective of the actual course of the lode. *Iron Silver Mining, supra.*[7]

In 1964, however, the Department departed from the *Star Gold Mining* rule in *U.S. v. Alaska Empire Gold Mining Co.*, 71 I.D. 273 (1964), an Assistant Solicitor's decision. In the *Alaska Empire* case, patent application was filed for four lode mining claims located on National Forest lands. A vein containing "considerable mineral values" was present on all four claims, but the veins ran from the end lines to the side lines on two of the claims and from the side lines te the side lines on two of the claims. The BLM, relying on the *Star Gold Mining* decision, had ruled "that a mining claimant who has in good faith

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[6] Costigan acknowledges that one early Colorado State court case and two California State cases appear to conflict with his view and he concludes that these decisions are erroneous. *Id.* at 202. The conflicting cases are: *Patterson v. Hitchcock*, 3 Colo. 533 (1877); *Southern Calif. Ry. Co. v. O'Donnell*, 85 P. 932 (Cal. App. 1906); and *McElligott v. Krogh*, 90 P. 823 (Cal. 1907). However, in 1911 in *Harper v. Hill* the California Supreme Court distinguished and refused to follow *O'Donnell* and *McElligott.*

[7] BLM regulation, 43 CFR 3841.4-3, paraphrases 30 U.S.C. § 23, and states that a claim's "lateral measurements cannot extend beyond 300 feet on either side of the middle of the vein at the surface . . . For example: 400 feet cannot be taken on one side and 200 feet on the other." This regulation is taken verbatim from the General Land Office's regulations of April 1, 1879. *See* Copp, *U.S. Mineral Lands*, Part II, Land Office Regulations, 45 (1881); *see also* 44 L.D. 285 (1915). This regulation does no more than te describe the form of the ideal lede location contemplated by the statute. It should not be construed literally and strictly any more than the statute itself should in light of *Iron Silver Mining* and the other cases discussed in the text. In this respect the regulation is analogous to 43 CFR 3841.3-1 which continues to recite that "[n]o claim shall be located until after the discovery of a vein or lode within the limits of the claim . . ." This regulation, which also paraphrases the statute, is derived from the same 1879 mining regulations and was never revised to conform te the meaning of the law as construed by the Supreme Court and as administered by the Department. Nonetheless, we now advise that the BLM should revise and clarify both of these regulatery provisions te comport expressly with the case law and this opinion.

staked and marked a mining claim should not be required to relocate and resurvey his claim as a prerequisite to obtaining a patent even if it is demonstrated that the discovery vein materially deviates from a central course through the claim." 71 I.D. at 274-75. The Forest Service appealed this decision to the Department.

The Assistant Solicitor's decision reversed the BLM and ruled that the Department "has no power to issue a mineral patent to any surface ground exceeding 300 feet in width on each side of the middle of the vein or lode, and a patent so issued is void as to the excess over 300 feet and is subject to collateral attack." 71 I.D. at 276. The Assistant Soliciter cited in support of this holding an unpublished Department decision, *U.S. v. Curlee*, A-22301 (Dec. 22, 1939). The *Curlee* decision does contain this statement, but the statement was dictum, as the Department had found that the mining claim on National Forest lands had been amended to take in better recreational ground by running across, instead of along, the lode, raising a "serious doubt . . . whether the claim was located for bona fide mining purposes." In addition, the decision found insufficient mineralization to show a discovery that would allow a patent for any part of the claim.

The *Curlee* decision and the *Alaska Empire* decision rely upon *Lakin v. Dolly*, 53 F. 333 (C.C.N.D. Cal. 1891), *aff'd, Lakin v. Roberts*, 54 F. 461 (9th Cir. 1893), which does contain a general statement that "the land department had no jurisdiction te issue a patent for a quartz lode te any surface ground exceeding 300 feet in width on each side of the middle of the vein or lode . . ." 53 F. at 337. However, the mineral patonts involved in *Lakin v. Dolly*, were blatantly in excess of the maximum allowable size of a lode claim, which is, of course, 1500 feet by 600 feet. In *Lakin v. Dolly*, a patent for two separate mining claims held by the plaintiff encompassed 4100 feet along the lode and extended 3/4 of a mile in width. The portion of the patented claim occupied by the defendants, which the court held was outside the limits of the mineral patent as a matter of law, was situated over 1000 feet laterally from the actual lode.

The *Alaska Empire* decision challenges the necessary implications of *Iron Silver Mining* and *King v. Amy & Silversmith Mining Co.* In both of the latter cases, the Supreme Court ratified patents conveying land more than 300 feet from the line of the actual lode. Did it ignore 30 U.S.C. § 23 when it did so? No. Rather, *Alaska Empire* ignores those cases by failing to recognize the principle established there–the patent cannot convey land more than 300 feet from the center line of the claim as located. *Lakin v. Dolly* is consistent with this principle, as the width of the claims *as located* exceeded statutory limits. We conclude the 1964 *Alaska Empire* decision is unsound and should not be followed.[8] So is dicta in *United States v. Curlee*. Ratber, tbe Department should follow the prior rule stated in *Beik v. Nickerson*, 29 L.D. 662 (1900), and *Star Gold Mining Co.*, 47 L.D. 38 (1919), and reflected in the decisions of the Supreme Court in *Iron Silver Mining Co. v. Elgin Mining Co.*, 118 U.S. 196 (1886), and *King v. Amy & Silversmith Mining Co.*, 152 U.S. 222 (1894). Under this approach the actual course of a vein may materially deviate from the center line of a lode claim without adversely affecting the validity of the claim. Originally staked claim boundaries need not be adjusted to comport with the actual course of the vein, so long as the claim has been located in good faith for mining purposes. No portion of the claim shall be considered excessive where the statutory dimensions, 1500 feet by 600 feet, are not exceeded.

2. *To establish a valid mining claim a lode mining claimant need not show that his discovery is situated on the apex of the vein rather than on a down-dip extension of the vein.*

We begin our analysis of this apex issue by reviewing the Department's decision in *U.S. Borax Co.*, 51 L.D. 464 (1926). In the *Borax* case, the Department considered whether a lode claimant who proves that his mineral deposit "occurs in veins within the several claims, must . . . show that they apex there before the claims can be held valid and passed to patent?" *Id.* at 466. The Department's decision reviewed the relevant mining regulations and noted they were concerned only with ensuring the existence of "a vein or lode within the limits of the claim" and "whether a valuable deposit of mineral actually exists within the limits of each of the locations." *Id.* at 469. The Department stated:

> Not in these or in any other mining regulation is the applicant required to affirmatively show that his discovery is upon the apex of his vein. Furthermore, it has never been the practice of the Department to attack a discovery by adverse proceedings upon the ground that the discovery was not upon the apex of the vein disclosed, or to require such proof as an essential element in establishing the validity of the discovery. Many of the cases in the courts illustrato the difficulty and embarrassments that attend the proof that a vein has its apex within a certain location.

Id.

This statement of practice was affirmed in *U.S. v. Arizona Manganese Corp.*, 57 I.D. 558 (1942), where the Department stated it has "never been the practice of the Department to require proof that the discovery

[8] The Interior Board of Land Appeals departed slightly from the strict rule of *Alaska Empire* in *U.S. v. Cornelius E. Mannix*, 50 IBLA 110 (1980). In *Mannix*, a Forest Service mineral examiner projected the situs of the vein outcrop to be some 70 to 80 feet from the center line of the claims, so that one side line was more than 300 feet from the projected center of the vein. The administrative law judge ruled the claims were improperly located because the actual lede line was more than 300 feet from the south side lines of the claims. The Board vacated this ruling, stating: "A locator must assume that some place on the earth's surface represented the middle of the vein, and from such peint he cannot exceed the statutory limit . . . Accordingly, we hold that in the absence of a clearly exposed vein at the surface of the ground, a projection vertically upward te the surface from the discovery points . . . is acceptahle to identify the center line of the claims." 50 IBLA at 120. Our opinion is consistent with the result in *Mannix*. However, *Mannix* does suggest that if the vein was clearly exposed at the surface the center line might have to follow the actual center of the vein. Our opinion now clarifies that a material deviation of the vein from the center line is of no consequence to the Government in a patent proceeding, as long as the claims were located in good faith for mining purposes.

was upon a vein that apexed in the claim as an essential element in establishing the validity of the discovery." *Id.* at 565.

The *Borax* case did acknowledge one exception to its general statement that the Department would not inquire whether an apex is present within a lode mining claim for validity examination purposes. The exception noted by the *Borax* case is presented by the decision in *Bunker Hill v. Shoshone Mining Co.*, 33 L.D. 142 (1904). Bunker Hill, the owner of the Stemwinder lode mining claim, filed a formal protest against Shoshone's patent application covering the Shoshone and Summit lode claims. Bunker Hill alleged that "the discoveries upon which the Shoshone and Summit locations are respectively based were made many feet below the surface upon the dip or downward course of a vein or lode of mineral, the top or apex of which lies inside the surface lines, extended downward vertically, of the Stemwinder claim . . ." *Id.* at 143-44. The Department held, in view of the extralateral rights provision of the Mining Law: a) that if the protestant's allegations were true, the Shoshone locations were void; and b) that the Department had jurisdiction to make such a determination.[9] *Id.* at 148-49.

In *Borax*, the Department stressed the limited scope of the *Bunker Hill* decision, stating that in *Bunker Hill* "there was a definite allegation that the discovery was upon the dip of the vein that had been lawfully appropriated *and was the property of another.*" *Borax*, 51 L.D. at 468 (italics added). Explaining further, the *Borax* decision states "the *Bunker Hill* case is not authority for a rule that an applicant for patent can be required to affirmatively show that the discovery he alleges is situated upon the apex of his vein in the absence of an adverse claim to such apex, or in the absence of a positive allegation that the apex is elsewhere than inside the claim boundaries." *Id.* The Department concluded the *Borax* decision, stating:

> for administrative purposes in determining the validity of a patent application, it may be assumed that the discovery upon which the applicant relies is upon a vein that has its apex within the claim for which patent is sought in the absence of a positive allegation and offer of proof to the contrary; and if such allegation is forthcoming, the burden of proof in cases where inquiry is pertinent will be upon the party questioning the applicant's right to a patent.

The exception recognized in *Borax* and illustrated by the *Bunker Hill* case is simply not applicable to the Manville claims at issue here for two reasons. First, there are no third parties asserting an extralateral right to the mineral underlying any of the claims. Second, the apparent apex of the vein, as well as the apparent down-dip extension of the deposit, is covered by Manville's claims. In circumstances such

[9] With respect to this issue, the Department held that such a protest would not constitute an adverse claim to be litigated in stato court (and over which the Department would have no jurisdiction, see n.5, *supra*) under sec. 7 of the Mining Law, 30 U.S.C. § 30, because an adverse claim must involve conflicting locations of the same land surface. *Id.*

as are present in the Manville patent application, the general rule stated in *Borax* controls the validity examination and processing of the patent application, that is, the Government has no statutery interest in requiring the applicant to show affirmatively that each claim for which patent is sought contains the apex of the vein discovered.

The Department has always refrained from making apex and extralateral rights determinations in the course of patenting mining claims because of the intolerable burden of making such determinations if definitive, prohative facts had to be established to adjudicate the patent or fix the contest charges, and the uncertainty which would be placed upon the applicant. *Borax, supra*. One of the few recent extralateral rights cases states that there "is no established degree of continuity or identity which an extralateral rights claimant must show between an apex within the boundaries of his claim and the vein he is pursuing into an adjoining claim." *Silver Surprize, Inc. v. Sunshine Mining Co.*, 547 P.2d 1240 (Ct. App. Wash. 1976). In the *Silver Surprize* case, interceptions of slightly different mineralization by drill holes 800 feet apart were held insufficient to establish continuity and identity of the vein for extralateral rights purposes. *See also Collins v. Bailey*, 125 P. 543 (Colo. 1912) (court refused to find continuity between an apex and a vein over an unexposed distance of 550 feet).[10]

In *Lawson v. U.S. Mining Co.*, 207 U.S. 1 (1907), the Supreme Court approved of the Department's practice of not determining questions of extralateral rights in the course of processing mineral patent applications. The Court quoted in part section 6 of the Mining Law of 1872, 30 U.S.C. § 29, which establishes the procedures for patenting mining claims. The Court said: "In the section the only matters mentioned for examination and consideration relate te the surface of the ground. There is no suggestion for any inquiry or determination of subterranean rights." 207 U.S. at 16. The court approvingly cited the Department's decisions made in *New York Hill Co. v. Rocky Bar Co.*, 6 L.D. 318 (1886), and *Smuggler Mining Co. v. Trueworthy Lode Claim*, 19 L.D. 356 (1894), where the Department declined to resolve extralateral rights disputes in patent proceedings. *See also Beik v.*

[10] The *Silver Surprize* court observed that it is common practice for rival mining claimants to avoid litigating complex extralatoral rights issues by entoring into exploration agreements resolving boundary disputes. 547 P.2d at 1240. We note that where rival mining claimants have executed a boundary agreement and patent is sought by the down-dip claimant, the Department would have no basis to deny patent to the down-dip claimant on the ground that the apex claimant holds extralateral rights to the down-dip claim, if the apex claimant expressly agreed not to assert an extralatoral right against the down-dip claim. Iu such a case the general rule of *Borax*, that the Department should not and will not inquire into apex questions on its own motion, should clearly bo followed. Neither the *Bunker Hill* exception nor the jurisdiction of stato courts on adverse claims would be invoked to defeat or qualify the rights sought by the patent applicant. The propriety of this practice is indisputably established by *Richmond Mining Co. v. Eureka Mining Co.*, 103 U.S. 839 (1880), where the Supreme Court approvingly discussed, interpreted and enforced a boundary line agreement resolving extralateral rights disputes which was purposely made, in part, in order "to secure the necessary grants from the United States." 103 U.S. at 846. The rival claimants each agreed "not to protest any application . . . for a patent for the . . . claims, provided such applications did not cross the [boundary] line which was fixed." 103 U.S. at 842-43. The Court noted that patents to all the claims had duly issued and observed that the parties properly "were settling, as botween themselves, their rights to mining property . . . for the purpose of carrying on mining operations in that locality." 103 U.S. at 846.

Nickerson, 29 L.D. 662 (1900) (Department will not take cognizance of extralateral rights questions). The *Lawson* Court concluded: "As the place of union [of mineral veins] may he far below the surface, this evidently contemplates inquiry and decision after patent, and then it can only be in the courts. And the same rule will obtain as to other subterranean rights." 207 U.S. at 17-18.

The Department's 1926 decision in *Borax* and the Supreme Court's decision in *Lawson* show that the Department generally has no duty or reason to require a mining claimant to show that he holds the apex of his claimed mineral deposit, or to resolve extralateral rights disputes in patent proceedings. The *Silver Surprize* case illustrates the difficulties inherent in trying to establish continuity and identity of a vein for extralateral rights purposes on the basis on drilling data alone, which is all that is available in Manville's case. Therefore, under *Borax* Manville need not establish in this patent proceeding that each of its claims contains the apex of the discovered vein and not a down-dip extension of the vein. This is a matter into which the Government will simply not inquire in the absence of a formal protest by a third party who asserts a property interest in the vein, and even then, under *Lawson,* the Department may decline to adjudicate the controversy.

In stating that the Department generally has no reason to inquire in patent proceedings into this matter, the courts, the Department, and the authorities have been resolving cases without resolving a more fundamental issue--can a lode claim be valid without an apex as a general unqualified matter. It has been stated as as general rule that "the top or apex of a vein must be within the boundaries of the claim in order to enable the locator te perfect his location and obtain title." *Larkin v. Upton,* 144 U.S. 19, 22 (1892). Every case we have found in which such statements are made, however, involves rival claimants, where proof of ownership of the apex entails ownership of the disputed mineral vein under the extralatoral rights doctrine. Lindley states that "the top or apex, of the vein, to some extent at least, should be found within the limits of the location, as defined at the surface, at least *as a condition precedent to the enjoyment of the extralateral right.*" 2 *Lindley on Mines,* § 364, p. 849 (3d Ed. 1914) (italics added). Lindley then discusses examples of lode claims recognized as valid though not containing an apex, such as where the true apex was found within a prior patont which carried no extralatoral rights,[11] or where the vein is horizontal with no definable apex,[12] or where the inclination of the vein is so slight one cannot ascertain which is the top and which is the side edge or bottom of the vein.[13] Another important group of lode

[11] *See Woods v. Holden,* 26 L.D. 198, *on review,* 27 L.D. 375 (1898).
[12] *See Belligerent & Other Lodes,* 35 L.D. 22 (1906).
[13] *See* cases discussed in 1 *Lindley on Mines, supra,* §§ 310 and 311.

mining claims considered valid though lacking in apex are those claims located for porphyry deposits or desseminated mineral zones. These deposits, when they consist of rock in place, undouhtedly are properly located as lode claims despite the fact that such claims will contain no actual apex. *See Pacific Coast Molybdenum Co.*, 75 IBLA 16, 90 I.D. 352 (1983) (32 lode claims patented for large cohesive body of molybdenite mineralization containing reserves of 700 million tons).

These examples show that the existence of an apex within a given lode claim is not essential te the validity of the claim, at least claims of these types, but only to the claimant's ability to assert an extralateral right derived from that location. This view of the law is expressed as a general principle in the opinion of the Supreme Court of Utah in *Grand Central Mining Co. v. Mammoth Mining Co.*, 83 P. 643 (Utah 1905), where the court stated: "What constitutes a discovery that will validate a location is a very different thing from what constitutes an apex, te which attaches the statutory right to invade the possession of and appropriate the property which is presumed to belong to an adjoining owner." 83 P. at 677. The United States Supreme Court affirmed this state court decision, but expressly declined to express its position on the above-mentioned holding. *Mammoth Mining Co. v. Grand Central Mining Co.*, 213 U.S. 72, 77 (1909). The Department in the *Borax* decision also declined to address the issue of whether the existence of the apex within the claim was a condition precedent to claim validity or merely affected the extralateral right. 51 L.D. at 470. Rather, the *Borax* decision only indirectly spoke to the issue by holding that the Department would not inquire into the matter in the absence of a third party protest of the kind (no surface conflict) involved in *Bunker Hill*. We now believe this issue should be expressly addressed.

In our opinion, even if BLM could prove that the platinuin-group metals bearing horizon in the Stillwater Complex constitutes a clearly defined continuous vein with an apex from which extralateral rights could flow, claims located on the down-dip extonsion of such a vein, as well as those located along the apex, are valid so long as each claim contains an exposure of a valuable mineral deposit and the claims covering the apex as well as the down-dip portion of the vein are held by Manville. We observe that the extralatoral right granted by the Mining Law "is an expansion of the rights which would be conferred by a common law grant." *St. Louis M. & M. Co. v. Montana Mining Co.*, 194 U.S. 235 (1904). It is part of the apex locator's reward for discovery. Phrased conversely, it is properly seen as a statutory limitation on the rights of a junior, adverse locator te mineral within his claim's boundaries extended vertically downward.

The primary purpoe of the Mining Law "is the disposal of the mines and minerals, and in interpretation of the statute this primary purpose must be recognized and given effect." *Del Monte M. & M. Co. v. Last Chance M. & M. Co.*, 171 U.S. 55, 66 (1898). To construe the Mining

Law to allow the location of claims only along the apex of a vein, based upon the theory that the apex locations appropriate the entire vein under the extralateral rights doctrine, would twist the extralateral rights doctrine into a severe limitation on the claimant's right to develop the vein, especially where the continuity of the vein and its true apex are not known by the progress of mining the ore. This limitation arises chiefly because extralateral rights generally include only the right to follow veins downward into the earth, with no right to approach the deposit either from the surface by crosscut involving adversely held ground. *St. Louis M. & M. Co., supra.* We think it is clear that the statutory grant of extralateral rights, which is an expansion of the property rights a claimant would receive under the common law, cannot reasonably be construed to limit the claimant to appropriating a discovered vein only by apex locations where he has made physical exposures of the vein on each claim located on what may, upon mining, be shown to be the vein's down-dip extension.

We therefore construe the Mining Law as not limiting a locator to appropriate a discovered mineral vein only by locating claims along the apparent apex. The Mining Law requires an apex as a prerequisite to the exercise of extralateral rights, but not to the validity of a lode mining claim. If there is in fact a true apex with an identifiable descending vein, the claimant may at his option rely solely on locations on the apex and the corresponding extralateral right to appropriate the vein. Alternatively, the locator may locate claims upon the dip of the vein, as well as upon the apex, so long as each claim is supported by an exposure of the valuable mineral deposit discovered.

Where a claimant chooses to locate claims along the apex and the dip of the vein, the location and maintenance of the claims on the dip is properly viewed as evidencing the claimant's intent to abandon any extralateral right flowing from the apex locations with regard to the mineral within the boundaries of the down-dip claims. *Golden Link Mining, Leasing & Bonding Co.*, 29 L.D. 384 (1899).[14] In the *Golden Link Mining* decision, the Department recited the general rule that: "Third parties having no interest in an existing valid location, can predicate no claim or right whatever to veins or lodes the tops of apexes of which lie within the lines of an existing location . . . for the all sufficient reasons that such veins or lodes are already . . . subject to the claim of the owners of the existing prior location." *Id.* at 386. The Department held that this rule was not applicable to invalidato mining claim B, partially overlapping claim A that was staked earlier, even where the discovery on claim B was based upon mineralization

[14] We do not need to resolve whether a claimant who locates claims down-dip from his own apex claims abandons all of the extralatoral rights which may flow from his apex claims. The claimant remains free to assert, with what success we do not opine, an extralateral right flowing from the apex claims to portions of the vein which may prove to be present lying beyond the down-dip claims.

found within the boundaries of preexisting claim A. This result was reached because both of the overlapping claims were held in common ownership. The Department held that both claims could proceed to patent on the theory that the parties, "to the extent of the overlap of the two claims, intended to abandon and did abandon their rights under their prior location . . ." *Id.* at 387. Applying this principle to the Manville claims, the location and maintenance of the down-dip claims clearly evidences Manville's intont to abandon any extralatoral right to the mineral within the boundaries of the down-dip claims which may flow from their apex claims. In the words of the *Golden Link Mining* decision: "Indeed, it is the most reasonable interpretation which can be placed upon their conduct in the premises throughout." *Id.*

Conclusion

For the reasons stated above, the Manville claims at issue here are neither invalid nor improperly located even though: a) the course of the apex crosses the side lines of some claims and b) some of the claims may in fact be locatod on the down-dip extension of the deposit and not on the apex. Neither of the issues raised and discussed in this opinion are a basis for contest or patent rejection, and patont adjudication should promptly proceed consistent with this opinion.

RALPH W. TARR
Solicitor

I approve and overrule *U.S. v. Alaska Empire Gold Mining Co.*, 71 I.D. 273 (1964), and dicta in *U.S. v. Curlee*, A-22301 (Dec. 22, 1939), inconsistent with this opinion.

DONALD PAUL HODEL
Secretary

APPEAL OF HAWKINS & POWERS AVIATION, INC.

IBCA-1608-8-82 Decided: *September 4, 1986*

Contract No. 80-0663, Office of Aircraft Services.

Sustained.

Contracts: Performance or Default: Suspension of Work

Under a 90-day contract to furnish five C-119 aircraft for firefighting purposes in Alaska, the contracting officer suspended performance resulting in a 3-week delay to the contractor in order to comply with an unscheduled airworthiness inspection order, issued because of the crash of a similar C-119 aircraft in California, but having no relationship to the subject contract aircraft. The Board found that tbe Government failed to prove the contractor's aircraft to be unairworthy; that the suspension of the work for the emergency inspection, although authorized under the contract, was for the convenience of the Government, not based on the fault or negligence of the contractor, and was for an unreasonable period. The Board concluded that the contractor was entitled to an equitable adjustment pursuant to the suspension clause and awarded the contractor lost availability payments and its extra inspection costs plus interest.

APPEARANCES: Michael R. Sullivan, Williams, Walsh & Sullivan, Attorneys at Law, Los Angeles, California, for Appellant; Bruce E. Schultheis, Department Counsel, Anchorage, Alaska, for the Government.

OPINION OF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

By this appeal, Hawkins and Powers Aviation, Inc. (H&P) claims entitlement to the costs of an unscheduled inspection of its aircraft ordered by the Government, and the loss of aircraft availability payments that would have been paid under the contract terms but for the unscheduled inspection order. The inspection costs claimed total $48,891.21 and the lost availability payments total $112,148.80.

Background

Appellant had a longstanding relationship with the Office of Aircraft Services in the Department of the Interior to supply airtankers for firefighting purposes. H&P had a good reputation for assuring availability of airtankers on the occasion of a forest fire and maintained this reputation by keeping a spare tanker in readiness to substitute for one that might be temporarily out of service. Under its contract for supplying airtankers in Alaska during the fire season of 1981, H&P supplied five C-119 aircraft equipped as airtankers. Under the terms of the contract, the Office of Aircraft Services (OAS) agreed to provide Government-furnished fuel, and to pay a daily rate for availability of each aircraft during the guaranteed period, an additional daily rate for any extension of the guaranteed period, and a fixed hourly flight rato for those periods when the aircraft were actually engaged in flight operations to combat fires. In addition to the aircraft designation numbers assigned by the Federal Aviation Agency (FAA), airtankers are assigued a tanker number. Pursuant to the contract requirements, the tankers supplied by H&P were inspected by Ernest Mitchell, equipment specialist for OAS to assure that they met the contract specifications and were airworthy. This inspection consisted of an external inspection and a review of the aircraft maintenance records (Tr. III-106-7).[1]

On July 8, 1981, a C-119 aircraft (Tanker-88) crashed in California with a loss of both pilot and co-pilot. Tanker-88 was engaged in a firefighting mission under contract with the United States Forest

[1] Hereinafter, references to the official record in this proceeding will be abbreviated typically as follows: Appeal File, Volume 2, Exhibit 13 (AF 2-13); Hearing Transcript Volume III, page 64 (TR III-64); Appellant's Exhibit 4 (AX 4); and Government's Exhibit E (GX E).

Service (USFS) of the Department of Agriculture at the time of the incident. Eyewitnesses saw the left wing of the aircraft separate prior to the crash. Tanker-88 was owned by the Hemet Valley Flying Service, a firm unrelated to H&P. H&P had never owned, operated or maintained Tanker-88. Tanker-88 was a C model of the C-119, while all of the C-119 aircraft owned by H&P were G models purchased from Canada. All of the C-119 aircraft were over 30 years old. In 1979, Tanker-133, owned and maintained by H&P, crashed after a loss of a wing. The National Transportation Safety Board (NTSB) found the probable cause of the loss of Tanker-133 to be pilot error in exceeding the operating limitation and designed flight envelope of the aircraft (TR I-44). The probable cause of the loss of Tanker-88 is not known, but a broken airleron bell crank was found. Mr. Powers of H&P advised that the bell crank of Tanker-88 was found to have been defectively manufactured and one could not determine if it failed and causod the accident or whether it was simply broken in the accident. (Ex 1). He also indicated that a pilot's report of extreme turbulance a few days before the accident literally tore the helmets from the pilot and co-pilot's heads, broke loose tools and cargo and damaged the floor and roof of the aircraft.

On July 8, 1981, the USFS grounded all C-119 aircraft contracted to the Service, and notified other agencies of the accident, including OAS. By Memorandum of July 13, 1981, the Director of OAS grounded all C-119 airtankers under contract with the Department, and advised that availability pay would continue to be earned (Ex 4). On July 22, 1981, the OAS issued a notice establishing inspection criteria for the C-119 outer wing panel and aileron system according to T.O. 1C-119 G-36 (Dash-36). The notice indicated the criteria has been outlined in conjunction with the FAA, the NTSB, and the USFS (AF 2-12).

At the hearing, Mr. Thurston, Director, OAS, testified that he had received a telephone call from Mr. Powers protesting the stringent inspection requirements of Dash-36, and that he called a meeting of the contracting officer, the equipment specialist and others. He determined that the staff had relied on information supplied by USFS, and advice that the FAA was shortly going to issue an Airworthiness Directive (AD). He sent them out to develop information directly from the proper sources, and issued a second notice to operators of C-119 aircraft dated July 24, 1981 (AF-2-13). This notice statod that the July 22 notice was based on erroneous information, and that contact with the NTSB and FAA indicated that the Tanker-88 investigation was not complete and that there had been no recommendations of corrective action nor had the FAA initiated an AD on the subject. The July 24 notice required compliance with Dash-36. Mr. Thurston testified that he understood the notice required more stringent inspection requirements than required by the contract (TR II-114), but less time consuming and less stringent than those required in the July 22 notice. (Tr II-116).

