UNITED STATES DEPARTMENT OF THE INTERIOR

Douglas McKay, *Secretary*
J. Reuel Armstrong, *Solicitor*

DECISIONS
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DEPARTMENT OF THE INTERIOR

Edited by

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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1952, to December 31, 1954. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Oscar L. Chapman and the undersigned served successively as Secretary of the Interior during the period covered by this volume; Messrs. Richard D. Searles, Vernon D. Northrop, Ralph A. Tudor, and Clarence A. Davis served successively as Under Secretary; Messrs. Dale E. Doty, Robert R. Rose, Jr., Joel D. Wolfsohn, Robert M. McKinney, Fred G. Aandahl, Orme Lewis, and Felix E. Wormser served as Assistant Secretaries of the Interior; Messrs. Vernon D. Northrop and D. Otis Beasley served as Administrative Assistant Secretary of the Interior during this period; and Messrs. Mastin G. White and Clarence A. Davis served successively as Solicitor of the Department of the Interior. Mr. J. Reuel Armstrong* served as Acting Solicitor.

This volume will be cited within the Department of the Interior as "61 I. D."

Douglas McKay

Secretary of the Interior.

*Mr. Armstrong was appointed Solicitor on April 4, 1955, and this volume is being published under his direction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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. Co. (36 L. D. 41) ; overruled, 41 L. D. 284. (See 43 L. D. 536.)

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

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

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

Lonergan *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) ; overruled so far as in conflict, 51 L. D. 291.

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

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

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, 45 L. D. 221.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Northern Pacific R. R. Co. (20 L. D. 191); modified, 22 L. D. 224; overruled so far as in conflict, 29 L. D. 550.

Northern Pacific R. R. Co. (21 L. D. 412; 23 L. D. 204; 25 L. D. 501); overruled, 53 I. D. 242. (See 26 L. D. 265; 33 L. D. 426; 44 L. D. 218; 177 U. S. 435.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Phebus, Clayton (48 L. D. 128); overruled so far as in conflict, 50 L. D. 281.

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

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

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

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

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

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

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

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

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

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

Prange, Christ C., and William C. Braasch (48 L. D. 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Spruill, Lelia May (50 L. D. 549); overruled, 52 L. D. 339.

Standard Shales Products Co. (52 L. D. 522); overruled so far as in conflict, 53 I. D. 42.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

State of Nebraska *v.* Dorrington (2 C. L. L. 647); overruled so far as in conflict, 26 L. D. 123.

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

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

State of Utah (45 L. D. 551); overruled, 48 L. D. 98.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thorstenson, Even (45 L. D. 96); overruled so far as in conflict, 47 L. D. 258.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

United States *v.* Bush (13 L. D. 529); overruled, 18 L. D. 441.

United States *v.* Central Pacific Ry. Co. (52 L. D. 81); modified, 52 L. D. 235.

United States *v.* Dana (18 L. D. 161); modified, 28 L. D. 45.

United States *v.* M. W. Mouat et al. (60 I. D. 473); modified, 61 I. D. 289.

Utah, State of (45 L. D. 551); overruled, 48 L. D. 98.

Veatch, Heir of Natter (46 L. D. 496); overruled so far as in conflict, 49 L. D. 461. (See 49 L. D. 492 for adherence in part.)

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

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

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

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

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

Walker *v.* Prosser (17 L. D. 85); reversed, 18 L. D. 425.

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

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

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

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

Wass *v.* Milward (5 L. D. 349); no longer followed. (See 44 L. D. 72 and unreported case of Ebersold *v.* Dickson, September 25, 1918, D–36502.)

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

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

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

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

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

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

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

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

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

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

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

Wickstrom *v.* Calkins (20 L. D. 459); modified, 21 L. D. 553; overruled, 22 L. D. 392.

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

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

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

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

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

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

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

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

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

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

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

Wright et al. *v.* Smith (44 L. D. 226); in effect overruled so far as in conflict, 49 L. D. 374.

Zimmerman *v.* Brunson (39 L. D. 310); overruled, 52 L. D. 715.

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.

TABLE OF STATUTES CITED

(A) ACTS OF CONGRESS

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(B) REVISED STATUTES

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DECISIONS OF THE DEPARTMENT OF THE INTERIOR

BETTIE H. REID
LUCILLE H. PIPKIN

A–26330 *Decided February 4, 1952**

Noncompetitive Oil and Gas Lease—First Qualified Applicant—Cancellation.

If the Department determines that a tract of public land which is not within any known geological structure of a producing oil or gas field will be made available for oil and gas development, the Department is under a mandatory duty, imposed by statute, to lease the land to the qualified person first applying for it.

Where a noncompetitive oil and gas lease was erroneously issued to a junior applicant, the lease is subject to cancellation.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the head of the Department by Mrs. Bettie H. Reid from a decision of the Director of the Bureau of Land Management denying her petition for the reinstatement of her application for a noncompetitive oil and gas lease on the E½NE¼ sec. 18, T. 24 S., R. 29 E., New Mexico principal meridian, pursuant to section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1946 ed., sec. 226).

On August 19, 1947, Mrs. Reid filed with the district land office at Las Cruces, New Mexico, an application (Las Cruces 065970) for a noncompetitive oil and gas lease on several tracts of public land in T. 24 S., R. 29 E., New Mexico principal meridian, including the NE¼ sec. 18. In a decision dated January 26, 1951, the manager of the Land and Survey Office at Santa Fe, New Mexico,[1] rejected the application as to the NE¼ sec. 18, but approved the application respecting the other tracts desired by Mrs. Reid.

In explanation of the partial rejection of Mrs. Reid's application, the manager said that "The NE¼ sec. 18, T. 24 S., R. 29 E. has been withdrawn for reclamation purposes * * *." Actually, this statement was correct only with respect to the W½ of the NE¼ sec. 18. The E½ of that quarter-section had not been withdrawn, but, instead, was available for oil and gas leasing at the time of the submission of Mrs. Reid's application and at the time of the manager's decision.

On April 5, 1951, Miss Lucille H. Pipkin submitted to the Santa Fe Land and Survey Office an application (New Mexico 05236) for a

*Overruled. See p. 355. [Ed.]

[1] The district land office at Las Cruces had been discontinued in the meantime.

noncompetitive oil and gas lease on the E½NE¼ sec. 18. On May 14, 1951, the manager took administrative action purporting to accomplish the issuance, prospectively, of an oil and gas lease on this tract to Miss Pipkin effective as of June 1, 1951.

In the meantime, Mrs. Reid apparently learned of the error that had been made by the manager in rejecting her application as to the E½NE¼ sec. 18 and of the submission by Miss Pipkin of an application for an oil and gas lease covering this tract. On May 28, 1951, Mrs. Reid filed with the manager a petition for the reinstatement of her application respecting the E½NE¼ sec. 18.[2] The petition called attention to the fact that Mrs. Reid's application had been "denied by erroneous action," and that "the Land Office has the opportunity to correct the errors before any lease to Pipkin can become effective."

Notwithstanding the fact that attention was thus called to the error that had previously been made in rejecting Mrs. Reid's application respecting the E½NE¼ sec. 18, no corrective action was taken prior to June 1, 1951, in accordance with Mrs. Reid's petition.

Thereafter, on June 19, 1951, the Director of the Bureau of Land Management formally denied Mrs. Reid's petition for the reinstatement of her application as to the E½NE¼ sec. 18. This appeal to the head of the Department was then taken by Mrs. Reid.

In the issuance of noncompetitive oil and gas leases on public lands, the Department is bound by the provisions of section 17 of the Mineral Leasing Act. This section provides, in pertinent part, as follows:

> * * * When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease * * * shall be entitled to a lease of such lands * * *.

The provision of law quoted above is mandatory in nature. It cannot be waived or ignored by the Department. Although the Secretary of the Interior (or his delegate) has the discretionary authority to decide whether a particular tract of public land, which is not within any known geological structure of a producing oil or gas field, will be made available for oil and gas development, the Secretary (or his delegate) is obliged, if the tract is made available for oil and gas development, to lease it to "the person first making application for the lease who is qualified to hold a lease."

In the present case, Mrs. Reid was the qualified person first making application for an oil and gas lease on the E½NE¼ sec. 18. Therefore, under the controlling statutory provision, it was the mandatory duty of the Department to issue an oil and gas lease to Mrs.

[2] Although the petition requested the reinstatement of the application "regarding the NE¼ of sec. 18," it was only entitled to consideration insofar as it referred to the E½ of that quarter-section.

Reid for this tract in the event of a decision to make the tract available for oil and gas development. The failure to do so cannot be justified, in view of the plain language of the statutory provision governing the issuance of noncompetitive oil and gas leases.

It is true that Mrs. Reid delayed from February 7, 1951 (the date on which she received notice of the partial rejection of her application), until May 28, 1951, before she filed a formal petition seeking corrective action respecting the erroneous rejection of her application as to E½NE¼ sec. 18. In connection with this matter of delay, however, it is pertinent to note that the question whether the E½NE¼ sec. 18 had been withdrawn was a question of fact the answer to which was reflected in the official records maintained in the Land and Survey Office. There was no reason why Mrs. Reid, upon being informed by the manager of the office that this area was withdrawn and, hence, was unavailable for oil and gas leasing, should have questioned the accuracy of the manager's statement concerning the status of the land, since this was a factual matter within the peculiar competency of the manager as the official in charge of the records showing such status. Consequently, no lack of reasonable diligence is attributable to Mrs. Reid because of a failure to check the records promptly in order to determine whether the factual information furnished to her by the manager was accurate or erroneous.

In any event, when Mrs. Reid did learn of the error that had been made by the manager respecting the status of the E½NE¼ sec. 18 and submitted her formal request that action be taken to rectify the error, the effective date stated in the purported lease to the junior applicant, Miss Pipkin, had not been reached and, accordingly, the way was still open to rescind the action previously taken on Miss Pipkin's application and to carry out the mandatory requirement of the statute by leasing the E½NE¼ sec. 18 (if it was to be leased to anyone) to Mrs. Reid as the qualified person first applying for a lease on this tract. Instead of corrective action to carry out the statutory mandate being taken, however, the previous action in favor of the junior applicant, Miss Pipkin, was permitted to stand.

Under these circumstances, the outstanding lease which purported to come into existence as of June 1, 1951, and to confer on Miss Pipkin, the junior applicant, oil and gas rights respecting the E½NE¼ sec. 18 must be regarded as having been issued without authority of law and, indeed, in contravention of the plain statutory mandate. Such an oil and gas lease is subject to cancellation. See *Russell Hunter Reay* v. *Gertrude H. Lackie*, 60 I. D. 29 (1947).

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the

decision of the Director of the Bureau of Land Management is reversed, and the case is remanded to the Bureau of Land Management with instructions to cancel the lease issued to Miss Pipkin, and to offer a lease on the E½NE¼ sec. 18 to Mrs. Reid if this tract is still outside any known geological structure of a producing oil or gas field.

MASTIN G. WHITE,
Solicitor.

APPEAL OF THE GENERAL ELECTRIC COMPANY

CA–130 *Decided February 6, 1952*

Contract Appeal—Delay—Strike—Article 5 of U. S. Standard Form 32.

Article 5 of U. S. Standard Form No. 32 (supply contract) becomes operative if, and only if, the right of the contractor to proceed with performance under the contract is terminated by written notice on account of failure to deliver the supplies within the time specified in the contract, and the Government thereupon obtains the supplies elsewhere.

A strike which was in progress in the contractor's plant at the time when the contractor prepared its bid, and which was still in progress at the time when the contract was made, cannot be regarded as an "unforeseeable" cause of delay in performance under the contract, so as to make the delay excusable under article 5 of U. S. Standard Form No. 32.

ADMINISTRATIVE DECISION

This decision considers the appeal of the General Electric Company, Denver, Colorado, dated May 10, 1951,[1] from the findings of fact made by the contracting officer on April 18, 1951, under supply contract No. I2r–16428, entered into with the Bureau of Reclamation on March 9, 1946.

The contract was executed on the standard form for Government supply contracts (U. S. Standard Form No. 32, revised June 18, 1935). It called for the fabrication and delivery of oil circuit breakers and lightning arresters (together with the services of erecting engineers and mechanics, if required) for the Kennett Division of the Central Valley project in California. Article 1 of the contract made the attached specifications (No. 1144) part of the contract, and provided that "Deliveries shall be made as stated in schedules Nos. 1, 2 and 4 of the specifications No. 1144." Schedule No. 1 provided for the shipment of four circuit breakers, and schedule No. 2 called for the shipment of one circuit breaker, within 420 calendar days after

[1] In its letter of appeal dated May 10, 1951, the contractor stated that the findings of fact of the contracting officer were unsatisfactory, that "Appeal is hereby made to these Findings," and that additional information would be submitted as soon as possible. The additional information was submitted in a letter dated August 8, 1951.

the receipt of the notice of the award of the contract. Schedule No. 4 provided for the shipment of three lightning arresters within 270 calendar days after the receipt of the notice of the award of contract.

Notice of the award of the contract was received by the contractor on March 9, 1946, thus fixing the final dates for complete shipment under the contract as May 3, 1947, for the five circuit breakers under schedules Nos. 1 and 2, and as December 4, 1946, for the three lightning arresters under schedule No. 4. No delay occurred in making shipment of the circuit breaker covered by schedule No. 2. Shipment of the four circuit breakers under schedule No. 1 was substantially completed on July 16, 1947, or 74 calendar days after the final date fixed in the schedule. Shipment of the three lightning arresters under schedule No. 4 was completed on March 25, 1948, or 477 calendar days after the final date fixed in the schedule.

The provision of the contract covering the subject of delay in performance was article 5. It provided, in part, as follows:

> If the contractor refuses or fails to make deliveries of the materials or supplies within the time specified * * *, the Government may by written notice terminate the right of the contractor to proceed with deliveries or such part or parts thereof as to which there has been delay. In such event, the Government may purchase similar materials or supplies in the open market or secure the manufacture and delivery of the materials and supplies by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby: *Provided*, That the contractor shall not be charged with any excess cost occasioned the Government by the purchase of materials or supplies in the open market or under other contracts when the delay of the contractor in making deliveries is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including * * * strikes * * *, if the contractor shall notify the contracting officer in writing of the cause of any such delay, within 10 days from the beginning thereof * * *. The contracting officer shall then ascertain the facts and extent of delay, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal within 30 days by the contractor to the head of the department concerned or his duly authorized representative * * *.

The record indicates that the earliest written communication from the contractor on the subject of delay in performance was dated April 8, 1947, and stated, in part, that—

> As required by Article 5 * * *, you are hereby notified that we will be delayed in completing shipment * * * of three * * * lightning arresters, until May 6, 1947.

This was followed by a letter dated April 9, 1947, in which the contractor stated, in part, as follows:

> As required by Article 5 * * *, you are hereby notified that we will be delayed in completing shipment * * * of four * * * circuit breakers * * * until June, 1947.

Thereafter, under date of March 7, 1951, the contractor wrote a letter supplementing its previous communications, which purported to furnish notices of delay under article 5 of the contract. The letter of March 7, 1951, stated, in pertinent part, as follows:

> Our plants were on strike from January 15, 1946 until March 13, 1946. The duration of our strike, and the inability to obtain materials, could not be foreseen or evaluated during this period. As a direct result of this strike, shipment was delayed. This delay was not a result of factors within our control.
>
> We request that the formal contract completion dates be extended, the duration of our strike (from March 9, 1946, the date of the award, to March 13, 1946, the date our strike ended), plus 60 days, which was the minimum recovery time necessary to regain full and normal production, or a total of 64 days.
>
> * * * * * * *
>
> In view of the circumstances herein described and, in compliance with Article 5 of the contract, it is formally requested that a Findings-of-Fact be prepared, whereunder the contract delivery dates will be extended to July 6, 1947 on Schedule 1, and to February 6, 1947 on Schedule 4.

The contracting officer on April 18, 1951, found as follows respecting the contractor's request for an extension of time:

> It is found that the delays in deliveries by reason of a strike in the contractor's plant, of the equipment described under Schedule No. 1 and under Schedule No. 4, were not due to causes which were unforeseeable, beyond the control, and without the fault or negligence of the contractor. These delays, therefore, are not excusable under the provisions of article 5 of the contract. [Findings, paragraph 6 (b).]

The contractor thereupon took an appeal to the head of the Department within the 30-day period prescribed in article 5 of the contract.

In disposing of this appeal, it should be stated at the outset that both the contractor and the contracting officer have been laboring under a misapprehension in assuming that the facts of this case called for proceedings under article 5 of the contract. Article 5 would have been operative if, and only if, the right of the contractor to proceed with performance under the contract had been terminated by written notice on account of the failure to deliver the four circuit breakers under schedule No. 1 and the three lightning arresters under schedule No. 4 within the prescribed periods, and the Government had thereupon obtained the equipment elsewhere. In such a situation, the contractor would have been liable to the Government for any excess cost incurred by the Government in procuring the equipment from another source, unless it were found, after appropriate proceedings, that the contractor's failure to make timely deliveries had been "due to unforeseeable causes beyond the control and without the fault or negligence of the contractor." In the present case, however, the right of the contractor to proceed with performance under the contract was not terminated by the Government because of the delay in delivering the four circuit breakers under schedule No. 1 and the three lightning arresters under schedule No. 4. In-

stead, the contractor was permitted to proceed with performance under the contract, despite the delay in making deliveries, and these items of equipment furnished by the contractor were accepted and utilized by the Government. Hence, there was no occasion, under the facts of this case, for proceedings under article 5 of the contract.

Moreover, if the present case were an appropriate one for proceedings under article 5 of the contract, the question for decision on the appeal would not be (as has apparently been assumed by the contractor) whether the contractor was entitled to an extension of time for performance, but, rather, whether the contractor should be excused from compensating the Government for the excess cost incurred by the latter in procuring the equipment from another source after the contractor had failed to deliver the equipment within the time specified in the contract.

Finally, it should be noted that if the present case called for proceedings under article 5 of the contract, the reason stated by the contractor for relief under that article could not be upheld. The contractor asserts that the failure to deliver the four circuit breakers under schedule No. 1 and the three lightning arresters under schedule No. 4 on time was excusable because of the strike in its plant from January 15 to March 13, 1946, and the resulting difficulty experienced by the contractor in resuming operations after the end of the strike. In this connection, article 5 of the contract makes excusable only delays due to "unforeseeable causes." This refers, of course, to causes which the contractor could not reasonably have foreseen at the time when the contract was made. In the present case, the strike in the contractor's plant was actually in progress at the time (January 24, 1946) when the contractor prepared its bid, and the strike was still in progress on the date (March 9, 1946) when the contract was made. Under these circumstances, the strike and its attendant complications could not be regarded as coming within the category of "unforeseeable causes" of delay, within the meaning of the quoted term as used in article 5 of the contract. Thus, no error would have been committed by the contracting officer in denying relief to the contractor under article 5 of the contract, if this case were an appropriate one for considering the merits of the contractor's contentions.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 24, Order No. 2509; 14 F. R. 307), the appeal of the General Electric Company from the findings of fact by the contracting officer dated April 18, 1951, under contract No. I2r–16428 is dismissed.

MASTIN G. WHITE,
Solicitor.

CONTRACTS FOR THE EMPLOYMENT OF MANAGERS OF INDIAN TRIBAL ENTERPRISES

Organized Tribes—Chartered Tribes—Indian Reorganization Act—Revised Statutes, Section 2103.

In granting a charter to an Indian tribe under section 17 of the Indian Reorganization Act, the Secretary of the Interior may grant to the tribe the freedom to make contracts without complying with the requirements prescribed in section 2103 of the Revised Statutes.

Where the Secretary of the Interior, in granting a charter to an Indian tribe, gave the tribe broad authority to make and perform contracts and agreements subject only to the limitations that tribal lands could not be sold or mortgaged or leased for a period exceeding 10 years and that any contract involving the payment of money in excess of $5,000 in any fiscal year should be subject to the approval of the Secretary, it was clearly the intent of the Secretary to authorize the tribe to make contracts without regard to the requirements prescribed in section 2103 of the Revised Statutes.

The inclusion by the Secretary in a tribal charter of a qualifying phrase, stating that the powers of the tribe under the charter shall be exercised "subject to any restrictions contained in the * * * laws of the United States," does not impose upon the tribe the necessity of complying with all the preexisting statutory restrictions relating generally to the activities of Indian tribes, but, instead, refers only to those statutory restrictions from which the Secretary cannot legally free the tribe.

The adoption by an Indian tribe of a constitution under section 16 of the Indian Reorganization Act does not relieve the tribe of the necessity of complying with section 2103 of the Revised Statutes in making a contract with a person to manage a tribal farming enterprise.

M–36119 FEBRUARY 14, 1952.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

You have requested that I express an opinion regarding the applicability of section 2103 of the Revised Statutes (25 U. S. C., 1946 ed., sec. 81) to an executed contract and a proposed contract, each of which is between an Indian tribe and a manager of a tribal enterprise conducted by the tribe.

Section 2103 of the Revised Statutes applies to, *inter alia*, contracts for services to be rendered to Indian tribes "relative to their lands." The section prescribes several requirements which are essential to the validity of such a contract. Among these is the requirement that such a contract "shall be executed before a judge of a court of record."

(a) *Contract for the management of the Grand Portage Trading Post and Resort Enterprise.*—The executed contract involved in your submission is dated July 27, 1951, and is between the Grand Portage Band of Chippewa Indians and Peter Gagnow, of Grand Portage, Minnesota. Under the terms of the contract, Mr. Gagnow will operate

a tribal enterprise known as the Grand Portage Trading Post and Resort Enterprise, which is located on and makes use of tribal land.

The Grand Portage Band is one of the constituent bands of the Minnesota Chippewa Tribe, which has adopted a constitution and has received a charter under sections 16 and 17, respectively, of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 987, 988; 25 U. S. C., 1946 ed., secs. 476, 477). The Grand Portage Band operates under a subordinate charter from the Minnesota Chippewa Tribe, and this charter confers on the band authority to manage enterprises and to administer tribal land.

Section 17 of the Indian Reorganization Act, in authorizing the Secretary of the Interior to issue a charter of incorporation to any Indian tribe which has adopted a constitution pursuant to the act, provides, in part, as follows:

> * * * Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal * * * and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. * * *

It seems to be clear from this language that section 17 permits the Secretary to grant to incorporated tribes far-reaching powers with respect to the conduct of business activities, including the making and performance of tribal contracts, and that the Secretary is subject, in this regard, only to the limitations expressly stated in the section. These express statutory limitations are to the effect that the Secretary cannot (1) authorize an incorporated tribe to sell or mortgage reservation lands or to lease them for periods in excess of 10 years, or (2) grant to the tribe incidental corporate powers which are inconsistent with law (i. e., powers which cannot lawfully be given to any corporation, non-Indian or Indian). Such statutory limitations on the Secretary's authority certainly are not broad enough to prevent the Secretary from granting to an incorporated tribe the power to make contracts without complying with the requirements of section 2103 of the Revised Statutes. In this connection, such a grant of power would not be "inconsistent with law," because it is a purpose of incorporation to provide the means for the conduct of business activities in a business-like way, and freeing a corporation from the necessity, *inter alia*, of executing all its contracts before a judge of a court of record would serve that purpose.

It is my view, therefore, that section 17 of the Indian Reorganization Act has superseded section 2103 of the Revised Statutes to the

extent of authorizing the Secretary to grant, in charters of incorporation, the power to make contracts without regard to the limitations prescribed in section 2103.

In granting charters under section 17 of the Indian Reorganization Act, the Secretary of the Interior has invariably conferred wide powers with respect to the making of contracts. Thus, section 5 of the charter of the Minnesota Chippewa Tribe, which is typical, confers upon the tribe the power to "make and perform contracts and agreements of every description, not inconsistent with law or with any provisions of this charter * * *," subject only to the limitation (prescribed by the statute) that tribal lands cannot be sold or mortgaged or leased for periods in excess of 10 years, and the further limitation (imposed by the Secretary in the exercise of his discretion) that "any contract involving payment of money by the corporation in excess of $5,000 in any one fiscal year shall be subject to the approval of the Secretary of the Interior or his duly authorized representative." It was clearly the purpose of the broad language used in this charter respecting the contracting power to grant to the tribe freedom to make contracts without complying with the requirements prescribed in section 2103 of the Revised Statutes.

It is true that the Department inserted in the charter to the Minnesota Chippewa Tribe (and in other charters as well) an introductory qualifying phrase stating that the powers conferred in the charter shall be exercised "subject to any restrictions contained in the * * * laws of the United States." However, this phrase (which, incidentally, is confusing and ambiguous) could not have been intended to render meaningless the broad grant of power conferred in the charter, by making the incorporated tribe subject to all the preexisting statutes imposing restrictions, procedural and substantive, on the conduct of tribal business. Such a construction of the quoted phrase would make a mockery of the liberal process of incorporation established by the Department.

In order that the general qualifying phrase, "subject to any restrictions contained in the * * * laws of the United States," in the charter to the Minnesota Chippewa Tribe may not render meaningless the freedom of operation expressly granted to the tribe in the other provisions of the charter, I believe that the general phrase should be construed as referring only to those statutory restrictions from which the Secretary of the Interior could not legally free the tribe in granting the charter to it, such as, for example, the restrictions imposed by the antitrust laws. As previously indicated, section 2103 of the Revised Statutes is not in that category.

For the reasons stated above, it is my opinion that section 2103 of

the Revised Statutes is not applicable to the contract dated July 27, 1951, between the Grand Portage Band of the Minnesota Chippewa Tribe and Peter Gagnow, relative to the management by the latter of the Grand Portage Trading Post and Resort Enterprise.

(b) *Proposed contract for the management of the Salt River Farming Enterprise.*—The proposed contract involved in your submission is to be made between the Salt River Pima-Maricopa Indian Community and a farm manager. Under the contract, the farm manager is to operate a tribal farming enterprise, which will include the cultivation of tribal lands, the development of livestock industries to utilize the crops raised by the enterprise, and the marketing of surplus crops.

The Salt River Pima-Maricopa Indian Community has adopted a constitution pursuant to section 16 of the Indian Reorganization Act (25 U. S. C., 1946 ed., sec. 476). It has not, however, received a charter of incorporation under section 17 of that act.

The adoption by the Salt River Pima-Maricopa Indian Community of a constitution under section 16 of the Indian Reorganization Act does not exempt it from the necessity of complying with the requirements of section 2103 of the Revised Statutes in connection with the making of a contract, such as the proposed contract under consideration here. A tribe adopting a constitution under the Indian Reorganization Act may obtain only the powers mentioned in section 16, which include the authority to employ legal counsel, to prevent the alienation of tribal lands or other assets, and to negotiate with Federal, State, and local governments, plus such other powers as were "vested in any Indian tribe or tribal council by existing law." We do not find here any grant of power to make contracts without regard to the requirements of section 2103 of the Revised Statutes, except that section 16 indicates that contracts for the employment of attorneys may be made subject only to the approval of the Secretary of the Interior respecting the choice of counsel and the fixing of the fees. (See Solicitor's opinion, M–36069 (June 22, 1951), 60 I. D. 484.)

It appears that the employment of a manager for the tribal farming enterprise is required by the terms of a plan of operation to which the tribe agreed in obtaining a loan from the Revolving Credit Fund for the purpose of conducting the tribal enterprise. This fund was established by section 10 of the Indian Reorganization Act (48 Stat. 986; 25 U. S. C., 1946 ed., sec. 470), which provides, in part, as follows:

> There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corpora-

tions for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. * * *

The Revolving Credit Fund was made available for loans to all Indian tribes and their members by the act of May 7, 1948 (62 Stat. 211; 25 U. S. C., 1946 ed., Supp. IV, sec. 482).

Under this legislation governing the making of loans to Indian tribes, the Secretary of the Interior has been given a broad rule-making power. It may be argued that this power is broad enough to encompass all the measures necessary to protect the interests of the United States in making loans to Indian tribes, and that any means or instruments adopted by the Department towards that end are subject to no other requirements than those which may be imposed in the exercise of the rule-making authority of the Secretary. Under such a theory, contracts required of a borrower for the protection of the Government (e. g., the proposed contract under consideration here) would be subject only to the requirements prescribed by the Secretary in the exercise of his rule-making power, and their validity would not depend upon compliance with the provisions of section 2103 of the Revised Statutes, which antedated the credit legislation by many years.

Courts have recognized that section 2103 of the Revised Statutes may be repealed by implication when a later enactment is based upon a premise inconsistent with its terms, or it may reasonably be inferred from the purpose and history of the later enactment that such was the intent of Congress. See *United States* v. *Crawford*, 47 Fed. 561 (C. C. W. D. Ark., 1891), and *Butler and Vale* v. *United States*, 43 Ct. Cl. 497 (1908). In dealing with organized Indian tribes, such a premise may, perhaps, be found in the philosophy of the Indian Reorganization Act, which was intended to make a new point of departure in the relations between the tribes and the Government.

Repeals by implication are not favored, however, and it would be unsafe to rely upon such an implied repeal of section 2103 of the Revised Statutes in the present instance, particularly since any person receiving money in violation of that section is subject to a fine of not more than $1,000 or to imprisonment for not more than 6 months, or both, and may be compelled to forfeit the money so received. (See 18 U. S. C., sec. 438.)

I believe, therefore, that the proposed contract between the Salt River Pima-Maricopa Indian Community and the manager of the tribal farming enterprise should be executed in accordance with the requirements of section 2103 of the Revised Statutes.

MASTIN G. WHITE,
Solicitor.

ESTATE OF KNEALE BLACKBIRD

IA-62 *Decided February 19, 1952*

Indian Estates—Claims—Notice and Hearing—Petition for Rehearing—Waiver of Time Limit.

An Examiner of Inheritance can consider and allow a claim against a restricted Indian's estate only upon notice to the interested parties and affording them an opportunity for a hearing.

Where an Examiner of Inheritance, after determining the heirs of a deceased Indian and entering an order for the distribution of the estate among the heirs, subsequently modified his previous order to the prejudice of the heirs by allowing a newly submitted claim against the estate, without having given them any prior notice, and the heirs thereafter permitted the 60-day period for the filing of a petition for rehearing to expire without having taken such action, it may be appropriate to waive the 60-day limitation on the time for the filing of a petition for rehearing.

APPEAL FROM EXAMINER OF INHERITANCE, BUREAU OF INDIAN AFFAIRS

Susan Baxter Blackbird has appealed to the head of the Department from a decision of an Examiner of Inheritance denying her "Petition to Reopen Proceedings" in the matter of the estate of Kneale Blackbird, a deceased unallotted Omaha Indian of Nebraska.

It appears that the decedent died intestate, and that his heirs were determined by the examiner on February 26, 1951, to be the appellant and the two minor children of the decedent and the appellant. The examiner held that the heirs were entitled to participate equally in the estate. On April 6, 1951, the examiner, without having given any notice to the heirs regarding the receipt of a new claim against the decedent's estate, modified his order of February 26, 1951, and allowed a claim of the Farmers' Home Administration, Department of Agriculture, against the estate in the sum of $1,987.15. A copy of the modifying order dated April 6, 1951, apparently was mailed to the appellant. The exact date of such mailing is not revealed by the record, but it presumably was on, or within a few days after, April 6, 1951. Thereafter, the appellant filed on August 9, 1951, her "Petition to Reopen Proceedings," asking that a hearing be held on the matter of the allowance of the claim for $1,987.15. The petition was denied by the examiner on August 10, 1951, because it had not been filed within the 60-day period prescribed in 25 CFR 81.17 for the filing of a petition for rehearing. The present appeal followed.

The regulations of the Department relating to Indian probate proceedings make provision for two possible methods whereby persons aggrieved by the decision of an Examiner of Inheritance in such a case may seek to obtain reconsideration of the decision: (1) The filing of

a petition for rehearing under 25 CFR 81.17, and (2), the filing of a petition for the reopening of the case under 25 CFR 81.18.

A petition for rehearing may be filed by "Any person who feels aggrieved by the decision of the examiner." The time fixed for the filing of such a petition is stated by the pertinent regulation to be "within 60 days from the date of notice to the parties of the decision." The appellant in the present case was clearly eligible to file a petition for rehearing with respect to the examiner's modifying order of April 6, 1951 (which was, of course, a "decision" within the meaning of this term as used in the regulation), but the record indicates that she failed to act within the period of time prescribed by the regulation. When the phrase "within 60 days from the date of notice to the parties of the decision" in 25 CFR 81.17 is considered in connection with the statement in 25 CFR 81.16 to the effect that "Distribution of an estate may be made by the superintendent after 60 days have elapsed from the date upon which notice of the decision is mailed to the interested parties unless, within that period, a petition for rehearing is filed * * *," it appears that the 60-day period prescribed in section 81.17 begins to run on the date when notice of the decision is mailed to the interested parties. Although the record in this case does not show precisely upon what date a copy of the examiner's modifying order of April 6, 1951, was mailed to the appellant, the inference seems to be reasonable that it was mailed on, or within a few days after, April 6, 1951. Inasmuch as the appellant's petition was not filed until August 9, 1951, it was proper for the examiner to find that the petition was filed subsequent to the expiration of the 60-day period prescribed in section 81.17.

A petition for reopening under section 81.18 may be filed by "any person claiming an interest in the estate who had no actual notice of the original proceedings and who was not on the reservation or otherwise in the vicinity at any time while the public notices of the hearing were posted." The time for the filing of such a petition is fixed by the regulation as "Within a period of 3 years from the date of a decision by an examiner of inheritance." Although the appellant's petition in the present case was filed within the 3-year period prescribed in section 81.18 for the filing of a petition for reopening, it appears that the appellant was not within the category of persons eligible to file such a petition. The appellant not only had actual notice of the original proceedings, but she appeared at the hearing and participated in it by testifying as a witness.

It must be concluded that the examiner was technically correct in denying the appellant's petition. It was not filed within the time limit prescribed by 25 CFR 81.17 respecting a petition for rehearing,

and it was not filed by a person eligible to petition for reopening under section 81.18.

It is readily apparent, however, that the examiner committed a serious error when he modified his order of February 26, 1951, to the prejudice of the heirs by allowing the claim of the Department of Agriculture, without having given the heirs any notice of the receipt of the claim and of his intention to act upon it. The authority of the Department to consider and allow claims against the estates of deceased Indians is incidental to and derived from the authority to determine the heirs of such Indians, which is conferred upon the Department by section 1 of the act of June 25, 1910, as amended (25 U. S. C., 1946 ed., sec. 372). As the authority to determine the heirs of deceased Indians may be exercised only "upon notice and hearing," it follows that the requirement of notice and hearing must also be observed in the allowance of claims against the estate of a deceased Indian.

The Department of Agriculture has indicated that it would not have any objection if this case were remanded to the examiner for a hearing on the merits of its claim against the estate of the decedent. In view of this commendable attitude on the part of the claimant, I believe that the ends of justice would be served by waiving in this case the 60-day limitation prescribed in 25 CFR 81.17 and by remanding the case to the examiner for a hearing on the claim submitted by the Department of Agriculture.

In connection with this matter, the Omaha Tribe of Indians has requested that, if a further hearing should be held in the present case, it be permitted to appear as an *amicus curiae* at such hearing and in all subsequent proceedings. As the ultimate decision on the claim of the Department of Agriculture may constitute a precedent affecting the interests of many members of the Omaha Tribe, it seems appropriate to permit the tribe to participate hereafter in the case as an *amicus curiae* if it so desires.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 25, Order No. 2509; 14 F. R. 307), the examiner's order of April 6, 1951, allowing the claim of the Department of Agriculture, and the order of August 10, 1951, denying the appellant's petition, are set aside, and the case is remanded to the examiner for a hearing on the merits of the claim submitted by the Department of Agriculture and for such further action as appears to be appropriate in the light of the evidence adduced at such hearing.

MASTIN G. WHITE,
Solicitor.

JOHN L. McMILLAN

A-26365 *Decided February 25, 1952*

Oil and Gas Lease—Member of Congress as Lessee.

An oil and gas lease is a "contract or agreement" within the meaning of those terms as used in 18 U. S. C. sec. 431.

An oil and gas lease issued to a Member of Congress under the Mineral Leasing Act is void by virtue of 18 U. S. C. sec. 431.

An oil and gas lease issued to a Member of Congress under the Mineral Leasing Act is not within the scope of the statutory exemption from the provisions of 18 U. S. C. sec. 431, granted by Congress with respect to "the purchase or sale of * * * property" under certain circumstances.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

John L. McMillan has appealed to the head of the Department from a decision dated November 8, 1951, by the Assistant Director of the Bureau of Land Management, which affirmed the action of the manager of the Land and Survey Office at Salt Lake City, Utah, in canceling a noncompetitive oil and gas lease (Utah 01283) previously issued to him.

The record indicates that on April 18, 1950, the Land and Survey Office at Salt Lake City received from Mr. McMillan an application for a noncompetitive oil and gas lease under section 17 of the Mineral Leasing Act (30 U. S. C., 1946 ed., sec. 226) on a total of 1,480 acres of public land described as the E½W½ sec. 23 and the NE¼SW¼ sec. 25, T. 9 S., R. 17 E., and sec. 13, the N½ sec. 14, and the N½ sec. 15, T. 10 S., R. 17 E., S. L. M., Utah. The rental for the first lease year, in the amount of $740, and the prescribed filing fee of $10 were tendered with the application. On April 10, 1951, favorable action was taken by the manager of the Land and Survey Office on Mr. McMillan's application, and lease forms were mailed to the applicant for execution. These forms were duly executed by the applicant and returned to the Land and Survey Office, and on June 1, 1951, a 5-year noncompetitive oil and gas lease (Utah 01283) was issued by the manager to Mr. McMillan on the land for which he had applied. In issuing the lease, the manager was acting pursuant to Secretarial authority which had been delegated to the Director of the Bureau of Land Management in 43 CFR, 1946 Supp., 4.275(a)(17), and which the Director had, in turn, subdelegated to the manager of the local office at Salt Lake City in BLM Order No. 325 (August 6, 1948, 13 F. R. 4710), as amended by BLM Order No. 330 (August 16, 1948, 13 F. R. 5023).[1]

[1] The local office was designated as a district land office at the time of the subdelegation, but its title was changed to Land and Survey Office prior to the occurrences involved in this appeal. Although the Director's authority under 43 CFR, 1946 Supp., 4.275(a)(17) had been superseded prior to June 1, 1951, by a new delegation of authority made to the

On July 20, 1951, the Land and Survey Office received from Francis L. Neely a protest against the issuance of the oil and gas lease to Mr. McMillan. The protest asserted that Mr. McMillan was disqualified from taking and holding an oil and gas lease from the Government because he was a Member of Congress, and it asked that the McMillan lease be revoked and that an oil and gas lease covering the same lands be issued to Mr. Neely under an application which he had filed on February 15, 1951.

The manager of the Land and Survey Office rendered a decision on August 9, 1951, canceling the lease previously issued to Mr. McMillan. The cancellation of the lease was based upon the ground that the lessee was, at the time when the lease was issued, and still is, a Member of the Congress of the United States, representing the Sixth Congressional District of South Carolina. The lessee thereupon took an appeal to the Director of the Bureau of Land Management, and on November 8, 1951, the Assistant Director affirmed the manager's decision. Mr. McMillan then appealed to the head of the Department.

This case is squarely covered by section 431 of Title 18, United States Code. This section provides, among other things, that if any Member of Congress "executes, holds, or enjoys, in whole or in part, any contract or agreement, made or entered into in behalf of the United States or any agency thereof, by any officer or person authorized to make contracts on its behalf," such contract or agreement "shall be void."

An oil and gas lease issued on behalf of the United States to a Member of Congress under section 17 of the Mineral Leasing Act is obviously a "contract or agreement," because it establishes, by the mutual assent of the parties, their respective rights and duties in relation to the development of the oil and gas deposits within the area covered by the lease; and, accordingly, it is clearly within the scope of the broad prohibitory language used by Congress in section 431 of Title 18, United States Code. The all-inclusive nature of that language was pointed out by Circuit Judge (later Supreme Court Justice) Van Devanter in the case of *United States* v. *Dietrich*, 126 Fed. 671 (C. C. D. Nebr., 1904), which involved a land lease entered into between the Government and a Member of Congress. At that time, the provisions that are now contained in section 431 of Title 18, United States Code, were incorporated (with minor variations in language) in section 3739 of the Revised Statutes, and Judge Van Devanter had the following to say (p. 673) with regard to the scope of the section:

Director by the Secretary of the Interior in section 2.31 of Secretary's Order No. 2583 (Aug. 16, 1950, 15 F. R. 5643), that order contained in section 4.2 a saving clause to preserve the effectiveness of subdelegations of authority theretofore made by the Director.

We think it is entirely clear that the purpose and effect of this legislation is to absolutely inhibit all contractual relations with the United States upon the part of any member of or delegate to Congress * * * save in the instances specifically excepted * * *. The comprehensive character of the inhibition is more apparent when it is considered that it is not confined to contracts or agreements obtained or held through the exercise of the influence incident to membership of or delegateship to Congress, or to those which are not fair to the United States, or to those which give an undue advantage to a member of or delegate to Congress. It plainly includes "any contract or agreement," no matter how fairly obtained or held, how reasonable in its terms, or how advantageous to the United States. * * *

In section 433 of Title 18, United States Code, the Congress has granted certain specific exemptions from the prohibition contained in section 431. It is stated in section 433 that section 431 shall not extend to—

* * * any contract or agreement made or entered into, or accepted by any incorporated company for the general benefit of such corporation; nor to the purchase or sale of bills of exchange or other property where the same are ready for delivery and payment therefor is made at the time of making or entering into the contract or agreement. Nor * * * to advances, loans, discounts, purchase or repurchase agreements, extensions, or renewals thereof, or acceptances, releases or substitutions of security therefor or other contracts or agreements made or entered into under the Reconstruction Finance Corporation Act, the Agricultural Adjustment Act, the Federal Farm Loan Act, the Emergency Farm Mortgage Act of 1933, the Federal Farm Mortgage Corporation Act, the Farm Credit Act of 1933, or the Home Owners Loan Act of 1933, the Farmers' Home Administration Act of 1946, the Bankhead-Jones Farm Tenant Act, or to crop insurance agreements or contracts or agreements of a kind which the Secretary of Agriculture may enter into with farmers.

With the possible exception of the phrase referring to "the purchase or sale of bills of exchange or other property where the same are ready for delivery and payment therefor is made at the time of making or entering into the contract or agreement," it is obvious at a glance that none of these exemptions is applicable to the present case. Even as to the quoted phrase, it is readily apparent upon consideration that this exemption does not cover the oil and gas lease that was issued to Mr. McMillan.

In the first place, an oil and gas lease under section 17 of the Mineral Leasing Act conveys an interest in land, and it has been held that land does not come within the scope of the term "other property," as used in the statutory exemption. The Comptroller General considered this provision of law in 20 Comp. Gen. 46 (1940), and, after referring to the doctrine of *ejusdem generis*, made the following statement (p. 52):

* * * In the legislation here under consideration there would have been no occasion to use the specific term "bills of exchange" if the following general

phrase "or other property" was intended to comprehend all property, because the word "property" would have included bills of exchange without specific prior mention. Considering the purpose and policy of the statute and applying the stated principles of statutory interpretation, the conclusion is required that the phrase "bills of exchange or other property" means bills of exchange or other property of similar character—that is, having a fixed or readily ascertainable value and which ordinarily passes from hand to hand at time of payment—and, therefore, that the exception does not extend to the purchase or sale of land or interests therein. * * *

In the second place, it will be noted that the exemption under consideration here is applicable only to the purchase or sale of property where "payment therefor is made at the time of making or entering into the contract or agreement." Hence, even if it were assumed, for the purpose of discussion, that an oil and gas lease under section 17 of the Mineral Leasing Act might be regarded as coming within the category of a "purchase or sale of * * * other property," Mr. McMillan's case would not be within the scope of the exemption, because he did not, in obtaining the lease, make "payment therefor * * * at the time of making or entering into" the lease. The McMillan lease expressly obligates the lessee to pay rentals in the fourth and fifth lease years, and also in each succeeding year if there should be an extension of the lease. Moreover, future royalties on any production of oil or gas under the lease would become due and payable throughout the life of the lease. Apart from other considerations, therefore, these future financial obligations assumed by the lessee would necessarily take the present case outside the scope of the exemption relating to the purchase or sale of property.

In addition, the exemption to which consideration is being given refers to the purchase or sale of property which is "ready for delivery." This language is clearly aimed at executed transactions. The McMillan oil and gas lease, extending over a primary term of 5 years and requiring the continuous performance of obligations throughout its existence, is executory in nature. This is another reason why the McMillan oil and gas lease is outside the scope of the exemption relating to the purchase or sale of property. See 26 Op. Atty. Gen. 537, 540 (1908).

For the reasons indicated above, the oil and gas lease that was issued to Mr. McMillan is void under the plain language of section 431 of Title 18, United States Code.

Furthermore, the lease shows on its face that it cannot be held by a Member of Congress. Section 9 of the lease declares that—

It is also further agreed that no Member of, or Delegate to, Congress, or Resident Commissioner, after his election or appointment * * * and during

his continuance in office, * * * shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom * * *.[2]

The holding of the lease by Mr. McMillan, a Member of Congress, is clearly a breach of this express provision of the lease. Consequently, even in the absence of section 431 of Title 18, United States Code, this lease would be subject to cancellation under the second paragraph of section 31 of the Mineral Leasing Act, as amended (30 U. S. C., 1946 ed., sec. 188), which declares that—

> Any lease issued after August 21, 1935 * * * shall be subject to cancellation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. * * *

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decisions below are modified to hold that oil and gas lease (Utah 01283) issued to John L. McMillan is void under section 431 of Title 18, United States Code, as well as subject to cancellation under the second paragraph of section 31 of the Mineral Leasing Act, and, as so modified, they are affirmed.

MASTIN G. WHITE,
Solicitor.

TOLAN-DOWSE CONTROVERSY OVER SALE OF ISOLATED TRACTS (MONTANA 0718)

Preference-Right Claimants—Timely Action—Failure to Appeal—Supervisory Power of Secretary.

In connection with the assertion of a preference right to purchase an isolated tract of land offered for sale by the Government at public auction, it is the date on which the appropriate office of the Department receives the document asserting such preference right, with accompanying remittance, that determines whether timely action has been taken.

In a case where the 30-day period for the assertion of preference rights to purchase an isolated tract was scheduled to expire on October 22, 1950, and on October 19, 1950, an owner of contiguous land prepared and mailed to the appropriate land office a communication, with accompanying remittance, asserting a preference-right claim to purchase the tract, but such communication was not received by the land office until October 23, 1950, it came too late to merit preferential consideration in connection with the disposition of the tract.

A person who is dissatisfied with an award made by personnel of the Bureau of Land Management in connection with the sale of an isolated tract, but who

[2] Apart from the provisions of 18 U. S. C. sec. 431, the inclusion of this provision in the lease was required by section 3741 of the Revised Statutes, as amended (41 U. S. C., 1946 ed., sec. 22).

fails to take an appeal from such action within the time allowed for that purpose by the departmental regulations, is not thereafter in a position to object, as a matter of right, to the award.

So long as public lands are subject to the jurisdiction of the Secretary of the Interior, he may, on his own initiative, review and correct erroneous actions previously taken within the Department respecting such lands.

M-36125 MARCH 31, 1952.

TO THE SECRETARY.

At the request of Senator Zales N. Ecton, of Montana, this office has reviewed the circumstances relating to the proposed sale of certain isolated tracts situated in Montana.

The lands were offered for sale under the authority contained in section 2455 of the Revised Statutes, as amended (43 U. S. C., 1946 ed., Supp. IV, sec. 1171), which provides in pertinent part as follows:

> * * * it shall be lawful for the Secretary of the Interior to order into market and sell at public auction * * * any isolated or disconnected tract or parcel of the public domain not exceeding one thousand five hundred and twenty acres * * *: *Provided*, That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants * * *.

It will be noted that section 2455 allows the owners of contiguous lands a minimum period of 30 days after the receipt of the highest bid within which to assert their preference rights to purchase an isolated tract, but it does not fix the maximum period for the assertion of preference rights; and that the section does not indicate what shall be done in a case where two or more owners of contiguous lands assert conflicting preference rights to purchase an isolated tract that consists of a single subdivision (i. e., a quarter-quarter section or a fractional lot). In order to implement the statutory law with respect to these points, the Secretary of the Interior has provided in a regulation (43 CFR 250.11(b)) that the minimum statutory period of 30 days after the receipt of the highest bid shall also be the maximum period within which the owners of contiguous lands may assert their preference rights by meeting the highest bid; and that where only one subdivision is offered for sale and it is sought by two or more preference-right claimants, the tract will generally be awarded to the person pursuant to whose application the land is being sold, if he is a qualified preference-right claimant.

On March 31, 1950, George E. Dowse submitted to the Montana land office of the Bureau of Land Management an application (Mon-

tana 0718), requesting that two isolated tracts of land, the SW¼SW¼ sec. 4 and the NE¼SE¼ sec. 9, T. 25 N., R. 50 E., Montana principal meridian, be ordered into market and sold at public auction under section 2455 of the Revised Statutes. Mr. Dowse stated in his application that he was the owner of certain specified tracts of land adjoining the isolated tracts covered by the application.

The sale of the two isolated tracts was ordered pursuant to Mr. Dowse's application, and three bids were received. They were opened on September 22, 1950. Mr. Dowse bid $2.25 per acre (the appraised value) for each of the two tracts. Mrs. Nels Tolan bid $5 per acre for the NE¼SE¼ sec. 9, and her son, Jack Tolan, who apparently was acting in behalf of Mrs. Tolan, bid $5 per acre for the SW¼SW¼ sec. 4. The manager of the Montana land office declared the Tolans to be the high bidders for the respective tracts, but he suspended action on the bids for a period of 30 days "to allow preference-right claimants to assert their rights to purchase the land."

On October 6, 1950, Mrs. Tolan asserted a preference right as the owner of contiguous land to purchase the NE¼SE¼ sec. 9. On October 23, 1950, Mr. Dowse, as the owner of land adjoining each of the isolated tracts, matched the high bids submitted for the respective tracts by Mrs. Tolan and Jack Tolan, and claimed a preference right to purchase both of the isolated tracts.

Thereafter, on January 19, 1951, the Regional Administrator of Region III of the Bureau of Land Management made a determination, awarding both of the isolated tracts to Mr. Dowse. The SW¼SW¼ sec. 4 was awarded to him as the only owner of contiguous land to assert a preference-right claim respecting this tract. In recognizing Mr. Dowse's preference-right claim to purchase the NE¼SE¼ sec. 9 as against the similar claim of Mrs. Tolan, the Regional Administrator based his determination upon the fact that Mr. Dowse was the person pursuant to whose application the sale of the tract had been ordered. The Regional Administrator's determination awarding both tracts to Mr. Dowse informed the parties that "30 days' right of appeal, to the Director of the Bureau of Land Management, is allowed."

The Regional Administrator's action in awarding the SW¼SW¼ sec. 4 to Mr. Dowse apparently was accepted without objection by the Tolans. However, within the period allowed for the taking of an appeal, Mrs. Tolan appealed to the Director of the Bureau of Land Management from the Regional Administrator's determination insofar as it awarded the NE¼SE¼ sec. 9 to Mr. Dowse. The appeal asserted that it was inequitable to award both tracts to Mr. Dowse; that Mrs. Tolan had been the lessee of the NE¼SE¼ sec. 9 for several years and, at that time, held the tract under a lease whose 10-year

term would not expire until May 1959; that she had a greater need than Mr. Dowse for the NE¼SE¼ sec. 9; and that, under the law, the NE¼SE¼ sec. 9 should have been awarded to Mrs. Tolan, and the SW¼SW¼ sec. 4 should have been awarded to Mr. Dowse.

On October 15, 1951, the Assistant Director of the Bureau of Land Management rendered a decision affirming the action of the Regional Administrator in awarding the NE¼SE¼ sec. 9 to Mr. Dowse. This decision stated that it was issued "subject to the right of appeal to the Secretary of the Interior within 30 days from receipt of notice hereof."

There is no record of any appeal ever having been taken by Mrs. Tolan to the head of the Department from the Assistant Director's decision. However, Mrs. Tolan apparently addressed several communications to Senator Ecton, indicating her dissatisfaction with the handling of this matter by the Department.

It appears that the awarding of each of these isolated tracts to Mr. Dowse was incorrect under the controlling departmental regulation.

The bids in this case were opened on September 22, 1950, and the high bidders for the respective tracts were declared by the manager in a decision issued on the same day. Consequently, the 30-day period allowed for the owners of contiguous lands to assert preference-right claims and to match the high bids commenced to run on the following day and expired at the close of October 22, 1950. The record shows that Mr. Dowse's letter asserting his preference-right claim to the tracts and matching the high bids was dated October 19, 1950, but that it was not received in the land office until approximately 1:45 p. m. on October 23, 1950. It is the date of the receipt of Mr. Dowse's communication and remittance matching the high bids, and not the date on which these documents were prepared or mailed, that must be considered in determining whether he acted within the 30-day period allowed for the assertion of preference rights to purchase the isolated tracts involved in this case. See *Annie L. Hill et al.* v. *E. A. Culbertson*, A–26150-A–26157, August 13, 1951. Consequently, as the 30-day period expired at the close of October 22, 1950, and as Mr. Dowse's letter and remittance were not received until October 23, 1950, it is clear that, under the pertinent departmental regulation, he was not entitled to any preferential consideration in connection with the disposition of these isolated tracts.

For the reason indicated above, the Regional Administrator erred in awarding the isolated tracts to Mr. Dowse, instead of awarding the SW¼SW¼ sec. 4 to Jack Tolan as the high bidder, and the NE¼SE¼ sec. 9 to Mrs. Tolan as the high bidder and also as a preference-right claimant. Similarly, the Assistant Director of the Bureau of Land Management erred in affirming the Regional Administrator's

action with respect to the NE¼SE¼ sec. 9 (although it should be mentioned, in this connection, that Mrs. Tolan's appeal to the head of the Bureau did not point out the error that had been made by the Regional Administrator).

However, Jack Tolan failed to take any appeal from the Regional Administrator's action in awarding the SW¼SW¼ sec. 4 to Mr. Dowse, and Mrs. Tolan failed to appeal to the head of the Department from the Assistant Director's decision affirming the action of the Regional Administrator in awarding the NE¼SE¼ sec. 9 to Mr. Dowse. By failing to take advantage of the rights accorded them under the departmental regulations with respect to appeals, the Tolans waived the objections that they might otherwise have urged against the awarding of these tracts to Mr. Dowse.

Although, as indicated in the preceding paragraph, the Tolans are not now in a position to object, as a matter of right, against the awarding of the two isolated tracts to Mr. Dowse, it is within the supervisory authority of the Secretary of the Interior to take corrective action with respect to the errors made in the Bureau of Land Management. As the awards have not yet been consummated, the two isolated tracts are still subject to the jurisdiction of the Secretary of the Interior. So long as public lands are subject to the jurisdiction of the Secretary of the Interior, he may, on his own initiative, review and correct erroneous actions previously taken within the Department respecting such lands. See *Pueblo of San Francisco*, 5 L. D. 483 (1887); *John H. Trigg et al.*, A–24483 (April 8, 1949); *Albert Mendel et al.*, A–26222 (May 4, 1951); *Union Pacific Coal Company*, A–26118 (April 13, 1951); *Theora A. Gerry, Lexa Oil Corporation*, A–26319 (October 3, 1951).

With regard to the SW¼SW¼ sec. 4, the rival claimants are Mr. Dowse, who owns land contiguous to the isolated tract, and Jack Tolan, who does not own any contiguous land. There does not appear to be any persuasive reason why the Secretary, in the exercise of his supervisory authority, should set aside the Regional Administrator's determination awarding this tract to Mr. Dowse as the owner of contiguous land, since neither Jack Tolan nor his mother owns land contiguous to this tract and, indeed, the record indicates that the Tolans are not especially interested in it.

On the other hand, when consideration is given to the NE¼SE¼ sec. 9, a different situation is presented. Here, the rival claimants are Mr. Dowse and Mrs. Tolan, both of whom own lands contiguous to the isolated tract. Since Mrs. Tolan took timely action to assert her preference right to purchase this tract, whereas Mr. Dowse did not assert his preference right within the prescribed period, it appears

that supervisory action by the Secretary on his own initiative to correct the error that was made in awarding the tract to Mr. Dowse would be warranted. Accordingly, this office has prepared a proposed order to effect such corrective action.

MASTIN G. WHITE,
Solicitor.

WAYNE N. MASON
WILLIAM B. MASON

A–26176 *Decided April 2, 1952*

Isolated Tract—Public Sale—Preference-Right Claimants—Apportionment.

Where an isolated tract containing two or more subdivisions is disposed of at a public sale, and two or more owners of contiguous lands assert their preference rights to purchase the tract, it is the ordinary rule, prescribed in a departmental regulation, that the subdivisions are to be apportioned among the preference-right claimants "so as to equalize as nearly as possible the tracts they should be permitted to purchase."

The fact that one preference-right claimant owns substantially more contiguous acreage than any other preference-right claimant does not, *ipso facto*, take the case outside the ordinary rule that two or more subdivisions in an isolated tract are to be equally apportioned, as far as possible, among competing preference-right claimants.

Where the subdivisions in an isolated tract that is to be apportioned between two preference-right claimants aggregate an odd number, and one of the claimants applied for the sale, it is appropriate, in applying the ordinary rule of equal apportionment as far as possible, to allocate the subdivisions equally between the claimants as far as possible and then allocate the remaining odd subdivision to the claimant who applied for the sale.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Wayne N. Mason has appealed to the head of the Department from a decision dated December 12, 1950, by the Assistant Director of the Bureau of Land Management relative to the apportionment among preference-right claimants of an isolated tract offered at public sale on September 28, 1949, under the authority of section 2455 of the Revised Statutes, as amended (43 U. S. C., 1946 ed., Supp. IV, sec. 1171).

The tract in issue is a single unit composed of 13 subdivisions aggregating 540.16 acres.[1] It was offered at public sale pursuant to an

[1] The tract is described as follows:
T. 14 N., R. 3 W., Salt Lake Meridian,
sec. 26: lot 1 (NE¼NE¼); lot 2 (NW¼NE¼);
lot 4 (SE¼NE¼); lot 5 (NE¼SE¼);
lot 6 (NE¼SE¼); lot 8 (SW¼SE¼);
lot 9 (SE¼SE¼).

(Continued on p. 26.)

application filed by William B. Mason. Within the time allowed by law for the assertion of such rights, William B. Mason, the applicant, and Wayne N. Mason, as the owners of contiguous lands, both asserted preferential rights to purchase the isolated tract offered for sale by the Government. William B. Mason owns lands contiguous to five subdivisions of the isolated tract. Wayne N. Mason owns land contiguous to one subdivision of the isolated tract.

As the preference-right claimants failed to agree respecting the division of the isolated tract between them, the matter was referred to the Regional Administrator of the Colorado-Utah Region, Bureau of Land Management. He determined on April 10, 1950, that Wayne N. Mason should be permitted to purchase the one subdivision (the SE¼NW¼ sec. 35) of the isolated tract to which his privately owned land is contiguous, and that William B. Mason should be permitted to purchase the 12 other subdivisions of the isolated tract. Upon the basis of the Regional Administrator's determination, the manager of the Land and Survey Office at Salt Lake City on April 13, 1950, issued a formal decision apportioning the isolated tract between the preference-right claimants in the 12-and-1 manner indicated by the Regional Administrator.

Both of the preference-right claimants thereupon took appeals to the Director of the Bureau of Land Management. William B. Mason contended that the entire isolated tract should have been apportioned to him. On the other hand, Wayne N. Mason contended that at least half of the isolated tract should have been apportioned to him.

On September 12, 1950, the Assistant Director of the Bureau of Land Management affirmed the apportionment of the tract previously made by the manager pursuant to the Regional Administrator's determination. Wayne N. Mason then took the present appeal to the head of the Department.[2]

Section 2455 of the Revised Statutes, as amended, provides, in part, as follows:

> * * * it shall be lawful for the Secretary of the Interior to order into market and sell at public auction * * * any isolated or disconnected tract or parcel of the public domain not exceeding one thousand five hundred and twenty acres which, in his judgment, it would be proper to expose for sale * * * : *Provided*, That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, and where two or more per-

sec. 35: lot 1 (NE¼NE¼); lot 2 (NW¼NE¼); lot 3 (NE¼NW¼); lot 4 (SW¼NE¼); lot 5 (SE¼NE¼); SE¼NW¼.

[2] William B. Mason did not take a further appeal from the Assistant Director's decision. Although he was served with a copy of Wayne N. Mason's appeal to the head of the Department, he did not file any response.

sons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants * * *.

The statutory provision quoted above is implemented by the following relevant portion of 43 CFR 250.11(b) (3):

> Where there is a conflict between two or more persons claiming a preference right of purchase, they will be allowed 30 days from receipt of notice within which to agree among themselves upon a division of the tracts in conflict by subdivisions. In the absence of an agreement, the regional administrator will make a determination equitably apportioning the various subdivisions among the claimants, ordinarily so as to equalize as nearly as possible the tracts they should be permitted to purchase. * * *

The basic departmental policy expressed in the second sentence of this portion of the regulation is that the subdivisions included in an isolated tract are ordinarily to be divided equally among competing preference-right claimants, if this is possible in view of the number of subdivisions and the number of such claimants; and that where an equal apportionment cannot be accomplished because of an odd number of subdivisions in relation to the number of preference-right claimants,[3] the apportionment shall be as close as possible to the standard of equality.[4] In thus tipping the scales in favor of an equal division, the departmental policy is consistent with the requirement of the statute that the division be "equitable," since it is generally true that equality is equity.