By letter dated July 24, contracting officer Aker invoked Clause 5, Suspension of Work, to suspend all performance under the contract and to end availability payments upon receipt of the notice of inspection. The letter was received by H&P on July 28 and availability pay was stopped on that date.[2] H&P had already commenced the ordered inspection when equipment specialist Mitchell visited the Fairbanks repair facility on July 28. Upon his return to Anchorage that evening, and based on his report of seeing cracked and corroded parts, he was ordered back to Fairbanks the following day to photograph the parts. He photographed some 34 parts which appear in Ex. 27 of this record. The inspections were completed in mid-August 1981 and the three aircraft still subject to contract work were returned te service. Two of the aircrafts' availability periods had lapsed during the inspection.

On August 31, 1981, the FAA issued an AD requiring essentially the same inspection on all C-119 aircraft, with compliance to occur within 100 flight hours or 60 days after the effective date thereof, September 10, 1981. It is noted that this would have permitted compliance with the AD by H&P on or before November 9, 1981, or 65 days after the conclusion of the 1981 fire season and the contract in Alaska. Four of the five aircraft of H&P were from 13 to 24 days away from the end of their availability period when the inspection notice was issued on July 24, and the fifth was 43 days away from the end of availability. (Appellant's opening brief, p. 17).

From the outset of the investigation of the loss of Tanker-88, there was speculation that the probable cause was the broken aileron bell crank. The Government position was that a broken bell crank would cause a fluttering of the aileron, which would set up a vibration sufficient to cause wing separation. Mr. Powers disputed this, saying that the balancing of the aileron with lead would permit continued flight even with the disconnection of the bell crank. The final decision of the contracting officer cited the testing of all the bell cranks Hemet had on hand that had been used on an aircraft by ultrasonic and x-ray testing with consistent findings of erosion and corrosion (AF 2-32). Mr. Graff of Hemet testified that the tests were conducted three times with inconsistent results from one test to the next, that there was not a finding of poor structural integrity, and that the tests used were not appropriate for the part (Tr II-153, II-3-7).

A major controversy in this case centered on the question of what effect corrosion on parts had respecting the airworthiness of parts, and the method by which airworthiness would be determined. Confronted with an affidavit of Dr. Fowler, a metallurgical engineer, stating that "no accurate determination can be made of the effect of the alleged

[2] The final decision of the contracting officer changed this date te July 24 and required the repayment of $25,123.80 for 3.9 days of unearned availahility.

corrosion on the depicted parts' strength or structural integrity," (GX 6). Mr. Mitchell agreed that an airworthiness determination cannot be made solely on a visual inspection (TR III-179-181). Mr. Mitchell's testimony also made clear that the corrosion on parts had to be removed, the part measured to determined whether it remained within tolerance for use, tested by ultrasonic, x-ray or dye penetration means te determine structural integrity, and treated to prevent further corrosion to assure airworthiness of a part found to be within tolerance. (Tr III-179-214). During his inspection trip on July 29 when the photographs were taken, Mr. Mitchell did not take with him a micrometer or magnifier to measure or make a close examination of the parts he photographed (Tr III-180). The parts themselves were not saved, but were either discarded or restored to serviceable condition, without any Governmental request that they be preserved. Mr. Powers testified that many small parts showing any wear and costing little were commonly discarded and replaced with new parts during any inspection or repair work to avoid the costly work of reopening the aircraft to replace a single part later (Tr I-143,4).

Mr. Mayville, head of the H&P Fairbanks repair facility, forwarded his report to H&P under date of August 22, 1981, to provide the results of conducting the ordered inspection. (Ex 6). The report disclosed that a total of 570 parts from the five aircraft had been inspected, including 340 by dye penetrant means, 160 by x-ray, and 70 by visual means. He further reported that four items were found to have cracks and five had corrosion beyond tbe limits allowed by the Technical Order. None of the failed parts listed were bell cranks. It is not known whether any of the bell cranks were replaced during the inspection.

Pertinent contract provisions to this claim are 102.0 requiring certification and agency approval of the aircraft; 201.0 specifying aircraft maintenance requirements; Clause 2 entitled Changes and Clause 5 entitled "Suspension of Work." In 201.7, there is a requirement for appellant to comply with applicable manufacturer's mandatory bulletins and FAA ADs prior to performance, and to comply with such bulletins and ADs issued during performance as required by the bulletins or directives. The Suspension of Work provision provides for an equitable adjustment of the contract price in the event of an unreasonable period of suspension ordered by the contracting officer for reasons without the fault or negligence of the contractor.

Discussion and Findings

The Government's position is that the aircraft inspection that was ordered was reasonable and that the condition of the parts removed during the inspection proved that the aircraft had not been airworthy at the time of the precontract inspection and that appellant had failed in his obligation to provide airworthy aircraft in accordance with the specifications. Tbe Government argues the necessity of inspecting and testing of parts to determine airworthiness, and that the precontract inspection did not reveal the actual condition of the parts to be unairworthy and was a latent defect which appellant was obliged to remedy.

Appellant contends that the Government unreasonably suspended performance under the contract without the fault or negligence of H&P and that the ordered inspection was a change of the contract specifications resulting in greater work for appellant.

In our view of the case, the central issue is whether there was a suspension of the work for an unreasonable period without the fault or negligence of the appellant. Both parties rely to an extent on events or knowledge gained during or after the suspension. The Government contends that the discovery of corroded and unairworthy parts during the inspection proved the aircraft provided had not been airworthy or specification compliant at the inception of performance. Appellant contonds that the FAA issuance of the AD when it did and the time allowed for compliance with the Dash-36 inspection showed the OAS to have prematurely grounded the aircraft unreasonably suspended performance, and unreasonably required the inspection to be performed under the most urgent circumstances with much greater attendent costs.

Respecting the question of the fault or negligence of appellant causing or justifying the suspension, the Government seeks to prove that H&P had not initially complied with the contract requirements to furnish airworthy aircraft. The method of initially determining the airworthiness was a precontract inspection by Mr. Mitchell, who acceptod the aircraft to be airworthy during that inspection. He relied heavily on the appellant's maintenance records, which were required to be maintained in accordance with H&P's FAA approved maintenance program and manual. Undoubtedly, the long preexisting and successful relationship between the Government and this contractor, and the undisputed good reputation H&P in maintaining availability of air tankers aroused little concern at the inception of the contract and the inspection concerning the airworthiness of the aircraft. The evidence that later became available to the Government must be evaluated carefully to determine whether there was probable cause to warrant the ordered inspection and whether appellant's aircraft were, in fact, unairworthy.

The loss of Tanker-88 was the central event that led to the suspension and this dispute. On July 24, 1981 when the inspection was ordered and the suspension commenced, little was known regarding the probable cause of the loss of Tanker-88. There was lacking any specific indications that the loss was due to a failure common to all C-119 aircraft and therefore, a basis for concern about the airworthiness of H&P's aircraft. The USFS and OAS ordered the aircraft grounded and inspected, while other operators of the same type aircraft continued flying. Little was known regarding whether there were significant differences between the maintenance provided by Hemet and H&P. The record does not indicate whether there was any consideration given to the report of Tanker-88's pilot of the aircraft being subjected to extreme turbulence a few days prior to the accident. Nor does the record indicate that the decision to order the inspection included any consideration of whether the bell crank found broken on Tanker-88 may have been flawed in its manufacture, and therefore, an isolated incident rather than an indication of a problem common to all C-119 aircraft. The inspection notice itself recounts that the first such notice of two days previous was based on erroneous and unfounded information and provides no positive information that the inspection notice was based on any knowledge or rational that a probable cause existed to suspect all C-119 aircraft. It simply states that the FAA and the NTSB had not concluded the investigation and that no immediate AD was contemplated.

The record is unclear respecting the authority of the OAS to ground the aircraft and to order the inspection. The specifications require that the contractor comply with manufacturer's bulletins and ADs issued during the performance according to their terms; however, the maintenance requirements are silent regarding groundings and inspections ordered by the OAS. The authority of the Director of OAS te issue orders affecting performance of this contact was traced by the Director to the fact that the contracting officer's authority was a delegation from him, leaving him the power to issue orders as a contracting officer. No such authority is cited in the inspection order, nor is it clear that the contracting officer appointed for this contract would have the authority to issue inspection orders. Had the inspection order originated with the FAA, the only agency authorized to issue ADs, H&P would have been bound to comply by the terms of the contract. However, with the order emanating from the contracting agency, relying on powers granted in the contract, we must find that authority to be properly exercised to remedy a contractor fault pursuant to the contract, or that it was a suspension interfering with the contractor's performance for which the Government must compensate the contractor. It is possible that there is a regulation permitting the control of all aircraft contracted to the Department by the Director of OAS, but none is cited in the record.

The evidence later discovered that would indicate the inspection order was an appropriate and timely action rests with the FAA's later issued AD and the findings of the condition of the aircraft during inspection. Because the FAA order allowed 100 hours of flight or 60 days for compliance, it is clear that the judgment of the agency primarily concerned with airworthiness was that no emergency existed, and that a well-ordered program of inspection was all that was warranted. There is nothing in the record to show that an expertise existed in the OAS for determining airworthiness needs on the level of such expertise in the FAA. Rather, there appears as a basis for the immediate inspection order, nothing more than the secondhand information flowing from the USFS with respect to their reasons for considering that an emergency existed. This is the admitted basis for the July 22 order which was cancelled, and the order of July 24 cites no added basis for believing that an emergency existed. Therefore, unless the inspection proved that the suspected condition of aileron failure was the prohable cause or that the aircraft were not airworthy, we consider the inspection order te be an over-reaction to a single incident, and an unwarranted interferance with appellant's performance.

The principal evidence concerning the inspection results are (1) photographs of parts, (2) Mr. Mitchell's testimony of his observations and conclusions, (3) the inspection report of the USFA concerning the inspection performed by Hemet, and (4) the final report of Mr. Mayville on the inspection performed by H&P.

The photegraphs do show discoloration on some of the parts which appears to be rust or corrosion and which Mr. Mitchell identified as corrosion. Apart from the photegraphs of these parts, there is no follow-up evidence as to the disposition of the parts or the determination of their airworthiness. There is no evidence of the removal of the corrosion, the measurement of the parts to determine whether they remained within allowable tolerances to permit adding protective coatings against further corrosion, or whether any of the parts were so faulty as te classify them as unairworthy. The Government did not request that they be saved so that the parts could be tested to determine airworthiness. Mr. Mitchell's oft-repeated conclusion that he observed corrosion that indicated unairworthiness is undermined by his own admission that a visual inspection was insufficient to make such a determination. Our viewing of the photographs does not permit any determination that any of them were so faulty before their removal as to make them unairworthy.

As stated earlier, Mr. Mitchell's testimony loses much of its persuasive value in light of his admission that visual inspection is not sufficient to determine airworthiness. Additionally, he agreed that while it was mandatery that corrosion be removed, subsequent testing was required to determine if the part was faulty or within permissible tolerances. Absent some evidence relating to a specific part that affected aircraft airworthiness, and that was tested and found to be defective, the generalities of Mr. Mitchell's testimony are not persuasive that the aircraft were unairworthy. It would seem apparent that any inspection of 30-year-old aircraft operated in the environment of Alaska would show some indications of corrosion. However, that does suffice to permit a finding that the existance of corrosion, per se, was indicative of unairworthiness. Curiously, Mr. Mitchell's precontract inspection did not disclose the conditions that he saw during the inspection. Admittedly, the dismantling of the aircraft wing and removal of parts permitted a much facilitated inspection. However, the failure to note any such conditions in an inspection designed to determine airworthiness calls inte question the method by which the inspection was accomplished, or the adequacy of the inspection criteria.

The report on the inspection by Hemet is cited by the contracting officer to indicate various faulty conditions that existed on C-119 aircraft in the suspect aileron system. The testimony of an employee of Hemet refutes the inferences that there were positive results in testing of the bell cranks showing that all of them proved faulty. At best, the tests were inconclusive, and again, the Government did not present direct evidence respecting the part to show that it was unairworthy. In any event, without evidence of similar maintonance practices, parts replacement judgments, and inspection practices, there can be little evidentiary value in the Hemet report to show the condition of H&P's aircraft.

The final report of H&P indicates that nine parts were found to have cracks or corrosion sufficient to cause them to be out of tolerance to be used. We cannot identify a bell crank in the list of nine parts, and there is no analysis of the nine parts to indicate that the failure of any one of them would cause an unsafe or unairworthy condition. Absent an indication of unairworthiness, it must be assumed that replacement of these parts could have awaited the next scheduled maintonance or the compliance with the AD issued by the FAA on August 31, 1981. In summary, the failure to identify any specific parts found to be unairworthy requires that we find, and we do find, that H&P did provide airworthy aircraft under the contract.

Having found the aircraft provided were airworthy, we conclude that the suspension of the work to require an emergency Dash-36 inspection was for the convenience of the Government, and without the fault of the appellant. The suspension of the work was authorized under Clause 5 of the contract, but not being based on the fault or negligence of the contracter, the appellant is entitled to an equitable adjustment pursuant to the suspension clause if the suspension was for an unreasonable period. The determination of what is unreasonable will necessarily vary under different contracts. Here, by the grounding Order, the appellant's aircraft were prevented from performing from July 13 te August 15. The suspension order lasted from July 24 to August 16 in terms of appellant losing the payments for providing availability of the aircraft. A suspension of 3 weeks on a multiyear construction project while the parties develop a solution to an unexpected problem may be determined to be not unreasonable. However, a delay of 3 weeks under a contract of only 90 days duration involves a significant portion of the total performance time. With an inventery of expensive aircraft idled without the alternative of using them on other work, and being compelled to comply with the inspection order instead of earning availability payments, we have little difficulty in finding, and do find, that the suspension was for an unreasonable period.

Having found that there was a suspension for an unreasonable period without contractor's fault or negligence, it is not necessary to address the issue of whether the order of a Dash-36 inspection was an increase of the contract specifications. We are inclined to agree that the ordered inspection exceeded the inspection requirements in the contract, but the cost of the added work is partly subsumed in our findings respecting quantum, and appellant is otherwise entitled to an equitable adjustment for damages resulting from the suspension.

Quantum

Early in the hearing, appellant's counsel referred in the opening statement to a stipulation to confine the hearing to the issue of entitlement to the types of damages claimed (TR I-15). The hearing official asked that the stipulation be articulated into the record after the parties worked it out during a recess. Somehow, the proposed stipulation appears to have been forgotten and never read inte the record. Inasmuch as appellant's claim is precise and defined as to each category of costs claimed, there appears to be no reason to remand this long-standing matter for a determination of quantum. The claim of loss of availability payments is $112,148.80. The Government had contractually agreed to make these payments just to have the five aircraft available for fire-fighting. Having chosen to suspend the fire-fighting work and require the appellant te do the inspection work during the suspension, the amount of the availability payments is the precise amount appellant lost during the period. Fortunately, the issue of flight pay is not involved because there were no fires during the suspension. We allow the lost availability payments in the amount of $112,148.80.

Regarding the claim for inspection costs of $48,891.21, the appropriate amount is less clear. (Opening brief, p. 29). Of that amount, $13,537.50 was for overtime work and $16,128.71 for other expenses such as payment for tests, parts, supplies and x-ray testing. The cost of labor other than overtime was $19,225.00. Prior te the expiration of the contract period, the FAA issued an AD which would have entailed the same inspection work on the aircraft in order for appellant to maintain his type certificato on the aircraft. Recognizing that the actual inspection work was done in greater haste and in circumstances that did not permit the best use of appellant's own repair facilities, there is little question that the inspection cost more than it would have, if scheduled after completion of the contract work. Attributing all of the overtime work to the untimeliness of the inspection, we allow the amount of $13,537.50. We allow 30% of the remainder of the inspection cost of $35,353.71, or $10,606.11, because of the increased difficulty of the inspection.

Decision

The appeal is sustained in the amount of $112,148.80 for lost availability payments, $13,537.50 for overtime, and $10,606.11 for increased difficulty caused by the untimely inspection order, for a total award of $136,292. In addition, interest shall be paid on the amount of the award in accordance with the Contract Disputes Act of 1978. Of the amount awarded for availability payments, $25,123.80 was repaid to the Government on August 22, 1982, in response to the Government's demand for repayment of availability payments made for 3.9 days from July 24, 1981 to July 28, 1981. Therefore, interest on the $25,123.80 shall accrue from August 22, 1982. Interest on the balance of the award shall be computed from November 30, 1981.

DAVID DOANE
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge & Vice Chairman of the Board

PEABODY COAL CO.

93 IBLA 317 Decided *September 11, 1986*

Appeal from a decision of the Colorado State Office, Bureau of Land Management, denying an application for royalty rate reduction for coal lease C-19885.

Affirmed as modified.

1. Administrative Authority: Estoppel--Appeals--Board of Land Appeals--Federal Employees and Officers: Authority to Bind Government--Public Lands: Administration--Secretary of the Interior

Under 43 CFR 4.1, the Board of Land Appeals is empowered to consider and detormine issues raised on appeal as fully and finally as might the Secretary. In considering the significance of actions taken by BLM, the Secretary is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors-in-interest. It necessarily follows that the Board, in exercising the Secretary's review authority, is not reqnired to accept as precedent erroneous decisions made by the Secretary's subordinates.

2. Coal Leases and Permits: Leases--Coal Leases and Permits: Royalties--Mineral Leasing Act: Royalties

Under 30 U.S.C. § 209 (1982), BLM is autborized to reduce tbe royalty for a coal lease below the minimum specified by statuto whenever it is necessary to do so in order to promote development, or whenever the lease cannot be successfully operated under the torms provided therein.

3. Coal Leases and Permits: Leases--Coal Leases and Permits: Royalties--Mineral Leasing Act: Royalties

The provisions of 30 U.S.C. § 209 (1982) specify no circumstance in which BLM is required to reduce the royalty of a coal lease. Under that statute, no entitlement to a reduction can ever arise. BLM remains free to accept the economic consequences of denying a reduction. The discretionary authority conferred by sec. 209 enables BLM to exercise prudent business judgment to select the alternative which best protects the economic interest of the Unitod States as owner of the mineral resource.

4. Coal Leases and Permits: Leases--Coal Leases and Permits: Royalties--Mineral Leasing Act: Royalties

The "bonus royalty" bid received in a competitive coal lease sale is properly considered a component of fair market value which the Secretary is required to obtain by terms of statute, 30 U.S.C. § 201(a)(1) (1982), and, hence, there is no authority for reduction of that "bonus royalty" just as there is no authority for refund of a "cash bonus" from a lease sale. However, where protection of the interests of the Unitod States requires a reduction in royalty te ensure successful operation of a lease, 30 U.S.C. § 209 (1982) authorizes reduction of the statutory minimum component of the royalty.

5. Coal Leases and Permits: Leases--Coal Leases and Permits: Royalties--Mineral Leasing Act: Royalties

When a coal lessee applies for a royalty reduction under 30 U.S.C. § 209 (1982), BLM cannot disregard the fact that the lessee's contracts with its customers provide for passing the royalty through to them. This fact is relevant to a determination of the necessity for royalty relief and must be considered if BLM is not to overstep the authority conferred by 30 U.S.C. § 209 (1982).

APPEARANCES: Michael H. Hyer, Esq., Denver, Colorado, for appellant; Lyle K. Rising, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

Peabody Coal Co. (Peabody) appeals from a December 6, 1983, decision of the Colorado State Office, Bureau of Land Management (BLM), denying its application for a 3-year reduction in the royalty rate for coal lease C-19885 from 17.08 to 5 percent. This lease covers approximately 125.16 acres located in lots 5, 6, 7, and 8, sec. 1, T. 5 N., R. 87 W., sixth principal meridian, Routt County, Colorado.

The existing royalty rate of 17.08 percent was selected by Peabody itself as the result of unusual circumstances leading to the issuance of the lease. At the time appellant's lease was issued in 1979, a court had enjoined the Department from issuing coal leases unless there was an on-going mining operation in connection with which the coal could best be removed as part of an orderly mining sequence in order to avoid by-pass of the coal body and a resultant failure to develop the resource. *Natural Resources Defense Council* v. *Hughes*, 454 F. Supp. 148 (D.D.C. 1978). The court explained the need for this exception as follows:

> Because of local ownership and reserve patterns, past federal coal leasing practices, and reclamation and other environmental concerns, the failure of the Department to issue a lease to an existing mining operation that could mine an unleased federal coal deposit as part of its ongoing operation may isolate that tract from other coal depesits. This

isolation creating "bypassed" coal can make that tract too expensive, either economically or environmentally, to mine in the future. Potentially significant energy supplies which could have been mined with a minimal increment of environmental impact will be lost. Federal royalty receipts, part of which are passed on to the States in which the coal is mined, will also be lost.

Id. at 156. The coal deposit which is subject to appellant's lease was deemed suitable for a "by-pass" leasing arrangement consistent with the court's order because of its location next to appellant's working, non-Federal coal mine.

Nevertheless, issuance of the lease posed a dilemma: although a competitive lease sale was required by statute, *see* 30 U.S.C. § 201 (1982),[1] the terms of the court order limited the prospects for competitive bidding on the tract. Thus, the Department had to establish the fair market value of the lease at the time of the sale in order to ascertain the minimum bid which could be accepted. Normally, Federal leases are issued at a fixed statutory royalty rate to the bidder who submits the highest cash bonus exceeding the minimum bid established by BLM. Had the subject lease been issued in this manner, appellant would have been required to pay a minimum bonus bid of $4,884.90 per acre. However, as part of an experimental leasing policy tried by the Department for a short time, bidders were permitted to bid for a higher royalty rate instead of submitting so large a cash bonus. Consequently, appellant was offered the following choice: (1) a lease with a 12-1/2 percent royalty rate accompanied by a minimum bonus bid of $4,884.90 per acre, or (2) a lease with a 17.08 percent royalty on production coupled with a minimum bonus bid of $25 per acre.

The lease was offered competitively on April 10, 1979. Peabody was the only participant, bidding a $35.35 per acre bonus payment and a 17.08 percent bonus royalty. The lease was issued to Peabody effective June 1, 1979. In consideration of Peabody's promise to pay a 17.08 percent royalty and $35.35 per acre, the Government did not exercise its right under 30 U.S.C. § 201 (1982) to require Peabody to pay $4,884.90 for a lease with a 12-1/2 percent royalty. Peabody now seeks reduction of this royalty to 5 percent.

At first, there may appear to be no valid reason for BLM to relinquish its contractual rights in order to grant such a request from a lessee. However, there may be circumstances where adherence to the original royalty rate would more adversely affect the economic interest of the United States as owner of the mineral deposit than would a reduction of the royalty. The ultimate issue in the adjudication of any royalty reduction request is whether BLM may properly conclude, on the basis of the material submitted by an appellant, that granting a reduction would best serve the interests of the Government.

While the lease is held by Peabody, the coal deposit is within the mine permit area of the Seneca II mine operated jointly by Peabody

[1] The terms of 30 U.S.C. § 201(a)(1) also expressly provide: "No bid shall be accepted which is less than the fair market value, as determined by the Secretary, of the coal subject to the lease."

and Western Utility Corp. In October 1982, mining progressed onto the extreme nortbwest corner of the lease. Although not dedicated to a particular buyer, the coal mined under lease C-19885 is marketable under an existing supply agreement to deliver coal from the Seneca Il mine to the nearby Hayden Power Plant. However, because Peabody considers the development of additional markets for this coal essential to the prosperity of it s operations, on December 21, 1982, it requested a 3-year royalty rate reduction to 5 percent based on a perception the higher royalty rate would render future sales on the open market unprofitable.

BLM forwarded the application with its supporting documents to the Compliance Division, Minerals Management Service (MMS), for an accounting and audit evaluation. MMS recommended that the request for royalty reduction be denied. After reviewing the application and MMS's recommendation, BLM concluded that "the factors or elements used in the royalty rate calculation [at the time of the lease sale] are still correct and [Peabody] has not shown that the lease cannot be successfully exploited" (Decision at 7). BLM grounded its denial of Peabody's application on a lack of sufficient justification for the request.

In its statement of reasons, Peabody asserts that BLM erred by making the conclusion that the economic factors employed in 1979 to determine the royalty rate may still be relied upon. Peabody argues the high rate strongly discourages development and that BLM's reference to the royalty "pass through" clause in the coal supply agreement with Hayden Power Plant as a decisive factor was an abuse of discretion, contrary to Departmental policy, and was inconsistent with BLM's adjudication of other royalty reduction requests. Moreover, Peabody challenges BLM's decision as an irregular "ad hoc" determination made without adequate procedural standards.

Appellant's reference to a Departmental policy raises an initial issue about the scope of this Board's review of BLM's decision. In *Kenneth H. Bunch*, 37 IBLA 346 (1978), we held that under 43 CFR 4.1, the existence of a Secretarial policy limits review by the Board to the question whether the action under review is consistent with that policy. In *Blue Star, Inc.*, 41 IBLA 333, 335 (1979), we observed that an Assistant Secretary "has the power to act with finality on matters within his or her own province," and dismissed for lack of jurisdiction an appeal from a decision made at the direction of an Assistant Secretary. The *Blue Star* decision, however, opined that after an appeal was filed with this Board, subsequent action by an Assistant Secretary could not oust this Board's jurisdiction. No action has been taken on Peabody's application which would deprive us of jurisdiction under the *Blue Star* holding.

[1] Under 43 CFR 4.1, this Board is empowered to consider and determine the issues raised in this appeal "as fully and finally as

might the Secretary." In considering the significance of actions taken by BLM whicb have not been reviewed by higher officials, we must bear in mind that the Secretary of the Interior "is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors in interest." *Ideal Basic Industries, Inc.* v. *Morton*, 542 F.2d 1364, 1367 (9th Cir. 1976). "It necessarily follows that this Board, in exercising the Secretary's review authority, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates." *Pathfinder Mines Corp.*, 70 IBLA 264, 278, 90 I.D. 10, 18 (1983), *aff'd, Pathfinder Mines Corp.* v. *Clark*, 620 F. Supp. 336 (D. Ariz.), *appeal docketed*, No. 85-2834 (9th Cir. Nov. 18, 1985).

The issues raised by Peabody in this appeal are matters of first impression with this Board. While we may certainly take cognizance of actions taken by Departmental officials in other cases, our determination of this appeal is governed only by the pertinent statutory and regulatory provisions. Thus, analysis of the legal issues must begin with an examination of those authorities.

[2] Discretionary authority te grant reductions in production royalties is provided in section 39 of the Act, *as amended*, 30 U.S.C. § 209 (1982):

> The Secretary of the Interior, for the purpose of encouraging the greatest ultimate recovery of coal, oil, gas, oil shale, gilsonite (including all vein-type solid hydrocarbons), phosphate, sodium, potassium and sulphur, and in the interest of conservation of natural resources, is authorized te waive, suspend, or reduce the rental, or minimum royalty, or reduce the royalty on an entire leasehold, or on any tract or portion thereof segregated for royalty purposes, whenever in his judgment it is necessary te do so in order to promote development, or whenever in his judgment the leases cannot bo successfully oporated under the terms provided therein. [Footnote omitted.]

A request for Federal coal lease royalty reduction is properly made by submission of an application containing specified information. 43 CFR 3485.2(c)(2); *cf.* 43 CFR 3473.3-2(d) (1982).[2,3] The authorized BLM officer must consider the request and determine whether relief is warranted. 43 CFR 3480.0-6(d)(6), 3485.2(c)(4).

When Congress established a minimum production royalty rate of 12-1/2 percent for Federal coal leases other than those where coal is

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[2] Implementation of sec. 39 of the Mineral Leasing Act, was first addressed in Circular 1341 at 55 I.D. 67 (1934). However, this reference merely identified the existence and general purpose of the statute and Federal coal lease royalty reductions were not mentioned. In 1948, regulations were adopted to estahlish fundamental procedures to be used when applying for reduction of the royalty rate set by a lease for any of the Mineral Leasing Act minerals. These guidelines have been continued to the present with only minor changes and are now found at 43 CFR 3503.3-2(d). *See* 13 FR 5641 (Sept. 29, 1948); 29 FR 4509 (Mar. 31, 1964); 35 FR 9708 (June 13, 1970). When a Federal coal management program was developed, royalty reduction guidelines specifically designed for Federal coal leases were promulgated and codified at 43 CFR 3473.3-2 (1979). These regulations were transferred to 30 CFR Part 211 (1982) when MMS assumed responsibilities for the coal program, and now appear at 43 CFR 3485.2, since responsibility for royalty reductions has again been transferred to BLM. *See* 47 FR 33179 (July 30, 1982); 48 FR 41589 (Sept. 16, 1983).

[3] The Department has consistently held that in no case may royalty rates below the statutory minimum be prescribed as the initial or readjusted terms of any lease. The relief afforded must occur apart from establishment of the basic lease terms. *Sunoco Energy Development Co.*, 84 IBLA 131, 137 (1984); *Mid-Continent Coal & Coke Co.*, 83 IBLA 56, 63 (1984); *Coastal States Energy Co.*, 81 IBLA 171, 179-80 (1984); *Solicitor's Opinion*, 87 I.D. 69 (1979). *See Coastal States Energy Co.* v. *Watt*, 629 F. Supp. 9 (D. Utah 1985), *affirming Coastal States Energy Co.*, 70 IBLA 386 (1983); *but see FMC Corp.*, 74 IBLA 389 (1983), *reversed sub nom. FMC Corp.* v. *Watt*, C. 83-0347 (D. Wyo.), *appeal docketed*, No. 84-2175 (10th Cir. Aug. 29, 1984), *cross appeal* docketed, No. 84-2208 (10th Cir. Sept. 5, 1984).

recovered by underground mining, 30 U.S.C. § 207(a) (1982), the Department considered whether this action precluded BLM from granting reductions below that amount under section 209. The Department concluded that section 209 conferred authority to reduce rates below the statutory minimum. *Solicitor's Opinion*, 87 I.D. 69 (1979). Any liberality in granting reduction requests, however, would seriously undermine Congress' intont in establishing a minimum production royalty. BLM was mindful of this concern when it issued regulations for its coal management program, and BLM stated the Department's policy in exercising the authority conferred by section 209: "This authority to reduce production royalty below that specified in the lease will be used sparingly, *if at all*, only upon a convincing showing of hardship, and only for a temporary period or periods on any lease." 44 FR 42584, 42607 (July 19, 1979) (italics added).

Why should a lessor ever unilaterally reduce a royalty below the amount it is entitled by law and by contract to receive? Simply because there may be circumstances in which the lessor would avoid a greater economic detriment by doing so. If, for example, the authority conferred by section 209 did not exist, a lessee could seek permission to cease operations under 30 U.S.C. § 207 (1982). BLM would then collect only an advance royalty in lieu of a production royalty. A lessee might also choose to relinquish its lease. If the leased deposits can be leased to someone else who can operate more efficiently, the interest to the public as owner of the deposits would be best served by allowing the original lessee to fail. Often, however, Federal leases comprise part of a larger mining operation, and no other operator could perform more efficiently than the existing lessee. Section 209 provides BLM an alternative te accepting relinquishment of a lease or advance royalty in lieu of production royalty. Thus, section 209 enables BLM to maintain a flow of royalty income, although at a diminished level.

[3] Section 209 specifies no circumstance which requires BLM to reduce royalty. Under the statute, no entitlement to such a reduction can ever arise. BLM remains free to accept the economic consequences of denying royalty relief, which may vary from case to case. These consequences may be sufficiently severe to compel a lessee to seek suspension of the condition of continued operation under 30 U.S.C. § 207(b) (1982). Or a lessee might be impelled to relinquish the lease. The discretionary authority conferred by section 209 enables BLM to exercise prudent business judgnent to accept the alternative that best protects the economic interest of the United States as owner of the mineral resource.[4] It necessarily follows that if the circumstances of a

[4] The Federal Government is not the primary beneficiary of BLM's prudent exercise of discretion. Although the United States is the owner of the mineral resource, it keeps only 10 percent of the royalties Peabody pays. Under 30 U.S.C. § 191 (Supp. II 1984), the State of Colorado receives 50 percent and the remaining 40 percent is deposited in the Reclamation Fund established under 43 U.S.C. § 391 (1982). The State's entitlement under 30 U.S.C. § 191 (Supp. II 1984) gives it standing te seek judicial review of Departmental decisions affecting the amount the State

Continued

given case do not confront BLM with such a choice, the case presents no opportunity for BLM to exercise the discretion conferred by section 209. This conclusion is underscored by the fact that section 209 requires BLM to make one of two alternative threshold determinations before its discretionary authority can be invoked: (1) that a reduction "is necessary to promote development," or (2) "the leases cannot be successfully operated under the terms provided therein." On the basis of material that an appellant is required to submit in its application, BLM must be able to find there is a reasonable probability operations would cease or development, recovery, or conservation of the resource would be jeopardized before it can even consider exercising its discretion to grant relief. Otherwise, the Federal mineral owner has nothing to gain by reducing the royalty.

Although appellant emphasizes the phrase "to promote development" in the statutory authorization for reducing royalty, appellant fails to notice the statute includes the limiting word "*necessary.*" Because a royalty operates as a direct cost on development, reduction of royalty would almost always promote development, all other things being equal. Thus, the statute cannot be read to authorize reduction of a royalty whenever doing so would promote development; indeed, the statute only authorizes such action where it is *necessary.* Keeping in mind that such reductions are to be granted for "the purpose of encouraging the greatest ultimate recovery of coal," and "in the interest of conservation of natural resources," it would not be proper to reduce the royalty if the coal would ultimatoly be recovered and natural resources conserved in the absence of such a reduction. Unless an applicant shows that these goals cannot be met without a royalty reduction, the statute confers no authority on the Department to grant such a reduction.

Focusing on the second alternative threshold requirement, appellant suggests that the phrase "successfully operated" should be construed to allow a reasonable profit for the lessee. This argument implies that royalty should be reduced whenever a lessee's profits fall below a "reasonable" level. There can be no quarrel with appellant's expectation of a profit. A business certainly has such a motive when it enters into a contract or lease. It is the lessee, however, not the Government, who assumes the risk arising from changing market conditions and increases in the costs of operations. There is no evidence that Congress enacted section 209 to make BLM the guarantor of its lessee's profits. Rather, as stated above, section 209 operates to give the Government additional options to protect its interest as owner of the mineral deposit if the ultimate recovery from that deposit is threatened or when the lease cannot be operated successfully.

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would receive. *E.g., Arkla Exploration Co.* v. *Watt,* 548 F. Supp. 466, 472-73 (W.D. Ark. 1982). BLM therefore bears a responsibility to the beneficiaries of the statutory royalty provision to ensure that receipts are not unlawfully diminished.

Assuming that royalty reductions are usually hased on current operational difficulties, Peabody's plea that substantially different economic conditions forecast severe financial difficulty for this leased coal deposit is put into perspective by the observation made in one of the few Departmental decisions reviewing denial of royalty reduction of a Federal coal lease:

> It does not follow, merely because costs have gone up by a considerable amount since the date of the issuance of the lease, that it is impossible to operato successfully under this lease, or that a reduction in the royalty rato is necessary if the land is to be developed for coal mining purposes.

Sheridan-Wyoming Coal Co., A-25845 (June 27, 1950) at 2. The operator in that case showed that increased costs of production indicated the lease could not be profitably developed under the prevailing royalty rate. That argument was rejected and the petition for reduction was denied. The denial was affirmed on appeal.

In addition to the preceding statutory considerations governing the adjudication of applications for royalty relief generally, one other factor affects the disposition of appellant's application. Appellant's lease was not issued for the minimum royalty with a cash bonus; instead of paying a large cash bonus, appellant decided to select a bonus royalty. A bonus offered in the lease bidding process is a payment reflecting the anticipated market value of the coal deposit. Whether the bonus payment is represented by an added royalty percentage or an initial cash outlay, it is an expected expense of developing the lease. There are important differences, however. When a lease is issued on the basis of a nonrefundable cash bonus bid, the fair market value of the lease is primarily reflected in the amount of the cash bonus rather than the royalty. Accordingly, reducing the royalty for such a lease usually does not siguificantly jeopardize receipt of fair market value. If the fair market value has already been substantially met by a cash bonus, the bonus payment, not being a variable cost, does not inhibit continued development or threaten the successful operation of a mine.[5] The effect of a bonus royalty is quite different; it defers BLM's realization of fair market value until the lease has been completely mined. It also adds to a lessee's variable costs, *i.e.*, the costs which can be avoided by curtailment of production.

When Congress was considering coal program amendments to the Mineral Leasing Act of 1920, the Department objected to language which would have precluded the Department from issuing leases on

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[5] In *Chillicothe Sand & Gravel Co.* v. *Martin Marietta Corp.*, 615 F.2d 427, 431, n.5 (7th Cir. 1980), the court defined fixed and variable costs:

"Fixed costs are those costs which, in the short run, do not vary with changes in output. Fixed costs generally include items such as management expenses, interest on bonded debt, and other items of irreducible overhead. Variable costs are those costs which in the short run vary with changes in output, including items such as raw matorials, labor directly used in production, and per unit royalties. Average cost is the sum of fixed cost and total variable cost, divided by output. The definitions of fixed and variable costs are limited to the short run because all costs are considered variable in the long run."

the basis of royalty bids. Letter from Jack Horton, Assistant Secretary of the Interior, to James A. Haley, Chairman, Committee on Interior and Insular Affairs, House of Representatives (Mar. 13, 1975), H.R. Rep. No. 94-681, p. 28, *reprinted in*, 1976 U.S. Code Cong. & Ad. News, 1964-65. As finally enacted, 30 U.S.C. § 201 (1982) contains no such prohibition.

Nevertheless, very few bonus royalty leases have issued, and no adjudicative precedent has been established by the Department regarding management of the bonus royalty. The problems relating to bonus royalty leases, however, have attracted concern, both within the Department and outside. On February 20, 1981, the Director, Office of Coal Leasing, Planning and Coordination, Geological Survey, issued a memorandum setting forth the policy recommendations for 11 coal leases issued at above-minimum royalties. This memorandum was approved by the Deputy Assistant Secretary, Land and Water Resources, on February 25, 1981. Different guidelines have been proposed, but not yet adopted. *Draft Revision; Royalty Reduction Guidelines for Federal Coal, Phosphate, Potassium, Sodium, Sulphur, and Tar Sand Leases*, 50 FR 6062 (Feb. 13, 1985). The policy affecting these leases has been considered by the Government Accounting Office (GAO) in a report dated August 10, 1982. *Need for Guidance and Controls on Royalty Act Reductions for Federal Coal Leases*, GAO/EMD-82-86. In addition, at pages 211-16 of a report dated February 1984, the Commission on Fair Market Value Policy for Federal Coal Leasing discusses bidding systems for Federal leases, and offers a critical analysis of royalty bidding. The report makes particular reference to coal leases such as appellant's. Although the report recommends that leasing be done on the basis of bonus rather than royalty bidding, it is clear the Department must administer existing bonus royalty leases in a manner consistent with statutory requirements. It must also administer those leases so as to maintain the intogrity of the royalty bidding system as long as the statutory authority to conduct royalty bidding remains in effect.

The most significant legal obstacle to reducing the royalty in a bonus royalty lease is the statutory requirement that the Government obtain fair market value as determined at the time of acceptance of the lease. *See* 30 U.S.C. § 201(a)(1) (1982). Usually this requirement is satisfied when a lessee submits a nonrefundable cash bonus bid. Consequently, the recovery of fair market value is generally not an issue when the bidder of such a lease requests a royalty reduction. Peabody, however, elected to satisfy this requirement with a bonus royalty, deferring BLM's realization of fair market value until the end of the lease term. Therefore, any reduction of royalty in this case may cause a diminution of BLM's realization of the fair market value as that value was determined at the date of lease issuance.

There is one way in which a royalty in a bonus royalty lease can be reduced so as not to violate the requirement that the Government receive fair market value. First, the cash bonus equivalent of the bonus royalty would be calculated as of the date of lease issuance; second, the lessee would be required to submit that amount plus interest compounded to the date of application. By proceeding in this fashion, the royalty can be reduced below the 12-1/2 percent minimum level te the level necessary to ensure successful operation of the lease. Of course, the impracticality of such an approach is obvious. A lessee seeking a reduction might not be in a position to make the required payment, or might choose instead to cease operations or relinquish the lease, thereby diminishing or terminating the flow of royalty payments to the United States. Enforcing the fair market value requirement in this manner could therefore thwart the intent of section 209 that BLM protect the best interest of the United Statos as the owner of the mineral resource.

Another attempt to reconcile royalty reduction with the fair market value requirement is offered by the 1981 Coal Leasing memorandum cited above. This memorandum suggests dividing the total royalty into two components: (1) the statutory minimum of 12-1/2 percent and (2) the remainder which is termed the bonus royalty. Appellant suggests that under this analysis, the 12-1/2 percent component of the royalty may be reduced without diminishing the bonus, so the Government's receipt of fair market value would be unaffected. Analysis, however, demonstrates that this approach tends to obscure the fact that appellant is seeking nearly a complete waiver of the statutory royalty. (Only a .43 percent royalty would be left.) One need only compare the consequences of reducing appellant's royalty to 5 percent with the result produced by reducing the royalty of a cash bonus lease to 5 percent.[6] In the lattor situation, the royalty would decline from 12.5 percent to 5 percent, a reduction of 7.5 percent. To reduce appellant's 17.08 percent royalty to 5 percent, a 12.08 percent cut is required, which is 4.58 percent more than the 7.5 percent cut required for the same result, if the lease had been a cash bonus lease. This 4.58 percent difference corresponds to the bonus component of the royalty, which appellant had agreed to pay instead of the $4,884.90 per acre bonus bid which represented the fair market value of the lease. Granting appellant's request therefore means that the Government has either surrendered the statutory royalty or waived the bonus royalty. If the former is true, it cannot be in the best interest of the lessor. If the latter, then it is impossible to reconcile the requestod reduction of appellant's royalty under section 209 with enforcement of the fair market value requirement of section 201.

Although appellant's application necessarily poses a conflict between these two statutory provisions, the fair market value requirement in

[6] This comparison is justified because the royalty level necessary to allow for successful operation of the leased deposit is the same for appellant's bonus lease as it would bo had appellant taken a cash bonus lease instead. Because the cost of a cash bonus is a fixed cost which cannot bo avoided by curtailment of lease operations, it has no relevance in considering a lessee's short-term incentives to continue mining. Except for the difference in royalty rates, the variable costs of mining are the same under either lease.

section 201 and the relief authority in section 209 have one common ohjective: the enhancement of the interest of the United States as the owner of the mineral resource. The fair market value requirement was imposed to prevent the United States from leasing resources at less than fair market value. Section 209 ensures the Government will be able te take necessary action when a lease encounters difficulty, in order to see that the economic interests of the United States are not jeopardized.

[4] When the Department saw a similar conflict between section 209 and Congress' specification of a statutory minimum royalty, the Department concluded that section 209 authorized reductions below the specified level. *Solicitor's Opinion, supra*, 87 I.D. at 69. This construction of the statute assured the Department's ability to take what action was necessary to protect its economic interests. To hold that the fair market value requirement found in section 201 precludes the reduction of any royalty for a bonus royalty lease would frustrate the evident purpose of section 209. Such a construction could force an action which might be economically harmful rather than beneficial. Therefore, it is concluded the statutory objectives are more properly served by holding that, to the extent the interest of the Unitod States may require lowering the statutory minimum royalty (as opposed to the bonus royalty) to whatever level is necessary to ensure successful operation of a lease, section 209 provides such authority. But this holding rests on the premise that section 209 gives BLM authority to grant such relief only when it is in the economic interest of the United States to do so. If the statutory authority granted under section 209 were any broader, the fair market value requirement established in section 201 would be effectively nullified. Section 209 cannot be construed so as to provide a loophole for lessees to circumvent the requirement that the Government receive fair market value for a lease as determined by conditions in effect at the time of lease issuance.

There is a second consideration which affects granting reduction of bonus royalty leases: the need to assure the integrity of the royalty bidding program. This concern voiced by the Solicitor is not so "specious" as Peabody suggests (Appellant's Reply to BLM's Response at 3). When the Department requested that the coal leasing amendments be drafted to permit royalty bidding, it seemed such a system would encourage greater competition for Federal leases. But if the winner of a bonus royalty lease could later obtain a reduction of royalty below the rate bid by the next highest bidder, such action would be unfair to all potential bidders and could ultimately work against the interests of the United States as the owner of the mineral resource. If appellant were correct in contending that section 209 authorizes the reduction of royalty to a level necessary to provide a lessee with some degree of profit, bidders for royalty bonus leases would have no incentive to base their bids upon market values. Rather, they would be induced to bid royalty rates at whatever level was necessary to win the lease, knowing their bids would not set the rate under which they would ultimately be required to operate.

It is not suggested Peabody selected the 17.08 percent royalty for this lease with the intent to avoid the cash bonus and later have the royalty reduced to a more profitable level. It is clear, however, that the availability of relief undermines the incentives which are necessary for a fair and successful royalty bidding system. Although denying royalty relief may in a particular case work to the disadvantage of the Unitod States, the availabihty of relief for bonus royalty leases may so medify the incentives of the participants in royalty bidding that the Unitod States would possibly be better served by exercising its discretionary authority to catogorically exclude bonus royalty leases from relief under section 209. For the purposes of this appeal, however, the Solicitor contends it is not necessary te go so far in order to deny Peabody's application:

> To allow Peabody to ["be relieved of keeping its bargain"] is to invite acceptance of high royalty rates, instoad of cash bonuses, knowing that the company can always obtain a royalty reduction if it guesses wrong on future market conditions. By analogy, if BLM were to sell the fee interest in coal lands for the fair market value at the time (say, 1979) and then 3 years later the buyer wanted a rebate of the purchase price due to cha[n]ged market conditions, the BLM would not even entortain the idea, nor would any private landowner, nor would any court. Neither should BLM do so here. What BLM can do is apply its royalty reduction standards, which require tbat the operator show operation to bo possible only at a loss. Thero is uothing in that standard which allows subsidizing management's erroneous predictions as to market conditions.

Solicitor's Brief at 7.

Having stated the general legal considerations governing the adjudication of a request for reduction of royalty in bonus royalty leases, the particular contentions raised by appellant's application can be addressed. As a threshold matter, appellant's application must provide a basis for concluding the lease cannot be successfully operated at the existing royalty rate, or that a reduction of that rate is necessary to promote development of the lease.

Appellant asserts it has shown the existence of an unusual economic condition not encountered when the royalty rate was established in 1979. The application, however, discusses only marketing problems and no assertion is made concerning operation, engineering, or resource-relatod difficulties arising from conditions on the tract or the nature of the coal. Peabody complains the royalty rate is substantially higher than royalties paid on nearby coal reserves and that inclusion of this Federal coal under its existing coal supply agreement would jeopardize the amount ordered because of its higher price. However, the Seneca II mine has been generally operated by appellant at a profit despite an average price per ton well helow the market for the coal sold to Hayden Power Plant. While the low price may be due to pricing provisions in the supply agreement, a September 22, 1981, amendment to the agreement permits Peabody to charge the buyer for increases in actual rents and royalties paid to obtain the coal. Even with the added royalty expense for coal from lease C-19885, the total price per ton of such coal delivered to Hayden Power Plant appears to be below the prevailing market. Hence, the coal extracted from lease C-19885 and sold to Hayden Power Plant would be unaffected by a royalty reduction.

A royalty reduction would therefore merely reduce the uncertainty associated with the opening of new markets. Peabody's prediction for profitable mining of the lease deposit for sale on the open market rests upon its analysis of profit margins and rates of return. Peabody claims that, despite its advantageous position to mine C-19885 under the Seneca II mine operations, its projected rates of return with a 17.08 percent royalty are below minimum levels necessary to justify continued investment in the lease. However, MMS experts reviewed the financial data presented by Peabody and concluded the adjusted rate of return, based on a cash-flow determination including depreciation and depletion factors, would be acceptable under industry standards. MMS therefore recommended denial of the request.

Peabody refers to the August 10, 1982, report prepared by the Comptroller General, General Accounting Office, concerning controls on royalty rate reduction for Federal coal leases, and claiins BLM's decision violated due process critoria because the decision process lacked proper guidelines or standards. The applicable statute, however, establishes threshold requirements that must be met before royalty reduction can be granted: unless Peabody's application shows that one of the two alternative threshold requirements established by section 209 has been met, this argument raises no issue of dispositive significance.

The GAO report discussed problems encountered by the Departinent in developing its procedures for reviewing royalty reduction requests. GAO recommended the development of a better defined policy statement and responsive regulations and advocated better use of existing financial expertise in the evaluation process. No new regulations implementing the royalty reduction program have been formally promulgated. Accordingly, it appears BLM has chosen to adhere to the standards stated in the statute and reflected in the regulations found in 43 CFR Subpart 3480, cited previously. As suggested by the GAO report, the Acting State Director (the authorized officer reviewing the request) sought the expert advice of the Royalty Comphiance Division, MMS. However, MMS' recommendation did not constitute the sole basis for the decision. Instead, the Acting State Director independently applied the facts to the standards found in the statute and, relying upon the provided expert opinion, rendered his determination. This process does not constitute an "ad hoc" decision rendered without gnidelines. The criteria and process for review are enumerated in statute and regnlation. Appellant has not identified an improper deviation froin the outlined review process.

Appellant, however, contends BLM failed to consider its application in a manner consistent with the policy approved hy the Deputy Assistant Secretary in 1981. The Solicitor's response to Peabody's appeal fails to address this inportant issue. Indeed, the Solicitor's only oblique reference to this issue appears on page 4 of its reply brief: "Until the release of this [GAO] report [datod Aug. 10, 1982], the Department had relied on internal guidelines and opinions from the Office of the Solicitor to determine the validity of royalty-reduction requests" Despite the apparent implication that this policy was no longer considered applicable after the issuance of the GAO report, the record contains no evidence the described policy has been revoked. This is not the only issue raised by appellant to which the Solicitor has made no response. Appellant has also alleged that BLM has not been consistont in its consideration of reduction requests for bonus royalty leases, citing in particular requests granted for two leases held by Western Energy Co. (Western Energy).

As earlier stated, the 1981 Coal Leasing memorandum attempted to analyze the problem posed by a grant of relief to holders of bonus royalty leases by dividing the royalty into two components: (1) the statutory minimum royalty of 12-1/2 percent, and (2) the remainder, characterized as the bonus royalty. The reason for dividing the royalty rate into two components arose from an effort to make the bonus royalty leases analogous to those leases won by a lump-sum bonus bid. Any amount exceeding the 12-1/2 percent statutory minimum royalty would be analogous to the lump-sum bonus bid. Because an initial cash bonus bid could not be passed to a customer in the same way a royalty could if the lessee's contract with the customer had a royalty pass-through provision, the 1981 Coal Leasing memorandum suggested that, in recalculating the worth of the coal lease by the discounted cash-flow method, it should be assumed the bonus royalty cannot be passed to custemers just as a lump-sum bonus bid could not be passed through, even though a lessee's contracts with its customers might contain such a pass-through provision. It should be noticed that this assumption was made only for the purpose of making a discounted cash-flow analysis of the value of the deposits; it does not necessarily follow that the memorandum precluded BLM from taking the pass-through provision into account in making a final determination as to the necessity for royalty relief.

[5] Although Peabody objects to consideration of the fact that appellant's contracts with its customers provide for passing-through the royalty, no statutory basis exists for disregarding a fact of relevance to a determination of the necessity for royalty relief. If BLM is not to overstep the scope of authority conferred by 30 U.S.C. § 209 (1982), it must determine the necessity for relief on the basis of fact, not fiction. The existence of a royalty pass-through provision is a fact which BLM is not free to disregard. Appellant contends that "a lessee

is denied *ipso facto* any possible remedy under [30 U.S.C. § 209] if there is a royalty pass through provision" (Appellant's Reply to BLM's Response at 2). This contention is not correct. If a lessee could establish tbat failure te reduce royalty would force its customers to curtail their demand te the extent that operations on the lease would cease, the existence of the pass-through provision would not stand as an obstacle to relief.[7]

BLM's disposition of a request for royalty relief from Western Energy with respect to coal lease M-35735 shows BLM did take into account the distinction between bonus royalty and statutory minimum set forth in the 1981 memorandum. That lease was issued with a royalty rate of 21 percent. In 1981, 1982, and 1983, BLM reduced that rate to the statutory minimum, 12-1/2 percent. By decision dated November 9, 1984, from which Western Energy appealed, BLM determined the rate should be reduced only to 16.6 percent. Later, however, BLM moved to vacate its decision and Western Energy asked to withdraw its appeal. The Board remanded the case by order and did not consider the issues raised by that appoal. *Western Energy Co.*, IBLA 85-177 (order dated June 11, 1985).

Accordingly, BLM's decision denying royalty relief is affirmed because appellant has failed to satisfy either of the threshold requirements te enable BLM to exercise its discretion to reduce Peabody's royalty. Even if appollant's applications can be construed as meeting one of the threshold requirements, royalty relief could not be proporly granted in the exercise of BLM's discretion because appellant's application does not clearly indicate that the economic interest of the United States as owner of the depesit would be more favorably affected hy granting the relief than by denying it.

Therefore, pursuant te the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appoaled from is affirmed as modified by this opinion.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

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[7] A notice setting forth draft guidelines for use in handling applications for royalty reductions in Federal leases for renewals including coal was published Feb. 13, 1985. 50 FR 6062. Those draft guidelines would require BLM to take into account royalty pass-through provisions that applicants for royalty relief may have in their contracts with customers. As part of its appeal, Peabody has submitted copies of comments on the draft guidelines, citing the hardship that such consideration of pass-through provisions imposes upen the economy in the West. BLM, however, cannot be hlamed for this. BLM did not negotiate the royalty pass-through provisions in appellant's contracts with its customers; nor was BLM a party to those agreements.

ESTATE OF MARY DODGE PESHLAKAI *v.* AREA DIRECTOR, NAVAJO AREA OFFICE, BUREAU OF INDIAN AFFAIRS

15 IBIA 24 Decided *October 28, 1986*

Appeal from a decision of the Area Director, Navajo Area Office, Bureau of Indian Affairs, disapproving a temporary lease of Navajo Grazing Permit No. 18-984.

Affirmed.

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

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

2. Indians: Trihal Powers: Self-Determination--Indians: Trihal Powers: Trihal Sovereignty

In furthering the doctrines of Indian sovereignty and self-determination, the Department of the Interior has recoguized the right of Indian tribes initially to interpret their own governing documents and to resolve their own intornal disputes and has given deference to a tribe's reasonable interpretation of its own laws.

3. Bureau of Indian Affairs: Generally--Regulations: Interpretation

It is axiomatic that the Bureau of Indian Affairs has a respensibility to intorpret Federal regulations in carrying out its duties under those regulations.

4. Bureau of Indian Affairs: Generally--Regulations: Generally

When the Bureau of Indian Affairs receives information suggesting that Federal regulations have been violated, it has an affirmative duty to inquire inte the matter and take appropriate action to correct or end any violation found to exist.

5. Indians: Trihal Government: Judicial System

The extont of a tribal court's jurisdiction should be raised first to the court, rather than being addressed through collateral attack before the Bureau of Indian Affairs.

6. Indians: Trihal Government: Generally--Indians: Trihal Powers: Generally

When the Bureau of Indian Affairs becomes aware of an action it believes exceeds tribal authority and impacts upon an area of legitimate BIA concern, it should bring the matter te the attention of appropriate tribal officials.

APPEARANCES: Lawrence A. Ruzow, Esq., Window Rock, Arizona, for appellant; Ross O. Swimmer, Assistant Secretary--Indian Affairs, U.S. Department of the Interior, Washington, D.C., for appellee; Rohert C. Ericson, Esq., St. Michaels, Arizona, for Margaret Jose and Beulah Allen.