The record in this case does not reveal any persuasive reason for departing from the ordinary rule of apportioning subdivisions among preference-right claimants on a basis of equality as far as possible.

The Regional Administrator's determination of April 10, 1950, which prescribed the apportionment that is now under consideration, stated that it was made "after giving due consideration to the lands owned by each of the conflicting preference-right applicants, the nature of the isolated tract, and the use each applicant makes of his own lands together with the land in the isolated tract." There was no indication in the determination, however, regarding the relationship between the apportionment provided for in it and "the nature of the

[3] In disposing of public lands, it is the long-established policy of the Department not to split quarter-quarter sections or fractional lots unless unusual circumstances require it. See *United States* v. *Central Pacific Ry. Co.*, 49 L. D. 250 (1922); *Nick Nemes and Isaac J. Van Nostern*, A–21830 (May 24, 1939); *Samuel Wilson Cain et al.*, A–23563 (May 31, 1943).

[4] Sometimes, in view of the policy of the Department against splitting subdivisions unless unusual circumstances require it, the closest possible approximation to equality of treatment in dividing an isolated tract among preference-right claimants seems to involve substantial disparity. For example, where it is necessary to divide an isolated tract containing three subdivisions between two preference-right claimants, the closest approximation to equality of treatment would be the apportionment of two subdivisions to one claimant and one subdivision to the other claimant. See *John F. Fredrickson*, A–26117 (January 17, 1951); *Russell Myers and I. R. Norton*, A–26186 (May 22, 1951).

isolated tract" or "the use each applicant makes of his own lands together with the land in the isolated tract"; and the record does not contain any supplementary reports or other written data tending to explain why these particular factors were regarded as sufficient to warrant a departure in the present case from the ordinary rule prescribed in 43 CFR 250.11(b)(3). This leaves for consideration the other factor mentioned by the Regional Administrator, i. e., "the lands owned by each of the conflicting preference-right applicants."

With regard to the factor of "the lands owned by each of the conflicting preference-right applicants," the only significant information revealed by the record is that William B. Mason owns lands adjoining five subdivisions of the isolated tract, whereas the privately owned land of Wayne N. Mason is contiguous to only one of the 13 subdivisions in the isolated tract. However, the fact that William B. Mason owns a substantially greater acreage of contiguous land than Wayne N. Mason does not, *ipso facto*, take this case outside the ordinary rule of equal apportionment as far as possible, prescribed in 43 CFR 250.11(b)(3), and justify the award of 12 subdivisions to William B. Mason, as compared with one subdivision to Wayne N. Mason. In this connection, it is to be noted that neither section 2455 of the Revised Statutes nor the pertinent departmental regulation mentions the degree of contiguity as a factor affecting the apportionment of an isolated tract among competing preference-right claimants.[5]

As indicated above, the record does not reveal any sound basis for departing in this case from the ordinary rule prescribed in 43 CFR 250.11(b)(3). Under that rule, the isolated tract involved in this case should be apportioned between the two preference-right claimants "so as to equalize as nearly as possible the tracts they should be permitted to purchase."

In this case, absolute equality of apportionment cannot be achieved, since 13 subdivisions must be apportioned between two preference-right claimants. As William B. Mason is the person pursuant to whose application the public sale of this tract was ordered, it would seem appropriate, after apportioning 12 of the subdivisions equally between the two preference-right claimants, to award to William B. Mason the odd (or 13th) subdivision in the tract. In other words, it appears that, under the pertinent rule prescribed in 43 CFR 250.11(b)(3), as applied to the facts of this case, the isolated tract in issue should be appor-

[5] In the *Fredrickson* case cited in footnote 4, where the apportionment of an isolated tract containing three subdivisions between two preference-right claimants on a 2-and-1 basis resulted in the claimant with the greater contiguous acreage getting two subdivisions, there was a reference in the decision to the fact that the apportionment of the three subdivisions by the Bureau of Land Management between the two preference-right claimants was "proportionate to their respective interests in the adjoining private lands." That factual statement should not be understood as laying down a rule for general application (although a headnote prepared in connection with the *Fredrickson* decision so implied).

tioned between the two preference-right claimants so that William B. Mason will be permitted to purchase seven subdivisions and Wayne N. Mason will be permitted to purchase six subdivisions.

Therefore, in pursuance of the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decisions below are set aside, and the case is remanded to the Bureau of Land Management for disposition in accordance with the views expressed above.

MASTON G. WHITE,
Solicitor.

McPHERRIN LAND COMPANY
MRS. ALICE KRAMER

A-26192 *Decided April 4, 1952*

Isolated Tract —Public Sale—Division Between Preference-Right Claimants.

Where an isolated tract consisting of two or more subdivisions is offered for sale and two or more owners of contiguous lands assert preference rights to purchase the tract, and the preference-right claimants are unable to agree upon a division of the tract, the Regional Administrator must divide the subdivisions equitably among the preference-right claimants. He cannot award the entire tract to one of the preference-right claimants.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This appeal to the head of the Department relates to a controversy over the public sale of an isolated tract of public land in Nebraska pursuant to the provisions of section 2455 of the Revised Statutes, as amended (43 U. S. C., 1946 ed., Supp. IV, sec. 1171). The tract involved in the dispute consists of four subdivisions described as the NE¼NE¼, NW¼NE¼, NE¼NW¼, and lot 1 (NW¼NW¼), sec. 31, T. 19 N., R. 29 W., sixth principal meridian, Nebraska, comprising a total of 160.37 acres.

Section 2455 of the Revised Statutes, as amended, provides, in pertinent part, as follows:

> * * * it shall be lawful for the Secretary of the Interior to order into market and sell at public auction * * * any isolated or disconnected tract or parcel of the public domain not exceeding one thousand five hundred and twenty acres * * *: *Provided*, That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants * * *.

An implementing regulation (43 CFR 250.11 (b) (3)) promulgated by the Secretary of the Interior provides, in pertinent part, as follows:

Where there is a conflict between two or more persons claiming a preference right of purchase, they will be allowed 30 days from receipt of notice within which to agree among themselves upon a division of the tracts in conflict by subdivisions. In the absence of an agreement, the regional administrator will make a determination equitably apportioning the various subdivisions among the claimants, ordinarily so as to equalize as nearly as possible the tracts they should be permitted to purchase. * * *

On August 18, 1949, John H. McPherrin, acting for the McPherrin Land Company, submitted to the Bureau of Land Management an application asking that the isolated tract mentioned above be ordered into market and sold at public auction. The application stated that the applicant was the owner of land adjoining the tract.

The sale of the isolated tract was ordered pursuant to the McPherrin application, and two bids for the land were received. One of the bids, in the sum of $1,679.07, was submitted by the McPherrin Land Company. The other bid was in the amount of $1,600.00, and it was submitted by Lewis Kramer. Within the period of time allowed for the assertion of preference rights by the owners of contiguous lands, the McPherrin Land Company and Mrs. Alice Kramer submitted preference-right claims.

The preference-right claimants having failed to agree on an apportionment of the isolated tract between them, the Regional Administrator on October 10, 1950, made a determination apportioning two subdivisions of the tract (lot 1 and the NE¼NW¼) to the McPherrin Land Company, and two subdivisions (the NE¼NE¼ and the NW¼NE¼) to Mrs. Kramer.

The McPherrin Land Company took an appeal to the Director of the Bureau of Land Management, and the Assistant Director on December 29, 1950, affirmed the Regional Administrator's determination. Thereafter, the McPherrin Land Company took the present appeal to the head of the Department.

The appellant contends that the Regional Administrator should have awarded the entire isolated tract to it, instead of dividing the tract between the appellant and Mrs. Kramer. The grounds urged in support of this contention are that the appellant owns lands which are contiguous to all four of the subdivisions in the isolated tract, whereas Mrs. Kramer's privately owned land is contiguous to only one of the subdivisions in the isolated tract; that if the entire isolated tract were awarded to the appellant, the result would be a compact unit (the appellant would then own section 31 in its entirety), whereas the two subdivisions awarded to Mrs. Kramer comprise a sort of peninsula in relation to her contiguous privately owned land (she is the owner of section 32); that the isolated tract is easily accessible from the lands of the McPherrin Land Company, but it is not readily

accessible from Mrs. Kramer's lands because of the nature of the rugged terrain; and that the awarding of the entire tract to the appellant would eliminate the necessity of building a fence across the rugged terrain of the tract.

The appellant's argument is based upon the assumption that the Regional Administrator had the discretionary authority to award the whole of the isolated tract to the appellant and that he should have done so. This is an incorrect assumption. Under the departmental regulation quoted above, the Regional Administrator's function in this case was that of "apportioning the subdivisions among the claimants." To apportion is "to divide and assign in just proportion * * *." (Webster's New International Dictionary, 2d ed., 1946.) Hence, if the Regional Administrator had awarded the entire tract to the appellant, instead of dividing it between the appellant and Mrs. Kramer, the Regional Administrator's action would have been outside the scope of the authority conferred upon him.

The action of the Regional Administrator in apportioning two subdivisions of the tract to the appellant and two subdivisions to Mrs. Kramer was in accordance with the rule, prescribed in the pertinent departmental regulation, that the apportionment of subdivisions between two perference-right claimants shall be done "ordinarily so as to equalize as nearly as possible the tracts they should be permitted to purchase."

For the reasons indicated above, it is concluded that no error was made by the Regional Administrator. It necessarily follows that no error was made by the Assistant Director of the Bureau of Land Management in affirming the Regional Administrator's determination.

Therefore, in pursuance of the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the Assistant Director's decision is affirmed.

MASTIN G. WHITE,
Solicitor.

JOHN B. WILLIAMS
RICHARD AND GERTRUDE LAMB

A–26320 *Decided May 20, 1952* *

Public Sale—Isolated Tracts—Preference Rights—Appeals—Supervisory Authority of Secretary.

There is no authority under section 2455 of the Revised Statutes to offer at public sale, as an isolated tract, an area of public land which is part of a larger tract of public land.

*Overruled in part by *Martin J. Plutt, Ellen E. Hosley,* A–26723 (August 17, 1953), p. 185.

Where a field decision awards an isolated tract to one bidder and requests him and a conflicting bidder to agree on a division of a second isolated tract, and, upon the parties' failure to reach an agreement, a further field decision is rendered making the division of the second tract, the unsuccessful bidder for the first tract has no standing, on an appeal from the second decision, to challenge the award of the first tract in the earlier decision.

So long as public land remains subject to the jurisdiction of the Department, the head of the Department has supervisory authority to consider whether a person who claims a preference right in such land is actually entitled to assert such right.

Only an owner of contiguous land has a preference right to buy an isolated tract of public land offered at public sale.

Where the owner of land contiguous to an isolated tract of public land offered at public sale properly asserts a preference right to purchase the land, but disposes of the contiguous land after the close of the period allowed for the assertion of preference-right claims and before he receives a final certificate or patent for the isolated tract, he thereby loses his preference right to buy the isolated tract.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On May 10, 1948, John B. Williams filed application, Santa Fe 080221, requesting that two noncontiguous tracts of land, sec. 1 and the S½ sec. 11, T. 8 N., R. 10 E., N. M. P. M., be offered at public sale pursuant to section 2455 of the Revised Statutes, as amended (43 U. S. C., 1946 ed., Supp. IV, sec. 1171). Mr. Williams stated in his application that he owned, among other land, the N½ sec. 11, which corners on sec. 1 and is, of course, contiguous to the S½ sec. 11.

The sale was held on June 21, 1949, and Mr. Williams and Richard W. Lamb bid for the two tracts. Mr. Williams was the high bidder.

On July 13, 1949, in order to support his claim of a preference right to purchase the tracts as the owner of contiguous land, Mr. Williams filed an affidavit stating that he was the owner in fee simple of, among other land,[1] the N½ sec. 11.

On July 18, 1949, which was within the 30-day period allowed for the assertion of preference-right claims by the owners of contiguous lands (see 43 CFR 250.11(b)), Mr. Lamb and his wife, Gertrude Lamb, matched Mr. Williams' bid for the two tracts. The Lambs stated that they were the owners of sec. 12, which is contiguous to both sec. 1 and the S½ sec. 11.

By a decision dated August 14, 1950, the manager awarded sec. 1 to the Lambs, since Mr. Williams' ownership of cornering land was insufficient to give him any preference right to sec. 1 (43 CFR 250.11(b)), and allowed the parties 30 days within which to agree upon a division of the S½ sec. 11 (43 CFR 250.11(b)(3)). No agreement having been reached by the parties, the manager on Janu-

[1] None of the other land was contiguous to either sec. 1 or the S½ sec. 11.

ary 19, 1951, in accordance with a determination by the Regional Administrator, Region V, declared Mr. Williams to be the purchaser of the SW¼ sec. 11 and the Lambs to be the purchasers of the SE¼ sec. 11.

Mr. Williams appealed from the manager's decision of January 19, 1951, asserting that he owned water which could service both sec. 1 and the S½ sec. 11, that the Lambs had no water for that purpose, and that he intended to use the tracts in a livestock operation, whereas the Lambs would hold the tracts for speculation.

On July 13, 1951, the Associate Director of the Bureau of Land Management affirmed the manager's decision.

On August 9, 1951, Mr. Williams appealed to the head of the Department. He asserted that the Lambs had sold their contiguous land. Since the filing of the appeal to the head of the Department, several documents have been submitted by the Lambs and by Mr. Williams regarding the ownership of land by the respective parties.

It appears at the outset that there is a serious question as to the propriety of offering one of the tracts, the S½ sec. 11, at public sale.

Section 2455 of the Revised Statutes, as amended, authorizes the Secretary of the Interior to sell "any isolated or disconnected tract or parcel of the public domain not exceeding one thousand five hundred and twenty acres."

The pertinent regulation (43 CFR 250.6) provides, in part, as follows:

> (b) As a general rule, no tract will be deemed isolated unless it is completely surrounded by lands held in non-Federal ownership, or is so effectively separated from other federally owned lands by some permanent withdrawal or reservation as to make its use with such lands impracticable. * * *

The records of the Bureau of Land Management show that the S½ sec. 11 is part of a single tract of public land consisting of secs. 14, 24, 25, 26, and 27, the E½ sec. 23, and the S½ sec. 11, and comprising 3,840 acres, more or less. All of this tract, except the S½ sec. 11, is included in grazing lease, Santa Fe 075453, which was issued on February 21, 1944, for a period of 10 years. A grazing lease does not, of course, effect a "permanent withdrawal or reservation" of Federally owned land. Consequently, the existence of the grazing lease in this case does not effect the segregation of the remainder of the 3,840-acre tract from the S½ sec. 11, for the purposes of section 2455 of the Revised Statutes. Hence, it must be concluded that the S½ sec. 11 is not itself an "isolated or disconnected tract" of public land, but, rather, that it is merely part of such a tract.

It follows that the offer of sale as to the S½ sec. 11 was unauthorized and should be withdrawn.

In view of the conclusion stated above regarding the S½ sec. 11, it is unnecessary to determine whether the respective parties were entitled to assert preference-right claims to that tract as the owners of contiguous lands.

With respect to sec. 1, Mr. Williams has never claimed the ownership of any land contiguous to that tract, and he has not denied that the Lambs were, on the date of the sale and for a period of more than 30 days after that date, the owners of land contiguous to sec. 1. He asserts, however, that the Lambs have sold their contiguous land in the meantime and, therefore, that they are no longer entitled to purchase sec. 1 on a preferential basis.

The documents submitted by the parties show that the Lambs on June 18, 1951, conveyed sec. 12 (the contiguous land on which their preference-right claim to sec. 1 was based) to Buck Harvey and Gerald Farr. Mr. Williams contends that this conveyance of sec. 12 by the Lambs necessarily deprived them of their preference right to purchase sec. 1.

It should be stated at the outset of the discussion regarding sec. 1 that Mr. Williams does not have any standing as a party to question the propriety of the award of sec. 1 to the Lambs. The award of sec. 1 to the Lambs was made by the manager in his decision of August 14, 1950. Mr. Williams did not take any appeal from that decision. The present proceeding relates to the appeal that was taken by Mr. Williams from the manager's subsequent decision of January 19, 1951, which dealt only with the apportionment of the S½ sec. 11 between the parties. Mr. Williams, as an appellant from the second decision, has no standing to question the award made in the first decision.

However, the Department is concerned over any allegation that persons claiming preferential rights in public lands are actually not entitled to such rights under the law. Consequently, the question as to the effect of the Lambs' conveyance of sec. 12 will be considered in the exercise of the supervisory authority of the head of the Department over lands remaining under the jurisdiction of the Department.

Section 2455 of the Revised Statutes, as amended, provides, in pertinent part, that—

> * * * for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price * * *.

The statutory provision fixes only the minimum period of time in which an owner of contiguous land can assert his preference right. However, the Secretary of the Interior has provided in a regulation (43 CFR 250.11(b)) that the minimum statutory period of 30 days after the receipt of the highest bid shall also be the maximum period

within which an owner of contiguous land may assert his preference right by meeting the highest bid. See Solicitor's opinion, M–36125 (March 31, 1952), 61 I. D. 20.

On the date of the sale in this case, during the ensuing 30-day period for the assertion of preference rights, and for almost 2 years thereafter, the Lambs were the legal owners of land contiguous to sec. 1. During all that time, they qualified as preference-right claimants for sec. 1. If sec. 1 had been conveyed to the Lambs pursuant to their preference right, they would not, by virtue of the preferential manner in which they acquired sec. 1, have been subjected to any restriction on the subsequent alienation of the contiguous sec. 12, or even of sec. 1 itself.

Nevertheless, the law grants only to the "owner or owners of contiguous land" a preference right to buy an isolated tract at the price offered by the high bidder. The Lambs, having disposed of the contiguous sec. 12 on which their preference-right claim for sec. 1 was based, are no longer the "owner or owners of contiguous land." Hence, if the Department were now to permit the Lambs to buy sec. 1 on a preferential basis, it would thereby extend, by administrative action, the scope of the controlling statutory provision. This cannot be done.

Since the award of sec. 1 to the Lambs must be set aside because they no longer qualify as preference-right claimants for this tract, and since Mr. Williams has no standing in the present proceeding with respect to sec. 1, I conclude that the present offer of sale as to sec. 1 should be withdrawn, along with the offer of sale as to the S½ sec. 11. This action is not, of course, any obstacle to future proceedings looking toward the sale of sec. 1.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decisions below are set aside, and the case is remanded to the Bureau of Land Management with instructions to withdraw the offer to sell the tracts involved in this proceeding.

MASTIN G. WHITE,
Solicitor.

KADIAK FISHERIES COMPANY

A–26335 *Decided May 21, 1952*

Soldiers' Additional Homestead Entry—Character of Land—Use of Land.

Where the report of a field examination indicates that a tract of land is suitable for agricultural use, and there is no contradictory evidence in the record, the land should be regarded as agricultural land for the purpose of entry under the soldiers' additional homestead law.

There is no requirement which restricts the right of entry under the soldiers' additional homestead law to persons who indicate an intention to devote the lands applied for to farming or homestead purposes.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Kadiak Fisheries Company has appealed to the head of the Department from a decision by the Director of the Bureau of Land Management dated August 13, 1951, tentatively rejecting the Company's application under the soldiers' additional homestead law (sec. 2306, Revised Statutes; 43 U. S. C., 1946 ed., sec. 274) for approximately 10 acres of land in Alaska, embraced in United States survey 2424.

The decision below cited the departmental decision in *David B. Morgan*, A-24551 (December 24, 1948), 60 I. D. 266, as governing the present case. It was held in the *Morgan* case that lands unsuitable for any sort of farming use could not be entered under the soldiers' additional homestead law.

It appears from a report prepared by a field examiner of the Bureau of Land Management that the land involved in the present proceeding is rolling to rough; that it contains a sparse stand of alder and spruce of little commercial value, numerous sedges, and a heavy overgrowth of beach rye, redtop, and salmon berry brush; that the topsoil is comparable to nearby patented land, which has been planted to garden vegetables; and that the tract is, in the examiner's opinion, suitable for farming use.

There is no evidence in the record contradicting the statement of the field examiner with respect to the suitability of the land for farming purposes.

It appears, however, that the applicant actually does not plan to use the land as a farm or as a homestead.

It has been held that the grant of additional lands under the soldiers' additional homestead law was without restriction;[1] and that the right was an unfettered gift in the nature of compensation for past services, and the beneficiaries were free to apply the additional lands to any beneficial uses that they might choose.[2] Moreover, it has been held, and the regulations provide, that an entryman under the soldiers' additional homestead law need not settle or reside on or cultivate the land;[3] and the Department has permitted the right to be assigned before entry.[4]

[1] *Webster* v. *Luther*, 163 U. S. 331, 339 (1896).
[2] *Barnes* v. *Poirier*, 64 Fed. 14, 18 (8th Cir. 1894); *Mullen* v. *Wine*, 26 Fed. 206, 207 (C. C. D. Colo., 1886).
[3] 43 CFR 132.4; *Webster* v. *Luther*, 163 U. S. 331, 339, 340; *Cornelius J. MacNamara*, 33 L. D. 520, 523, 524 (1905).
[4] *William C. Carrington*, 32 L. D. 203, 205 (1903).

It appears, therefore, that there is no requirement in the law or in the pertinent regulations which restricts the right of entry under the soldiers' additional homestead law to persons who indicate an intention to devote the lands applied for to farming or homestead purposes.

For the reasons indicated above, it is concluded that this record does not contain any evidence warranting the rejection of the appellant's application.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the Director's decision of August 13, 1951, is set aside, and the case is remanded to the Bureau of Land Management for further proceedings not inconsistent with this decision.

MASTIN G. WHITE,
Solicitor.

STATE SOCIAL SECURITY CLAIMS AGAINST RESTRICTED INDIAN ESTATES

Act of June 25, 1910—Restricted Indian Estates—Payment of Claims—Administrative Practice—Congressional Recognition.

Under the act of June 25, 1910, as amended, providing for the determination of heirs and the approval of wills of deceased Indians who have left trust or restricted estates, the Secretary of the Interior has implied authority to allow all just claims against such estates.

Having been recognized by the Congress, the departmental practice of allowing claims against trust or restricted Indian estates has in effect received the approval of that body.

The Secretary of the Interior may, in his discretion, determine what income from trust or restricted Indian estates shall be applied in payment of claims against the estates, and a regulation which permits such claims to be paid from any income which may accrue from the decedent's trust or restricted property after his death is valid.

M-36121 JUNE 2, 1952.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

This responds to your memorandum requesting an opinion on the question whether there is adequate statutory authority to support the departmental practice which permits the settlement of State claims for reimbursement of social security or old-age assistance payments to an Indian allottee out of income derived from the decedent's allotment after his death. (See 25 CFR 81.25.)

The jurisdiction of the Secretary of the Interior over the trust or restricted estates of deceased Indians, including the determination of

heirs and the approval of wills, is based upon sections 1 and 2 of the act of June 25, 1910, as amended (25 U. S. C., 1946 ed., secs. 372, 373). Section 1 of the 1910 act, as amended, provides, in pertinent part, that—

> When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. * * *

Section 2 of the 1910 act, as amended, provides, so far as relevant here, that—

> Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior * * *.

While the 1910 act provided in so many words only for the ascertainment of heirs and the approval of wills, and did not expressly grant to the Secretary the power to allow or disallow claims against the trust or restricted estates of deceased Indians, the practice of considering and allowing claims against the estates of deceased allottees was almost immediately instituted.[1] The regulations of September 13, 1915, and June 19, 1923, relating to the determination of heirs and the approval of wills, provided in sections 14 and 9, respectively, for serving notices of hearing on "claimants" as well as on "presumptive heirs." Detailed provisions relating to the handling of claims were contained in sections 46, 47, 48, and 49 of the regulations on the same subject promulgated May 31, 1935, which preceded the present regulations.

The propriety of paying claims against the trust or restricted estates of Indians has been recognized in recent years by two Solicitors of the Department, who expressly stated that such claims might be paid not only from income to the credit of the estate at the time of the decedent's death but also from income accruing to the estate subsequent to the death of the decedent.[2]

[1] See *Grace Cox et al.*, 42 L. D. 493, 501–502 (1913), where it was said apropos of claims: "Claims for reasonable expenditures of this nature receive favorable consideration in this Office and are paid out of rentals or other funds remaining to the credit of the estate."

[2] See letter dated June 20, 1940, from Solicitor Margold to the Solicitor of the Department of Agriculture, and letter dated September 28, 1944, from Solicitor Harper to Senator Harlan J. Bushfield of South Dakota.

It is clear that the 1910 statute confers upon the Secretary of the Interior an implied power to allow claims against trust or restricted Indian estates. As the Supreme Court said in an early case, *United States* v. *Macdaniel*, 7 Pet. 1, 14 (1833), in speaking of the duties and responsibilities of the head of a department of the Federal Government: "He is limited in the exercise of his powers by the law; but it does not follow that he must show statutory provision for everything he does." [3] The exigencies of government in more recent times have led to the enactment of many statutes which merely lay down broad general policies or objectives and leave it to the executive to fill in the details. The lacunae of the 1910 act in particular have had to be filled in by administrative practice. For example, section 1 of the act did not expressly confer upon the Secretary of the Interior the power to ascertain the heirs to Indian allotments which were patented in fee but held subject to restrictions against alienation; yet the power of the Secretary to do so was upheld in *United States* v. *Bowling*, 256 U. S. 484 (1921). On the authority of that case, the Department held that the Secretary had the power to determine the heirs to lands which had been purchased with restricted funds, and had been subjected by the Secretary to restrictions against alienation.[4] Moreover, although section 1 (unlike section 2) of the 1910 act does not expressly give the Secretary jurisdiction over Indian trust funds, it has been the uniform practice of the Department to determine the heirs to such funds as an incident of the power to determine the heirs to the lands from which such funds are derived.[5]

The implied power to allow claims against trust or restricted Indian estates is readily deducible from the terms of the 1910 act. A rule-making power is expressly conferred upon the Secretary of the Interior by both sections 1 and 2 of the act, and this rule-making power necessarily carries with it the authority to utilize all proper means for effectuating the purposes of the act.[6] Now, conceivably, if creditors could, without the assistance of the Secretary of the Interior, collect debts which Indians had incurred before their deaths but which remained unpaid at the time of their deaths, it might be possible to

[3] See, also, *Rainbow* v. *Young*, 161 Fed. 835 (C. C. A. 8th, 1908); *William Small, Executor* v. *United States*, 45 Ct. Cl. 13, 17 (1909); 34 Op. Atty. Gen. 320, 326 (1924).

[4] See 49 L. D. 414 (1923).

[5] The propriety of this practice was inferentially recognized in the act of January 24, 1923 (42 Stat. 1185, 25 U. S. C., 1946 ed., sec. 377), which provided for the collection of fees by the Secretary of the Interior for the cost of the work performed by him in determining the heirs to any trust or "restricted Indian property" or in approving wills covering "restricted property" and which authorized the fees to be collected "from any trust funds belonging to the estate of the decedent."

[6] As the Supreme Court said in *Hallowell* v. *Commons*, 239 U. S. 506, 508 (1916), the Secretary in promulgating regulations under the act has "considerable discretion as to details."

argue that the power of the Secretary to see that such debts were paid was not necessarily to be implied from his power to ascertain the heirs or approve the wills of the debtors. Section 1 of the 1910 act expressly declares, however, that the decision of the Secretary in this respect "shall be final and conclusive"; and, although section 2 of the act contains no such express declaration, wills devising trust or restricted Indian property cannot be probated in the courts.[7] As the jurisdiction over the trust or restricted estates of Indians is thus vested in the Secretary, their creditors cannot resort to the courts to collect their debts; and if these were not paid at the direction of the Secretary of the Interior, the creditors would be left without any remedy. It is hardly to be assumed that the Congress intended to make itself a party to such dishonesty.

So far as concerns the allowance of claims against the estates of Indians who have left wills, there is an additional factor which supports the power of the Secretary. Indian testators almost invariably direct that their just debts shall be paid. Thus, the Secretary, in allowing claims against their estates, is only carrying out their express wishes.

In recent years, Congress has recognized that the Secretary of the Interior was exercising a general probate jurisdiction with regard to the trust or restricted estates of deceased Indians. In adopting the act of July 8, 1940 (54 Stat. 746, 25 U. S. C., 1946 ed., sec. 372a), which regulates the adoption of children by Indians who own trust or restricted estates, Congress provided that the statutory procedure should apply to "probate matters under the exclusive jurisdiction of the Secretary of the Interior * * *," and, even more significantly, that the act should not apply to "the distribution of estates of Indians who have died prior to the effective date of this act." The distribution of an estate clearly includes the allowance of any just claims against the estate. Moreover, in providing in the act of November 24, 1942 (56 Stat. 1021, 25 U. S. C., 1946 ed., secs. 373a–373c) for the disposition of the trust or restricted estates of Indians who died intestate without heirs, Congress expressly declared that the estate should escheat only "subject to the payment of such creditors' claims as the Secretary of the Interior may find proper to be paid from the cash on hand or income accruing to said estate * * *."

The legislative history of the act of November 24, 1942, is particularly interesting as a test of congressional sentiment on the question

[7] As the Supreme Court said, in speaking of the words of section 2 of the 1910 act in *Blanset v. Cardin*, 256 U. S. 319, 326 (1921): "They not only permit a will but define its permissible extent, excluding any limitation or the intrusion of any qualification by State law." It then added that "the act of Congress is complete in its control and administration of the allotment and of all that is connected with or made necessary by it * * *."

of the payment of creditors' claims against Indian estates. In its original form, the bill (H. R. 4533, 77th Congress) which became the act of November 24, 1942, made no express provision for the payment of creditors' claims. Indeed, it was couched in such phraseology that it seemed to exclude the payment of any creditors' claims. Thus, it provided:

> That upon final determination by the Secretary of the Interior that the Indian holder of a trust or restricted allotment of lands or an interest therein has died intestate without heirs, the land or interest, together with all accumulated rents, issues, and profits therefrom held in trust for the decedent, shall escheat to the tribe owning the land at the time of allotment.

When the bill came up for consideration in the House on May 19, 1941, Congressman Case of South Dakota objected to the bill. "The bill, as I read section 1," he pointed out, "provides that not merely the land but all the accumulated rent, issues, and profits therefrom held in trust for the decedent shall escheat to the tribe owning the land at the time of the allotment. It occurs to me that many times where Indians die under this circumstance claims against the estate of the Indian could not be taken care of. I find no provision in the bill that would permit the settlement of the claims before the property, the rents, and so forth, go to the tribe." To this, Congressman Rogers of Oklahoma, who had introduced the bill at the request of the Department, replied: "That is under the supervision of the Secretary. The estate would have to be settled before any of it would revert."[8] Still dissatisfied with the language of the bill, however, Congressman Case asked that the bill be passed over, and on June 16, 1941, he offered an amendment expressly providing for the payment of creditors' claims, and this amendment was adopted by the House.[9]

It might be contended that the departmental practice in the matter of allowing claims against trust or restricted Indian estates runs counter to the provision in section 5 of the General Allotment Act of February 8, 1887 (24 Stat. 389), as amended (25 U. S. C., 1946 ed., sec. 348), which states that at the expiration of the trust period of an allotment the United States will convey the same "free of all charge or incumbrance whatsoever," and to a related provision in the act of June 21, 1906 (34 Stat. 327, 25 U. S. C., 1946 ed., sec. 354), which states that no allotted land shall become "liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor." Even conceding, for the sake of argument, that these provisions would preclude the allowance of claims against the estates of allotted Indians, it is clear that they have, in effect, been set aside by the later

[8] See Congressional Record for May 19, 1941 (87 Cong. Rec. 4220).
[9] See Congressional Record for June 16, 1941 (87 Cong. Rec. 5198).

adoption of the act of June 25, 1910, which, properly construed, permits the allowance of such claims. The General Allotment Act, to be sure, attempted to forbid the alienation or incumbrance of allotted lands in any manner during the trust period, but this policy was soon abandoned, and all sorts of transactions affecting allotted lands were subsequently authorized by a long series of congressional enactments. The allowance of creditors' claims against trust or restricted estates is only another example of such an authorization.

It might also be contended that even if claims against trust or restricted Indian estates may be allowed from cash on hand at the time of the decedent's death, such claims cannot be allowed from the rents, profits, or income of the decedent's lands accruing after his death. If, however, the Secretary of the Interior has authority to allow claims against Indian estates, the question of the time of the accrual of the income to be applied to the satisfaction of a claim is to be determined entirely in his discretion. It is true that it is the rule generally that the rents, profits, and income derived from realty vest in the heirs or devisees of the decedent and are not assets in the hands of an executor or administrator, but this rule does not apply where the personalty is insufficient to pay the debts of the estate. Moreover, in many States the general rule has been altered by statutes which make subsequently accruing rents and profits from realty assets in the hands of personal representatives for the payment of debts.[10] In any event, the Secretary of the Interior is not bound by these rules of State law, for under section 5 of the General Allotment Act (25 U. S. C., 1946 ed., sec. 348), he is bound by State law only in his determination of heirship.

I am of the opinion, therefore, that the regulation of the Department which requires the allowance of claims of States on account of social security or old-age assistance payments, and which gives such claims priority over the claims of general creditors, has an adequate statutory basis.

It is possible, however, that in some instances the application of the regulation may cause undue hardship. You may wish to reconsider the policy question whether or under what circumstances income accruing to trust or restricted Indian estates subsequent to the death of the decedents should be used to pay State social-security claims, with the idea of perhaps proposing a change in the regulation.

MASTIN G. WHITE,
Solicitor.

[10] See 33 C. J. S., title "Executors and Administrators," sec. 105, and authorities there cited.

MONOLITH PORTLAND CEMENT COMPANY ET AL.

A–26281 *Decided July 22, 1952*

Rules of Practice—Mineral Leasing Act—Application for Oil and Gas Lease—Mining Claims—Valuable Mineral Deposits—Discovery.

The Secretary of the Interior (or his delegate) may assume jurisdiction at any stage of a public-land proceeding that is pending before the Department, without waiting for the matter to come before him by way of appeal or otherwise.

A motion for a new trial will be granted by the Department only upon the ground of newly discovered evidence; and it must appear, among other things, that such evidence is material to the issues involved in the case and that its lack at the previous hearing injuriously affected the substantial rights of the applicant.

There is no requirement in the Rules of Practice that the initial decision in a public-land proceeding shall be rendered by the person who presided over the hearing in such proceeding.

Valid rights cannot be acquired under the mining laws in an area of public land after the filing and during the pendency of a proper application for a noncompetitive oil and gas lease on such land.

A mining claimant who protests against an application for an oil and gas lease on the land covered by the claim has the burden of showing, as a minimum, that a valid location had been made on the area of the claim prior to the time when the application for an oil and gas lease was filed.

A valid location of a mining claim can be made only if a valuable mineral deposit has been discovered within the limits of the claim.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On June 26, 1946, J. R. Gillbergh filed an application (Sacramento 037302, now Los Angeles 087445) for a noncompetitive oil and gas lease on certain public lands in California pursuant to section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1946 ed., sec. 226). On June 15, 1948, Richfield Oil Corporation filed an agreement which had been executed by J. R. Gillbergh and Gladys Owen Gillbergh, his wife, and by Richfield Oil Corporation and which, among other things, granted to Richfield an option to purchase the lease for which Mr. Gillbergh had made application.

Thereafter, on December 16, 1948, Monolith Portland Cement Company protested against the Gillbergh application insofar as it covered the following lands:

T. 9 N., R. 23 W., S. B. M., California,
sec. 19: NW¼ (except lots 10, 15), SW¼ (except lots 11, 12),
sec. 30: NW¼ (except the portion of Tract 60 situated within this quarter-section).
T. 9 N., R. 24 W., S. B. M., California,
sec. 24: W½E½, NE¼NE¼,
sec. 25: SE¼, E½SW¼, N½NE¼, S½NE¼ (except the portion of Tract 59 situated within this half-quarter section).

The protest was based upon allegations to the effect that these lands were covered by valid mining claims held by Monolith, designated as Extension No. 1 and Last Chance Nos. 5, 6, 7, 8, 9, and 10. Mr. and Mrs. Gillbergh and Richfield were named by Monolith as protestees.

Mr. and Mrs. Gillbergh filed separate answers to the protest on March 9, 1949, and Richfield also answered.

On November 23, 1949, the Associate Director of the Bureau of Land Management ordered that a hearing should be held on the protest. The manager of the land office at Sacramento, California, thereupon sent to the parties a notice dated December 14, 1949, directing them to appear before Elizabeth G. Storey, a notary public, at Los Angeles, California, for a hearing on the issues. The notice also informed the parties that the United States would intervene in the proceedings.

Thereafter, Monolith filed an amended protest on January 27, 1950.

An oil and gas lease was issued to Mr. Gillbergh as of February 1, 1950, on those lands covered by his application which were not involved in Monolith's protest. With respect to the lands involved in the protest, Mr. Gillbergh's application was suspended pending a decision on the protest.

Evidence was taken before the notary public at Los Angeles on February 21, 22, 24, and 25, 1950, and, by agreement of the parties, before the land-office manager at Sacramento on March 15 and 16, 1950.

The manager of the land office at Sacramento left the employ of the Bureau of Land Management on May 28, 1950, without having rendered a decision in the matter. Subsequently, the record made at the hearing was transmitted to the Bureau of Land Management in Washington, D. C., for a decision to be rendered at the Bureau level. Such a decision was rendered by the Assistant Director on May 4, 1951.

The Assistant Director held that the mining claims upon which Monolith's protest had been based were null and void; and, accordingly, the Assistant Director dismissed Monolith's protest against the Gillbergh application.

Thereupon, Monolith filed, simultaneously, a motion for a new trial and an appeal to the head of the Department.

I

The Department's Rules of Practice provide that a motion for a new trial will be acted on initially by the manager of the appropriate land office. (See 43 CFR 221.42–221.45.) The reason for this is that, under the normal procedure, the initial decision in a public-land pro-

ceeding is rendered by the land-office manager,[1] and, obviously, the official whose decision is involved in a motion for a new trial should, under ordinary circumstances, act upon the motion in the first instance.

In the present case, the normal procedure was departed from, in that the initial decision was not rendered by the land-office manager. Due to the fact that the manager who issued the notice of hearing and who presided during a portion of the hearing left the service of the Bureau of Land Management shortly after the conclusion of the hearing, the record in the proceeding was forwarded to the headquarters of the Bureau of Land Management for the initial decision to be rendered at that level. In view of this circumstance, the reason behind the rule that a motion for a new trial is to be acted upon in the first instance by the manager of the land office is not present in this case.

Moreover, it is well established that in the exercise of his supervisory authority over the public lands, and over proceedings which relate to the public lands, the Secretary of the Interior may assume jurisdiction over any public-land proceeding that is pending before the Department at any level, and that he may do so at any stage of the proceeding, without waiting for the matter to come before him by way of appeal or otherwise. *George C. Vournas*, 56 I. D. 390 (1938); *Union Pacific Coal Company*, A–26118 (April 13, 1951); *Theora A. Gerry, Lexa Oil Corporation*, A–26319 (October 3, 1951); *Albert Mendel et al.*, A–26222 (May 4, 1951).

Accordingly, Monolith's motion for a new trial can be considered in the first instance by the Secretary of the Interior (or his delegate) if it seems desirable to dispose of the motion at the Secretarial level.

An examination of the motion for a new trial and the appeal reveals that they contain interrelated contentions and really comprise, in effect, one document. Because of this, and because of the unusual procedure that was followed in connection with the rendering of the decision below because of the departure of the land-office manager shortly after the conclusion of the hearing, it seems advisable to waive in this case the rule under which a motion for a new trial is to be acted upon in the first instance by the manager of the appropriate land office, and to consider and dispose of Monolith's motion for a new trial and appeal at the same time.

II

It is provided in the Rules of Practice that the initial decision in a public-land proceeding "will be vacated and new trial granted only

[1] Proceedings for the adjudication of grazing privileges within grazing districts constitute an exception to this general rule. See 43 CFR 161.9, as amended.

upon the ground of newly discovered evidence * * *." (43 CFR 221.42.)

The "newly discovered evidence" involved in Monolith's motion for a new trial relates to two wells which were drilled, after the conclusion of the hearing in this proceeding, by Richfield on lands that were leased to Mr. Gillbergh as of February 1, 1950, upon the basis of the partial approval of his application dated June 26, 1946. The wells were evidently unproductive, and they were, according to the Deputy Supervisor of the Division of Oil and Gas, Department of Natural Resources, State of California, abandoned by Richfield in March and April of 1951. It is alleged by Monolith that these two wells were drilled within the geological structure underlying the lands involved in the present proceeding. In the event of a new trial, this "newly discovered evidence" presumably would be submitted in an effort to show that the lands involved in this proceeding are not valuable for oil and gas.

In determining whether a motion for a new trial shall be granted upon the ground of newly discovered evidence, it is necessary to consider, among other things, whether the newly discovered evidence is material to the issues involved in the case, and whether the lack of the evidence has injuriously affected the substantial rights of the applicant to such an extent that the result of a second trial may reasonably be expected to be different from and more favorable to the applicant than the result of the first trial. (See *Bean et al.* v. *Commercial Securities Company et al.*, 156 S. W. 2d 338 (Tenn., 1941); 43 CFR 221.42.)

For the reasons set out in part IV of the discussion below, evidence showing that two unproductive wells were drilled on nearby lands after the hearing in this proceeding is really immaterial to the issues involved in this case, and would not warrant a decision different from that previously rendered by the Assistant Director of the Bureau of Land Management respecting the invalidity of Monolith's claims and Monolith's consequent lack of standing to protest against the Gillbergh application for an oil and gas lease. Accordingly, Monolith's motion does not present a sound basis for a new trial in this proceeding.

III

Monolith contends that its substantial rights have been injuriously affected because of the failure of the land-office manager to render a decision in this proceeding. Monolith asserts, in this connection, that it is entitled to a ruling in the first instance by an official who has heard all the testimony, and who has had the benefit of viewing the witnesses and observing their demeanor while testifying.

There is no requirement in the Rules of Practice that the initial decision in a public-land proceeding of this sort shall be rendered by the person who has conducted the hearing in such proceeding. On the contrary, the Rules of Practice (see 43 CFR 221.28) specifically authorize a land-office manager (who normally has the responsibility of rendering the initial decision) to direct that the hearing in a public-land proceeding shall be held "before a United States Commissioner or other officer authorized to administer oaths," and provides that, in such a situation, the officer conducting the hearing will, at its conclusion, forward the transcript of the testimony to the manager, who thereupon proceeds, in the ordinary case, to render a decision upon the basis of the record.

In the present case, the land-office manager who issued the notice of hearing did not personally preside at the hearing throughout its entirety. Instead, the early stages of the hearing were presided over by a notary public, in accordance with the notice of hearing and without any objection being interposed by Monolith. Hence, even if the land-office manager who issued the notice of hearing and who presided over the later stages of the hearing had remained in the service of the Bureau of Land Management and had rendered the initial decision in this proceeding, Monolith's standard of a determination by an official who heard all the testimony would not have been realized.

Furthermore, although the Rules of Practice contemplate that the initial decision in a public-land proceeding will be rendered by the manager of the appropriate land office, it was not improper in the present case for the head of the Bureau of Land Management (or his delegate), in view of the departure of the land-office manager who was familiar with the case, to exercise the supervisory authority of the Bureau head by issuing the initial decision in the case at the Bureau level. The record does not reveal any basis for a contention that Monolith's substantial rights were injuriously affected by reason of the fact that the initial decision in this proceeding was made by the Assistant Director of the Bureau of Land Management rather than by the successor to the former land-office manager at Sacramento.

IV

We turn now to a consideration of the merits of Monolith's contention that the existence of its mining claims is sufficient, as a matter of law, to prevent the issuance of an oil and gas lease on the lands covered by the claims.

The Mineral Leasing Act, pursuant to which Mr. Gillbergh's application for an oil and gas lease was filed, is applicable to "Deposits of

coal, phosphate, sodium, potassium, oil, oil shale, or gas, and lands containing such deposits owned by the United States * * *." (30 U. S. C., 1946 ed., sec. 181.)[2] Under the Mineral Leasing Act, "lands valuable for such minerals" are subject to disposition only in the form and manner provided for in that act. (30 U. S. C., 1946 ed., sec. 193.)[3]

Shortly after the enactment of the Mineral Leasing Act, the Department held that there could be no room for the contemporaneous operation of the mining laws and the Mineral Leasing Act with respect to the same lands; and that if an attempt were made after the enactment of the Mineral Leasing Act to locate a mining claim on land known to be valuable for any of the minerals named in the Mineral Leasing Act, the Department would not recognize the attempted location. (See letter dated October 5, 1924, from Secretary Work to Congressman Richards; 50 L. D. 650.) The Department has maintained its position in this respect over the years. (See *United States* v. *United States Borax Company*, 58 I. D. 426, 432 (1943).)

The test to be applied in determining whether a particular tract of land was known at a given time to be valuable for one of the minerals named in the Mineral Leasing Act is not whether an actual discovery of such mineral on the land had been made as of the significant date, but rather whether the known conditions at the time were such as would have supported the belief that the land contained the mineral in such quantities and of such quality as to make its extraction profitable and to justify expenditures to that end. (See *United States* v. *United States Borax Company*, *supra*, at p. 433.)

Moreover, it is clear that rights under the mining laws cannot be acquired in a tract of public land after the filing and during the pendency of a proper application for a noncompetitive oil and gas lease on such land. Although the mere filing of a proper application for a noncompetitive oil and gas lease on a tract of public land does not obtain for the applicant a vested right to a lease, the person first submitting a proper application does acquire an inceptive or inchoate right to be offered a lease on the land before a lease is offered to a subsequent applicant, if it is decided by the Secretary of the Interior (or his delegate), in the exercise of his discretion, that the land will be made available for oil and gas development, if it is decided that the land is not within any known geological structure of a producing

[2] Attorneys General have held that the term "lands," as used here, is restricted to public lands. See 34 Op. Atty. Gen. 171 (1924); 40 Op. Atty. Gen. 9 (1941).

[3] The cited section of the Mineral Leasing Act contains a saving clause, covering "valid claims existent on February 25, 1920," but this has no bearing on the present case inasmuch as there is no contention here that the claims relied upon by Monolith were in existence on February 25, 1920.

oil or gas field, and if it is decided that the applicant is qualified to obtain and hold a lease on the land. (See *Warwick M. Downing*, A–25798, August 16, 1950, 60 I. D. 433; *Bettie H. Reid et ano.*, A–26330, February 4, 1952, 61 I. D. 1.) The inceptive rights of the senior applicant for a noncompetitive oil and gas lease on a particular tract of public land must be protected pending a determination as to whether the land will be made available for oil and gas development, as to whether the land applied for is within the known geological structure of a producing oil or gas field, and as to whether the applicant is qualified to hold the lease for which he has applied. For this reason, rights cannot be acquired under the mining laws in land that is covered by a pending proper application for a noncompetitive oil and gas lease, since such rights would be incompatible with the rights of an oil and gas lessee if the applicant's inchoate or inceptive right should ripen into an oil and gas lease.

As the protestant in this proceeding, therefore, it was incumbent upon Monolith, as a minimum, to show that, prior to the time (June 26, 1946) when Mr. Gillbergh filed his application for an oil and gas lease on the lands involved in this controversy, Monolith had made valid locations under the mining laws on each of its claims covering such lands.

A valid location of a mining claim can be made only if a valuable mineral deposit has been discovered within the limits of the claim. *Waskey* v. *Hammer*, 223 U. S. 85, 91–92 (1912); *United States* v. *M. W. Mouat et al.*, A–26181 (May 16, 1951), 60 I. D. 473. In determining whether mineral deposits discovered on public lands are valuable, the test to be applied is whether they are "such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine." *Cameron et al.* v. *United States*, 252 U. S. 450, 459 (1920).

The evidence in the record of the present proceeding is insufficient to show that discoveries of valuable mineral deposits had been made prior to June 26, 1946, on any of the claims upon which Monolith's protest is based. Although the record reveals that deposits of gypsum, clay, and sand and gravel were known to exist on some of Monolith's claims, inasmuch as such materials were visible to the naked eye, there is nothing in the record to show that, prior to the time of the filing of the Gillbergh application on June 26, 1946, Monolith's exploration or development work in connection with these known deposits had progressed sufficiently to establish that any of them were in the category of valuable mineral deposits. Indeed, even if the evidence with respect to Monolith's work on the claims after the filing of the Gillbergh application could properly be considered, the evidence in the record

would not sustain a finding that any of the known mineral deposits on these claims are of such quality and are present in such quantity that a person of ordinary prudence would be justified in the further expenditure of his time and means in an effort to develop a paying mine.

Monolith contends that geologic inferences based upon the presence of gypsum on Monolith's nearby patented lands would warrant a finding that, at the time of the filing of the Gillbergh application, a valuable gypsum bed was known to underlie some of the claims involved in this proceeding. Evidence of this sort cannot be considered, however, in passing upon the validity of a mining claim. The presence of a valuable mineral deposit near a mining claim, plus geologic indications that the deposit probably extends into the area of the claim, does not warrant a finding that the claim is valid. *United States* v. *M. W. Mouat et al.*, A-26181 (May 16, 1951), 60 I. D. 473.

It is concluded that, up to the time of the filing of the Gillbergh application on June 26, 1946, Monolith had not made valid mining locations on any of the lands covered by the Gillbergh application; and, accordingly, that the existence of Monolith's invalid claims does not require the rejection of the Gillbergh application.

V

An additional argument made by Monolith is to the effect that the validity of its mining claims was not in issue before the Assistant Director of the Bureau of Land Management, and, consequently, that the Assistant Director erred in holding the mining claims to be invalid. The short answer to this contention is that Monolith itself put the validity of its claims in issue when it protested against the Gillbergh application on the ground that the issuance of an oil and gas lease pursuant to the application would interfere with Monolith's "vested right to the exclusive possession of each of said mining claims." In order to make a determination respecting the soundness of Monolith's protest, it was necessary for the Assistant Director to decide whether the purported rights asserted by Monolith as the basis for the protest were valid or invalid.

VI

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as amended), the motion for a new trial is denied, and the decision of the Assistant Director is affirmed.

MASTIN G. WHITE,
Solicitor.

DAVID G. BERGER

A–26331 *Decided July 31, 1952*

Oil and Gas Lease Application—Preference-Right Lease—Informal Application—Filing Time—Insufficient Postage.

To obtain a preference-right oil and gas lease under section 1 of the act of July 29, 1942, a lessee must comply with regulations in force at the time when he files his preference-right application.

Where a regulation requires that a preference-right application for an oil and gas lease be filed on a specified form, a letter from a lessee expressing an intention to exercise the preference right does not establish a predicate for the issuance of a preference-right lease.

Where the existence of rights with respect to the obtaining of an oil and gas lease depends upon the date of the filing of an application, it is the actual filing of a proper application in the appropriate office that is significant, and not the date on which a proper application is mailed to such office.

Where an envelope containing a proper application for an oil and gas lease was tendered by the postal service to a land office subject to the payment of postage due on the envelope, and the personnel of the land office declined to pay the postage and the envelope was thereupon returned to the applicant, such tender did not constitute a filing of the application and did not establish any predicate for the issuance of an oil and gas lease on the application contained in the envelope.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

David G. Berger has appealed to the head of the Department from a decision dated August 10, 1951, by the Director of the Bureau of Land Management, which affirmed a decision by the manager of the Land and Survey Office at Salt Lake City, Utah, rejecting Mr. Berger's application (Utah 04314) for a preference-right oil and gas lease on 1,070.53 acres of land situated in secs. 3, 10, 11, 14, and 23, T. 11 S., R. 7 E., S. L. M., Utah.

From May 1, 1946, until April 30, 1951, Mr. Berger held a noncompetitive oil and gas lease (Salt Lake 065518) on the land that is involved in this proceeding. His application for a new preference-right lease on the same land was based upon section 1 of the act of July 29, 1942 (56 Stat. 726), which provided, in pertinent part, as follows:

> That upon the expiration of the five-year term of any noncompetitive oil and gas lease * * *, the record title holder shall be entitled to a preference right over others to a new lease for the same land * * *under such rules and regulations as are then in force, if he shall file an application therefor within ninety days prior to the date of the expiration of the lease. * * *[1]

[1] Section 1 of the 1942 act, as amended, was repealed by section 14 of the act of August 8, 1946 (60 Stat. 950, 958), but section 15 of the latter act saved rights existing at the time of the repeal.

The pertinent regulations in force during the 90-day period immediately preceding, and on, the date (April 30, 1951) of the expiration of Mr. Berger's lease were 43 CFR 192.42, 192.130, as amended, effective January 28, 1951 (15 F. R. 8583, 8585). Paragraph (b) of 43 CFR 192.130, as amended, provided, in part, as follows:

(b) To obtain such a new lease [pursuant to section 1 of the 1942 act], the lessee *must* * * * submit an offer on Form 4–1158 in accordance with sec. 192.42 * * *. [Italics supplied.]

Paragraphs (a) and (b) of 43 CFR 192.42, as amended, provided, in part, as follows:

(a) To obtain a noncompetitive lease, an offer to accept such a lease *must* be made on Form 4–1158, "Offer and Lease Form," or on unofficial copies of that form in current use, provided that the copies are exact reproductions on one page of both sides of the official approved one page form, and are without additions, omissions, or other changes or advertising * * *.

(b) * * * The offer *must* be filed on a form in effect at the date of filing. For the purpose of this part, an offer will be considered filed when it is received in the proper office during business hours.[2] [Italics supplied.]

The appellant's residence is in Bethesda, Maryland, and his office is in Washington, D. C. He began his attempt to exercise his preference right respecting the land under consideration here by mailing a letter dated April 12, 1951, to the manager of the Land and Survey Office, Salt Lake City, Utah, in which he expressed a desire to "renew" the existing lease and requested the necessary forms and instructions. By a letter dated April 18, 1951, and postmarked April 20, 1951, the manager mailed to Mr. Berger the proper forms to be used in applying for a new lease on the land covered by Mr. Berger's existing lease.

Mr. Berger thereafter transmitted to the manager, by air mail from Washington, D. C., an application for a new lease, properly filled out, and also the requisite filing fee and advance rental. The envelope containing these items bears the following postmark, "Washington, D. C., 10:30 p. m., April 29, 1951," and the notation, "Postage due 6 cents." The personnel of the Land and Survey Office refused to pay the postage, and the envelope was returned to the appellant unopened. In connection with the return of the envelope, it has written on it in pencil the word "Refused," and it has stamped on it "Return to writer" and "Salt Lake City, Utah, May 2, 1951, 12:30 p. m."

Mr. Berger again mailed the application to the Land and Survey Office—this time with proper postage prepaid—and the application was received in the Land and Survey Office on May 14, 1951.

In the meantime, however, Preston M. Neilson had filed an application (Utah 04250) on May 4, 1951, for an oil and gas lease on all the

[2] Paragraph (b) was amended in another respect on July 23, 1951 (16 F. R. 7419).

land covered by Mr. Berger's expired lease; and a lease had been issued to Mr. Neilson on May 7, 1951.

In words as plain as they could be written, the controlling regulations quoted above made mandatory the use of Form 4–1158, or an exact copy of that form, in applying for a new preference-right lease under the 1942 act. The applicant's letter of April 12, 1951, which was received in the Land and Survey Office on or before April 18, 1951, was not on Form 4–1158 and it was not a reproduction of the prescribed form. Therefore, the filing of that letter, though timely, did not constitute compliance with the regulations and did not provide any basis for the issuance of a new preference-right lease to Mr. Berger.

Moreover, the date (April 29, 1951) on which Mr. Berger first mailed to the Land and Survey Office a proper application for a new lease on the land involved in this proceeding has no significance in determining his rights. It is the actual filing of a proper application for an oil and gas lease in the appropriate office that establishes a predicate for the issuance of a new preference-right oil and gas lease under section 1 of the 1942 act, or for the issuance of a noncompetitive oil and gas lease under section 17 of the Mineral Leasing Act (30 U. S. C., 1946 ed., sec. 226).

This leads us to a consideration of the question whether the tender by the postal service to the Land and Survey Office in Salt Lake City of the envelope which Mr. Berger had dispatched by air mail from Washington, D. C., on April 29, 1951, and which contained his application for a new lease and the requisite filing fee and advance rental, constituted a filing of the application and supporting payments in that office. If so, the appellant's application was entitled to priority over the application filed by Mr. Neilson, because if the appellant's filing occurred on or before April 30, 1951,[3] he thereby established the necessary predicate for a new preference-right lease under section 1 of the 1942 act, and if his filing occurred on May 1 or 2, his application was entitled to be treated as a regular application for a noncompetitive oil and gas lease on the land covered by the application,[4] and, being senior in point of time to the application which Mr. Neilson filed on May 4, the appellant's application would take precedence over the Neilson application under section 17 of the Mineral Leasing Act.

We have previously seen that 43 CFR 192.42(b) provided as of the time when Mr. Berger mailed his application that an application

[3] It seems unlikely that the application was offered for delivery by April 30, 1951. It appears that an air-mail communication postmarked in Washington, D. C., at 10:30 p. m., on April 29, 1951, would not have reached Salt Lake City, Utah, prior to the late afternoon of April 30, 1951, and that it would not have been delivered until the next day.

[4] *William H. Phipps*, A–25720 (August 19, 1949).

for an oil and gas lease "will be considered filed when it is received in the proper office during business hours." In the present case, if it were to be held that the personnel of the Land and Survey Office improperly refused to accept the envelope containing the appellant's application when it was tendered by the postal service for delivery on or before May 2, 1951, it might seem appropriate to regard the application as having been "received" in the Land and Survey Office at that time.

Hence, the answer to the question whether the tender by the postal service to the Land and Survey Office of the envelope dispatched by the appellant on April 29, 1951, constituted a filing of the appellant's application apparently turns upon whether the refusal of personnel of the Land and Survey Office to accept the envelope because it lacked sufficient postage was improper. Section 3900 of the Revised Statutes (39 U. S. C., 1946 ed., sec. 272) forbids the delivery of mail until the postage thereon has been paid. The personnel of the Land and Survey Office was under no obligation to pay the postage due on mail addressed to that office, nor could the appellant have reasonably expected that anyone in the office would defray the cost of the postage for him. It was the responsibility of the appellant to affix the proper postage to the envelope containing his application. He cannot shift any part of that responsibility to the personnel of the Land and Survey Office.

It necessarily follows that the refusal by the personnel of the Land and Survey Office to accept the envelope which the appellant dispatched from Washington, D. C., on April 29, 1951, was not improper; and that the tender of that envelope to the Land and Survey Office by the postal service, subject to the payment of the postage due on it, did not establish a predicate for the issuance of an oil and gas lease on the application contained in the envelope.

For the reasons indicated above, there appears to be no proper basis for disturbing the decision below.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director is affirmed.

MASTIN G. WHITE,
Solicitor.

MABEL E. HALE, GRACE E. VAN HOOK

A-26358 *Decided August 21, 1952**

Oil and Gas Lease—Preference-Right Application—Timeliness of Filing.

The Department is not authorized to extend the time for filing an application for a preference-right oil and gas lease under the act of July 29, 1942, beyond the date of the expiration of the base lease.

Where the base oil and gas lease expires on a nonbusiness day, an application for a new preference-right lease filed on the first day thereafter that the land office is open for business cannot be regarded as timely filed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mabel E. Hale has appealed from a decision by the Director of the Bureau of Land Management which rejected her application (New Mexico 04543) for a preference-right oil and gas lease on sec. 1 and the SW¼ and the N½ of sec. 11, T. 20 S., R. 30 E., N. M. P. M., New Mexico, containing 1,120 acres. The application was filed pursuant to section 1 of the act of July 29, 1942, as amended.[1]

Mrs. Hale's application was based upon oil and gas lease Las Cruces 063614 covering this land. That lease was issued to Mrs. Hale on January 1, 1946, and it terminated by operation of law on Sunday, December 31, 1950.

The land and survey office having jurisdiction over the land under consideration here was closed on Saturday and Sunday December 30 and 31, 1950, and on Monday, January 1, 1951. Mrs. Hale's preference-right application was filed at 3:15 p. m. on January 2, 1951, the first day on which the land office was open for business following the expiration of the lease Las Cruces 063614.

In the meantime, at 10:30 a. m. on January 2, 1951, Mrs. Grace E. Van Hook had filed an application (New Mexico 04535) under section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1946 ed., sec. 226), for a noncompetitive oil and gas lease on the land that had been included in Mrs. Hale's expired lease.

Section 1 of the act of July 29, 1942, provided in applicable part as follows:

> That upon the expiration of the five-year term of any noncompetitive oil and gas lease * * * maintained in accordance with the applicable statutory requirements and regulations, the record title holder shall be entitled to a preference right over others to a new lease for the same land * * * under such rules and regulations as are then in force, if he shall file an application therefor within ninety days prior to the date of the expiration of the lease. * * *

*Petition for Reconsideration was denied on January 2, 1953.

[1] 56 Stat. 726, 57 Stat. 608, 58 Stat. 755, 59 Stat. 587; repealed with saving clause by secs. 14 and 15 of the act of August 8, 1946, 60 Stat. 950, 958.

A departmental regulation (43 CFR 192.130) issued pursuant to the act of July 29, 1942, and in effect at the time when the appellant's application was filed, provided in part that:

> * * * To obtain such a new lease, the lessee must, within the period beginning 90 days prior to the date of expiration of the lease and ending on the date of expiration, submit an application in accordance with sec. 192.42, accompanied by a proper filing fee and the first year's rental * * *.