OPINION BY ADMINISTRATIVE JUDGE LYNN

INTERIOR BOARD OF INDIAN APPEALS

On January 6, 1986, the Board of Indian Appeals (Board) received a request from the Estate of Mary Dodge Peshlakai (appellant) to assume jurisdiction over an appeal filed with the Washington office of the Bureau of Indian Affairs (BIA) pursuant to 25 CFR Part 2. The appeal was taken from a September 18, 1985, decision of the Navajo Area Director, BIA (appellee), disapproving the temporary leasing of a Navajo grazing permit. For the reasons discussed below the Board affirms the September 18, 1985, decision.

Background

In 1981, the estate of Mary Dodge Peshlakai, Navajo C#54007 (decedent), was submitted for probate in the Window Rock District Court (court) of the Navajo Nation. One asset of decedent's estate was grazing permit No. 18-984, which permitted the use of the Sonsela Butte Management Unit, an area of tribally owned land. Apparently because of the protracted nature of the probate proceedings, the court approved the temporary leasing of the permit by the administratrix of decedent's estate, pending completion of probate. The purpose of this lease was to raise funds for estate administration.

Under the terms and conditions approved by the court, the permit was leased to Dennis Lee for the 1985 and 1986 grazing seasons; *i.e.*, March 1 through October 31, 1985 and 1986. Lee was permitted to graze 50 head of cattle for a lease rate of $225 per month during each grazing season.

The court furnished a copy of its order and the lease to the Branch of Land Operations, Fort Defiance Agency, BIA. Because Federal regulations in 25 CFR Part 167 provide for the leasing of tribal land by the District Grazing Committee, the Fort Defiance Agency Superintendent (Superintendent) questioned the court's authority to enter this order, and requested an opinion from the Department's Field Solicitor in Window Rock on whether or not the lease should be approved. The Field Solicitor recommended BIA approve the lease, reasoning:

> 1. Under 25 CFR §167.8(d), Tribal Courts have authority to determine the rights te grazing permits of deceased permittees. I see no basis in the Tribal Code for any involvement by District Grazing Committees in the transfer of grazing permits hy * * * inheritance.
>
> 2. It seems appropriate for a Tribal Court to make the assets of an estate productive during the pendency of probato. I understand that lease payments ultimately will be transferred to the persons the Court determines to be heirs.
>
> 3. It is only the temporary use of the decedent's permit rights that will be acquired by a non-heir, not the pemit itself.
>
> 4. I see no legal objection te the form of the lease approved by the court.

> 5. It is in the interests of tribal sovereignty and self-determination for the Bureau to respect orders of Tribal Courts unless those orders are in clear violation of federal law. [1]

The Field Solicitor concluded: "I see no guise or ploy involved in this transaction. The sole purpose of the lease is to pay the cost of probate, not to bypass the authority of any tribal legislative/administrative body."[2]

Subsequent to receipt of the Field Solicitor's recommendation, the Superintendent learned that the Sonsela Butte Management Unit was also permitted to Margaret Jose, C#1037, and that Jose and her daughter, Beulah Allen, C#1039, had the right to use the management unit in common with decedent, and were, in fact, using it. On page 2 of a letter to appellant dated July 9, 1985, the Superintendent stated he could not approve the lease for the following reasons:

> 1. Margaret Jose, C#1037, and Beulah M. Allen, C#1039, have an undivided joint grazing right in the Sonsela Butte Management Unit with the estate of Mary Dodge Peshlakai.
> 2. Beulah M. Allen, on her own behalf and that of her mother, Margaret Jose, opposes the leasing of the area covered by Grazing Permit No. 18-984, and further, she states that the proposed lease of the grazing area approved by the Tribal Court did not consider their grazing rights.
> 3. The leasing will only prolong the probate action and will subject the parties concerned to further disputes.

Appellant appealed this decision to appellee, who affirmed the Superintendent's decision in a letter dated September 18, 1985, stating at pages 1-4:

> 1. The grazing rights of the proposed lessee are not in question. The leasing action itself cannot be allowed since neither the Tribal Code nor the Navajo grazing regnlations provide for the leasing of a grazing permit by probable heirs. Indeed, the only subleasing of a grazing permit that is allowed is by a grazing permit holder to probable heirs of immediate family pursuant to 25 CFR [167.9(e)].
> 2. Since the permitted grazing area is a common use area and has not been divided into specific described units that could be fenced, any permit action impacts all permit holders whose needs must be considered. While Ms. Margaret Jose and Ms. Beulah Allen do not seek any direct benefits resulting from the Peshlakais' death, they certainly have a right to express tbeir desires regarding any action regarding their common grazing permit, which they have done * * *.
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> * * * * * * *
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> 7. The subject correspondence [June 14, 1985, Memorandum from Executive Director, Navajo Division of Resources, to Deputy Attorney General, Navajo Department of Justice] can hardly be interpreted as lack of opposition to the proposed lease by the Navajo Nation. [The Executive Director] merely states that in the absence of tribal laws specifically addressing leasing of grazing permits, he is unable to approve or disapprove [the District Court's action]. The District 18 Grazing Committee having been delegated the Tribe's authority to act on all grazing matters within their district, provided a more definite picture of the Tribe's position on leasing of grazing permits. I enclose their September 1, 1981 letter regarding a proposed grazing lease on this same unit where the

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[1] Letter to Executive Director, Navajo Division of Resources, from Field Solicitor, Window Rock (June 3, 1985) at 2.
[2] Memorandum to Superintendent, Fort Defiance Agency, from Field Solicitor, Window Rock (June 20, 1985) at 1.

purported Lessee was directed to remove his livestock or face immediate trespass action resulting from a violation of the Navajo Grazing Regulations with regard te subleasing.

8. Part 167.8 of the Code of Federal Regulations Title 25 gives the Tribal Courts the responsibility for detormining rights to grazing pormits involved in cases of divorce, separation, threatened family disruption, and permits of deceased pormittees. All other grazing permit actions are authorized by the Superintendent considering the recommendation of the Grazing Committee. The Superintendent and the Grazing Committee have had no involvement in this proposed grazing lease and as such the heirs and the courts appoar to have taken such authorities and responsibilities to lease upon themselves.

9. The Superintendent's decision was made in accordance with the Navajo Grazing Regulations as well as with the knowledge of longstanding Navajo Tribal practices regarding grazing permits. The Solicitor fails to mention the proper regulations of 25 CFR if such lands were to be leased with approval of the B.I.A.

10. The decision to disapprove the proposed lease does not fail to protect the estate or favor one group of land users against another, instead we must insure that the rights of all common users are considered and protected.

For this lease to be executed legally and properly the following requirements would have to be met:

1. The Navajo Grazing Regulations would have to be revised or waived.
2. The B.I.A. would have to determine grazing and carrying capacities and establish fair market appraisals.
3. The subject lands would have to be advertised for competitive bidding.
4. The lands under the permit would have to be subdivided, legally described, fenced, and proper arrangements made for adequate livesteck watering.
5. A lease bend to insure compliance with the terms would have to be considered.

Appellant filed an appeal from this decision with the Assistant Secretary–Indian Affairs. On January 8, 1986, appellant requested the Board to assume jurisdiction over the matter, stating its appeal had been pending before the Assistant Secretary for more than 30 days without decision, in violation of 25 CFR 2.19.[3] By order dated January 15, 1986, the Board made a preliminary determination that it had jurisdiction over the matter, and requested the administrative record. The record was received on February 4, 1986. Briefs on appeal were filed by appellant, appellee, and Margaret Jose and Beulah Allen.

Contentions of the Parties

On appeal appellant argues that appellee's disapproval of the court-ordered lease constitutes an impermissible intrusion into the internal affairs of the Navajo Nation and a derogation of the nation's right of self-government. Appellant contends that BIA has no authority to disapprove an order entered by a Navajo court in a matter over which that court undisputably had jurisdiction. Alternatively, appellant argues that the court had full authority to make an asset of the estate

[3] Section 2.19 states in pertinent part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or BIA official exercising the administrative review functions of the Commissioner] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the written decision."

The 30-day time limit applies to the Assistant Secretary when he is exercising the administrative review functions of 25 CFR Part 2. *Interim Ad Hoc Committee of the Karok Tribe* v. *Sacramento Area Director*, 13 IBIA 76, 92 I.D. 46 (1985).

productive during the pendency of probate, that the person receiving the lease was qualified to receive a grazing permit, and that the temporary leasing of a grazing permit by the court does not in any way contravene the authority of the Navajo District Grazing Committee.

Appellee disapproved the lease on the grounds that the court's action violated regulations set forth in 25 CFR Part 167. In his brief to the Board, appellee takes a different approach and argues that the decision to disapprove the lease should be affirmed because the Navajo Nation agrees the court did not have authority to order the lease:

> The real issue in this appeal is the scope of the authority of the Navajo Tribal Court. In deference to the Navajo Tribe's sovereignty and its interest in defining the scope of authority of its Courts, we requested tbe tribe to advise us of its opinion on tbis mattor. By letter dated May 14, 1986, the tribe advised the Board of Indian Appeals and all concerned parties that the Area Director's September 18, 1985, decision was correct, and that under the Navajo Tribal Code and 25 CFR § 167.9(e), the Court had exceeded its authority in directing that the sublease be issued * * *. We believe that the tribe's position on this matter is dispesitive of the issues raised in this appeal and should be accepted by the Board.
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> *Conclusion*: In view of the Navajo Attorney General's opinion, we urge the Board of Indian Appeals to affirm the Area Director's Septomber 18, 1985, decision.

Appellee's Brief at 1-2.

The May 14, 1986, letter from the Navajo Attorney General states at pages 1-2:

> After careful review, it is my opinion that tbe Area Director's decision dated September 18, 1985 is correct. Clearly, the Tribal Courts have full authority to detormine beirs of a Grazing Permit holder. 25 C.F.R. Section 167.8(d). However, the authority to review and approve grazing permit subleasing rests solely with the District Grazing Committee and Agency Superintendent. 25 C.F.R. Section 167.9(e), 3 N.T.C. Section 786. These same provisions specifically limit grazing permit subleasing to family members or probable heirs.
>
> Presumably, the Navajo Tribal Council delegatod that authority to the District Grazing Committoe because it determined that a Committoe composed of community members wbo are familiar witb local customs, family ties, and grazing pattorns could do the best job of allocating grazing rights. In determining the heirs of the Mary Dodge Peshlakai estate and approving a grazing permit sublease, the Tribal Court failed to adequatoly consider the conflicting grazing rights of Margaret S. Jose and Beulah M. Allen. This conflict could have been avoided had the Court consulted with or deferred subleasing matters to the District Grazing Committee.

Mootness

Although not raised by the parties, the present case is potentially subject to dismissal on the grounds of mootness because the court-ordered lease at issue was for only the 1985 and 1986 grazing seasons. Accordingly, the lease would expire by its own terms on October 31, 1986.

The doctrine of mootness in Federal courts is based on the case-or-controversy limitations set forth in Article III, § 2, of the United States Constitution. As interpreted by the courts, The fundamental policies underlying the doctrine appear to be two and awareness of them is essential to dealing with this complex area of the law. The first is that the courts, for reasons of judicial economy, ought not to decide cases in which the controversy is hypothetical, a judgment cannot grant effective relief, or the parties do not have truly adverse interests. Second, it is a premise of the Anglo-American judicial systom that the genuinely conflicting self-interests of parties are best suited to developing all relevant matorial before the court. * * * Hence, when the circumstances out of which a controversy arise change so as to raise doubt concerning the adversity of the parties' interests, courts ordinarily dismiss cases as moot, regardless of the stage to which the litigation has progressed.

Marchand v. *Director, U.S. Probation Office*, 421 F.2d 331, 332 (1st Cir. 1970).

[1] The Board has previously discussed the similarity between Article III restrictions and its own authorizing regulations in the context of standing. *Hawley Lake Homeowners' Ass'n* v. *Deputy Assistant Secretary--Indian Affairs (Operations)*, 13 IBIA 276 (1985). As an executive/administrative forum, the Board is not bound by the Constitutional restrictions on judicial branch review. As a quasi-judicial body, however, it has consistently applied the doctrine of mootness in the interest of economy of judicial resources. *See, e.g., LeBeau* v. *Acting Deputy Assistant Secretary--Indian Affairs (Operations)*, 14 IBIA 84 (1986); *Estate of Milton Roy Osage, Sr.*, 13 IBIA 146 (1985); *Burns* v. *Anadarko Area Director*, 11 IBIA 40 (1983).

A major exception to the mootness doctrine recognized both by the courts and the Board concerns potentially recurring questions raised "by short term orders, capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). *See also Boise City Irrigation & Land Co.* v. *Clark*, 131 F. 415, 419 (9th Cir. 1904) (The court considered a question allegedly moot "partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter.") The Board has also considered the merits of cases falling into this category. *See, e.g., Aleutian/Pribiloff Islands Ass'n, Inc.* v. *Acting Deputy Assistant Secretary--Indian Affairs (Operations)*, 9 IBIA 254, 89 I.D. 196 (1982); *Rosenberg* v. *Portland Area Director*, 6 IBIA 124, 84 I.D. 439 (1977).

Because the present case raises the same type of question, the Board will address the merits of the case even though the matter is arguably moot.

Applicable Regulations

Regulations concerning grazing on Navajo tribal land are found in 25 CFR Part 167. A major objective of these regnlations, as set forth in 25 CFR 167.3(a) is "[t]he preservation of the forage, the land, and the water resources on the Navajo Reservation, and the building up of those resources where they have deteriorated." Grazing permits evidence a valuable right to use tribal land because under section

167.9(a), "[a]ll livestock grazed on the Navajo Reservation must be covered by an authorized grazing permit issued by the Superintendent based upon the recommendations of the District Grazing Committee. * * * All such grazing permits will be automatically renewed annually until terminated." Section 167.8 sets forth those persons who are eligible to hold grazing permits.

Part 167 also regulates the transfer of grazing permits. Section 167.9(d) provides that "[u]pon recommendation of the District Grazing Committee and with the approval of the Superintendent, grazing permits may be transferred from one permittee to another in accordance with instructions provided by the Advisory Committee of the Navajo Tribal Council, or may be inherited." Under section 167.8(d), the "[d]etermination of rights to grazing permits involved in cases of divorce, separation, threatened family disruption, and permits of deceased permittees shall be the responsibility of the Navajo Court of Indian Offenses under existing laws, rules, and regulations."

The sublease of a grazing permit is addressed in section 167.9(e): "By request of a permittee to sublet all or a part of his or her regular grazing permit to a member of his family or to any person who would receive such permit by inheritance, such subletting of permits may be authorized by the District Grazing Committee and the Superintendent or his authorized representative."

Section 167.7 provides that "[t]he District Grazing Committee, the Superintendent, and his authorized representatives shall keep accurate records of all grazing permits and ownership of all livestock. Master files shall be maintained by the Superintendent or his authorized representatives."

Discussion and Conclusions

This case raises two distinct questions: (1) did appellee commit error by disapproving the temporary leasing of Navajo Grazing Permit No. 18-984, and (2) does a determination of that issue impermissibly intrude on the Navajo Nation's right of self-government.

[2] The Board is fully cognizant of the Department's policy to further the doctrines of Indian sovereignty and self-determination by recognizing the right of Indian tribes initially to interpret their own governing documents and resolve their own internal disputes. This policy extends to giving deference to the tribe's reasonable intorpretation of its own laws when BIA must interpret tribal laws to ensure that tribal action in which the Department has an interest is consistent with that law. *Rogers* v. *Acting Deputy Assistant Secretary--Indian Affairs (Operations)*, 15 IBIA 13 (1986), and cases cited therein. The present matter does not, however, fall neatly into this class.

[3] Under 25 CFR Part 167, the grazing of livestock on the Navajo Reservation is clearly the joint responsibility of the Navajo Nation and BIA. The duties of BIA and various components of the government of

the Navajo Nation are set forth in detail in those regulations. The governing law in this case is not Navajo tribal law, but is Federal law embodied in Federal regulations. It is axiomatic that BIA has a primary responsibility to interpret Federal regulations in carrying out its duties under those regulations.

Here, appellee interpreted the Navajo grazing regulations as not authorizing the action taken by the court. This position is reasonable and supportable. Section 167.9(e) provides for subleasing of grazing permits by the District Grazing Committee and the Superintendent only to a limited class of individuals. There is no disputo that the lessee under the court's order is not a person to whom the permit could be subleased. Furthermore, section 167.8(d) gives the court in this case authority only to determine who should receive the grazing permit of the deceased permittee. Nothing in the regulations authorizes the court te sublease the permit.

[4] Appellant notes no one asked BIA to approve or disapprove the court-ordered lease. This fact is irrelevant. Regardless of the source or context, when BIA receives information suggesting Federal regulations have been violated, it has an affirmative duty to inquire into the matter and take appropriate action to correct or end any violation found to exist.

Accordingly, the Board holds that appellee did not commit error by disapproving the court-ordered lease of Navajo Grazing Permit No. 18-894.

The Board also holds that this determination does not impermissibly intrude on the Navajo Nation's right of self-government. Initially, it is interesting that appellant and appellee each argue that their diametrically opposed positions must be sustained on the grounds of tribal sovereignty. Appellant contends BIA must respect the court's order as an exercise of self-government; while appellee argues the Navajo Attorney General's statement during the course of this appeal represents the position of the Navajo Nation and must be followed.

[5] In fact, what this case reveals is the failure of the Navajo Nation to have a unified position in this matter. Initially, the record does not show that lack of jurisdiction to enter this order was argned to or considered by the court. The extent of a court's jurisdiction is clearly the kind of question that should be raised first te the court, rather than being addressed through collateral attack in a separate forum.

[6] When BIA became aware of the court's order, which it reasonably believed was an action exceeding the court's authority and impacting upon an area of legitimate Federal concern, it properly brought the matter to the attention of tribal officials.[4] When BIA also disapproved the lease, attention was diverted from the fact that tribal remedies may not have been exhausted and the matter might still be ultimatoly unresolved within the Navajo Nation, and was instead focused on the

[4] In *Potter* v. *Acting Deputy Assistant Secretary--Indian Affairs (Operations)*, 10 IBIA 33 (1982), the Board noted with approval BIA's actions in bringing conflicting official reports of a tribal council's action to the council's attention.

role of BIA. Under the circumstances, however, BIA had no alternative except to take the dual course of action of disapproving what it considered an *ultra vires* action by the court, while informing appropriate tribal officials of the reason for its action.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Navajo Area Director's Septomber 18, 1985, decision is affirmed.[5]

KATHRYN A. LYNN
Administrative Judge

I CONCUR:

ANITA VOGT
Acting Chief Administrative Judge

NATURAL RESOURCES DEFENSE COUNCIL, INC., *ET AL.* (PETITIONERS) *v.* OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT (RESPONDENT), WEST ELK COAL CO. (INTERVENOR), STATE OF COLORADO (INTERVENOR)

94 IBLA 269 Decided *November 18, 1986*

Issue of appropriate relief for certain failures in the approval of permit to mine coal at the Mt. Gunnison No. 1 mine. CO 0021.

No relief appropriate, except to the extent petitioners may request a comment period on the sedimentation control plan for the loadout facility.

1. Surface Mining Control and Reclamation Act of 1977: Federal Lands: Cooperative Agreements--Surface Mining Control and Reclamation Act of 1977: Federal Lands: Mining Plan--Surface Mining Control and Reclamation Act of 1977: Federal Lands: Permits--Surface Mining Control and Reclamation Act of 1977: Permits: Reclamation Plan

Where one files a permit application package to mine coal on Federal lands in a state in which the state and the Secretary of the Interior have entered into a cooperative agreement in accordance with 30 U.S.C. § 1273(c) (1982), the state is responsible for approving or disapproving the mining permit, but the Secretary retains authority to approve or disapprove the operation and reclamation plan component of the application. A cooperative agreement does not vest the state with complete control over mining on Federal lands.

[5] This decision in no way reflects upon the intent of the court's order under the circumstances before it, or restricts these or future parties in seeking alternative legal means for dealing with the type of situation underlying this dispute.

2. Board of Land Appeals--Surface Mining Control and Reclamation Act of 1977: Permits: Approval

The Board of Land Appeals is not bound by the permitting scheme established by Congress in fashioning relief in an administrative review proceeding in which issuance of a permit to mine has been challenged, where the party seeking review has actively waived or acquiesced to a waiver of the review deadlines in 30 U.S.C. § 1264(c) (1982).

3. Surface Mining Control and Reclamation Act of 1977: Federal Lands: Cooperative Agreement--Surface Mining Control and Reclamation Act of 1977: Hydrologic Protection System: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Approval

Under 30 U.S.C. § 1260(b)(3) (1982), in reviewing a permit or permit revision application the regulatory authority is required to assess the probable cumulative impact of all anticipated mining on the hydrologic balance. Where the state has the primary responsibility under a cooperative agreement for purposes of providing notice and opportunity for a hearing on the review and approval of a permit or permit revision application, it prepares the probable cumulative impact assessment and solicits public comment.

4. Surface Mining Control and Reclamation Act of 1977: Federal Lands: Cooperative Agreements--Surface Mining Control and Reclamation Act of 1977: Hydrologic Protection System: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Approval

Where the Board of Land Appeals finds on the basis of a petition for review of the approval by OSM of a 1981 pornit to mine that OSM failed to prepare a proper probable cumulative impact assessment before issuing the permit, no relief is appropriate where, under a cooperative agreement entered into after the issuance of the permit, the permittee seeks two revisions of its permit for which the state prepares new probable cumulative impact assessments, invites comment thereon, and the petitioners fail to register any objections. OSM's failure will be considered to have been cured when no objection to the new assessments prepared by the state was raised by potitioners.

APPEARANCES: L. Thomas Galloway, Esq., Washington, D.C., and Albert T. Meyerhoff, Esq., Of Counsel, San Francisco, California, for the Natural Resources Defense Council, Inc., *et al.;* Glenda H. Owens, Esq., and Walton D. Morris, Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; Robert E. Benson, Esq., Timothy M. Rastello, Esq., and Thomas F. Linn, Esq., Denver, Colorado, for the West Elk Coal Co.; Inc., Linda E. White, Esq., Assistant Attorney General, Denver, Colorado, for the State of Colorado.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

INTERIOR BOARD OF LAND APPEALS

On September 27, 1985, the Board issued its decision in *Natural Resources Defense Council, Inc.* v. *Office of Surface Mining Reclamation and Enforcement*, 89 IBLA 1, 92 I.D. 389 (1985).[1] The

[1] On Nov. 12, 1985, West Elk Coal Co., Inc. (West Elk), filed a motion seeking to substitute itself for Atlantic Richfield Co. as Intervenor in this case. By order dated Nov. 22, 1985, the Board granted the motion.

Board held that Natural Resources Defense Council, Inc. (NRDC), and various individual petitioners had established that in approving Federal permit CO 0021 to mine coal at the Mt. Gunnison No. 1 mine:

(a) OSM failed to assess the probable cumulative impacts of all anticipated mining in the area on the hydrologic balance;

(b) OSM failed to make its alluvial valley floor determination prior to permit issuance and stipulations #3 and #5 were added to the permit to elicit information required before permit approval;

(c) OSM failed to require plans for the loadout site sedimentation pond prior to permit approval and stipulation #23 was added te the pernit to satisfy that requirement.

89 IBLA at 71, 92 I.D. at 423. The Board, in accordance with the understanding of the parties, extended the opportunity to file briefs addressing the issue of the appropriate relief for the above-stated failures. NRDC *et al.*, West Elk Coal Co. (West Elk), the State of Colorado (State), and the Office of Surface Mining Reclamation and Enforcement (OSM) filed initial briefs and replies.[2]

Generally, the relief sought by the parties may be summarized as follows. NRDC *et al.* request that the Board deny the permit in part because of the identified deficiencies and vacate the permit in part. NRDC *et al.* would have the Board direct in an order that coal extraction cease at the Mt. Gunnison No. 1 mine within 30 days of the date of the order; that within 15 days of the date of the order West Elk submit a plan to OSM and the Colorado Mined Land Reclamation Division (CMLRD) for ceasing extraction while continuing to comply with all applicable environmental performance standards during the period extraction is halted; and that within 15 days of submission of the plan, after seeking NRDC *et al.*'s views, OSM be required to modify or approve the plan. NRDC *et al.* also urge that the Board remand the case to OSM for proceedings to address the deficiencies identified by the Board. NRDC *et al.* suggest the Board direct OSM to offer at least a 30-day comment period following preparation by OSM of a probable cumulative impact (PCI) assessment and resubmission by West Elk of materials to replace the improper stipulations.[3] Any person who is or may be adversely affected should be allowed to request an informal conference on the issues raised, NRDC *et al.* argue. Following any

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[2] West Elk represents in its reply hrief that the individual petitioners did not file a brief and that it was informed by counsel for the individual petitioners that counsel for NRDC *et al.* would be substituted as counsel for the individual petitioners (West Elk Reply at 4). West Elk asserts that record statements of certain individual petitioners are inconsistent with the relief sought by counsel for NRDC *et al.* The Board has received no specific request for substitution. However, in the briefs filed in response to the oppertunity extended by the Board, L. Thomas Galloway certifies he is "*Counsel for NRDC et al.*" (Italics in original.)

[3] Sec. 510(b)(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1260(b)(3) (1982), requircs the regulatory authority to find in writing that "the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balanco" has been made and the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Throughout our earlier decision we referred to this assessment as the PCI (probable cumulative impact) assessment. The parties variously refer to it in their briefs as the "CHIA" (cumulative hydrologic impact assessment) (NRDC *et al.*), "CHIS" (cumulative hydrologic ünpact study) (the Stato), "PCIA" (probable cumulative impact assessment) (OSM), and "PCI" assessment (West Elk). We note the regulations use the acronym adopted by NRDC *et al. See* 30 CFR 784.14(f). However, for purposes of continuity with our previous decision we will continue to refer to the sec. 510(b)(3) assessment as the PCI assessment.

informal conference, NRDC *et al.* assert, OSM should be required to approve or disapprove that portion of the permit vacated by the Board.

Both West Elk and the State believe no relief is necessary because, they allege, all the deficiencies have been remedied by subsequent action. The subsequent action is identified as two permit revision and mine plan modification approvals by CMLRD and the Department of the Interior, respectively, in 1985 for the Mt. Gunnison No. 1 mine.[4] West Elk also believes the Board cannot grant any relief and that the action should be dismissed as moot because authority over the Mt. Gunnison No. 1 mine rests exclusively with the State under the September 27, 1982, cooperative agreement between the State and the Department.

OSM contends no relief is required for the failure to do the PCI assessment or for the failure to make the alluvial valley floor (AVF) determination because the subsequent permit revision and mine plan modification approvals have cured the deficiencies. OSM states, however, the deficiency which resulted in the loadout site sedimentation pond plan stipulation, although substantively cured by subsequent action, technically still exists because CMLRD did not allow public comment on the approval of the plan. OSM concludes the only necessary relief is an order from the Board to CMLRD directing it to seek public review and comment on the sedimentation control plan and to treat the matter as a permit revision made pursuant to the cooperative agreement.

[1] We will first consider West Elk's contention that the Board no longer has jurisdiction over the Mt. Gunnison No. 1 mine and that the Federal permit upon which this case is premised is moot due to the cooperative agreement. West Elk states that at the time of original permit issuance (July 12, 1981) no cooperative agreement existed and both a Federal and State permit were necessary. Following the September 27, 1982, cooperative agreement, jurisdiction and regulatory authority over surface coal mining and reclamation operations on Federal lands within the State was transferred te the State, West Elk asserts. Only a State permit, West Elk argues, is now necessary for the mine. West Elk does admit, however, that OSM retains jurisdiction over mine plan approval for Federal lands. West Elk asserts that permit challenges, when the State of Colorado is the regulatory authority, must be directed to the Colorado Mined Lands Reclamation Board (CMLRB). West Elk requests the Board to dismiss this action or,

[4] In addition, West Elk points out that subsequent to issuance of the 1981 permit challenged by NRDC *et al.* in this case, CMLRD issued five permits for mines in the North Fork Valley of the Gunnison River for which OSM also issued mining plan approvals. West Elk states those mines are: (1) Bear Mines Nos. 1, 2, and 3 (one permit), (2) Orchard Valley Mine, (3) Blue Ribbon Mine, (4) Hawk's Nest Mine, and (5) Somerset Mine. Also, in addition to the two Mt. Gunnison No. 1 mine permit revisions, West Elk states CMLRD approved two permit revisions for the Orchard Valley Mine and one for the Bear Mines Nos. 1, 2, and 3 and OSM approved mining plan modifications for the Orchard Valley Mine. The mining plan modification for the Bear Mines is pending, West Elk states. West Elk asserts that in connection with these approvals PCI assessments were prepered and the area covered by the assessments is the same as that for the Mt. Gunnison No. 1 mine. NRDC *et al.* does not dispute this claim nor is there any evidence in this record that NRDC *et al.* registered objections te any of the PCI assessments.

in the alternative, to transfer it to the CMLRB which, it asserts, has jurisdiction of the Mt. Gunnison No. 1 mine pennit.