The expiration date of an oil and gas lease cannot be extended by the discretionary action of an administrative official (with an exception not here relevant regarding the suspension of operations under a lease), and departmental decisions have consistently held that the time for filing a preference-right application under section 1 of the act of July 29, 1942, cannot be extended administratively beyond the expiration date of the base lease. *Charles R. Wright*, A-26220 (June 25, 1951); *William J. Howe*, A-26205 (August 28, 1951); *L. R. O'Rear, A. L. Greer*, A-25859 (July 12, 1950); *William H. Phipps*, A-25720 (August 19, 1949); *H. P. Saunders, Jr.*, 59 I. D. 41 (1945); see Solicitor's opinion M–36045 (July 26, 1950).

On this appeal, however, it is asserted that Mrs. Hale's application was filed within the time prescribed by section 1 of the act of July 29, 1942. Reliance is placed by the appellant upon the rule stated in the case of *R. R. Rousseau*, 47 L. D. 590 (1920), that in all cases where the last day of the statutory period within which an act is required to be performed falls on Sunday or on a legal holiday, such period shall be held to include the next following business day.

However, the *Rousseau* case is clearly distinguishable from the present appeal, because the provision in the act of July 29, 1942, which is involved in this appeal is a time limitation of a kind different from that which was involved in the earlier case.

In the *Rousseau* case, conflicting claimants endeavored to assert preference rights to a prospecting permit on a tract of public land under section 13 of the Mineral Leasing Act.[2] It was necessary to interpret a statutory provision granting to a qualified applicant a preference right to a prospecting permit "during a period of 30 days following" compliance with the requirements regarding the location of the claim and the posting of notice on the claim. The only way to determine the end of the preference-right period was to count 30 days following the posting of the required notice. This kind of a provision gives a designated number of days to a claimant for the performance of a required act, and the intent seems to be that the claimant shall have the full number of days specified in the statute within which to

[2] 41 Stat. 437, 441. The section has since expired by its own terms.

act. To allow this period to be curtailed by a Sunday or a holiday falling at the end of the period would thus defeat the legislative intent.

On the other hand, the obvious intent regarding the end of the period prescribed by the very different provision in section 1 of the act of July 29, 1942, is to cut off the privilege when the lease expires, rather than (as in the *Rousseau* case) to give the claimant the full measure of a designated number of days within which to act. In the context, the purpose and effect of the phrase "within ninety days" in section 1 of the act of July 29, 1942, are to fix the earliest date on which an application for a preference-right lease may be filed.[3] That phrase has no real significance from the standpoint of determining just when the preference-right period terminates under the act, because the termination is fixed by the occurrence of a definite event, i. e., the expiration of the lease, and it is unnecessary to compute time or to count days in order to determine when the period ends.

Therefore, for the purpose of this appeal, there is no question as to the number of days allowed for the filing of preference-right applications, and section 1 of the act of July 29, 1942, can be considered as if it provided merely that a preference-right application must be filed prior to the expiration of the base lease. In cases requiring the interpretation of similar time limitations, it has been held that the rule contended for by the appellant is not applicable and that when an act is required to be done before a definite time or before a stated event, and the stated time or event occurs on a Sunday or on a holiday, the required act must be performed before the final Sunday or holiday. *State ex rel. Alton R. Co.* v. *Public Service Commission*, 155 S. W. 2d 149 (Mo., 1941); *Hutchins* v. *County Clerk of Merced County et al.*, 35 P. 2d 563 (Calif., 1934). The same conclusion must follow with respect to section 1 of the act of July 29, 1942. This conclusion is not affected by the fact that the expiration date in the present case fell on a Sunday, and was preceded and followed by nonbusiness days.

For the reasons indicated above, there is no valid basis for modifying the Director's decision holding that Mrs. Hale's application, New Mexico 04543, was not timely filed under section 1 of the act of July 29, 1942, and does not provide any basis for the issuance of a preference-right lease to her.

Section 17 of the Mineral Leasing Act provides, *inter alia*, that the first qualified applicant for an oil and gas lease on land outside the known geologic structure of a producing oil or gas field is entitled

[3] Without a statutory beginning date for the period, the assertion of a preference right for a new lease would be possible immediately upon the issuance of the original lease. In setting such a date, Congress was concerned with barring a premature preference-right claim, rather than with assuring that a claimant should have exactly so many days for making the claim.

to a lease on the land if the Department decides to make it available for oil and gas development. Accordingly, since Mrs. Hale's application was not filed in time to establish a preference right to a new lease under section 1 of the act of July 29, 1942, her application is subordinate to Mrs. Van Hook's previously filed application.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

JOHN C. STEWART

A-26369 *Decided August 22, 1952*

Noncompetitive Oil and Gas Lease—Notice—Time Limit—Reinstatement of Application.

It was appropriate for the manager of a land and survey office, in transmitting oil and gas lease forms for execution by a person whose application for a noncompetitive oil and gas lease had been approved, to fix a time limit of 30 days for action by the applicant, and to reject the application upon the applicant's failure to comply with this requirement.

As the action of the manager of a land and survey office in fixing a time limit for the execution of lease forms by the successful applicant for a noncompetitive oil and gas lease was not required by any statutory provision or departmental regulation, the manager's requirement could be waived by the head of the Department (or his delegate), but such a waiver would be justified only upon the basis of a showing that compelling equitable factors warrant such action.

In a case where lease forms, together with a notice that they should be executed within 30 days, were accepted from the postal service at an applicant's address by the applicant's mother as his agent, the fact that she failed to call the documents to the applicant's attention during the period of time prescribed for action by him would not warrant the waiver of the time limit and the reinstatement of the application after it had been rejected because of the failure of the applicant to act within the prescribed time limit.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On January 19, 1949, John C. Stewart filed an application (Salt Lake City 070795) for a noncompetitive oil and gas lease covering the SE¼ sec. 15, T. 43 S., R. 15 W., S. L. M., Utah, pursuant to section 17 of the Mineral Leasing Act of February 25, 1920, as amended (30 U. S. C., 1946 ed., sec. 226). On October 30, 1950, Richard Hungate filed an application (Salt Lake City 02553) for an oil and gas lease which included the land applied for by Mr. Stewart.

By a decision dated January 30, 1951, the manager of the Salt Lake City Land and Survey Office found that Mr. Stewart was entitled to receive an oil and gas lease on the land for which he had applied. The decision allowed Mr. Stewart a period of 30 days "from notice hereof" in which to execute the prescribed lease forms. It was expressly stated in the decision that "Failure to comply within the time allowed will result in the final rejection of the application without further notice."

It appears that a copy of the manager's decision and the prescribed lease forms were sent by registered mail to Mr. Stewart at 176 South 11th East, Salt Lake City, Utah, which was the address given in his application. The return receipt, dated February 2, 1951, was signed by Mrs. John R. Stewart (the applicant's mother), as agent for Mr. Stewart.

No action was taken by Mr. Stewart in response to the decision, and on March 15, 1951, the case relating to his application was closed on the books of the Bureau of Land Management.

On April 18, 1951, Mr. Stewart filed with the Salt Lake City land office a petition for the reinstatement of his application. The lease forms which had previously been sent to him were duly signed and accompanied his petition.

In his petition for reinstatement, Mr. Stewart stated that his mother, Mrs. John R. Stewart, who had signed the return receipt for the manager's decision and attached lease forms on February 2, 1951, was suffering from the infirmities of age and had failed to inform him of the receipt of such documents until April 17, 1951. Mr. Stewart stated further that Mrs. John R. Stewart was not his agent and was not authorized to accept on his behalf the manager's communication.

On April 19, 1951, the manager of the Salt Lake City Land and Survey Office denied the petition for reinstatement. The applicant appealed to the head of the Bureau of Land Management from the manager's decision, and on September 19, 1951, the Acting Director of the Bureau of Land Management affirmed the manager's decision. The present appeal to the head of the Department was then taken by Mr. Stewart.

The 30-day limitation imposed by the manager of the Salt Lake City Land and Survey Office on action by Mr. Stewart was not required by any statutory provision or departmental regulation. Consequently, the limitation could be waived by the Secretary of the Interior (or his delegate). *Warwick M. Downing*, A–25798 (August 16, 1950), 60 I. D. 433.

On the other hand, it was obviously in the interest of good administration that a reasonable time limit be fixed by the manager for the

completion by Mr. Stewart of his part of the procedure involved in the issuance of the lease. It would not have been business-like to permit this phase of the transaction to remain in suspension indefinitely while awaiting Mr. Stewart's pleasure. The 30-day period fixed by the manager was a reasonable one. Consequently, a waiver of the manager's requirement in this respect would be warranted only upon the basis of a showing by the appellant that compelling equitable factors in his favor outweigh the administrative principle of orderly procedure upon which the manager's requirement was based. I do not find any such showing in this case.

The lease forms, together with a clear statement that failure to execute them within 30 days would result in the final rejection of the application without further notice, were sent by registered mail to Mr. Stewart at the only address that he had given to the Land and Survey Office. Mr. Stewart had not furnished any special instructions as to the proper recipient of his mail at that address. In such circumstances, the delivery of the documents to the applicant's mother, upon her receipt as agent, at the address given by the applicant constituted all the notice that could reasonably have been expected. Thereafter, the Department was under no obligation to see to it that the envelope containing these documents was actually opened by, or called to the attention of, the addressee.

The fact that Mr. Stewart's mother failed to call his attention to the envelope or its contents does not provide any sound reason for undoing the administrative action that was taken in closing out Mr. Stewart's case, particularly as an intervening application has been filed for an oil and gas lease on the same land sought by Mr. Stewart.

I conclude that Mr. Stewart's request for the reinstatement of his application was properly rejected.

Therefore, the decision of the Acting Director of the Bureau of Land Management is affirmed.

R. D. Searles,
Under Secretary.

APPEAL OF ASSOCIATED PIPING AND ENGINEERING COMPANY, INC.

CA-168 *Decided August 25, 1952*

Contract Appeal—Failure to Give Timely Notice of Cause of Delay.

Where a contract provides that the contractor shall be excused for any delay in performance that is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, if the contractor shall notify the contracting officer in writing within a prescribed period that the

contractor has encountered such a cause of delay, the furnishing of a timely written notice to the contracting officer is a prerequisite for obtaining relief with respect to an excusable delay in performance.

The fact that a Government officer or employee had actual knowledge of a contractor's delay and its cause would not be the equivalent of the timely filing by the contractor of a written notice with the contracting officer respecting the delay and its cause.

ADMINISTRATIVE DECISION

The Associated Piping and Engineering Company, Inc., Compton, California, appealed on June 9, 1952, from the findings of fact and decision of the contracting officer dated May 9, 1952, denying the contractor's claim for relief from the payment of liquidated damages under supply contract No. I107r–53, which was entered into with the Bureau of Reclamation on September 27, 1950.

The contract was executed on the standard form for supply contracts (Form No. 33, revised, approved January 17, 1939) and in accordance with amendment No. 1 of the invitation for bids, No. 203–AD–51, dated September 6, 1950, which was made a part of the contract. It provided that the contractor would furnish wrought-iron pipe, pipe bends, screwed fittings, pipe supports, bolts, studs, nuts, anchors, tubing, and gaskets, as indicated in the specifications and in certain specified parts of a drawing which was attached to the invitation for bids and to the contract.

The contract provided for the complete delivery of the supplies to the point of destination within 30 calendar days from the date of receipt of notice of the award of the contract. The contractor received notice of the award of the contract on October 2, 1950, and the final date for the complete delivery of all the materials to the point of destination was thus established as November 1, 1950.

Delivery of all the materials was completed by the contractor on November 30, 1950. This was 29 calendar days after the date on which performance under the contract should have been completed.

Amendment No. 1 of the invitation for bids provided that liquidated damages would be assessed in the sum of $5 for each calendar day of delay in making delivery. It also contained two provisos, the second of which stated, in part, as follows:

* * * That the contractor shall not be charged with liquidated damages or any excess cost when the delay in delivery is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God or the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and delays of a subcontractor due to such causes * * * if the contractor shall notify the contracting officer in writing of the cause of any such delay, within 10 days from the beginning thereof, or within such further

period as the contracting officer shall, with the approval of the head of the department or his duly authorized representative, prior to the date of final settlement of the contract, grant for the giving of such notice. * * *

Because of the contractor's delay in performance, a total of $160 was withheld as liquidated damages by the Government in making payment under the contract. As $5 per day for the 29 days of delay would amount to $145, the contracting officer found that only that sum should have been withheld, and that the contractor was entitled, therefore, to receive $15 out of the total amount withheld.

The contractor seeks on appeal to obtain the remainder of $145 withheld from it as liquidated damages.

The record indicates that the contractor did not lay a proper predicate for a request that it be excused from the payment of liquidated damages, by furnishing to the contracting officer, within the period of time allowed for that purpose, a written notice indicating that the contractor had encountered a cause of delay which it regarded as "unforeseeable" and "beyond the control and without the fault or negligence of the contractor." In the absence of such a timely written notice, the contractor's delay cannot be excused, irrespective of the nature of the cause of the delay.

The contractor alleges that the Government inspector of the materials that were to be delivered had knowledge of the delay and of the reasons for it, and that the Department, therefore, had timely notice respecting such matters. Even if the Department was, in fact, given informal notice in this manner regarding the contractor's delay and its cause (an allegation which is not reflected by the records of the Department), such a notice would not meet the requirements of amendment No. 1 of the invitation for bids, viz, that the contracting officer shall be notified in writing of the cause of the delay within the time fixed for that purpose.

Consequently, I agree with the conclusion of the contracting officer that, in view of the contractor's failure to give timely written notice in accordance with the second proviso of amendment No. 1 of the invitation for bids, the rejection on procedural grounds of the contractor's request for relief from the assessment of liquidated damages is warranted, irrespective of whether the cause of the delay would or would not have made it excusable under the terms of the contract if a proper notice had been given. *The Mine and Smelter Supply Co.*, CA–145 (February 21, 1952); *Porcelain Products, Inc.*, CA–144 (January 16, 1952).

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 17 F. R.

6793), the decision of the contracting officer in regard to rejection of the contractor's request on procedural grounds is affirmed.

MASTIN G. WHITE,
Solicitor.

APPEAL OF WELCH INDUSTRIES, INC.

CA–153 *Decided August 27, 1952*

Contract Appeal—Procedure—Timely Protest.

Where a contractor fails to comply with a time limit prescribed in the contract for the filing of a written protest against a requirement that the contractor perform work which it believes to be outside the scope of the contract, the contractor cannot thereafter claim additional compensation, over and above that stipulated in the contract, for such work.

ADMINISTRATIVE DECISION*

This appeal involves a claim by Welch Industries, Incorporated, of Colorado Springs, Colorado, for additional compensation under contract No. I78r–275, dated August 11, 1949. The contract, which was executed on the standard form for Government construction contracts (Form No. 23, revised April 3, 1942), provided for the clearing of the "Platoro Reservoir site under the schedule of specifications No. R 5–13, San Luis Valley project, Colorado," and called for a lump-sum payment of $33,769 to the contractor.

The appeal is based upon the appellant's contention that, in connection with the performance of the contract, it was required by Government personnel in charge of the work to clear areas not covered by the terms of the contract.

As of the time when the invitation for bids in this case was issued, the plans for the Platoro Reservoir contemplated that the site of the reservoir would cover approximately 980 acres of land below contour 10,044 in the valley of the Conejos River, Colorado, extending upstream from the Platoro Dam. The proposed site included 15 timbered areas, aggregating 69.2 acres, that extended below contour 10,044 from the forest-covered mountain slopes above the valley, and approximately 910.2 acres of so-called meadow land in the floor of the valley. Except for 1.1 acres of scattered timber in the upstream portion of the meadow, the meadow land did not contain any timber, but it did contain driftwood scattered here and there.

The invitation for bids stated that sealed bids would be received "for furnishing labor and materials and performing all work for

*See supplemental decision of January 16, 1953, p. 68. [Editor.]

clearing Platoro Reservoir Site, San Luis Valley project, Colorado." The invitation further stated that "The work consists of clearing about 69 acres of land in Platoro Reservoir site, lump sum." A note at the end of the invitation for bids indicated that copies of the specifications would be furnished to prospective bidders upon request, and that "Prospective bidders desiring to visit the site of the work should communicate with the Construction Engineer."

The specifications thus referred to in the invitation for bids (the specifications subsequently were made part of the contract) described the work to be performed under the contract in the following language:

Schedule—

Clearing Platoro Reservoir site as shown on the attached drawings and in accordance with these specifications * * *.

Paragraph 15—

The requirement.—It is required that there be cleared in accordance with these specifications and the drawings listed in paragraph 20 hereof, the Platoro Reservoir site, San Luis Valley Project, Colorado. The work is situated along the Conejos River about one mile upstream from the town of Platoro, Colorado, as shown on the drawings.

Paragraph 26—

Areas to be cleared.—The area to be cleared includes all areas under contour 10,044 within the reservoir area, and all dead timber standings, protruding into, or contained in that area bounded by contour 10,044 and either contour 10,054 or a distance twenty feet horizontally beyond contour 10,044, whichever involves the lesser amount of work. The approximate areas to be cleared are shown on the drawing and the boundaries of the areas are marked on the ground. Areas Nos. 7, 14 and 15 total approximately 57.0 acres and contain all of the merchantable timber consisting of thick stands of spruce. All other areas total approximately 12.2 acres and consist of thin, scattered stands of aspen, pine, and spruce. The areas are approximate only and the contractor shall be entitled to no additional compensation because of any variation therefrom. Prospective bidders should inspect the areas to be cleared and determine the location of the boundaries, and the conditions under which the work is to be performed. * * *

Paragraph 27—

Cutting timber and brush.—All trees and all brush and stumps more than 5 feet high, having a diameter at the butt of more than 1 inch, within the areas covered by the schedules, shall be cut down, and all materials of a combustible nature, including the cut timber, dead timber, logs, snags, branches, uprooted trees, driftwood, and all other combustible material, shall be piled and burned or otherwise disposed of as provided in these specifications or as directed by the contracting officer. * * *

The schedule and paragraph 15 of the specifications, both quoted above, referred to two drawings that were attached to the specifications. The first drawing was a location map of the Platoro Dam. The second drawing was designated as the "Platoro Dam Reservoir

Clearing Area." It contained 15 numbered areas, which were designated as the "Timber Clearing Area." A table on the second drawing gave the acreage for each numbered area. The total acreage, which appeared at the bottom of the table, was 69.2 acres.

As previously indicated, the bid of $33,769 made by Welch Industries, Inc., in response to the invitation for bids was accepted by the Government. Notice to proceed with the work was received by the contractor on September 10, 1949.

The record indicates that the contractor assumed that its obligation under the contract related only to the clearing of the 15 numbered areas of timbered land, aggregating 69.2 acres, situated on the fringes of the reservoir site, but that shortly after beginning work under the contract, the contractor learned from Government inspectors assigned to the project that they expected the contractor to clear areas of the reservoir site outside the 15 numbered areas. Thereupon, the contractor addressed a letter dated October 15, 1949, to the attention of the construction engineer of the Bureau of Reclamation at Monte Vista, Colorado. In this letter, the contractor stated that "We have found that the map which is a part of our contract for the clearing of the Platoro Reservoir site does not conform to the blazed markings that your inspectors require our men to work to," and that "there are several acres that we have been required to clear that are not shown on the map." The contractor asked, among other things, that a complete survey be made of "all land that we will be required to clear," and said that "It will be appreciated if you will obtain clarification in this matter as soon as possible."

The acting construction engineer at Monte Vista replied by means of a letter dated October 19, 1949, and addressed to the contractor at Colorado Springs, Colorado. In this reply, the acting construction engineer called attention to the statement in paragraph 26 of the specifications that "The area to be cleared includes all areas under contour 10,044 within the reservation area * * *."

The contractor then addressed a letter under the date of November 10, 1949, to the contracting officer of the Bureau of Reclamation at Amarillo, Texas. That letter, which was received in the office of the contracting officer on November 14, 1949, stated that it was written "in formal protest of the work that we have been asked to do in the clearing of the Platoro Reservoir site that is not shown on the map that was furnished us as a part of our contract."

The contracting officer, in effect, rejected the protest and decided against the contractor in a letter dated December 2, 1949. The ground stated was that "The specifications required the successful contractor to clear *all areas under contour 10,044 within the reservoir area* * * *."

In a letter to the contracting officer bearing the date January 9, 1949, but which presumably was written on January 9, 1950, the contractor took an appeal to the Secretary of the Interior from the contracting officer's action of December 2, 1949.

The contractor proceeded with the work of clearing the entire reservoir site, as required by Government personnel. This included the cutting and removing of the scattered timber from the 1.1 acres of timbered land in the upstream portion of the so-called meadow, and the piling and burning of driftwood in other portions of the meadow. Upon the completion of the work, the contractor requested additional compensation in the amount of $182,160 for what it regarded as the extra work of clearing the 910.8 acres of meadow land. This claim was denied by the contracting officer in findings of fact and a decision dated November 21, 1951, and the contractor again appealed to the head of the Department under the date of December 14, 1951.

The first question to be decided is whether the contractor properly preserved its right to question the propriety of the requirement by Government personnel that it clear areas of the reservoir site outside the 15 timbered areas designated as Nos. 1 to 15, inclusive, aggregating 69.2 acres. In order to preserve its right in this respect, it was necessary for the contractor to comply with the following procedure prescribed in paragraph 12 of the specifications:

> *Protests.*—If the contractor considers any work demanded of him to be outside the requirements of the contract, or considers any record or ruling of the contracting officer or of the inspectors to be unfair, he shall immediately upon such work being demanded or such record or ruling being made, ask, in writing, for written instructions or decision, whereupon he shall proceed without delay to perform the work or to conform to the record or ruling, and, within twenty (20) days after date of receipt of the written instructions or decision, he shall file a written protest with the contracting officer, stating clearly and in detail the basis of his objection. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive. * * *

The contractor's letter of October 15, 1949, addressed to the attention of the construction engineer and requesting a clarification with respect to the demand which had been made upon the contractor by Government inspectors that it clear areas of the reservoir site outside the 15 numbered areas, could properly be regarded as a request "for written instructions or decision," in accordance with paragraph 12 of the specifications. Upon receiving the letter dated October 19, 1949, from the acting construction engineer, stating that the contractor would be required to clear all areas of the reservoir site below contour 10,044, the contractor had a period of 20 days in which to file a written protest with the contracting officer.

The record does not reveal precisely when the contractor received the letter dated October 19, 1949. However, in view of the relatively short distance between Monte Vista and Colorado Springs and the time ordinarily required for mail to be transported between those points, the letter of October 19, 1949, was probably received by the contractor on the following day, October 20, or certainly not later than the second day, October 21. Assuming for the purpose of this decision that the acting construction engineer's letter of October 19, 1949, was not received by the contractor until October 21, 1949, the contractor, under paragraph 12 of the specifications, had until November 10 for the filing of a written protest with the contracting officer. The contractor's protest to the contracting officer bears the date of November 10, 1949, but it was not received in the office of the contracting officer until November 14, 1949. Hence, the protest was filed after the expiration of the 20-day period prescribed by paragraph 12 of the specifications, and, as a result, it was ineffective for any purpose.

Since the contractor did not file a timely protest with the contracting officer under paragraph 12 of the specifications in order to preserve its right to question the propriety of the requirement that it clear areas of the reservoir site outside the timbered areas designated as Nos. 1 to 15, inclusive, it is unnecessary to consider whether the contractor thereafter took a timely appeal to the head of the Department from the contracting officer's decision of December 2, 1949, on the belated protest filed by the contractor.

Also, since the appeal is being disposed of on a procedural point, there is no occasion for a determination on the substantive question whether the acting construction engineer and the contracting officer correctly construed the contract in requiring the contractor to clear the entire 980 acres of the reservoir site.

For the reasons indicated above, I conclude that it would not be proper to allow the claim made by the contractor for additional compensation in the amount of $182,160.

Determination

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 24, Order No. 2509, as revised; 17 F. R. 6794), the action of the contracting officer in rejecting the claim of the appellant for additional compensation under contract No. I78r-275 is affirmed.

Mastin G. White,
Solicitor.

CA–153 (Supp.) *Decided January 16, 1953*

Contract Appeal—Timeliness of Appeal—Questions of Fact and Law—Finality of Decisions of Contracting Officer—Interpretation of Contracts—Ambiguity.

Appeals which involve mixed questions of fact and law are not subject to the 30-day limit prescribed in article 15 of the standard Government construction contract, as that article relates only to "disputes concerning questions of fact."

Decisions of contracting officers concerning disputes arising under article 15 of the standard Government construction contract are final and conclusive only as to questions of fact.

Questions involving interpretation of the contract or its specifications are questions of law or sometimes of mixed law and fact.

In the interpretation of contracts, it is a well-established axiom of the law that they must be read as a whole.

Where there is a repugnancy in the wording of a contract, a general provision in the contract must give way to a special provision concerning the same ground.

When a contract is drawn by one of the parties to it and one or more of its provisions are ambiguous, and the intention of the parties does not otherwise appear, the interpretation given to the ambiguous provision or provisions by the party who did not draw the contract will govern.

When a definite statement is, in good faith but erroneously, made in the specifications accompanying a Government contract, and, due to the nature of the matter concerning which the statement is made, the contracting party is unable to discover the error and reasonably relies on the statement to his detriment, even though he may have been told to inspect and did, in fact, do so, the Government will be responsible for the additional expense involved.

When a contracting officer by letters to the contractor erroneously construes the terms of a contract, with the result that the contractor performs work not required by the contract, such letters are in effect change orders requiring extra work for which an equitable adjustment should be made under article 3 of the contract.

SUPPLEMENTAL DECISION

On August 27, 1952,* I rendered an adverse decision on the appeal of Welch Industries, Inc., of Colorado Springs, Colorado, for additional compensation under contract No. I78r–275, dated August 11, 1949. The ground of the decision was that the appellant had not complied with the procedure prescribed in paragraph 12 of the specifications, requiring that a protest be made in writing to the contracting officer within 20 days if the contractor should consider any work demanded of it to be outside the requirements of the contract. *Perry McGlone* v. *United States*, 96 Ct. Cl. 507, 535–536 (1942); *The Shoshone Company*, CA–112 (April 23, 1951); *Peter Kiewit Sons' Company*, CA–50, CA–51 (March 24, 1950).

*P. 63.

The protest involved in the appeal related to an administrative decision contained in a letter dated October 19, 1949, and mailed at Monte Vista to the contractor at Colorado Springs, Colorado. The contractor's protest was not received until November 14, 1949.

The attorney for the contractor, after the decision of August 27, 1952, was rendered, requested a reconsideration and an opportunity to be heard, and I granted his request. At the time of the conference (September 23, 1952), I indicated that I would accept and consider an affidavit from a competent official of Welch Industries, Inc., with respect to the date on which the company actually received the letter dated October 19, 1949.

By a letter dated October 18, 1952, the attorney for the contractor transmitted to me an affidavit executed by R. R. Welch, president of Welch Industries, Inc., on October 10, 1952. In the affidavit, Mr. Welch asserts that, to the best of his knowledge, both he and his project superintendent were in camp at Platoro from October 17, 1949, to October 29, 1949; and that, because they were in camp between those dates, he (Mr. Welch) could not have received the letter of October 19, 1949, until Sunday, October 30, 1949, at which time he returned to his office in Colorado Springs, Colorado. He further asserts that he "was at the time very conscious of the twenty-day limitation on his right to appeal from the decision contained in the said letter dated October 19, 1949 * * * [and] that he is positive in his own mind that his letter of protest dated November 10, 1949, was mailed well within the twenty day time limit * * *."

As Mr. Welch also asserts that his recollections on this matter are the best evidence that he has available, and as he has sworn to the veracity of his statements, I am constrained to accept his affidavit as sufficient proof that the administrative decision of October 19, 1949, was not received by the contractor until October 30, 1949. On that basis, the filing of the protest by the contractor on November 14, 1949, was within the 20-day period prescribed for that purpose by paragraph 12 of the specifications.

Some of the facts given in my original decision will be repeated briefly, for the sake of clarity, in this decision.

The contract, which was executed on the standard form for Government construction contracts (Form No. 23, revised April 3, 1942), provided for the clearing of the "Platoro Reservoir Site under the schedule of Specifications No. R 5–13, San Luis Valley Project, Colorado," and called for a lump-sum payment of $33,769 to the contractor.

The appeal was based upon the appellant's contention that, in connection with the performance of the contract, it was required by Gov-

ernment personnel in charge of the work to clear areas not covered by the terms of the contract.

At the time when the invitation for bids in this case was issued, the plans for the Platoro Reservoir contemplated that the site of the reservoir would cover approximately 980 acres of land below contour 10,044 in the valley of the Conejos River, Colorado, extending upstream from the Platoro Dam. The proposed site included 15 timbered areas, aggregating 69.2 acres, which were numbered and marked off on the area map accompanying the specifications and which extended below contour 10,044 from the forest-covered mountain slopes above the valley, and approximately 910.2 acres of so-called meadowland in the floor of the valley. Except for 1.1 acres of scattered timber in the upstream portion of the meadow, the meadowland did not contain any timber, but it did contain driftwood scattered here and there.

The invitation for bids stated that sealed bids would be received "for furnishing labor and materials and performing all work for clearing Platoro Reservoir site, San Luis Valley Project, Colorado." The invitation further stated that "The work consists of clearing about 69 acres of land in Platoro Reservoir site, lump sum." A note at the end of the invitation for bids indicated that copies of the specifications would be furnished to prospective bidders upon request. It was also stipulated that "Prospective bidders desiring to visit the site of the work should communicate with the Construction Engineer," and the record indicates that a representative of the contractor did, in fact, visit the site prior to submission of its bid.

The contractor received notice to proceed with the work on September 10, 1949, and it was not long before it became evident that the contractor had assumed that its obligation under the contract related only to the clearing of the 15 numbered areas of timbered land, aggregating 69.2 acres, situated on the fringes of the reservoir site.

Shortly after commencing its work under the contract, the contractor learned from the Government inspectors assigned to the project that they expected the contractor to clear areas of the reservoir site that were outside the 15 numbered areas. Thereupon, the contractor addressed a letter dated October 15, 1949, to the attention of the construction engineer of the Bureau of Reclamation at Monte Vista, Colorado. In that letter, the contractor stated that "We have found that the map which is a part of our contract for the clearing of the Platoro Reservoir Site does not conform to the blazed markings that your inspectors require our men to work to," and that "there are several acres that we have been required to clear that are not shown on the map." The contractor asked, among other things, that a complete survey be made of "all land that we will be required to clear," and

said that "It will be appreciated if you will obtain clarification in this matter as soon as possible."

The acting construction engineer at Monte Vista replied by means of a letter dated October 19, 1949, and addressed to the contractor at Colorado Springs, Colorado. In that reply, the acting construction engineer called attention to the statement in paragraph 26 of the specifications that "The area to be cleared includes all areas under contour 10,044 within the reservation area * * *."

The contractor then addressed a letter under the date of November 10, 1949, to the contracting officer of the Bureau of Reclamation at Amarillo, Texas. That letter, which was received in the office of the contracting officer on November 14, 1949, stated that it was written "in formal protest of the work that we have been asked to do in the clearing of the Platoro Reservoir site that is not shown on the map that was furnished us as a part of our Contract."

The contracting officer, in effect, rejected the protest and decided against the contractor in a letter dated December 2, 1949. The ground stated for that rejection was that "The specifications required the successful contractor to clear *all areas under contour 10,044 within the reservoir area* * * *."

In a letter to the contracting officer bearing the date January 9, 1949, but which presumably was written on January 9, 1950, the contractor took an appeal to the Secretary of the Interior from the contracting officer's action of December 2, 1949, in rejecting the contractor's protest. This appeal was not forwarded to the office of the Secretary, but was retained by the contracting officer.

The contractor proceeded with the work of clearing the entire reservoir site, as required by Government personnel. This included the cutting and removing of the scattered timber from the 1.1 acres of timbered land in the upstream portion of the so-called meadow, and the piling and burning of driftwood in other portions of the meadow. Upon the completion of the work, the contractor requested additional compensation in the amount of $182,160 for what it regarded as the extra work of clearing the 910.8 acres of meadowland. This claim was denied by the contracting officer in findings of fact and a decision dated November 21, 1951, and the contractor again appealed to the head of the Department under the date of December 14, 1951.

The question of the timeliness of the contractor's appeal of January 9, 1950, to the head of the Department will be discussed first.

By the letter of December 2, 1949, the contracting officer had rejected the contractor's protest of November 10, 1949, against the administrative requirement that it clear the entire reservoir site. The contracting officer had stated in that letter that the boundaries of the

clearing "* * * remain unchanged, with the original stakes and tree blazing being currently used for line and grade on the clearing work you are performing. The areas identified on the plat and in the specifications are for information purpose only and are not the basis upon which bids were requested, or accepted. Rather, bids were for the entire job, regardless of extent. * * * Furthermore, Article 26 [of the Specifications] reads in part: 'The areas are approximate only and the contractor shall be entitled to no additional compensation because of any variation therefrom.'"

If the contractor's appeal of January 9, 1950, had been based solely on questions of fact, it apparently would not have been timely, because it appears that there probably was a lapse of more than 30 days (the time limit fixed by Article 15, "Disputes", of the contract for appeals to the head of the Department from findings of fact made by the contracting officer) between the time when the contractor received the contracting officer's letter of December 2, 1949, and the time when the contracting officer received the contractor's letter of January 9, 1950. However, the 30-day time limit prescribed in Article 15 of the contract applies only to "disputes concerning questions of fact arising under this contract," and would not necessarily be applicable in cases involving questions of law.

As the court said in *Callahan Construction Co.* v. *United States*, 91 Ct. Cl. 538, 616–617 (1940):

> The rule is well established by the decided cases that in contracts of this character where, as in art. 15 above-mentioned relating to disputes, it is provided that the decision of the contracting officer and the head of the department shall be final and conclusive only as to questions of fact, a decision or ruling on a protest or appeal which involves or is based upon an interpretation and construction of a contract and the specifications is a decision on a question of law rather than the determination of a fact and does not preclude the consideration, decision, and determination by the court of the question in controversy, including the facts. *Rust Engineering Co.* v. *United States*, 86 C. Cls. 461, 473. In *Davis et al.* v. *United States*, 82 C. Cls. 334, this court held that the competency of the parties to a Government contract to stipulate that the decision of disputed questions by the contracting officer of the Government, or by the head of the department on appeal, shall be final and conclusive is limited to questions of fact and, therefore, does not include questions involving construction of the contract which are questions of law. * * * In *Rust Engineering Co.* v. *United States, supra*, this court held that "Under Art. 15 of the contract only decisions *as to questions of fact* by the contracting officer and the head of the department concerned, if an appeal was taken, were to be final and conclusive upon the parties. No appeal was required from any decision of the contracting officer, except as to questions of fact." * * *

To similar effect, see *Silas Mason Co.* v. *United States*, 62 F. Supp. 432, 435 (1945); *Rogers et al.* v. *United States*, 99 Ct. Cl. 393, 408 (1943).

As the contractor's appeal of January 9, 1950, related to the question whether the contract and specifications, properly construed, required the contractor to clear the entire reservoir site or only the 15 numbered areas of timbered land aggregating 69.2 acres, and as this was a question of law, or perhaps a mixed question of law and fact, it appears that the appeal was not subject to the 30-day time limit prescribed in Article 15 of the contract, which related only to "disputes concerning questions of fact."

Consequently, the controversy will be considered on its merits.

It is asserted by the contractor that, while certain parts of the invitation to bid, of the specifications, and of the contract mentioned the clearing of "all areas" in the reservoir site, the words "all areas" referred to the 69.2 acres that were specifically shown on the map of the general area that was made a part of the specifications. It was the view of the contracting officer, on the other hand, that the reference to the 15 specific areas was merely for the purpose of pointing out the timbered areas in the general area, and that the invitation to bid, the schedule, the specifications and the contract all refer in various ways to the clearing of the whole Platoro Reservoir site.

It is a well-established axiom of the law that contracts must be read as a whole. *Staton* v. *Reynolds Metals Co.*, 58 F. Supp. 657 (W. D. Ky., 1945); *J. A. La Porte Corp.* v. *Mayor and City Council of Baltimore*, 13 F. Supp. 795 (D. Md., 1936). The courts have also long held that "effect should be given, if possible, to every word, phrase, clause, and sentence of a contract. And apparently conflicting provisions should be reconciled, if that can be done by any reasonable construction." *F. W. Woolworth Co.* v. *Petersen*, 78 F. 2d 47, 48–49 (10th Cir. 1935). Also see *Sasinowski* v. *Boston & M. R. R.*, 74 F. 2d 628 (1st Cir. 1935).

In the present instance, the wording of the invitation to bid, of the schedule, of the specifications, and of the contract is, at best, ambiguous. The invitation to bid refers in the first paragraph to the clearing of the Platoro Reservoir site, and gives the general location of the work. The second paragraph of the invitation to bid states that the work consists of clearing about 69 acres in the Platoro Reservoir site, lump sum, while the third paragraph states that the specifications will be a part of the contract. The schedule contains the provision that "Bids will be considered on the following schedule, but no bid will be considered for only a part of the schedule," yet the work is described as "clearing Platoro Reservoir site as shown on the attached drawings and in accordance with these specifications." One of the two drawings shows the general location of the site, while the other drawing is a detailed map of the site, with 15 specific areas marked off on

it and their total acreage is shown as 69.2 acres. In paragraph 26 of the specifications, there is a reference to the site generally and then to the specific areas. That paragraph reads in pertinent part that: "The *area* to be cleared *includes all areas under contour 10,044* within the reservoir area, * * *. *The approximate areas* to be cleared *are shown on the drawing* and the boundaries of the *areas* are marked on the ground." (Italics supplied.) It then discusses the type of timber to be found in each of the 15 marked areas and the acreage involved in each.

It appears, therefore, that as there is not only a consistent and continual reference to the Platoro Reservoir site, but also a consistent and continual reference to 15 specific and well-defined areas within the general area, the case falls within the rule stated in *Harrity et al.* v. *Continental-Equitable Title & Trust Co. et al.*, 124 Atl. 493 (Pa., 1924). In that decision the court stated that where there is a repugnancy in the wording of a contract, a general provision in the contract must give way to a special one covering the same ground.

Moreover, the courts have consistently held that "where one of the parties to a contract draws the document and uses therein language which is susceptible of more than one meaning, and the intention of the parties does not otherwise appear, that meaning will be given the document which is more favorable to the party who did not draw it. This rule is especially applicable to Government contracts where the contractor has nothing to say as to its provisions." *Peter Kiewit Sons' Company et al.* v. *The United States*, 109 Ct. Cl. 390, 418 (1947). See also, *Star-Chronicle Pub. Co.* v. *New York Evening Post, Inc. et al.*, 256 Fed. 435 (2d Cir. 1919); *Rosa Orino* v. *The United States*, 111 Ct. Cl. 491 (1948); *Sheridan-Kirk Contract Company* v. *The United States*, 52 Ct. Cl. 407 (1917); *Morrison-Knudsen Company, Inc., and Peter Kiewit Sons' Company*, CA–114 (June 27, 1951).

The contractor urges in its brief that the contracting officer should have known, because of the small amount of its bid, that it had interpreted the invitation to bid and the specifications as relating only to the clearing of the 15 numbered areas. The contractor bases its argument upon the fact that its total bid of $33,769, if it were intended to cover 980 acres, would have amounted to $34.46 per acre, which, the contractor contends, is "an impossible figure in view of the work to be done and the ruggedness of the terrain." (Contractor's Brief on Appeal, p. 22.)

In regard to this factor, however, the Acting Regional Director of the Bureau of Reclamation, Region No. 5, reported to the Commissioner of the Bureau in a letter dated August 24, 1951, that "* * * six bids were submitted for conducting these clearing operations. The low bid was approximately 93% higher than the Engineer's estimate

of $17,500 * * *." The three lowest of the six bids were in the same range, being $33,769, $33,937, and $48,000, while the two highest bids were several times larger. This case, therefore, does not appear to be parallel to those cases which hold that a party to a contract may not "snap up" an offer or bid knowing that it was made in mistake. *State of Connecticut* v. *F. H. McGraw & Co., Inc. et al.*, 41 F. Supp. 369 (D. Conn., 1941); *Tyra* v. *Cheney*, 152 N. W. 835 (Minn., 1915); *Fransen* v. *State et al.*, 240 N. W. 503 (S. Dak., 1932).

As the contract was for a lump sum for the total clearance required, and the timbered and meadow areas actually varied greatly as to the amount of work required for their clearing (the report kept by the Government indicates that the 69.2 timbered acres required approximately 97.9 percent of the total time expended by the contractor, while the remaining 910.8 acres of meadowland and the "upper meadow" required only 2.1 percent of the contractor's time), it would not be reasonable to hold that the Government knew, or should have known, by the lowness of the contractor's bid that the contractor was bidding only upon the 69.2 acres of timbered land.

Lastly, the contractor asserts that, when it was required to clear the "upper meadow," it performed work not originally contemplated by the Government, as it believes the Government did not know that this area existed. Part of this so-called "upper meadow" does not appear on the area clearing map that was made a part of the specifications, and it is impossible to determine, because of the small size of the map and the even smaller size of the general area marked on it, whether it was included on the general area location map. The contracting officer in his Report on the Contractor's Brief on Appeal admits that "part of the 'upper meadow' including an area of 1.1 acres of thin, scattered timber was not shown on the map as was anticipated by the specifications * * *." (P. 13.)

The Bureau of Reclamation apparently intended to include the "upper meadow" on the drawings accompanying the specifications. This part of the contractor's claim, therefore, appears to fall within the general rule laid down in a number of cases involving Government contracts that when a definite statement is, in good faith but erroneously, made in the specifications accompanying a Government contract, and, due to the nature of the matter concerning which the erroneous statement is made, the contracting party is unable to discover the error and reasonably relies on the statement to his detriment, even though he may have been told to inspect and did, in fact, do so, the Government will be responsible for the additional expense involved. *Christie* v. *United States*, 237 U. S. 234 (1915); *Hollerbach* v. *United States*, 233 U. S. 165 (1914); *Industrial Salvage Corporation* v. *The*

United States, 122 Ct. Cl. 611 (1952); *Sheridan-Kirk Contract Co.* v. *The United States*, 53 Ct. Cl. 82 (1917).

I am constrained to conclude that as the contract was ambiguous and as ambiguities in contracts must be resolved against the party drawing the instrument, the contractor's interpretation of the contract must govern in this case, and all work which it performed over and beyond the clearing of the 15 numbered areas, comprising 69.2 acres, of timbered land was, in effect, extra work for which a change order should have been issued by the contracting officer. Under my construction of the contract, therefore, the contracting officer's letters of October 19, 1949, and December 2, 1949, were, in effect, change orders that required the performance by the contractor of extra work, for which an equitable adjustment should have been made under Article 3 of the contract. This adjustment was not made.

Accordingly, in these circumstances, I am left with no alternative but to remand the matter of the extra work to the contracting officer, with instructions that an appraisal, similar in nature to that made informally by him in his "Report on Contractor's Brief on Appeal," should be made covering the nature of the work done, the type of areas cleared, and the number of man-hours spent on the work, and that a fair and equitable price should be fixed for this extra work in accordance with the terms of Article 3 of the contract.

In order that the contractor may be accorded the full benefit of its administrative remedies under the contract, the price which the Government intends to pay for the work should be communicated to it. If acceptable to the contractor, an agreement for payment should be incorporated into a change order. If the price proposed is not acceptable to the contractor, the matter may be brought again before the head of the Department by the contractor in accordance with the provisions of the contract, together with a record adequate to permit the making of a determination.

I have noted that the contractor wrote to the General Accounting Office on May 18, 1951, concerning this matter. For the information of that office, therefore, a copy of this decision is being forwarded to it.

DETERMINATION

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 24, Order No. 2509 as amended; 17 F. R. 6793), the decision of the contracting officer dated November 21, 1951, is reversed, and the case is remanded to the contracting officer, who is directed to proceed according to the directions contained in this decision.

MASTIN G. WHITE,
Solicitor.

ALIDORE MAHLER ET AL.

A-26446 *Decided November 14, 1952*

Railroad Land Grant—Withdrawal—Preemptive Right—Equitable Title—Oil and Gas Lease.

Under a railroad land-grant act, the grantee did not obtain any rights as to lands situated within the indemnity limits of the grant unless and until specific tracts within such limits were specially selected in the manner prescribed by law to make up for deficiencies that had been found to exist within the primary limits of the grant.

The Commissioner of the General Land Office could not lawfully withdraw lands within the indemnity limits of a railroad land grant for the purpose of protecting the possible future right of the grantee to make indemnity selections in the event that deficiencies should be found to exist within the primary limits of the grant.

An invalid withdrawal of lands did not prevent otherwise proper entries from being made on the lands.

An entryman under a preemptive right, having made final proof, paid the purchase price, and received a final certificate, became vested with the equitable title to the land covered by the entry.

Lands to which the United States holds only the bare legal title are not subject to leasing under the Mineral Leasing Act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Alidore Mahler and others have appealed to the head of the Department from a decision dated February 7, 1952, by the Assistant Director of the Bureau of Land Management denying their respective applications [1] for the reinstatement of cash entries numbered 3466, 3467, 3461, and 3469, covering certain lands in T. 14 S., R. 18 E., Louisiana meridian, as to which the original entrymen claimed preemptive rights under section 10 of the act of September 4, 1841 (5 Stat. 453, 455).

The historical background for this appeal goes back to May 31, 1856, when the Commissioner of the General Land Office—apparently in anticipation of the imminent enactment of a statute making a land grant to the State of Louisiana for the purpose of aiding in the construction of a railroad—sent a telegram to the register and the receiver at New Orleans, directing them to "suspend from sale or location until further orders" the lands mentioned in the telegram, including the lands in T. 14 S., R. 18 E.

[1] Application B. L. M. 024679 was submitted by Alidore Mahler and J. A. Gravois.
B. L. M. 024680 was submitted by Mrs. Victoria Martinez Lorio, Miss Laurentia Martinez, Eddie Martinez, Davis Martinez, Whitney Martinez, Betty Marie Martinez, Mrs. Lavinia Martinez Torres, George Edwin Martinez, Lawrence Leo Martinez, Raymond Francis Martinez, and Marion Paul Martinez.
B. L. M. 024681 was submitted by Rene Kraemer, Fabian Zeller, Mrs. Bernadette Zeller Rodrigue, Mrs. Clara Zeller Mahler, and Allen Prestenbach.
B. L. M. 024682 was submitted by Adlar Hotard.

Three days later, there was enacted the railroad land-grant act of June 3, 1856 (11 Stat. 18), which granted to the State of Louisiana "every alternate section of land designated by odd numbers, for six sections in width on each side of" a railroad to be constructed from the Louisiana-Texas line west of Greenwood to a point on the Mississippi River opposite Vicksburg, and from New Orleans via Opelousas to the Louisiana-Texas line, and from New Orleans to the Louisiana-Mississippi line, in the direction of Jackson, Mississippi. The statute provided that if it should appear, "when the line or route of said road is definitely fixed," that any sections or parts of sections within the primary limits of the grant had been sold by the United States or preempted by settlers, the State might select, in lieu thereof, "from the lands of the United States, nearest to the tier of sections above specified, so much in alternate sections, or parts of sections, as shall be equal to such lands" sold or preempted. The granted lands were to become available for sale by the State in groups of 120 sections each as 20-mile strips of the railroad were completed from time to time.

Following the enactment of the statute mentioned above, the route of the proposed railroad was definitely located on December 5, 1856. Inasmuch as the act failed to designate the particular sections from which indemnity selections might be made, the railroad company which had succeeded to the grant was permitted to elect whether it would make such selections from the odd or even-numbered sections contiguous to the primary limits of the grant; and on April 17, 1857, the company elected to make indemnity selections from the odd-numbered sections.

It appears that on April 15, 1858, the appellants' original predecessors in interest settled on the lands involved in the present proceedings. The lands were within the indemnity limits of the grant made by the act of June 3, 1856.

Notwithstanding the instructions that had been issued by the Commissioner of the General Land Office to the effect that the lands in T. 14 S., R. 18 E., were not to be sold or located upon, the New Orleans land office permitted the entries with which we are concerned to be made in May and June of 1859 by the appellants' original predecessors in interest. Each of the entrymen made the necessary proof, paid the required price in full, and was issued a certificate, which stated that, upon its presentation to the Commissioner of the General Land Office, the entryman mentioned therein "shall be entitled to receive a patent" for the land described in the certificate.

By a letter to the register and the receiver at New Orleans dated September 13, 1860, the Commissioner of the General Land Office notified them that all the entries under consideration here had been

canceled, "the settlements having been made after the right of the railroad attached." The letter stated that "These claimants all settled April 15, 1858, and the railroad elected to take the odd sections on the 17th April 1857." The register and the receiver were directed to note the cancellations on their books and plats, and to notify the entrymen to apply for repayment of the amounts which they had previously paid to the Government for the lands included in their entries. However, the available records do not show that the entrymen were actually notified regarding the cancellation of their entries, or that any applications for repayment were filed.

Sworn statements made in connection with the present proceedings indicate that the entrymen, and their heirs, successors, or assigns, have remained in open, continuous, undisturbed, and peaceable possession of the entered lands from the date of settlement in 1858 until the present time. It appears that each of the entries has been sold several times, that the conveyances have been recorded, and that taxes have been paid on the lands.

The railroad provided for in the act of June 3, 1856, was not constructed. As a result, the land grant made in the 1856 act was forfeited by the act of July 14, 1870 (16 Stat. 277). The latter act provided, in substance, that the title of the United States was resumed as to the granted lands, and that thereafter such lands were to be disposed of as public lands of the United States.

Although the lands now under consideration remained on the records of this Department as vacant public lands after September 13, 1860 (the date of the cancellation of the entries), no application respecting them was submitted to the Department until March 21, 1951, when Patrick A. McKenna filed an application under section 17 of the Mineral Leasing Act (30 U. S. C., 1946 ed., sec. 226) for a noncompetitive oil and gas lease covering all the lands in these entries. A lease (B. L. M. 022888) was issued to Mr. McKenna effective as of July 1, 1951. By an assignment filed on July 19, 1951, and approved November 13, 1951, Mr. McKenna assigned the lease to S. Gordon Reese.

Meanwhile, the appellants on June 18, 1951, filed their applications for the reinstatement of the canceled entries. The applications contained statements under oath to the effect that the applicants had learned only recently of the cancellation of the entries.

As previously indicated, the Assistant Director of the Bureau of Land Management denied the applications on February 7, 1952. The present appeal to the head of the Department was then taken.

The holder of the oil and gas lease mentioned above has participated in these proceedings.

In considering the legal points involved in the case, it seems to be plain at the outset that the reason given by the Commissioner of the General Land Office for the cancellation of the entries on September 13, 1860—i. e., that the settlements had been made "after the right of the railroad attached"—did not provide a sound basis for the Commissioner's action.

As we have previously seen, the entered lands were within the indemnity limits of the grant made by the act of June 3, 1856. In connection with other similar railroad land-grant acts, the Supreme Court has held that a grantee did not obtain any rights as to lands situated within the indemnity limits of the grant unless and until specific tracts within such limits were specially selected in the manner prescribed by law to make up for deficiencies that had been found to exist within the primary limits of the grant. *St. Paul Railroad* v. *Winona Railroad*, 112 U. S. 720, 731–732 (1885); *Brandon* v. *Ard*, 211 U. S. 11, 21 (1908); *Osborn* v. *Froyseth*, 216 U. S. 571, 577 (1910). Here, the tracts with which we are concerned were never specially selected for indemnity purposes under the provisions of the 1856 act. Indeed, since there was no occasion to determine whether deficiencies existed within the adjacent primary limits of the grant, there was never any opportunity to select these lands for indemnity purposes. It is clear, then, that no rights were ever acquired under the 1856 act in these tracts within the indemnity limits of the grant. Hence, the Commissioner of the General Land Office was in error when he said on September 13, 1860, that the settlements of the appellants' original predecessors in interest had been made "after the right of the railroad attached."

We turn now to a consideration of the question whether, although the reason given by the Commissioner of the General Land Office for the cancellation of these entries in 1860 was unsound, the actual cancellation of the entries was correct for a reason not stated by the Commissioner—i. e., the withdrawal of these lands from sale or location by the Commissioner of the General Land Office on May 31, 1856, which was approximately 2 years before the appellants' original predecessors in interest settled on the lands and approximately 3 years before the entries were made.

It is reasonably to be inferred that the withdrawal of May 31, 1856, was made in anticipation of the enactment 3 days later of the railroad land-grant act of June 3, 1856. In decisions relating to other similar statutes, the Supreme Court has held that officials of this Department could not, in the absence of express statutory authority, withdraw lands within the indemnity limits of a railroad land grant for the purpose of protecting the possible future right of the grantee to make indemnity selections in the event that deficiencies should be found to

exist within the primary limits of the grant. *Brandon* v. *Ard*, *supra* (at p. 21); *Osborn* v. *Froyseth*, *supra* (at p. 574); *cf. Hewitt* v. *Schultz*, 180 U. S. 139 (1901).[2]

Hence, it must be concluded that the Commissioner of the General Land Office did not have the authority to withdraw these lands on May 31, 1856. As the withdrawal was invalid with regard to the lands now under consideration, it did not prevent otherwise proper entries from being made on the lands. *Brandon* v. *Ard*, *supra* (at p. 21); *Osborn* v. *Froyseth*, *supra* (at p. 576). It necessarily follows that the existence of the invalid withdrawal cannot provide any support for the cancellation of these entries on September 13, 1860, and that the cancellation was erroneous.

Each of the entrymen made final proof, paid the purchase price, and was issued a final certificate. Upon the performance of these acts, each entryman became vested with the equitable title to the land covered by his entry. *Ard* v. *Brandon*, 156 U. S. 537, 542 (1895); *Brandon* v. *Ard*, *supra* (at pp. 18–19). Despite the purported cancellation of the entries, the entrymen and their successors in interest[3] are said by the appellants to have maintained unbroken possession of the lands and to have asserted at all times their unqualified claims to the lands. In the absence of any controverting evidence tending to show abandonment of the entries, it appears that the entrymen and their successors in interest have retained the equitable title to their respective entries, and that the present holders of such interests are entitled to have the entries reinstated and to obtain patents upon applying for them.[4] *Cf. Lane* v. *Hoglund*, 244 U. S. 174 (1917).

The existence of the oil and gas lease which was issued to Mr. McKenna and which is now held by Mr. Reese does not present any obstacle to the granting of the relief mentioned above. At the time when the lease was issued, the equitable title (under the factual situation shown by the appellants) was in the appellants as the successors in interest to the entrymen, and the United States held only the bare legal title to the lands. Lands to which the United States holds only

[2] But *cf. United States* v. *Midwest Oil Company*, 236 U. S. 459 (1915), concerning the implied power of the President under the Constitution to withdraw lands for public purposes; and Solicitor's opinion M–36144 (August 4, 1952) regarding the exercise by the Secretary of the Interior of the President's implied power in this respect.

[3] After final proof, payment, and the issuance of a final certificate, preemptive rights were transferable; and the transferee took the same estate that the entryman had. *Hawley* v. *Diller*, 178 U. S. 476, 485–488 (1900); *C. P. Cogswell*, 3 L. D. 23, 26 (1884).

[4] Although the lands are now reported to be valuable for oil and gas, the appellants cannot be required to take the limited patent provided for by the act of July 17, 1914 (30 U. S. C., 1946 ed., secs. 121–123), because their rights had vested prior to the effective date of that statute and prior to any intimation that the lands were mineral in character. *Wyoming* v. *United States*, 255 U. S. 489 (1921); *Columbus C. Mabry* (on rehearing), 48 L. D. 280, 286 (1921).

the bare legal title are not subject to leasing under the Mineral Leasing Act. Solicitor's opinion M–36051 (December 7, 1950).

Accordingly, under the facts shown by the present record, the outstanding oil and gas lease must be held to have been issued without lawful authority and to be subject to cancellation.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Assistant Director of the Bureau of Land Management is reversed, and the case is remanded to the Bureau of Land Management for further handling in accordance with this decision.

MASTIN G. WHITE,
Solicitor.

PROPOSED AMENDMENTS TO THE CHARTER AND TO THE CONSTITUTION AND BYLAWS OF THE CADDO INDIAN TRIBE

Attorney Contracts—Oklahoma Indian Welfare Act—Indian Reorganization Act.

Section 3 of the Oklahoma Indian Welfare Act incorporates by reference the provisions of the Indian Reorganization Act prescribing what powers can be conferred upon an organized Indian tribe.

The provision in section 16 of the Indian Reorganization Act respecting the exercise by the Secretary of the Interior of the authority to approve for organized Indian tribes "the choice of counsel and fixing of fees" is mandatory; and it would not be permissible to insert an inconsistent provision in the charter of an Indian tribe organized under the Indian Reorganization Act or the Oklahoma Indian Welfare Act.

There is no requirement in the Oklahoma Indian Welfare Act that any prescribed percentage of the eligible voters in an Indian tribe must participate in an election to adopt a constitution and bylaws, or to adopt amendments to a constitution or bylaws.

As the Secretary of the Interior has not issued any rules or regulations concerning the amendment of constitutions and bylaws adopted by Indian tribes pursuant to the Oklahoma Indian Welfare Act, it is proper to look to the constitution of the Caddo Indian Tribe to determine what procedures must be followed in the adoption of amendments to the constitution and bylaws of that tribe.

M-36155 NOVEMBER 21, 1952.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

I am returning to you the draft of a proposed letter addressed to the Superintendent of the Southern Plains Agency, in which an election would be called to enable the voters of the Caddo Indian Tribe of Oklahoma to vote on proposed amendments to the charter and to the constitution and bylaws of the tribe.

I

Paragraph (e) of section 4 of the charter of the Caddo Indian Tribe now provides that:

In any attorney's contract hereafter executed by the Tribe, the choice of attorneys and the fixing of fees shall be subject to the approval of the Secretary of the Interior.

It is proposed that this paragraph be amended to read as follows:

In any attorney's contract hereafter executed by the Tribe, the choice of attorneys and the fixing of fees shall be subject to the approval of the Secretary of the Interior; provided, however, that in any contract with an attorney authorizing him to demand, collect, or sue for amounts due on loans made by the Tribe, and not subject to the provisions of 25 U. S. C. 81, the choice of counsel and the fixing of fees shall not be subject to such approval.

The Caddo Indian Tribe was granted a charter of incorporation pursuant to the provisions of the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967). Section 3 of the act provides in part as follows:

* * * The Secretary of the Interior may issue to any such organized group a charter of incorporation * * *. Such charter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right * * * to enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934 (48 Stat. 984) * * *.

There is no specific mention in the Oklahoma Indian Welfare Act of the power to enter into contracts with attorneys. The powers which may be granted to an Indian tribe under the Indian Reorganization Act of June 18, 1934, have been incorporated by reference, however, into the Oklahoma Indian Welfare Act. The propriety of the proposed amendment to the charter of the Caddo Indian Tribe which would relax the requirement for departmental approval of the choice of counsel and fixing of fees must depend, therefore, upon the construction put upon the provisions of the Indian Reorganization Act concerning the employment of attorneys.

Section 16 of the Indian Reorganization Act (25 U. S. C., 1946 ed., sec. 476) provides, among other things, as follows:

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior * * *.[1]

[1] Authority to approve contracts between attorney and Indian tribes was delegated to the Commissioner of Indian Affairs by Secretarial Order No. 2508, dated January 11, 1949 (14 F. R. 258, 260).

Paragraph (e) of section 4 of the charter of the Caddo Indian Tribe is based upon this provision of the Indian Reorganization Act. Having determined to grant the Caddo Indians this statutory power, the Secretary of the Interior cannot expand or restrict it. The provision in section 16 of the Indian Reorganization Act respecting the exercise by the Secretary of the Interior of the authority to approve "the choice of counsel and fixing of fees" is mandatory. Section 16 states plainly that every constitution granted to an Indian tribe *shall* vest in the tribe the powers specified in the section—including, of course, the power to employ legal counsel subject to the Secretary's approval respecting the choice of counsel and the fixing of fees—and this has been construed as mandatory from the very beginning.[2] It would not be permissible to avoid this plain statutory directive by inserting an inconsistent provision in the charter of an organized Indian tribe.

It is my opinion, therefore, that it would be contrary to the statutory requirement discussed above—which has been incorporated by reference in the Oklahoma Indian Welfare Act—for the Secretary of the Interior to approve an amendment to the charter of the Caddo Indian Tribe which would authorize the employment of attorneys for any purpose without departmental approval of the choice of attorneys and fixing of fees.

II

It appears that the suggested certifications of the proposed amendments to the constitution and bylaws of the Caddo Indian Tribe are not in proper form. They are apparently based on the assumption that at least 30 percent of those entitled to vote must vote in the election. The provision in section 3 of the Oklahoma Indian Welfare Act requiring a total vote of at least 30 percent of those entitled to vote applies, however, only to the initial ratification of a charter.

So far as the adoption of a constitution and bylaws is concerned, section 3 provides as follows:

> Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe * * *.

[2] See "Explanatory Memorandum on Drafting of Tribal Constitutions," issued by the department, pp. 1 and 12: "There are, of course, several standard provisions which should be included in every constitution, in accordance with the terms of the Indian Reorganization Act, such as provisions on the manner of adoption and ratification, the manner of amendment, and those tribal powers which are enumerated in section 16 of the Indian Reorganization Act * * *." After mentioning as the first power the power to negotiate with Government agencies, the memorandum proceeds to state: "A second power which, by the terms of the Indian Reorganization Act, is to be included in every constitution is the power 'to employ legal counsel, the choice of counsel and the fixing of fees to be subject to the approval of the Secretary of the Interior.'"

No rules or regulations concerning the amendment of constitutions and bylaws adopted pursuant to the Oklahoma Indian Welfare Act have been issued by the Secretary. In order to determine what procedure must be followed in adopting amendments to the constitution and bylaws of the Caddo Indian Tribe, reference must be made, therefore, to the constitution itself.

Article XI of the constitution of the Caddo Indian Tribe provides that amendments to the constitution and bylaws may be proposed by either of two methods, and—

> if approved by the Secretary of the Interior, shall be submitted to a referendum vote of the adult members of the Tribe, and shall be effective if approved by a majority vote.

Under this provision, an amendment to the constitution or to the bylaws would be validly adopted if a majority of those voting in the election voted in favor of its adoption, and the number of voters participating in the election would be immaterial.

It is suggested that the following form be employed in certifying the proposed amendments:

> Pursuant to an order approved on _____ by the _____ Secretary of the Interior, the attached amendments II and III to the constitution and bylaws of the Caddo Indian Tribe of Oklahoma were submitted for ratification to the adult members of the Caddo Indian Tribe of Oklahoma, and on _____ were duly adopted by a vote of ____ for and ____ against in the case of amendment II and by a vote of ____ for and ____ against in the case of amendment III, all in accordance with Article XI of the constitution of the Caddo Indian Tribe of Oklahoma.

MASTIN G. WHITE,
Solicitor.

TRANSCO GAS & OIL CORPORATION
JOAN FORD

A–26436 *Decided December 8, 1952*

Noncompetitive Oil and Gas Lease—First Qualified Applicant—Correction of Defective Application—Cancellation of Lease.

Where an application for a noncompetitive oil and gas lease is defective because it is not supported by an adequate remittance, or because it covers a larger acreage than is permitted under the departmental regulations, and the applicant cures the defect prior to the rejection of the application, the application is effective for priority purposes as of the date when the curative action is received by the appropriate office of the Department.

If the Department determines that a tract of public land which is not within any known geological structure of a producing oil or gas field will be made available for oil and gas development, the Department is under a mandatory

duty, imposed by statute, to lease the land to the qualified person who first submits a proper application for it.

Where a noncompetitive oil and gas lease was erroneously issued to a junior applicant, the lease is subject to cancellation.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Transco Gas & Oil Corporation has appealed to the head of the Department from a decision dated October 11, 1951, by the Assistant Director of the Bureau of Land Management, which affirmed the action of the manager of the Land and Survey Office at Cheyenne in rejecting the appellant's application (Wyoming 05908) for a noncompetitive oil and gas lease on the E½E½ sec. 31, T. 26 N., R. 113 W., sixth principal meridan, Wyoming.

The appellant filed its application on April 9, 1951, and submitted $80 to cover the filing fee and advance rental. On April 12, 1951, the manager notified Transco that its application was being "held for suspension" because the payment was $10 less than the amount required. On April 23, 1951, Transco paid the additional $10.

In the meantime, however, Joan Ford, on April 9, 1951, had also filed an application (Wyoming 05952) for a noncompetitive oil and gas lease on the E½E½ sec. 31, together with other lands. By a notice dated April 13, 1951, and received on April 18, 1951, Mrs. Ford was notified by the manager that her application was being held for rejection because some of the land applied for was either included in outstanding oil and gas leases or was "Deeded, Unrestricted Land." The manager allowed Mrs. Ford 15 days to withdraw the tracts in each unavailable category from her application. Mrs. Ford filed a withdrawal of those tracts on April 30, 1951. Her application, as submitted, had included 2,755.71 acres. After the elimination of the leased and deeded land, the application included 1,068.89 acres.

On May 28, 1951, the manager rejected Transco's application on the ground that it was not considered as filed until April 23, 1951, the date on which the deficiency of $10 was paid, whereas Mrs. Ford's application was filed and the filing fee and advance rental were paid by her on April 9, 1951. A lease was issued to Mrs. Ford effective July 1, 1951.

Transco took a timely appeal to the head of the Bureau of Land Management; and when the Assistant Director affirmed the manager's action, the present appeal to the head of the Department was taken.

At the time when the Transco and Ford applications were filed, the pertinent regulations provided, in part, as follows:

(d) * * * Each offer [application] must be for an area of not more than 2,560 acres, except where the rule of approximation applies.

(e) Each offer, when first filed, shall be accompanied by:

(1) A filing fee of $10 which will be retained as a service charge even though the offer should be rejected or withdrawn either in whole or in part.

(2) Full payment of the first year's rental based on the total acreage if known, and if not known, on the basis of 40 acres for each smallest legal subdivision.

* * * * * * *

(g) An offer will be rejected and returned to the offeror with any rental paid, and it will confer no priority if it is not filled in and accompanied by the payments and documents required by the regulations in Parts 191 and 192 and the instructions printed on the lease form * * *. [43 CFR 192.42 (d), (e), (g), as amended November 29, 1950, 15 F. R. 8583.]

Paragraph 9 of the general instructions printed on the lease form which the appellant and Mrs. Ford severally submitted as an application or offer declared in pertinent part that—

The offer will be rejected and returned to the offeror with any rental paid and will afford the applicant no priority if: * * * (b) The total acreage exceeds 2,560 acres * * *. (c) The full filing fee and the first year's rental do not accompany the offer * * *.

Under the plain language appearing in the regulations and instructions, each of the applications with which we are concerned was obviously defective—the Transco application because it was not supported by an adequate remittance and the Ford application because it covered more than 2,560 acres of land. Accordingly, both of the applications were clearly subject to prompt rejection.

However, the manager did not reject either application. Transco's application was held in suspension, and Mrs. Ford was allowed 15 days within which to eliminate the excess acreage from her application. Thereafter, as previously indicated, Transco, on April 23, 1951, paid the deficiency of $10 in order to bring its tender up to the amount prescribed by the regulations; and Mrs. Ford on April 30, 1951, eliminated the excess acreage from her application.

Section 17 of the Mineral Leasing Act (30 U. S. C., 1946 ed., sec. 226) provides, in pertinent part, as follows:

* * * When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease * * * shall be entitled to a lease of such lands * * *.

This provision of law is mandatory in nature. If the Secretary (or his delegate) decides, in his discretion, to lease such land for oil and gas development, he is required by this statutory directive to lease it to the first qualified person making a proper application for the lease. *Bettie H. Reid et ano.*, A–26330 (February 4, 1952) 61 I. D. 1; *John F. Deeds et ano.*, A–26287 (June 26, 1952).

Transco, by correcting its application before the application was rejected, had a proper application on file as of April 23, 1951. Mrs.

Ford also corrected her application, but this was not done until April 30, 1951.

Therefore, Transco was the first applicant to submit a proper application for the land involved in this proceeding. *James Des Autels*, A–26245 (November 14, 1951) 60 I. D. 513; *Adah G. Macauley*, A–26419 (September 3, 1952). It follows that, unless Transco was disqualified for some reason not apparent in this record, it was entitled under the law to receive an oil and gas lease on the E½E½ sec. 31.

Under these circumstances, the outstanding lease, which purported to come into existence as of July 1, 1951, and to confer on Mrs. Ford, the junior applicant, oil and gas rights respecting the E½E½ sec. 31, must be regarded as having been issued without authority of law, and, indeed, in contravention of the plain statutory mandate. Such an oil and gas lease is subject to cancellation. *Bettie H. Reid et ano.*, *supra*.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the Assistant Director's decision is reversed, and the case is remanded to the Bureau of Land Management for further proceedings not inconsistent with this decision.

MASTIN G. WHITE,
Solicitor.

CLAIM OF MARILYNN TRUSCOTT AND SOLVEIG C. EVANS

Irrigation Claim—Project Plan—Transfer of Project Before Completion of Construction—Responsibility for Operation.

Damage caused by the operation or maintenance of a project constructed by the Bureau of Reclamation, but operated or maintained at the time of the damage by an entity other than the Bureau of Reclamation, is outside the scope of the provision in the annual appropriation act providing for the payment of damages resulting from "activities of the Bureau of Reclamation."

The funds now appropriated for the activities of the Bureau of Reclamation should not be charged with damages resulting from a failure by other entities to execute a plan of construction that the Bureau was precluded from completing in due course.

T–453 (Ir.) JANUARY 15, 1953.

Marilynn Truscott and Solveig C. Evans, % Keeley and McElwain, Deer Lodge, Montana, filed a claim against the United States about October 22, 1951, in the amount of $7,500 for compensation because of damage to their land and buildings in the S½ sec. 28, T. 14 N., R. 54 E., Montana principal meridian, allegedly caused by seepage

conditions in the Buffalo Rapids project of the Bureau of Reclamation.

Presumably, since the amount of the claim is in excess of $1,000, which places it beyond my jurisdiction to consider under the Federal Tort Claims Act (28 U. S. C. sec. 2671 *et seq.*), and negligence was not alleged, the claim was filed under the provision of the annual Interior Department appropriation act which makes funds available for the payment of claims based upon property damage "arising out of activities of the Bureau of Reclamation." Under this provision, I am authorized to award compensation for damages resulting from activities of the Bureau of Reclamation where no negligence was present.

The First Division of the Buffalo Rapids project extends along the west bank of the Yellowstone River in Dawson and Prairie Counties, Montana. Along the river in this area, according to a report of the Geological Survey entitled "Ground Water Factors Affecting the Drainage of Area 2, First Division, Buffalo Rapids Irrigation Project, Montana," dated April 1951, the land rises in a series of four terraces. The complainants' land is located on the lowest terrace, No. 1. The main project canal is on terrace 3, which is narrow in this area.

It appears that a substantial area of land on terrace 1, including 100 acres belonging to the complainants, has become waterlogged since the inception of the project, and that the main canal on terrace 3 is a primary source of the water responsible for this condition. As stated on page 31 of the Geological Survey report mentioned above:

> Leakage from the main canal and precipitation are the only possible sources of recharge to the gravels that underlie terraces 3 and 4. As highly permeable materials lie between the bottom of the main canal and the water table above the waterlogged area * * * and as the rise of the level of ground water in terrace 1 reportedly has occurred since irrigation was begun, it is not surprising that the studies of canal leakage that were made by the Bureau of Reclamation in 1950 * * * show that some water is lost from the canal by seepage. Although the loss of water is small in comparison with standard permissible rates of leakage, it is nonetheless sizeable in terms of ground-water recharge. * * *

To determine whether, in view of these physical data, the complainants should be awarded damages for the undisputed seeping of their land, it is necessary to examine the history of the project in some detail.

The record shows that construction of the First Division—or, as it was formerly called, the Glendive Unit—of the Buffalo Rapids project was initiated by the Bureau of Reclamation under the Emergency Relief Appropriation Act of 1937 (50 Stat. 352). The finding of feasibility, submitted by the Acting Secretary of the Interior on June 16, 1937 (Bureau of Reclamation Project Feasibilities and Authorizations, pp. 75, 76), called for an unlined canal, excavated through earth in the most part, with priming and puddling substituted for the canal

lining. It was recognized that substantial drainage problems would occur, and provision was made for a drainage system in the following language:

(5) A drainage system which will need to be started shortly after water is delivered and the construction of which may be extended over a period of years until all of the unit is under irrigation.

The "Report on Buffalo Rapids Irrigation Project, Montana," by Assistant Engineer R. R. Robertson and dated August 1935, which formed the basis of the 1937 finding of feasibility, considered this problem in some detail. Quoting from page 50 of the report:

On practically all irrigation projects, there are certain areas whose subsoil formations are such that eventually the discharge capacity of the subterranean wasteways is exceeded by the additional load due to irrigation. The water table then rises until the surface is encrusted by the process of capillary evaporation with such alkali salts as may be in the soil and the water, or it may flood the root zone and create a marsh. In either event productivity is destroyed until drains lower and maintain the water table at safe elevations.

Drainage problems will eventually develop on parts of the Buffalo Rapids Project. An item has been included in the construction cost for this purpose at the rate of $15 per acre. * * *

It will thus be seen that the Bureau of Reclamation's plan for the construction of the project contemplated the construction of drains when and as the need for them became apparent during the existence of the project. This scheme for the orderly construction of a drainage system either by the Bureau of Reclamation or under its supervision was, however, interrupted. On April 10, 1940, the Secretary of the Interior proposed a plan to bring the project under the Water Conservation and Utilization Act (54 Stat. 1119, 16 U. S. C. sec. 590y) and on May 15, 1940, the President approved the proposal, including the following language:

I recommend * * * that the Bureau of Reclamation continue to act as the construction agency; that the bureaus of the Department of Agriculture conduct the land development program and the arrangements for settlement, repayment, and project operation; * * *. (Project Feasibilities, etc., *supra*, p. 83.)

Pursuant to this approved plan, on November 19, 1942, upon substantial completion of the irrigation works, including the distribution system, the Department of the Interior transferred them to the Department of Agriculture for operation and maintenance and for the negotiation of contracts for repayment of the reimbursable expenditures of the Department of the Interior. Under article 1 of the agreement, the Secretary of Agriculture undertook "the responsibility for the completion of construction of the project in so far as funds are made available therefor." Of the funds allocated to the Bureau of Reclamation for expenditure on the project, all sums remaining unexpended

and unobligated were transferred to the Department of Agriculture, to be used in accordance with their allocated purpose.

The Farm Security Administration of the Department of Agriculture shortly thereafter, on May 3, 1943, entered into an agreement with the Buffalo Rapids Farms Association, a corporation, whereby the association leased the project system and facilities, and agreed to operate and maintain them in the following language:

3. * * * The Association agrees to care for, operate and maintain the system and facilities in accordance with rules and regulations now or hereafter prescribed by the Secretary of Agriculture; and agrees to keep and maintain during the life of this contract and to redeliver to the Government at the termination thereof, said system and facilities in as good and efficient condition as is the case at the date of this contract, and further agrees to maintain the system at its present carrying capacity and redeliver the same without diminution thereof at the expiration of this contract, provided, however, that the Association shall not be liable to make extraordinary and excessive repairs unless the same shall be caused by the malfeasance, misfeasance, or non-feasance of the Association, its officers or agents.

The agreement contained two additional articles which have a bearing upon the extent of the managerial responsibility assumed by the Association, and indirectly by the Department of Agriculture under the transfer agreement. These articles are as follows:

10. The Association agrees, upon demand by the Government, to purchase a policy or policies of public liability and property damage insurance issued by companies approved by the Government, with limits of $5,000 for any one person and $10,000 for any one accident and with coverage adequate to protect the Association from any claim for personal injury or property damage arising out of or incident to the control, care, operation and maintenance of the said system and facilities.

* * * * * * *

16. The Association hereby waives any and all claims for damage against the Government arising from the activity or inactivity of any of the agents of the Government and will indemnify and save harmless the United States, its officers and agents, from any and all claims for damages of whatsoever nature arising out of the care, operation and maintenance of said system and facilities and all other activities undertaken by the Association in connection therewith or pertaining thereto.

Under section 3(c) of the Water Conservation and Utilization Act, as amended, *supra*, a memorandum of understanding was subsequently entered into by the Department of the Interior and the Department of Agriculture, whereby supervision and control of the irrigation system was retransferred to the Department of the Interior on April 15, 1948. The lease under which the Buffalo Rapids Farms Association operated and maintained the irrigation system was continued, with the Department of the Interior substituted for the Department of Agriculture.

The evidence is clear, I think, that it is project water which has saturated the claimants' land, and that a primary source of the water is leakage from the main canal. If the Bureau of Reclamation's plans for the construction of the project had ended with the completion of the main and branch canals and the laterals, it would have at least been arguable that the seepage was the inevitable result of operating a canal so constructed by the Bureau of Reclamation that it leaked, and that the damage therefore consequentially flowed from the construction activities of the Bureau of Reclamation.

However, as repeatedly shown in the record, the Bureau of Reclamation, anticipating that there would be drainage problems in some areas of the project, planned to construct drainage devices as they were needed to compensate for the expected leakage from the canal. When operation of the project was transferred to the Department of Agriculture, construction funds were also transferred, and the principal items of construction remaining at that time related to the drainage system.

The record includes a memorandum from the district manager to the regional director, Region 6, Bureau of Reclamation, dated September 23, 1952, containing assurances that even at this late date drainage of the seeped land by facilities recently constructed for that purpose should restore 31 acres of the land to their original value for agricultural purposes. On the basis of this memorandum and the evidence showing that the drainage system was originally planned as part of the completed project, it seems reasonable to conclude that timely construction of drains for the claimants' lands would have prevented the damage upon which the claim is based.

There is no evidence in the record that seepage from the canal had progressed to the point that claimants' land was being waterlogged in 1942, when operation of the project was turned over to the Department of Agriculture, or that, without an unreasonable amount of investigation and drilling of test wells, adequate drains to prevent seepage could have been undertaken prior to the transfer in 1942. In fact, the evidence shows that a fair crop of alfalfa was grown on the damaged area as recently as 1946.

In order for me to make an award under the provisions of the annual appropriation act, the damages must have resulted from "activities of the Bureau of Reclamation," which could only have been in relation to construction, operation, or maintenance.

If it is assumed that the damage resulted from the operation or maintenance of the project or the canal, it is clear from the facts set forth above that no damage occurred during the period when the Bureau of Reclamation was operating the project, and that from November 19, 1942, until the present time, the operation and maintenance

of the canal have been the responsibility of entities other than the Bureau of Reclamation. Any damage caused by the operation or maintenance of the project, therefore, would not have resulted from "activities of the Bureau of Reclamation" and would be outside the scope of the appropriation act.

If, on the other hand, it is assumed that the damage is attributable to the construction activities of the Bureau of Reclamation, because it constructed a leaky canal through permeable soil without providing drainage, I do not believe that it would be proper to make an award, because the responsibility for completing the construction was transferred from the Bureau of Reclamation before it was able to put into effect its authorized plan for the project, including the drainage system which would have offset the seepage from the canal. The funds now appropriated for the activities of the Bureau of Reclamation should not, in my opinion, be charged with any damages resulting from a failure by other entities to execute a plan of construction that the Bureau was precluded from completing in due course.

DETERMINATION

Therefore, in accordance with the provisions of the Interior Department Appropriation Act, 1953, and the authority delegated to me by the Secretary of the Interior (sec. 22, Order No. 2509, as amended; 17 F. R. 6793), I determine that: (*a*) Marilynn Truscott and Solveig C. Evans have suffered no damages for which they are entitled to compensation under the provisions of the Interior Department Appropriation Act, 1953; and (*b*) the claim of Marilynn Truscott and Solveig C. Evans must be denied.

MASTIN G. WHITE,
Solicitor.

PHILLIPS PETROLEUM COMPANY

A-26528 *Decided January 15, 1953*

Oil and Gas Leases—Railroad Rights-of-Way—Act of May 21, 1930—Mineral Leasing Act—Statutory Construction.

Where the Congress has accepted an administrative construction of a statute and confirmed it through the enactment of further legislation because of it, the administrative agency cannot thereafter change the statutory construction.

By virtue of administrative interpretation, accepted and confirmed by Congress, the Mineral Leasing Act of 1920 is inapplicable to oil and gas deposits underlying railroad rights-of-way acquired pursuant to the act of March 3, 1875.

An oil and gas lease issued under the Mineral Leasing Act does not include the oil and gas deposits underlying a railroad right-of-way which crosses the leased tract, even though the lease does not expressly except such deposits from its coverage.

The act of May 21, 1930, provides the exclusive authority for the leasing of oil and gas deposits underlying railroad rights-of-way acquired pursuant to the act of March 3, 1875.

The fact that an oil and gas lease on land contiguous to a railroad right-of-way was issued at a time when the departmental regulations under the act of May 21, 1930, provided that leases would be issued on oil and gas deposits in rights-of-way only if drainage was present or threatened without any obligation upon the part of the drainer to pay the Government a royalty of at least 12½ percent on the drainage does not vest in the holder of such lease, or of a preference-right lease based upon it, a contractual right to demand continued observance of the restrictions after their elimination from the regulations.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Chicago and North Western Railway Company holds, by succession, a right-of-way for railroad purposes across the W½NW¼ (comprising lots 4 and 5) sec. 6, T. 33 N., R. 75 W., 6th P. M., Wyoming. The right-of-way, which is 200 feet in width, was acquired on November 29, 1886, by a predecessor of the railroad pursuant to the act of March 3, 1875 (43 U. S. C., 1946 ed., secs. 934–939).

The W½NW¼ sec. 6 is included, together with other land, in a noncompetitive oil and gas lease (Wyoming 0249) which was issued to the Phillips Petroleum Company on May 1, 1950, pursuant to section 17 of the Mineral Leasing Act of 1920, as amended (30 U. S. C., 1946 ed., sec. 226).[1] No reference to the right-of-way is made in the lease.

On November 19, 1951, the railroad company applied pursuant to the act of May 21, 1930 (30 U. S. C., 1946 ed., secs. 301–306), for a lease on the oil and gas deposits underlying the right-of-way across the W½NW¼ sec. 6. In accordance with that act, the Assistant Director of the Bureau of Land Management, by a letter dated February 5, 1952, notified Phillips of the application and invited Phillips, "as lessee of the adjoining lands," to submit an offer or bid of the amount of compensatory royalty that it would pay for the extraction, through wells in its adjoining lands, of the oil and gas deposits under the railroad right-of-way across the W½NW¼ sec. 6. The Assistant Director also asked the railroad company, by a separate letter of the same date, to submit an offer of the amount of royalty that it would pay if a lease for the oil and gas deposits were issued to it.

[1] Phillips' lease was issued as a preference-right lease in accordance with section 1 of the act of July 29, 1942 (56 Stat. 726), and was based upon noncompetitive oil and gas lease, Cheyenne 068637, which had been issued to Anna N. Brimmer on May 1, 1945, pursuant to section 17 of the Mineral Leasing Act.

On March 5, 1952, Phillips filed a protest against the action taken in the Assistant Director's letters of February 5, 1952, and asked for reconsideration of the action. The ground of the protest was that Phillips' lease already included the oil and gas deposits underlying the railroad right-of-way across the W½NW¼ sec. 6.

On June 24, 1952, the Assistant Director of the Bureau of Land Management dismissed the protest. Phillips thereupon appealed to the head of the Department.

The appellant's basic contention is that the Mineral Leasing Act of 1920 and the act of May 21, 1930, confer overlapping or concurrent authority upon the Secretary of the Interior to issue leases covering oil and gas deposits underlying railroad rights-of-way granted under the 1875 act, and that, as the Secretary has already leased the oil and gas underlying the right-of-way in question to the appellant pursuant to the Mineral Leasing Act of 1920, he no longer has authority to issue a lease for the same deposits pursuant to the 1930 act.

The scope of the respective statutes with which we are concerned is indicated in the first section of each statute.

Section 1 of the Mineral Leasing Act, as originally enacted on February 25, 1920 (41 Stat. 437), provided, in part, as follows:

> * * * deposits of * * * oil * * * or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act * * * and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, * * * shall be subject to disposition in the form and manner provided by this Act * * *.

This language remained unchanged until the section was amended by the act of August 8, 1946 (60 Stat. 950). The present version of section 1 of the Mineral Leasing Act reads, in pertinent part, as follows:

> * * * deposits of * * * oil * * * or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, * * * and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, * * * shall be subject to disposition in the form and manner provided by this Act * * *.

Section 1 of the act of May 21, 1930, provides, in part, as follows:

> * * * whenever the Secretary of the Interior shall deem it to be consistent with the public interest he is authorized to lease deposits of oil and gas in or under lands embraced in railroad or other rights of way acquired under any law of the United States, whether the same be a base fee or mere easement * * *.

The background leading up to the enactment of the 1930 act is important in dealing with the problem before us.

In 1915, 5 years prior to the enactment of the Mineral Leasing Act, the Supreme Court held in the case of *Rio Grande Western Railroad Co.* v. *Stringham*, 239 U. S. 44, 47, that the right-of-way granted by the act of March 3, 1875, *supra*, "is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee."

A few years after the enactment of the Mineral Leasing Act, the question arose as to whether the Secretary of the Interior had authority to issue an oil and gas prospecting permit under the Mineral Leasing Act for land included in a reservoir right-of-way granted under the act of March 3, 1891 (43 U. S. C., 1946 ed., sec. 946). It was held in a departmental decision that the 1891 act was to be given the same construction as the 1875 act, that the reservoir right-of-way was a limited fee, and that the Secretary had no authority to issue the permit. *Windsor Reservoir and Canal Company* v. *Miller*, 51 L. D. 27 (1925); on rehearing, 51 L. D. 305 (1925). The view was expressed, however, that "The title to such [mineral] deposits [in the right-of-way] remains in the United States, subject only to such disposition as may be authorized by law." [51 L. D., at p. 34.]

The 1925 departmental decision, therefore, amounted to a holding that the Mineral Leasing Act, although purporting to apply to oil and gas deposits "owned by the United States," did not apply to deposits of oil and gas underlying rights-of-way granted under the 1891 and 1875 acts, despite the fact that the United States owned such deposits.

This was the view of the Department when, on December 27, 1929, Secretary Wilbur submitted to the Congress a draft of a proposed bill to authorize the leasing of oil and gas deposits underlying easements and rights-of-way. Section 1 of the proposed bill contained the identical language that is now contained in the excerpt quoted above from section 1 of the 1930 act. In his letter of transmittal, Secretary Wilbur stated that "Because of the lack of such authority in the Department [to lease the oil and gas deposits underlying rights-of-way], the oil and gas can be drained from easement and right of way lands without remuneration to or control by the Government." (S. Rept. No. 520, 71st Cong., 2d sess.)

The bill suggested by the Department was introduced in the Congress as H. R. 8154 and S. 3074. In a report dated January 11, 1930, on H. R. 8154, Secretary Wilbur sent to the House Committee on Public Lands a memorandum dated January 11, 1930, by the Commissioner of the General Land Office, which, after pointing out that the courts had held a right-of-way to be a limited fee, stated that neither the

holder of the right-of-way nor the owner of the reversion had authority under existing legislation to mine any minerals in the land (H. Rept. No. 263, 71st Cong., 2d sess.). The House and Senate committees adopted, in substance, the Department's reports in recommending enactment of the proposed legislation.

H. R. 8154 was debated at some length on the floor of the House and of the Senate. Fairly extensive excerpts from the debate have been attached to the appellant's brief. The debate indicates quite clearly that the enactment of H. R. 8154 was believed to be necessary in order to resolve a situation in which neither the holder of a right-of-way nor the United States had authority to develop the mineral deposits underlying the right-of-way, because of the nature of the right-of-way grant.

From the preceding discussion, it is plainly evident that the Congress, in enacting the act of May 21, 1930, adopted the Department's construction of the Mineral Leasing Act—which was that, despite the broad language contained in section 1 of that act, the act did not confer any authority upon the Secretary to lease oil and gas deposits underlying rights-of-way granted by the 1875 act and other similar legislation.[2] It is clear, therefore, that the 1930 act was proposed and enacted, not with the intent to supplement or to supplant the Secretary's authority under the Mineral Leasing Act of 1920, but with the intent of supplying authority that was deemed to be previously nonexistent.

Further evidence of the Department's position is to be found in the case of *Charles A. Son et al.*, 53 I. D. 270 (1931), decided less than a year after the passage of the 1930 act. In that case, Mr. Son and others protested an order dated December 9, 1930, by the Commissioner of the General Land Office requiring the submission of bids under the 1930 act for an oil and gas lease on a railroad right-of-way granted under the 1875 act. The protestants asserted, among other contentions, that the oil and gas in the right-of-way was already included in a lease which had been issued to them on November 7, 1929, pursuant to the Mineral Leasing Act for the quarter-section of land crossed by the right-of-way. The Department held that, although the existing lease described the entire quarter-section without excepting the right-of-way, nonetheless the right-of-way was a limited fee and the minerals in it were not included in the lease. This clearly constituted a holding that the Mineral Leasing Act did not cover oil and gas deposits in a right-of-way granted under the 1875 act. *Cf.*

[2] It is settled that "subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Marchie Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309 (1911); *Great Northern Railway Company* v. *United States*, 315 U. S. 262, 276 (1942).

A. Otis Birch et al., 53 I. D. 339 (1931); on rehearing, 53 I. D. 340 (1931).

This was the situation obtaining until February 2, 1942. On that date, in *Great Northern Railway Co.* v. *United States*, 315 U. S. 262, the Supreme Court overruled the *Stringham* case and held that the right-of-way granted by the 1875 act is not a limited fee but only an easement.

Three years later, as previously stated (footnote 1, *supra*), a lease covering the land involved in this proceeding was issued to Anna N. Brimmer. The Brimmer lease, like the subsequent preference-right lease on the same land that was issued to the appellant as the holder of the Brimmer lease, did not contain any reference to the right-of-way across the W½NW¼ sec. 6.

The crucial question in this proceeding is what effect the *Great Northern* decision had upon the interpretation of the Mineral Leasing Act that had obtained up to the date of that decision (i. e., that the Mineral Leasing Act was not applicable to oil and gas deposits in rights-of-way granted under the 1875 act).

It may be noted at the outset that the *Great Northern* decision did not affect the applicability of the 1930 act to oil and gas deposits in railroad rights-of-way granted under the 1875 act. The 1930 act was expressly made applicable to oil and gas deposits in railroad and other rights-of-way "whether the same be a base fee or mere easement." [3] Moreover, the Supreme Court stated specifically in the *Great Northern* decision:

> Since petitioner's right of way is but an easement, it has no right to the underlying oil and minerals. This result does not freeze the oil and minerals in place. Petitioner is free to develop them under a lease executed pursuant to the Act of May 21, 1930 * * *. [315 U. S., at p. 279.]

I do not believe that the *Great Northern* decision served to make the Mineral Leasing Act applicable, along with the 1930 act, to oil and gas deposits underlying the rights-of-way granted by the 1875 act. As we have seen, the 1930 act had been enacted some 12 years previously to provide an authority which had theretofore been deemed not to exist. The legislative history of the 1930 act shows that its enactment constituted an acceptance and confirmation by Congress

[3] The reason for the inclusion in the 1930 act of this clause, which was drafted by the Department, is not entirely clear. The only explanation for it appears in a letter dated February 13, 1930, from Secretary Wilbur to Representative Cramton, in which he referred to rights-of-way or easements granted to canal or ditch companies under the act of March 3, 1891, or similar acts "which are more nearly in the nature of easements * * *." This statement is puzzling in view of the fact that in the Windsor Reservoir and Canal Company decisions, *supra*, the Department had squarely held that rights-of-way granted under the 1891 act were limited fees, the same as railroad rights-of-way granted under the 1875 act.

of the Department's construction of the Mineral Leasing Act as inapplicable to oil and gas deposits underlying railroad rights-of-way granted under the 1875 act. The Department could not now overthrow this legislatively approved construction of the scope of the Mineral Leasing Act, merely upon the basis of the Supreme Court's change of view respecting the nature of the right enjoyed by the holder of a railroad right-of-way acquired under the 1875 act.

It must be concluded, therefore, that at the time when the Brimmer lease was issued (May 1, 1945), the 1930 act was the only statute authorizing the leasing of oil and gas deposits underlying railroad rights-of-way granted under the 1875 act. Consequently, the Brimmer lease, which was issued under the Mineral Leasing Act, could not and did not embrace the oil and gas deposits underlying the railroad company's right-of-way across the leased land, despite the fact that the lease did not contain any express exception of the land or of the oil and gas deposits in the right-of-way.

The appellant acquired the Brimmer lease by assignment, and applied for its current lease as a preference-right lease under section 1 of the act of July 29, 1942 (*supra*, footnote 1). In the application, the appellant requested that the new lease "include the same land as is presently covered by lease Cheyenne 068637." It follows, accordingly, that the appellant's current lease cannot be considered to include the oil and gas deposits in the railroad's right-of-way.

Perhaps it should be pointed out that the amendment of section 1 of the Mineral Leasing Act by the act of August 8, 1946, *supra*, did not affect the previous inapplicability of the Mineral Leasing Act to the land involved in this proceeding. Insofar as our present problem is concerned, the only pertinent changes made in section 1 by the 1946 amendment were to add lands in national monuments and lands acquired after February 25, 1920, to the category of lands excluded from the Mineral Leasing Act, and to limit the previous exception of lands withdrawn or reserved for military or naval purposes to lands within naval petroleum and oil-shale reserves. There is not the slightest inkling in the legislative history of the 1946 amendment to section 1 that the continuance without change of the other language in section 1 was intended to extend the coverage of the Mineral Leasing Act to mineral deposits underlying rights-of-way granted by the 1875 act or other statutes.

It is my conclusion, therefore, that at the time when the appellant's present preference-right lease was issued under the Mineral Leasing Act in 1950, the Mineral Leasing Act continued to be inapplicable to oil and gas deposits underlying railroad rights-of-way granted under

the 1875 act. Hence, the appellant's present lease could not extend to oil and gas deposits underlying the railroad right-of-way in the W½NW¼ sec. 6.

The appellant argues that, in any event, a lease should not be issued under the 1930 act on the oil and gas deposits underlying the railroad right-of-way in the W½NW¼ sec. 6. The appellant cites the departmental regulations (43 CFR, 1940 ed., 192.65–192.73) under the 1930 act which were in effect at the time when the Brimmer lease was issued and which provided, in part, as follows:

> No lease will be authorized [under the act of May 31, 1930] until the Secretary of the Interior has determined that development of the right of way is necessary to offset or prevent drainage or threatened drainage of the oil and gas deposits from the right of way and consequent loss of royalty to the Government through operations on adjoining or near-by lands.
>
> As drainage through wells on lands leased by the United States at a royalty of not less than 12½ per cent does not cause loss to the Government, leases will not be issued for rights of way through such leased lands. * * *

The appellant contends that the present case is covered by the second paragraph quoted above.

The provisions quoted in the preceding paragraph (together with the other regulations relating to the 1930 act) were omitted—and, consequently, revoked—when Part 192 of Title 43 of the Code of Federal Regulations was revised in its entirety and reissued on October 28, 1946 (11 F. R. 12956). New regulations under the 1930 act were subsequently promulgated on October 10, 1947 (12 F. R. 6810), but the provisions quoted above were not incorporated in the new regulations (codified as 43 CFR 200.80–200.87). Therefore, the regulatory provisions upon which the appellant relies were no longer in effect when the appellant's preference-right lease was issued in 1950, and they have not been in effect at any subsequent time.

The appellant asserts that, even if this is so, the Brimmer lease, upon which the appellant's current lease is based, was issued while the earlier regulations were in effect, and that the earlier regulations conferred upon the original lessee the right—of which the appellant cannot now be deprived—to demand continued observance by the Department of the restrictions on leasing contained in the earlier regulations. This contention is essentially the same as that advanced in the case of *Chapman* v. *Sheridan-Wyoming Coal Company, Inc.*, 338 U. S. 620 (1950). In that case, the Sheridan-Wyoming Coal Company, the holder of a coal lease under the Mineral Leasing Act, contended that, because its lease was issued while there was in effect a departmental regulation which stated that the General Land Office (now the Bureau of Land Management) would recommend the issuance of coal leases only where a showing was made that additional coal mines were needed,

it had a contractual right not to have leases on other coal lands issued to other persons unless the required showing was made. This contention was not upheld by the Supreme Court. The reasoning of the Court in that case amply answers the contention made here.

For the reasons set out above, it appears that the dismissal of the appellant's protest was proper.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the Assistant Director's decision is affirmed.

MASTIN G. WHITE,
Solicitor.

HAROLD HARBY AND EMMA M. HARBY

A-26547 *Decided January 19, 1953*

Oil and Gas Leases—Stock-Raising Homesteads—Preference Right.

An application for an oil and gas lease on land which is subject to the right of another person to have a subsisting oil and gas lease on the same land extended is properly rejected.

Where land was patented under the Stock-Raising Homestead Act, which requires that the minerals be reserved to the United States, the owner of the surface has no preference right to an oil and gas lease under section 20 of the Mineral Leasing Act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the head of the Department by Harold Harby and Mrs. Emma M. Harby from a decision of the Associate Director of the Bureau of Land Management dated June 24, 1952, which affirmed the decision of the manager of the land office at Los Angeles, dated November 16, 1951, rejecting their application under section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1946 ed., sec. 226), for an oil and gas lease on certain land in sec. 22, T. 5 N., R. 17 W., S. B. M., California. The application was rejected because the land covered by it was said to be embraced in oil and gas lease, Los Angeles 064205.

The appellants claim that the outstanding lease had expired when they filed their application on November 2, 1951, and that they are entitled to a preference right to an oil and gas lease by virtue of their ownership of the surface of the land.

Oil and gas lease, Los Angeles 064205, was issued to Richard M. Ferguson as of November 1, 1946, pursuant to section 17 of the Mineral Leasing Act, as amended, which provides, in pertinent part:

> Upon the expiration of the primary term of any non-competitive lease maintained in accordance with applicable statutory requirements and regulations, the record titleholder thereof shall be entitled to a single extension of the lease, unless then otherwise provided by law, for such lands covered by it as are not on the expiration date of the lease within the known geological structure of a producing oil or gas field * * *. No extension shall be granted unless an application therefor is filed by the record titleholder within a period of ninety days prior to such expiration date. * * * [60 Stat. 951.]

Within the 90-day period immediately prior to the expiration of the lease, the then record titleholders thereof, Continental Oil Company and State Exploration Company, applied for an extension of the lease. By a decision dated November 15, 1951, the manager extended the lease for 5 years from the expiration date of the original lease, October 31, 1951. The extension was granted only after a determination was made that the lease had been maintained in accordance with the applicable statutory requirements and regulations, and that the lands covered thereby were not, on October 31, 1951, within the known geological structure of a producing oil or gas field. Thus, although the primary term of oil and gas lease, Los Angeles 064205, had expired on November 2, 1951, when the appellants' application was filed, the land included in their application was not available for leasing to others because of the statutory extension granted under section 17 of the Mineral Leasing Act, as amended.

The appellants' title to the surface of the land is apparently derived from a patent issued under the Stock-Raising Homestead Act of December 29, 1916 (43 U. S. C., 1946 ed., sec. 291 *et seq.*). Section 9 of that act (43 U. S. C, 1946 ed., sec. 299) provides that—

> All entries made and patents issued * * * shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented * * *.

Section 20 of the Mineral Leasing Act (30 U. S. C., 1946 ed., sec. 229) provides that—

> In the case of lands bona fide entered as agricultural, and not withdrawn or classified as mineral at the time of entry, * * * the entryman or patentee, * * * if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery * * *.

The Department has uniformly held that lands designated for entry under the Stock-Raising Homestead Act are to be regarded as having been "withdrawn or classified as mineral at the time of entry" by virtue of section 9 of that act, and, therefore, that the entryman or patentee of land under that act does not have a preference right to an oil and gas lease under section 20 of the Mineral Leasing Act. *Leonora M. McCullough Cordell*, A–25784 (December 6, 1949). Obviously, the

successors in interest of the patentee have no greater right than the patentee.

As the land involved in this proceeding was, when the appellants' application was filed, subject to the right of the record titleholders of oil and gas lease, Los Angeles 064205, to have their lease extended, and as the appellants have no preference right to a lease under section 20 of the Mineral Leasing Act, it was proper to reject their application.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Associate Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

JEANETTE L. LUSE
(FORMERLY JEANETTE L. PETERSON)
MILDRED M. HORNUNG

A–26589 *Decided January 19, 1953*

Noncompetitive Oil and Gas Lease—Preference Right—Abandonment.

Where an applicant failed to take an appeal from a manager's decision offering a noncompetitive oil and gas lease, which offer erroneously omitted part of the land applied for, and where the applicant signed a lease which did not include such land, the omission being apparent on the face of the lease, and the applicant did not appeal from this action of the manager but acquiesced for approximately 2 years in the lease as it was issued, the applicant is deemed to have abandoned the preferential right as the first qualified applicant to lease the land which was erroneously omitted from the lease.

Where the preferential right of the first qualified applicant to obtain a noncompetitive oil and gas lease has been lost by abandonment, it cannot be reestablished retroactively by administrative action to the prejudice of third persons whose rights have intervened.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On July 27, 1948, Mildred M. Hornung filed an application (Billings 041195) for a noncompetitive oil and gas lease on 720 acres of land, which included the "S½S½ sec. 6," T. 12 N., R. 57 E., Principal meridian, Montana, pursuant to section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1946 ed., sec. 226).

In a decision dated September 8, 1949, the manager of the land office at Billings offered an oil and gas lease to Mrs. Hornung for 662.21 acres of the land for which she had applied. That decision indicated that a 40-acre tract—not involved in the present proceeding

but included in Mrs. Hornung's application was covered by an outstanding lease, and Mrs. Hornung's application—was rejected to that extent. The decision itself did not describe the land for which the application was allowed. However, the lease forms which were transmitted with the decision to Mrs. Hornung for signature contained a description of the 662.21 acres to be embraced in the lease. Thereafter, the lease was executed and issued as of December 1, 1949.

The lands covered by this lease did not include lot 14 in section 6, for which Mrs. Hornung had applied (lot 14, together with the SE¼SW¼ and the S½SE¼, comprises the S½S½ of sec. 6), but did include lot 1 in section 6, for which she had not applied. The exclusion of lot 14 from the lease and the inclusion of lot 1 in the lease were inadvertent.

In a letter dated November 26, 1951, which was approximately 2 years after the lease had been issued to Mrs. Hornung, she requested, in effect, that lot 14, which had been erroneously omitted from the lease issued to her, be substituted for lot 1 in her lease. A check to cover the difference in rental charges between lot 14 and lot 1 was submitted with the request.

In the meantime, pursuant to an application (Billings 041865) filed on January 14, 1949, a noncompetitive oil and gas lease covering lot 14 in section 6 was issued as of March 1, 1950, to Jeanette L. Peterson, now Jeanette L. Luse.

On February 7, 1952, the manager of the Billings land office issued a decision requiring that Mrs. Luse show cause why her lease should not be revoked as to lot 14 and Mrs. Hornung's lease corrected to include that lot. Counsel for Mrs. Luse responded to the show-cause order within the time required by the manager's decision of February 7, 1952.

In a decision dated September 9, 1952, the Assistant Director of the Bureau of Land Management held Mrs. Luse's lease for cancellation as to lot 14. Mrs. Luse has appealed to the head of the Department from the Assistant Director's decision.

If the Department determines that a tract of public land which is not within any known geological structure of a producing oil or gas field will be made available for oil and gas development, the Department is under a mandatory duty, imposed by statute, to lease the land to the qualified person first applying for it. *Bettie H. Reid, Lucille H. Pipkin*, 61 I. D. 1 (1952); *Transco Gas & Oil Corporation et ano.*, 61 I. D. 85 (1952).

In the instant case, it appears that Mrs. Hornung was a qualified applicant for lot 14; that the land was available for oil and gas development; and that the failure to lease the land to Mrs. Hornung was due to an inadvertent clerical mistake in the land office.

However, as held in the case of *C. A. Rose*, A–26354 (May 13, 1952), where an erroneous decision of the Bureau of Land Management fails to recognize the preferential right of the first qualified applicant to obtain a noncompetitive oil and gas lease on a tract of land, and where the error is as obvious to the applicant as to anyone else, the failure of the applicant to take an appeal from such a decision is considered to be an abandonment of the preferential right; and that right cannot be reestablished by administrative action to the prejudice of third persons whose rights have intervened.

In this case, Mrs. Hornung knew, or must be deemed to have known, what land was included in her application.[1] The erroneous omission of lot 14 and the erroneous inclusion of lot 1 were apparent on the face of the lease which she signed, and an executed copy of which she presumably retained in her possession. Mrs. Hornung could have inquired about the omission of lot 14 before she signed the lease, and she could have appealed from the manager's decision of September 8, 1949, offering the lease (43 CFR 221.64). The decision itself indicated a discrepancy between the amount of land described in the lease and the acreage included in the application, even after excluding the 40-acre tract which had been included in an outstanding lease. (Lot 14 includes 35.67 acres; lot 1 includes 22.21 acres.) Mrs. Hornung was entitled also to take an appeal from the manager's action in issuing the lease effective December 1, 1949, without having included lot 14 therein. However, she took no appeal to the Director of the Bureau of Land Management, and the time for appeal expired 30 days after she received notice of the action of the manager from which she was entitled to take an appeal.

Since the error in omitting lot 14 from Mrs. Hornung's lease should have been more apparent to her as the applicant for the land than to anyone else, and since she failed to appeal from the manager's decision of September 8, 1949, and from the manager's action in executing the lease without the inclusion of lot 14, she is deemed to have abandoned the preferential right which she initiated by applying for lot 14, and to have acquiesced in the lease as it was issued.

Accordingly, Mrs. Hornung's letter dated November 26, 1951, requesting that lot 14 be included in her lease must be considered to be a new application. Her request to lease lot 14 should have been denied because the land was covered by Mrs. Luse's lease. *Jean W. Evans*, A–26267 (October 24, 1951).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17

[1] The departmental regulations in effect at the time when Mrs. Hornung's application was filed required that surveyed lands be described "by legal subdivisions" (43 CFR, 1946 Supp., 192.42).

F. R. 6794), the Assistant Director's decision holding Mrs. Luse's lease for cancellation as to lot 14 is set aside, and the case is remanded to the Bureau of Land Management for further proceedings not inconsistent with this decision.

MASTIN G. WHITE,
Solicitor.

UNION OIL COMPANY OF CALIFORNIA

A-26518 *Decided January 19, 1953*

Mineral Patent—Reconveyance of Patented Land to United States—Mineral Location on Agricultural Entry—Stare Decisis.

A mining locator of mineral land embraced in a subsisting uncompleted homestead entry, subsequently patented pursuant to the act of July 17, 1914, who has acquired the title of the surface entryman may execute a deed of reconveyance and, upon cancellation of the surface patent, receive a mineral patent.

A departmental rule based upon statutory construction which has been followed for many years and upon which applicants for public lands have relied ought not to be reversed except for cogent reasons, and any such change should be effected by regulation rather than in the adjudication of a case.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Union Oil Company of California has appealed to the head of the Department from a decision dated June 16, 1952, by the Assistant Director of the Bureau of Land Management, which held for rejection so much of its application (Colorado 0619) for a mineral patent as pertained to the E½SE¼ sec. 3, T. 6 S., R. 96 W., 6th P. M., Colorado.

On May 20, 1915, Arcadious Benson's homestead entry, Glenwood Springs 09181, covering the W½SW¼ sec. 2, E½SE¼ sec. 3, T. 6 S., R. 96 W., 6th P. M., Colorado, was allowed. On June 29, 1916, the major portion of township 6, including all of sections 2 and 3, was classified as mineral in nature, being valuable as a source of petroleum and nitrogen. On July 15, 1917, the appellant's predecessors in interest located oil-shale-placer claims on the N½S½ sec. 3 (Falls No. 2) and on the S½S½ sec. 3 (Falls No. 3). On December 9, 1921, the entryman filed his consent to have his entry controlled by the provisions of the act of July 17, 1914 (38 Stat. 509; 30 U. S. C., 1946 ed., secs. 121–123), and on March 14, 1922, the land was patented to him with a reservation to the United States of oil, gas, and oil shale or other rock valuable as a source of petroleum or nitrogen.

On January 16, 1950, the Union Oil Company filed its mineral-patent application for Falls No. 1 (N½SE¼ sec. 4), Falls No. 2, and Falls No. 3.

On August 7, 1951, the Director of the Bureau of Land Management issued a decision which rejected the application as to the E½SE¼ sec. 3. The Director stated, however, that if the applicant could reconvey to the United States the title to the surface and to minerals other than oil, gas, and oil shale in the E½SE¼ sec. 3, further consideration would be given the application for a patent for this land.

Accordingly, on August 10, 1951, the appellant submitted a deed reconveying to the United States the surface title to the E½SE¼ sec. 3. Nevertheless, by a decision dated June 16, 1952, the Assistant Director held that the reconveyance should not be accepted, and rejected the application as to the E½SE¼ sec. 3. The Union Oil Company has appealed from that decision to the head of the Department.

The appellant has offered to the United States a warranty deed conveying to the United States all "the land title and estate in the [E½SE¼ sec. 3], with which it parted by patent to Arcadious Benson, that the same may be returned to the public domain, subject to existing mineral entry."

The act of July 17, 1914, provides as follows:

> That lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to 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; but no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres. All applications to locate, select, enter, or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of the above-mentioned sections.
>
> Sec. 2. That upon satisfactory proof of full compliance with the provisions of the laws under which the location, selection, entry, or purchase is made, the locator, selector, entryman, or purchaser shall be entitled to a patent to the land located, selected, entered, or purchased, which patent shall contain a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same, such deposits to be subject to disposal by the United States only as shall be hereafter expressly directed by law. * * *
>
> Sec. 3. That any person who has, in good faith, located, selected, entered, or purchased, or any person who shall locate, select, enter, or purchase, after July 17, 1914, under the nonmineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands

were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same. [38 Stat 509.]

Until the enactment of this statute, an agricultural entry on land subsequently withdrawn, classified, or reported as valuable for minerals was subject to cancellation if the land was determined to be mineral in character. *Henry W. Pollock*, 48 L. D. 5, 7 (1921). The statute, however, permitted an entryman to enter or to retain an entry on land withdrawn, classified, or reported as valuable for the specified minerals and to receive a patent with a reservation of the specified minerals to the United States.

At the time of the homestead entry and the location of the mining claim involved in this proceeding, lands classified as mineral remained subject to location under the general mining laws. Rev. Stat., sec. 2319; 30 U. S. C., 1946 ed., sec. 22; act of February 11, 1897, 29 Stat. 526; *Instructions*, 47 L. D. 548 (1920). Later, section 37 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, 451; 30 U. S. C., 1946 ed., sec. 193), specifically removed oil shale and certain other minerals from the scope of the general mining laws. *Henry W. Pollock, supra.*

Although the act of July 17, 1914, provides for the reservation of the specified minerals to the United States in the patent and for the disposition of the reserved minerals only as "shall be hereafter expressly directed by law," it does not state when the reservation arises or whether lands in subsisting uncompleted homestead entries are subject to mineral location.

The Department was confronted with the same issues raised by this appeal in the case of *James W. Bell*, 52 L. D. 197 (1927). In that case, the First Assistant Secretary held that a mineral location might be made on land included within a subsisting incompleted homestead entry subsequently patented pursuant to the act of July 17, 1914, and that a mineral locator who has acquired the title of the surface entryman may execute a deed of reconveyance and, upon cancellation of the surface patent, receive a mineral patent.

The *Bell* decision has been accepted as defining the rights of mineral locators in similar circumstances. The Bureau of Land Management has issued in recent years several mineral patents for oil-shale-placer claims covering lands in this area to mineral locators who reconveyed the surface and unreserved minerals to the United States.[1]

The rule established in the *Bell* case has been consistently followed

[1] Harry K. Savage, Patent 1130593, January 17, 1951, including the W½SW¼ sec. 2, which is the other half of the homestead patented to Benson; Patent No. 1131394, Delos D. Potter, March 19, 1951; Federal Oil Shale Company, Patent No. 1130595, December 18, 1950; Federal Oil Shale Company, Patent No. 1130594, December 18, 1950.

for some 30 years.[2] Therefore, it should not be changed in the course of adjudication except for compelling reasons. *Luckenbach Steamship Co.* v. *United States*, 280 U. S. 173, 182 (1930); *Smith Hartfield et al.*, 17 L. D. 79, 81 (1893); *Instructions*, 13 L. D. 9, 17 (1891). There appear to be no such compelling reasons in this case. If the rule is to be changed, it should be done by regulation so as to provide for prospective application only.

Accordingly, the partial rejection of the appellant's application was in error.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Assistant Director is set aside, and the case is remanded to the Bureau of Land Management for further proceedings not inconsistent with this decision.

MASTIN G. WHITE,
Solicitor.

CLAIM OF RUTH O. WILES

Irrigation Claim—Land-Purchase Contract—Interpretation.

Notwithstanding an agreement in a land-purchase contract to accept the purchase price as full payment for all damages for entry upon the property and the construction, operation, and maintenance of reclamation works thereon, a vendor may be awarded damages under the provisions of the annual Interior Department appropriation act when the contract gives the vendor the right of possession until a certain date, subject to certain limitations, and before that date the Bureau of Reclamation, inconsistently with such right of possession, overflows the land and destroys the crops growing upon it.

An ambiguous provision in a land-purchase contract drafted by the Government will be construed against the Government.

The flooding of land by the filling of a reservoir is neither surveying or the construction of irrigation works within the meaning of a land-purchase contract permitting a vendor to retain possession of the land for a limited period after the execution of the contract but barring any claim for damages from an entry during that time by officers and agents of the United States "to survey for and construct reclamation works * * * and other structures and appliances incident to said reclamation works."

T-462 (Ir.) JANUARY 19, 1953.

Ruth O. Wiles, 1621 Fairview, Wichita, Kansas, has filed a claim dated December 28, 1951, in the amount of $3,978.61 against the United

[2] Mineral Patent No. 886259, dated January 8, 1920, issued to Doyle and Mower, November 14, 1922, included lands previously patented to James Helm pursuant to homestead entry Glenwood Springs 09207.

States because of damage allegedly caused to crops growing on her land in Trego County, Kansas, by the construction and operation of Cedar Bluff Dam, Smoky Hill Division, a part of the Missouri River Basin project of the Bureau of Reclamation. This amount represents one-third of the alleged total damage, the remaining two-thirds being claimed by tenants.

The claim was filed under the provision of the annual Interior Department appropriation act which makes funds available for the payment of claims for damage to or loss of property arising out of activities of the Bureau of Reclamation.

The record shows that Cedar Bluff Dam was constructed on the Smoky Hill River, in Kansas, a short distance downstream from the claimant's property. On May 2, 1951, Mrs. Wiles entered into a land-purchase contract, I-103r-1396, with the United States, whereby she agreed to convey to the United States in fee simple the S½NE¼NE¼, SE¼NE¼, E½SW¼NE¼, N½NE¼SE¼, SW¼NE¼SE¼, NW¼SE¼SE¼, W½SE¼, S½S½SW¼, and N½SW¼SW¼, sec. 33, T. 14 S., R. 23 W., Sixth principal meridian, Trego County, Kansas, representing land below the normal irrigation pool of the reservoir, and to convey a flowage easement over the NE¼NE¼NE¼, SE¼NW¼-NE¼, W½SW¼NE¼, S½SW¼NW¼NE¼, N½SE¼SW¼, N½SW¼S½S½SE¼NW¼, SE¼NE¼SE¼NW¼, N½NE¼SE¼-NW¼, NE¼NW¼SE¼NW¼, SE¼SW¼NE¼NW¼, S½SE¼-NE¼NW¼, SE¼NE¼SE¼, E½SE¼SE¼, and SW¼SE¼SE¼ of the same section.

Article 6 of the contract provided that upon execution and delivery of a deed and the signing of the Government vouchers therefor, and their approval by the proper Government officials, the Government would cause to be paid to the vendor, "as full purchase price and full payment for all damages for entry upon the said property and the construction, operation, and maintenance of reclamation works thereon," the sum of $13,865.

Article 8 of the contract reads as follows:

> The Vendor may retain possession of said property until Dec. 1, 1951 notwithstanding earlier delivery of the deed as herein provided, and may harvest and retain the crop thereon until Dec. 1, 1951; except that the proper officers and agents of the United States shall at all times have unrestricted access to survey for and construct reclamation works, telephone and electrical transmission lines, and other structures and appliances incident to said reclamation works, free of any claim for damage or compensation on the part of the Vendor.

Shortly after the land-purchase contract was signed, but before delivery of the deed and before December 1, 1951, the claimant's land—both that portion to be conveyed in fee and that portion included in the flowage easement—was inundated for substantial periods, first by

the natural rising of the river and later by the filling of Cedar Bluff Reservoir. In more detail, the facts disclosed by the record are as follows:

The planned elevation of the irrigation pool of the Cedar Bluff Reservoir, which will cover the fee acquisitions, is 2,144 feet. Early in May, the surface elevation of the Smoky Hill River reached 2,145 feet, rising temporarily on May 21 to 2,148 feet. These and other elevations of the river and the reservoir during the period in question are charted on drawings Nos. 372–701–239 and 372–701–241 attached to the file, and are based upon detailed records of flood stages in the vicinity maintained by the office of the Bureau of Reclamation in charge of constructing the dam. Early in June again, the river began to rise, reaching a peak of 2,151.8 feet on June 11. On that date, according to the Bureau of Reclamation's measurements, the reservoir stage had only reached 2,132 feet, 20 feet below the peak river stage in the immediate vicinity of Mrs. Wiles' land. It was not until June 21 that water in the reservoir rose as high as the natural stage of the river, the elevation at that time being approximately 2,149 feet. From June 25 until September 30, the river stage was not recorded, because tail water from the reservoir rendered readings inaccurate. The reservoir remained high during this time, however, reaching 2,151.9 feet on July 26 and July 27. The rainfall in the area during June 1951 has been computed by the Weather Bureau as 10.82 inches, as compared with an average for the same period of 3.07 inches, and a June 1952 fall of .78 inch, indicating the probability of high river stages, without regard to the dam.

Mrs. Wiles alleges that all the inundation of her land and the destruction of the crops growing there resulted from the construction and operation of Cedar Bluff Dam, making the following statement:

> It is estimated that the amount of water included in the maximum flow during the period of time in question would have produced a critical point of elevation of 2142.9 feet. Whereas, as a result of the construction and operation of the Cedar Bluff Dam, the elevation reached a point of 2154.8 feet. The high stage of river low (sic) [flow?] was well within the banks of the river. Whereas, the high stage of the reservoir inundated the agricultural land to a depth of more than 10.8 feet.

With respect to this area of disagreement as to the effect of the filling of the reservoir upon the level of the river adjacent to Mrs. Wiles' land, approximately 9 miles upstream from the dam, I have been assured by qualified engineers of the Bureau of Reclamation that, until the water in the reservoir reached the elevation of the river emptying into it, the river flow would not be impeded and the river elevation would not be increased. On the contrary, there would be a substantial

downward slope in the river elevation near the point where it would be emptying into the filling reservoir.

Accepting these statements as correct, I find that the Bureau of Reclamation was not responsible for the damage to the crops on Mrs. Wiles' land resulting from the natural rise of the Smoky Hill River prior to June 21, 1951, but only for such damage as may have occurred after that date, when the reservoir rose to the river stage.

On the basis of Map 372–701–195, showing the flooded areas, and chart No. 372–701–239 mentioned above, two agronomists employed by the Bureau of Reclamation have reached the following conclusions:

(*a*) Crops on land below contour elevation of 2,149 feet were continuously flooded for 29 hours or more by Smoky Hill River waters during the period June 10 to June 14, a period of sufficient duration completely to destroy them;

(*b*) Crops on land between contour elevation 2,149 and contour elevation 2,150 feet were continuously flooded for between 19 and 29 hours by Smoky Hill River waters during the period June 10 to June 14, a period of sufficient duration to damage them 50 percent;

(*c*) Crops on land above contour 2,150 feet were continuously flooded by Smoky Hill River water for less than 19 hours, a period insufficient to damage them, and any damage to crops above that elevation was caused by continuous flooding from stored waters in the Cedar Bluff Reservoir;

(*d*) There was no crop loss by flooding at elevations above 2,155 feet.

These conclusions, based upon the best technical advice which I have been able to obtain, are accepted as correct.

Map No. 372–701–195 shows the acreage at each elevation planted to various crops. On the basis of the information contained on this map, I find that of 74.2 acres of corn destroyed, the loss of 4.9 acres is attributable solely to Smoky Hill River floodwaters, the loss of 18 acres is attributable 50 percent to Smoky Hill River floodwaters and 50 percent to the operation of the reservoir, and the loss of 52.3 acres is attributable solely to the operation of the reservoir.

Of approximately 16.6 acres planted to alfalfa, the loss of 11.9 acres is attributable solely to Smoky Hill River floodwaters, the loss of 1.3 acres is attributable 50 percent to river floodwaters and 50 percent to the operation of the reservoir, and the loss of 3.4 acres is attributable solely to the operation of the reservoir.

Of approximately 32.7 acres of milo in an area below elevation 2,155 feet, the loss of 18 acres is attributable solely to Smoky Hill River floodwaters, the loss of 5 acres is attributable 50 percent to Smoky Hill River floodwaters and 50 percent to the operation of the reservoir, and the loss of 7.7 acres is attributable solely to the operation of the reservoir.

I find also that the alleged loss of 10 acres of milo sorghum or sargo growing above the 2,155-foot elevation line because of lack of access to it during the harvest period was not caused by the activities of the

Bureau of Reclamation. The high waters began to recede on July 18, 1951, and reached an elevation just below the normal irrigation pool of Cedar Bluff Reservoir on September 24, 1951. Since milo is a crop which is usually not harvested until after October or November, the record does not sustain the claimant's contention that the crop could not have been harvested because of the high waters from Cedar Bluff Reservoir.