We reject West Elk's argument that the Board no longer has jurisdiction in this case. West Elk's argument is based on the cooperative agreement. However, that agreement was in existence long before our initial decision in this case. West Elk did not come forward to argue that we should, prior to that decision, transfer jurisdiction to CMLRB on the basis of the agreement. Likewise, we cannot accept West Elk's assertion that "only a state permit is necessary to mine" (West Elk Brief at 7-9) for the following reasons.

The distinction between permit approval by the State and mine plan approval by the Secretary in cases involving Federal lands was explored by Judge Flannery in *In re Permanent Surface Mining Regulation Litigation*, No. 79-1144 (D.D.C. July 6, 1984) (Round I), 14 ELR 20617 (1984). Therein, in response to a challenge to the definition of "mining plan" in Departmental regulation 30 CFR 740.5 (1983), the court analyzed the meaning of the following language in section 523(c) of SMCRA, 30 U.S.C. § 1273(c) (1982):

> Nothing in this subsection shall be construed as authorizing the Secretary to delegate to the States his duty to approve mining plans on Federal lands, to designate certain Federal lands as unsuitable for surface coal mining pursuant to section 1272 of this title, or to regnlate other activities taking place on Federal lands.

The court stated that the term "mining plan," as used in that section, refers to a plan required by the Mineral Leasing Act, 30 U.S.C. §§ 202a(2) and 207(c) (1982), and while "mining plan" is not defined in that Act, section 508 of SMCRA, 30 U.S.C. § 1258 (1982) (setting out reclamation plan requirements), does provide some guidance as to its meaning. The court found:

> [t]he regulation defining mining plan [30 CFR 740.5 (1983)] cannot ignore the clarification provided by SMCRA. The admonition against delegation contained in section 523(c) means that the Secretary must render a decision on the operation and reclamation portions of the permit application. [Footnoto omitted.]

14 ELR at 20619. The court, thus, remanded the regulation defining "mining plan" to the Department for repromulgation because the regulation had reduced the Secretary's review to "nothing more than review of a reclamation schedule." 14 ELR at 20619. The court clearly explained that where Federal land is involved, one seeking to mine must receive both mining pennit approval from the State and mining plan approval from the Secretary.

The cooperative agreement itself cannot be read as vesting complete control over mining on Federal lands with the State of Colorado. Article VI, Paragraph 8, of the agreement provides in relevant part:

> 8. The MLRD shall assume primary responsibility pursuant to sections 510(a) and 523(c) of the Act for the analysis, review, and approval of the permit application or application for a permit revision or renewal according to the standards of the approved Program. The Director [OSM] shall assist the MLRD in the analysis of the permit

> application or application for a permit revision or renewal and coordinate with the other appropriate Federal agencies as specified by the Secretary according to the procedures set forth in Appendix B. The Department shall concurrently carry out its responsibilities which cannot be delegated to the State * * * so as, to the maxinum extent pessible, not to duplicate the responsibilities of the State as set forth in this Agreement and the Program. The Secretary shall consider the information submitted in the permit application package and, when appropriate, make the decisions required by the Act, MLA, NEPA and other public laws as described above.

30 CFR 906.30. Thus, while the State has primary responsibility, tbat responsibility is not exclusive, and the Secretary must continue to make the decisions required of him by law. As stated in Article III, Paragraph 4, of the cooperative agreement, "Orders and decisions issued by MLRD in accordance with the State Program that are appealable, shall be appealable to the State reviewing authority. Orders and decisions issued by the Department that are appealable, shall be appealed to the Department of the Interior's Office of Hearings and Appeals." We are not persuaded that the cooperative agreement has divested the Board of jurisdiction over this case.

We now turn te NRDC *et al.*'s contentions. Central to NRDC *et al.*'s arguments on the issue of relief is their position that, having found error in the permitting process, the Board is bound by the permitting scheme established by Congress in the Act in fashioning relief. Deviation from that system, NRDC *et al.* argue, will be a sigual to state regulatory authorities to issue permits without requiring the necessary information and making the required findings.

Under the Act a person cannot undertake surface coal mining operations on lands on which such operations are regulated by a stato without obtaining a permit issued by the appropriate regulatory authority. 30 U.S.C. § 1252(a) (1982). Section 510(b) of the Act provides that no permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing that all necessary requirements of the Act have been met. 30 U.S.C. § 1260(b) (1982). Section 514 of the Act governs the permit application approval or disapproval process. 30 U.S.C. § 1264 (1982). The application may be approved or disapproved in whole or in part. 30 U.S.C. § 1264(b) (1982). If the application is approved, the permit shall issue. 30 U.S.C. § 1264(c) (1982). If the application is disapproved, specific reasons for disapproval must be set forth. *Id.* Administrative challenges to approval or denial are regulated by 30 U.S.C. § 1264(c) (1982), which establishes rigorous time limits for requesting a hearing ("[w]ithin thirty days after the applicant is notified of the final decision"), for holding the hearing ("[t]he regulatory authority shall hold a hearing within thirty days of such request"), and for issuance of a decision ("[w]ithin thirty days after the hearing the regulatory authority shall issue * * * the written decision

* * * granting or denying the permit in whole or in part and stating the reasons therefor").[5]

NRDC *et al.* argue that the Board is hound by the same remedies in its review as the regulatory authority is in review of the permit application. If the Board finds any deficiency in the approval and issuance of the permit, NRDC *et al.* contend, the permit must be denied in part, as the permit application would be disapproved in part under 30 U.S.C. § 1264(c) (1982), and the improper issuance by the regulatory authority must be vacated, and mining must cease. NRDC *et al.* charge the "Board's authority to grant relief is founded on, and restricted to, its statutory grant of authority set forth in Section 514(c)" (NRDC *et al.* Brief at 13). NRDC *et al.* acknowledge that not allowing coal extraction during re-examination of the permit application will have "significant consequences" for West Elk, but it argues the permit issued improperly in the first instance and to allow mining to continue where the permit has issued improperly would "defeat the clear Congressional intent not to allow mining to go forward where the required showings had not been made" (NRDC *et al.* Brief at 18).

In response to NRDC *et al.*'s arguments West Elk asserts the Board should examine the objectives of relief with attention to the policies of the Act. West Elk states the central purpose of SMCRA is protection of the environment. It alleges NRDC *et al.* view this case as a method to "establish the standards for relief in permit proceedings nationwide," quoting NRDC *et al.* Brief at page 2. West Elk asserts this is a controversy limited to its facts and the Board should acknowledge that all deficiencies have been remedied and no environmental damage, "as prophesied by NRDC," has taken place (West Elk Answer Brief at 8). West Elk charges NRDC *et al.* want the entire burden of OSM errors to be horne by West Elk even though there is no allegation of environmental damage or harm resulting from the identified deficiencies. West Elk urges that the Board should examine various factors in fashioning any relief, including the economic impact, whether the environmental objectives of SMCRA are being fulfilled, and whether the relief will provide any environmental benefit. An administrative agency has wide discretion in formation of appropriate relief in a case before it, West Elk argues, citing *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, *reh. denied*, 382 U.S. 873 (1965), and *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952). West Elk contends under the present circumstances there is no justification for closing the mine and that even if a deficiency remains, public comment can be allowed while mining continues. Finally, West Elk asserts that the Board, in accordance with 5 U.S.C. § 705 (1982),

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[5] On Oct. 2, 1986, the Office of Hearings and Appeals proposed procedural regulations governing, *inter alia*, requests of review of the approval or disapproval of an application for a permit to mine. 51 FR 35248. Under 43 CFR 4.1365 of those proposed rules styled "Status of permit pending administrative review," the filing of a request for review of approval of an application "shall not suspend the permit pending completion of administrative review." 51 FR 35253 (Oct. 2, 1986).

has the authority to postpone the effective dato of action taken by it, pending judicial review.

The issue presented is whether the remedies available to the Board are limited by section 514(c) of the Act, 30 U.S.C. § 1264(c) (1982). NRDC *et al.* state that remedies are controlled by the intent of Congress and in this case the Board must look to congressional intent in sections 510 and 514 of the Act (NRDC *et al.* Brief at 20). They further state other environmental statutes are not controlling because of their radical differences in permitting procedures.

[2] We will commence our analysis of this issue by turning to the language of SMCRA. Review of section 514(c) reveals that Congress was interested in swift administrative review of permit application decisions, regardless of whether applications were approved or disapproved. The time limits set for hearing and decision are among the most stringent imposed in any environmental statute. In an effort to show how serious it considered these deadlines to be, Congress provided at section 514(f), 30 U.S.C. § 1264(f) (1982), that

> [a]ny applicant or any person with an interest which is or may be adversely affected who has participated in the administrative proceedings as an objector, and who is aggrieved by the decision of the regulatory authority, *or if the regulatory authority fails to act within the time limits specified in this chapter shall have the right to appeal in accordance with section 1276 of this title.* [Italics added.]

30 U.S.C. § 1276 (1982) sets forth the procedures for seeking judicial review. In addition, at section 514(d) Congress provided the authority for granting tomporary relief in a permit application review proceeding, thus providing a mechanism for even swifter review of a temporary nature.

It appears the purpose of the review deadlines in section 514 was to benefit the permit applicant, *i.e.*, to provide it with expeditious resolution of the status of its permit application or permit. In fact, in S. 7, the Senate version of the Act, and H.R. 2, the House version of the Act, this section (designated therein as sections 414 and 514, respectively) provided for review with the 30-day deadlines, only if the application were denied; approval of the permit was not subject to administrative review. S. Rep. No. 128, 95th Cong., 1st Sess. 22-23, 81 (1977); H. Rep. No. 218, 95th Cong., 1st Sess. 28 (1977). The present review system was added by the conference committee without relevant comment. *See* H. Rep. No. 493, 95th Cong., 1st Sess. 106-07 (1977).

Under section 514(c), 30 U.S.C. § 1264(c) (1982), if the approval of a permit were challenged by a "person with an interest which is or may be adversely affected," presumably the intent of Congress was that such a challenge be resolved expeditiously, such that the permittee would not incur a lengthy delay in its operations. On the other hand, if the application were disapproved, presumably Congress intended that the applicant could seek speedy review of that denial and possibly take remedial action to secure the permit as soon as possible.

In this case NRDC *et al.* sought review of the July 1981 issuance by OSM of the Federal permit to mine at the Mt. Gunnison No. 1 mine. The Department did not adhere to the section 514(c) deadlines for hearing and decision, nor was it pressed to do so by the parties. No party sought judicial review because of such failure, and 5 years later there still has not been a final administrative resolution of the controversy. Yet, NRDC *et al.* still assert the Board has no choice but to deny the permit in part and vacate issuance of the permit in part and order the cessation of mining for any of the identified deficiencies until they all are procedurally and substantively corrected.

NRDC *et al.* has urged the Board to look to the intent of Congress in passing the Act. We have done so, and we cannot believe Congress intended the result urged by NRDC *et al.* under the circumstances of this case. Where tbe party challenging the approval of a permit has actively waived or acquiesced in waiver of the review deadlines in section 514(c), we believe, where deficiencies are identified, the Board is not restricted automatically to denying the permit in whole or in part, which NRDC *et al.* assert leads to only one result–cessation of mining.[6] This is not to say the Board could not deny a permit in whole or in part in such a case and order the vacation or partial vacation of the permit. However, under circumstances such as those existing in this case, the Board is not bound, as NRDC *et al.* claim, to the same remedies as the regulatory authority in reviewing a permit application. The Board may fashion relief which is appropriate in this case.

West Elk and the State argue no relief is necessary because subsequent permit revisions have rectified the failures of OSM identified by the Board. OSM joins this contontion as to the PCI assessment and AVF deficiencies. West Elk claims the issue of relief is now moot. We will examine these arguments as they relate to each deficiency. First, the PCI assessment.

Probable Cumulative Impact Assessment

The facts are undisputed that West Elk sought two permit revisions for the Mt. Gunnison No. 1 mine and in 1985 the State and OSM approved those revisions as to the permit and mine plan, respectively.[7] As part of its review process the State in each case underteok a PCI assessment. The State allowed public comment on its proposals to approve the revisions, which NRDC *et al.* admit (OSM Brief at 3,

[6] In their hrief at p. 13, NRDC *et al.* state: "Once the Board denies the permit in part, the Act is crystal clear that mining cannot proceed."

[7] The two permit revisions are known as the "320 acre" revision and the "1630 acre" revision. OSM points out the second revision application originally related to 1,630 acres. This was subsequently modified hy adding 135 acres; therefore, the 1,630-acre permit revision is actually for 1,765 acres (OSM Brief at 3). The State proposed approval of the 320-acre permit revision in June 1985, offering a 30-day comment period. No comments were filed and approval became final on July 27, 1985. The Assistant Secretary for Land and Minerals Management signed the mining plan modification approval on Aug. 16, 1985. The notice for proposed approval of the 1,630-acre permit revision was puhlished on Aug. 26, 1985, announcing a 30-day comment peried. The State's final approval came on Sept. 26, 1985, and the Assistant Secretary's approval for the Department on Sept. 27, 1985.

Exh. A; NRDC *et al.* Brief at 21). NRDC *et al.* raised no objection to those determinations. They assert they believe "the state regulatory authority has a closed mind concerning our contentions and acts as an adversary, not as an impartial regulatory authority" (NRDC *et al.* Brief at 21-22). NRDC *et al.* complain that mine plan approvals by OSM occurred without the opportunity for public comment. With regard to the approval for an additional 320 acres, NRDC *et al.* allege, if they had had the opportunity, they

> would have shown OSM the major failures in what purports to be the CHIA [cumulative hydrologic impact assessment] and PHC [probable hydrologic consequences determination], including (1) failures to consider and limit life of the mine impacts on the hydrologic balance, especially in the key area of dispute, the Minnesota Creek Basin; and (2) failures to include all anticipated mining in the analysis, to mention only two of many deficiencies. [Footnote omitted.]

(NRDC *et al.* Brief at 22). NRDC *et al.* argue they must be allowed to present their views to OSM (or to the Board) on why the two PCI assessments prepared by the State and relied upon by OSM did not cure the deficiencies found by the Board in the original assessment. In essence, NRDC *et al.* contend they were not required to challenge the sufficiency of the PCI assessments before the State because they were relying on their opportunity to contest that determination in OSM's mining plan review process, but OSM never provided that opportunity. NRDC *et al.* further argue

> there is no question but that all the deficiencies found by the Board in the initial permit approval fall within the scope of the Section 508 non-delegable duty. As far as the CHIA is concerned, the finding required by Section 508(a)[13] that the Secretary determine whether the mining operation will assure the protection of, *inter alia*, the quality and quantity of surface and ground water systems must be based on the PHC and CHIA hydrologic analysis. Thus, the Secretary must ensure that an adequate PHC and CHIA is done in order to make the hydrologic findings required by Section 508.
>
> In fact, the Secretary has accepted this rather obvious construction of the statute, as he routinely reviews and approves the CHIA and PHC analysis in order to perform his Section 508 duty, as he did, however badly, for the permit and mine plan amendments in the instant case.

(NRDC *et al.* Reply at 7).

The permit challenged in this case was the Federal permit issued in 1981 prior to the execution of the cooperative agreement by the State and OSM in September 1982. Under the cooperative agreement set forth in 30 CFR 906.30, the permit application package or application for permit revision or renewal is submitted to both the State and OSM. *See* Article VI, Paragraph 7. According to the cooperative agreement, the State assumes primary responsibility pursuant to sections 510(a) and 523(c) of the Act for analysis, review, and approval of the application. *See* Article VI, Paragraph 8. The Secretary retains the power to approve or disapprove the operation and reclamation plan component of the permit application. *See* Article VI, Paragraph 8; *In re Permanent Surface Mining Regulation Litigation (Round I), supra.* Importantly, the cooperative agreement provides: "To the fullest extent allowed by State and Federal law, the Director [OSM] and MLRD shall cooperate so that duplication will be eliminated in conducting the review and analysis of the permit application package or application of a permit revision or renewal." Article VI, Paragraph 12.

The 1985 permit revision and mining plan approvals followed analysis and review by the State and OSM. In accordance with the State's primary role, it undertook compilation of the PCI assessments. Prior to the State's approval of each permit revision, it provided the opportunity for public comment on its proposed approval, including comment on its PCI assessment. None was forthcoming from NRDC *et al.* NRDC *et al.* now claim they did not do so because of their perception of the State's attitude toward them and their belief that they were relying on their Federal rights.

The question presented is whether NRDC *et al.* waived their right to object to the sufficiency of the PCI assessments by failing to pursue those objections at the State level. NRDC *et al.* argue that mining plan approval under section 508(a) of the Act, 30 U.S.C. § 1258 (1982), necessarily entails ensuring whether or not the PCI assessment is adequate and, if OSM had provided for public participation, they would have participated. Not commenting to the State, they assert, should not defeat their Federal rights.

[3] The purpose of the cooperative agreement involved in this case is to, as set forth at Article I, Paragraph 2: "(a) foster Federal-State cooperation in the regulation of surface coal mining; (b) eliminate intergovernmental overlap and duplication; and (c) provide uniform and effective application of the Program on all non-Indian lands in Colorado, in accordance with the Act and the Program." 30 CFR 906.30. The attempt by the Department to delegate to the states the Secretary's duty under section 523(c) to approve mining plans on Federal lands was overturned by Judge Flannery in his 1984 *In re Permanent Surface Mining Litigation (Round I)* opinion, *supra.* Therefore, at the time of review of the permit revision applications in 1985 the State and OSM were operating under the cooperative agreement and Judge Flannery's opinion in performing their respective review functions.

The record indicates, and there is no dispute, the State provided notice to the public of its proposed approval of the permit revisions and invited public comment. It does not appear the State permit revision review and OSM's mining plan review operations were conducted independently.[8] The process involved the coordination contemplated by

[8] In a letter to OSM dated Aug. 27, 1985, CMLRD stated:

"Thank you for your comments on the Division's Findings of Compliance Document for the Mt. Gunnison 1765 Acre Permit Revision. Numerous written and oral comments were forwarded by OSM in our meeting of August 13, 1985 and subsequent telephone conversations on August 13th and August 14th. Formal written comments were received from OSM on August 21, 1985. The Division responded to OSM concerns via a revised Findings Document on August 23, 1985. Final comments were raised by OSM on August 19, 1985 in a meeting with Rick Lawton of OSM. The Division made final changes to the document that day so that a proposed decision was available by the afternoon of August 26, 1985. It is our understanding that the final decision document adequately addresses all of OSM's concerns." (OSM Brief, Exh. A).

the cooperative agreement to avoid duplication of effort. *See* 30 CFR 906.30, Appendix B. OSM's role in mining plan review and approval is governed by the regulations at 30 CFR Part 746.[9] Section 746.1 of 30 CFR states Part 746 "provides the process and requirements for the review and approval, disapproval or conditional approval of mining plans on lands containing leased Federal coal." Under the regulations OSM is required to prepare and submit to the Secretary a decision document recommending approval, disapproval, or conditional approval of the mining plan. 30 CFR 746.13. The recommendation is required to be based, at a minimum, upon:

> (a) The permit application package, including the resource recovery and protection plan;
> (b) Information prepared in compliance with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*;
> (c) Documentation assuring compliance with the applicable requirements of other Federal laws, regulations and executive orders other than the Act;
> (d) Comments and recommendations or concurrence of other Federal agencies, as applicable, and the public;
> (e) The findings and recommendations of the Bureau of Land Management with respect to the resource recovery and protection plan and other requirements of the lease and the Mineral Leasing Act;
> (f) The findings and recommendations of the regulatory authority with respect to the permit application and the Stato program; and
> (g) The findings and recommendations of OSM with respect to the additional requirements of this subchaptor.

30 CFR 746.13.

While 30 CFR 746.13(d) provides that the recommendation is to be based upon comments from the public, there is no provision in 30 CFR Part 746 pertaining to a public comment procedure. The comments for the Mt. Gunnison No. 1 mine permit revisions were solicited at the State level in accordance with Article VI, Paragraph 8, of the cooperative agreement. Thus, under the cooperative agreement the State, as the regulatory authority, undertook a PCI assessment. The time for comment on that assessment was when comments were solicited by the State.[10]

NRDC *et al.* charge the Secretary must make findings under section 508(a), 30 U.S.C. § 1258(a) (1982), *inter alia*, that the mining operation will assure the protection of the quality and quantity of surface and ground water systems. Section 508(a)(13) provides:

> Sec. 508. (a) Each reclamation plan submitted as part of a permit application pursuant to any approved Stato program or a Federal program under the provisions of this Act shall include, in the degree of detail necessary to demonstrate that reclamation required by the State or Federal program can be accomplished, a statement of:
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> * * * * * * *

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[9] The Part 746 regulations were published in final on Feb. 16, 1983, at 48 FR 6912, 6941, to be effective Mar. 18, 1983.

[10] Since the State was required under the cooperative agreement and the Act to perform the PCI assessment, it is logical that it would receive public comment thereon. However, where mining plan modification review involves findings required in the first instance by OSM, 30 CFR 746.13(d) indicates a public comment peried would be necessary at the Federal level. None was provided for the two 1985 Mt. Gunnison No. 1 mining plan modification approvals.

(13) a detailed description of the measures to he taken during the mining and reclamation process to assure the protection of:

(A) the quality of surface and ground water systems, hoth on- and off-site, from adverse effects of the mining and reclamation process;

(B) the rights of present users to such water; and

(C) the quantity of surface and ground water systems, hoth on- and off-site, from adverse effects of the mining and reclamation process or to provide alternative sources of water where such protection of quantity cannot be assured;

30 U.S.C. § 1258(a)(13) (1982). NRDC *et al.* contend that the Secretary has accepted "this rather obvious construction" of 30 U.S.C. § 1258 (1982) "as he routinely reviews and approves the CHIA and PHC analysis in order to perform his Section 508 duty" (NRDC *et al.* Reply Brief at 7). The fact that the Secretary accepted the PCI assessments made by the State in review of the permit revision applications does not mean he was doing so pursuant to any section 508 obligation. That section does not require specific findings by the Secretary, as NRDC *et al.* allege. It merely describes reclamation plan informational requirements with which an applicant must comply as part of the permit application process. This is information which in the first instance goes to the completeness of a permit application package.[11] In that regard section 508(a), 30 U.S.C. § 1258(a) (1982), should be compared with section 510(b), 30 U.S.C. § 1260(b) (1982), which requires written findings by the regulatory authority as part of the permit approval process. In addition, the mining plan approval regulations provide that the Secretary's decision on mining plan approval will be based on, among other things, the State's findings on the permit application. *See* 30 CFR 746.13(f). Neither the Act nor the regulations require the Secretary, in a situation involving a cooperative agreement, to make the PCI assessment required of the regulatory authority. Certainly nothing would preclude the Secretary from denying a mining plan where he was not satisfied with the PCI assessment; however, under a cooperative agreement the State and OSM presumably would work together to develop a PCI assessment satisfactory to both.

[4] If any person was dissatisfied with the PCI assessment, the proper forum for complaint was the CMLRB, as set forth in the State's public comment notification. *See* OSM Brief, Exh. A. The fact that NRDC *et al.* may have been apprehensive about proceeding in a forum in which it believed it had little chance to prevail is not dispositive of the question whether it was afforded an opportunity to make its concerns known. Allowing the opportunity to comment on the PCI assessment at

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[11] "Permit application package" is defined in the regulations at 30 CFR 740.5(a) as

"a proposal to conduct surface coal mining and reclamation operations on Federal lands, including an application for a permit, permit revision, or pormit renewal, all the information required by the Act, this subchapter, the applicable State program, any applicahle cooperative agreement and all of the applicable laws and regulations including, with respect to leased Federal coal, the Mineral Leasing Act and its implementing regulations." The data presented in tbe permit application package should be sufficient for the permit application and the mining plan. *See In re Permanent Surface Mining Regulation Litigation (Round I)*, 14 ELR at 20619, n.2.

the Federal level, after that opportunity had been provided by the State, as regulatory authority under the cooperative agreement, would be duplicative. As previously stated, the purpose of a cooperative agreement is to avoid such duplication.

We cannot find that NRDC *et al.* were denied due process, as they allege. They had the opportunity to challenge the PCI assessment for both permit revisions at the State level. They chose not to do so, perhaps in the belief that they would have another opportunity to do so at the Federal level.[12] The fact that such an opportunity did not materialize does not mean, as NRDC *et al.* argue, they "had no chance to present [their] objections to the subsequent hydrologic analysis" (NRDC *et al.* Reply Brief at 8). They had the chance and waived it by failing to participate.

NRDC *et al.* also attack the proposition that subsequent action by the State cured the deficiency identified by the Board by arguing that "the Secretary in approving the mine plan amendments for the Mt. Gunnison mine explicitly noted that his action did not affect in any way the ongoing litigation in the instant case" (NRDC *et al.* Reply Brief at 8). Special Condition 6, included in the mining plan modification for the "1,630 acre" permit revision, states: "This approval does not affect the outcome of the challenge to permit issued by OSM in 1981, now pending before Interior Board of Land Appeals. If any additional conditions are required by that decision this approval may be modified accordingly." The Assistant Secretary for Land and Minerals Management signed this mining plan modification approval on September 27, 1985.[13]

NRDC *et al.* contend the action by the Assistant Secretary preserved the right of the Board to provide appropriate relief in this case. NRDC *et al.* charge:

> NRDC *et al.* would note that it would be Kafkasque [sic] and grotesquely unfair, for the Board to hold that the federal mine plan amendments decision in which NRDC *et al.* (and the public) had no way to participate constituted the forum in which NRDC *et al.* should have obtained relief. As a matter of fundamental due process, NRDC *et al.* is entitled te a fair chance to present its views that no appropriate CHIA has ever been done for the Mt. Gunnison site and the Board should so hold.

(NRDC *et al.* Reply Brief at 9-10).

First, we must note that a decision made by an Assistant Secretary of the Department is not subject to appeal to this Board under the procedures prescribed in 43 CFR Part 4, and the Board has no jurisdiction in such a matter. *Blue Star, Inc.*, 41 IBLA 333, 335 (1979). Thus, the Board would have had no authority to entertain direct appeals from the Assistant Secretary's August and September 1985 mining plan modification approvals, and none was filed.

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[12] Counsel for NRDC *et al.* represents, however, that OSM was queried "as to the opportunity for puhlic comment and [he] was told there was no opportunity to comment or otherwise participate" (NRDC *et al.* Reply Brief at 7). Counsel does not disclose the date on which such inquiry was made.

[13] The earlier approval for the 320-acre permit revision, which was signed by the Assistant Secretary for Land and Minerals Management on Aug. 16, 1985, contained no such condition.

The Board is left, however, to determine the impact of those approvals, if any, on the present case. With regard to the PCI assessment for the 1981 permit, the Board found it lacking. In reviewing the "320 acre" permit revision, the State conducted a new PCI assessment. That assessment, as part of the State's documents supporting its permit revision approval, was incorporated by the Department in its mining plan decision document signed by the Assistant Secretary. *See* State's Brief, Exh. B. As noted, *supra*, at note 11, the Assistant Secretary did not include special condition 6 in his "320 acre" approval. We do not believe the existence of the special condition, however, even if it were in both approvals, guaranteed NRDC *et al.* any particular type of relief in this case. The approval containing the condition was signed on the same date our first decision in this case was issued, September 27, 1985. The Assistant Secretary, therefore, was unaware of the deficiencies which were identified in the Board's decision. It is clear the Assistant Secretary intended that his approval should not prejudice the pending case, and he allowed that any conditions imposed by the Board would be incorporated into his approval. There is no indication he intended unilaterally te modify responsibilities under the cooperative agreement.