Having determined the acreage of each crop lost through the activities of the Bureau of Reclamation, the financial loss can be computed. Mrs. Wiles claims $1.97 per bushel as the market price of corn in the area. On the other hand, a board of appraisers appointed to determine her losses sets the value of corn at $1.20 a bushel. The latter figure is confirmed by the *1951 Crop Summary and Related Data*, published by the Bureau of Reclamation. This document also tends to confirm the appraisers' estimate of the corn yield at 25 bushels per acre rather than the 40 bushels claimed by Mrs. Wiles. Accepting the $1.20 and 25-bushel figures as correct, I find that the market value of the corn lost to Mrs. Wiles by reason of the activities of the Bureau of Reclamation is represented by the following formula:

$$\left(52.3+\frac{18}{2}\right)\times 25\times \$1.20=\$1,839.$$

To arrive at the net loss suffered by Mrs. Wiles and her tenant, it is necessary to deduct from this figure the picking and marketing expenses they were spared, but not the expenses actually incurred, which she has deducted in her claim. The picking and marketing expenses, estimated at $144.50 and $40.80, respectively, are based upon a claimed loss of 2,800 bushels. Since I have determined the loss to have been only 1,532 bushels, these estimated deductions should be reduced in the proportion of $\frac{1532.5}{2800}$. So reduced, they total $87.32. Deducting this amount from $1,839, the net value of the corn lost was $1,851.70, of which the loss suffered by Mrs. Wiles was one-third, or $617.23, and that suffered by her tenant Alan F. Olsen was $1,234.47.

Mrs. Wiles also claims the loss of three expected cuttings of alfalfa at 33 tons per cutting (on a basis of 17.5 acres, or slightly less than 2 tons per cutting per acre), valued at $40 a ton, plus a fourth cutting of alfalfa for seed, with an expected yield of 112 pounds per acre valued at 50 cents per pound. The appraisal board estimated a total production of alfalfa of 1½ tons per acre, valued at $20 a ton. With respect to the number of cuttings, the district manager of the Bureau of Reclamation in a memorandum to the regional director dated March 11, 1952, says:

* * * Ordinarily it is not possible to raise 3 crops of alfalfa in the area and then a seed crop. At the most, the landowner could only hope to raise two crops with the third for seed.

This latter statement is confirmed by conferences with members of the Washington staff of the Bureau of Reclamation familiar with the growth of crops in the area, and by reference to the 1951 Crop Summary mentioned above. This volume places the alfalfa yield of *irrigated* lands in nearby projects (substantially more than yields on dry land, such as Mrs. Wiles' farm) at 2.5 tons per acre, the highest average yield in the country being 4.7 tons per acre in an area where alfalfa can be grown almost the year round. Upon the basis of this information, I determine 2 tons per acre as the estimated per-acre yield of the alfalfa grown on Mrs. Wiles' land, a figure that makes allowance for a possible cutting of alfalfa seed. I also find, by reference to the 1951 Crop Summary, that the value of alfalfa in the vicinity during 1951 was $20 a ton. Accordingly, the market value of the alfalfa lost to Mrs. Wiles by reason of the activities of the Bureau of Reclamation is represented by the following formula:

$$\left(\frac{1.3}{2}+3.4\right)\times 2\times \$20=\$1.62$$

Deducting from this amount, in the fashion described with respect to corn, $\frac{8}{99}$ of the estimated mowing and shelling expenses of $17.50 and $50 respectively, or $7.77, the net loss on account of alfalfa resulting from the activities of the Bureau of Reclamation was $154.23. Of this loss, $51.41 was suffered by Mrs. Wiles and $102.82 by her tenant Alan F. Olsen.

The market price of milo claimed by Mrs. Wiles of $1.12 a bushel is confirmed by reference to the 1951 Crop Summary and is accepted as correct, rather than the 95-cent figure of the appraisal board. On the other hand, the 35-bushel per acre figure of the appraisal board is accepted over the 40 bushels per acre claimed by Mrs. Wiles, after referring to the 1951 Crop Summary. Using these figures, the above formula yields the following gross loss:

$$\left(\frac{5}{2}+7.7\right)\times 35\times \$1.12=\$399.84.$$

Since no figures concerning the estimated costs of harvesting and marketing the milo have been given either by the appraisal board or by the claimant, I shall assume them to be comparable to the cost of picking and marketing corn, which I determined to be approximately 5 cents a bushel. The sum of $17.85 must therefore be deducted from $399.84, and we arrive at a net loss of $381.99. This loss is distributed

one-third to Mrs. Wiles, or $127.33, and two-thirds to Raymond G. Stanton, the tenant raising the destroyed milo crop, or $254.66.

Having thus established Mrs. Wiles' losses, we arrive at the question whether she has already been compensated for them under the land-purchase contract which she executed on May 2, 1951. Under article 6 of that contract, she agreed to accept the sum of $13,865 "as full purchase price and full payment for all damages for entry upon the said property and the construction, operation, and maintenance of reclamation works thereon." On the other hand, article 8 gives her the right of possession, not only of the land covered by the flowage easement but also of the land conveyed in fee, until December 1, 1951, "except that the proper officers and agents of the United States shall at all times have unrestricted access to survey for and construct reclamation works * * *, and other structures and appliances incident to said reclamation works, free of any claim for damage or compensation on the part of the Vendor."

If the last phrase quoted in the preceding paragraph is intended to protect only the officers and employees of the United States, presumably article 6 is intended to preclude Mrs. Wiles from making any claim for future damages, either before or after December 1, 1951.

On the other hand, it is possible to interpret article 8 as a qualification of article 6 which permits Mrs. Wiles to claim damages for injuries to her possession occurring before December 1, 1951, either against the United States or its officers or employees, except for entries to survey or construct reclamation works.

The latter construction would appear to be the one intended by the parties, because it would be an idle gesture to permit Mrs. Wiles by the land-purchase contract to retain possession until December 1 of the lands conveyed in fee, which were to form part of the irrigation pool of the Cedar Bluff Reservoir, if it were also intended to raise the pool within a few weeks so as to destroy the crops which under article 8 she was to be permitted to harvest and retain.

However, I should reach the same conclusion even if it were not possible to draw any inferences as to the intent of the parties. When the language of a contract is so ambiguous that it may be construed in two ways, that construction is adopted which is least favorable to the party drafting the contract. In this instance, the contract having been drafted by personnel of the United States, it must be construed against the United States. Accordingly, I am constrained to adopt that interpretation of the contract which permits Mrs. Wiles to claim damages for any loss of crops occasioned by activities of the Bureau of Reclamation prior to December 1, 1951, other than those resulting

from surveying or the construction of reclamation works. Since the raising of the pool level was neither surveying nor construction, it does not come within the specific exceptions named, and is an activity upon which a claim may properly be based.

DETERMINATION

Therefore, in accordance with the provisions of the Interior Department Appropriation Act, 1953, and the authority delegated to me by the Secretary of the Interior (sec. 22, Order No. 2509, as amended; 17 F. R. 6793):

1. I determine that—

(*a*) a portion of the damage occurring during 1951 to crops growing upon lands in sec. 33, T. 14 S., R. 23 W., Sixth principal meridian, Trego County, Kansas, belonging to Ruth O. Wiles or to which she had the right of possession arose out of activities of the Bureau of Reclamation;

(*b*) as a result of the activities of the Bureau of Reclamation, Ruth O. Wiles was damaged in the amount of $795.97.

2. Accordingly, I award to Ruth O. Wiles the sum of $795.97 as damages, and I direct that this amount be paid to her, subject to the availability of funds for such purpose.

MASTIN G. WHITE,
Solicitor.

HJALMER A. JACOBSON
E. B. TODHUNTER

A–26543 *Decided February 12, 1953*

Oil and Gas Leases—Suspension—Soldiers' and Sailors' Civil Relief Act of 1940—Segregative Effect of Erroneously Extended Lease.

Section 506 of the Soldiers' and Sailors' Civil Relief Act of 1940, which provides for suspension of oil and gas leases under certain circumstances when lessees are called into military service, has no application to any person already in military service when he accepts an oil and gas lease.

An extension of an oil and gas lease granted by a competent official of the Department of the Interior, though based upon an error of law and requiring cancellation, segregates the land embraced in the lease and prevents initiation of rights by other lease applicants so long as it remains uncanceled of record.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Dr. Hjalmer A. Jacobson, the appellant herein, applied on January 31, 1941, for a noncompetitive oil and gas lease on the N½S½ sec. 24, T. 29 N., R. 13 W., New Mexico principal meridian. On December

10, 1941, he entered military service. On September 1, 1943, this Department issued him a lease for a term of 5 years, which he accepted. On January 27, 1944, he filed notice of military service in the Santa Fe District Land Office and requested suspension of operations under his lease, as provided in section 506 of the Soldiers' and Sailors' Civil Relief Act of 1940 (54 Stat. 1178, 1188, 50 U. S. C., 1946 ed., App., sec. 566). On July 17, 1944, the Commissioner of the General Land Office [now the Bureau of Land Management] rendered a decision purporting to suspend the lease for the period of Dr. Jacobson's military service and 6 months thereafter. On April 12, 1947, Dr. Jacobson retired from the Army. His lease would accordingly have expired on October 12, 1952, if the decision of the General Land Office were correct.

On October 3, 1949, E. B. Todhunter applied for a noncompetitive oil and gas lease on the same tract. On August 16, 1951, he filed another application for this tract. In a decision dated September 28, 1951, the Manager of the Land and Survey Office at Santa Fe rejected both of Mr. Todhunter's applications on the ground that the land applied for was included in Dr. Jacobson's lease. Mr. Todhunter appealed to the Director of the Bureau of Land Management, contending that the Jacobson lease was not effectually extended by the decision of July 17, 1944, because Dr. Jacobson had not given notice to the Land Office within 6 months after entering military service, as required by law.

On June 26, 1952, the Director of the Bureau of Land Management reversed the manager's decision on Mr. Todhunter's applications, and held that the suspension granted by the decision of July 17, 1944, was ineffective, that Dr. Jacobson's lease had expired by operation of law on August 31, 1948, the end of its primary term, and that the fourth and fifth years' rental had become a debt due to the United States.

From the foregoing decision of the Director of the Bureau of Land Management, Dr. Jacobson has appealed.

The section of the Soldiers' and Sailors' Civil Relief Act of 1940 upon which the suspension of the appellant's lease was based reads as follows:

> Sec. 506. (1) Any person holding a permit or lease on the public domain under the Federal mineral leasing laws who enters military service may, at his election, suspend all operations under his permit or lease for a period of time equivalent to the period of his military service and six months thereafter. The term of the permit or lease shall not run during such period of suspension nor shall any rentals or royalties be charged against the permit or lease during the period of suspension.
>
> (2) In order to obtain the benefit of this section, such permittee or lessee shall, within six months after the effective date of this Act or six months after his entrance into military service, notify the General Land Office by registered mail

of his entrance into such service and of his desire to avail himself of the benefits of this section.

(3) This section shall not be construed to supersede the terms of any contract for operation of a permit or lease. [54 Stat. 1188.]

The Director of the Bureau of Land Management cited the opinion of the Comptroller General of the United States in the case of *Joseph W. Walton*, Phoenix 078873 (General Accounting Office No. B70870, July 14, 1947), as authority for his decision reversing the previous decision of the Commissioner of the General Land Office on the Jacobson lease suspension. The Comptroller General stated in that opinion:

Paragraph (2) of the above cited statute makes it mandatory for a lessee to notify the General Land Office by registered mail within six months after the date of his entry into military service of his desire to avail himself of the benefits of paragraph (1). Furthermore, the statute contains no provision whereby the General Land Office may in its discretion grant relief where a late notice is filed.

It is clear, therefore, that, if section 506 were applicable to one in the appellant's position (i. e., to one who was not issued a lease until after he had entered military service), he would have to file his notice of military service within 6 months after his date of entry within the military service, not within 6 months after the issuance of the lease to him.

However, section 506 of the Soldiers' and Sailors' Civil Relief Act of 1940 purports to grant relief to "Any person holding a permit or lease * * * who enters military service * * *." This language clearly indicates that section 506 applies only to persons who already hold oil and gas leases when they are called into service. The rights of persons who, like Dr. Jacobson, go into military service while they have ungranted applications pending are protected by section 501 (50 U. S. C., 1946 ed., App., sec. 561). Upon request under that section, Dr. Jacobson could have had his application held in suspension until he left the Army, but he could not accept the lease while in service and then claim relief under section 506.

It does not follow, however, from the fact that the Commissioner erred in suspending the Jacobson lease that Mr. Todhunter's application should be accepted. The Director of the Bureau of Land Management apparently regarded his predecessor's decision as a complete nullity. Departmental precedents, on the contrary, establish that where a competent official who has jurisdiction over the subject matter issues an oil and gas lease, its existence must be recognized even though it was issued in violation of law. *Reay* v. *Lackie*, 60 I. D. 29 (1947); *Bettie H. Reid, Lucille H. Pipkin*, 61 I. D. 1 (1952); *Transco Gas & Oil Corporation et ano.*, 61 I. D. 85 (1952). In such cases the lease has uniformly been ordered canceled, but not declared void from

its inception. The rule is otherwise, of course, where some explicit provision of law makes the official's action void (*John L. McMillan*, 61 I. D. 16 (1952)), or where he lacks jurisdiction over the subject matter, as, for instance, when a lease has been issued to another person. *Cf. L. N. Hagood*, A–26226 (October 5, 1951). That case emphasizes that the word "cancellation" connotes the annulment or avoidance of something which has been in force. Equity and administrative fair play require such a view of the effect of erroneous decisions made by competent officials within their jurisdiction. Otherwise a favorable decision becomes a trap if erroneous. In the instant case, for example, to hold the extension a complete nullity is actually to give it the effect of throwing the land involved open for leasing to everyone except the person it purported to favor. If a "nullity" it would not prevent others from filing effective applications for new leases at the end of the primary term of Dr. Jacobson's lease, but it would (and did) prevent Dr. Jacobson from making a timely application for renewal.

A lease merely subject to cancellation, so long as it remains of record and uncanceled, segregates the land it embraces from the public domain and prevents third parties from initiating rights in such land. *United States* v. *United States Borax Company*, 58 I. D. 426, 444 (1943), and cases cited therein. There appears to be no substantial distinction between an improper extension of an oil and gas lease and the improper issuance of one. Accordingly, the Todhunter applications should have been rejected.

No question of law is presented with respect to the fourth and fifth years' rentals under the Jacobson lease. A pencil notation of undetermined origin included in the record of this case indicates that the rentals have already been paid. If they have not, they are now due and payable regardless of whether the lease expired at the end of its original term on August 31, 1948, or on October 12, 1952, as provided by the erroneous decision of July 17, 1944.

In his appeal Dr. Jacobson contends he has a preference right to a renewal of his lease by virtue of a letter he sent to the District Land Office at Santa Fe on December 2, 1948. Whether the lease is deemed to have expired on August 31, 1948, or on October 12, 1952, on both dates the regulations of the Department required an application for a preference-right lease to be submitted during the last 90 days of the lease term and to be accompanied by a filing fee and the first year's rental. A special form of application was required in 1952. In 1948 no such form was required, but the applicant had to submit statements as to his citizenship and interests in other oil and gas leases and applications, a description of the lands sought to be leased, and a statement that he was ready to pay the remainder of the rent and to furnish bond.

For the regulations in effect during 1948, see 43 CFR 192.130, 192.42 (Circular 1624, 11 F. R. 12956); for those in effect during 1952, see 43 CFR, 1951 Pocket Supp. 192.42, 192.130. Dr. Jacobson's letter clearly did not comply with any of these regulations. Consequently, it furnished no basis for a preference-right lease.

Since the purported extension of Dr. Jacobson's lease expired by its own terms on October 12, 1952, the question of its cancellation has become moot.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the Director's decision is reversed to the extent that it directs reinstatement of E. B. Todhunter's applications; and the case is remanded to the Bureau of Land Management for determination as to whether the fourth and fifth years' rentals under lease Santa Fe 076281 have been paid, and if they have not, the Director's decision is affirmed to the extent that it requires payment.

The Bureau of Land Management is further instructed to give advance notice to Dr. Jacobson and Mr. Todhunter and the public generally of the time when the tract in question will be opened again to the filing of applications for oil and gas leases.

W. H. FLANERY,
Acting Solicitor.

OSCAR L. BUTCHER AND CARL L. SACKETT

A–26498 *Decided February 16, 1953*

Oil and Gas Leases—Renewals—Time Limit—Waiver.

The departmental regulation which provides that holders of 20-year oil and gas leases who desire to renew such leases should file applications for renewal within certain time limits will be waived in the case of a tardy application, where it appears that several wells have been drilled on the leasehold, other investments have been made in the lease, and efforts have been made to resume operations on the lease.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Oscar L. Butcher's 20-year oil and gas lease (Buffalo 023304) expired on September 13, 1951. On February 11, 1952, almost 5 months later, Mr. Butcher and Carl L. Sackett filed a joint application for the renewal of the lease. They stated in the application that Mr. Butcher had assigned the lease to Mr. Sackett on June 1, 1938.

On March 4, 1952, the Assistant Director of the Bureau of Land Management denied the application for renewal on the ground that

it was filed too late. Messrs. Butcher and Sackett have appealed to the head of the Department from this decision.

43 CFR 192.61 provides that an application to renew a 20-year oil and gas lease "should be filed * * * at least 90 days, but not more than six months, prior to the expiration of its term." In *Melvin N. Armstrong et al.*, A–26474 (August 22, 1952), it was held that this provision was not mandatory and could be waived in an appropriate case, but that a waiver would not be granted in the absence of a clear and persuasive showing that the delay in filing the renewal application was not unreasonable.[1]

In the present appeal, no explanation is offered as to why Mr. Butcher, the record titleholder of the lease, was tardy in filing his application for renewal. The only explanation for the delay is that, because of illness and family circumstances, Mr. Sackett overlooked the filing of the renewal application. The assumption throughout the appeal is that Mr. Sackett is the real party in interest because of the purported assignment of the lease to him in 1938.

This Department, of course, cannot recognize Mr. Sackett as having any interest in the lease. At the time the purported assignment was made, section 30 of the Mineral Leasing Act (30 U. S. C., 1946 ed., sec. 187) clearly stated that "no lease issued under the authority of this act shall be assigned or sublet, except with the consent of the Secretary of the Interior," and a departmental regulation in effect since March 11, 1920, provided that "leases may be assigned * * * upon first obtaining consent of the Secretary of the Interior." (43 CFR, 1940 ed., 192.41.) Also, section 2 (k) of Mr. Butcher's lease provided that he was "[n]ot to assign this lease or any interest therein * * * except with the consent in writing of the Secretary of the Interior first had and obtained." The purported assignment to Mr. Sackett has, therefore, been completely ineffective so far as the Department is concerned because the consent of the Department was never given to the assignment or even requested. Even now the appellants have not requested the approval of the assignment.[2]

However, the records of the Geological Survey show that eight wells have been drilled on the leasehold (all of which have been plugged and abandoned), and that full compliance has been made with the operating regulations applicable to the lease. The appellants state that,

[1] Such a showing was held not to have been made in the *Armstrong* case where there was a delay of more than 17 months in filing the renewal application. However, upon a subsequent detailed showing by the lessee of the reasons for his 17 months' delay in applying for a renewal, the time limit in the regulation was waived. *Melvin N. Armstrong et al.*, A–26474 (Supp.), November 14, 1952.

[2] It may be noted that if the assignment is considered to have been submitted for approval on February 11, 1952, when the joint application for renewal was filed, it could, upon approval, take effect only as of March 1, 1952. 30 U. S. C., 1946 ed., sec. 187a.

although no operations have been conducted on the lease since October 8, 1942, efforts have been made since that date to resume operations and, in anticipation of resumption of operations, there has been maintained on the lease certain itemized oil-well equipment which will have no value except as junk if the lease is not renewed. The appellants also state that since 1943 the amount of $2,769.21 has been spent to hold the lease while efforts have been made to resume operations.

In view of these factors, which show that a considerable investment has been made in the lease, it appears equitable to waive the time requirement for the filing by Mr. Butcher of his renewal application, despite the fact that he has offered no explanation for his delay in applying for a renewal.

Therefore, the Assistant Director's decision is reversed, and the case is remanded to the Bureau of Land Management for further consideration of and action on Mr. Butcher's renewal application.

JOEL D. WOLFSOHN,
Assistant Secretary.

APPEAL OF RODARMEL PLUMBING COMPANY

CA-182 *Decided March 4, 1953*

Contract Appeal—Duty of Contractor Under Supply Contract—Necessity of Giving Timely Notice of Delays in Writing—Showing of Actual Damage Under Liquidated Damages Provision.

Where the essence of a contract is the promise to supply and install devices which will meet the standard set in the contract, a delay by the contractor in performing the contract is not excusable under the "Delays-Damages" clause of the standard Government supply contract when it is caused by the contractor's failure to order devices that would meet the contractual standard.

The obligation of a contractor to obtain and install devices which will meet a standard fixed by the contract is not fulfilled when the contractor relies on the representations of a supplier.

In order to satisfy the standard requirement in a Government contract respecting notices of delay, written notice must be given.

Officials of this Department do not have authority to waive the imposition of liquidated damages on equitable grounds or on the asserted ground that the Government actually did not suffer any loss by reason of the delay in completing a particular contract.

ADMINISTRATIVE DECISION

Rodarmel Plumbing Company, Chico, California, filed an appeal dated September 11, 1952, from a decision dated August 21, 1952, of the contracting officer of the Bureau of Reclamation denying the

appellant's claim for relief from the payment of liquidated damages, which were assessed under Contract No. I75r–3222 dated July 19, 1951, Specifications No. 200C–167. The work was done in connection with the Central Valley Project of the Bureau of Reclamation in California.

The contract, which was on the standard form for United States Government construction contracts (Form No. 23, revised April 3, 1942), required the contractor to furnish and install 20 evaporative coolers for 10 duplex cottages at the Toyon Government Camp, near Redding, California. The work was to be commenced and completed in accordance with the provisions of paragraph 21 of the specifications. That paragraph provided in part that:

> The contractor shall begin work within ten (10) calendar days after date of receipt of notice to proceed, and shall complete all of the work within forty (40) calendar days from the date of receipt of such notice: * * *.

The contractor received notice to proceed with the work on August 9, 1951. The date of final completion for all of the work, therefore, became September 18, 1951. The work, however, was not completed and accepted by the Government until December 6, 1951, 79 calendar days after the scheduled completion date.

By August 22, 1951, the number of coolers and all but six of the ceiling registers required by the specifications had been installed. On September 17, 1951, the contractor filed a written notice with the contracting officer that it had not yet received the six registers because of a shutdown in the plant of the contractor's supplier. The six registers were shipped on October 2, 1951, and were installed shortly thereafter.[1] In the meantime, however, those coolers that had been installed failed to perform in accordance with the requirements of the specifications. New coolers were eventually acquired and installed by the contractor, but only after a delay of 79 calendar days.

Liquidated damages in the amount of $15 for each calendar day of delay were assessed by the Government pursuant to the provisions of paragraph 22 of the specifications. The contractor, in a letter dated January 22, 1952, objected to the assessment of the liquidated damages and requested a review of the entire question of damages.

On August 21, 1952, the contracting officer issued a finding of fact and decision denying the request of the contractor for an extension of time to cover the period of delay on the ground that the contractor

[1] Respecting these registers, the contracting officer, in his finding of fact, said: "The inability of the contractor to secure six ceiling registers until after the time for completion of the contract need not be considered as a possible excusable cause of delay, for even after the registers were received and installed, the work remained incomplete because the contractor still was not able to install satisfactory coolers. Hence, the only question to be treated here is whether the contractor's difficulty in procuring coolers meeting the performance requirements of the specifications was an excusable cause of delay under Article 9 of the contract."

had failed to notify the contracting officer of the delay within ten days from its beginning. The contracting officer also found that the delay was not attributable to unforeseeable causes on the ground that unexpected delay by a supplier does not automatically excuse the prime contractor, and that the contractor had submitted no evidence that its delay resulted from unforeseeable causes. The contracting officer further found that there was no merit in the contractor's contention that the Government had suffered no actual damages because of the delay. On September 11, 1952, the contractor appealed from the findings of fact and decision of the contracting officer.

I

In its appeal, the contractor asserts that the coolers were installed prior to the completion date fixed by the contract, that it was merely the corrective work that was not completed until a later date, and that the corrective work was delayed due to unforeseeable causes beyond its control and without the fault or negligence of the contractor.

The provisions of paragraph 15 of the specifications not only required that the 20 evaporative coolers were to be furnished and installed by the contractor in the cottages at the Toyon Government camp, but they also required that the coolers be installed "in accordance with these specifications." This requirement encompassed, among other things, the provisions of paragraph 26 of the specifications, which required that "Each evaporative cooler shall deliver a minimum of 1,700 cubic feet of air per minute." The contracting officer stated in the findings of fact that "tests on September 18, 1951, revealed an average output of only 250 cubic feet of air per minute" for the coolers.

Thus, the delay in this case was caused by the failure of the contractor initially to obtain coolers that would meet the standards of performance required by the specifications. Yet the obligation to obtain and install coolers that would deliver 1,700 cubic feet of air per minute was the very essence of the contract under consideration. The contractor was at liberty to test or examine various types of coolers to ascertain whether they would measure up to the standard of the specifications, or, it was free to rely on the advice of a supplier, as it seems to have done. The contractor cannot, however, excuse its failure to complete the work under the contract within the time specified by showing that it made no independent attempt to appraise the coolers which were ordered initially or by showing that its supplier was careless or mistaken. There were, therefore, in this case no "delays in the completion of the work due to unforeseeable causes beyond

the control and without the fault or negligence of the contractor, including, but not restricted to, * * * delays of subcontractors due to such causes * * *" within the meaning of article 9 of the contract, which provides for extensions of time. *Carnegie Steel Co.* v. *United States*, 240 U. S. 156 (1916); *Krauss* v. *Greenbarg*, 137 F. 2d 569 (3d Cir. 1943), *certiorari denied*, 320 U. S. 791, *rehearing denied*, 320 U. S. 815.

II

The contractor does not dispute the finding that it failed to give a written notice to the contracting officer 10 days after the beginning of the delay, as article 9 of the contract provides. However, the contractor alleges that the "Bureau of Reclamation and numerous officials and agencies, employees and officers were fully cognizant of the situation, and the contractor kept it fully informed and advised on all the facts all the time." The contractor states further that there was no indication that the Bureau of Reclamation "intended to rely on the technical *written* notice of delay, as all indications were to the contrary."

The contractor has not shown that the contracting officer did, in fact, have actual notice of the delay, but even such a showing by the contractor would be insufficient to satisfy the requirement of article 9 of the contract that notices of delay be in writing. *United States* v. *Cunningham*, 125 F. 2d 28 (D. C. Cir., 1941); *Associated Piping and Engineering Company, Inc.*, 61 I. D. 60 (1952).

III

Finally, the contractor contends that the imposition of liquidated damages is discretionary and, in this instance, would impose an unfair burden on the contractor, who acted in good faith and with reasonable diligence in reliance upon "the representation of a reputable supplier, which in turn relied upon the representation of a reputable manufacturer," and that the Government actually suffered no damage as a result of the delay in the completion of the work.

It is well established that, if a provision for liquidated damages in a contract is a reasonable one, it is not necessary for the party enforcing it to show that any actual damage was sustained. *Wise* v. *United States*, 249 U. S. 361, 364–367 (1919); *United States* v. *Bethlehem Steel Company*, 205 U. S. 105, 120–121 (1907). As stated by the Court of Claims in a recent decision:

> * * * we cannot assume that the mere failure to assert the existence of actual damage to defendant necessarily implies that no actual damage in fact resulted. Certainly under the rule prevailing in the Federal courts today actual damage

is not a necessary allegation nor required proof where the contract contains a valid provision for liquidated damages—"Recovery of liquidated damages is allowed upon mere proof of an explicit contractual undertaking to that effect. No proof that, in fact, damages did not flow from the breach is allowed." *Byron Jackson Co.* v. *The United States*, 35 F. Supp. 665 (S. D. Calif.). In the second place the test is not what appears at the termination of the contract but what the parties must have fairly intended when the contract was made. The amount stipulated in the contract as liquidated damages for a breach thereof, and which is regarded by the courts as liquidated damages rather than as a penalty, may be recovered in the event of a breach, even though no actual damages are suffered as a consequence of such breach. * * * *Weathers Bros. Transfer Co., Inc.*, v. *United States*, 109 Ct. Cl. 310, 320–321 (1947).

Moreover, the authority of administrative officials of the Department to excuse the contractor from the payment of liquidated damages in the event of a delay in the performance of the contract is limited by the terms of the contract to situations where the failure to perform on time is attributable to "causes beyond the control and without the fault or negligence of the contractor." Officials of this Department do not have any authority to waive the imposition of liquidated damages on equitable grounds. See *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 294 (1941).

DETERMINATION

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 17 F. R. 6794), the findings of fact and decision of the contracting officer are affirmed.

CLARENCE A. DAVIS,
Solicitor.

J. B. MULCOCK

A–26568 *Decided March 4, 1953*

Oil and Gas Leases—Suspension of Production—Expiration of Term.

Where an oil and gas lease is governed by the Mineral Leasing Act as it existed before its amendment on August 8, 1946, if production is ordered suspended by authority of the Secretary of the Interior, the term of the lease will be automatically extended so long as the order of suspension remains in effect.

An order issued by authority of the Secretary of the Interior requiring suspension of production under an oil and gas lease cannot be abrogated by the lessee, and will remain in effect until revoked by authority of the Secretary or until it expires by its own terms.

Where a lessee having only gas wells on his lease has been directed to suspend the production of gas from the lease for an indefinite period of time in order to conserve reservoir energy for the production of oil, the plugging and abandonment of the gas wells by the lessee several years later cannot be considered as having terminated the suspension order.

March 4, 1953

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

J. B. Mulcock has appealed to the head of the Department from a decision rendered August 13, 1952, by the Associate Director of the Bureau of Land Management, in which it was held that his noncompetitive oil and gas lease on the N½SW¼ sec. 24 and the SW¼ sec. 25, T. 16 S., R. 30 E., New Mexico principal meridian, had expired on December 31, 1946.

Both the tracts in question, together with other land, were originally embraced in noncompetitive oil and gas lease, Las Cruces 029424, issued to Ada Nye Etz for a 5-year term beginning January 1, 1940. Mr. Mulcock became lessee of the two tracts by various mesne assignments, which were approved by the Department on May 1, 1945.

Between April 25, 1940, and October 19, 1940, Mr. Mulcock drilled a well in the SW¼SW¼ sec. 25 and struck gas only, the well having an initial daily capacity of 4,000,000 cu. ft. At that time, he was apparently acting as operator for a preceding assignee of the leasehold. Under temporary approval from the district engineer of the Geological Survey for production of 1,000,000 cu. ft. of gas a day, Mr. Mulcock started producing this well in March of 1941, and continued until July of 1942.

During this period, drilling for and discovery of oil on surrounding tracts convinced the local officials of the Geological Survey that the Mulcock well was in the gas cap of an oil-producing reservoir and was wasting pressure necessary to efficient production of the oil. Accordingly, on May 30, 1942, the Acting Oil and Gas Supervisor at Roswell, New Mexico, ordered Mr. Mulcock to shut in his well, which he did the following July.

That same year Mr. Mulcock drilled a well in the SE¼SW¼ sec. 25, and again struck gas only; this well had an initial capacity of 6,000,000 cu. ft. per day. On October 22, 1942, before there had been any commercial production from this well, the Oil and Gas Supervisor ordered him not to produce it either, for the same reason that the first well was shut in. Accordingly, there has been no production from the tracts embraced in lease, Las Cruces 063925, since July of 1942.

The third paragraph of section 17 of the Mineral Leasing Act, as it existed in 1942, contained the following language:

> * * * *Provided*, That no such [oil and gas] lease shall be deemed to expire by reasons of suspension of prospecting, drilling, or production pursuant to any order or consent of the said Secretary: * * *. [49 Stat. 677.]

Although this proviso was deleted from the act in 1946, all rights acquired under the law as it previously existed were declared in section 15 of the amendatory act (60 Stat. 958) to be governed by the

law in effect at the time of their acquisition. The Oil and Gas Supervisor's orders of May 30 and October 22, 1942, were within the scope of the authority delegated to him under the operating regulations promulgated by the Secretary of the Interior (30 CFR 221.2(c)(n), 221.9) and were, therefore, in legal effect orders of the Secretary of the Interior. They appear never to have been rescinded. Accordingly, Mr. Mulcock's lease, Las Cruces 063925, has not expired, but will continue in force so long as the shut-in orders remain unrevoked.

In March 1949, Mr. Mulcock removed the casing from both wells and plugged them, after first receiving the approval of the Oil and Gas Supervisor. The decision of the Associate Director of the Bureau of Land Management seems to hold that these acts somehow terminated Mr. Mulcock's lease. It would appear, however, that an oil and gas lease cannot be relinquished except by the filing of a formal surrender in accordance with section 30(b) of the Mineral Leasing Act (30 U. S. C., 1946 ed., sec. 187b) and the regulations adopted thereunder (43 CFR 192.160). *Cf. Lugarda Peisker*, A–26300 (February 13, 1952). Nor can the abandonment of the wells be considered to have terminated the suspension of production which held the lease in existence beyond its expiration date. Under the circumstances of the instant case, there would be no logic in holding the suspension of production to be dependent upon the lessee's maintaining a well capable of producing. The suspension order was for the stated purpose of conserving gas pressure necessary to efficient production of oil from the geological structure. Therefore, it was reasonable to assume that it would remain in effect so long as oil remained in the structure to be produced. During that period, which might last many years, there would be no point in Mr. Mulcock's maintaining perfectly useless gas wells in operating condition. Nor can we say that the cause for the continued suspension of production ceased to be the official shut-in order and became Mr. Mulcock's own act after he plugged the wells, because the plugging itself was no more than a reasonable reaction to an order which had made the wells useless for the foreseeable future. The continuing cause of the suspension of production ever since 1942 has, therefore, been an order issued pursuant to authority vested in the Secretary of the Interior. This order will save the lease from expiration until it is revoked by competent authority.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Associate Director of the Bureau of Land Management is reversed.

CLARENCE A. DAVIS,
Solicitor.

EARL W. HAMILTON

A–26609 *Decided April 9, 1953*

Oil and Gas Leases—Defective Application—6-Mile Square.

An application for a noncompetitive oil and gas lease covering lands within an area which, contrary to departmental regulations and the instructions on the form of application used, exceeds a 6-mile square is subject to rejection.

Where a noncompetitive oil and gas lease is issued by the manager of a land office covering lands within an area which exceeds by 40 acres the 6-mile-square limit fixed by departmental regulation and the instructions on the form of application used, and the rights of no third persons are prejudiced thereby, the lease should not be canceled.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Pursuant to an application filed on July 26, 1951, by Earl W. Hamilton, oil and gas lease Montana 03100 was issued as of February 1, 1952, covering 1,595.26 acres of land in Montana. (30 U. S. C., 1946 ed., sec. 226.) On May 16, 1952, Hazel V. Crowe filed a protest against the issuance of Mr. Hamilton's lease on the ground that the lands covered thereby are not entirely within a 6-mile square. In a decision of October 20, 1952, the Assistant Director of the Bureau of Land Management held Mr. Hamilton's lease for cancellation. Mr. Hamilton has taken an appeal to the head of the Department from the Assistant Director's decision.[1]

When Mr. Hamilton's oil and gas lease application was filed, one departmental regulation (43 CFR, 1951 Pocket Supp., 192.42(d)) provided that an offer to lease "must cover only lands entirely within a six-mile square." Another departmental regulation (43 CFR, 1951 Pocket Supp., 192.40) provided that—

* * * Leases for not to exceed 2,560 acres, except where the rule of approximation applies, within a six-mile square, may be issued for all other land subject to the act [i. e., land not within the known geologic structure of a producing oil or gas field], to the first qualified offeror * * *.

Paragraph 9 of the General Instructions on the reverse side of the Offer to Lease and Lease for Oil and Gas filed by and issued to Mr. Hamilton, states, among other things, that—

The offer will be rejected * * * if (a) * * * the lands are not entirely within a 6-mile square * * *.

[1] The Assistant Director's decision states that the protestant filed an application (Montana 08346) for the land included in Mr. Hamilton's lease. This application was rejected in the decision of October 20, 1952, because the land applied for was covered by an outstanding oil and gas lease. The protestant did not appeal from that decision. The appellant sent copies of his notice of appeal from the Assistant Director's decision and of his brief in support of his appeal to the protestant by registered mail, but she filed no brief or any other document respecting that appeal.

Presumably through inadvertence, the lease which was issued to Mr. Hamilton covers land in an area which exceeds the 6-mile-square limit to the extent of a quarter-quarter section or one-sixteenth of a square mile. The acreage covered by the lease is less than the maximum 2,560 acres set by regulation. It appears that there was no conflicting application for any of the land covered by the lease when it was issued to Mr. Hamilton.

The issuance of an oil and gas lease of land in an area exceeding the 6-mile-square limit is not prohibited by the Mineral Leasing Act (30 U. S. C., 1946 ed., sec. 181 *et seq.*). However, the issuance of an oil and gas lease covering lands in an area exceeding a 6-mile square is inconsistent with the above-quoted portions of the departmental regulations and instructions. Hence, an offer covering land not entirely within a 6-mile square is subject to rejection. *Adah G. Macauley*, A–26419 (September 3, 1952); paragraph 9, General Instructions, Offer to Lease and Lease for Oil and Gas Form No. 4–1158, first edition, filed by and issued to Mr. Hamilton. The question in this case is whether a lease which was issued on the basis of an offer which could have been but was not rejected for that reason, should be canceled.

As a matter of law, there is no requirement that a lease must be canceled if a departmental regulation or an "instruction" of the character here involved is violated.[2] Assuming that the authority to cancel for such violation exists, should it be exercised in this case? Here the manager should have known of the excess acreage and he should not have issued a lease covering such excess acreage. The issuance of the lease did not prejudice the rights of any other person. The lands covered by the lease exceed the 6-mile-square limit by the relatively small area of a sixteenth of a square mile or 40 acres. In these circumstances, the cancellation of the lease does not seem to be justified. *Cf. L. N. Hagood*, 60 I. D. 462 (1951); *Melvin N. Armstrong, Montana-Dakota Utilities Company*, A–26474 (Supp.) (November 14, 1952).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the Assistant Director's decision is reversed, and the case is remanded for further proceedings not inconsistent with this decision.

CLARENCE A. DAVIS,
Solicitor.

[2] 30 U. S. C., 1946 ed., sec. 188; section 7 of the lease terms on the reverse side of lease issued to Mr. Hamilton.

APPEAL OF SACRAMENTO ELECTRIC WORKS

CA–177 *Decided April 16, 1953*

Contract Appeal—Liquidated Damages—Substitute Material.

Where the completion of a contract was delayed because of the action of the contracting officer in determining whether substitute materials should be approved under a provision in the specifications of the contract permitting the use of substitute material, with governmental approval, whenever the contractor is unable, despite diligent efforts, to procure the materials required by the specifications, liquidated damages should not be assessed against the contractor for such delay.

ADMINISTRATIVE DECISION

Sacramento Electric Works, 835–841 43d Street, Sacramento, California, filed an appeal dated August 22, 1952, from the findings of fact and decision of the contracting officer dated June 25, 1952, which denied in part a request of the appellant for an extension of time to complete a contract with the Bureau of Reclamation dated July 10, 1951. The contract, No. I75r–3170, which was on U. S. Standard Form No. 23 for Government construction contracts (revised April 3, 1942), provided for the construction of the electrical distribution system for construction headquarters at Folsom Power Plant, under Schedule No. 2 of Specifications No. 200C–163 and Supplemental Notices Nos. 1, 2, and 3, Central Valley project, California.

Pursuant to paragraph 22 of the specifications the contractor was given notice to proceed on August 18, 1951. The contractor, as provided in paragraph 22(a)(3) of the specifications, was to complete the 12-kv distribution line 90 days after receipt of notice to proceed and was to complete the remainder of the work, construction of secondary distribution system, under paragraph 22 (a) (4), 120 days after receipt of such notice. The construction of the 12-kv distribution line was completed on December 8, 1951, or 22 days after the 90-day period had expired on November 16, 1951, while the remainder of the work was completed on December 23, 1951, or 7 days late.

Under the terms of paragraph 23 of the specifications the contractor was assessed liquidated damages at the rate of $15 per day for each calendar day of delay in the completion of the 12-kv distribution line and $25 for each calendar day of delay in the completion of the remainder of the work.

Although the record before me does not so indicate, the contractor apparently objected to the assessment of the liquidated damages and the contracting officer, therefore, issued his findings of fact and decision of June 25, 1952. In that finding of fact and decision the contracting officer denied the contractor's request for an extension of

time for the delay in the completion of the 12-kv distribution line on the ground that the delay was not the result of an unforeseeable cause within the meaning of article 9 of the contract. He did, however, grant an extension of 7 calendar days for the delay in the completion of the remainder of the work on the ground that that delay was the result of an act of the Government in failing to make a building available for attachment of the service drops as required by the contract and that such a delay was one which the contractor could not reasonably have foreseen or anticipated.

The contractor appealed from the decision of the contracting officer, seeking an extension of 22 calendar days for the delay in completion of the 12-kv distribution line on the ground that the insulators of the type required by paragraph 166 of the specifications were not available.

As previously noted, the contractor received notice to proceed with the work under the contract on August 18, 1951. On August 2 the contractor placed an order (with Line Material Company, 101 Williams Street, San Francisco 24, California) for the 7½-inch ball and socket type strain insulators and dead end shoes required by the specifications. Line Material Company ordered the insulators from an eastern supplier on August 5, 1951, but because of a shortage of the specified insulator, delivery was rendered impossible. Thereafter, the contractor sought without success to obtain the insulators from other sources, among which were Westinghouse Electric Co., General Electric Supply Co., Thompson & Diggs Co., Valley Electric Co., and Graybar Electric Co.

In a letter dated November 14, 1951, the contractor informed the Bureau of Reclamation of its inability to obtain the specified insulators and requested permission to employ a substitute type insulator together with a request for an extension of time to finish the work in the event the proposed substitution was not agreeable. On November 15, 1951, the contractor was verbally notified that its proposed substitution was not acceptable and was requested to exhaust all possible sources for obtaining the insulators. The verbal instructions were confirmed by a letter dated November 20, 1951, from the construction engineer on the project.

Subsequently, on December 6, 1951, the contractor verbally informed the Government that it had made additional unsuccessful attempts to obtain the specified insulators. The Government, after conducting a survey, verified the fact that the stock of specified insulators had been completely exhausted in all of the local supply houses and on December 7, 1951, authorized the use of the substitute insulators, which were then procured and installed by the contractor on December 8, 1951,

a period of 22 calendar days after the scheduled completion date for that phase of the work.

The contracting officer, in his findings of fact and decision dated June 25, 1952, stated that:

> Although there appears to be no doubt that a shortage occurred in the supply of the specified insulators, this alone does not excuse a delay in the performance of the contract. The Comptroller General has stated the general rule as follows in 15 Comp. Gen. 313, 315 (1935):
>
> "* * * When a contractor enters into a contract without having on hand material necessary to the performance of such contract, it cannot be said that the unexpected delay in obtaining such material is delay due to an 'unforeseeable cause' excusing performance by the contractor."
>
> The only exception to this rule is where the failure of the supply is caused by "conditions so abnormal, extraordinary, or unusual that they reasonably could not have been anticipated or foreseen at the time the contract was formulated." See 22 Comp. Gen. 1127, 1129 (1943). 27 Comp. Gen. 621, 624 (1948). The record reveals no evidence indicating the reason for the shortage in the supply of the specified insulators, although the contractor was requested to submit such evidence. The only reply to this request was a letter which the contractor received from the Line Materials Company, attached and marked Exhibit "C", which indicated that there existed a shortage in the supply of the specified insulators at the time the contractor placed his order. Since there is no evidence that the shortage of the supply of the specified insulators was caused by "conditions so abnormal, extraordinary, or unusual that they reasonably could not have been anticipated or foreseen at the time the contract was formulated", no extension of time may be granted for a delay in the performance of the contract caused by the shortage.

The rulings of the Comptroller General which the contracting officer cites do not absolutely exclude a shortage of materials from the category of excusable delays under the standard form of contract. If it were necessary for me to rule upon the point, I would be inclined to the view that the contractor could not reasonably have been expected to foresee that it could not, over a period of 3½ months, obtain the insulators with which this appeal deals.

In this contract, however, the provisions of article 9 and paragraph 22 of the specifications, as amended, relating to liquidated damages, must be read in connection with that part of subparagraph (b) of paragraph 25 of the specifications which reads as follows:

> * * * Materials furnished by the contractor shall be of the type and quality described in these specifications. The contractor shall make diligent effort to procure the specified materials from any and all sources, but where because of Government priorities or other causes, materials required by the specifications become unavailable, substitute materials may be used: *Provided*, That no substitute materials shall be used without prior written approval of the contracting officer, said written approval to state the amount of the adjustment, if any, to be made in favor of the Government. The contracting officer's determination as to whether substitution shall be permitted and as to what substitute

materials may be used shall be final and conclusive. If the substitute materials approved are of less value to the Government or involve less cost to the contractor than the materials specified, an adjustment shall be made in favor of the Government, and where the amount involved or the importance of the substitution warrants, an order for changes will be issued; otherwise the adjustment will be handled by deduction from payments to the contractor on the basis of prices stated in the written approval. No payments in excess of prices bid in the schedule will be made because of substitution of one material for another, or because of the use of one alternate material in place of another.

This provision of the contract was not required to enable the Government to permit a substitution of materials called for by the specifications, because under article 3 of the contract the Government might unilaterally have changed the specifications. Therefore, it is reasonable to suppose that this provision of the contract was intended to afford some relief to the contractor if, in spite of diligent efforts on its part, particular materials proved to be unavailable, and if the materials proposed as substitutes would serve as well from the standpoint of performance as those originally specified.

It is unnecessary on this appeal to decide whether, in view of the language as to the conclusiveness of the determination of the contracting officer on the matter of substitutions, the contractor would in any situation have had a *right* to require the acceptance by the Government of a proposed substitute. It is sufficient to note in this regard that the provision would have no real meaning unless it enabled the contractor in a proper case to toll the running of the period set for completion of the work or to terminate the period of delay for which liquidated damages might be assessed.

The undisputed facts in the record which are relevant to the application of the provision of the specifications quoted above appear to be as follows. The contractor, both before and after the receipt of the notice to proceed, endeavored diligently to obtain the insulators required by the specifications, and in a letter dated November 14, 1951, it notified the Bureau of Reclamation of the unavailability of the insulators and its efforts to obtain them. The Bureau in a letter dated November 20, 1951, refused the proposed substitute and urged the contractor to exhaust all sources of supply. The contractor on December 6, 1951, informed the Bureau that it had without success made additional attempts to obtain the insulators. The Bureau by means of a survey verified the unavailability of the insulators at all the local supply houses, and approved the use of the substitute insulators on December 7, 1951. The substitute insulators were installed on the following day.

It also appears, from a memorandum dated October 1, 1952, from the Acting Regional Director to the Commissioner of Reclamation that "The only reason for refusing earlier permission to use substi-

tute insulators was because of the desire to standardize materials for maintenance purposes. These substitute insulators served the same purpose and are equal in all respects to those required by the specifications."

Under my reading of the provision of paragraph 25 of the specifications discussed above, when the contractor notified the Government that it had diligently but unsuccessfully sought to obtain the insulators and proposed an adequate substitute, the Government had a reasonable time after receipt of the notification to verify the contractor's diligence, the unavailability of the insulators, and the adequacy of the substitute. Thereafter, assuming that the contractor had been diligent, the insulators were unavailable, and the substitute insulators adequate (as was the case here), no liquidated damages were assessable whether the proposed substitute was accepted or not.

The time fixed under the other provisions of the contract for the completion of the 12-kv distribution line on which the insulators were to be installed was November 16, 1951. The contractor waited until November 14, 1951, to notify the Bureau of Reclamation by letter that a situation such as contemplated by the provision of paragraph 25 quoted above had arisen. It appears that this letter was not received in the regional office in Sacramento until November 15. Although the contractor was treading perilously near to the deadline, in view of the fact that the Bureau acted within 2 days in December, I conclude that it might reasonably have confirmed the situation and approved the proposed substitute by the close of business on November 16, 1951. Therefore, paragraph 25 of the specifications operated to save the contractor from the assessment of liquidated damages for any delay occurring after that date and attributable to the unavailability of the insulators, and the delay that occurred because the Government desired that an additional effort be made to locate a supply of insulators was not chargeable to the contractor.

Conclusion

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 17 F. R. 6794), the decision of the contracting officer in imposing liquidated damages for the 22 days' delay in the completion of the construction of the 12-kv distribution line is reversed, and the case is remanded to the contracting officer with instructions to remit to the contractor the amount withheld as liquidated damages.

Clarence A. Davis,
Solicitor.

APPEAL OF STUDER CONSTRUCTION COMPANY

CA–188 *Decided April 20, 1953*

Contract Appeal—Procedure—Timely Protest.

Where a contractor fails to comply with a time limit prescribed in the contract for the filing of a written protest against a requirement that the contractor perform work which it believes to be outside the scope of the contract, the contractor cannot thereafter claim additional compensation, over and above that stipulated in the contract, for such work.

ADMINISTRATIVE DECISION

Studer Construction Co., 619 Lewis Avenue, Billings, Montana, filed an appeal dated December 22, 1952, from a decision made by the contracting officer dated November 17, 1952, denying a claim in the amount of $720 for additional compensation based upon extra work under contract No. I79r–2367, specifications No. 601c–20. The contract, on U. S. Standard Form No. 23 for Government construction contracts (revised April 3, 1942), was entered into on April 23, 1952, with the Bureau of Reclamation, and provided for the clearing of the Heart Mountain Camp Area, Shoshone Project, Wyoming.

Notice to proceed with the work under the contract was received by the contractor on May 3, 1952, and all work under the contract was completed and accepted on August 29, 1952, within the time for completion as established by paragraph 21 of the specifications.

The contractor, in executing the release on the contract dated September 6, 1952, made the following exception: "Except as noted in letter attached." That letter states in part as follows:

> Under the above numbered contract we claim additional compensation due us in the amount of $720.00 for work done that was not covered in the payments for any items in our final estimate. We ask that we be paid for the cleanup of all non-combustible debris that we were ordered to clear from the same area that the combustible debris was cleared from earlier, namely the 300 acres.
>
> When this work was ordered done, our foreman, Ed Cummins, protested that it was not a part of our contract. When he was told to do the work after calling this to the attention of the inspector in charge for the Bureau, I told him to go ahead and get the job done as we had need of his service elsewhere.

The contracting officer, in findings of fact and decision dated November 17, 1952, disallowed the contractor's claim on the ground that the contractor had failed to make a timely protest as required by paragraph 12 of the specifications. As a second ground for disallowing the claim the contracting officer found that the work which the contractor alleges to have been in excess of that called for in the contract, was required to be performed under paragraphs 17, 29, and 31 of the specifications.

The correctness of the contracting officer's action in denying the claim on the ground that the contractor failed to make a timely protest will be considered first.

Paragraph 12 of the specifications provides as follows:

Protests. If the contractor considers any work demanded of him to be outside of the requirements of the contract, or considers any record or ruling of the contracting officer or of the inspectors to be unfair, he shall immediately upon such work being demanded or such record or ruling being made, ask, in writing, for written instructions or decision, whereupon he shall proceed without delay to perform the work or to conform to the record or ruling, and, within twenty (20) calendar days after date of receipt of the written instructions or decision (unless the contracting officer shall grant a further period of time prior to commencement of the work affected) he shall file a written protest with the contracting officer, stating clearly and in detail the basis of his protest. Except for such protests as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive. * * *

The Acting Chief, Construction Section, Big Horn District, Bureau of Reclamation, in a memorandum to the Regional Director, Region 6, dated September 18, 1952, stated as follows:

Although the clean-up of the scattered brick and concrete rubble was discussed several times with the contractor's superintendent, at no time during the performance of the work did he make protest of the work demanded of him or request written instructions. * * *

There is nothing in the record which indicates that the contracting officer knew of the discussions referred to in the memorandum.

The record discloses also that the contractor's letter dated September 9, 1952, which was referred to in the exception to the release on contract and which was submitted after the completion and acceptance of all work under the contract, constitutes the only written protest given by the contractor. Obviously, this written protest was not timely, and did not conform to the procedural requirements fixed by paragraph 12 of the specifications, quoted above, that when the contractor considers any work demanded of it to be outside of the requirements of the contract, he shall immediately ask for written instructions, and within 20 calendar days after the date of receipt of the written instructions, he shall file a written protest with the contracting officer.

The contractor in its appeal does not dispute the findings of the contracting officer that it failed to make timely written protest as required by paragraph 12 of the specifications. (Findings, item 7.) Moreover, the contractor has not shown that the contracting officer did, in fact, have actual notice that the contractor believed that the cleanup of the scattered brick and concrete rubble for which the con-

tractor now claims additional payment was outside of the requirements of the contract.

In *United States* v. *Madsen Const. Co.*, 139 F. 2d 613, 615-6 (6th Cir., 1943), the court, in deciding a dispute between a subcontractor and a prime contractor with the United States, addressed itself to the effect of a failure to comply with the provisions of the contract requiring a written protest against a ruling of the contracting officer deemed to be unfair or to require extra work. The court, in pertinent part, stated:

> The interpretation of the Contracting Officer concerning the required sizing of brick, not having been formally protested or appealed by appellant, was under the contract binding upon it. Appellant did not make at any time a clear, formal protest to the Contracting Officer with respect to any claimed improper elimination of tile within the permissible degree of distortion; nor was any request made by appellant upon the appellee, principal contractor, to protest the matter to the Contracting Officer.

Also, see *United States* v. *Cunningham*, 125 F. 2d 28, 30, 31 (D. C. Cir., 1941).

This case illustrates the importance of promptly presenting a dispute of this nature to the contracting officer by a formal protest. In its letter dated September 9, 1952, claiming additional compensation, the contractor said:

> * * * We ask that we be paid for the cleanup of all non-combustible debris that we were ordered to clear from the same area that the combustible debris was cleared from earlier, namely the 300 acres.

The Acting Chief of the Construction Section, Big Horn District, in the memorandum referred to earlier, states that the "scattered concrete brick and concrete rubble" with which the claim deals "was a result of felled brick chimneys," to which paragraph 30 of the specifications applies. In his findings of fact and decision, the contracting officer states that

> * * * The contractor's claim apparently pertains specifically to the scattered loose brick and concrete rubble that remained after the removal of barrack buildings prior to the date of the issuance of the invitation for bids, as distinguished from the brick and rubble from large main chimneys of mess halls and utility buildings which were required to be broken and removed under the provisions of this contract.

And, finally, in its letter of appeal, dated December 21, 1952, the contractor states that his claim is "for the cost only of picking up broken concrete and brick [from] the whole of the 300 acres outside of the areas" shown on Drawing No. 26–601–270, which is referred to in paragraph 29 of the specifications relating to concrete floors. Thus the record does not show clearly either the location or the source of the rubble in dispute.

If a written protest is made promptly in accordance with provisions of a contract similar to paragraph 12 of the specifications, the contracting officer may obtain specific information respecting the work in dispute and decide whether the work is required by the contract. In the event that the contracting officer decides that the work is not required by the contract, he will then have an opportunity to issue a written order and to compute the cost of the work and state the price in the order, as required by article 5 of the standard form of construction contract.

Accordingly, by reason of its failure, pursuant to paragraph 12 of the specifications, to submit a timely protest in writing to the contracting officer when ordered to perform work which it believed to be in excess of that called for in the contract, the contractor must be held to have accepted the order, and, consequently, to have waived the right thereafter to object to or challenge the propriety of the requirement that it clear the debris in dispute.

As the claim should be denied by reason of the contractor's failure to file a timely protest as required by paragraph 12 of the specifications, it is deemed unnecessary to determine the validity of the claim on the merits. (See *Welch Industries, Inc.*, p. 63.)

DETERMINATION

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 17 F. R. 6793), the action of the contracting officer in rejecting the claim of the appellant for additional compensation under contract No. I79r-2367 is affirmed.

CLARENCE A. DAVIS,
Solicitor.

ESTATE OF ISAAC MAYNARD BRONCHEAU (BRONCHE), DECEASED, UNALLOTTED NEZ PERCE INDIAN

IA-96 *Decided April 20, 1953*

Indian Estates—Probate of Will—Testamentary Charitable Trust—Testamentary Capacity—Prejudice and Bias of Examiner of Inheritance.

A will devising in trust for charitable purposes, the restricted estate of an Indian testator to a tribe not organized under the Indian Reorganization Act, is valid.

Mere inconveniences of administration of a trust to an Indian tribe to provide scholarships for tribal members, do not defeat the purposes of an otherwise valid testamentary trust.

The findings of an Examiner of Inheritance with respect to the testamentary capacity of an Indian testator, will not be set aside when they are supported by the weight of all the evidence adduced in a proper and adequate probate proceeding.

A contention of prejudice and bias directed against an Examiner of Inheritance cannot be sustained when no specific acts of prejudice or bias are cited, and none is discernible in a record to the accuracy or adequacy of which no objection is made.

APPEAL FROM EXAMINER OF INHERITANCE, BUREAU OF INDIAN AFFAIRS

Cecelia Alberts has appealed to the head of the Department from a decision, dated October 8, 1952, by an Examiner of Inheritance, Bureau of Indian Affairs, denying her petition for a rehearing in the matter of the estate of Isaac Maynard Broncheau (Bronche), deceased, unallotted Nez Perce Indian, whose last will and testament, executed on standard Indian Service Form 5–109 and dated April 16, 1948, was approved by the Examiner of Inheritance on November 28, 1951.

The testator, who was 28 years old at the time of his death on May 29, 1950, left an estate subject to the jurisdiction of this Department appraised at $23,427.51. He left surviving as his sole heir at law, determined by the Examiner of Inheritance in accordance with sec. 14–103, Idaho Code Annotated 1932, one Cecelia Alberts, 79-year-old Nez Perce Indian, a first cousin twice removed, who in the absence of a valid will would have inherited by the Examiner's findings the entire estate.

By the terms of the approved will, the testator devised his entire estate to the Nez Perce Tribe of Indians, the income from which is to be administered by the official governing body of that tribe and credited to a fund to be known as the Isaac Broncheau Memorial Foundation and to be used to grant scholarships to outstanding high school graduates of the Nez Perce Tribe for educational expenses at any college, university or other institution of higher learning, with the limitation that such a scholarship is not to exceed $500 per annum per student.

Hearings to determine the heirs of the decedent and the validity of his will were held at Lapwai, Idaho, by an Examiner of Inheritance on August 31, 1950, April 18, 1951, and October 9, 1951, at which lengthy and detailed testimony was taken. The decision of the Examiner held the will valid and also determined Cecelia Alberts to be the sole heir at law of the decedent had he died intestate.

Cecelia Alberts filed a petition for rehearing before another Examiner of Inheritance, in which she attacked the decision on two principal grounds: (*1*) Bias and prejudice of the Examiner during the course of the hearings and (*2*) insanity of the decedent. Her petition

for rehearing was denied, and she has taken this appeal from that denial.

The findings of an Examiner of Inheritance based upon competent evidence that is both comprehensive and detailed in respect of all the issues, should not be lightly set aside. In this case, the findings have been based upon such a record, and are consonant with the preponderant weight of all the evidence contained therein.

The appeal does not allege any specific error in the record or offer to introduce any newly discovered evidence, but rather it attacks the conclusions of the Examiner based upon the existing record.

The first of the principal contentions of appellant is that the Examiner exhibited bias in the conduct of the hearings, although the record is devoid of any such complaint from anyone during the hearings themselves. Appellant was represented by counsel throughout both the continued hearings, during which no objection was noted with respect to the manner in which the hearings were being conducted or to the form or substance of any of the testimony or other evidence adduced. The record does not show that anyone desiring to testify was not afforded full opportunity to do so or that any of the testimony offered was objected to by, or was excluded or admitted over the objection of, appellant. Instead, it shows that appellant was afforded full opportunity to testify and to produce any and all witnesses she desired. It shows that she and her witnesses did in fact testify and that her attorneys were afforded and availed themselves of the opportunity to examine all the witnesses. Neither the petition for rehearing nor the appeal from its denial contests in any particular the accuracy or adequacy of the record.

Moreover, the appeal does not enumerate any specific acts of bias or contend that any specific evidence was ignored by the Examiner. No bias or prejudice on the part of the Examiner of Inheritance is shown.

The second principal contention advanced in the appeal is that the testator was insane and under the undue influence of the then Agency Superintendent Archie Phinney at the time the will was made.

There is extensive testimony and other evidence in the record directed specifically to the question of the testamentary capacity of the decedent and the influence, if any, of the late Archie Phinney over him. The findings and conclusions of the Examiner of Inheritance on these issues are amply supported by the weight of all the evidence.

The will of Isaac Broncheau was witnessed by the late Archie Phinney, former Superintendent of the Northern Idaho Agency, and its former Chief Clerk Victor Fontenelle, both of whom at the time of

its execution made the customary affidavits. It was approved as to form by the Department.

The record contains a statement dated April 4, 1951, by Mr. Fontenelle, the sole surviving attesting witness, made under oath in response to written interrogatories. It was read by the Examiner at the first continued hearing and deals in detail with the circumstances surrounding the execution of the will, the desires of the decedent in the premises, his soundness of mind and memory, and freedom from coercive influences in his testamentary acts. It affirms in all respects the validity of the will.

No challenge is raised directly to anything that is set forth in this statement and no request is made that Mr. Fontenelle be questioned further. Although the testimony of appellant herself as well as that of her several witnesses is far from consistent throughout, such testimony in its entirety tends to support the recitals of Mr. Fontenelle, as does the weight of all the other evidence.

Emphasis in the appeal, as in the petition for rehearing, is laid by the appellant-contestant upon the voluntary commitment of the decedent to an institution for the insane approximately ten and a half months subsequent to the execution of his will. The record of, and circumstances surrounding, the decedent's commitment and subsequent discharge and transfer to a veterans' hospital were fully brought out by competent and expert testimony and other evidence at the probate hearings, and are here found to have been fully considered and weighed in the Examiner's decision. The weight of such testimony and other evidence amply supports the findings and conclusions of the Examiner of Inheritance.

Isaac Broncheau was a disabled veteran of World War II in which he suffered crippling wounds in both legs and was receiving veterans' disability compensation at the time of his death. In addition, he was suffering from the progressive stages of advanced tuberculosis, with knowledge that he had not long to live. In the post-war years, he had been confined for the treatment of tuberculosis many times in veterans' hospitals. He drank excessively and his use of alcoholic beverages appeared to increase with the progressive ravages of his disease until the uncontroverted testimony indicates he was sober not more than two-thirds of the time during a period immediately preceding his commitment to the State Hospital at Orofino, Idaho.

The affidavits filed in support of the petition for rehearing and those filed in support of this appeal are of limited materiality in stressing the actions of the decedent in his early childhood and those during a period considerably subsequent to the making of his will. Moreover, the Army apparently found the former actions no bar to his acceptance for unlimited military service, including combat duty, and the weight

of the evidence pictures him ten and a half months after the making of his will to be a desperately sick man in need of urgent hospitalization, rather than insane. The weight of all the evidence shows him to have been of full testamentary capacity, free of undue influence, during the considerable period of time he was giving thought to making his will and when he finally made it.

Appellant's supporting affidavits, principally from those who testified at the hearing, consist largely of opinion statements that are unsupported by specific allegations or by the establishment of the bases from which such opinions were formed. None contains any new substantive matter not already considered by the Examiner of Inheritance.

Appellant has failed to show any error in the record or that the Examiner ignored or did not impartially give due consideration to all the evidence contained therein. She has not shown that the decision of the Examiner is in any respect inconsistent with the weight of all the evidence. Nor does she claim to possess, or to offer to introduce at a rehearing, new evidence which was not available or brought out in the proceedings in this case. Appellant has failed to show where any just purpose would be served by a rehearing.

Several questions presented by the record should be considered. They relate to the validity of a devise by the testator of an equitable interest in restricted lands to an Indian tribe not organized under the Indian Reorganization Act, to be held and administered by the tribe in trust for the charitable purposes set forth in such testamentary trust. These questions involve the power of the Indian testator to devise and the power of the Nez Perce Tribe to accept the estate in trust and the right of the Secretary of the Interior to approve the terms of such devise which limit his own discretionary powers over the administration of the restricted interests involved.

It is our considered judgment that the will is valid and that its terms may lawfully be carried out, although not perhaps without considerable administrative difficulty. Mere inconveniences of administration, however, should not defeat the purposes of an otherwise valid testamentary trust. There is no showing that the purposes of the instant trust are impossible of attainment.

The Indian testator derives his power to dispose by will of interests in trust allotments from the act of June 25, 1910 (36 Stat. 855), as amended by the act of February 14, 1913 (37 Stat. 678, 25 U. S. C. sec. 373). These statutes are enabling acts in respect of the subject matter under consideration and were enacted to grant to an Indian powers in addition to and not in deprivation of any of his preexisting rights. As such they are entitled to the customary rules of construction applicable to enabling legislation. That an Indian may by virtue of these acts

dispose by will of his interest in lands allotted in trust, is not open to question inasmuch as such right is expressly so granted. Nor do either of these acts limit to whom such a devise may be made. It may lawfully be made to an Indian tribe. Neither do we see any legal impediment to the acceptance of such a devise by an Indian tribe even though it has duly withdrawn itself from the application of the act of June 18, 1934 (48 Stat. 984, 25 U. S. C. sec. 461), known as the Indian Reorganization Act. The Nez Perce Tribe is a lawful devisee of the estate of Isaac Broncheau.

The devise, however, is to that tribe in trust for the purposes set forth in the will. These purposes are noble. The trust is a charitable one for the benefit of the tribe as a whole and is confined to a reasonably designated class of all the tribe's members. The class is not a capricious one, but a worthy one supported by public policy, properly designed to foster the objects of the trust itself. No sound criticism could be directed to the purposes of the trust. The testator died without dependents. No one entitled to support by the testator is deprived thereof by his will.

No legal impediment is seen to the right or power of the testator to devise his equitable interests in restricted allotments to the Nez Perce Tribe in trust, or to the right or power of that tribe to accept this trust.

The will does not seek, nor would its approval operate, to terminate the trust or restrictive period applicable to the estate devised. It is true that the realty interests affected are impressed with the restrictions applicable to tribal lands and the nonalienability thereof under existing law. However, a sale of the realty interests is not a condition to the proper effectuation of the trust purposes. It might conceivably at some future date become so under circumstances necessitating enabling legislation. At the present time as for some time in the past the lands have been under grazing leases, the rentals from which have been duly apportioned among the owners of the equitable interests in such lands. The corpus of the trust contains fractional interests in these lands. Administrative difficulties in this connection are apparent but none substantially different from those already involved in respect of the testator's interest prior to his death. Other problems will undoubtedly arise in connection with the orderly administration of the trust and its corpus. Yet none is seen as constituting justifiable grounds for a finding that the will is invalid.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 25, Order No. 2509, 14 F. R. 307), the decision of the Examiner of Inheritance denying the appellant's petition for rehearing is affirmed.

CLARENCE A. DAVIS,
Solicitor.

LEVI A. HUGHES ET AL.

A-26612 *Decided April 28, 1953*

Oil and Gas Lease Applications—6-Mile-Square Requirement—Rules of Practice—Authority of the Secretary to Assume Jurisdiction of Pending Matter.

An application for a noncompetitive oil and gas lease which was filed on September 30, 1946, and is still pending, which describes tracts that cannot be embraced in a 6-mile square is not required to be rejected in favor of junior applications for the same tracts, each of which is confined to such a square. In such a case, separate leases will be issued for the tracts in each 6-mile square involved in the first application.

An application for a noncompetitive oil and gas lease is not fatally defective because it lists as references to the applicant's reputation and business standing corporations which he owns or controls.

When a matter pending before the Department of the Interior has been considered at the highest level in the Department, no interested party may be heard to complain of defective consideration at a lower level, since the Secretary of the Interior has authority under the law to assume jurisdiction at any stage of the proceedings.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

H. H. Phillips filed an application on September 30, 1946, for a noncompetitive oil and gas lease on the following tracts of land in the State of New Mexico:

New Mexico principal meridian,
T. 32 N., R. 7 W.,
sec. 21, W½ of NW¼;
sec. 25, S½ of NE¼.
T. 28 N., R. 8 W.,
sec. 32, lots 1, 2, N½ of SW¼, NW¼.
T. 30 N., R. 8 W.,
sec. 13, S½ of SE¼.
T. 31 N., R. 8 W.,
sec. 21, N½ of N½, N½ of S½, SE¼ of SE¼.
T. 32 N., R. 10 W.,
sec. 8, lots 3, and 4;
sec. 9, S½ of S½;
sec. 10, lot 1, SE¼ of SE¼;
sec. 11, S½ of S½;
sec. 12, S½ of S½;
sec. 15, E½ of E½.
T. 28 N., R. 11 W.,
sec. 16, W½ of E½, W½, SE¼ of SE¼;
sec. 22, S½ of SE¼, SW¼, SE¼ of NW¼.

Sec. 13, T. 30 N., R. 8 W., was located within the area of the proposed San Juan-Shiprock project for irrigation of Navajo lands, and might be inundated, or needed for a camp site and borrow pit, depending on

which of two alternate locations under consideration should be finally selected for erection of a dam. Accordingly, the Bureau of Indian Affairs requested that a lease not be issued pending final determination of the location of the proposed dam. For this reason, the manager of the Land and Survey Office at Santa Fe took no action as to any of the tracts embraced in the application until December of 1949. In that month, Mr. Phillips wrote the Director of the Bureau of Land Management that the S½NE¼ sec. 25, T. 32 N., R. 7 W., was included in the proposed Allison Unit Area, and requested early issuance of a lease on that tract. On March 3, 1950, the manager required execution by Mr. Phillips of a lease on this acreage, but still withheld decision as to the other tracts. Mr. Phillips executed the lease, and it was made effective by the Secretary of the Interior as of April 1, 1950, and given the serial number, New Mexico 01745. No lease on the remaining area embraced in the application has been issued.

On January 18, 1952, Levi A. Hughes and Charles B. Gonsales jointly filed five separate applications for noncompetitive oil and gas leases to include all of the lands in Mr. Phillips' application, except the S½NE¼ sec. 25, T. 32 N., R 7 W., which was already leased. On January 21, 1952, they filed a protest against the issuance of any further lease on the Phillips application, on the ground that it listed tracts which cannot be included within a 6-mile square. On February 26, 1952, Messrs. Hughes and Gonsales filed an amendment to their protest, alleging that the three references as to his reputation and business standing given by Mr. Phillips in his original application were corporations which he owns or controls. In support of this allegation they submitted photostatic copies of certain letters from the Secretary of State of Texas.

On March 11, 1952, the manager dismissed the protest and transmitted lease forms to Mr. Phillips for execution, covering all the remaining unleased land in his application except the S½SE¼ sec. 13, T. 30 N., R. 8 W. He rejected the application as to the latter tract on advice of the Bureau of Indian Affairs, which desired to use it in connection with construction of the proposed Navajo Dam.

Messrs. Hughes and Gonsales appealed to the Director of the Bureau of Land Management on April 14, 1952. The record on appeal, less the protestants' brief, was received in the office of the Director of the Bureau of Land Management on April 28, 1952. On May 21, 1952, the Assistant Director affirmed the decision of the manager and ordered the Hughes-Gonsales applications held for rejection. The protestants' brief was not received by the Director until the following day. The protestants have appealed to the head of the Department. Their appeal is based on the same grounds as their original protest and on the additional ground that the Assistant Director issued his

decision within 30 days of receipt of the record on appeal in violation of the Rules of Practice. 43 CFR 221.68.

At the time Mr. Phillips filed his application, a regulation of the Department (which was in force from May 9, 1936, until October 28, 1946) required applications for noncompetitive leases to include—

> (d) Description of the lands for which a lease is desired, which may not exceed 2560 acres as nearly compact in form as possible * * *. [43 CFR, 1938 ed., 192.23; sec. 10, 55 I. D. 507.]

In *Mary I. Chapman et al.*, A–25517, A–25688, 60 I. D. 376 (1949), the compactness requirement of this regulation was, in effect, interpreted as requiring that the lands applied for must be containable within a 6-mile square. The Department held that an application which did not conform with this requirement was a defective application which could be rejected or allowed to stand in the discretion of the Department. Therefore, at the time Mr. Phillips filed his application there was no requirement that his application be rejected because it included lands which could not be contained within a 6-mile square.

Within a month after the application was filed, the oil and gas regulations of the Department were completely revised, on October 28, 1946 (43 CFR, 1946 Supp., Part 192). The revised regulations omitted the requirement that an application for a noncompetitive lease must describe lands "as nearly compact in form as possible." (43 CFR, 1946 Supp., 192.42(d).) The regulations provided only that noncompetitive leases, "in reasonably compact form, may be issued." (43 CFR, 1946 Supp., 192.40.) It will be noted that this provision was not couched in the form of an instruction imposing any duty upon an applicant.

On June 6, 1947, sec. 192.40 was amended to read, in part, as follows:

> Leases * * * in reasonably compact form, may be issued * * *. No single lease will be issued embracing lands which cannot be included within a six mile square area. Where an application covers tracts which cannot be so contained two or more leases, as may be necessary, will be issued. The right is reserved to suspend, or reject in whole or in part, applications involving scattered tracts considerably more than six miles apart.

This amendment to the regulation made it plain that an application for land which could not be contained in a 6-mile square was not fatally defective and subject to summary rejection. On the contrary, the amended regulation plainly implied that such an application would be allowed unless it embraced scattered tracts "considerably more than six miles apart." Even in that event, the Department merely reserved the right to suspend or reject such application in whole or in part.

It was not until November 29, 1950, that the Department adopted a mandatory requirement that an application for a lease must be confined to land which could be included in a 6-mile square. On that date, the Department revised its oil and gas regulations to provide for the use of a combined offer and lease form, and in that connection required that "Each offer * * * must cover only lands entirely within a six-mile square." (43 CFR 192.42 (d); 15 F. R. 8582.) The revised regulations became effective 60 days after date of issuance, or on January 28, 1951. However, it was provided in the revised regulations that—

> Applications filed prior to the effective date of the regulations in this part will be processed in accordance with the regulations in effect immediately prior to such date * * *. [43 CFR, 1951 Pocket Supp., 192.44.]

It will be noted that the quoted passage applies to all prior pending applications, and not merely to those filed subsequent to any particular previous amendment of the regulations.

It thus appears that at the time the Phillips application was filed, and at all times since, there has never been a departmental regulation applicable to it which would require its rejection because it included lands that cannot be contained in a 6-mile square. Even if the application could be rejected on this ground, there appears to be no good reason for taking such action. The superior equity appears to be on Mr. Phillips' side rather than the appellants'. Their applications are 5 years junior to his. They have alleged nothing militating against his eligibility to hold leases on the tracts listed in his application. To reject Mr. Phillips' application on nonmandatory grounds after 6 years of pendency, in favor of applications 5 years junior to it is entirely out of accord with the principles of fair administration.

With respect to the appellants' assertion concerning the three references supplied by Mr. Phillips as to his reputation and business standing, it is sufficient to observe that even the appellants admit that Mr. Phillips' deficiency in this respect, assuming that there is a deficiency, is not fatal.

The appellants also assign as error the action of the Assistant Director of the Bureau of Land Management in rendering a decision prior to the expiration of 30 days after receipt of the record. However, Messrs. Hughes and Gonsales' appeal has now received consideration on the merits at the highest level in the Department. The Secretary of the Interior has authority under the law to assume jurisdiction of a matter before his Department at any stage of the proceeding. *Knight* v. *United States Land Association*, 142 U. S. 161 (1891); *Dwight Hunter Reay et al.*, 58 I. D. 522 (1943); 43 CFR 221.83. Defective consideration at the Bureau level is, in these circumstances, harmless error.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Assistant Director of the Bureau of Land Management is affirmed.

W. H. FLANERY,
Acting Solicitor.

VIOLA P. DREYFUS

A–26598 *Decided May 5, 1953*

Small-Tract Leases—Amendments—Equitable Power of the Department.

The Department may, in the exercise of its equitable power, permit the amendment of a small-tract lease to embrace land different from that originally leased where it is satisfactorily shown that through no fault of the lessee the land is so far unfit for the purpose for which it was leased as to make it practically impossible to construct the improvements required by the lease.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Viola P. Dreyfus has appealed to the head of the Department from the decision of the Assistant Director of the Bureau of Land Management dated November 30, 1951, which affirmed the action of the manager of the land office at Los Angeles in rejecting Mrs. Dreyfus' application to amend her small-tract lease (Los Angeles 084661) to substitute other land for the 5-acre tract covered by her present lease. The application was rejected because the regulations governing small-tract leases (43 CFR, Part 257) make no provision for the amendment of such leases.

The lease was issued to Mrs. Dreyfus on September 12, 1950, under the provisions of the act of June 1, 1938, as amended (43 U. S. C., 1946 ed., sec. 682a), which authorizes the Secretary of the Interior to lease tracts of public land, not to exceed 5 acres, which the Secretary (or his designated representative) may classify as chiefly valuable as home, cabin, camp, health, convalescent, recreational or business sites, under such rules and regulations as the Secretary may prescribe. Mrs. Dreyfus' lease is for cabin-site purposes, and it requires her to construct on the land, to the satisfaction of the Regional Administrator of the Bureau of Land Management, improvements appropriate to the use for which the lease was issued.

Mrs. Dreyfus contends that the land described in her lease is inaccessible, and that when she attempted to go on the land to have blueprints made for her cabin she was unable to reach it even by foot.

The question arises whether, aside from the regulations governing small-tract leases, there is authority to allow Mrs. Dreyfus to substitute other land for the land covered by her lease.

One of the purposes of the statute under which the lease was issued was to permit the use of public lands for cabin sites. A cabin site is defined in the departmental regulations as a site suitable for a summer, week-end, or vacation residence (43 CFR, 1951 Cum. Pocket Supp., 257.2). The land now under lease to Mrs. Dreyfus was presumably classified as chiefly valuable as a cabin site by the Regional Administrator, pursuant to the authority delegated to him to make such classifications (43 CFR, 1951 Cum. Pocket Supp., 257.4). Mrs. Dreyfus' lease states that it is to be used for "cabin-site purposes only," and it requires that she place suitable improvements on the land "appropriate to the use for which the lease is issued." Yet Mrs. Dreyfus says she cannot reach the land to place improvements on it. In such a situation, it seems obvious that her lease is of no value to her as a cabin site.

It has long been recognized that the Department may permit the amendment of an entry of any kind on equitable grounds, not only to correct mistakes but to prevent unmerited hardship. *Loyd Wilson*, 48 L. D. 380 (1921). Thus, in cases where it has been shown that through no fault or neglect on the part of the entryman the land embraced in an entry is so far unfit for occupancy as to make it practically impossible to perform the requirements of the law thereon, amendments to substitute other land have been allowed. See 43 CFR 104.11; section 10, Circular No. 423, 44 L. D. 181 (1915); *Fred C. Barron*, 50 L. D. 597 (1924). The word "entry" when used in this context is used in its generic sense and treated as signifying an appropriation of public lands generally. *Loyd Wilson*, 48 L. D. 380 (1921).

It appears, therefore, that there is no legal objection to the amendment of a small-tract lease where it is satisfactorily shown that, through no fault or neglect on the part of the lessee, the land included in the lease is so far unfit for the purpose for which it was leased as to make it practically impossible to construct the improvements required by the lease.

It has been suggested that Mrs. Dreyfus should have examined the land before she applied for a lease, and that had she done so she would have discovered the nature of the land. However, there is no requirement in either the statute or the regulations that an applicant examine land classified as suitable for cabin-site purposes before accepting a lease for such purposes. Moreover, land classified by the Department as suitable for cabin-site purposes should, at least, be accessible by foot and of such character as to permit the construction of a cabin.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Assistant Director is reversed, and the case is remanded to the Bureau of Land Management for the consideration of the application to amend her lease and for appropriate action thereon consistent with this decision.

CLARENCE A. DAVIS,
Solicitor.

PHILIP L. BOYER ET AL.

A–26614 *Decided May 12, 1953*

Authority of Attorney to Appear—Appeals.

Where a party adversely affected by a decision of a manager of a district land office of the Bureau of Land Management authorizes a person, who is not an attorney, or that person's attorneys to represent him in taking an appeal from that decision, and the agent employs attorneys to take such an appeal to the Director of the Bureau of Land Management, the taking of an appeal to the Director by those attorneys is to be regarded as authorized by the party.

An appearance filed by an attorney-at-law in a matter pending before the Department creates a presumption that he is authorized to represent the party for whom he purports to appear.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Philip L. Boyer and 313 other persons [1] have appealed to the head of the Department from a decision dated November 13, 1952, by the Assistant Director of the Bureau of Land Management which dismissed their appeals to the Director of the Bureau of Land Management from the actions of the managers of the Nevada and Wyoming Land and Survey Offices rejecting their respective applications for noncompetitive oil and gas leases. The appeals were dismissed on the ground that they were not filed either by the applicants or their attorneys, but by the attorneys of Petro Associates, an organization which had acted as the appellants' agents in filing their lease offers.

The various offers to lease were all for less than 640 acres, and with few exceptions, sought a lease covering only 40 acres. On June 17, 1952, the pertinent regulation was amended to require that an offer to lease may not be for less than 640 acres, with certain exceptions not material here. 43 CFR 192.42(d); 17 F. R. 5615. This amendment

[1] The names of all the individuals involved and the serial numbers of their applications are set forth in exhibit A attached to the Assistant Director's decision of November 13, 1952.

became effective on June 20, 1952, the date on which it was filed with the Division of the Federal Register, National Archives. [2]

All of the lease offers involved in these appeals appear to have been filed prior to June 20, 1952, the effective date of the said amendment to the regulations. Nevertheless, they were rejected by the managers on the ground that they were for an area of less than 640 acres. Appeals from the managers' decisions were timely filed with the Director of the Bureau of Land Management by Disney and Gall, attorneys, in the names of the lease offerors. In view of the fact that the attorneys had previously advised the Bureau of Land Management that they represented "Petro Associates" in these proceedings, they were requested by the Bureau, by letter of July 25, 1952, to disclose whom they represented in filing the appeals. It then appeared that the following statement had been addressed to Petro Associates and signed by all but two[3] of the appellants:

> You or your attorneys are hereby authorized to represent me in appealing this rejection to any appropriate Government authority.

This statement was contained in a form letter sent by Petro Associates to all persons for whom they had attempted to obtain a lease, which read as follows:

> We have just been advised that due to new Government regulations, there is a possibility that your lease which we filed for you in the State of Wyoming may be rejected. Should this happen, we have made arrangements to file an appeal to the highest authorities, at no cost to you.
>
> As you have only a limited time to appeal, mail to us immediately the rejection you received from the Department of the Interior, together with the form at the bottom of this letter, properly signed by the parties named in the lease.
>
> If you sign the withdrawal mailed to you by the Government with the rejection, no appeal would then be possible.

After the Assistant Director's decision of November 13, 1952, dismissing the appeals had been mailed to the lease offerors, 252 of them signed and mailed to the Secretary of the Interior a form letter, the pertinent parts of which are as follows:

> The writer, prior to June 17, 1952, filed an application with the Bureau of Land Management for an oil and gas lease. This application was rejected because the Bureau changed its rules and regulations regarding the size of leases which might be obtained. The order changing the minimum acreage allowed under a lease offer was dated June 17, 1952, was filed June 20, 1952, and was published in the Federal Register on June 21, 1952.
>
> Subsequent to such date, I authorized Petro Associates of New York City, to employ the firm of Disney and Gall, Washington, D. C., to appeal the rejection in my case to the proper authorities within the Department of the Interior. Thereafter, the Bureau of Land Management reviewed its order of June 17,

[2] Section 7 of the Federal Register Act; 44 U. S. C., 1946 ed., sec. 307.
[3] William Itzkowitz, Wyoming 016366; Byron R. Lerner, Wyoming 015632.

1952, and determined that all applications for leases of acreages less than 640 acres which had been filed prior to June 17, 1952, should be honored.

Subsequent to that time I have received a notice in which the Bureau of Land Management dismissed my appeal, together with other appeals brought by the firm of Disney and Gall. The basis for this dismissal was solely for the reason that the Department claims there was no client-attorney relationship between myself and Disney and Gall, who brought the appeal on my behalf.

* * * I consider my appeal to be properly brought by the attorneys whom I authorized to appeal for me.

The firm of Disney and Gall are authorized to take whatever further steps are necessary in appealing this matter to you, as Secretary of the Interior, and to bring court action, if necessary, to protect my rights.

Wesley E. Disney and Lawrence H. Gall submitted a statement declaring that they are members of the bar of the Court of Appeals for the District of Columbia and the Supreme Court of the United States. They are, therefore, qualified to practice before this Department. 43 CFR 1.4 (b).

The relationship of attorney and client arises from a contract of employment, express or implied, and is essentially one of agency.[4] The client may employ an attorney himself or an authorized agent may employ counsel on behalf of the principal.[5] The appearance of an attorney-at-law in a proceeding on behalf of a party thereto is presumptive evidence of his authority to represent that party.[6] Although the presumption in favor of an attorney's authority to appear is rebuttable, it can be successfully challenged only by substantial evidence that authority is lacking.[7] Such evidence is lacking in this case.

The evidence upon which the Assistant Director relied is apparently the aforesaid statement signed by 312 of the appellants. In that statement, each of those appellants expressly "authorized" Petro Associates "or" the latters' attorneys to represent "me" in appealing from the action of the manager in rejecting his application. Under the Department's regulations, the appeals could be taken and prosecuted only by an attorney or a selected class of persons which did not include Petro Associates (43 CFR 1.4). The statement took account of such a contingency by, in effect, authorizing Petro Associates to employ attorneys who could represent those appellants on appeal. Hence, it seems clear that Petro was authorized by the statement and it was appropriate for them to employ attorneys to take and to prosecute the appeals.[8] It follows that the statement is evidence of authoriza-

[4] 5 Am. Jur., Attorneys at Law, secs. 29, 67; *Moe* v. *Zitek*, 27 N. W. 2d 10, 13 (N. Dak., 1947).

[5] *Rodgers* v. *Bromberg*, 53 F. 2d 723, 724; 5 Am. Jur., Attorneys at Law, sec. 30.

[6] *Hill* v. *Mendenhall*, 88 U. S. 453; Albert J. Boyle, 6 L. D. 509, 510 (1888); 5 Am. Jur., Attorneys at Law, sec. 80.

[7] *Booth et al.* v. *Fletcher*, 101 F. 2d 676, 683 (C. C. A., D. C., 1939).

[8] *Restatement, Agency*, sec. 80, comment a: *Griffith* v. *Rosenberg*, 8 P. 2d 284 (Wash. 1932); *Koscinski* v. *White*, 286 Fed. 211, 214 (D. C. E. D., Mich., 1923).

tion, rather than of lack of authorization, as the Assistant Director seems to have assumed.[9]

Ackley v. *Prime*, 278 Pac. 932 (Calif., 1932), cited by the Assistant Director, is distinguishable, apart from other grounds, because the purported principal in that case denied that he had authorized the purported agent, an attorney, to employ another attorney.

Accordingly, in the case of all the appellants, except Byron R. Lerner, the Director of the Bureau of Land Management should proceed to dispose of the appeals on the basis that they authorized Disney and Gall to take the appeals to the Director.

In the case of Byron R. Lerner, Wyoming 015632, there is before us neither the written statement nor the letter above mentioned. He should be afforded an opportunity by the Bureau of Land Management to submit evidence with respect to the authority of Disney and Gall to take the appeal to the Director on his behalf. In the light of the showing he submits in response and of this decision, the Bureau should determine whether the taking of the appeal was authorized by him, and then dismiss his appeal or dispose of it on the basis that the taking of it was authorized, as may be appropriate.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Assistant Director of the Bureau of Land Management is reversed and the cases are remanded to the Bureau of Land Management for further proceedings consistent with this decision.

CLARENCE A. DAVIS,
Solicitor.

NORTHPORT IRRIGATION DISTRICT

Land Classification—Secretarial Authority—Reclamation.

After executing an amendatory repayment contract, with an irrigation district under sections 7(a) and 7(c) of the Reclamation Project Act of 1939 (43 U. S. C. sec. 485), the classification of the lands of the district as temporarily or permanently unproductive, made under sections 41 and 43 of the Omnibus Adjustment Act of May 25, 1926 (43 U. S. C. secs. 423, 424(b)), and the authority of the Secretary of the Interior under these sections, are no longer effective unless made so by express provisions in the mandatory repayment

[9] Though, in the light of this conclusion, it was not necessary to do so, after the Assistant Director's decision was rendered, 252 of the appellants submitted the above-mentioned letters in which they affirmatively stated that they had authorized Petro Associates to employ Disney and Gall to represent them.

With respect to one of the appellants, William Itzkowitz, Wyoming 015632, there is before us only one of these letters as evidence of authorization, which in his case may as a minimum be regarded as a ratification. *Rodgers* v. *Bromberg*, 53 F. 2d 723 (5th Cir. 1931); 5 Am. Jur., Attorneys at Law, sec. 71; 2 Am. Jur., Agency, sec. 209; *Restatement*, Agency, sec. 82.

contract and in the approval act of the Congress required under section 7(c); the authority of the Secretary of the Interior in the premises is that in section 8 of the Reclamation Project Act of 1939 (43 U. S. C. sec. 485), and it can be exercised only upon request of the irrigation district or its duly authorized representative.

M–36171 MAY 19, 1953.

To ASSISTANT SECRETARY FRED G. AANDAHL.

Please refer to your May 4, 1953, memorandum in which you request my opinion as to the authority of the Secretary of the Interior to declare 2,555 acres of lands in the Northport Irrigation District permanently unproductive, and to eliminate them from the Northport Division of the North Platte project, and to write off as a loss to the Reclamation fund $141,405.81, the amount of the construction charge allocated to such lands.

The question in this case is:

Does article 12 of the contract of August 19, 1948, between the United States and the Northport Irrigation District constitute an express amendment of article 38 of the November 24, 1926, contract, and of articles 7 and 8 of the April 1, 1934, contract between the parties?

This is believed to be the question because of the provision of article 11 of the August 19, 1948, contract that:

This contract amends and shall be in lieu of the existing Government-District contracts to the extent expressly provided by this Contract: * * *.

Article 38 of the November 24, 1926, contract adjusts the Northport District's construction charge obligation to the United States, under the original Government-District Contract of February 24, 1919, as directed by section 26 of the Omnibus Adjustment Act of May 25, 1926 (44 Stat. 642), and in particular, it suspends the payment of the construction charge obligation allocated to 2,555 acres of land that were found to be temporarily unproductive for the lack of fertility in the soil.

Article 7 of the April 1, 1934, contract modified the terms of payment under the November 24, 1926, contract, by terminating the crop production plan of repayment, authorized under subsection F of section 4 of the act of December 5, 1924 (43 U. S. C. secs. 473, 474), and by substituting a plan of repaying the unpaid balance of the district's construction charge obligation applicable to productive lands (Classes 1–4) of a fixed annual installment of graduated amounts to be payable in the period 1939–1963. The terms of repayment of that part of the district's suspended obligation applicable to temporarily unproductive lands (Class 5) was the subject of a special provision of article 7.

Article 8 of the April 1, 1934, contract fixed the unpaid balance of the district's construction charge obligation under the November 24, 1926, contract, as $1,037,143.17, and it provided:

That of the unpaid balance $778,957.78 is applicable to productive lands (Classes 1–4), and $258,185.39 is applicable to temporarily unproductive or suspended lands (Class 5).

The several provisions of the cited repayment contracts with respect to the lands as being temporarily or permanently unproductive and the effect of such land classification on the terms of repayment were authorized under the Omnibus Adjustment Act of May 25, 1926, particularly sections 41 and 43 thereof (43 U. S. C. secs. 423, 424(b)).

Because of the Northport District's inability to make the payments to the United States, as required under the cited repayment contracts, there existed a repayment problem within the purview of section 7(a) of the Reclamation Project Act of August 4, 1939 (43 U. S. C. sec. 485).

The conclusion is pointed then, that the provisions of the Federal reclamation laws, particularly those of the Omnibus Adjustment Act of May 25, 1926, were inadequate to permit the Secretary of the Interior to negotiate and execute with the district a contract that would provide fair and equitable treatment of the repayment problem of the district, and that would be in keeping with the general purpose of the Reclamation Project Act of 1939 to provide a feasible and comprehensive plan for the variable payment of construction charges on United States reclamation projects, and to protect the investment of the United States in such projects.

In this situation, the Secretary of the Interior, acting through the Bureau of Reclamation, negotiated and executed with the Northport Irrigation District a so-called Section 7(a) Contract, which contract, as required by section 7(c) of the Reclamation Project Act of 1939, was approved by the Congress by the act of May 25, 1948 (62 Stat. 273). This contract is dated August 19, 1948, and it provides in article 12, as follows:

PAYMENT OF CONSTRUCTION CHARGE OBLIGATIONS

12. The District shall pay annually to the United States, for application against its construction charge obligation of nine hundred fifty-two thousand and forty-five dollars and fifty-seven cents ($952,045.57) the sum of three thousand five hundred dollars ($3,500.00). The first said payment shall become due and payable on June 1, 1949, and successive payments on June 1 of each year thereafter until said construction charge obligation shall have been fully liquidated by the application of such payments together with the application under Article 13 hereof, of revenues, if any, from power and other sources: *Provided*, however, should the Congress hereafter so authorize, the Secretary, if he so finds, shall determine and announce that the Project works and facilities provided for the District have no further useful life, then, subject to such terms

and conditions as the Secretary may be authorized to prescribe, all payments thereafter otherwise becoming due from the District shall cease.

It will be observed that this article fixes the construction charge obligation of the district as $952,045.57. It will be further observed that the provisions of the Omnibus Adjustment Act of May 25, 1926, respecting the classification of lands and the terms of repayment in accord with such classification, all of which were basic to the contracts of November 24, 1926, and April 1, 1934, are not given any recognition either in the contract of August 19, 1948, and in particular article 12, or in the Approval Act of May 25, 1948. The conclusion is pointed, therefore, that article 12 of the August 19, 1948, contract does constitute an express amendment of article 38 of the November 24, 1926, contract and of articles 7 and 8 of the April 1, 1934, contract, and that such amendment makes inapplicable provisions of sections 41 and 43 of the Omnibus Adjustment Act of May 25, 1926, covering the authority of the Secretary of the Interior to declare temporarily unproductive lands of a Federal reclamation project permanently unproductive and to eliminate them from the project.

The only remaining authority, then, of the Secretary of the Interior to classify or to reclassify the lands of Federal reclamation projects is that in sections 8(a) and 8(b) of the Reclamation Project Act of 1939, and this authority is not absolute, but, as provided in section 8(b), it is to be exercised only on a request of an organization or duly authorized representatives of the water users.

In respect of the Northport Irrigation District, then, it is my opinion that the Secretary of the Interior cannot order the elimination of 2,555 acres of lands from the Northport project, because neither the contract of August 19, 1948, nor the Approval Act of May 25, 1948, gives him such authority. It is further my opinion that before any classification or reclassification of the lands of the Northport project is undertaken by the Secretary of the Interior, he must have a request therefor from the Board of Directors of the Northport Irrigation District.

CLARENCE A. DAVIS,
Solicitor.

ROY LEONARD WILBUR
ROBERT MONTGOMERY TUBB

A-26618 *Decided May 20, 1953*

Isolated Tract—Homestead Application—Withdrawn Land—Public Sale.

An application for homestead entry on land under withdrawal is nugatory and cannot be given life subsequent to its date of filing, even by a restoration of the land during pendency of an appeal from its rejection.

An application for a homestead entry which is not accompanied by the required fee and commission is ineffective until the necessary payments are made.

An improper application for a public sale under the Isolated Tract law should be rejected; nevertheless, it is legal for the manager of the local land office to sell the land applied for, since he has authority to order such a sale on his own motion.

Where a homestead applicant whose application was rejected because of a withdrawal of the land applied for lost an opportunity to submit a new application after restoration of the land before a conflicting application for public sale was filed, because his appeal from the original rejection was mislaid and not acted upon for 5 years, equity requires cancellation of the uncompleted public sale so as to afford the homestead applicant an opportunity to file a new application.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On November 20, 1946, Roy Leonard Wilbur filed an application for homestead entry under section 2289 of the Revised Statutes (43 U. S. C., 1946 ed., sec. 161) on the E½SE¼ sec. 24, T. 18 S., R. 50 E., M. D. M., Nevada. His application was not accompanied by the fee and commission required by regulation of the Department (43 CFR 166.8). In accordance with the regulations then in force (43 CFR 216.29—repealed October 26, 1949, 14 F. R. 6642), the application was assigned a serial number, but not noted on the tract book.

The acting manager of the district land office at Carson City, Nevada, rejected Mr. Wilbur's application the same day it was filed, on the ground that the tract on which entry was requested had been withdrawn by the Secretary of the Interior for a proposed grazing district on November 30, 1937 (2 F. R. 2556). The decision failed to mention the lack of fee and commission as a ground for rejection. Mr. Wilbur appealed to the Director of the Bureau of Land Management. His entire case file, including the appeal, then seems to have been mislaid.

On June 4, 1947, the land here in issue was restored from the withdrawal of November 30, 1937 (12 F. R. 3779). A memorandum in the present record from the Regional Chief, Division of Adjudication, Region II, states that a field report recommending allowance of entry by Mr. Wilbur was submitted on December 21, 1948. This report has not been found.

On April 25, 1951, a notation was made on the serial register book at the Reno Land and Survey Office to the effect that the application was closed as "defective, no interest shown by the applicant, and the same is cancelled." The manager, however, has stated that this notation was not authorized by him.

On October 10, 1949, Robert M. Tubb, an adjoining landowner, applied to have the same tract described in Mr. Wilbur's application sold under the second proviso of the so-called Isolated Tract law (43

U. S. C., 1946 ed., Supp. V, sec. 1171). This proviso authorizes the ordering into market of mountainous public lands or those too rough for cultivation. Since Mr. Wilbur's application was not noted in the tract book and his file had disappeared, the conflict between Mr. Tubb's application and Mr. Wilbur's was not apparent.

The tract was duly examined by a field examiner of the Bureau of Land Management and classified as suitable for public sale. All the parties involved, and the field examiner, agree that this land is not mountainous or too rough for cultivation, but is isolated from other public land. Hence, apparently Mr. Tubb meant to apply for public sale under the first clause of section 1171, *supra*, relating to isolated tracts.

The manager of the Land and Survey Office at Reno, Nevada, taking this view of the matter, on June 25, 1951, ordered a sale under the first clause, to be held at 3 p. m. on August 16, 1951.

At 9 a. m. on that day the manager received a letter from Mr. Wilbur protesting the public sale and enclosing the proper fees for a homestead entry on the tract involved. The manager proceeded with the sale. Mr. Tubb's bid of $800, the appraised value, was the only one submitted. The manager accepted it, but in accordance with the Order for Public Sale withheld the cash certificate of purchase pending consideration of the protest. The land was again examined, and on December 11, 1951, classified as suitable for entry under the Homestead Law, *supra*.

On September 24, 1951, the Assistant Director of the Bureau of Land Management issued a decision disposing of both Mr. Wilbur's appeal and protest. In it he held that Mr. Tubb's public-sale application should be rejected, and that Mr. Wilbur's homestead application should receive further consideration. Mr. Tubb appealed to the head of the Department.

It is well settled that no rights are acquired by an application to enter land if the land sought is withdrawn from entry at the time the application is filed, and it is equally well settled that no rights accrue to an applicant if, pending an appeal by him from the rejection of his application for such a reason, the land is restored to entry. *Hunt* v. *State of Utah*, 59 I. D. 44, 46 (1945). Mr. Wilbur's application, therefore, was properly rejected by the acting manager at the time it was filed, and the restoration of the land to entry on June 4, 1947, imparted no new life to his application.

Mr. Wilbur's application was also subject to rejection, because it was not accompanied by the required fee and commission. The homestead law plainly indicates that an applicant will not be permitted to make an entry until the proper fee is paid (43 U. S. C.,

1946 ed., sec. 162), and a regulation of the Department clearly states that when a homesteader applies to make entry he "must" pay a prescribed fee and commission (43 CFR 166.8). At the time when Mr. Wilbur filed his application and until October 26, 1949, another regulation of the Department provided, in part, as follows:

> * * * Where no money is tendered, the application, etc., will be rejected. On such rejection, the applicant, of course, has the right of appeal within 30 days, under the Rules of Practice * * *. The manager will not in such cases, pending the receipt of the money, segregate the land, as the law and regulations are specific in that the money must be tendered with the application, and if it is not transmitted the applicant acquires no rights under the application until the money is tendered. * * * [43 CFR 216.29.]

In any event, therefore, even though it may have been possible to reinstate Mr. Wilbur's application following the restoration to entry of the land in question on June 4, 1947, in lieu of requiring him to file a new application (see *Hunt* v. *State of Utah*, *supra*) his application still would have been ineffective to give him any rights until he paid the requisite fee and commission. He did not make the necessary payments until August 16, 1951, the date for which the public sale had been set pursuant to Mr. Tubb's application of October 10, 1949. (It will be noted that the regulation partially quoted in the preceding paragraph was not repealed until after Mr. Tubb's application had been filed.)

As to Mr. Tubb's application, it was technically defective because it was not executed on the proper form and should have been rejected (43 CFR 250.3, 250.4). However, the public sale of an isolated tract may be ordered by the Secretary on his own motion, and this authority had been delegated to the manager at the time when the public sale was ordered (43 CFR, 1947 Supp., 50.501(a)(36), as amended, 13 F. R. 5615). The order of sale was, therefore, authorized despite any deficiency in Mr. Tubb's application. Even if Mr. Tubb's application had been in order, he would not have acquired any rights to the land in question by reason of the filing of his application or by submitting the only bid at the sale. Until a cash certificate is issued, an applicant for, or a bidder at, a public sale acquires no rights against the United States, and the sale can be canceled at any time. (43 CFR 250.5; *Frank B. Powell Lumber Co., Inc.*, A–26461 (April 23, 1952).)

The case, therefore, comes to this: Neither Mr. Wilbur nor Mr. Tubb has acquired any right to the land in controversy or any priority over the other by reason of filing a valid application for the land. The land has been classified as being suitable for both homesteading and public sale and may properly be disposed of for either purposes. On the one hand, Mr. Tubb appears to own the land adjoining the land in controversy and has asserted that Mr. Wilbur's possession of the latter

would interfere with his ranch operations. On the other hand, Mr. Wilbur merits equitable consideration for the reason that if his appeal from the acting manager's decision rejecting his application had not been mislaid and had been acted upon with reasonable promptness, he would probably have had an opportunity to file a valid application before Mr. Tubb applied for the sale of the land.

In the circumstances, there appear to be sufficient reasons to warrant canceling the public sale and permitting Mr. Wilbur to file a new homestead application.

Therefore, the Assistant Director's decision is affirmed.

ORME LEWIS,
Assistant Secretary.

PERCY FIELD JEBSON ET AL. v. EMMET F. SPENCER AND TYLER F. WOODWARD, UNITED STATES, INTERVENER

A–26596 *Decided June 11, 1953*

Mineral Leasing Act—Prospecting Permits—Oil and Gas Leases—Mining Laws—Mining Claims—Valuable Mineral Deposits—Discovery—Rules of Practice—Contests.

The rule of the Department that no application will be received and no rights will be recognized as initiated by the tender of an application for a tract of land embraced in an entry of record until such entry has been canceled and the cancellation noted on the records of the local land office is not applicable to the initiation of rights under the mining laws on lands subject to such laws.

When an oil and gas prospecting permit, issued under section 13 of the Mineral Leasing Act, expired by operation of law, the land embraced in that permit again became subject to location under the mining laws, and remained so until the filing of an allowable application for a permit or lease under the act or until the land was known to be valuable for any of the minerals covered by that act.

A valid location of a mining claim can be made only if a valuable mineral deposit has been discovered within the limits of the claim.

In a contest initiated by one individual against another, the Government should not attack the validity of the contestant's claim on grounds other than those disclosed by the application to contest without first notifying the contestant of its charges and allowing him an opportunity to meet such charges.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Percy Field Jebson, for himself and his colocators of the Eleanor placer mining claim, situated on the SW¼NW¼, the E½NW¼, and the NE¼SW¼ of Sec. 10, T. 10 N., R. 24 W., S. B. M., California,

has appealed to the Secretary of the Interior from the decision of the Assistant Director of the Bureau of Land Management dated July 3, 1952, which affirmed the decision of the manager of the land office at Los Angeles in dismissing the protest of Mr. Jebson and his associates against the issuance of oil and gas leases on the land covered by the mining claim and in declaring the mining claim to be null and void.

On September 7, 1948, Mr. Jebson filed an application at the Sacramento land office for an oil and gas lease on the above-described land (Sacramento 039504). He stated that he believed himself to be entitled to a preference right to a lease because of his interest in the land under a mining location recorded on February 27, 1940. By a decision of the acting manager of the land office at Sacramento dated January 31, 1949, Mr. Jebson was informed that part of the land was embraced in an oil and gas lease application filed on March 25, 1940 (Los Angeles 087318, formerly Sacramento 032816), by Tyler F. Woodward, on which a lease was issued to Mr. Woodward as of February 1, 1949, and that the balance of the land was embraced in an oil and gas lease application filed by Emmet F. Spencer on November 22, 1943 (Los Angeles 087382, formerly Sacramento 035596). Mr. Jebson was allowed 30 days within which to file a formal protest against the lease of Mr. Woodward and the application of Mr. Spencer in the event he wished to assert any rights under the mining claim.

On February 28, 1949, Mr. Jebson, on behalf of himself and his associates, filed a protest against the issuance of the oil and gas leases, alleging that on February 2, 1940, "Fire clay, white sand, titanium, ochre and a type of clay used in the drilling of oil wells" were discovered on the land; that the minerals were at the time of discovery and were then commercially valuable and that there were sufficient quantities of them to be mined profitably; that on February 16, 1940, a notice of location of the claim was posted; that the notice of location was recorded on February 27, 1940, in the official records of the county recorder of Kern County, California; and that, prior to March 30, 1940, the claim had been further developed through the digging of a trench exposing some of the aforementioned materials.

Answers were filed by Messrs. Woodward and Spencer denying the validity of the mining claim on the ground that the locators had failed to perfect the claim by recording a statement that the required discovery work had been completed on the claim and on the further ground that deposits of minerals claimed to have been discovered within the claim were not of sufficient value to validate the claim.

On April 21, 1950, a notice of hearing on the contest was sent to Mr. Jebson and his associates and to Messrs. Spencer and Woodward. The notice, after indicating in the heading thereof that the United States

was a party to the contest as an intervener, called upon the parties "to appear, respond, and to offer evidence touching the allegation."

At the hearing, the attorney for Mr. Jebson and his associates requested to be informed as to the nature of the intervention by the United States. He was told that the question involved was the validity of the claim and that the contestants must show that they had a valid mining claim on the date location was made and that the land was open to location on that date (Tr. 2–3). The attorney was subsequently informed that an oil and gas prospecting permit had been issued covering the land on May 31, 1933, and that it was canceled on March 25, 1940 (Tr. 6). The attorney then pleaded surprise and requested a continuation of the hearing. This request was refused and the attorney was told that unless the contestants continued with the hearing the Government would move to declare the contestants in default. The hearing was continued over the protest of the contestants (Tr. 8).

After the introduction of testimony on behalf of the contestants, the contestees, and the United States as to the discovery of minerals on the claim, there was introduced in evidence on behalf of the United States a certified copy of the Serial Register of the Sacramento land office, showing that an oil and gas prospecting permit (Sacramento 027651) had been issued to R. E. S. Hesse on May 31, 1933, pursuant to the Mineral Leasing Act of February 25, 1920 (30 U. S. C., 1946 ed., sec. 181 *et seq.*), that the permit had been extended to December 31, 1938, and that the permit was canceled effective March 25, 1940 (Tr. 77–82, Intervener's exhibit B, Tr. 87).

I

The first question for consideration is whether the land was subject to mining location on February 2, 1940, when the discovery of minerals is claimed to have been made by the contestants.

Prior to the passage of the leasing acts, including the Mineral Leasing Act of February 25, 1920, all valuable mineral deposits in lands belonging to the United States were open to exploration and purchase, and the lands in which they were found were open to occupation and purchase under the provisions of the mining laws (30 U. S. C., 1946 ed., sec. 21 *et seq.*). The leasing acts inaugurated an entirely new system with respect to the disposition of lands containing the deposits dealt with in those acts. The Mineral Leasing Act provided that, with the exception of valid claims existing on February 25, 1920, deposits of oil and gas and lands containing such deposits should be subject to disposition only in the form and manner provided therein (30 U. S. C., 1946 ed., secs. 181 and 193).

Shortly after the passage of the Mineral Leasing Act, the Department held that there could be no room for the contemporaneous operation of the mining laws and the Mineral Leasing Act with respect to the same lands; and that if an attempt were made, after the enactment of the Mineral Leasing Act, to locate a mining claim on land covered by an outstanding permit or lease issued under the act or known at the time of the attempted location to be valuable for any of the minerals mentioned in the Mineral Leasing Act, the Department would not recognize the attempted location. See *Joseph E. McClory et al.*, 50 L. D. 623 (1924); letter dated October 9, 1924, from Secretary Work to Congressman Richards, 50 L. D. 650 (1924). The Department has maintained its position in this respect over the years. See *United States* v. *United States Borax Company*, 58 I. D. 426, 432 (1943). The Department has also held that the filing of an allowable application for an oil and gas prospecting permit or for a noncompetitive oil and gas lease has a segregative effect on the land applied for and confers upon the applicant a priority of right over any adverse interest thereafter sought to be initiated. *Filtrol Company* v. *Brittan and Echart*, 51 L. D. 649 (1926); *Monolith Portland Cement Company et al.*, 61 I. D. 43 (1952).

There is no indication in the present record that the land was known to be valuable for any of the minerals mentioned in the Mineral Leasing Act on February 2, 1940, or that, aside from the Hesse permit, any other permit or lease issued under the act was then outstanding, or that any other allowable application for such a permit or lease on the land had been filed prior to that date. Therefore, it would appear that at that time the land was open to mining location for minerals other than those covered by the Mineral Leasing Act unless the prospecting permit issued to Mr. Hesse in 1933 was still in force on February 2, 1940.

Section 13 of the Mineral Leasing Act (41 Stat. 437, 441; 30 U. S. C., 1946 ed., sec. 221, note), under which the Hesse permit was issued, authorized the Secretary of the Interior—

> * * * to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field * * *.

It also provided that—

> The Secretary of the Interior may, if he shall find that the permittee has been unable with the exercise of diligence to test the land in the time granted by the permit, extend any such permit for such time, not exceeding two years, and upon such conditions as he shall prescribe.

The act of August 21, 1935 (49 Stat. 674), amended section 13 by providing that, thereafter no prospecting permits should be granted except upon those applications which had been filed 90 days or more prior to the effective date of that act. It provided:

> * * * That all permits outstanding on the effective date of this amendatory Act, which on said date shall not be subject to cancelation for violation of the law or operating regulations and which have theretofore been extended by the Secretary of the Interior, shall be, and the same are hereby, extended until December 31, 1937, subject to the applicable conditions of such prior extensions: *Provided further*, That the Secretary of the Interior is hereby authorized, to extend for an additional period of not to exceed one year any permit on which diligence has been exercised or on which drilling or prospecting has been suspended at the direction of the Secretary during the extension period hereby granted, but no extension of any permit beyond December 31, 1938, shall be granted under the authority of this Act, or any other Act.

Section 13, as amended in 1935, also authorized the exchange of prospecting permits for leases, without proof of discovery, when applications for exchange leases were filed prior to the termination of the prospecting permits.

By the act of August 26, 1937 (50 Stat. 843), Congress extended to December 31, 1939, those outstanding permits which met the conditions enumerated in that act. It provided further that—

> * * * All oil and gas prospecting permits shall cease and terminate without notice of cancelation on the final date of their current term, including any extension herein granted, and no extension of any permit beyond December 31, 1939, shall be granted under the authority of this Act or any other Act.

On December 23, 1937, the Secretary of the Interior extended all oil and gas prospecting permits outstanding on December 31, 1937, to December 31, 1938, under the authority of the act of August 21, 1935 (Order No. 1240; 43 CFR, 1940 ed., sec. 192.7). Accordingly, Mr. Hesse's permit was extended to December 31, 1938. On July 27, 1938, the Commissioner of the General Land Office[1] notified the Sacramento land office that the permit was not extended to December 31, 1939, under any of the provisions of the act of August 26, 1937; that the permit might not be extended beyond December 31, 1938; but that the right to prospect the land could be continued under lease by the filing on or before December 31, 1938, of an application to exchange the permit for a lease under the provisions of the act of August 21, 1935. No application to exchange the permit for a lease apparently was filed before December 31, 1938.

Thus, the Hesse permit expired by operation of law on December

[1] Effective July 16, 1946, the General Land Office was abolished and its functions were transferred to the Bureau of Land Management by section 403 of Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

31, 1938, under the congressional mandate that all oil and gas prospecting permits should "cease and terminate without notice of cancellation" on the final dates of their current terms. As this Department had no authority to extend the permit beyond December 31, 1938, the permit was not, as the manager held, still in force in February, 1940.

The question remains whether the subsequent action of the General Land Office in "canceling" the Hesse permit, which had already expired by operation of law, precluded the initiation of a right under the mining laws on February 2, 1940.

The so-called cancellation was made by the Commissioner of the General Land Office who, on February 27, 1940, after the mining right is alleged to have been initiated, in a letter to the register of the land office at Sacramento, called attention to the fact that he, the register, had previously been advised of the serial numbers of those oil and gas prospecting permits in his district which had terminated by operation of law on December 31, 1938, and December 31, 1939. The Commissioner cited the regulations of the Department approved on February 6, 1940, prescribing the method by which lands embraced in oil and gas prospecting permits which had terminated by operation of law were to be opened to application for oil and gas leases (5 F. R. 696; 43 CFR, 1943 Cum. Supp., 192.14a). He directed the register to note the termination of certain permits, including the Hesse permit, on his records as of March 25, 1940.

It is implicit in these instructions that the Commissioner recognized that all prospecting permits had then terminated by operation of law and that he was dealing not with the effective date of the termination of the Hesse permit but rather with the date on which the lands formerly covered by that permit should become subject to application for oil and gas leases. These instructions were in accord with the holding of the Department in *Martin Judge*, 49 L. D. 171 (1922), that until an outstanding oil and gas prospecting permit was canceled by the Commissioner of the General Land Office and the notation of the cancellation made in the local office, no person would be permitted to gain any right to a permit for the same class of deposits by the filing of an application therefor. See also *Instructions*, 50 L. D. 364 (1924), 56 I. D. 489 (1937), and 43 CFR, 1940 ed., 192.14.

It is a well-established rule of the Department that no application will be received and no rights will be recognized as initiated by the tender of an application for a tract of land embraced in an entry of record until such entry has been canceled and the cancellation noted on the records of the local land office. Circular, 29 L. D. 29 (1890). However, a mining claim is not initiated by application made at the local land office. A right in a mining claim is established by a series of acts including discovery of valuable mineral deposits within the limits

of the claim, marking the boundaries of the claim, posting notice on the claim, and recording the claim in the manner required by the regulations of the mining district. 30 U. S. C., 1946 ed., secs. 22–28. There is no requirement under the mining laws that application for the land must be made at the local land office or that notice of the claim must be filed with the United States, either at the local land office or elsewhere. Thus, this rule is not applicable to the initiation of rights under the mining laws on lands subject to such laws.

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

Accordingly, it was error to hold that the land was not open to mining location on February 2, 1940.

II

There remains for consideration the question whether the discovery alleged to have been made on the claim is sufficient to validate the claim.

A valid location of a mining claim can be made only if a valuable mineral deposit has been discovered within the limits of the claim. *Waskey* v. *Hammer*, 223 U. S. 85, 91–92 (1912); *United States* v. *M. W. Mouat et al.*, 60 I. D. 473 (1951). In determining whether mineral deposits discovered on public lands are valuable, the test to be applied is whether they are "such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine." *Cameron et al.* v. *United States*, 252 U. S. 450, 459 (1920).

Mr. Jebson, who was the only witness on behalf of the mining claimants, testified generally that he had discovered sand, yellow ochre, and clay, and that the minerals had been tested and proved successful for commercial purposes (Tr. 28). He did not, however, produce any samples of the minerals said to have been discovered nor did he produce any evidence of the tests which were said to have been made or elaborate in any way as to the nature of these tests. He testified that he had made a mechanic's hand soap out of some of the materials but he admitted that he had never sold any material from the claim (Tr. 29). When asked about the value of the "plaster" sand found on the claim, Mr. Jebson stated that it was worth "Millions of dollars" (Tr. 35). Later, Mr. Jebson testified, "Truthfully, it is still in the experimental stage" and that until several more experiments were made he would not know the value of the claim (Tr. 37). He testified that the clay

would make a rotary mud but admitted that tests had revealed that the clay might have too much sand in it to be satisfactory for that purpose (Tr. 38).

On behalf of the Government, Mr. Val Payne, a mining engineer employed by the Bureau of Land Management, testified that he had made a field examination of the claim; that he examined the claim for possible fire clay and that none of the material found on the claim appeared to be particularly suitable (Tr. 52); that the small clay beds found on the claim were found at a considerable distance from each other, which would make mining uneconomical (Tr. 52). He testified that of the area of the claim which he examined he found only one outcropping that had any apparent characteristic of a usable or marketable material (Tr. 53). He had a sample of this material tested for its suitability for a rotary mud and the result of that test showed that the material could not be used as an oil well drilling mud because of four detrimental features (Tr. 53–59, Intervener's exhibit A). Mr. Payne also testified that he found no ochre or sand on the claim which would be commercially valuable (Tr. 39).

On the basis of the testimony produced at the hearing, it must be concluded that there has been no discovery of valuable mineral deposits on the claim and, therefore, that the claim is without validity. *Chrisman* v. *Miller*, 197 U. S. 313 (1905).

Accordingly, it was proper to dismiss the protest against the issuance of the oil and gas leases and to declare the mining claim to be null and void.

III

The appeal of the mining claimants raises two other points which require mention. The first is that the Government failed to notify them of the basis for its intervention, thus depriving them of an opportunity to prepare to meet the contention of the Government that the Hesse permit prevented the location of the claim. The second point is that the hearing was conducted in an irregular manner.

If the contention of the Government that the land was not open to mining location when the mining claimants made their location were sound, the failure of the Government to notify the appellants of this ground of attack on the validity of the claim would require consideration. However, as it has been determined that the land was open to mining location on February 2, 1940, and that the Hesse permit was no bar to the location of the mining claim on that date, the failure of the Government to notify the contestants of its intention to challenge the validity of the claim on that ground becomes immaterial to the disposition of the contest.

It should be pointed out that the mining claimants initiated the contest. The burden of proving the allegations in their protest was upon them. *Minerva L. Jones Starks* v. *Frank P. Mackey*, 60 I. D. 309 (1949). As the mining claimants alleged discovery of minerals on the land embraced in their claim, the burden was upon them to prove a discovery sufficient to validate their claim. This they failed to do. The failure of the Government to notify the contestants of another ground on which the claim was to be attacked did not deprive the appellants of their opportunity to prove the allegations set forth in their protest.

However, it should be noted that the Government should not, in a contest initiated by one individual against another, seek to challenge the asserted right of the individual contestant on grounds other than those disclosed by the application to contest without itself preferring charges and notifying the contestant of its charges, as provided in 43 CFR 222.4, and without allowing the individual contestant full opportunity to deny those charges or to submit a statement of facts rendering the charges immaterial, as provided in 43 CFR 222.5.

The alleged irregular manner in which the hearing was conducted lies in the fact that the so-called "Hearing Officer" acted not only in that capacity but he also acted as counsel for the Government and took the stand and testified as a witness for the Government.

The practice of administrative officials acting in the capacity of hearing officers and at the same time acting as counsel for the Government and testifying on behalf of the Government is a practice which, in my opinion, ordinarily results in the denial of due process and the denial of a fair hearing. The dual capacity assumed by such officers, when they are in the true position of a hearing officer determining admissibility of evidence and arriving at conclusions, cannot be held to comport to the standards of a fair hearing.

However, in this case the testimony given by the hearing officer related only to the validity of the Hesse permit, which has been determined in any event to be immaterial to the disposition of this contest, and, consequently, it can be disregarded without doing any injustice to the claimant. Furthermore, the matter hinges entirely upon the contestant's proof of discovery of valuable mineral deposits on this land, and the contestant himself, by his own testimony, having admitted that his discovery was only in the experimental stage and that he was not certain himself as to the value of the claim, has precluded any likelihood of any findings in his favor, and, therefore, justifies me in disregarding whatever procedural errors may have occurred at the hearing.

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IV

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Assistant Director of the Bureau of Land Management is, for the above-stated reasons, affirmed.

CLARENCE A. DAVIS,
Solicitor.

STATE OF LOUISIANA

A-26708 *Decided June 17, 1953*

Swamp-Land Selection—Reinstatement.

Principles of orderly administration dictate against the reopening of swamp-land selection proceeding more than 39 years after the selection was finally rejected.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The State of Louisiana has taken an appeal to the Secretary of the Interior from a decision of January 13, 1953, by the Associate Director of the Bureau of Land Management which rejected the State's application, filed on November 24, 1952, to select as swampland the SE¼SW¼ sec. 23, T. 18 N., R. 7 E., Louisiana meridian, Louisiana, containing 40 acres (43 U. S. C., 1946 ed., secs. 982–984).

Departmental records indicate that sometime after March 3, 1857, Louisiana claimed the above-described tract among others as swamp and overflowed. The claim was held for rejection on November 20, 1899, by the Commissioner of the General Land Office (predecessor of the Bureau of Land Management), "subject to the then right of the State to apply for an investigation in the field because the field notes of the official survey show affirmatively that they are dry land," but further action respecting the claim was suspended pending issuance of instructions for the adjustment of the swampland grant in Louisiana.[1] In a decision of October 28, 1913, after full consideration of the case, the Commissioner of the General Land Office rejected the State's claim to this and other tracts because the field notes of the official survey showed affirmatively that the tracts were dry land, "subject to the right of appeal to the Department," within 30 days of service of notice of the decision. A copy of the decision was sent by letter dated December 30, 1913, by registered mail to Governor L. E. Hall, and was received by him on January 3, 1914. But no further action was taken by the State. By decision of the Acting

[1] See Commissioner's decision of October 28, 1913 (66778).

Assistant Commissioner dated April 7, 1914, the State's claim for this land was finally rejected.