Thus, the Assistant Secretary's conditional approval did not preclude Board action on the issues raised in this case, but our review reveals that further action by this Board in the form of relief for the original PCI assessment deficiency is not warranted because the State has performed new PCI assessments with which NRDC *et al.* did not take issue.

NRDC *et al.* assert they have a right to a Federal determination on the PCI assessment issue. The basis for any right they had, however, was the 1981 permit issued by OSM. The 1982 cooperative agreement changed the responsibilities of the parties to that agreement. The Board in its September 27, 1985, decision made its determination on the basis of that 1981 permit and found OSM failed in its PCI assessment duties. NRDC *et al.* would have us remand the case to OSM for a new PCI assessment. NRDC *et al.* argue:

> Upon remand, OSM may, if it so chooses, rely upon the suhsequent hydrologic analysis performed to cure the deficiencies found by the Board. It can also choose, if it is wise, to perform a more adequate analysis. However, NRDC *et al.* sbould be permitted an opportunity to prove to OSM, and on appeal to the Board, that the new CHIA upon which the permit and mine plan approval rests is inadequate.

(NRDC *et al.* Reply Brief at 12). Clearly, this would be a viable option in the absence of the cooperative agreement; however, this Board is not at liberty to iguore that document which represents the Secretary's determination on how surface mining regulatory responsibilities will be shared between the State and the Department. Under the Act the regulatory authority is to prepare the PCI assessment. *See* 30 U.S.C. § 1260(b)(3) (1982). The State is the regulatory authority under the agreement. What NRDC *et al.* ignore is that OSM no longer has the responsibility to do the PCI assessment for the Mt. Gunnison No. 1 mine. Assuming no revisions had been sought and no new PCI assessments had been prepared, any referral for action to cure those deficiencies would have to be made to the State, rather than to OSM. Here, new PCI assessments have been prepared by the State and they have been subjected to public comment. By failing to comment, as we stated previously, NRDC *et al.* waived any objection to their sufficiency.

Alluvial Valley Floor Determination

OSM, the State, and West Elk all argue that the improper stipulations regarding the AVF determination have also been cured by the permit revision and mining plan modification approvals. NRDC *et al.* contend the same relief outlined for the PCI assessment should be granted because, as with that assessment, they were denied an opportunity to comment at the Federal level on the adequacy of the submissions made to cure the deficiency.

In our earlier decision we stated that OSM's failure to require the applicant to satisfy 30 CFR 785.19(d) (1981) before issuing the permit, by allowing the applicant to submit the necessary information or establish that it was not required te do so, was error. *NRDC* v. *OSM*, 89 IBLA at 57, 91 I.D. at 416. The Board found that issuance of the permit had deprived the applicant of the opportunity to comply with the regulation and that OSM's stipulation Nos. 3 and 5 were apparently included to satisfy the regulation.

The basis for the argument that the deficiencies have been cured is subsequent actions by CMLRD in review of the applications for permit revisions. West Elk, the State, and OSM argue that CMLRD found that the operations would not materially damage the quality and quantity of water in surface and underground systems that supply the AVF, and, thus, the AVF would not be affected. The deficiency identified by the Board was the failure of OSM, prior to permit issuance, to allow the applicant to comply with the regulation or establish that compliance was not necessary because the AVF would not be affected. The State found, based on West Elk's permit revision application packages, that the AVF would not be affected. The State invited the public te comment on its proposed approvals, which included the AVF findings. NRDC *et al.* did not avail themselves of this opportunity. Thus, we find, for the same reasons discussed for the PCI assessment, that NRDC *et al.* waived any right to comment on the information supplied which resulted in the CMLRD's findings. NRDC *et al.* is not entitled to any relief on that basis.

Loadout Facility

We also found OSM had erred in issuing the permit without requiring plans for the loadout site sedimentation pond and by adding stipulation No. 23 to satisfy that requirement. Stipulation No. 23 of the OSM permit required the applicant to submit a sedimentation control plan for the loadout site prior to initiation of construction of the loadout facilities. The same stipulation appeared in the State permit as stipulation No. 2. The plan was submitted to CMLRD and approved by it in March 1982 (West Elk Brief, Addendum 3).[14]

West Elk argues that under the circumstances no relief is required. It points out that approval occurred prior te construction, and there is no suggestion the plan did not fulfill the requirements. The State presents a similar argument. OSM, however, states that CMLRD did not submit its approval of the plan for public review and comment because CMLRD assumed the permit had been properly issued and public comment was unnecessary. OSM states that since the Board has held OSM should have required the plan prior to issuing the original permit, at this time it would be proper for the Board to direct CMLRD to solicit public comment on the approval in the absence of a showing tbat it had previously done so. OSM notes that loadout site activities should be allowed to continue during any public comment period. OSM contends: "This procedure would ensure effective public participation in the consideration of whether the CMLRD-approved sedimentation control plan cures the defect identified by the Board, while precluding an interruption in mining operations which would be unwarranted at this juncture" (OSM Brief at 7, footnote omitted). OSM characterizes the failure to require the plan as a "procedural error wbich can easily be cured in short order" (OSM Brief at 7).

NRDC *et al.* argue that they have been afforded no right at either the State or Federal level te comment on the "subsequent submission which supposedly corrected the deficiency concerning the load-out facility stipulation" (NRDC *et al.* Reply Brief at 13). NRDC *et al.* disagree with OSM, however, concerning the forum for entertaining comments. They state:

> If OSM believes the materials which ARCO/West Elk previously submitted to satisfy the stipulations are adequate, it may submit those materials for public comment. If OSM chooses this course, as is likely, OSM must evaluate the public comment submitted and make an independent judgment on the adequacy of these materials based on that comment.

(NRDC *et al.* Brief at 28).

The error identified by the Board was of a technical nature. OSM failed to require the information prior to permit issuance, as required by regulation. However, both the State and OSM inserted stipulations in their respective permits requiring the submission of the plan prior te any construction, and the plan was submitted and approved by

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[14] OSM represents that this approval by CMLRD was undertaken pursuant to "its cooperative agreement" (OSM Brief at 6). The cooperative agreemant set forth at 30 CFR 906.30 is dated Sept. 27, 1982. Thus, approval by CMLRD could not have been pursuant to the cooperative agreement. The record does not indicate whether OSM participated in the approval or independently approved the plan.

CMLRD before construction began. NRDC *et al.* complain they did not have the opportunity to comment on the adequacy of that plan, and West Elk admits that the public did not have the opportunity (West Elk Reply Brief at 11). West Elk points out, however, that "no one has ever suggested that anything is wrong with the pond" (West Elk Reply Brief at 11-12). Nothing in the record indicates otherwise. NRDC *et al.*'s only complaint was that the plan was not submitted prior to permit issuance. Although the plan was approved in March 1982, NRDC *et al.* never challenged that plan as inadequate in the hearing held in this case in May and June 1982 nor in any of the multitude of pleadings subsequently filed in this case.

The purpose of the regulation found by the Board to have been violated was to provide the regulatory authority with sufficient information to determine, for the loadout site, whether the applicant had an adequate plan for sediment control, and, as noted above, CMLRD approved the plan. However, should NRDC *et al.* believe that the present loadout site sedimentation control plan is inadequate, they shall have 30 days from receipt of this decision to request CMLRD to offer a comment period. CMLRD should then allow a comment period and handle any comments in accordance with its established procedures. Any request and ensuing comment period shall not result in the disruption of any of West Elk's activities at the mine site.

Attorneys' Fees and Expenses

NRDC *et al.* contend they are entitled to an award of reasonable attorneys' fees and expenses as a result of the Board's September 27, 1985, decision. They suggest the Board find they are entitled to an award pursuant to section 525(e), 30 U.S.C. § 1275(e) (1982), and establish a briefing schedule. In reply the State argues that this case has not furthered environmental concerns but detracted from them, and "[i]f attorneys fees are assessed they should be assessed *against* rather than for NRDC" (State Reply Brief at 4, italics in original). West Elk asserts the Board should not consider the attorneys' fee issue until presented with a petition. OSM queries whether the question of attorneys' fees should be addressed at this time, but states it reserves the right to address the issue upon direction to do so by the Board.

We find it premature at this time to rule on entitlement to attorneys' fees and expenses. Any party to this case may file a petition for award of costs and expense in accordance with the procedures in 43 CFR 4.1290-4.1295. Such petition must be filed within 45 days of receipt of this decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board finds that the deficiencies identified by the Board have been cured and that no relief is appropriate, except to the extent NRDC *et al.* may request within 30 days of receipt of this decision that CMLRD offer a comment period on the sedimentation control plan for the loadout facility.

BRUCE R. HARRIS
Administrative Judge

I CONCUR:

GAIL M. FRAZIER
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

The majority hold that, because NRDC "waived or acquiesced in waiver of" the time limitations for administrative review imposed by section 514(c), the Board is not limited to granting or denying the permit in whole or in part, but "may fashion relief which is appropriate in this case." *See supra* at 425. They do so, presumably, te avoid NRDC's argument that our finding a permit must be denied in part "leads to only one result–cessation of mining." *Id.*

NRDC *et al.* argue:

> Since no mining can lawfully occur without a permit, it follows that mining cannot continue where the Board or the regulatory authority denies the permit in part * * * The basic contontion of NRDC *et al.* can be expressed in a simple syllogism. The Act requires a permit to mine; no person is entitled to a permit if the person has not met all the requirements of the Act, therefore they cannot lawfully mine.

(Statement of Position filed Dec. 2, 1985, at 12-13).

The difficulty with this argument is that it ignores the language of section 514. Sections 514(a) and 514(b) provide that the regulatory authority may, respectively, "issue * * * [a] written finding * * * granting or denying the permit in whole or in part," and "notify the applicant * * * whether the application has been approved or disapproved in whole or in part." In those sections the "regulatery authority" is the Office of Surface Mining Reclamation and Enforcement (OSM) or a state. In section 514(c) the regulatory authority, after holding an adjudicative hearing on the reasons for the final determination, shall "issue * * * [a] written decision * * * granting or denying the permit in whole or in part and stating the reasons therefor."

This language has been a part of the Act since it was first drafted. *See, e.g.*, section 215, H.R. 11500, H.R. Rep. No. 1072, 93d Cong., 2d Sess. (1974); section 209, S. 425, S. Rep. No. 402, 93d Cong., 1st Sess. (1973). Indeed, in the original Senate bill the language appears immediately before the provision that "no permit will be issued unless the regulatory authority finds that * * * all requirements of this Act and the State or Federal Program have been complied with," thus indicating the drafters of the legislation found no apparent inconsistency in the language of these two provisions.

Thus, the question is not whether the parties insist on the time limits in section 514(c) or whether we are limitod to granting or denying the permit in whole or in part–the language of the Act says we are–but what follows if we do deny it in part. It is true that section 502(a) provides that no person shall open a mine unless a permit has been obtained and section 510(b) provides that no permit shall be approved unless the application demonstrates and the regulatory authority finds in writing that all the requirements of the Act and the state or federal program have been complied with. It does not follow, however, that the Board must block or halt mining because OSM improperly approved the application. If the permit may be granted or denied in part, as section 514(c) says, then whether mining must wait or cease depends on what terms of the permit are denied and whether they are so integrally related to mining that they must be granted before mining can proceed. This is a question that will have to be answered in each case.

In this case, therefore, the question is whether any of the deficiencies found by the Board in OSM's approval of the permit application are so central that the mine must remain closed until they are remedied.[1] The answer must be "yes" because there has not yet been an assessment, by either OSM or the State of Colorado, of the probable cumulative impact of all anticipated mining in the area–including the life-of-the-mine area of the Mt. Gunnison No. 1 mine–on the hydrologic balance.[2] Such an assessment is central to determining whether and how mining may proceed.

The majority also find it "premature at this time to rule on entitlement to attorneys' fees and expenses." *See supra* at 434. At the time of our decision on the merits, in September 1985, 43 CFR 4.1294(b) provided for the award of appropriate costs and expenses, including attorneys' fees, te any person from OSM "if the person initiates * * * any proceeding under the Act upon a finding that the person made a substantial contribution to a full and fair determination of the issues." Effective December 16, 1985, a condition was added that the initiating or participating person must be one "who prevails in whole or in part, achieving at least some degree of success on the merits." *See* 50 FR 47222, 47224 (Nov. 15, 1985); *cf. Donald St. Clair*, 84 IBLA 236, 92 I.D. 1 (1985). Whether the rule at the time of our decision on the merits applies, or the rule as subsequently amended, it is clear that NRDC *et al.* are entitled to an award. The only issue is

[1] The Mt. Gunnison No. 1 mine is presently not in operation.

[2] The Colorado Mined Land Reclamation Divisions' (CMLRD's) "Proposed Decision and Findings of Compliance," dated June 14 and Aug. 26, 1985, for the revisions of the Mt. Gunnison No. 1 mine permit only assess the impacts on hydrology from mining during the 5-year permit term, not the life of the mine. *See, e.g.*, June 14 Proposed Decision (OSM Exh. B) at 30-31, 34, 38-39, 43. The CMLRD finding that "an assessment of the probable cumulative impact of all anticipated mining in the general area on the hydrologic balance has been made" (*id.* at 46) must be evaluated with this understanding.

how much it should be under the applicable standards. *See Council of the Southern Mountains* v. *OSM*, 3 IBSMA 44, 88 I.D. 394 (1981).

WILL A. IRWIN
Administrative Judge

CENTRAL COLORADO CONTRACTORS, INC. (APPLICATION FOR ATTORNEY FEES)

IBCA-2078-F Decided: *November 28, 1986*

Contract No. M00C14201837, Bureau of Indian Affairs.

Denied.

1. Attorney' Fees: Contract Disputes Act of 1978--Attorney's Fees: Equal Access to Justice Act: Prevailing Party--Attorney's Fees: Equal Access to Justice Act: Substantially Justified--Contract Disputes Act of 1978: Attorney Fees: Prevailing Party--Contract Disputes Act of 1978: Attorney Fees: Substantially Justified--Contracts: Contract Disputes Act of 1978: Attorney Fees--Equal Access to Justice Act: Contract Disputes Act of 1978: Prevailing Party--Equal Access to Justice Act: Contract Disputes Act of 1978: Substantially Justified

The position of the Government is substantially justified, and attorney fees under the Equal Access to Justice Act are not warranted where, in connection with a construction contract, (1) the contracting officer clearly acted reasonably and in the contractor's interest by allowing two claims and reducing the liquidated damages recommended in the Government's post-completion audit, but denying other claims for lack of proof, and (2) the agency later permitted the contractor to submit additional claims and attempted to resolve them by further audit and through interrogatories and by stipulating to certain further entitlements, but requiring the other claims to be resolved by a hearing, in a situation where the Board's ultimate award was primarily by jury verdict.

2. Attorney's Fees: Contract Disputes Act of 1978--Attorney's Fees: Equal Access to Justice Act: Special Circumstances--Contract Disputes Act of 1978: Attorney Fees: Special Circumstances--Equal Access to Justice Act: Contract Disputes Act of 1978: Special Circumstances

Attorney fees and expenses will not be awarded to a contractor tbat has unreasonably protracted the proceedings because of its failure to keep adequato records; its initial delay in submitting its claims; its repeated failures to provide consistent claims data; and its submission of substantial but unmeritorious new claims in its answers to the Government's interrogatories just prior to the hearing.

3. Attorney Fees: Contract Disputes Act of 1978--Attorney Fees: Equal Access to Justice Act: Allowable Expenses--Contract Disputes Act of 1978: Attorney Fees: Allowable Expenses--Equal Access to Justice Act: Contract Disputes Act of 1978: Allowable Expenses

An applicant for attorney fees is not entitled to an award by the Board for costs incurred in connection witlı court proceedings, travel, telephone bills, or postage. The Board has no obligation to seek clarification of an application that fails to explain, allocate, or prorate fees and expenses; and in appropriate circumstances, such as in this case, the application may be denied on that basis.

APPEARANCES: Harry S. Connelly, Esq., Santa Fe, New Mexico, for Appellant; Margaret C. Miller, Esq., Government Counsel, Santa Fe, New Mexico, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

An appeal by Central Colorado Contractors, Inc. (appellant/ contractor/CCC) relating to Bureau of Indian Affairs (BIA) Contract No. M00C14201837 (IBCA Appeal No. IBCA-1203-8-78), bearing the same name as this case and reported at 19 IBCA 1 (1983), 90 I.D. 109, 83-1 BCA par. 16,405, was granted in part by the Board on March 25, 1983. The amount claimed at the time of the hearing was $223,865.68, and the amount granted was $70,854.90. The present application is for attorney fees. We deny it for the reasons set forth in this decision.

Findings of Fact

The BIA awarded Contract No. M00C14201837 to appellant on April 25, 1975, in the amount of $566,556.77, for the grading and draining of the Ignacio-Bondad Road and for construction of the Florida River Bridge, Project SU110(1) 1 & 2, Southern Ute Indian Reservation, La Plata County, Colorado. Notice to proceed with construction was given by telephone on May 23, 1975, effective May 27, 1975; and the initial excavation on the project took place on June 13, 1975. The work was scheduled for completion on June 24, 1976, but was ultimately extended to July 15, and accepted as complete on August 2, 1976, 18 days later. Liquidated damages in the amount of $4,500 were assessed because of the delay (Finding 1, n.4; Finding 2, 19 IBCA at 5-6; Tr. 4-5). The Government proposed final settlement of the contract by letter dated December 6, 1976, identified as Final Change Order No. 5 (Appeal File (AF) 1). A partial release of claims was executed by the contractor on December 21, 1976 (Finding 25, 19 IBCA at 46).

Six months later, by letter dated June 20, 1977, the contractor submitted seven claims, totalling $54,814.81, to the contracting officer (CO) for decision (Finding 26, 19 IBCA at 47). By decision dated May 15, 1978, the CO allowed two of them, totalling $752, and denied the remainder, because they were not timely submitted and for lack of proof (AF 1, last page). The contractor subsequently submitted various revisions of the claims that were disallowed, plus additional claims as indicated below. In total, nine claims ultimately came before the Board in the original appeal.

The contract had contemplated unclassified excavation of approximately 397,530 cubic yards; but a Government audit completed on May 11, 1979 (Tr. 654), prior to the hearing on the appeal, arrived at a total of 441,245 yards, requiring additional payment in the amount of $9,176 for "unforeseen work." At the hearing the Government stipulated that it was further liable for an additional 11,268 cubic yards (Claim 8: $9,577.80) (Findings 1-2, 19 IBCA at 5-6, 100). The Board accepted the claim involved in this stipulation, as well as the two claims previously allowed by the CO (Claim 9: $752) (AF 1; 19 IBCA at 100).

Appellant's principal claims before the Board were that the Government was liable to the contractor for unforeseen work because of the existence of large boulders (Claim 6: $38,600 at the hearing; initially, $117,804.05) and a ridge of rock (referred to in the hearing as the "caprock") (Claim 1: $93,441.92; initially, $105,456.36) that the contracter had to remove. The contracter and the Government differed mainly on whether the Government had included the boulders in its pre-bid estimates and on whether the Government had erroneously represented prior to the bidding that the road right-of-way would fall beneath the caprock and thus that the caprock would not have to be removed (Findings 1, 4-12). The Board denied in its entirety the claim for additional compensation for boulder removal on the basis of insufficient evidence (19 IBCA at 91-99) but, based on a jury verdict approach, awarded the contractor $55,000 in connection with the caprock claim (19 IBCA at 58-69).

Two additional excavation claims were based upon admitted errors by the Government in the design and layout of the road (including some errors made by the Federal Highway Administration, which BIA had called upon for help). Claim 2 ($1,025.10; initially, $1,622.65) involved extra work that the Government admitted prior to the hearing but believed it had already paid for; and Claim 3 ($27,805.83; initially, $32,198.45) involved work that the contractor alleged that it had to redo because of the Government errors, but which the Government denied had occurred, on the ground that it had ultimately accepted the contractor's work on an "as built" basis and that it had had no notice of any claim for additional compensation while the work was in progress. The Board accepted the contractor's version as to Claim 2, partly because the claim had been excepted from the contractor's original release of claims (19 IBCA at 69-70), but denied Claim 3 in its entirety, partly because over 31 months elapsed between the time the project was completed and the time the claim was first asserted in appellant's answers to Government's interrogatories (19 IBCA at 71-77).

Claim 4 ($19,801.86; initially; $20,306.34) involved extra excavation work alleged by the contractor because of an embankment slide that had occurred during the winter upon a portion of the road which had already been graded; but the Government's witnesses contended that the road work where the slide occurred had not been completed, and that the contractor had already been paid for the excavation involved.

The Board found the claim to be similar to Claim 3, in that the road had been accepted "as built," the evidence was conflicting, and the claim had not been asserted until 31 months after the project had been completed. Thus, the claim was denied (19 IBCA at 77-80).

Claim 5 $28,361.17; $21,700.16 as submitted to the CO; "at least $40,000" at the time of the appeal; and $28,550.14 in the answers to the Government's interrogatories) involved extra expense that the contractor had allegedly incurred because the Government had refused to permit it to use for hauling the new Florida River Bridge that had been constructed under the contract. The Board denied the claim primarily on the ground that the contract contained no provision authorizing the contractor to use the bridge, and that the project engineer had not abused his discretion in refusing permission for its use (19 IBCA at 80-91).

Claim 7 ($4,500) sought a return of liquidated damages that had been assessed by the CO for an 18-day delay in the completion of the contract, a reduction of 12 days from the 30 days' liquidated damages that had been recommended in the audit report (AF 1). The amount was based upon a rate of $250 per day, as specified by the contract. The Board granted the refund, noting that the record did not disclose what additional time appellant had been allowed by reason of the 11,268 cubic yards of excavation that had subsequently been agreed upon and that, in any event, the Board had found that 18 days of additional time had been required in connection with the uncompensated excavation involved in Claim 1 (19 IBCA at 99-100).

Thus, the outcome of the claims as variously submitted and as adjudicated upon appeal can be shown as follows:

Claim	(1) Highest Amount	(2) Hearing Amount	(3) Amount Awarded	(4) (3) as a % of (2)	(5) (3) as a % of (1)
1	$105,456.36	$93,441.92	$55,000.00	58.9	52.2
2	1,622.65	1,025.10	1,025.10	100	63.2
3	32,198.45	27,805.83	0	0	0
4	20,306.34	19,801.86	0	0	0
5	40,000+	28,361.17	0	0	0
6	117,804.05	38,600.00	0	0	0
7	4,500.00	4,500.00	4,500.00	100	100
8	9,577.80	9,577.80	9,577.80	100	100
9	752.00	752.00	752.00	100	100
	$332,217.65	$223,865.68	$70,854.90	32	21

If the $9,577,80 (Claim 8) and $752 (Claim 9) that the Government had already agreed to before the hearing were subtracted from each of the above totals, the percentages of recovery on appeal would be 28 percent (column 4) and 19 percent (column 5), respectively. If only the claims on which appellant actually prevailed (at least in part) in an adversary proceeding before the Board are considered (Claims 1, 2, and 7), appellant succeeded on only three out of the nine claims.

Nevertheless, on April 22, 1983, counsel for appellant submitted an application (IBCA-1672-4-83) for attorney fees and expenses in the amount of $41,582.98 and for expert witness fees and expenses in the amount of $9,127.14, for a total of $50,710.12 (plus the costs of the transcript), in connection with the original appeal. That application was denied by the Board on August 17, 1983, *eo nomine*, 19 IBCA at 295, for lack of jurisdiction, on the ground that neither the Contract Disputes Act, 41 U.S.C. §§ 601-613, nor the Equal Access to Justice Act (EAJA/Act), 5 U.S.C. § 504, authorized the awarding of such fees by boards of contract appeals, as determined by the Court of Appeals for the Federal Circuit (CAFC) in *Fidelity Construction Co.* v. *United States*, 700 F.2d 1379 (1983). Appellant's counsel was aware of this circuit court case but disagreed with it (19 IBCA at 297).

Counsel then appealed the Board's denial of attorney fees te the CAFC, but the appeal was dismissed on April 20, 1984. *CCC* v. *United States*, 732 F.2d 169.

On August 5, 1985, the Congress amended the EAJA by P.L. 99-80, reversing the decision in *Fidelity* and applying the provisions of the Act to applications for fees and expenses resulting from adversary adjudications that had been pending on or commenced after October 1, 1981, before boards of contract appeals, which had been timely filed but dismissed by the boards for lack of jurisdiction. On September 3, 1985, counsel filed a timely application under the amended Act for attorney fees in the amount of $61,196.80 and for expert witness fees and expenses in the amount of $9,127.14, for a total claim of $70,323.94.

Accompanying counsel's September 3, 1985, application are photocopies of two exhibits submitted in justification of the amounts claimed. Exhibit A, referred to as "an itemized statement of Appellant's attorneys," is six pages long, and purports to cover the period from June 1978 through March 19, 1984. It contains no allocation or proration of fees among the underlying appeal, the original application for attorney fees, the court appeal from the Board's decision denying that it had jurisdiction, or the preparation of the present application. The other exhibit, Exhibit B, relates to expert witness fees and expenses that were presumably incurred in connection with the hearing.

The first three pages of Exhibit A, covering the period June 1978 thru March 1983, lists fees claimed both by appellant's principal counsel and by another attorney. Costs for copying, telephone calls, and unexplained trips are also included. The attorney fees claimed are broken down only by attorney name, total number of hours, and the month and year in which the hours were expended. There is no indication of how the hours were spent, nor any attempt to prorate hours as to successful and unsuccessful claims.

The fees and expenses claimed on these first three pages amount to $41,582.98, plus expert witness fees and expenses of $9,127.14 (Exhibit B), for a total of $50,710.12, the amount before the Board at the time it dismissed the original fee application (19 IBCA at 296). Page 4 contains a photocopy of a sworn statement by the principal attorney, dated April 21, 1983–which presumably was also before the Board when it dismissed the original attorney fee application–certifying that the information on the "foregoing" three pages is correct and that the fees and expenses are reasonable. There is no recertification of the fees claimed with respect to the present application.

Pages 5 and 6 of Exhibit A, which total $9,309.68 for fees and taxes, plus $994.48 in expenses, are supported by no certification whatsoever. The itoms on these pages, though they contain a breakdown by specific hours on specific dates and involve only appellant's principal attorney, contain no indication of the purpose for which the hours were expended, nor any allocation among claims. The last item, "plane fare-Washington, D.C.," and the 26 entries preceding it, are dated after the Board's previous dismissal of the application for attorney fees (August 17, 1983) but before the enactment date of the legislation under which this application is being considered. A number of the items listed on pages 5 and 6 are also for copying and telephone calls. Since no documents were submittod to the Board and nothing pertaining to this application was pending before it during this period, it is not clear how these expenses relate to the present application.

The three invoices constituting Exhibit B are also photocopies. The copies indicate that the original invoices, which were addressed to the contractor, were certified (but not notarized) by someone (signature illegible) on behalf of Wilson & Co., which apparently furnished appellant with the witnesses whose fees are being claimed. Apparently, no independent verification of these fees was ever submitted te the Board, and none accompanied this application.

Even if the Board were to accept counsel's exhibits at face value, the most they purport to represent is $61,014.28–consisting of $41,582.98 (Exh. A at 1-3), plus $10,304.16 (Exh. A at 5-6), plus $9,127.14 (Exh. B)–rather than the $70,323.94–consisting of $61,196.80 in attorney fees and expenses (allegedly "advanced by the attorneys"), plus $9,127.14 in expert witness fees and expenses–that counsel now seeks (Application at 2, statements 5 and 6).

The statements in the application allege that appellant is "a corporation whose net worth at no time during the proceedings herein exceeded $7,000,000" (Application at 2-3, statement 3). The $7 million figure is presumably based upon changes in the amended Act.

However, the amendments and the House report accompanying them make clear that substantive changes made by the 1985 amendments, such as the changes in the net worth provisions of 5 U.S.C. § 504(b)(1)(B), do not apply retroactively and that, therefore, the application should certify to a net worth not in excess of $5 million in order for appellant to be eligible to apply for attorney fees (Sec. 7, P.L. 99-80; H.R. Rep. 99-120 on H.R. 2378, May 15, 1985, at 11).

Adequate consideration of the merits of an application for attorney fees is not possible without an overall examination of the underlying decision upon which it is based. First, under the heading of *General Observations*, we find that the Board commented (19 IBCA at 56):

> Perhaps the most surprising aspect of this appeal is the protracted delay by the contractor in submitting its claims in writing to the contracting officer for decision. It does not appear that the delay can be attributed to ignorance on the part of those concerned. The Board notes that at the time the instant contract was awarded, Ms. Gibson [appellant's president] had had over a quarter of a century's experience in the field of Government contracting in various capacities and Mr. Sharpe [appellant's general superintendent] had been actively involved in the construction business for about the same length of time.

The Board went on to observe that protracted delays in presenting claims have always involved the contractor in taking unnecessary risks, but particularly so under the 1967 revisions of the equitable adjustment provisions in Standard Form 23-A, which required the contractor to give notice of any constructive change within 20 days after its occurrence. However, since none of the claims involving this issue were considered meritorious, the Board did not find it necessary to address the question in its decision (19 IBCA at 56-57).

What apparently did concern the Board then, and concerns us now, was the prolonged, difficult, and unsatisfactory nature of the underlying case presented by appellant, which necessitated 3 days of hearings and 865 pages of transcript (and a 101-page Board decision) in order to reconstruct 3- to 4-1/2-year-old events, largely through the testimony of expert witnesses, because of the absence of adequate contractor records. Counsel for appellant in effect admitted the existence of this state of affairs in his post-hearing reply brief, where he stated: "It is CCC's position that if the contractor is unable to establish, with specificity, his actual costs the Board will not deny the Contractor his claim for an equitable adjustment where the Board can nevertheless make a fair and reasonable approximation of the amount recoverable" (ARB 9).

The Board ultimately decided to make such an adjustment in connection with Claim 1–which involved the largest amount awarded by far ($55,000)–primarily because the testimony of the contractor's superintendent (that he was told by the Government's project engineer prior to bidding that the road right-of-way would fall below the caprock) was corroboratod both by another bidder and by another of the contractor's employees who was present at one of the conversations

(19 IBCA at 52-56). The Board decided that the testimony of the contractor's superintendent was therefore credible; that the lack of specificity in the Government's contract concerning the matter had to be construed against the drafters; and that the contractor, in bidding, was entitled to rely on the representations of the project engineer. Thus, the contractor was entitled to the increased costs of removing the caprock as an equitable adjustment under the changes clause (19 IBCA at 59-63).

However, the Government's project engineer never waivered in his testimony that he had not made such a statement (Findings 9-10, 19 IBCA at 21-23), and the Board's finding to the contrary would have been extremely unlikely in the absence of a hearing. Thus, in determining the amount of compensation to which appellant was entitled, the Board commented (19 IBCA at 64-65):

> According to the testimony offered by appellant's witnesses, the representations made by the project engineer upon which appellant relied related only to the caprock area. The representation so made, as well as the one design error and three significant staking errors acknowledged by the Government, undoubtedly increased substantially the costs of performing the contract work and the time required for its performance over what the contractor had anticipated at the time of bidding. *A review of the record indicates, however, that a significant part of the costs incurred on the project were attributable to contractor inefficiency.* As reflected in the project inspector's diary and the master diary (GX 9) to which we have frequently referred in this opinion, items of costs falling into such category include but are not limited to the following: (i) Shortage of operators to man equipment; (ii) improper installation of strain panels, (iii) removal and destruction of improperly made monuments following their installation and the remaking and the reinstallation of the replacement monuments; (iv) damages to culverts by contracter personnel; (v) sustained difficulty in obtaining the required compaction in various areas of the project due to a variety of causes, but principally attributable to the improper size of lifts, failure to properly mix materials being compacted and failure to incorperate sufficient water into such materials; and (vi) removal of nonspecification material improperly placed in fills.
>
> *The failure of the contractor to segregate its costs* [63] *between those chargeable to the contract work and the costs considered to be allocable to what it regarded as extra work at the time those costs were incurred greatly complicates the task of determining the amount of the equitable ndjustment to which appellant is entitled for the claim with which we are here concerned, as does the failure of the contractor's superintendent to keep a job diary or an equipment use summary (Finding 27).* [Italics added.]

[63] Denying a motion for reconsideration in *H. R. Henderson & Co.*, ASBCA No. 5146 (Sept. 28, 1961), 61-2 BCA par. 3166 at 16,446, the Armed Services Board stated: "Whether there existed a formal change order or not, appellant, acting as a prudent contractor and aware of its potential claim, should have kept records reflecting the extra costs attributable to the de facto change."

In concluding its discussion of the merits of Claim 1, the Board stated (19 IBCA at 67-68):

> Finally, before undertaking to determine the amount of the equitable adjustment to be awarded te appellant, the Board notes tbe great variances in the amounts the appellant has claimed from time to time for the work encompassed in claim 1. The amount initially claimed for this item in the contractor's letter of June 20, 1977, was $26,240. By the time the notice of appeal and the complaint were filed, the amount of the claim had almost doubled being stated to be in the sum of at least $50,000. A fourfold increase over the amount initially claimed occurred when in its answers to the Government's interrogatories under date of March 28, 1979, appellant submitted an amended claim for this item in the amount of $105,456.36 (GX 20, Schedule 1). The amount presently

> claimed of $93,441.92 (Finding 1) represents more than a 350 percent increase over the amount claimed initially.
>
> We attribute these startling differences in claimed amounts for the same claim item, all of which were submitted after the contract work was completed, to the fact that the records maintained by the contractor were so deficient that no realistic appraisal of the damages suffered by appellant as a result of the Government's action was possible. Although the Board has benefitted materially *from the testimony offered and the exhibits introduced by both parties at the hearing,* it is still extremely difficult to find an adequate basis for determining the amount of the equitable adjustment. [Italics added.]

Claim 7, dealing with liquidated damages based upon the contractor's delay in completing the project, was presumably granted because it was in large measure the counterpart of Claim 1. That is, since the Board had decided that the contractor was entitled to additional compensation for additional work in removing the caprock, it was also entitled to additional time in which to do the additional work (19 IBCA at 99-100). It is obvious, therefore, that this claim could not have been resolved in the manner it was independently of Claim 1.

Claim 2, which is relatively small in amount, was accepted by the Board because the Government had admitted that extra work had been done in the area in question, and because the contractor had indicated the existence of a claim at the time of the walk through after completion of the project and had excepted the claim from its December 21, 1976, release (19 IBCA at 70). However, it was not until the contractor's answers to the Government's interrogatories, signed on March 28, 1979, that the contractor reduced its claim from $1,622.65 to $1,025.10, the amount awarded by the Board.

Discussion

Appellant is claiming attorney fees under the provisions of the EAJA, which in general authorizes an administrative agency to award attorney fees and expenses to a party (other than the United States) that prevails in an adversary adjudication conducted by that agency, unless the position of the agency was substantially justified or special circumstances make an award unjust. As we have noted, P.L. 99-80 (August 5, 1985) brought proceedings before contract appeals boards within the meaning of adversary adjudication.

Although the EAJA was first applied to contract appeal boards only recently, neither the Act, nor its concepts, nor its requirements are new. A statute permitting the Government to pay attorney fees to an opposing party that prevails in adversary litigation against it, however socially or economically desirable such relief may be, still constitutes a waiver of sovereign immunity; and it is widely recoguized that the requirements of such a statute, as interpreted by the courts, must be construed strictly.

As the Eighth Circuit Court of Appeals said in a decision a year before appellant's first attorney fee application was dismissed by the CAFC, "[Appellant's] characterization of the EAJA as a remedial statute does not necessarily suggest that it should be construed liberally; *every waiver* of [a] sovereign immunity statute is remedial" *Monark Boat Co.* v. *NLRB,* 708 F.2d 1322, 1327 (1983) (italics added). Moreover, "[t]he Supreme Court has stated that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Monark* at 1329, citing *Soriano* v. *United States,* 352 U.S. 270, 276, 77 S. Ct. 269, 273, 1 L.Ed.2d 306 (1957).

More than 10 years before the Congress renewed the EAJA and made it applicable to contract boards in 1985, the Fifth Circuit Court of Appeals saw fit to establish for civil rights litigation in that circuit no fewer than 12, fairly stringent, guidelines for determining the propriety of requested attorney fees. *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (1974). Although we see no need to discuss those criteria here, the fact is that they were imposed because the reviewing court, on the basis of the record before it, could not determine "the factors which contributed to the [attorney fee] decision and upon which it was based. No correlation to the facts and figures * * * is visible." 488 F.2d at 717. The courts have generally demanded substantial documentation of the basis for attorney fees at least since that case.

Perhaps the leading recent Supreme Court case on the subject of attorney fees is *Hensley* v. *Eckerhart,* 461 U.S. 424, 103A S. Ct. 1933 (1983), also decided a year before appellant's request for attorney fees was denied by the CAFC. In that case, the court stated expressly that, "*The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'*" 461 U.S. at 433 n.7 (italics added).

What are those standards? In the context of discussing civil rights litigation, the court observed (461 U.S. at 436):

> Although the plaintiff often may succeed in identifying some unlawful practices or conditions, the range of possible success is vast. That the plaintiff is a "prevailing party" therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved. In this case, for example, the District Court's award of fees based on 2,557 hours worked may have been reasonable in light of the substantial relief obtained. But had respondents prevailed on only one of their six general claims * * * a fee award based on the claimed bours clearly would have been excessive.

The court went on to say, "The applicant should exercise 'billing judgment' with respect to hours worked * * * and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." A footnote to the quoted sentence states: "We recognize that there is no certain method of determining when claims are 'related' or 'unrelated.' Plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. *But at least counsel should identify the general subject matter of his time expenditures.*" 461 U.S. at 437 (italics added). The concurring opinion by Chief Justice Burger adds:

November 28, 1986

It would be inconceivable that the prevailing party should not be required to establish at least as much to support a claim under [the Federal statute] as a lawyer would be required to show if his own client challenged the fees. A district judge may not, in my view, authorize the payment of attorney's fees unless the attorney involved has established by clear and convincing evidence the time and effort claimed and shown that the time expended was necessary to achieve the results obtained. [Italics added.]

461 U.S. at 440-441.

To put the matter further into perspective, we note that the EAJA, with which we are concerned here, was first enacted by the Congress on October 21, 1980, to become effective on October 1, 1981. Under section 504(c)(1) of the Act, each agency, after consultation with the Chairman of the Administrative Conference of the United States (ACUS) was required to establish uniform procedures for the submission and consideration of attorney fee applications. Model rules were published by ACUS in June 1981; and this Department published its rules, based on the ACUS model, on April 25, 1982 (48 FR 17596).

Among other requirements, the Department's rules provided that: "The application shall itemize the amount of fees and expenses for which an award is sought." 43 CFR 4.608(d). "The application shall contain or be accompanied by a written verification under oath or affirmation under penalty of perjury that the information provided in the application and all accompanying material is true and complete to the best of the signer's information and belief." 43 CFR 4.608(f). "Each [applicant] must submit with its application a detailed exhibit showing its net worth at the time the proceeding was initiated." (The same requirement applies to any individual owner of the applicant.) 43 CFR 4.609(a). "The application shall be accompanied by *full documentation* of the fees and expenses * * *" and "[t]he documentation shall include an affidavit from each professional firm or individual whose services are covered by the application, stating the actual time expended and the rate [applying to each]." Further, "[t]he affidavit shall itemize in detail the services performed by the date, number of hours per date, *and the services performed during those hours* * * *." 43 CFR 4.610(a) and (b) (italics added).

We do not hold that the Department's rules, which were adopted before the 1985 amendments made the EAJA applicable to contract appeal boards, necessarily or per se govern the application before us. We take note, however, that the application in question is not one filed by some uneducated, inexperienced, or disadvantaged person unfamiliar with judicial or quasi-judicial requirements. Rather, it is an application duly filed by a member of the bar, who, in our view, ought to be charged with at least minimal knowledge of what the Congress, the courts, and the agencies involved in the implementation of the EAJA have typically required in order to justify an award under the Act.

Moreover, because the EAJA, as a waiver of sovereign immunity, must be strictly construed, it is obvious that the criteria established by

ACUS and by the Department must ultimately be literally applied, or else they will have no utility in protecting the Government from possible abuses of Board discretion in construing the Act. Since the application in this case does not provide the required exhibits and affidavits, or even accurate and consistent data, the Board might normally be constrained to dismiss it simply on the basis of those deficiencies. *Cf. J.M.T Machine Co.*, ASBCA No. 23928, 86-2 BCA par. 18,928 (1986); *Roberts Construction Co.*, ASBCA No. 31033, 86-2 BCA par. 18,846 (1986). However, since this is a case of first impression, at least some discussion of the Act and of the substantive merits of the application would appear to be appropriate.

The 1985 amendments did not alter the basic proposition that attorney fees under the Act may be awarded only to a "prevailing party" in a case in which the Government's position in denying the relief applied for was not "substantially justified." 5 U.S.C. § 504(a)(1). However, tbe notion of "prevailing party" has been somewhat liberally construed, in that the courts have said that a party prevails if it is successful on any significant issue in litigation that achieves some of the benefit sought in bringing the suit. *Austin* v. *Department of Commerce*, 742 F.2d 1417 (Fed. Cir. 1984), citing *Hensley, supra*. Similarly, the courts have been relatively lenient in determining the amount of the attorney fee award in cases where an award was found to be justified. *Crumbaker* v. *MSPB*, 781 F.2d 191 (Fed. Cir. 1986). *Cf. Hensley, supra*.

Thus, the crux of the matter in most cases, as in this one, is likely to be whether the Government's position in denying the relief that the litigant sought was in fact "substantially justified." However, it is equally important to determine whether the applicant has in any way unreasonably protracted the proceedings, since no fees may be awarded in such circumstances. 5 U.S.C. § 504(b)(1)(E). We turn to those questions now.

As the court noted in *Russell* v. *National Mediation Board*, 775 F.2d 1284, 1291 (5th Cir. 1985), "The language and legislative history of Pub.L. No. 99-80 make clear that the new EAJA is designed to enable those *oppressed by unreasonable government action* to vindicate their rights without having to worry about attorney fees." (Italics added.) "On the other hand," as the court said in *Gavette* v. *OPM*, 785 F.2d 1568, 1579 (Fed. Cir. 1986) (*en banc*), "it is clear that the EAJA was not intended to be an automatic fee-shifting device * * *" (citing House committee report). The court in *Gavette* further stated:

> We hold that "substantial justification" requires that the Government show that it was *clearly* reasonable in asserting its position, including its position at the agency level, in view of the law and the facts. The Government must show that it has not "porsisted in pressing a tenuous factual or legal position, albeit one not wholly without foundation." It is not sufficient for the Government to show merely "the existence of a colorable legal basis for the government's case." [Italics in original, citations omitted.]

Id. at 1579.

What is sufficient for the Government to show? The Eighth Circuit Court of Appeals in a recent case concluded that the Government "must show not merely that its position was marginally reasonahle; its position must be clearly reasonable, well founded in law and fact, *solid though not necessarily correct.*" *United States* v. *1,378.65 Acres of Land*, 794 F.2d 1313, 1318 (1986), citing *Gavette, supra*, and *McDonald* v. *Schweiker*, 726 F.2d 311, 316 (7th Cir. 1983) (italics added). ln *1,378 Acres*, the court had to deal with variations in professional appraisals of land subject to occasional flooding, where the applicant in a condemnation action had been awarded a substantially higher award from a three-member commission than the Government had offered, based primarily on the findings of its own appraiser. The court noted that in condemnation actions, the Government was only obliged to offer "a just price, not a premium price." "Most significantly," the court notod, "botb the Government's pre-trial settlement offer and its trial evidence matched its concurrent appraisals." Reversing the lower court's award of fees, the court went on to comment (794 F.2d at 1319):

> When in a condemnation action the Government selects experienced, qualified, competent appraisers, and consistently relies on their valuations in its offers of just compensation, *without any evidence of bad faith on its part*, its course of conduct is solid, well founded, and clearly reasonable. lts pesition, therefore, is substantially justified. [Italics added.]

McDonald, supra, sheds additional light on when the Government's position is substantially justified. In a case involving a social security claim, the court pointed out that that standard means that the Government "must have a solid *though not necessarily correct basis* in fact and law for the position it took." The court went on to say (726 F.2d 316):

> However, we do not have te decide whether Mrs. McDonald was entitled to prevail on her social security claim; *it is enough that the government had a solid basis for resisting it.* * * * Mrs. McDonald would have been worse off if the government had pursued its district court remedies assiduously. * * * The question under the Equal Access te Justice Act is not whether the government has fought tooth and nail but whether it was proceeding on the basis of a solid legal claim or defense, which it was in this case. [Italics added.]

Still further guidance is found in *Morris Mechanical Enterprises, Inc.* v. *United States*, 728 F.2d 497 (1984), in which the CAFC, citing *Broad Avenue Laundry & Tailoring* v. *United States*, 693 F.2d 1387 (Fed. Cir. 1982), stated that the test depends on "all the pertinent facts in a given case." Thus, the Government was entitled to view events as they occurred rather than with the benefit of hindsight. 728 F.2d at 499. The Armed Services Board has taken a similar position in *Pat's Janitorial Service, Inc.*, ASBCA No. 29129, 86-2 BCA par. 18,995 (1986).

Although the courts in *McDonald, Morris*, and *Broad* were referring to the Government's litigating position rather than to its agency position, we see no reason why the same principles are not applicable in both situations.

Moreover, since the reasonableness at issue here has to do with reasonableness in relation to Government contracts, the principles of Government contract law, or analogies based upon them, as set forth in contract cases, would appear to appropriate to applications such as the one before us. One case that comes to mind in this context is *Bruce Construction Corp.* v. *United States*, 163 Ct. Cl. 97 (1963), which held that the actual or historical cost of an item used by a contractor in the performance of a Government contract is presumptively the reasonable cost of that item. We think that the same principle ought to apply to the cost of any additional *work* done by a contractor. Accordingly, a contracting officer needs to know what that cost is.

In the absence of adequate contractor records, a contracting officer is in the unenviable position of trying to *guess* whether and to what extent the contractor may be entitled to relief. That is not the manner in which an officer charged with the custody of public funds ought to operate. In such circumstances, it is difficult to see that the CO can do anything but rely on the advice of his on-site technical representatives and on any audit reports or other hard data that may be available. As the Armed Services Board said in denying attorney fees in *Hurlen Construction Co.,* 86-3 BCA ¶ 19,153 (1986):

> After considering the information appellant provided, we conclude that *at the time the contracting officer denied the claim* the evidence available did not support a finding of differing site conditions. In fact, such a finding was pessible only after a full hearing on the merits. * * * *The facts and information were such that they were not fully developed until the hearing,* and likewise, a valid determination could not be made until then. Based on the information available, the Government was substantially justified in denying appellant's claim for differing site conditions. [Emphasis added.]

Another case with facts analogous to those before us is *Zinger Construction Co.,* PSBCA No. 1015 (Sept. 9, 1986), 86-— BCA——, in which the board said: "As our findings reflect, Appellant indeed failed to elucidate any meaningful new claim with its original filings. The claim was only 'vaguely stated' and provided no basis from which Respondent could view it as other than a claim for impact costs that had been subsumed in the previous litigation." With respect to the Government's posture, the board added, "While not condoning Respondent's file deficiencies, we cannot conclude that Respondent's actions during the period from March 1982 though August 1982, were unreasonable." Accordingly, the board denied the application for fees.

Finally, because a substantial number of the cases discussed above have placed heavy reliance on *Broad Avenue, supra,* the application for attorney fees in that case appears to warrant discussion. In the underlying case, *Broad Avenue Laundry and Tailoring* v. *United States,* 681 F.2d 746 (1982), the Court of Claims reversed the Armed Services Board and held that a contracting officer's modification of wage rates in a contract to operate a Government-owned laundry service facility was within the scope of her authority, even though the modification was erroneous, since the CO had actual authority to embody mistakes of law in her decision, and thus the Government was estopped from repudiating the CO's written modification of the fixed-price contract.

Although the Government's position (presumably before both the Armed Services Board and the Court of Claims) was one *opposing* the favorable decision of the Government's own contracting officer, on the ground that the CO's contract modification was illegal and therefore invalid (whereas the Court of Claims had ultimately upheld the CO), the CAFC nevertheless refused to award attorney fees to the appellant to compensate it for its efforts to vindicate the CO. In so refusing, the CAFC stated that the mere fact that the Government lost the case does not show that its position in defending the case was not substantially justified. 693 F.2d at 1391.

Applying by analogy the court's reasoning in *Broad Avenue* to the case before us, it would seem that if the Government can be justified in contesting a claim based upon an express determination (incorporated into a contract modification) by the CO herself, then it certainly ought te be justified in contesting a claim based on an alleged representation by a project engineer (concerning the location of the roadbed in relation to the caprock) who not only had no authority to make such a representation but who at all times up to and including the hearing denied that he ever made it.

Having now spent an almost inordinate number of hours in the consideration of this application, and perhaps more than were warranted in reviewing the underlying record, the Board concludes that:

1. There is no evidence that the CO was anything but reasonable in his handling of the claims that were before him, since there was a clear lack of evidence at the time to justify any equitable or other adjustment beyond those that he made. For example, he acted

November 28, 1986

reasonably and in the appellant's interest by allowing two claims and by reducing the number of days for which liquidated damages were charged from the 30 recommended by the audit report to 18. Neither is there is any indication whatsoever that the CO was arbitrary, that his decision was in bad faith or not well founded, or that he failed at any time to follow proper procedures. *1,378 Acres, supra; McDonald, supra.*

2. The agency subsequently acted reasonably and in the contractor's favor by agreeing to resolve the matters at issue substantively rather than simply denying the claims on the basis of procedural formalities, such as excessive delays. Later, because of continued discrepancies and revisions in the amount of compensation sought by the contractor subsequent to the CO's decision, the Government acted reasonably in ordering another audit, seeking answers to interrogatories, stipulating to certain additional entitlements, and requiring a hearing to resolve the remaining claims.

3. The contractor was responsible for unreasonably protracting the proceedings in the underlying case, leading to an unduly long 3-day hearing and 865 pages of transcript, in large part because of its failure to keep adequate records; its initial delay in submitting its claims; its repeated failures to provide consistent claims data; its submission of substantial (but unmeritorious) new claims in its answers to the

Government's interrogatories just prior te the hearing; its unsuccessful efforts to prove these new claims at the hearing; and in its introduction of essentially new information both in its answers to the Government's interrogatories and at the hearing.

4. The contractor prevailed in the underlying decision in only a relatively small percentage of its claims, and only because the Board (primarily by jury verdict) gave it the benefit of every doubt with respect to Claims 1, 2, and 7. Claim 8 was settled before the hearing. With respect to Claim 9, applicant prevailed not because of an adversary adjudication, as the EAJA requires (5 U.S.C. § 504(a)(1)) but because of an award previously made by the CO. *Gricoski Detective Agency*, GSBCA No. 8245 (1986), 86-3 BCA par. 19,195. (For a sinilar recent example of strict construction with respect to attorney fees, *see North Carolina DOT* v. *Crest Street Community Council,* 55 Law Week 4001 (S. Ct. Nov. 4, 1986).) Moreover, the very basis upon which appellant prevailed at the underlying hearing constitutes further evidence that the Government's position in seeking an adversary adjudication in order to resolve the disputed claims was clearly reasonable. Thus, an award of attorney fees in this case would be justified only if the EAJA was intended to be an automatic fee-shifting device, a construction of the Act that both the CAFC and the Congress have rejected. *Gavette, supra.*

5. The attorney fee application submitted by counsel for appellant in this case was inconsistent, deficient, and defective, whether judged in light of ACUS's model rules and the Department's existing regulations or in light of previous court decisions setting standards for such applications. At least where an application has been duly submitted by an experienced member of the bar, the Board has no legal or moral obligation to seek to correct the application's deficiencies; and we hold that we would be justified in dismissing it on this basis even if an award were otherwise justified. We express no opinion on whether we might ever feel constrained to attempt to remedy such deficiencies with respect to any future application, but other attorney fee applicants might do well to heed the conclusion we have reached here.

6. Witb respect te the fees claimed in connection with applicant's court appeal of the Board's dismissal of the application for attorney fees (19 IBCA at 295), we hold, as a matter of law, that this Board has no jurisdiction to make any award of attorney fees or expenses with respect to any litigation that did not take place before this Board, inasmuch as the first sentence of 5 U.S.C. § 504(a)(1) limits the authority to award such fees to the agency that conducted the adversary adjudication for which the fees are claimed. Hence appellant should have allocated its fees and expenses between its court proceedings and its appearances before this Board. *Cf. North Carolina DOT, supra.*

7. Accordingly, even if appellant's present application were otherwise meritorious, we would have denied all fees relating to its court proceedings, as well as its costs for travel expenses, telephone bills, and postage relating to proceedings before this Board. *Massachusetts Fair Share* v. *LEAA*, 776 F.2d 1066, 1069-70 (D.C. Cir. 1985).

Decision

For the reasons stated, the Government's position in this matter is determined to be substantially justified, the application is found to he without merit, and the request for attorney fees is hereby denied in its entirety.

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

RUSSELL C. LYNCH
Administrative Judge

G. HERBERT PACKWOOD
Administrative Judge

DAVID DOANE
Administrative Judge

December 5, 1986

APPEAL OF MICHIGAN BUILDING MAINTENANCE, INC.

IBCA-1945 — Decided *December 5, 1986*

Contract No. 14-16-0003-84-005, Fish & Wildlife Service.

Sustained in part.

1. Contracts: Construction and Operation: Actions of Parties--Contracts: Construction and Operation: Contracting Officer--Contracts: Disputes and Remedies: Termination for Default--Contracts: Performance or Default: Acceptance of Performance

Since the Government has the burden of proof on appeal that it was justified in terminating a building maintenance contract for default, it also has the burden of proving the occurrence of the deficiencies in the provision of janitorial services that led up to the notification to the contracter of the proposed termination.

2. Contracts: Construction and Operation: Actions of Parties--Contracts: Construction and Operation: Contracting Officer--Contracts: Disputes and Remedies: Burden of Proof--Contracts: Disputes and Remedies: Termination for Default--Contracts: Performance or Default: Acceptance of Performance

In the absence of any proof by a contracting officer that he notified a huilding maintenance contracter at the time they occurred of alleged janitorial deficiencies leading up to a termination of the contract for default, the contractor is entitled te payment for its services up until the date of the termination even if it does not challenge the default termination as such.

APPEARANCES: Walter K. Hamilton, Esq., Egnor, Hamilton, & Muth, Ypsilanti, Michigan, for Appellant; Jean W. Sutton, Esq., Department Counsel, Twin Cities, Minnesota, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

This appeal is timely filed by Michigan Building Maintenance, Inc. (formerly Michigan Building Maintenance and Janitorial Service, Inc.) (contractor/appellant), from the February 8, 1985, decision of the contracting officer (CO) denying its claim for unpaid janitorial services in the amount of $9,055.20 rendered under United States Fish and Wildlife Service (FWS) Contract No. 14-16-0003-84-005 at the Great Lakes Fishery Laboratory at Ann Arbor, Michigan. The contract was entered into on October 3, 1983, commencing on October 1, and was terminated for default by the Government on August 20, 1984. The parties have not requested a hearing, and the appeal will be decided on the record.

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Facts

The contract, on Standard Form 33, was for a 1-year term, ending on September 30, 1984. It was suhject to the Service Contract Act, and was in the amount of $16,016, based on $308 per week. Notification of possible termination was first given by the CO on August 10, 1984. The actual termination letter was issued 10 days later.

The first indication in the file of dissatisfaction with the contractor's services is a February 10, 1984, letter from the contracting officer's representative (COR) to the contractor listing a number of deficiencies during the previous month, including 2 days when services were not provided. The letter proposed a 50-percent reduction in the Government's January payment.

A subsequent letter from the contractor to the CO, not in the appeal file but supplied to the Board by counsel for the contractor, indicates that the contractor's problems in January resulted from negligence by an irresponsible employee, who was discharged on January 20, 1984, 3 weeks before the COR's complaint. Since the contractor did not take issue with the proposed 50-percent reduction for January, the payment was reduced by that amount.

The only other indication in the file of the Government's dissatisfaction with the contractor's services prior to the August 10 notification is a May 4, 1984, letter from the COR to the contracter, which the contractor denies ever receiving. That letter does not so much list complaints about the contractor's work as call attention to major periodic items, such as stripping and waxing floors and cleaning fixtures and venetian blinds, which had not yet been scheduled. The letter states that some stripping and waxing of laboratory floors has been done, and that the work was acceptable, but that only 20 percent of the floors had been done.