In these circumstances, the application of November 24, 1952, is in effect, an effort to reopen a case closed more than 39 years ago. As was recently said in a similar case, "Principles of orderly administration dictate against the reopening of such a case." *John C. Carter et al.*, A–26545 (December 24, 1952).

In any event, there appears to be no substantial basis upon which the Department may properly classify this land as subject to selection under the Swamp Land Acts. The acts of March 2, 1849 (9 Stat. 352), and September 28, 1950 (9 Stat. 519; 43 U. S. C., 1946 ed., sec. 982), provided for the grant to the State of Louisiana of the public lands in that State which were swamp and overflowed and unfit thereby for cultivation at the time of the grants. It was further provided that when the greater part of a subdivision was not wet and unfit for cultivation at the time of the grants, the entire subdivision was excluded from the grant (43 U. S. C., 1946 ed., sec. 984).

The plat of survey of the township in which the 40-acre tract here involved is located was approved on October 29, 1853. Nineteen other sections in the township are listed on the plat of survey as being overflowed and containing swampland, but none of the legal subdivisions in section 23 was included in the list of swamp and overflowed lands. In the Louisiana Field Notes of Survey, vol. 59, p. 399, the following notation occurs with reference to a line dividing sections 23 and 26, the line being the south boundary of section 23 and of the SE¼SW¼ of the section here involved:

"Land 2nd rate soil. Timber, oak, hickory, & gum, undergrowth cane, vines & bushes. April 28th, 1853."

Inasmuch as the plat of survey and the field notes on this land were made after the legislation granting swamplands to Louisiana was enacted, and as the plat of survey in this case shows that the surveyor noted the swamp and overflowed character of 19 other sections in this township,[2] there is good reason to believe that if more than 20 acres of this quarter section had actually been swamp and overflowed land, that fact would have been indicated on the plat of survey and in the field notes.

Three affidavits were submitted in support of the State's present application for this land. The affiants, aged 80, 86, and 73 in 1952, recollected that during their childhood a levee crossed this land, and each affiant stated that if the levee had not been constructed, the land

[2] For example, immediately preceding the above-quoted notation in vol. 59, p. 399 of the Louisiana Field Notes of Survey, with reference to a line between sections 2 and 3 in T. 18 N., R. 7 E., is the following description: "Land subject to overflow, and unfit for cultivation * * * May 13, 1853."

would have stood under water for the greater portion of each year.[3] The affidavits refer to the character of the land after 1870, and contain no evidence of the physical condition of the land in 1849 and 1850.[4]

Accordingly, the rejection of the State's selection in this case appears to have been proper. *State of Mississippi*, A–25822 (October 10, 1950); *State of Louisiana*, A–25166 (June 29, 1949).

The land here involved is said to be occupied by Mrs. Virginia Jordan Mangham whose claim to the land is traced to an entry made by John A. Pugh on March 19, 1857, and authorized by the State of Louisiana. The record indicates that on March 12, 1952, Dr. Harrison Jordan, an uncle of Mrs. Mangham, filed an application under the Color of Title Act (43 U. S. C., sec. 1068) for this land. In a decision of May 16, 1952, the Acting Regional Administrator, Region VI, required the submission of additional evidence in support of the application. The time within which the applicant might submit the required evidence was extended, but no further action has been taken under this application. It seems possible that Mrs. Mangham may be able to acquire this tract under the Color of Title Act, the Public Sale Act (43 U. S. C., 1946 ed., Supp. V, sec. 1171) or under some other appropriate public land law.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Associate Director of the Bureau of Land Management is affirmed.

CLARENCE A. DAVIS,
Solicitor.

JOHNNIE E. WHITTED, BILL SMITH

A–26602 *Decided June 30, 1953*

Desert-Land Entry—Cancellation of Entry—Hearing.

A desert-land entry is not to be canceled for defects not appearing on the face of the record without notice to the entryman and without the holding of a hearing, if the entryman demands one.

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[3] The statements in the affidavits are not consistent as to when this levee was built, although it seems probable that it was constructed sometime after 1861, the year in which H. Jordan is said to have purchased the land.

[4] Each of the affiants mentioned that in the bend of the Boeuf River is a cypress tree on which are placed markers showing the level of high water for the years 1869, 1892, and 1927. The plat of survey indicates that the Boeuf River runs north and south through the SW¼SW¼ of sec. 23 in approximately the middle of that quarter section; and that the cypress tree in the bend of the river is not on and not very close to the selected tract. In any case, the high watermark for the years designated would be no indication that the greater part of the SE¼SW¼ of sec. 23 was actually swamp land in 1849 and 1850.

June 30, 1953

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On December 21, 1948, Johnnie E. Whitted filed an application (Idaho 0262) for a desert-land entry (43 U. S. C., 1946 ed., sec. 321 *et seq.*) for the W½SW¼ sec. 32, T. 4 S., R. 3 E., Boise meridian, Idaho. In his application he stated the tract was not occupied, improved, and appropriated by any other person claiming it. A field examination of the land was made on May 31, 1950, in the course of which the examiner noted that there were sheep pens and fences on the entry which had been constructed, apparently without authorization, by Bill Smith, the proprietor of a large-scale sheep operation. On December 21, 1950, the Manager of the Land and Survey Office at Boise, Idaho, notified Whitted of the allowance of his entry.

It appears that Smith first learned of the desert-land entry shortly thereafter. He informed the manager that the allowance of the entry as to the NW¼SW¼ would seriously interfere with his lambing operations, that he or his predecessors in title had been using the land for over 25 years, and that he had constructed sheep pens and other improvements, worth $3,500 on the west side of the NW¼SW¼ during October 1948.

By a decision dated February 28, 1951, the manager reversed the allowance of the entry as to the NW¼SW¼ on the ground that Whitted's statements in his application that the land was unoccupied, unimproved, and unappropriated, and in his petition for reclassification that the land was not improved by anyone and that there was no conflicting claim of any kind were incorrect. The manager classified the NW¼SW¼ as more suitable for use in connection with the existing sheep operation than for development under the desert-land law.

Whitted was served with a copy of this decision on March 1, 1951. The decision informed Whitted that he had the right of appeal.

Upon the failure of the parties to file an appeal within the required time, the manager, by a decision dated April 12, 1951, closed the case as to the NW¼SW¼.

However, it appears that Whitted prepared an appeal which his attorney mailed to Senator Dworshak within the 30-day period allowed for filing appeals. On June 4, 1951, Senator Dworshak, having learned that Whitted's attorney was under the impression that the appeal was properly filed with him, returned the appeal to Whitted's lawyer with the suggestion that it be filed with the Boise Land and Survey Office. Thereupon, on June 8, 1951, the appeal was filed with that office.

The manager forwarded the appeal to the Regional Administrator. On June 26, 1951, the Acting Regional Administrator held that

Whitted's appeal would be treated as a petition to reopen the case and denied the petition. Whitted filed an appeal from this decision with the Director of the Bureau of Land Management. By decision dated September 26, 1952, the Director reversed the manager's decision of February 28, 1951, which had revoked the allowance of Whitted's application as to the NW¼SW¼ and directed the reinstatement of the entry. Thereupon, Smith appealed to the Secretary of the Interior from that decision.

The appellant contends that Whitted should be bound by his failure properly to appeal from the manager's decision of February 28, 1951, and that he should be foreclosed from any further proceedings in this matter. However, it is well established that although a party who does not appeal from an adverse decision has no standing to question an award, the Secretary of the Interior may, on his own initiative, so long as the lands are subject to his jurisdiction, review and correct erroneous actions previously taken respecting such land. *Mary Volk et al.*, A–26601 (May 5, 1953); *State of California et al.*, 51 L. D. 141, 144 (1925).

The lands involved in this matter fall within this rule. Nevertheless, this supervisory authority need not be exercised in every case of erroneous action, but only when the facts of a particular case warrant it.

Although Whitted's appeal was not filed at the proper place, he did attempt to file a timely appeal. When his error became apparent he corrected it as soon as he could. Consequently, he cannot be deemed to have slept on his rights or abandoned them or to have acquiesced in the revocation of the allowance of his entry.

Furthermore, Whitted's entry was canceled in part without a hearing. Once an entry has been allowed, even though improperly, it is not to be canceled for defects not appearing on the face of the record without notice to the entryman and without giving him an opportunity to be heard. *William A. Fowler*, 17 L. D. 189 (1893); *Maxson* v. *Cory et al.*, 26 L. D. 499 (1898); *United States* v. *Kennedy*, 206 Fed. 47, 50 (5th Cir. 1913); *United States* v. *Jensen*, A–26486 (December 2, 1952); *Paris Gibson et al.*, 47 L. D. 185, 186 (1919); *United States* v. *Robert L. Pope, Jr.*, 58 I. D. 574 (1943). The procedure to be followed by the Government in seeking the cancellation of an entry is set out in 43 CFR, Part 222, and for individual contestants in 43 CFR, Part 221. The pertinent regulations require that an entryman be notified of the contest against his entry and that he be given a hearing if he so desires. There is nothing in the record to show compliance with the pertinent provisions of either Part 221 or 222. Accordingly, it must be held that the partial cancellation of Mr. Whitted's desert-land entry was unauthorized.

These considerations justify the exercise of the supervisory authority of the Secretary of the Interior despite the failure of Whitted to file a timely appeal.

While, for the procedural reasons mentioned, it is necessary to reinstate Whitted's entry as to the NW¼SW¼, the circumstances require that the Government immediately institute adverse proceedings for the cancellation of that portion of the desert-land entry pursuant to 43 CFR, Part 222. Definite findings of fact should be made as to the departmental status of the land at the time of Whitted's application and at the time of his entry, the relation of Smith to the land at those times and whether or not Smith's improvements and possession were readily observable at the time of Whitted's application.

In the light of the unusual amount of confusion and delay which has occurred in this case, the adverse proceedings should be initiated at the earliest opportunity and diligently prosecuted. Pending the final disposition of those proceedings, I suggest that Mr. Smith's possession not be disturbed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Bureau of Land Management is affirmed insofar as it directed the reinstatement of the entry and the case is remanded for further proceedings as indicated in the preceding paragraph.

CLARENCE A. DAVIS,
Solicitor.

JOHN L. RICE

A–26711 *Decided July 20, 1953*

Public Sale—Mountainous or Rough Tract—Sheep Driveway with Stopover Privilege.

Where an application for the public sale of land under the second proviso of section 2455, Rev. Stat., as amended, is rejected for the reasons that the land is not mountainous or too rough for cultivation and that the land is needed for a sheep driveway with overnight stopover privileges, the case will be remanded where the evidence in the record is inconclusive as to the physical character of the land and it is possible that the use of the land for driveway and holdover privileges can be preserved by a reservation in the patent or by amendment of the application to exclude the areas most directly affected.

The Secretary of the Interior has authority to insert in a patent issued as a result of a public sale under the second proviso of section 2455, Rev. Stat., as amended, a reservation of a right-of-way for driving sheep across the land patented and of overnight stopover privileges for such sheep.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

John L. Rice applied on November 6, 1950, for a public sale under the second proviso of section 2455, Rev. Stat., as amended (43 U. S. C., 1946 ed., Supp. V, sec. 1171), of the S½SW¼ sec. 5 and the SE¼, S½NE¼ and NW¼ sec. 8, T. 2 S., R. 13 E., B. M., Idaho. This proviso authorizes the Secretary of the Interior to sell, in his discretion, any legal subdivisions of the public lands not exceeding 760 acres in area, the greater part of which is mountainous or too rough for cultivation.

The tract in question had previously been examined by a representative of the Department in connection with an earlier application of Mr. Rice. The examiner reported the topography of the land to be "Flat to gently rolling." He did not state clearly whether or not it was too rough for cultivation. He further reported that the tract was needed as a sheep driveway and holdover area and that several stockmen had objected to sale of land of a similar kind. Accordingly, the manager of the Land and Survey Office at Boise, Idaho, in a decision dated March 22, 1951, rejected Mr. Rice's application.

Mr. Rice appealed to the Director of the Bureau of Land Management, who, acting through his delegate, the Chief, Division of Lands, affirmed the manager's decision on December 31, 1952.

Mr. Rice has appealed to the Secretary of the Interior. He contends that the land is definitely mountainous and too rough for cultivation and has submitted an aerial photograph in support of this contention. He further asserts that there are only three regular users of the sheep trail across the land applied for—John T. Patterson & Son, Ralph Faulkner, and Clarence Pauls. Mr. Rice calls attention to a letter signed by them which he forwarded to the Director of the Bureau of Land Management with his appeal below, in which they state that they "have no objection to having Leo Rice file on land north of Long Gulch, providing a trail right is provided with one night stopover." He also states that he is willing to accept a patent reserving the right-of-way and stopover privilege to the public. In a letter dated March 17, 1953, Mr. Rice has offered to deed these rights back to the Government, if it is not feasible to reserve them in the patent.

The District Range Manager at Shoshone, Idaho, in a letter dated September 17, 1952, has indicated his doubts as to whether an agreement with the present livestock operators would be satisfactory in 5 or 10 years when the situation may have changed. However, he stated that he has no objection to the sale of the lands in question at their appraised price if the patent can be issued subject to a right-of-way for the purpose of crossing livestock by any individual, or the routing of livestock across the patented lands by the United States.

While the reservation Mr. Rice offers to accept appears novel, the Secretary of the Interior does not lack authority to insert it in a patent issued persuant to section 2455, Rev. Stat., as amended, the Secretary's authority to sell at all being discretionary thereunder. Solicitor's opinion M–36071, 60 I. D. 477 (1951).

The two real difficulties are whether or not the land is in fact mountainous or rough, so as to be legally disposable under the second proviso of section 2455, Rev. Stat., as amended; and whether an actual reservation can be drafted which will protect the public interest in trail rights and stopover privileges without giving rise to excessive administrative difficulties and personal frictions.

It is impossible to decide either question on the basis of the present record. The evidence of the physical character of the land is inconclusive, and the reservation proposed by Mr. Rice has been stated only in general terms.

Accordingly, the land should be reexamined, and the question of whether it is mountainous or too rough for cultivation should be settled. If it is neither mountainous nor rough, the case will be at an end. If, on the other hand, it is rough or mountainous, representatives of the Bureau should attempt to draft a specific reservation to be inserted in a patent which will satisfy both the users of the sheep trail and the prospective purchaser, will protect the public interest, and will be likely to remain practical after the interests of the present driveway users change hands. Unless a satisfactory reservation can be drafted in advance, there would be no purpose in proceeding with the sale.

If the land is found suitable for public sale under the mountainous or rough tract proviso, the driveway problem may also conceivably be solved by Mr. Rice's amending his application to exclude the areas most directly affected.

The decision of the Chief, Division of Lands, Bureau of Land Management, is reversed, and the case is remanded for further proceedings consistent with this decision.

ORME LEWIS,
Assistant Secretary.

INCLUSION OF INDIAN LANDS IN STATE IRRIGATION DISTRICTS

Indian Lands—Indian Irrigation Projects—Contracts with State Irrigation Districts for Operation and Maintenance of Indian Irrigation Projects.

Generally speaking, Indian allotted and tribal lands may not, under existing law, be included, with or without the consent of the Indians, in State

irrigation districts which would have the power to operate and maintain the Indian projects serving such lands, and to assess such lands for irrigation charges, under contracts which would not permit the irrigation districts to resort to foreclosure proceedings in State courts to enforce the collection of such charges.

M–36175 JULY 30, 1953.

TO ASSISTANT SECRETARY ORME LEWIS.

In a memorandum to you dated May 28, the Acting Commissioner of Indian Affairs suggested that, in view of the facts that a considerable portion of the lands included in Indian irrigation projects had come into non-Indian ownership,[1] and that the Indian landowners compared favorably with their white neighbors in industry, intelligence, and agricultural experience, it would be desirable to turn over the operation and maintenance of the Indian projects to irrigation districts organized under State law,[2] which presumably would have jurisdiction over Indian as well as non-Indian lands. After reviewing the general legislation applicable to Indian irrigation projects, and stating that there is no provision of law, except the act of May 28, 1941 (55 Stat. 209), applicable solely to the Uintah Indian irrigation project,[3] which expressly authorizes the transfer of the operation and maintenance of any Indian irrigation projects to any irrigation districts organized under State law, it is requested that I render an opinion on the questions whether—

(a) under existing law, with or without the consent of the Indian owners, restricted or trust Indian lands, may be included for operation and maintenance purposes in irrigation districts pursuant to State laws;

(b) additional legislation by Congress is necessary to give the districts operating supervision over the Indian lands; and

(c) whether operating supervision, including the "power to assess Indian lands," may be transferred, with or without the consent of the landowners, to

[1] It is stated in the memorandum that Indian irrigation projects "now provide service to approximately 840,000 acres of which approximately 280,000 acres are owned by non-Indians."

[2] It is stated in the memorandum that there "are irrigation districts created pursuant to State law on the Flathead and Crow Indian irrigation projects in Montana." In addition, there is an irrigation district created pursuant to State law on the San Carlos Indian irrigation project in Montana. None of these districts has jurisdiction over Indian-owned lands but the San Carlos Irrigation and Drainage District, unlike the Flathead and Crow Districts, does operate and maintain part of the project works known as "district works," which serve non-Indian lands.

[3] This exception is more apparent than real. While the act of May 28, 1941, authorizes the Secretary of the Interior "to make contracts transferring the operation and maintenance of any canal system or systems under the said Project to an irrigation district or districts formed pursuant to State law," the act was passed to confirm recommendations made after an investigation pursuant to the act of June 22, 1936 (49 Stat. 1803, 25 U. S. C., 1946 ed., sec. 389), which authorizes the Secretary of the Interior to adjust irrigation charges against lands of non-Indians within Indian irrigation projects, subject to express confirmation by Congress, and the "contracts" to which the act refers appear to be contracts with the non-Indian landowners who were the beneficiaries of the legislation. See S. Rept. 243, 77th Cong., 1st sess. pp. 4–5.

irrigation districts under contracts containing protecting provisions against foreclosure in State courts when there are unpaid operation and maintenance assessments.

I believe that these three questions may be reformulated as the single question whether under existing law restricted or trust Indian lands may be included, with or without the consent of the Indians, in State irrigation districts which would have the power to operate and maintain the Indian projects serving such lands, and to assess such lands for irrigation charges, under contracts which would not permit the irrigation districts to resort to foreclosure proceedings in State courts to enforce the collection of such charges.

Any such contracts would be made presumably between the Secretary of the Interior and the State irrigation districts, and would be designed to terminate supervision by the Department of the operation and maintenance of Indian irrigation projects. The accomplishment of this objective would also involve presumably contractual relationships between the irrigation districts and the owners of the Indian lands. However, no specific contracts have been submitted to me, nor has any specific Indian irrigation project been mentioned, except the Uintah project. While the question posed is thus entirely general, there exists in addition to the general legislation governing Indian irrigation projects a vast amount of special legislation applicable to one or more of the Indian irrigation projects,[4] some of which were initiated in the closing decades of the last century, and this legislation is, moreover, of an extremely diverse character. While the major projects are not many, there are many smaller projects. To achieve absolute accuracy with respect to general questions relating to the Indian irrigation projects would, therefore, be such a formidable task that the purpose of any inquiry would be defeated. In the observations which follow any general statements made must be assumed to be subject to the qualification that there may conceivably be a contrary provision with respect to a specific project.

There is some special legislation expressly authorizing the formation of irrigation districts under State law but Indian lands have been excluded from the scope of such legislation. One of the acts governing the Flathead Indian irrigation project, namely, the act of May 10, 1926 (44 Stat. 453, 465), expressly excludes Indian lands from the irrigation districts organized pursuant to State law. In making funds available for the construction of the project, Congress in this act

[4] A compilation of laws relating to Indian irrigation projects which was printed as an appendix to Hearings before the Committee on Indian Affairs, House of Representatives, 66th Cong., 1st sess., on "The Condition of Various Tribes of Indians" (Washington: 1919), runs to 168 pages. A later compilation of such laws, published by the Bureau of Indian Affairs under the title "Analysis of Water Resources Authority," runs to 119 pages.

provided that none of the funds should be expended on construction work "until an appropriate repayment contract, in form approved by the Secretary of the Interior, shall have been properly executed by a district or districts organized under State law embracing the lands irrigable under the project, except trust patent Indian lands * * *." The act also contained a proviso, moreover, "That trust patent Indian lands shall not be subject to the provisions of the law of any district created as herein provided for but shall upon the issuance of fee patent therefor, be accorded the same rights and privileges and be subject to the same obligations as other lands within such district or districts * * * ." In conformity with these provisions, the repayment contracts executed by the three irrigation districts subsequently organized under State law expressly excluded trust patent Indian lands from the scope of the contracts.[5] While the act of May 10, 1926, has been amended in some respects by the act of May 25, 1948 (62 Stat. 269)[6] and amendatory repayments contracts have been executed pursuant to that act, the prohibition upon the inclusion of the trust patent Indian lands in the irrigation districts has not been disturbed.[7]

Similarly, the basic act governing the San Carlos Indian irrigation project, namely, the act of June 7, 1924 (43 Stat. 475), excludes Indian lands from the irrigation district organized pursuant to State law. Section 1 of the act authorized the Secretary of the Interior to construct a dam across the canyon of the Gila River near San Carlos, Arizona, "for the purpose, first, of providing water for the irrigation of lands alloted to Pima Indians on the Gila River Reservation, Arizona, now without an adequate supply of water and, second, for the irrigation of such other lands in public or private ownership, as in the opinion of the said Secretary, can be served with water impounded by said dam without diminishing the supply necessary for said Indian lands * * *." The three classes of lands to be benefited by the project thus were Indian allotted lands, public lands, and lands in private ownership. Section 4 of the act, in providing for the execution of a repayment contract to cover the construction costs of the project, stipulated that the contract should be executed "by a district organized under State law, embracing lands in public or private ownership irrigable under the project * * *." Thus the Indian lands were excluded.

[5] See paragraph 7 of the contract with the Flathead Irrigation District, approved November 24, 1928; paragraph 9 of the contract with the Mission Irrigation District, approved August 21, 1931; and paragraph 13 of the contract with the Jocko Valley Irrigation District, approved February 26, 1935.

[6] The principal purpose of the 1948 act was to provide for the liquidation of the construction costs of the project from the power revenues of the project.

[7] See Amendatory Repayment Contracts with the Flathead Irrigation District, Mission Irrigation District, and Jocko Valley Irrigation District, all approved September 15, 1949.

Finally, in the case of the only other Indian irrigation project, where an irrigation district organized under State law is in existence, namely, the Crow irrigation project, the Indian lands are also excluded from the jurisdiction of the district. Section 3 of the act of June 28, 1946 (60 Stat. 333), which is the last of the series of statutes governing the Crow irrigation project, authorizes the Secretary of the Interior to enter into repayment contracts only "with irrigation districts acting on behalf of all non-Indians owning land under the Crow irrigation project * * *."

Thus, Congress, in providing for the execution of repayment contracts with irrigation districts organized under State law has regularly excluded Indian lands, and in the case of the Flathead project has expressly made the provisions of State law relating to irrigation districts wholly inapplicable to the Indian lands. The Flathead and San Carlos irrigation projects are, moreover, the second and third largest, respectively, of the Indian irrigation projects, and the Crow project ranks sixth.

Again, in the case of at least three of the largest Indian irrigation projects, namely, the Flathead, Fort Hall,[8] and Fort Peck[9] projects, Congress has itself specified precisely when the operation and maintenance of the projects may be taken over by the landowners. The time when the projects may be taken over is when required payments have been made "for the major part of the unallotted lands irrigable under any system * * *." Thus, section 15 of the act of May 29, 1908 (35 Stat. 444, 450), applicable to the Flathead project, and section 2 of the act of May 30, 1908 (35 Stat. 558, 559), applicable to the Fort Peck project, provide in identical terms:

> When the payments required by this Act have been made for the major part of the unallotted lands irrigable under any system and subject to charge for construction thereof, the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such forms of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior.

The act of March 1, 1907 (34 Stat. 1024, 1025), applicable to the Fort Hall project, is the same, except that the words "in accordance with the laws of Idaho" are added after the reference to the Secretary of the Interior.

The provisions of the special legislation thus far discussed merely reflect the fundamental proposition which governs Indian relations that State laws have no application to Indians on Indian reservations unless Congress has specifically made such laws applicable. When-

[8] This project is the fifth largest of the Indian irrigation projects.
[9] This project is the eighth largest of the Indian irrigation projects.

ever it has been deemed desirable that Indians should in some respect be subjected to State jurisdiction, or have the benefit of State laws or State services, special legislation has always been sought to accomplish such purposes. [10] There appears to be only one general law authorizing the Secretary of the Interior to make contracts with State agencies to secure services for Indians. This is the Johnson-O'Malley Act of April 16, 1934 (48 Stat. 596), as amended by the act of June 4, 1936 (49 Stat. 1458, 25 U. S. C., 1946 ed., sec. 452), which authorizes such contracts in the fields of education, medical attention, agricultural assistance, and social welfare. [11]

It is also a fundamental principle of Federal administrative law—applicable not only to Indian relations but to all Federal activities—that Federal officials may make only such contracts as are authorized by law.[12] This does not mean, to be sure, that the nature of the contract must be precisely spelled out in some Federal statute. But the power to make the contract must be at least readily inferable from a statutory power, and must be in harmony with the policy behind the statute. The Secretary of the Interior has, no doubt, a wide rule-making power with reference to the management of Indian irrigation projects, and his power to delegate his functions to the officials and agencies of his own Department is now virtually limitless. [13] But this power may not be exercised with respect to Indians and Indian lands by delegating it to State agencies in the absence of a clear indication by Congress that such a step may be taken. [14] The only statute under which the Secretary of the Interior is authorized to make agreements in connection with the irrigation of Indian lands is the act of March 3, 1909 (35 Stat. 798, 25 U. S. C., 1946 ed., sec. 382) but this authority is limited to the making of agreements covering the allotments of Indians on the public domain and the act expressly provides that "no lien or charge for construction, or maintenance shall thereby be created against any such lands."

[10] See *Handbook of Federal Indian Law* (Wash., 1942), Chap. 6, where examples of such legislation in the field of crime, taxation, inheritance, probate, sanitation, and school attendance are given.

[11] It is interesting to note that some Indian groups were alarmed by this legislation and had to be assured by the Department that it did not provide authority for the States to assume jurisdiction over Indian lands (see letter dated April 23, 1930, from Secretary Ray Lyman Wilbur to Mr. Pablo Abeita). In sponsoring the legislation, the Commissioner of Indian Affairs had stated, however, that the legislation "does not in any way affect the status of the Indian either as to his citizenship or his property rights, nor does it affect in any way the tribal assets, land holdings, or any other property of individual Indians or of any tribe of Indians." (See S. Rept. 449, 71st Cong. 2d sess., p. 2.)

[12] Rev. Stat. 3732, as amended (41 U. S. C., 1946 ed., sec. 11), provides: "No contract * * * on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment * * *."

[13] See Reorganization Plan No. 3 of 1950 (15 F. R. 3174).

[14] See Solicitor's opinions M–25258 (June 26, 1929) and M–31351 (August 24, 1942) together with authorities there cited.

It would seem to be plain that no matter how desirable it may seem at present that Indian and non-Indian landowners on Indian irrigation projects should be treated on the basis of equality that such is not the policy that is embodied in existing Federal legislation governing such projects. The construction of Indian irrigation projects was often launched with little regard for their economic feasibility but were undertaken as part of the Federal Government's program of instructing the Indians in the arts of civilized life, which, of course, include agriculture. Sometimes the Indians benefiting from a project were not required to pay construction costs,[15] and sometimes they were excused even from paying operation and maintenance charges.[16] Congress, to be sure, subsequently adopted general legislation providing for the payment by Indians of operation and maintenance charges and construction costs of the Indian irrigation projects. However, the act of August 1, 1914 (38 Stat. 583, 25 U. S. C., 1946 ed., sec. 385), which made maintenance charges reimbursable, did so only "where the Indians have adequate funds to repay the Government," [17] and the act of February 14, 1920 (41 Stat. 409, 25 U. S. C., 1946 ed., sec. 386), which provided for the collection of construction charges, was limited to those cases "where reimbursement is required by law." Moreover, Congress subsequently adopted the Leavitt Act of July 1, 1932 (47 Stat. 564, 25 U. S. C., 1946 ed., sec. 386a), which authorized the Secretary of the Interior "to adjust or eliminate reimbursable charges of the Government of the United States existing as debts against individual Indians or tribes of Indians in such a way as shall be equitable and just in consideration of all the circumstances under which such charges were made," and which at the same time deferred the collection of all construction costs against any Indian-owned lands within any Government irrigation project, and provided that no assessments should be made "on behalf of such charges against such lands until the Indian title thereto shall have been extinguished * * *." Under the provision of the Leavitt Act permitting the adjustment of reimbursable charges, it has been common practice to cancel debts arising from the nonpayment by Indians of operation and maintenance charges made by Indian irrigation projects.

[15] *See, for example,* the act of May 30, 1908 (35 Stat. 558, 559), relating to the Fort Peck project, which provides: "The land irrigable under the system herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such land without cost to the Indians for the construction of such irrigation systems."

[16] *See, for example,* the act of March 1, 1907 (34 Stat. 1024, 1025), relating to the Fort Hall project, which provides that the Indians shall pay no construction charges, and no maintenance charges unless the lands are leased for more than three years.

[17] It has been the practice to deliver water to Indians unable to pay operation and maintenance charges upon a certification by the superintendent of the reservation of the Indian farmer's inability to pay the charges. See 25 CFR, Part 130.

There is also an ultimate reason for denying the power of the Secretary of the Interior to make contracts providing for the operation of Indian irrigation projects by State irrigation districts. This lies in the fact that Indian irrigated lands are almost entirely allotted lands. In the Northwest, the Indian irrigated lands are virtually all allotted lands; there are small areas of irrigated tribal lands in the Southwest, but two of the largest of these areas which lie under the San Carlos and Colorado River Indian irrigation projects are interspersed with allotted lands, so that any contract made with an irrigation district would necessarily have to cover both classes of lands.

Now allotted lands are wholly immunized by acts of Congress from State control, and from any contractual relationships between the allottee and state officials. Section 6 of the General Allotment Act of February 8, 1887 (24 Stat. 390), as amended by the act of May 8, 1906 (34 Stat. 182, 25 U. S. C., 1946 ed., sec. 349), expressly provides that "until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States," and section 5 of the General Allotment Act (24 Stat. 389, 25 U. S. C., 1946 ed., sec. 348), provides that if any contract is made "touching" allotted lands, such "contract shall be absolutely null and void." While Congress has, authorized, subsequent to the adoption of this provision, various types of contracts to be made with respect to allotted lands, the type of contracts proposed to be made with State irrigation districts has not been included. As any such contract is not authorized, moreover, it would make no difference that it contained a provision which would not permit a State irrigation district to institute foreclosure proceedings in State courts to enforce the collection of operation and maintenance charges.[18]

It follows from what has been said that the proposed plan of including Indian lands within irrigation districts organized under State law could not be carried out under existing law, and that the execution of the proposed plan will require additional legislation.

CLARENCE A. DAVIS,
Solicitor.

[18] It should be noted that such a provision would also be contrary to existing State law under which all assessments against lands included in an irrigation district are commonly made liens against all the lands in the district. *See, for instance,* Arizona Code of 1939, section 75 : 313(d) and Idaho Code of 1949, section 43 : 706.

MARTIN J. PLUTT
ELLEN E. HOSLEY

A–26723 *Decided August 17, 1953*

Public Sale—Isolated Tract—Conflicting Preference Rights—Continued Existence of Preference-Right Qualifications—Hearings.

Where an isolated tract consisting of only one subdivision is offered at public sale, and two preference-right claimants bid for the tract, it may properly be awarded to the qualified preference-right claimant who applied for the sale.

Where the owner of land contiguous to an isolated tract of public land offered for sale properly asserts a preference right to purchase the land, and then disposes of the contiguous land after the close of the period allowed for the assertion of preference-right claims and before he receives a cash certificate or patent for the isolated tract, he does not thereby lose his preference right to buy the isolated tract.

A preference-right claimant for an isolated tract consisting of one subdivision offered at public sale is not entitled to a formal hearing on the award of the tract.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Martin J. Plutt has appealed to the Secretary of the Interior from a decision dated January 28, 1953, by the Assistant Director of the Bureau of Land Management which affirmed the action of the manager of the Land and Survey Office at Denver awarding an isolated tract of public land to Ellen E. Hosley.

On May 26, 1949, Mrs. Hosley submitted to the Denver land office an application asking that the SW¼SE¼ sec. 28, T. 43 N., R. 13 W., N. M. P. M., containing 40 acres be ordered onto the market and sold at public auction as an isolated tract pursuant to the provisions of section 2455 of the Revised Statutes, as amended (43 U. S. C., 1946 ed., Supp. V, sec. 1171).

The sale of the isolated tract was ordered pursuant to Mrs. Hosley's application. At the sale which was held on July 31, 1951, Mrs. Hosley submitted a sealed bid of $8 per acre, or $320 for the tract. Martin J. Plutt appeared by his attorney and bid $12.25 per acre, or $490 for the entire tract. The land had been appraised at $4 per acre.

Mr. Plutt was declared to be the highest bidder. On August 15, 1951, Mrs. Hosley asserted her preference right allowed by the statute and the regulation (43 CFR 250.11 (b)) to owners of contiguous land by submitting a check for $160 to bring her bid up to $480, three times the appraised price. Mr. Plutt had claimed a preference right prior to the sale.

By decision dated October 10, 1951, the manager awarded the entire tract to Mrs. Hosley. Mr. Plutt filed an appeal from this decision

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with the Director of the Bureau of Land Management. On November 8, 1951, the manager issued a decision holding that the evidence that Mrs. Hosley had submitted to substantiate her claim to a preference right as the owner of contiguous land was insufficient and calling upon her to submit further evidence of her ownership of the whole title to contiguous land. Mr. Plutt filed an appeal from this decision with the Director of the Bureau of Land Management. On November 28, 1951, Mrs. Hosley filed satisfactory evidence of her ownership of the land upon which she had based her claim to a preference right.

By decision dated June 20, 1952, the Director of the Bureau of Land Management affirmed the manager's decision awarding the entire tract to Mrs. Hosley. Mr. Plutt took an appeal from the Director's decision to the Secretary of the Interior in which he submitted a certified copy of a deed from Mrs. Hosley to Keith Whatley, dated March 24, 1952, conveying, among other lands, the NW¼NE¼ sec. 33, T. 43 N., R. 13 W., a tract which is adjacent to the land in dispute and which is the land upon which Mrs. Hosley based her claim to a preference right. On August 26, 1952, the Assistant Director issued an order to Mrs. Hosley to show that she had retained continual ownership of the land upon which she had based her claim to a preference right. Mr. Plutt's appeal to the Secretary was remanded to the Bureau of Land Management to await a final decision on Mrs. Hosley's preference right.

On January 28, 1953, the Assistant Director of the Bureau of Land Management issued a decision reaffirming his decision of June 20, 1952, which awarded the entire tract to Mrs. Hosley. Mr. Plutt has appealed from this decision to the Secretary of the Interior.

Mr. Plutt owns land adjacent to the isolated tract on the west, north, and east. He alleges that he has used the tract for grazing in connection with his other holdings for a period of 15 years, that there is a fence across the southern boundary of the tract, and that he has a water right in a stream which crosses the tract which he uses for irrigation and for watering his livestock.

Mrs. Hosley owns land which adjoins the isolated tract on the south. She alleges that she has used the southern portion of the isolated tract for grazing for at least 12 years pursuant to a division of the tract between Mr. Plutt and Mrs. Hosley's late husband made by the acting district grazier.

Where only one legal subdivision is offered at public sale as an isolated tract, and claims to the tract are asserted by two preference-right bidders owning contiguous lands, the tract will ordinarily be awarded to the preference-right bidder who applied for the sale. 43 CFR 250.11 (b) (3); *E. Arthur Wilbur et al.*, A–26228 (June 25,

1951); *Chris Floden*, A–26232 (July 31, 1951); *Dominic Maglia et al.*, A–24808 (June 4, 1948).

The Department has long followed this practice of requiring disposals of the public lands to conform to the smallest regular legal subdivision or lot and of treating minor subdivisions as indivisible for administrative purposes. *State of Arizona*, 53 I. D. 149, 150 (1930); *L. S. Keye*, A–24369 (August 5, 1946); *Rubert Ray Spencer*, 60 I. D. 198 (1948); *Edward A. Kelly*, A–23430 (December 31, 1942); see 43 U. S. C., 1946 ed., sec. 298. The authority of the Department to impose such a restriction by regulation has been upheld by the courts. *Southern Pacific Railroad Company* v. *Fall*, 257 U. S. 460 (1922); *Work* v. *Central Pacific Railway Company*, 12 F. 2d 834 (1926).

Although this rule has been departed from in special situations (see *State of Arizona*, *supra*; *Rubert Ray Spencer*, *supra*; *Chambers* v. *Hall*, 49 L. D. 203 (1922)), the circumstances of this case as alleged by the appellant, even if assumed to be taken as estabished, would not warrant a departure from the general rule. *Mary Volk et al.*, A–26601 (May 5, 1953). Accordingly, the action of the manager in awarding the entire tract to Mrs. Hosley was clearly correct as of the date of the award.

However, the appellant contends that the fact that Mrs. Hosley conveyed the land upon which her preference right was based to her son some 6 months after she had been awarded the tract, but prior to the issue of the cash certificate, deprives her of her preference right to purchase the isolated tract.

The pertinent portion of the isolated-tract law provides:

> * * * *Provided*, That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered land at the highest bid price, * * * but in no case shall the adjacent land owner be required to pay more than three times the appraised price: * * *. [43 U. S. C., 1946 ed., sec. 1171.]

While the statute fixes only the minimum period during which a preference right can be asserted, the pertinent regulation requires that the claim of a preference right must be made within 30 days after the high bid is received (43 CFR 250.11(b)).

Neither the statute nor the regulation specifically states that the requirement that an applicant asserting a preference right must own contiguous land is a continuing one which must be met at all times until a cash certificate is issued to the preference-right claimant.

The general rule is that an applicant's qualifications for an entry under the public-land laws are to be determined as of the time the entry is made and subsequent changes in his qualifications will not deprive him of his entry. Where an entryman under the homestead

law (43 U. S. C., 1946 ed., sec. 161 *et seq.*) becomes the proprietor of 160 acres of land after his entry has been allowed, he does not thereby become disqualified to complete his entry. *Harris* v. *Miller*, 47 L. D. 406 (1920); *Mathison* v. *Colquhoun*, 36 L. D. 82 (1907); *West* v. *Edward Rutledge Timber Co.*, 210 Fed. 189 (D. C. Idaho, 1913), aff'd 221 Fed. 30. Similarly, the requirement of the desert-land-entry act that only a resident citizen of the State in which the land sought to be entered is located may make an entry (43 U. S. C., 1946 ed., sec. 325) is satisfied if the entryman qualifies at the time of entry, though he changes his residence prior to final proof. *Lacy* v. *Woodbury*, 49 L. D. 114, 117 (1922).

It has also been held that a settler's qualifications as a homestead entryman are to be determined as of the time he initiates his settlement and not at the time he files his application to enter the land. *Harris* v. *Miller*, *supra*.

Several cases concerning entrywomen who marry in the interval between the filing and the allowance of their applications illustrate the degree to which the Department has protected applicants against a change in qualifications in that time. In *Larson* v. *Parrish and Woodring*, 49 L. D. 311 (1922), an unmarried woman who filed a proper application for a homestead entry on May 19, 1917, and married in June 1919, was held as qualified to make an entry allowed on August 31, 1920. In *Condas* v. *Heaston*, 49 L. D. 374 (1922), an entrywoman who married after she had applied to have the land designated as suitable for entry under the stock-raising homestead act (43 U. S. C., 1946 ed., sec. 291 *et seq.*), and prior to its designation as being suitable for entry, was held not to have lost her qualification by her marriage. Since an application to have land designated as suitable for a stock-raising homestead entry confers upon the applicant merely a preference right to enter the tract against others when and if it is designated as subject to the provisions of the stock-raising homestead act and does not segregate the land or affect its status prior to its designation or protect the applicant against an intervening withdrawal (*John F. Silver*, 52 L. D. 499 (1928)), the position of an applicant and the status of the land applied for under that act is analogous to the position of Mrs. Hosley and the offered tract in this appeal. She, too, is applying for land under an act which gives her a mere preference right to it by an application which does not segregate the desired tract or give her any contractual or other right in the land until she is issued a cash certificate. (43 CFR 250.5.) Accordingly, the loss of qualifications upon which a preference right is based should have no different consequences in the one case than in the other.

In *Munsell* v. *Armstrong*, 51 L. D. 609 (1926), the Department dealt with the consequences of the sale of land which an applicant

for additional land was required to own and reside upon as a prerequisite for entering the additional land. Mr. Armstrong, as the owner and resident of a previously allowed homestead entry, applied, on August 17, 1920, to enter additional lands pursuant to section 5 of the stock-raising homestead act (43 U. S. C., 1946 ed., sec. 295). Section 5 limited the right of additional entry to those who own and reside upon land patented or upon which final proof has been submitted under the homestead laws. On May 24, 1924, prior to the allowance of his application, Mr. Armstrong sold and transferred his original entry. The Department held that so long as he owned and resided upon his original entry at the time of his application for an additional entry, the subsequent sale of his original entry did not disqualify him from making an additional entry. In other words, his preference right to make the additional entry was not affected by his failure to retain the lands upon which his preference right was based.

A similar problem of the effect of a change in qualifications of an applicant claiming a preference right was at issue in the cases of *Heryford* v. *Brown*, 49 L. D. 248 (1922), and *Matt Mechaley*, 51 L. D. 413 (1926).

In the *Heryford* case, Heryford had made a desert-land entry for certain land on November 26, 1918. On October 23, 1921, he filed a prospecting-permit application for the land covered by his entry, claiming a preference right under section 20 of the Mineral Leasing Act (41 Stat. 437, 445). On October 21, 1921, he filed his consent to the reservation of the oil and gas deposits in the land to the United States under the act of July 17, 1914 (30 U. S. C., 1946 ed., sec. 121 *et seq.*), and on November 25, 1921, he relinquished his entry. Meanwhile, Brown had filed an application for a prospecting permit on September 12, 1921, for the same land.

Section 20 of the Mineral Leasing Act provided that in cases of land "bona fide entered as agricultural land and not withdrawn or classified at the time of entry, * * * the entryman * * * shall be entitled to a preference right to a permit and to a lease * * *."

The Commissioner of the General Land Office[1] held that Mr. Heryford had forfeited his preference right when he relinquished his entry, and that Mr. Brown was entitled to a permit by reason of the priority of his application.

Upon appeal, the Department reversed the Commissioner's decision and awarded the permit to Mr. Heryford. The decision stated:

[1] Effective July 16, 1946, the General Land Office was abolished and its functions were transferred to the Bureau of Land Management by section 403 of Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

* * * It appears from the record that Heryford's application was complete in all respects when filed, that he possessed the requisite qualifications, and that the prescribed fees were paid. Upon the filing of the oil and gas waiver on October 20, 1921, those deposits became subject to disposal under the leasing act, and under the provisions of section 20 the entryman's preference right to a permit attached. Had his application received immediate consideration he would have been granted a permit, and to deny it now would be to penalize him because of the administrative delay in action on his application, for which he is in no way responsible.

* * * * * * *

* * * where a completed application is filed for deposits subject [to the Mineral Leasing Act] by one entitled to a preference right under section 20, and the proper fees paid thereon, the preference right to a permit attaches and is not forfeited by the subsequent relinquishment of the basic entry prior to the actual issuance of the permit. [Pp. 249–250.]

In the *Mechaley* case, the facts were practically identical with those in the *Heryford* case. There the entryman claimed his preference right in the 30-day period allowed him after a notice to show cause why his entry should not be canceled had been served upon him. The entryman took no action with respect to showing compliance with the homestead law and his entry was canceled. The Department held that under the rule of *Heryford* v. *Brown*, *supra*, the entryman was entitled to a preference under section 20 of the Mineral Leasing Act provided his entry stood intact at the time of his application for a prospecting permit despite the fact that the entryman had been notified that his entry was being held for cancellation and that it was later canceled.

Thus, it is apparent that the Department has not held that the granting of a preference dependent upon the existence of certain qualifications to an applicant for public lands requires that the qualifications be maintained until the Government has completed its action upon the application. It is generally sufficient if the qualifications were in existence at the time the preference is claimed. The Department has been particularly reluctant to deprive a preference-right applicant of his preference right when he has maintained his preference-right qualifications intact for a period sufficient in the ordinary course of events for departmental action to have been taken. In other words, the Department does not favor penalizing an applicant for delays in the administrative process for which he is not responsible.

In the instant case, Mrs. Hosley was the owner of contiguous land at the date of the sale, during the ensuing 30-day period for the assertion of preference rights, and for some months thereafter. Her position appears to be analogous to that of the various applicants in the cases cited above who were fully qualified as preference-right applicants at the time they asserted their preference rights but who were

not so qualified at some later time when the Government acted on their applications.

In the absence of a clear statutory requirement that a preference-right claimant for an isolated tract maintain his qualifications until he receives a cash certificate, it is my opinion that the statute is satisfied if the claimant maintains his qualifications through the preference-right period.

This ruling is consistent with the purpose of the preference-right provision because it does not expose contiguous land owners to nuisance bidders. It also removes a restraint on the alienation of the property on which the preference right is based. Furthermore, it relieves the Department of the necessity of ascertaining the ownership of such land up to the moment the cash certificate is issued.

A contrary view was reached in the case of *John B. Williams, Richard and Gertrude Lamb*, p. 31. Insofar as that case is inconsistent with this decision, it is overruled.

Finally, the appellant contends that a hearing should have been held to determine to whom the offered tract should be awarded. However, a preference-right claimant for an isolated tract offered at public sale is not entitled to a hearing on the award of the tract. *Mary Volk et al.*, A–26601 (May 5, 1953).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Assistant Director of the Bureau of Land Management is affirmed.

CLARENCE A. DAVIS,
Solicitor.

APPEAL OF BOESPFLUG-KIEWIT-MORRISON

CA–175 *Decided August 21, 1953*

Contract Appeal—Change Orders—Interpretation—Questions of Fact.

A decision as to whether or not any given work under a contract has been accomplished in accordance with the contract provisions involves the determination of a question of fact.

When the terms of a change order have not been followed, so that the payment of the stated lump sum for the work specified in the order, based on unit prices listed therein, would result in an overpayment to the contractor for the work actually performed by it, an appraisal of the entire work under the change order should be made and a new change order issued which will result in an equitable adjustment being made for the type and amount of work actually done under the order.

In the interpretation of a contract it should be construed as a whole and, whenever possible, effect should be given to all of its terms and provisions, and apparently conflicting provisions should be reconciled.

ADMINISTRATIVE DECISION

On June 25, 1952, Boespflug-Kiewit-Morrison [1] appealed from the decision of the contracting officer, dated May 29, 1952, denying additional compensation for work performed under a change order to a contract with the Bureau of Indian Affairs. The contract, contract No. I–1–Ind–42213, which is on the standard form for government construction contracts (Form No. 23, Revised April 3, 1942), was entered into on July 20, 1949. It provided for the construction of a hospital building, utilities, street paving, service courts, and parking areas in Anchorage, Alaska, in accordance with the specifications, which are designated as project No. 501–228.

On January 31, 1951, Change Order No. 13–W was issued in the form of a letter to the contractor from the contracting officer. It made provision for an increase of $18,949.55 in the contract price and stated in pertinent part that:

> Electrical offsite utilities for the complete new underground system as shown on the new prints, Job Sketch #7 revised August 31, 1950 entitled "Proposed Realignment Offsite Electrical Utilities" and as outlined by Alaska Native Service serial letter No. 232.
>
> You are advised that your proposal as described above is accepted, subject to contract requirements. Your contract No. I–1–Ind–42213 is modified accordingly. By reason of this modification, the present contract price of $4,609,733.01 is increased to $4,628,682.56 and the contract completion date of June 25, 1953 remains unchanged.

Appended, as a footnote, to the Government's copy of that letter was the following statement:

> Proposal is based on hand excavation for ductline and manholes. Should the excavation be performed by machine it is understood that a credit for the difference between the contract unit prices for hand excavation at $6.00 per cu. yd. and General excavation at $1.50 per cu. yd. for the 479 cu. yds. involved will be requested.

The evidence in the record that is before me is somewhat conflicting, but it appears that this notation pertaining to payment for machine and hand excavation was added to the Government's copy of the letter after the original copy had been mailed to the contractor. The notation apparently did not, therefore, appear on the contractor's copy of the letter.

The schedule of proposals and alternates, which was made a part of the invitation for bids and of the contract, provided in pertinent part that:

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[1] Peter Kiewit Sons' Company is a corporation organized and existing under the laws of the State of Delaware; Morrison-Knudsen Company, Incorporated, is a Nebraska corporation; and J. C. Boespflug Construction Company is a partnership of Seattle, Washington, consisting of J. C. Boespflug, Mary Boespflug, and John Boespflug. The contract was made by all three entities who signed as one and will hereafter be referred to as "the contractor."

The following unit prices will be used where applicable when conditions necessitate changes in the contract price in accordance with Articles 3, 4, and 5 of Contract Form No. 23 and paragraph 27 of the Standard General Conditions.

1. GENERAL EXCAVATION (Soil, Gravel, Clay)---------- $1.50 per c. y.
2. HAND EXCAVATION (Soil, Gravel, Clay)---------- $6.00 per c. y.

The change order was based upon a proposal of the contractor which it set forth in a letter dated January 19, 1951. That proposal had been requested by the Government project engineer, in accordance with the provision of paragraph 27 (a), *infra*, p. 195, of the Standard General Conditions of the Specifications, in two letters, dated August 7, 1950, and September 1, 1950. Those letters pertained to additional work in connection with the rearrangement of the offsite electrical services of the project. Included in the contractor's proposal was an item: "Hand Excavation for Ductline and Manholes 479 c. y. at unit price $6.00 c. y. $2,874.00."

The proposal was accepted by the Government which issued Change Order No. 13–W on January 31, 1951. The work under that order was completed by the contractor sometime during 1951, the ductline and manhole excavation apparently having been done by machine.

On November 20, 1951, the excavation not having been accomplished as the itemization in the change order had indicated it would be accomplished, the project engineer wrote to the contractor that he was "initiating action to take credit for the difference between $6.00 per cu yd hand excavation and $1.50 per cu yd for machine excavation for 479 cu yds in the amount of $2152.55." He stated, however, that since his records indicated that "hand labor was required to trim the backhoe excavation in the amount of approximately 16 man days," he was recommending that the cost of the hand trimming be deducted from the credit which was to be taken by the Government.

According to the information contained in the memorandum of the contracting officer transmitting the contractor's appeal, the contractor apparently ignored the project engineer's letter of November 20, 1951.[2] Subsequently, a new project engineer was appointed by the Government, and, on March 5, 1952, he wrote the contractor stating that the excavation required by Change Order 13–W "was accomplished by the use of a backhoe, which is considered trench digging equipment and machinery." He continued by stating that:

The difference between hand excavation at $6.00 per cu. yd. and general excavation at $1.50 being $2155.50, [that amount] is therefore deducted from your monthly estimate and from the sum $18,949.55 which was the original amount as proposed in the Change Order 13–W.

[2] Memorandum of Executive Officer, Bureau of Indian Affairs, October 3, 1952, transmitting contractor's appeal.

On March 11, 1952, the Chief of the Branch of Buildings and Utilities of the Bureau of Indian Affairs wrote the contractor that his office had received a copy of the project engineer's letter of March 5, 1952, and that:

> Inasmuch as your proposal for this change order was approved on the basis of the excavation being done by hand, and it was actually done by trench digging equipment, we agree with Mr. Reimer [the Project Engineer for the Bureau] that an adjustment in the price should be made.

He also requested the contractor to furnish a revised proposal covering the work and allowing credit for the use of trench digging equipment in lieu of hand labor.

In a letter dated April 3, 1952, the contractor protested the withholding of the $2,155.50 and requested "the restoration of this sum in the next periodical estimate due us." He stated in that letter that:

> This Change Order was approved on a lump sum basis. There is no restrictive clause in it in reference to the methods to be employed by the contractor in carrying out the work and we believe, therefore, that your request is without justification.

The contractor further asserted that the "amendment" which appears on the project engineer's copy of Change Order 13–W was placed there after the receipt of his copy of the change order.[3]

On May 29, 1952, the contracting officer issued a finding of fact and decision in which he stated that the contractor's change order proposal "was accepted as proposed and subject to contract requirements." He found that the proposal had been accepted on a lump-sum basis in reliance on the contractor's statement that the excavation work would be done by hand. He stated that no amendment to Change Order 13–W took place by the addition of the footnote to it, that the note "was merely a statement to the Project Engineer to put him on notice that in accordance with the contract the Government could expect a credit of the difference between hand excavation and general excavation which you [the contractor] listed in the Schedule of Proposals and Alternates of the contract if this work was done by machine rather than by hand." He concluded that as the excavation was actually performed by machine, the contractor could not be paid for excavation at the higher unit price for hand work as such payment would be contrary to the provisions of the contract.

The contractor has appealed that decision seeking payment of the $2,155.50 on the ground not only that the change order was approved on a lump sum basis, but also on the ground that "due to the use of a machine in excavating, a great many more yards were excavated than the quantity listed in the proposal; * * * [and] that it was

[3] *Supra*, page 192.

necessary because of the formation in which the excavation was dug to remove unstable soil and replace the same with a compacted fill for which no allowance was made in the proposal." The contractor further asserts that while the project engineer proposed in his letter of November 20, 1951, to recommend that the cost of hand trimming be deducted from the credit to be taken by the Government for the difference between hand and machine operation, that cost was not accounted for in the proposal and is not measurable in yards. The contractor questions the propriety of using the general excavation unit price given in the Schedule of Proposals and Alternates, contending that the unit price was not meant to apply to trench excavation, that "the costs involved in the work covered by Change Order 13–W were not necessarily limited to those listed in our proposal, but that it was necessary to do additional work and more work than estimated in order to complete a workmanlike and satisfactory job."

It appears from the statements made in the contractor's letter of appeal that it seeks remission of the $2,155.50 withheld by the Government as the difference between hand and machine excavation, not because it believes that it should be paid on the basis of the unit price for hand excavation rather than on the basis of the unit price for machine excavation, but because it believes that neither unit price is applicable and that the sum withheld apparently would satisfy what the contractor contends was work "not accounted for in the proposal, nor * * * measurable in yards."

It is evident, however, that a procedure for effecting changes in the terms of the contract was provided for in article 3 of the contract[4] and in paragraph 27(a) and (b) of the standard general conditions of the specifications which provided as follows:

27. CHANGES: The Contractor's attention is called to Articles 3, 4, and 5[5] of the Contract which deal with changes in the drawings and specifications which may or may not result in an increase or decrease in the contract price or any extension of time. Such changes must be authorized in writing by the Contract-

[4] The pertinent part of that article is as follows:

"The contracting officer may at any time, by written order, * * * make changes in the drawings and/or specifications * * *. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. * * * Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed."

[5] See footnote 4, *supra,* for the pertinent part of article 3 of the contract. Article 4 made provision for "Changed conditions" and is not applicable in this instance. Article 5 pertains to "Extras."

ing Officer and when such changes become necessary they will be accomplished as follows:

(a) When a change in either the drawing, or specifications, or both, is desired or becomes necessary, the Contractor will be requested to submit a lump sum proposal covering all costs whether an increase or decrease for making the change including an extension of time is warranted.

(b) Where UNIT PRICES govern any part of the work involved in the change that portion shall be itemized and the unit prices applied.

That procedure was followed by the Government in this instance. The contractor at the time it signed the contract agreed to its terms and to those of the accompanying specifications. When requested by the Government the contractor proposed the terms of "Change Order 13–W" which were later accepted by the Government. Both parties were bound, therefore, by the terms of that change order.

The courts have long held that in the interpretation of a contract it should be construed as a whole and that whenever possible effect should be given to all of its terms and provisions and apparently conflicting provisions should be reconciled. *Staton* v. *Reynolds Metals Co.*, 58 F. Supp. 657 (D. C., W. D. Ky., 1945); *Sasinowski* v. *Boston & M. R. R.*, 74 F. 2d 628, 633 (1st Cir. 1935). The contracting officer was correct, therefore, when he read together subsections (a) and (b) of paragraph 27 of the Standard General Conditions. The two clauses are not irreconcilable. When they are read together it becomes apparent that subsection (b) requiring the itemization of the work to be done under any given change order, was included in paragraph 27 for the primary purpose of indicating the method by which the lump sum, required to be stated by subsection (a) of the paragraph, is figured by the contractor, and not, primarily, for the purpose of indicating the manner in which the work is to be accomplished. Such being the case, the lump sum stated in the change order here involved and approved by both the contractor and the Government must govern over the unit prices.

However, the contractor cannot ignore the method or type of work indicated in the change order and expect to be paid at a higher unit rate than its labor is worth. It is apparent, therefore, that the contractor is at fault when it indicates by its itemization of the work to be done under Change Order No. 13–W that hand excavation will be used, and does not, in fact, use hand excavation, but rather a less expensive form of excavation, namely, "trenching."

The contracting officer may, under the provisions of article 15 of the contract, decide all disputes concerning questions of fact arising under the contract, and the question of whether any given work under the contract has been accomplished in accordance with its provisions is one of fact. In this instance, however, the contracting officer erred in using the method which he employed in reaching his decision. By

attempting to evaluate only one part of the work specified under the change order, he was, in effect, subdividing the change order into separate items for the purpose of arriving at the sum to be paid for all of the work under the order. That he could not do, as both parties had agreed upon the change order as an entire unit and upon a given lump sum as the consideration for the work specified in it.

Moreover, as "trench" excavation, the method employed by the contractor, cannot properly be defined as either "hand" or "general" excavation, the two methods for which unit prices are listed in the schedule of proposals and alternates, it is evident that the contracting officer also erred in applying the rate listed either for "hand" or "general" excavation to the method used by the contractor.

Accordingly, I am left with no alternative but to remand the case to the contracting officer with the instruction that an appraisal be made of all of the work done under Change Order 13–W, taking into special consideration the method of excavation employed, as well as the amount of excavation and time spent upon it, by the contractor. The contracting officer should then amend the change order in accordance with the procedure prescribed in article 3 of the contract and paragraph 27 of the specifications so as to cover accurately and completely all of the work done by the contractor pursuant to that order. An equitable adjustment should then be made in the amount paid the contractor. If the lump sum which the Bureau considers adequate for the work is not acceptable to the contractor and the parties cannot reach an agreement as to the amount of payment, the matter may be brought again before the head of the Department by the contractor in accordance with the provisions of the contract, together with a record adequate to permit the making of a determination.

Determination

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 24, Order No. 2509, as mended; 17 F. R. 6793), the findings of fact and decision of the contracting officer are reversed, and the case is remanded to the contracting officer, who is directed to proceed according to the directions contained in this decision.

William J. Burke,
Acting Solicitor.

CLAIM OF EMARD PACKING COMPANY

Tort Claim—*Res Ipsa Loquitur*—Negligence of Government Employees—Condition of Premises.

Doctrine of *res ipsa loquitur* is a rule of evidence which permits an inference of negligence by furnishing a substitute for it, thus relieving the claimant of the burden of producing specific proof of it.

The doctrine of *res ipsa loquitur* is that (*1*) if the cause of the incident is known, (*2*) if the thing which caused the damage was under the control of the defendant, and (*3*) if the incident is such as, in the ordinary course of things, does not happen if those who have control use proper care, reasonable evidence is afforded, in the absence of an explanation by the defendant, that the incident arose from want of care.

T-545 AUGUST 25, 1953.

The Emard Packing Company, Anchorage, Alaska, filed a claim, through its attorney, D. H. Cuddy, on December 2, 1952, in the amount of $278.50 against the United States for compensation because of damage to a 1941 Packard sedan, License No. 19645, owned by it, and because of damage to its dock and a ladder going to its paint house.* The damage resulted when a Brill train car belonging to The Alaska Railroad ran off a spur track belonging to The Alaska Railroad and located on property of the railroad leased by the claimant and into the claimant's property.

The question whether the claim should be paid under the Federal Tort Claims Act (28 U. S. C., sec. 2671 *et seq.*) has been submitted to me for determination. That act authorizes the settlement of any claim against the United States on account of damage to property caused by a negligent or wrongful act or omission of an employee of the Government while acting within the scope of his employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage in accordance with the law of the place where the act or omission occurred.

According to the record, the incident occurred between 5 and 6 p. m. on November 2, 1952, on a railroad spur adjoining the Emard Packing Company. The evidence in the record is somewhat conflicting on a number of points, but it appears that the weather was rainy and that it was becoming dark to the extent, according to the testimony

* Mr. Cuddy estimated the damage to the dock and ladder at $100, and enclosed an estimate from the Anchorage Body and Paint Shop, Anchorage, Alaska, for the repair of the 1941 Packard sedan in the amount of $178.50.

However, by a subsequent letter dated March 30, 1953, Mr. Cuddy stated that as the Railroad had already repaired the runway and as the damage to the ladder is minor, the claimant was "willing to forget * * * if the claim against the car is paid in a reasonable time."

of one man, that one could not see objects at a distance of more than three train-car lengths.