On August 7, 1984, the COR sent a memorandum to the CO stating that he was having serious problems with the contractor. The COR alleged that "Phone calls have gone unanswered, letters to the contractor are disregarded. * * * It is now time to officially inform the contractor, from your office, of the serious prohlems related to this contract." The COR stated that he was enclosing a copy of the May 4 letter, presumably to confirm his allegations. There is no indication in the record that the contractor was ever given a copy of the August 7 letter.

The CO's August 10, 1984, letter threatening termination is the next item in the file. It recites that the CO has "received a great many complaints regarding the quality of service being provided" by the contractor, that complaints (both letters and phone calls) go unanswered, and that, "This attitude on your part will not be tolerated." The letter directs the contractor to contact the COR "and work out a plan for the satisfactory performance of this contract." The letter concludes with a warning of termination if the situation is not satisfactorily resolved within the next few days.

December 5, 1986

The CO's August 20, 1984, notice of termination for default states that the contract required specific maintenance duties to be performed "at a timely, regular manner, and at an acceptable level of performance." It thus implies that the contractor's performance has not been satisfactery. However, it mentions no specifics, other than the contractor's failure to respond to the August 10 letter. A subsequent letter from the contractor te the CO alleges that the contractor did not receive the August 10 letter until 3 or 4 days later, and that afterwards it was unable to reach the COR despite repeated attempts.

The contractor did not contest the termination, subsequently alleging that it did not know it had a right to do so; but on December 10, 1984, it submitted a claim to the CO for the $9,055.20 now being sought, which it said represented services performed up until the August 20 termination.

In his February 8, 1984, decision denying the claim, the CO acknowledged that the contractor's services had improved slightly in February and March, but alleged that they had deteriorated once again in March and April. The letter stated that, "The record is repleat [sic] with written and oral requests to your firm to comply with the terms and conditions of the contract and te furnish acceptable service to the Ann Arbor Laboratery." The basis for the denial is apparently that the contracter had "failed to produce satisfactory evidence that * * * services were properly rendered" to the Ann Arbor laboratory.

The parties have provided us with copies of materials that counsel for the parties exchanged subsequent to the CO's decision, consisting primarily of employee time sheets submitted by the contractor, and security service sigu-in/sign-out sheets submitted by the Government, relating to the number of hours allegedly worked, or not worked, by the contractor's employees. We do not find these documents to be particularly persuasive with respect to the allegations of either side and therefore give them little weight.

To support the statement in the CO's August 10, 1984, notice that the Government's letters and telephone calls went unanswered, and the statement in the CO's February 8, 1985, decision that the record was replete with oral and written requests that the contractor comply with the terms and conditions of the contract, the CO merely provided the Board with an affidavit to the effect that he had had "repeated discussions" *with the COR* concerning the contractor's deficiencies, and that the CO had personally tried unsuccessfully on several occasions to reach the contractor. However, the CO stated that there were no memoranda of such calls or attempted calls. Neither did the affidavit contain any assertion that any complaint letter was ever sent to the contractor, except for the three letters previously discussed.

In her letter transmitting the CO's affidavit, Government counsel argues that FWS "has documented the unsatisfactory nature of the services rendered and asserts that no services at all were rendered on several occasions during the disputed months." In addition, she states that the claim suhmitted hy the contractor erroneously included three payments made in March, April, and May, totalling $3,326.50, thereby reducing the contractor's claim from $9,055.20 to $5,729.70 (actually, to $5,72*8*.70). She encloses copies of the Government's checks for the 3 months in question but no documentation of the allegedly unsatisfactory services.

The contractor has also submitted an affidavit, from its executive vice president, stating that the COR's allegations of numerous unreturned phone calls are untrue; that in his frequent meetings with the contractor's employees the COR assured them that the cleaning was acceptable; that the COR only once (February 1984) utilized the company evaluation forms the contractor sent to him monthly as a feedback mecbanism; and that the contractor's principals met personally with the COR on numerous occasions during the contract to discuss his concerns but that "most frequently his concerns were much less significant in person than they were made out to be over the phone."

Discussion

The parties have presented us with a case that is relatively simple to deal with, since each side has in effect denied everything the other side has said, and neither party has provided us with any significant proof of its contentions. Even the affidavits from the two sides primarily involve hearsay allegations: the CO's allegations relate to conversations that the COR allegedly had with the contractor, and the contractor's allegations relate to conversations that the COR allegedly had with the contractor's on-site employees. Neither counsel has cited any cases in support of its position, and neither has requested a hearing. Thus, the case will have to be decided solely on the basis of the relatively uncontested facts, and the applicable law as unearthed by the Board.

It is undisputed that the contractor had a 1-year janitorial services contract with FWS for a given monthly amount; that it made at least some effort to perform the services under the contract until the August 20 notice of termination for default was issued; and that FWS did not make payment for the months of April through Augnst, in the alleged amount (after subtracting the Government checks that were issued and cashed) of $5,728.70. Government counsel does not appear to contest this amount if the Board finds that the contractor is entitled to additional compensation.

The law on service contracts is relatively well settled, especially with respect to janitorial contracts. Appeals boards have recognized that cleaning services are a vital function that the contractor must perform satisfactorily, or else the contractor must be replaced. If properly documented, termination can be accomplished very quickly; for example, within 45 days after the contract work was commenced, in a situation where a hospital was involved. *Pride Unlimited, Inc.*, ASBCA No. 17778 (1975), 75-2 BCA par. 11436.

Far more commonly, however, the Government agency has attempted to work with the contractor in order to give it an adequate, or more than adequate, opportunity to improve its performance before the default termination provisions of the contract are invoked. *E.g., Dan's Janitorial Service, Inc.*, ASBCA No. 29485 (1985), 86-1 BCA par. 18,536; *Advance Building Maintenance Co.*, GSBCA No. 6691 (1985), 85-3 BCA par. 18,458; *HOW Services, Inc.*, GSBCA No. 7042 (1984), 84-3 BCA par. 17,681.

Since the Government has the burden of proving a default termination, it will normally face serious difficulty in justifying the action if it fails to document its attempts to obtain contract compliance before resorting to that remedy. E.g., *Handyman Building Maintenance Co.*, IBCA Nos. 1335-3-80, 1411-12-80 (1983), 83-2 BCA par. 16,646; *Curtis L. Holt, d/b/a Advance Maintenance Co.*, HUD BCA No. 75-11 (1976), 76-2 BCA par. 11,999; *Giltron Associates, Inc.*, ASBCA Nos. 14561 and 14589 (1970), 70-1 BCA par. 8316.

Therefore, the Government vastly improves its chances of prevailing on a default tormination if it regularly imposes deductions for clearly identified, unsatisfactory work as the contract progresses, rather than waiting until the occasion of the default termination to take decisive action. *Dan's, supra*. Similarly, in attempting to prove both the propriety and the amount of its deductions for allegedly deficient work, it behooves the Government to make use of daily, or at least periodic, inspection reports and related written evidence to establish its case. *Advance, supra*; *HOW, supra*.

The contractor is clearly entitled to the benefit of the doubt with respect to the performance of final services under the contract. For example, in a situation where there was no evidence before this Board as to actual performance during an 8-month period prior to a default termination, the Board commented that the Board's order settling the record allowed "ample opportunity for the Government to submit adequate documentation to prove the necessary elements of performance and payment. It has failed to do so." Therefore, the Board awarded full payment to the contractor. *Ballwebcr's Cleaning Service*, IBCA No. 1057-1-75 (1975), 75-2 BCA par. 11,515.

In the present case, the Government asserted: "Respondent * * * submits that the validity of the Termination for Default is not at issue in this appeal," but only the contractor's claim for final payment. However, as the Board stated in *Handyman, supra,* in connection with a motion to dismiss (83-2 BCA par. 16,646 at 82,774):

The Government has moved to dismiss these appeals for lack of prosecution. Handyman did not make a timely request for a hearing pursuant to the Board's rules (43 CFR 4.109) and it has submitted no evidence. It is the Government, however, that has the initial burden of proof in an appeal from a termination for default. *It must be established prima* *facie that the contractor was in default before the contractor must undertake to show that the default was excusable.* [Italics added.]

Here, the Government has failed to provide sufficient probative evidence even to make a prima facie case of the contractor's default. It has furnished us with no inspection reports, no additional letters expressing dissatisfaction to the contractor, no affidavit from the COR, and no other proof of any kind that the contractor either failed to perform the services required by the contract, or that it performed them unsatisfactorily.

Decision

Accordingly, the appeal is sustained in the amount of $5,728.70, plus interest computed in accordance with the Contract Disputes Act of 1978.

BERNARD V. PARRETTE
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

McWANE COAL CO., INC.

95 IBLA 1 Decided *December 11, 1986*

Appeal from a decision by the Office of Surface Mining Reclamation and Enforcement, Birmingbam Field Office, Alabama, ordering McWane Coal Co., Inc., to make payment of unpaid reclamation fees plus interest, and imposing an "administrative offset" for tbat amount against an overpayment of reclamation fees.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Reclamation Fees: Liability--Surface Mining Control and Reclamation Act of 1977: Words and Pbrases--Words and Pbrases

"*Operator.*" Identification of the "operator" respensible for payment of reclamation fees under sec. 402(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1232(a) (1982), does not turn solely upon a litoral interpretation of the phrase "removes or intends to remove" coal in 30 U.S.C. § 1291(13) (1982), but involves consideration of business realities. The person or entity who exercises control over the person or entity who actually removes the coal is responsible for payment of the reclamation fees.

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Reclamation Fees: Liability

Wben an operator bas made an overpayment of reclamation fees to the Office of Surface Mining Reclamation and Enforcement, and wben

December 11, 1986

that operator is responsible for payment of unpaid reclamation fees, the office may reasonably impose an "administrative offset" for the amount of the unpaid fees, provided it gives written notice to the operator which conforms with the requirements of 31 U.S.C. § 3716 (1982).

APPEARANCES: Arthur J. Sharbel III, Esq., Cathy S. Wright, Esq., David M. Smith, Esq., Birmingham, Alabama, for McWane Coal Co., Inc.; Melissa Gallivan, Esq., Alice P. L. Schwartz, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

INTERIOR BOARD OF LAND APPEALS

McWane Coal Co., Inc. (McWane), has appealed an April 16, 1985, decision of the Office of Surface Mining Reclamation and Enforcement (OSM), Birmingham Field Office, Alabama, informing McWane that it was responsible for $8,286.19 in unpaid reclamation fees due in accordance with sections 402 (a) and (b) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1232(a) and (b) (1982), for coal produced by Omega Fuels, Inc. (Omega), McWane's contract miner. OSM also stated it was deducting the unpaid reclamation fees from an $11,000 overpayment made by McWane. OSM further provided that its decision was appealable pursuant to 43 CFR 4.1280.

By letter dated September 6, 1984, OSM notified McWane that it had completod a reclamation fee audit of McWane's surface coal mines for calendar quarters 80-2 through 84-1 and had discovered discrepancies in reported coal production. OSM determined that McWane had underreported its coal production by the following amounts: 90.22 tons for the period 82-1, and 23,584.62 tons for the periods 80-2 through 84-1. The latter tonnage actually represented coal fines removed from McWane's sedimentation ponds by Omega. The letter stated that McWane had agreed witb the first determination, but that the parties could not reach agreement concerning the second. Subsequently, OSM issued the decision presently under appeal.

The basis for OSM's action in this case is two written agreements, datod June 23, 1980, and July 19, 1983, between McWane and Omega. In interpreting those agreements, OSM determined that Omega functioned as an agent of McWane and that McWane was responsible for payment of the unpaid fees.

On appeal, McWane relies upon those same agreements in arguing that Omega, and not itself, is the "operator" responsible for paying the reclamation fees with respect to the coal removed from McWane's ponds by Omega.[1] McWane maintains that Omega bore all costs associated with, and financed every aspect of, the coal fine pond operation, with no assistance from McWane; that Omega bore all of the risks associated with the operation; and that Omega and McWane understood that Omega's mining operation was independent of McWane's mining or coal-washing activities in the area.

[1] OSM's determination that McWane was responsible for payment of the $8,286.19 in unpaid reclamation fees was based upon section 402(a) of SMCRA, 30 U.S.C. § 1232(a) (1982), which provides:

> All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, * * * a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine * * *.

The term "operator" is defined in section 701(13) of SMCRA, 30 U.S.C. § 1291(13) (1982), as "any person, partnership, or corporation engaged in coal mining who removes or intends to remove more than two hundred fifty tons of coal from the earth by coal mining within twelve consecutive calendar months in any one location."

OSM's reclamation fee collection regulations do not define the term "operator," simply providing that "[t]he operator shall pay a reclamation fee on each ton of coal produced for sale, transfer, or use, including the products of in situ mining." 30 CFR 870.12(a). The preamble to OSM's initial reclamation fee regulation contains a discussion pertinent to resolving the issue of which entity, as between McWane and Omega, is the "operator" liable to OSM for tbe $8,286.19 in unpaid reclamation fees:

> Several commenters raised questions as to who is an operator responsible for payment of the fee. Section 402 of the Act [30 U.S.C. § 1232 (1982)] requires that all operators pay the fee. Section 701 [30 U.S.C. § 1291] of the Act defines "operator" as the "person * * * engaged in coal mining who removes * * *" the coal. Commentors pointed out that in some cases the one who removes the coal is actually a contractor who may be paid only for his services and who has no ownership or beneficial interest in the coal. The number and variety of business arrangements employed in the coal industry make it difficult to further define "operator" without considering the specific facts of particular cases. We believe that Congress intended the burden of fee payment te fall upon the person who stands to benefit directly from the sale, transfer, or use of the coal. This intent will guide the Office in making decisions as to who is liable for the fee. The identification of operaters will be made in light of the realities of the business world and will not turn solely on a literal interpretation of the word "removes." [2]

42 FR 62713 (Dec. 13, 1977) (comment 2).

The contractual relationsbip between McWane and Omega is embodied in a letter dated June 23, 1980. The letter details the parties' respective rights and obligations, and served to convince OSM that

[1] McWane does not contend that the removal of coal fines from sedimentation ponds does not constitute "surface coal mining operations" under sec. 701(28) of SMCRA, 30 U.S.C. § 1291(28) (1982). There is no doubt that such activities are regulated by SMCRA. *United States* v. *H.G.D. & J. Mining Co.*, 561 F. Supp. 315 (D.C. W.Va. 1983) (dredging coal from river is a surface coal mining operation); *United States* v. *Devil's Hole, Inc.*, 548 F. Supp. 451 (D.C. Pa. 1982) (removal of coal from silt dams constituted a surface coal mining operation); *Brentwood, Inc.*, 76 IBLA 73 (1983) (dredging to recover coal from a lake or river is a surface coal mining operation).

[2] The 1977 reclamation fee regulation, 30 CFR 837.12(a), contained law coverage identical to the current regulation, 30 CFR 870.12(a).

McWane was the "operator" responsible for paying the reclamation fees. It stated:

This letter will confirm the understanding between your Company and McWane Coal Company concerning the conditions under which you are to be permitted to process coal fines by washing. The conditions are as follows:

1. The reclaiming of coal fines shall be performed at the McWane Coal washer sito located at Coyle Station, Alabama. Your operation will be allowed to be upon McWane Coal property and permitted area so long as the operation is not in conflict with the primary washing operation of McWane Coal and your operation is in compliance with the instructions of the mining superintendent and washer superintondent at that location.

2. You will process the coal designated by McWane Coal in a workman like manner consistent with good coal washing practices and in compliance with all State and Federal mining laws and regulations and specifically agree that you are an independent contractor and not an employee or agent of McWane Coal and hereby agree to indemnify and hold harmless McWane Coal against any claims, demands, actions or causes of actions which arise in connection with your mining operation.

3. During the term of this agreement your company will maintain a labor contract with United Mine Workers of America and all coal processing on McWane Coal property will be done in accordance with the terms and conditions of that agreement.

4. McWane Coal Company has first call on all coal processed by your company. Where coal is of acceptable quality McWane Coal Company will purchase such coal at the rate of $15.00 per net ton F O B processing point. No coals processed from McWane Coal's property shall be sold or shipped to anyone other than McWane Coal without permission in writing signed by an officer of McWane Coal Company.

5. At its sole discretion McWane Coal Company shall determine whether the coal processed pursuant to this agreement is of acceptable quality. Coal which does not meet the quality standards established by McWane may be rejected in any point by McWane notwithstanding whether the coal has been previously accepted by McWane. If coal is rejected by McWane pursuant to this provision, you will have the right to offer the coal for sale to others.

6. Should McWane Coal Company either reject the coal or decide not to exercise its option to purchase coal provided permission is secured by Omega Fuels, your Company may offer such coal for sale. In the event any coal taken from McWane Coal property is offered for sale to others, the price to be paid to McWane Coal Company for such coal shall be $20.00 per net ton F O B processing point.

7. Your Company shall be responsible for all power, water connections and any cost associated hereto. At the conclusion of the coal washing operation, you shall be responsible for clean up of matorials and leaving the site in a workman like manner and in the as received condition.

8. This agreement may be terminated at any time and by either party by giving 30 days writton notice of an intention to terminate.

Additionally, by letter dated July 19, 1983, McWane confirmed its agreement with Omega regarding its "independent contract operation at McWane's Coal Company's washer site at Coyle, Alabama * * *." The parties agreed McWane would continue to purcbase Omega's processed fines deemed of acceptable quality by McWane; Omega would pay the full cost of backhoe rental from a specified company; Omega would pay McWane's backhoe operator; Omega would be responsible for cleaning out all ditcbes and settling ponds and maintaining good water flow in conjunction with McWane's normal plant operation; and the agreement could be unilaterally terminated with 30-day notice.

The question of whether McWane or Omega is the "operator," and accordingly responsible for payment of the reclamation fees, turns upon which party actually controlled Omega's operation. The U.S. District Court for the Western District of Virginia addressed a similar issue in *United States* v. *Rapoca Energy Co.*, 613 F. Supp. 1161 (D.C. Va. 1985), in which Rapoca Energy Co. (Rapoca), owner of large coal reserves, argued that independent coal companies who actually mined the coal were responsible for payment of reclamation fees under section 402 of SMCRA, 30 U.S.C. § 1232(a) (1982), since they, as "independent contractors," met the statutory definition of "operator" set forth at section 701(13) of SMCRA, 30 U.S.C. § 1291(13) (1982). Rapoca, like McWane, argued that it was not an operator within the meaning of section 701(13), since the independent contractors, and not Rapoca, physically removed the coal from the earth.

The court in *Rapoca* applied principles of agency law in concluding that Rapoca exercised "direct control over the mining companies," and, thus, was responsible for payment of the reclamation fees. Two elements must be present to establish an agency relationship, the court stated: (1) the agent must be subject to the principal's control with regard to the work to be done and the manner of performing it, and (2) the work has to be done on the business of the principal or for his benefit. 613 F. Supp. at 1163, *quoting Whitfield* v. *Whittaker Memorial Hospital*, 169 S.E.2d 563, 567 (Va. 1969). The court stated "the mere fact that these companies are termed 'independent contractors' is not a conclusive indication of the relationship between the parties." 613 F. Supp. at 1163. The right to control, not the degree of actual control exercised by the principal, is determinative. *Id.*

The *Rapoca* court examined the "actual relationship" between Rapoca and the independent mining companies, finding that Rapoca had the degree of control necessary to establish a principal/agent relationship. Rapoca determined, *inter alia*, what locations were suitable for coal mining operations, performed engineering work for the site, began actual site development work, provided engineering and mapping services for the contractors, and even provided instructions pertaining to extraction of the coal.

Most fatal to Rapoca's claim that the coal companies which actually removed the coal were independent contractors was the payment arrangement agreed to by the parties. The companies delivered the coal to a processing plant owned by one of Rapcoa's subdivisions, and were paid a fixed sum for every ton of coal delivered. The court stated that the relationship was not that of owners and independent contracter, otherwise "the mining companies would undoubtedly be free to sell to whomever would pay the highest price, with only a royalty per ton of coal mined or percentage of the sales price being remitted to Rapoca." 613 F. Supp. at 1164. The court's conclusion provides the standard by which we must evaluate the business arrangement between McWane and Omega:

> Because of the degree of control which Rapoca Energy Company exerts over the mining companies with respect to crucial aspects of the mining process, along with the corresponding lack of freedom regarding the mining companies [sic] ahility to sell to anyone other than Rapoca, this court must conclude that the "independent contractors" are no more than Rapoca's agents. Thus, it is Rapeca Energy Company that is liahle for payment of the reclamation fees.

Id.[3]

The husiness reality of the contractual arrangement between McWane and Omega belies McWane's characterization of Omega as an "independent contractor." Based on the court's analysis in *Rapoca,* we must affirm OSM's determination that McWane was the "operator" responsible for payment of the reclamation fees due on the coal recovered by Omega. We cannot accept McWane's oversimplistic explanation that Omega was the operator since it removed tbe coal. In the preamble to the initial reclamation fee regulations, OSM rejected a literal interpretation of the word "removes." Reading the agreements between McWane and Omega most favorably to McWane, we could say, at best, that Omega exercised control over the operations on a day-to-day basis within the analysis of the court in *Rapoca.*[4] However, that would overstate McWane's case, since the June 23, 1980, letter expressly states that Omega's operation would be allowed upon McWane's property "so long as the operation * * * is in compliance with the instructions of the mining superintendent and washer superintendent at that location." Obviously, McWane's superintendents possessed contractual authority to "control" Omega's day-to-day operation.

McWane's exercise of control was quite pervasive. Not only did McWane have right of first refusal as to all coal fines removed and processed by Omega, the June 23, 1980, letter provides that "[n]o coal processed from McWane Coal's property shall be sold or shipped to anyone other than McWane Coal without permission in writing signed by an officer of McWane Coal Company." McWane had retained the right to reject coal which was not of acceptable quality and, at the same time, set a minimum price for sale of rejected coal to others. Thus, if Omega produced coal of less than acceptable quality, it could only accept a premium price for that coal. The result of this dual requirement is to force Omega to adjust the quality of the coal to meet McWane's needs, rather than choosing to produce coal of a lower quality for sale to others. This indirect, but real restriction on Omega's ability to produce coal for sale on the open market also dictates a

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[3] In *S & M Coal Co.* v. *Office of Surface Mining Reclamation & Enforcement,* 79 IBLA 350 (1984), this Board addressed the question of which coal company, as between the company which owned the coal in place and a second company which actually removed the coal, was the "operator" of the surface coal mining operation and thus responsible for complying with a notice of violation. The Board's analysis is similar to that engaged in by the *Rapoca* court, and supports our ruling in this case.

[4] The court in *Rapoca* recognized that day-to-day control of the operation by the contractor is not necessarily persuasive as "an agency relationship impliedly carried with it the authority for the agent to use all means necessary for the accomplishment of the work to be performed." 613 F. Supp. at 1164.

finding that Omega has "no economic interest in the coal in place." 613 F. Supp. at 1166. Our conclusion that OSM correctly determined that McWane was the operator responsible for payment of the reclamation fees due on coal removed by Omega from McWane's ponds is consistent with congressional intent that the burden of fee payment "fall upon the person who stands to benefit directly from the sale, transfer, or use of the coal." 43 FR 62713 (Dec. 13, 1977) (comment 2); *see also Rapoca*, 613 F. Supp. at 1167.[5]

[2] In November 1984, McWane, due to a bookkeeping error, overpaid reclamation fees due OSM by $11,000. McWane requested a refund of the overpayment, but OSM declined the refund until an audit was conducted to verify the overpayment. In its April 16, 1985, decision OSM informed McWane that it would credit the $11,000 overpayment against the unpaid reclamation fees due on the coal retrieved by Omega, for which OSM had decided McWane was responsible as operator.[6]

McWane contends that there is no statutory or regulatory authority for OSM's decision to "offset reclamation fees claimed by OSM to be due from McWane against an unrelated overpayment made to OSM by McWane" (Statement of Reasons at 11). McWane relies upon SMCRA section 402(e), 30 U.S.C. § 1232(e) (1982), in making this argument. That section provides that "[a]ny portion of the reclamation fee not properly or promptly paid pursuant to [30 U.S.C. § 1232] * * * shall be recoverable, with statutory intorest, from coal mine operators, in any court of competent jurisdiction in any action at law to compel payment of debts." The implementing regulation is drafted in similar language: "OSM will bill delinquent operators on a monthly basis and initiate whatever action may be necessary to secure full payment of all fees and interest." 30 CFR 870.15(c). McWane would limit OSM to initiating an action in a court of competent jurisdiction to collect the disputed unpaid reclamation fees.

McWane's analysis ignores statutory and regulatory authority for imposing an "administrative offset" in this situation. The head of an executive agency may collect a claim by administrative offset, provided it follows the procedures set forth at 31 U.S.C. § 3716 (1982). That statute provides that the Department may collect a debt by administrative offset only after giving the debtor:

> (1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section;
>
> (2) an opportunity to inspect and copy the records of the agency related to the claim;
>
> (3) an opportunity for a review within the agency of the decision of the agency related to the claim; and

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[5] We note the court in *Rapoca* found the ownership of or economic interest in the coal to be a compelling factor where the question of the agency relationship is inconclusive. 613 F. Supp. at 1165. The court's analysis of that issue provided an alternative ground on which to find Rapoca liable for payment of reclamation fees. That analysis also compels the conclusion in this case that appellant is responsible for payment of reclamation fees.

[6] This overpayment indirectly benefited McWane, as interest should accrue only to the date of the overpayment.

(4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

31 U.S.C. § 3716(a) (1982).

The Department's policies and procedures concerning debt collection are published in the Departmental Manual.[7] 50 FR 8400 (Mar. 1, 1985). That manual, at Part 344, establishes procedures for the use of administrative offset: "A bureau may collect debts owed by persons or entities * * * by means of offsets against monies due from the United States under the procedures set forth in 4 CFR 102.3 and this Chapter." 344 DM 3.1A(1). As required by 31 U.S.C. § 3716(b) (1982), a bureau official must, before utilizing administrative offset procedures, examine the debt to see whether the likelihood of collecting the debt and the best interest of the United States justify the use of administrative offset. The Departmental Manual requires that the Department provide written notice to the debtor in accordance with 31 U.S.C. § 3716 (1982), set forth above. 344 DM 3.1A(2).

OSM's April 16, 1985, letter complies with the notice requirements enunciated in 31 U.S.C. § 3716 (1982). The only arguable defect in the notice is that it does not specifically advise McWane of its right to inspect and copy the agency records relating to the debt. However, the file is replete with correspondence between OSM and McWane concerning the payment of the unpaid reclamation fees, and McWane's counsel appears to have had access to all documents in the file. Moreover, the Department's policy is to make its records available to the public under 43 CFR Part 2, Subpart B Inspection of Records. Even if we were to rule that OSM's notice of administrative offset was technically deficient, OSM has the authority to proceed with the administrative offset prior to completion of the specified procedures if:

(1) failure to take the offset would substantially prejudice the bureau's ability to collect the debt, and

(2) the time before payment is made does not reasonably permit the completion of those procedures. Such prior offset must be promptly followed by the completion of those procedures. Amounts recovered by offset but later found not to be owed to the bureau will be promptly refunded (*see* 4 CFR 102.3(b)(5)).

344 DM 3.1E.

Accordingly, we rule that (1) OSM properly concluded that McWane was the "operator" responsible for the unpaid reclamation fees due on coal retrieved by Omega from McWane's ponds; and (2) OSM's decision to impose an administrative offset against the $11,000 overpayment was procedurally correct and substantively reasonable under 31 U.S.C. § 3716(b) (1982), 4 CFR 102.3, and the Departmental Manual. In light

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[7] The Comptroller General's regulations which implement 31 U.S.C. § 3716 (1982) are found at 4 CFR 102.3. That regulation sets forth procedures which must be followed by executive agencies in imposing an administrative offset. The Department's procedures, as published in the Departmental Manual, Part 344, reflect the standards required by 31 U.S.C. § 3716 (1982) and 4 CFR 102.3.

of our analysis and conclusions, we hereby deny the motions for a hearing submitted by both McWane and OSM.

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

R. W. MULLEN
Administrative Judge

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