It appears that a train crew was switching cars in a routine manner on the afternoon of the incident. The testimony of the crew as it appears in the transcripts of two hearings that were held in Anchorage on November 12, 1952, and January 14, 1953, is conflicting. It is evident, nevertheless, that Brill car 216 was the property of The Alaska Railroad and that it damaged the claimant's Packard automobile to a considerable extent when it ran off the end of the spur track which did not have a stop and struck the right side of the vehicle. It is also true, according to information received in response to an inquiry made here in Washington, that a Brill car is a self-propelled diesel car as opposed to train cars which must be pulled by an engine. A Brill car might, however, be pushed onto a siding or spur by a train of cars or an engine in order to avoid starting up its engines.

Whichever of these two modes of movement of the car were employed, it cannot be controverted that the Brill car 216 was at some time on the day of November 2, 1952, put onto the spur line on the property leased by the claimant from The Alaska Railroad.

It seems clear that the doctrine of *res ipsa loquitur* is applicable in this case. That doctrine, which is recognized in almost all jurisdictions, is that (*1*) if the cause of the incident is known, (*2*) if the thing which caused the damage was under the control of the defendant, and (*3*) if the incident is such as, in the ordinary course of things, does not happen if those who have control use proper care, reasonable evidence is afforded, in the absence of an explanation by the defendant, that the incident arose from want of care. *Washington Loan & Trust Co.* v. *Hickey*, 137 F. 2d 677 (App. D. C., 1943); *Mails* v. *Kansas City Public Service Co. et al.*, 51 F. Supp. 562 (D. C., W. D. Mo., 1943); *Ralston* v. *Dossey*, 157 S. W. 2d 739 (Ky., 1941); *Carlson* v. *Wheeler-Hallock Co.*, 137 P. 2d 1001 (Ore., 1943); *D'Amico* v. *Conguista*, 167 P. 2d 157 (Wash., 1946). The doctrine of *res ipsa loquitur* is a rule of evidence, permitting an inference of negligence, furnishing a substitute for, and relieving the claimant of the burden of, producing specific proof of negligence.

In this case (*1*) the cause of the accident is known (the uncontrolled rolling of the Brill car); (*2*) the Brill car and the upkeep of the spur track were under the control of the employees of The Alaska Railroad; and (*3*) the accident was such that in the ordinary course of events would not have happened if the employees of the railroad had not been negligent in leaving the Brill car in such a condition that

it could roll onto the spur track, or in pushing the car unattended onto a spur which had no stop at the end. Moreover, it appears that the railroad had knowledge that cars would roll off the end of this spur, in view of the fact that the claimant stated in its letter December 2, 1952, that:

> It might be noted that three years ago a similar occurrence happened and a boat was damaged as a result of a similar event. At that time you were notified and requested to install suitable stops at the end of the line which you have failed to do. * * *

There is nothing in the record to call in question the accuracy of this statement.

Accordingly, I find that the Brill car struck and damaged the plaintiff's automobile as a result of negligence on the part of employees of The Alaska Railroad.

As there is no evidence of contributory negligence on the part of the claimant, the claim should be allowed in a proper amount.

The claimant has submitted an estimate for repairs in the amount of $187.89 from Anchorage Motors and a bill by the Anchorage Body and Paint Shop, Anchorage, Alaska, in the amount of $178.50 for the repair of its Packard sedan. The latter amount appears to be reasonable.

DETERMINATION AND AWARD

Therefore, in accordance with the provisions of the Federal Tort Claims Act and the authority delegated to the Solicitor by the Secretary of the Interior (sec. 21, Order No. 2509, as amended; 17 F. R. 6793):

1. I determine that: (*a*) the claim of the Emard Packing Company accrued on November 2, 1952, and was presented in writing to the Department of the Interior on December 2, 1952; (*b*) the damage to the property of the Emard Packing Company, on which this claim is based, amounted to $178.50; (*c*) such damage was caused by a negligent act or omission of an employee of the United States Department of the Interior while acting within the scope of his employment; and (*d*) the United States, if a private person, would be liable to the claimant for such damage under the law of Alaska, where the negligent act or omission occurred.

2. I award to the Emard Packing Company the sum of $178.50, and I direct that this amount be paid to it, subject to the availability of funds for such purpose.

WILLIAM J. BURKE,
Acting Solicitor.

APPEAL OF J. F. WHITE ENGINEERING CORP.

CA–176 *Decided August 27, 1953*

Contract Appeal—Construction Contract—Delay by Contractor—Liquidated Damages—Acts of the Government—Delays of Government—Concurrent Causes of Delay—Failure of Contractor's Supplier.

When a provision for liquidated damages in a Government contract is a reasonable one, it is not necessary in order for the Government to enforce it to show that any actual damage was sustained.

A contractor is not entitled to remission of liquidated damages on the general allegation that the Korean conflict was an "act of the Government" within the meaning of the "Delays-Damages" clause of the standard Government construction contract.

Delays caused by the Government which are the result in turn of the contractor's failure to comply with the specifications are not grounds for the granting of extensions of time.

When a contractor is prevented from working on a given day by two concurrent causes, making delay excusable, an extension of time may be granted for only one day.

Where a subcontractor's compliance with a Government priority order or regulation directly affected the ability of a subcontractor to perform, a delay in performance by the prime contractor is not excusable under section 707 of the Defense Production Act, unless the order or regulation directly affected the prime contractor's ability to perform.

The failure of a contractor's supplier to furnish goods with the working quality or capacity required by the specifications and ordered by the contractor is a normal hazard of business which a contractor must assume.

ADMINISTRATIVE DECISION

The J. F. White Engineering Corporation, of Denver, Colorado, appealed within the allowable time limit from the findings of fact and decision of the contracting officer dated September 5, 1952, under Contract No. I–1–Ind–42301, entered into on August 28, 1950, with the Bureau of Indian Affairs.

The contract which is on the standard form for Government construction contracts (Form No. 23, Revised April 3, 1942) provided that the contractor would furnish the materials and perform the necessary work for the complete construction of a power and heating plant on the Navajo Indian Reservation at Shiprock, New Mexico, for the consideration of $677,506. The work was to be performed in strict accordance with the drawings, schedules and specifications which are referred to as project No. 620–201 (G).

Under the terms of the contract the work was to be completed within three hundred and sixty (360) calendar days after the date of receipt of the notice to proceed. On September 13, 1950, the con-

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tracting officer gave notice to proceed. This notice was received by the contractor on September 14, 1950, and the final completion date became, therefore, September 9, 1951, under the terms of the contract. Prior to the findings of fact from which this appeal is taken, the contractor was granted a total extension of time of 27 calendar days, thus making October 6, 1951, the date for final completion of the work.

By a letter dated September 8, 1952, the contracting officer notified the contractor that all work under the project had been completed and was finally accepted by the Bureau of Indian Affairs as of July 14, 1952. The contracting officer further stated, however, that "the work under the contract was determined to be substantially completed on May 16, 1952, and therefore no liquidated damages are assessable after that date."

On September 11, 1952, the contractor protested, by letter, the withholding of the liquidated damages that had been assessed by the Government for a 41-day period of delay, but attached to its letter a full release for and in consideration of $11,224.75 [1] "receipt of which is hereby acknowledged and confessed" of the Government from "all claims and demands, due or to become due" under the contract.

The contracting officer forwarded to the contractor together with a letter dated September 16, 1952, and identified as Change Order No. 8, a findings of fact, No. 129, dated September 5, 1952, from which this appeal is taken. In that letter the contractor was informed that the contract completion time had been extended 181 calendar days, and that by reason of that modification the contract completion date had been extended from October 6, 1951, to April 4, 1952. The contractor was further informed that liquidated damages in the amount of $2,050 had been subtracted from the final contract price to cover a delay of 41 calendar days.

On September 21, 1952 [2] the contractor appealed from the findings of fact and decision of the contracting officer seeking an extension of time from April 4, 1952, to May 16, 1952, and a remission of the

[1] This sum represents the amount of the final payment on the contract as stipulated in the contractor's final payment voucher. Apparently, however, the payment of $11,224.75 had not been made at the time of the execution of the release because the final Monthly Construction Report of the Bureau of Indian Affairs for September 1952 indicated that the amount of the final payment was $9,174.75. This smaller sum, according to the Report, took into account the final contract price of $659,309.40, as adjusted by Change Order No. 8, less the payments already made to the contractor in the total amount of $650,134.65, less the liquidated damages in the amount of $2,050. It is also to be noted that the contractor refers, in a letter dated October 8, 1952 (which postdates this appeal), to a request for final payment in the amount of $9,174.75 rather than to the sum of $11,224.75 which it had earlier referred to as having been received.

[2] This is the date used by the Bureau of Indian Affairs in transmitting the appeal to this office. No date, however, appears on the letter of appeal other than the date stamps showing the dates of receipt in the various offices of this Department.

$2,050.50 which was withheld by the Government as liquidated damages.[3]

I

The contractor contends that as the Government did not use the power plant for some months after it was finished and as the keys to it had not been formally turned over to the Government until the week of September 15, 1952, the Government had not, in fact, been damaged, and not having been damaged it does not have the power, nor the right, to assess liquidated damages.

It has been held, however, that if a provision for liquidated damages in a contract is a reasonable one, it is not necessary for the party enforcing it to show that any actual damage was sustained. *Wise* v. *United States*, 249 U. S. 361, 364–367 (1919); *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 120–121 (1907); *The Mine and Smelter Supply Company*, CA–145 (February 21, 1952); *Hendrie and Bolthoff Company*, 60 I. D. 466. The authority of the contracting officer and of the head of the Department to excuse the contractor from the payment of liquidated damages in the event of delay in performance of the contract is limited by the terms of the contract to situations where the failure to perform on time is attributable to "causes beyond the control and without the fault or negligence of the contractor," such as strikes, unusually severe weather, etc. (article 9).[4] *Rodarmel Plumbing Company*, p. 122; *McDaniel Construction Company*, CA–164 (October 9, 1952).

II

The contractor asserts that "the Korean War is an Act of the Government," that it was the basis of all the delay on the project, and that it should, therefore, be excused under article 9 of the contract for all of the delays it suffered.

Article 9 of the contract contained the usual "Delays-Damages" clause of the standard Government construction contract, the pertinent part of which provides that the contractor will not be:

> * * * charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor

[3] Paragraph 5 of the General Construction Information of the specifications provided that liquidated damages would be assessed in the amount of $50 per day for "each building" for each calendar day of unexcused delay beyond the date of completion as provided in the contract. Although the specifications read "each building," the contract actually required the construction of only one building.

[4] As the contractor requests extensions of time for specific causes as listed in Article 9 of the contract, those requests and their merits will be discussed later on in this decision.

in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay * * * notify the contracting officer in writing of the causes of delay, * * *.

The term "acts of the Government" has been variously defined. It has been held, for example, that delays suffered by a contractor are excusable under the usual "Delays-Damages" clause of the standard government construction contract, so as to permit an extension of time to be granted the contractor to cover the period of the delay when the Government holds up the shipping of an article or material (*Pacific Coast Engineering Company*, CA–158 (August 27, 1952)), does not approve or reject in the manner specified in the specifications of a contract the drawings or samples submitted to it by a contractor (*Struck Construction Company* v. *United States*, 96 Ct. Cl. 186 (1942); *Atwood Construction Company* [War Department, Board of Contract Appeals No. 391] 2 CCF 1173), or when the Government officer in charge of a project fails to approve certain items for purchase and issues conflicting orders with regard to the type of material to be used by a contractor (*Southeastern Construction Company* [Navy Board of Contract Appeals No. 132, 1946] 4 CCF paragraph 60,003).

No decision has been found, however, that would justify my holding that the act of the United States in engaging in the Korean conflict constitutes an act of the Government within the meaning of the term "acts of the Government" as it is used in the "Delays-Damages" clause of the standard Government construction contract.

Moreover, the Korean conflict had been in existence for over 2 months at the time the contractor signed the contract. It is inconceivable that men in the business world did not realize that it might result in a curtailment of the use, for other than defense purposes, of strategic materials. Accordingly, without a specific allegation as to how or in what manner the Korean conflict affected the performance of the contractor, the general allegation that the Korean "war" was an act of the Government and that delays due to it are excusable under article 9 of the contract must fall.

III

The contractor alleges that it was delayed 38 days by the failure of the Government engineering representative, Perkins and Will, to act promptly in approving the names of the manufacturers of equipment which the contractor submitted to the representative.

Article 7 of the contract pertained to "Materials and workmanship." It provided in pertinent part that:

* * * The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates incorporating in the work, together with their performance capacities and other pertinent information. * * *

Moreover, three provisions in the specifications [5] required the contractor to submit the manufacturers' names, together with the lists of the specific equipment that the contractor proposed ordering from them, as well as catalogue cuts, descriptive literature, and drawings of the equipment.

The contractor attempted by a letter dated October 14, 1950, to Perkins and Will, the Government engineering firm, to secure the approval of the manufacturers of equipment without submitting the catalogue cuts, descriptive literature, and job drawings concerning the equipment. The specifications clearly required the submission of the detailed information concerning the equipment at the same time as the contractor submitted the names of the manufacturers of the equipment and the proposed equipment. I agree, therefore, with the decision of the contracting officer denying an extension of time for a delay which resulted from the contractor's failure to comply with the specifications.

IV

The contractor asserts that it was delayed because of late delivery of the materials that it ordered from the Westinghouse Electric Corporation.

The evidence that is in the record before me indicates that the Westinghouse Corporation gave its first quotation and proposal in regard to the contractor's order on July 21, 1950. It further indicates that the contractor notified the Westinghouse Corporation on August 9, 1950, that it would receive the contractor's order, and that on August 28, 1950, after formal approval by the Bureau the contractor placed its order with Westinghouse for two turbine generator units, two surface condensers, and one element air ejector. The Westinghouse Corporation has informed the Bureau [6] that shipment on the generators was originally quoted by it as being 7 months, and that with approval of the formal order having been given on August 30, 1950, the delivery of the equipment would normally have been made on April 1, 1951.

The evidence that is in the record indicates that Westinghouse was delayed 66 days because of slow delivery of materials from the Read-

[5] Division M–16, par. 7; division M–17, par. 4; and division M–18, par. 5.
[6] See its letter of April 23, 1952.

ing Steel Corporation, one of its suppliers, and that the Reading Corporation's delay was caused by a strike at its plant between December 31, 1950, and March 7, 1951. It also indicated that work in the Westinghouse plant was shut down for the three days between May 7 and May 9, 1951, because of a dispute among its employees.

The Westinghouse Corporation has informed the Bureau that there was also slow delivery of materials from the Lebanon Foundries, and that there was some delay in its own shop due to an overloaded work schedule caused by the influx of defense orders.

The contracting officer granted an extension of 58 calendar days for the delay caused by the strike at the Reading Foundry. He found, however, that no evidence has been submitted by the contractor that would substantiate the cause or extent of the delay at the Lebanon Foundries, and, therefore, granted no extension of time for that delay. The contracting officer further found that the 3-day delay caused by the shutdown at the Westinghouse plant from May 7 through May 9, 1951, was concurrent with the delay involved in delivery of the boiler pressure tubing from the Crane-O'Fallon Company, and, for that reason, did not grant a further 3-day extension of time.

When a contractor is prevented from working on a given day by two different causes, either of which makes delay on the contractor's part excusable, there is only one day of excusable delay. Hence, the fact that in the present case there was a strike in the plant of one of the contractor's suppliers at the same time that another supplier was unable to make delivery to the contractor because of priority work in its shop, and that the contractor was also being concurrently delayed by the dilatory return of drawings which it had submitted to the Bureau for approval, can provide no reason for granting the contractor triple relief, as it were. *McDaniel Construction Company*, CA–164 (October 9, 1952).

Accordingly, I concur with the finding of the contracting officer that the contractor is entitled to an extension of 58 days because of the delay caused by the strike in the plant of its sub-contractor's supplier, the Reading Steel Corporation. I also concur with the finding that the contractor is not entitled to an extension of time for the period between December 31, 1950, and January 8, 1951, on the ground that an extension had already been granted for those days because of delay in approving drawings. I also concur with the finding that the contractor is not entitled to an extension of time for the 3-day period between May 7 and May 9, 1951, on the ground that an extension had already been granted to the contractor for that period because another supplier was unable to make delivery to the contractor because of priority work in its shop.

V

The contractor asserts that it placed its order for valves, pipes, and fittings for the project with the Crane-O'Fallon Company on November 3, 1950, that that company, in turn, placed its order with the National Tube Company on November 6, 1950, but that because of the critical situation which then existed in regard to steel and because the Government gave it no priority assistance, its order was approximately 180 days behind the normal delivery time of between 30 and 45 days.

The contracting officer denied this claim on the ground that there was no obligation on the part of the Government to furnish the contractor with a D. O. rating for the piping materials; that section 707 of the Defense Production Act provides relief only to persons "whose liability is the direct or indirect result of his own compliance with some rule, regulation or order issued pursuant to such act," [7] and that in this instance it was the supplier, not the contractor, who was unable to procure the piping materials promptly because of compliance with defense regulations.

The decision of the contracting officer on this point is substantiated by a recent decision of the Comptroller General in which he held that a delay caused by a Government priority order or regulation will not excuse a prime contractor from timely performance unless the order or regulation directly affected the prime contractor's ability to perform, and that it is not sufficient that such an order or regulation affected the ability of a subcontractor to perform. 31 Comp. Gen. 408 (1952).

Certainly, in the absence of a showing that the contractor was unable to acquire the necessary piping material from any other source—a matter which the contractor has neither alleged nor proved—its delay in the construction of a power plant because of the slow delivery of the piping material cannot be excused on the ground that the Government's priority orders and regulations delayed its supplier, the Crane-O'Fallon Company, in the matter of furnishing the necessary piping.

Accordingly, I am constrained to agree with the contracting officer that the delay suffered by the contractor because of slow delivery of the piping is not excusable.

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[7] That section, as amended, provides that:

"No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from his compliance with a rule, regulation, or order issued pursuant to this Act, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid. No person shall discriminate against orders, or contracts to which priority is assigned or for which materials or facilities are allocated under title I of this Act or under any rule, regulation, or order issued thereunder, by charging higher prices or by imposing different terms and conditions for such order or contracts than for any other generally comparable order or contracts, or in any other manner." (64 Stat. 798, 818.)

VI

The contractor does not dispute the decision of the contracting officer in regard to the extension of 22 calendar days that it was granted because the second turbine generator was delayed for that period of time by a blizzard. The contractor does, however, seek upon appeal the sum of $1,200 for the added expense that it incurred in rerouting the second turbine generator after the blizzard.

Such a claim for compensation is in the nature of a claim for unliquidated damages, which an administrative official of the Government has no authority to consider or settle. *William Cramp and Sons* v. *United States*, 216 U. S. 494, 500 (1910); *Flora Construction Corporation*, CA–148 (February 8, 1952); *Winston Brothers Company and the Utah Construction Company*, CA–93 (November 20, 1950). Accordingly, irrespective of its merits, this claim cannot properly be considered by this Department.

VII

Lastly, the contractor asserts that it was delayed (*1*) when defective castings and the metalized sleeve of the turbine shaft on the second turbine furnished by the Westinghouse Corporation and (*2*) the hot well condensate pump furnished by the Aurora Pump Company failed to meet the standard fixed for those items by the specifications and, consequently, had to be replaced.

The contractor contends that the contracting officer confused the metalized sleeve of the turbine shaft and the hot well condensate pump. A careful reading of the decision of the contracting officer clearly reveals, however, that he did not confuse or mix the two items.

However, as the claims are similar in nature and involve the same principles of law, I, too, will dispose of them, as well as the claim involving the defective castings, together.

In regard to the defective castings, the contractor in its letter of appeal states that "defective castings for high pressure steam operation, do not develop defects until such time as pressures or tests are put on the castings, and, therefore, this is an item beyond both the general contractor and the Westinghouse Corporation's control." The statement that defects in port rings and other castings may not appear until after they are put into operation is supported by a statement in Westinghouse's letter of April 23, 1952, to the Bureau.

It is evident, however, that although defects in port rings and other complex castings may not show up until they have been put into operation and for that reason a defect in any particular casting may not be foreseeable, yet it cannot be successfully asserted that it is not fore-

seeable that defects may appear in castings when they are put into operation.

Moreover, the defective material was supplied in each of these three instances by a supplier selected by the contractor, and it is well established that the failure of a supplier to perform his obligation is a normal hazard of business which a contractor assumes. *Walsh Brothers* v. *United States*, 107 Ct. Cl. 627, 645 (1947); *American Transformer Company* v. *United States*, 105 Ct. Cl. 204, 220 (1945); *Porcelain Products, Inc.*, CA–144 (January 18, 1952); *California Steel Products Company*, CA–61 (December 15, 1949).

Accordingly, I find that the contracting officer acted properly in denying an extension of time on the ground that the defects in the castings, the hotwell condensate pumps and in the turbine shaft were not unforeseeable.

DETERMINATION

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 17 F. R. 6793), the findings of fact and decision of the contracting officer are affirmed.

WILLIAM J. BURKE,
Acting Solicitor.

APPLICABILITY TO INDIAN LANDS OF ARIZONA LAW REGULATING WITHDRAWAL OF GROUND WATER

Indian Lands—Applicability of Arizona Law Regulating Withdrawals of Ground Water.

The law of Arizona regulating the withdrawal of underground water cannot be applied to Indians on Indian reservations in the State in the absence of Congressional legislation specifically making such law applicable.

It follows as a necessary corollary from this proposition that the law of Arizona regulating the withdrawal of underground water cannot be made applicable to Indians on Indian reservations in the State by agreement of the Department, Bureau of Indian Affairs, and Indian Tribal Councils as the interested parties.

M–36164 SEPTEMBER 10, 1953.

TO ASSISTANT SECRETARY ORME LEWIS.

This refers to your memorandum of March 23, relating to the possibility of regulating the withdrawal of underground water in Arizona by State laws which will apply to all lands. In this connection you request my advice upon three questions:

(*1*) Will such laws be enforceable against Indian lands?

(*2*) If not, can the Department, Bureau of Indian Affairs, or tribal councils agree upon the basis upon which the reservation lands can be bound by such laws, and can such agreement be enforced?

(*3*) Can the Bureau of Indian Affairs cooperate in effecting an orderly withdrawal of existing water supplies without the approval of the tribal councils?

I believe that the answers to questions (*1*) and (*2*) must be in the negative. As a general proposition, the application of State laws to Indians on Indian reservations is excluded unless Congress has specifically made them applicable, and this general proposition has been applied to Indian water rights, which have been held to be reserved exclusively for the benefit of the Indians. *Winters* v. *United States*, 207 U. S. 564 (1908); *United States* v. *Walker River Irrigation District*, 104 F. 2d 334 (9th Cir. 1939). It has been specifically held that rights cannot be acquired in the waters of Indian reservations under State laws relating to the appropriation of waters and that only Congress can provide how rights in such waters may be acquired. *United States* v. *McIntyre*, 101 F. 2d 650 (9th Cir. 1939). As the court said in this case of the Indian reservation waters: "Being reserved, no title could be acquired by anyone except as specified by Congress. * * * Likewise, the Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the reservation."

If the consent of Congress is necessary to make statutes applicable to Indian water rights, it follows as a necessary corollary that this cannot be accomplished by agreement of the interested parties. It is moreover, a basic rule of Federal administrative law that Federal officers can make only such agreements as Congress has authorized them to make, and there is no Federal legislation which authorizes agreements to make the laws of Arizona relating to underground waters applicable to Indian lands. On the contrary, there is Federal legislation which would doubtless be construed to prevent officials of the Department and the tribal councils from making any agreement which would have the effect of disposing of Indian water rights. Rev. Stat., sec. 2116 (now 25 U. S. C., 1946 ed., sec. 177) prohibits any alienation of Indian "lands," and lands commonly include the appurtenant water rights.

Since no specific proposal for the orderly withdrawal of existing ground-water supplies has been presented to me, a precise answer to question (*3*) cannot be given. I shall be glad, of course, to consider the legality of any such proposal if and when it is presented to me.

I think that I should add that the law of Arizona relating to percolating underground waters has become involved recently in a great deal of uncertainty and confusion which would make it difficult to regulate the withdrawal of such waters even if the law were applicable

to Indian lands. It appears to have been assumed in Arizona ever since the decision in the case of *Howard* v. *Perrin*, 8 Ariz. 347, 76 Pac. 460, aff'd 200 U. S. 71 (1904), that underground waters, except underground streams flowing in defined channels, were the property of the owner of the soil, although it was not entirely clear whether the Supreme Court of Arizona would apply the doctrine of reasonable use or correlative rights to such waters. In *Bristor* v. *Cheatham*, 73 Ariz. 228, 240 P. 2d 185 (1952), however, a majority of the Supreme Court of Arizona upset the doctrine of the *Perrin* case, and declared that percolating waters were public, and subject to appropriation. Upon rehearing, a majority of the court decided on March 14, 1953, not only to return to the doctrine of the *Perrin* case but to accept the doctrine of reasonable use. The court did not, however, decide precisely what would be a reasonable use. On the contrary, the court declared: "This rule does not prevent the extraction of ground water subjacent to the soil so long as it is taken in connection with a beneficial enjoyment of the land from which it is taken. If it is diverted for the purpose of making reasonable use of the land from which it is taken, there is no liability incurred to an adjoining owner for a resulting damage." While the court indicated that the legislature might take some regulatory measures under its police power, it declined to say whether the power could be invoked "to affect the rights involved herein." The decision appears to have caused considerable consternation in the State. On March 18, 1953, the Arizona Legislature adopted and Governor Pyle signed Senate Bill No. 107, the effect of which is to close until March 31, 1954, a large area in the Central Valley of Arizona to further agricultural development dependent on ground-water supplies. It is expected that new legislation of some sort will be prepared and submitted to the legislature in the interim.

CLARENCE A. DAVIS,
Solicitor.

APPEAL OF TIMBER STRUCTURES, INC.

CA–200 *Decided October 14, 1953*

Contract Appeal—Supply Contract—Liquidated Damages—Delay.

Under a Government supply contract, delay experienced by the contractor in obtaining supplies may, under certain circumstances, constitute a ground for granting an extension of time.

ADMINISTRATIVE DECISION

On March 27, 1953, Timber Structures, Inc., Portland, Oregon, appealed the decision of the contracting officer on February 27, 1953

under contract No. Ibp–7300, entered into on July 11, 1950, with the Bonneville Power Administration. That contract, which is on the standard form for government supply contracts (Form No. 33, Revised), provided that the contractor would furnish crossarms to the Government as specified in the five items of the schedule and in accordance with the specifications.

Section 104 of the specifications provided that:

Complete delivery of all material shall be made in accordance with the following schedule; time to be computed from date of receipt of notice of award:

Item	F. O. B. DESTINATIONS (Calendar Days)	F. O. B. BIDDER'S SHIPPING POINT (Calendar Days)
1	60	45
2	75	60
3	90	75
4	105	90
5	60	45

The contractor submitted its bid on June 28, 1950, which was 3 days after the attack on Korea. Notice of the award of the contract was received by the contractor on July 12, 1950, thus fixing the contract shipping dates for the five items as: August 26, 1950, September 10, 1950, September 25, 1950, October 10, 1950, and August 26, 1950, respectively. Actual shipment on the 5 items was not made, however, until September 8, 1950, October 4, 1950, October 10, 1950, October 10, 1950, and September 5, 1950, resulting, therefore, in delays of 13, 24, 15, none, and 10 days, respectively, on the 5 items.

In accordance with the provisions of section 105 of the specifications the contractor was assessed liquidated damages in the amount of $15 per calendar day for each day of delay in delivery of item 1, $10 per calendar day for items 2 and 3, and $5 per calendar day for items 4 and 5, for those delays suffered by it when its supplier was unable to ship by rail because of a severe shortage of railroad cars on the west coast in the summer of 1950. The contractor was also delayed by its own inability to ship by rail, but the contracting officer granted extensions of time for those delays, as the contractor was required, by the terms of section 110 of the specifications, to ship by railroad.

The contractor placed its order on July 28, 1950, with its supplier who was to make delivery by August 12, 1950. Thus the contractor placed its order for supplies 16 days after receipt of notice of award.

The contractor in its appeal seeks remission of all liquidated dam-

ages on the ground that shipment of the necessary lumber by the contractor's supplier was delayed during the summer of 1950 by "an extremely severe and unanticipated railroad car shortage" on the railroads which served the supplier's sawmills. It asserts that:

> * * * despite promises by the railroads that cars would be made available, they were still not able to supply the necessary railroad cars, we employed trucks at considerable additional expense over and beyond what was included in our estimate and pricing of our quotation to truck the material to a Eugene, Oregon site. We installed the necessary fabricating facilities at Eugene at considerable additional expense in order that we could save and salvage as much time as possible by fabricating the materials in Eugene and thus cut down the amount of time consumed in trucking the materials to our fabrication site, as well as being as close as possible to our treating plant which had to treat the material upon completion of fabrication. These two measures of trucking and moving of fabricating facilities were done by us at more than merely slight additional expense in an effort to overcome the unforeseeable delay that had developed due to railroad car shortage. We did not request from the Bonneville Power Administration that we be granted additional money to bear this additional expense.
>
> * * * * * * *
>
> Had we sat idly by in the face of the unforeseen delay which was entirely beyond our control and not of any of our doing, we realize we would have no grounds for appeal from a liquidated damages assessment. However, we did all we could to meet the contract shipping dates but still were late; we rapidly reorganized our methods to produce the materials and without consideration of the additional expense. To be out these expenses and now to have the liquidated damages assessed against us is in our opinion less than fair or ethical. Therefore, we respectfully submit these facts and reasons as being adequate justification for the removal of any liquidated damages assessed against us in the performance of subject contract.

With respect to the delay in performance caused by difficulties in obtaining the shipment of timber from its supplier, the contracting officer said:

> Delay in performing a contract is not excusable simply because of hardship or inconvenience, or unusual or unexpected expense. Although a car shortage prevented the supplier shipping by rail to the contractor, this shipment was, in fact, accomplished by truck, so the lack of railroad cars did not cause impossibility of performance. Furthermore, failure of a supplier to supply a contractor promptly is not within the purview of the excusable delay proviso of the "Liquidated Damages" article. It follows, therefore, that no extension of time can be granted for the supplier's delay.

As I read it, this ruling of the contracting officer is to the effect that, as a matter of law, the provisions of the contract relating to excusable delays are inapplicable to delays in obtaining materials from a supplier. In this regard, the contracting officer is in error.

It is true that the performance of work within the time set in a contract is not excused by reason of the fact alone that the contractor has

been delayed in obtaining materials and supplies (*Krauss* v. *Greenbarg*, 137 F. 2d 569 (3d Cir. 1943), *certiorari denied* 320 U. S. 791, *rehearing denied* 320 U. S. 815); *Munn & Perkins*, CA–39 (July 7, 1948); 27 Comp. Gen. 621 (1948); 22 Comp. Gen. 1127 (1943). It does not follow, however, that difficulties in obtaining materials and supplies constitute a class of causes of delay which fall outside such a provision for liquidated damages as is here under consideration, or, conversely, that the contractor has categorically undertaken either that he has the goods on hand or will be able to obtain them. On the contrary, it has been held that uncontrollable or unforeseeable delays in obtaining supplies constitute an excuse against the assessment of liquidated damages. *J. C. Ridnour Company* v. *United States*, 104 Ct. Cl. 221 (1945); *H. B. Nelson Construction Company* v. *United States*, 87 Ct. Cl. 375, 386–389 (1938). And in B–100534, dated January 24, 1951, the Comptroller General ruled that:

* * * The timely procurement of labor and materials necessary for the required performance of a Government contract is, of course, the responsibility of the contractor. However, when a contractor has taken every reasonable precaution to assure itself of an adequate and timely supply of materials, delays in receipt thereof not due to the contractor's fault or negligence properly may be considered unforeseeable. * * *[1]

(*See also* B–100608, February 5, 1951, to the same effect.)

In the contract under consideration, the provision entitled "Delays—Liquidated Damages" provides in part that:

* * * the contractor shall not be charged with liquidated damages or any excess cost when the delay in delivery is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, * * * delays of a subcontractor due to such causes unless the contracting officer shall determine that the materials or supplies to be furnished under a subcontract are procurable in the open market, * * *.

In view of the language quoted above, it seems to me that delays arising out of late receipt of or inability to obtain materials or supplies from a chosen subcontractor were to be regarded in the same manner as any other delays "unless the contracting officer shall determine that the materials or supplies to be furnished under the said contract are procurable in the open market." Thus, while a delay in obtaining supplies would not in itself be excusable, the contractor would be entitled to an extension if the delay were due to unforeseeable causes beyond the control or without the fault or negligence of the contractor or the subcontractor, in the absence of a finding by the contracting officer that the supplies and materials might be obtained on the open market.

[1] *Cf.* 15 Comp. Gen. 313 and 461 (1935). If these rulings stand for a contrary proposition, they presumably have been overruled *sub silentio*.

DETERMINATION

As the portion of the "CONTRACTING OFFICER'S FINDING OF FACT" on which an appeal was taken was predicated upon an erroneous conclusion of law—namely, that the contract does not permit the granting of an extension of time to cover a delay of the contractor in obtaining supplies, and as the record is insufficient for me to determine whether the contractor knew or should have known on July 12, 1950, the date it received notice of the award, or thereafter, that a severe railroad shortage would occur and as the record is insufficient also for me to determine whether the contractor exercised due diligence in arranging for the transportation of the supplies by an alternative mode of transportation such as by trucks, therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 17 F. R. 6793), the decision of the contracting officer is reversed, and the case is remanded with the instruction that the contracting officer make a supplemental finding of fact consistent with this administrative determination.

CLARENCE A. DAVIS,
Solicitor.

APPEAL OF BURY COMPRESSOR COMPANY

CA-189 *Decided October 19, 1953*

Contract Appeal—Supply Contract—Delay by Contractor—Liquidated Damages—Interest.

Under the "Delays—Damages" clause in the specifications of a standard Government supply contract, a delay in transit of supplies ordered by the contractor may, in particular circumstances, constitute a ground for an extension of time to perform the work covered by the contract.

Interest cannot be allowed by the Department of the Interior on the payment of claims arising out of contracts with the Department.

ADMINISTRATIVE DECISION

This is a decision on a timely [1] appeal by the Bury Compressor Company, Erie, Pennsylvania, from the findings of fact and decision of the contracting officer dated November 6, 1952, under contract No. I2r-19321 with the Bureau of Reclamation.

The contract, which was on the standard form for Government supply contracts (Form No. 32, revised June 18, 1935), was entered into on November 22, 1950. It provided that the contractor would furnish

[1] The Solicitor's office was informed by a telegram dated December 8, 1952, that the contractor intended to appeal.

and deliver one vertical and two horizontal air receivers in accordance with items 7 and 8 of schedule No. 4 of specifications No. 3196, for the Canyon Ferry Power Plant, Helena-Great Falls Division, Canyon Ferry Unit, Montana, a part of the Missouri River Basin Project.

Paragraph 19 of the specifications stated that:

> Time of delivery is important, and complete shipment from the shipping point or points is desired within one hundred and eighty (180) calendar days after date of receipt by the contractor of notice of award of contract. * * * Bidders are required to state, in the blank provided therefor in the schedule, a definite period of time within which shipment will be made. * * *

The contractor received telegraphic notice of award of the contract on November 22, 1950, thus making May 21, 1951, the date after which liquidated damages of $10 per calendar day were to become assessable under the provisions of paragraph 20 of the specifications. All work under the contract was completed on June 25, 1951, when item 7, the 6′ x 24″ air receiver was shipped by the contractor. There was, therefore, a delay of 35 calendar days beyond May 21, 1951.

Although several issues are presented on this appeal, this determination considers only the matter of delay in the receipt by the contractor of the 6′ x 24″ air receiver from its supplier, since in my view, the appeal may be disposed of on this ground alone.

On February 29, 1952, the Bureau forwarded the final payment voucher to the contractor, indicating that liquidated damages in the amount of $350 had been withheld for the 35-day delay in delivery of the vertical air receiver. The contractor, in a letter dated March 5, 1952, objected to the assessment of liquidated damages. The Chief Construction Engineer of the Bureau informed the contractor, in a letter dated March 28, 1952, that, although the contractor had not given notice of delay in accordance with paragraph 20 of the specifications, an extension of time was granted to permit the contractor to explain the causes of the delay.

Later, by a letter dated April 15, 1952, the contractor, in response to an inquiry from the Bureau, transmitted to the Bureau a photostatic copy of a letter from its supplier, The International Boiler Works Co., to the effect that the time which elapsed between the placing of the order by the contractor and the date of shipment of the receiver was normal for that time. The supplier further stated that it had "compared the history of this order with other orders received during the same period and found a similarity in the time which elapsed between the time of entering the order and shipment." It concluded by saying that it did not see how the contractor could have done anything that would have expedited the completion of "this unrated order." In its transmittal letter, the contractor suggests that since it supplied item

8 ahead of schedule, that that time should be set off against the delay in delivery on item 7.

Shortly after receipt of the contractor's letter, the Bureau on May 8, 1952, again wrote the contractor requesting more information as to the cause of delay. In reply to that letter, the contractor answered on May 16, 1952, that the air receiver had apparently been lost in transit, and that it had come into its shop on a stray bill of lading.

The contracting officer issued his finding of fact on November 6, 1952, and forwarded it to the contractor with a letter dated November 10. It denied the contractor's claim for remission of the liquidated damages on the ground, among others, that the delay in shipment of the vertical air receiver, because of its loss in transit, was not one that could "be considered to be of the type which is considered unforeseeable, beyond the control, and without the fault or negligence of the contractor * * *."

On November 21, 1952, the contractor, by letter, requested the contracting officer to reconsider his decision on the ground that the loss of the receiver in shipment was not a part of its responsibility and that it reshipped the receiver 3 days after its receipt. The contracting officer, in a letter dated November 28, 1952, declined to reverse his finding and said, in part:

> It appears also that you are convinced that we are mistaken in not extending your time by reason of delay in transit of the Item 7 Air Receiver. Paragraph 20 of the specifications provides, among other things, that you will be excused from assessment of liquidated damages if the delay is caused by "unforeseeable causes beyond the control and without the fault or negligence of the contractor" and "delays of a subcontractor due to such causes" with an exception stated to the latter provision. Therefore, your subcontractor is excused with respect to his tardy delivery to you only if the delays of the railroad company could be considered unforeseeable within the meaning of the contract, that being one of the requisites for excusability of delays under the contract terms. We do not think that delays, as such, or even loss of materials by a carrier are unforeseeable in and of themselves. Such eventualities are not so infrequent or unknown that they may, in our opinion, be considered in that category. We might be able to give favorable consideration to your claim if the facts were that the delay was unforeseeable and beyond the control and without the fault or negligence of the railroad. No such evidence is before us, however. You have every right to appeal our decision to the authorized representative of the Head of the Department. We are mindful of the equities which you urge in support of your claim, and we would not be displeased in any sense if we were reversed by higher authority. We think, however, that under the contract terms we have no authority to extend your time. A vested contractual right to liquidated damages cannot be waived by a Government contracting officer no matter how strong the equities.

The contractor asserts on appeal that "due to no fault on the part of the contractor, the [6′ x 24″ vertical air] receiver became lost in

shipment." It alleges that it made "diligent and strenuous efforts to obtain information of the receiver's whereabouts and to speed up delivery," and states that it "had no alternative but to continue its efforts to speed up the shipment, since to reorder another receiver from the International Boiler Works would have required an additional four months." It contends that its delay in shipment of the receiver to the Government was due to the loss of the receiver in transit, an unforeseeable cause that was beyond the control and without the fault or negligence of the contractor. It seeks, therefore, the sum of $178 in payment for the receiver, plus interest "at legal rate from June 25, 1951."

Paragraph 20 of the specifications provides that the contractor

> * * * shall not be charged with liquidated damages or any excess cost when the delay in shipment is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God or the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and delays of a subcontractor due to such causes unless the contracting officer shall determine that the materials or supplies to be furnished under the subcontract are procurable in the open market * * *.

When the contracting officer's ruling in the findings of fact and decision dated November 6, 1952, on the matter of the delay in the receipt of the 6′ x 24″ air receiver by the contractor is considered in conjunction with his statement in the letter dated November 28, 1952, on this matter, it appears that he did not regard the cause of delay as one which fell outside of the provisions of paragraph 20 of the specifications (*cf. Timber Structures, Inc.*, p. 211), but rather that he concluded that the delay was not unforeseeable within the meaning of that paragraph. It is true that items are delayed, or even lost, in transit, and the answer to the question whether the delay in this instance was unforeseeable within the meaning of paragraph 20 of the specifications is not free from doubt.

In the present case, the International Boiler Works Co. informed the contractor by telegram that the boiler company expected to receive steel in February 1951 and to ship the receiver about 3 weeks after the receipt of steel. Shipment was made on March 28. On appeal, the contractor alleged that the normal shipping time between East Stroudsburg, Pennsylvania, where the International Boiler Works Co. is located, and the contractor's plant was from 5 to 7 days. In response to an inquiry from this office, the contractor submitted photostatic copies of bills of lading and freight bills showing a time for delivery of air receivers of approximately 1 and 2 weeks, respectively.

I am not prepared to say that, if a shipment by rail takes longer than any period of time assumed to be normal, there has without more been

an "unforeseeable" delay within the meaning of such a provision as paragraph 20 of the specifications. Here, however, had the air receiver arrived within 50 days from the date of shipment, the contractor presumably could still have performed on time, since it took only 3 days to complete the work remaining to be done on the air receiver. In fact, 85 days elapsed between shipment and receipt. In my judgment, the contractor was not bound reasonably to anticipate that an item of the dimensions of the air receiver would go astray and that efforts to trace it would be unavailing with the result that more than 80 days would elapse between the time of its shipment and receipt. Accordingly, I hold that the delay in transit in this case was an unforeseeable cause within the meaning of paragraph 20 of the specifications. See *H. B. Nelson Construction Company* v. *United States*, 87 Ct. Cl 375, 386–389 (1938); *certiorari denied* 306 U. S. 661.

In my view, the cause of the delay was beyond the control and without the fault or negligence of the contractor. It could not control, nor was it negligent with respect to, the shipment. The possibility that another air receiver might have been obtained elsewhere on time was exceedingly remote. The national priorities system was in operation, steel was in short supply, and the contractor had not been assigned a DO rating.

The contractor seeks the payment of interest on the contract price of the air receiver. The Department of the Interior has no authority to grant interest on a claim under a contract. *Ramsey et al.* v. *United States*, 101 F. Supp. 353, 356 (Ct. Cl., 1951).

Conclusion

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 17 F. R. 6793), the decision of the contracting officer is reversed with instructions to remit the liquidated damages that have been withheld and to pay the contractor the agreed contract price for item 7.

Clarence A. Davis,
Solicitor.

CLAIM OF GUY P. KEARNS

Duties with Respect to Known Trespasser in Proximity to Controllable Force—Application of Rules with Respect to Property—Effect of Defective Condition of Instrumentality.

The United States is liable for injuries to a known trespasser in the vicinity of an instrumentality under the immediate control of one of its employees, resulting from a failure to exercise reasonable care to control the instru-

mentality to prevent injury or to give a warning which is reasonably adequate to enable the trespasser to protect himself.

An employee of the United States is not in immediate control of an instrumentality the movements of which he cannot regulate because of its defective condition.

While negligence is defined as the lack of reasonable care towards persons or property, the standards of reasonable care are higher when the risk of personal injury is involved.

T-548 OCTOBER 21, 1953.

Guy P. Kearns, 412 18th Avenue, Seward, Alaska, filed a claim on April 8, 1953, against the United States in the amount of $159.70 for compensation for damages to Mr. Kearn's 1951 Mercury sedan when it was struck by a Government-owned crane assigned to The Alaska Railroad and operated by Carl L. Owens, an employee of the Railroad.

The question whether the claim should be paid under the Federal Tort Claims Act (28 U. S. C., sec. 2671 *et seq.*) has been submitted to me for determination. That act authorizes the settlement of any claim against the United States on account of damage to property caused by a negligent or wrongful act or omission of an employee of the Government while acting within the scope of his employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage in accordance with the law of the place where the act or omission occurred.

According to the record, the incident occurred at approximately 11:30 a. m. on February 25, 1953, near a railroad crossing within the boundaries of The Alaska Railroad's reserve in Seward, Alaska. It appears that a portion of the reserve is leased to the Standard Oil Company of California, which has constructed a plant on the leased portion. The claimant and other employees of the company frequently, and for some time prior to the incident, parked their cars during working hours on a portion of the reserve near, but not a part of, the leased tract. On the day in question, claimant's car was parked almost at right angles to the track, its back pointed toward it, at a distance of from 10 to 20 feet. Parallel to the track, and between it and claimant's car, was a ditch which apparently was filled with snow at the time of the incident.

To clear the snow from the ditch and from the crossing, Mr. Owens was operating on the track a crane with clamshell attached. According to his account:

* * * I had just picked up a clamshell full of snow and started to back up to dump the snow when the clutch (left swing clutch) caught and the clam swung into the 1951 Mercury owned by Guy Kearns. * * *

It was snowing a hard, wet snow at the time of the accident, which was the reason for the swing clutch to catch.

* * * * * * *

When the clutch caught and started to swing toward the car, I immediately reversed it to try to swing the boom the other way but it was too late and the clam hit the car.

The possibility that the wet snow could have caused the clutch to slip is confirmed by the roundhouse foreman. The file contains no other information concerning the cause of the incident except the assertion by the claimant, who was not present at the time, that Mr. Owens accidentally swung the bucket of the crane so far over into the street that it struck the rear end of his car.

It seems clear that in these circumstances the claimant was either a trespasser or a licensee. Neither the location of his employer's plant upon another portion of the railroad reserve nor the fact that he and others had been accustomed to park their cars on the railroad property gave him a legal right to park at the place in question.

It is generally said that a landowner's only duty toward a licensee or trespasser is to refrain from willfully or wantonly injuring him. However, when the presence of a trespasser is known, the lack of ordinary care to avoid injuring him may be willful and wanton, as pointed out in *Georgia Power Co.* v. *Deese*, 51 S. E. 2d 724 (Ga., 1949), where is was said:

* * * it is unnecessary to decide whether the deceased was a trespasser or licensee since the duty owed to both is the same, namely to use ordinary care to avoid injuring him after his presence and danger are actually known or when the danger is known and his presence is reasonably to be anticipated, which, in point of fact, is merely the duty not to injure him wantonly or willfully. * * *

The highest court of Vermont expresses the same idea differently in *Watterlund* v. *Billings*, 23 Atl. 2d 540, 542 (1942):

* * * While [the defendant landowners] are not bound to keep the premises safe for her [a known licensee or trespasser], or to warn her of their dangerous condition, they owed her the duty of active care to protect her from force negligently brought to bear upon her. * * * If they or their servants knew or ought to have known of her presence it was incumbent upon them to exercise reasonable care to avoid injuring her. * * * See * * * Restatement of Torts, § 336, 341, * * *.

Other jurisdictions distinguish between active negligence and that arising from the condition of the property. In the case of *Davis* v. *Tredwell*, 32 Atl. 2d 411 (Pa., 1943), for example, where the plaintiff, while standing on a curb on defendant's property was injured by defendant's truck backing into her, the court said:

* * * This point overlooked * * * the legal distinction between harm caused by active negligence and that arising from natural or artificial conditions on

real property. * * * The owner of the property owes even to a licensee a duty to use reasonable care to avoid injuring him through active negligence. * * * (P. 413.)

This principle has been applied to distinguish between negligence arising from the defective condition of an instrumentality upon the real estate and that of the operator of the instrumentality, holding the landowner liable to a trespasser only in the second instance. In *Byrne* v. *New York Central & H. R. R. Co.*, 10 N. E. 539 (N. Y., 1887), the court held the railroad liable for the negligence of an engineer where due care would have averted injury to a trespasser, but commented that the case would have been different if the injury had occurred because of a defective condition of the engine attributable to negligence. Besides being regularly cited in New York cases (*Zambardi* v. *S. Brooklyn Ry. Co.*, 24 N. E. 312, 314), this case has been followed or cited in many other jurisdictions. Section 338 of the Restatement of the Law of Torts gives an excellent definition of the duties of a landowner operating an instrumentality upon his land with respect to a trespasser or licensee on the premises:

A possessor of land, who is in immediate control of a force, and knows * * * of the presence of trespassers in dangerous proximity thereto, is subject to liability for bodily harm thereby caused to them by his failure to exercise reasonable care

(a) so to control the force as to prevent it from doing harm to them, or

(b) to give a warning which is reasonably adequate to enable them to protect themselves.[1]

Applying these rules to the present situation, Mr. Owens, an employee of The Alaska Railroad, knowing of the presence of the claimant's car on the railroad property, and being unable to give an adequate warning, was obliged to use reasonable care to control the crane he was operating so as to prevent it from damaging the car. However, neither he nor the railroad would be responsible to the claimant, whether a trespasser or a gratuitous licensee, for a defective condition in the crane which would prevent the crane from being within the complete control of the operator.

According to the evidence before me, the damage either resulted from an unavoidable accident or was caused by a defective condition in the crane existing before the presence of the claimant's car was discovered, placing it beyond the control of the operator. There is no evidence that the operator failed to exercise reasonable care after he discovered the presence of the claimant's car on the railroad's property. Accordingly, the claim must be denied.

[1] Section 497 of the Restatement provides that the rules determining negligence with respect to land and chattels are the same as those with respect to bodily harm. Comment *a* to this section, however, points out that in the application of the rules, what would be unreasonable conduct towards a person would not necessarily be such when a chattel is involved.

October 29, 1953

DETERMINATION

Therefore, in accordance with the provisions of the Federal Tort Claims Act and the authority delegated to me by the Secretary of the Interior (sec. 21, Order No. 2509, as amended; 17 F. R. 6793), I determine that (*a*) the damage to the property of Guy P. Kearns, on which this claim is based, was not caused by a negligent or wrongful act or omission of an employee of the United States Department of the Interior under circumstances where the United States, if a private person, would be liable to the claimant for such damage under the law of Alaska, where the damage occurred; and (*b*) the claim of Guy P. Kearns must be denied.

Clarence A. Davis,
Solicitor.

TRANSFER OF ADMINISTRATION OF INDIAN TIMBER SALE CONTRACTS

Indian Timber Sale Contracts—Transfer of Administration Between Departments.

Congress, in the exercise of its constitutional power to regulate commerce with the Indian tribes, may transfer the administration of Indian timber sale contracts from the Secretary of the Interior to the Secretary of Agriculture, and such a transfer would not impair the obligation of such contracts, nor be lacking in due process.

M–36185 OCTOBER 29, 1953.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

In your memorandum of October 12, 1953, you raise the question whether the Bureau of Indian Affairs, in drafting legislation for terminating the Bureau's activities in the Pacific Northwest, may include a provision in such legislation for the transfer of the administration of Indian timber sale contracts [1] from the Secretary of the Interior and various subordinate officials of this Department to the Secretary of Agriculture.

It is apparently feared that the courts may hold that the purchasers of Indian timber may have a vested right to the discretion of the par-

[1] As an example of such contracts, there is attached to your memorandum a copy of a long-term timber sale contract covering the Crane Creek Logging Unit on the Quinaielt Indian Reservation. This contract was approved by the Department on June 30, 1952, and under it the purchaser of the timber agrees to cut all timber covered by the contract prior to April 1, 1986. Under the terms of the contract, provision is made for the revision of stumpage rates by the "officer approving this contract," who is the Secretary of the Interior, but other functions or determinations are entrusted to the Commissioner of Indian Affairs, or the Area Director of the Bureau of Indian Affairs.

ticular officials specified in the contracts. Indeed, you call attention to a line of cases in the Court of Claims [2] in which that court has held that a contractor is entitled to have the judgment of the particular contracting officer named in the contract rather than a superior officer on the question whether the contract has been breached in a particular respect. But, as you point out, this question differs from the question whether Congress has the power to transfer the administration of a contract from one officer to another in the same or different agencies or departments of the Government. Such a transfer would be executory and would be made before any breach of the contract had been alleged.

The only conceivable ground for doubting the power of Congress to transfer the administration of a contract from one agency to another is that such a transfer would impair the obligation of the contract. The only clause of the Federal Constitution which prohibits such impairment is to be found in Article I, section 10, thereof. But the courts have repeatedly had occasion to point out that this clause provides only that "no *State* shall * * * pass any * * * Law impairing the Obligation of Contracts," and that it does not therefore limit the power of Congress, which in the exercise of one of its constitutional powers may enact legislation which has the effect of impairing the obligation of existing contracts.[3] If Congress were to enact legislation authorizing the transfer of the administration of Indian timber sales contracts from this Department to the Department of Agriculture, it would do so in the exercise of its constitutional power to "regulate Commerce * * * with the Indian Tribes," and to make laws for "carrying into Execution * * * all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof (Article I, section 8)." The legislative actions of the Congress are, to be sure, subject to the requirements of due process, and Congress may not act arbitrarily. But the courts have said that they may inquire only whether what Congress has done has a reasonable relation to a legitimate end, and it could hardly be contended that a minor adjustment such as that involved in the executory transfer of the administration of a contract from one agency to another tran-

[2] There are mentioned in your memorandum the cases of *Standard Dredging Company* v. *United States*, 71 Ct. Cl. 218 (1930); *Cramp & Sons Ship Company* v. *United States*, 72 Ct. Cl. 146 (1931); *Karno-Smith Company* v. *United States*, 84 Ct. Cl. 110 (1936); *S. M. Siesel Company* v. *United States*, 90 Ct. Cl. 582 (1940); *Climatic Rainwear Company, Inc.* v. *United States*, 115 Ct. Cl. 520 (1950). Such decisions of the Court of Claims have been followed in *Brister & Koester Lumber Corporation* v. *United States*, 188 F. 2d 986 (U. S. Ct. App., D. C., 1951) and *United States* v. *Greendale Coop. Ass'n.*, 79 F. Supp. 536 (D. C. Wis., 1948).

[3] See *Legal Tender Cases*, 12 Wall. 457, 547–52 (1870); *Sinking Fund Cases*, 99 U. S. 700, 718–19 (1878); *Mitchell* v. *Clark*, 110 U. S. 633, 643 (1884); *Louisville Bridge Co.* v. *United States*, 242 U. S. 409, 418 (1917); *New York* v. *United States*, 257 U. S. 591, 601 (1922); *Norman* v. *B. & O. R. R. Co.*, 294 U. S. 240, 306–11 (1935); *Guaranty Trust Co. of New York* v. *Henwood*, 307 U. S. 247, 258–59 (1939).

scended the power of Congress. To deny such power to Congress would seriously impede the efforts which it has made in recent years to reorganize the Federal Government with the object of improving its efficiency.

Indeed, in the frequent reorganizations of the Federal Government in the last two decades, it has been common practice to make provision for the transfer of contracts from one agency to another. Such transfers have even been made by Executive orders under legislation which did not expressly provide for the transfer between agencies of contracts, or even of property rights.[4] Under the First War Powers Act of December 18, 1941 (55 Stat. 838), which authorized the President "to make such redistributions of functions among executive agencies as he may deem necessary," a number of Executive orders were issued which, in transferring the functions of particular agencies to other agencies, made provision for the transfer of the contracts of the abolished agency to its successor.[5] In various other reorganization acts which have been enacted by Congress since 1932 [6] provision has been expressly made only for the transfer of "functions" and "property" between agencies but these provisions have been deemed broad enough to authorize some reorganization plans which direct the transfer of contracts from one agency to another.[7] However, Congress has in at least one instance expressly provided for the transfer of contracts from one agency to another.[8]

Indian timber sales contracts are not, to be sure, Government contracts. They are rather tribal contracts between the particular tribe concerned and the purchaser of the timber,[9] made subject to the approval of the Secretary of the Interior, and to his continuing super-

[4] See Executive Order No. 7496, dated November 14, 1936, transferring Recreational Demonstration Projects from the Resettlement Administration to the Secretary of the Interior, and Executive Order No. 7546, dated February 1, 1937, transferring Indian Subsistence Homestead Projects from the Department of Agriculture to the Department of the Interior. These orders were made under the National Industrial Recovery Act of June 16, 1933 (48 Stat. 195), and the Emergency Relief Appropriation Act of April 8, 1935 (49 Stat. 115).

[5] See Executive Order No. 9070, dated February 24, 1942, paragraphs 5 and 6; Executive Order No. 9177, dated May 30, 1942, paragraph 5; Executive Order No. 9332, dated April 19, 1943, paragraph 8; and Executive Order No. 9357, dated June 30, 1943, paragraph 1. These orders are printed in 50 U. S. C. App., following sec. 601.

[6] Reorganization acts of June 30, 1932 (47 Stat. 382, 413); April 3, 1939 (53 Stat. 561); December 20, 1945 (59 Stat. 613); and June 20, 1949 (63 Stat. 203).

[7] See Reorganization Plan No. 3 of 1947, sec. 8 (12 F. R. 4981; 61 Stat. 954); Reorganization Plan No. 22 of 1950, sec. 5 (15 F. R. 4365; 64 Stat. 1277); Reorganization Plan No. 23 of 1950, sec. 2 (15 F. R. 4365; 64 Stat. 1279).

[8] See section 16 of the Commodity Credit Corporation Charter Act of June 29, 1948 (62 Stat. 1070, 1075, 14 U. S. C., sec. 714n), which provides: "The rights, privileges, and powers, and the duties and liabilities of Commodity Credit Corporation, a Delaware corporation, in respect to any contract, agreement, loan, account, or other obligation shall become the rights, privileges, and powers, and the duties and liabilities, respectively, of the Corporation."

[9] See *Algoma Lumber Co.* v. *United States*, 305 U. S. 415 (1939).

vision. Nevertheless, the supervision of the contracts is a governmental function, and, therefore, subject to the constitutional control of Congress. Indeed, insofar as the timber contracts are aspects of the management of tribal affairs, the power of Congress is even more manifest, for the courts have frequently declared that the power of Congress to manage tribal affairs for tribal benefit is "plenary," and not subject to inquiry by the courts.[10]

I am clearly of the opinion, therefore, that Congress has power to transfer the administration of Indian timber contracts from the officers of this Department to the Secretary of Agriculture. As Congress has already made similar provisions, it would indeed be inappropriate for me to question the constitutionality of such legislation.[11]

CLARENCE A. DAVIS,
Solicitor.

CLAIM OF FRANKLIN E. EDDLEMON

Tort Claim—Negligence—Duty to Invitee—Condition of Premises.

A visitor to a public museum operated by the National Park Service is an invitee.

The National Park Service is not an insurer of the safety of an invitee to its museums.

Under the law of Missouri, a property owner owes an invitee only the duty of guarding him against latent and concealed dangers known to the owner, but unknown to the invitee.

An invitee must exercise ordinary and reasonable care and prudence.

An invitee cannot recover for an injury suffered in a fall on a floor without showing that the floor was negligently maintained by the owner of the premises, and that such negligence caused the fall and the resulting injury.

TA–87 NOVEMBER 3, 1953.

On August 12, 1953, the Regional Counsel for Region Two of the National Park Service, Department of the Interior, made an administrative determination (T–NPS–2–52) denying a claim in the amount of $1,000 filed on July 7, 1953, against the United States by Maurice

[10] See *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 565 (1903), where the Court said: "Plenary authority over the tribal relations of Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." See also *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 311 (1911); *Sizemore* v. *Brady,* 235 U. S. 441, 449 (1914); *United States* v. *Creek Nation,* 295 U. S. 103, 109–10 (1935); *Shoshone Tribe* v. *United States,* 299 U. S. 476, 497 (1937); *Chippewa Indians* v. *United States,* 301 U. S. 358, 375 (1937).

[11] The Attorneys General of the United States have repeatedly declined to question the constitutionality of acts of Congress. *See* 31 Op. Atty. Gen. 475, 476; 38 Op. Atty. Gen. 252, 253; 39 Op. Atty. Gen. 11, 16; 40 Op. Atty. Gen. 158, 160.

S. Karner, Esq., 312 Title Guaranty Building, St. Louis 1, Missouri, on behalf of Franklin E. Eddlemon, an infant, for compensation because of a personal injury suffered by him as a result of a fall on the flagstone floor near the entrance to the Old Court House Building, St. Louis, Missouri, which is administered as the Jefferson National Memorial by the National Park Service.

This is an appeal from the decision of the Regional Counsel in accordance with section 21, Order No. 2509, as amended (17 F. R. 6793).

The evidence that is in the record is conflicting, although it is believed that some of the conflict is the result of typographical errors. It seems evident, however, that the incident occurred about 2:30 p. m. on July 30, 1951. After visiting the museum in the Old Court House, Franklin E. Eddlemon, who was 15 years of age at the time of the incident, slipped and fell as he stepped down a 5- or 6-inch step at one of the doorways to the building. As he fell on the flagstone floor, the wedge that held the heavy wooden door open became dislodged, permitting the door to close, thus striking the child's left arm and body.

A companion of the boy, Preston Roberts, also about 15 years old, who was with him at the time of the accident, described the episode and the floor of the building by stating that:

> * * * We just walked around and looked and we started going back out and the stones in the floor sort of go up and down, they are uneven, and he tripped over one and he stumbled and knocked the block out from under the door and the door came back and hit him on the arm.

The testimony of the superintendent of the building, which is substantiated by photographs, indicates, however, that the flagstones were not uneven and that the appellant and his companions may not have been wholly without fault. The superintendent described the floor and the action of the boys as follows:

> * * * the floor where the accident occurred was not uneven and slippery and there is evidence that the boy was running out of the Museum instead of walking.

The injured child's legal relation to the National Park Service was that of an invitee. The National Park Service, as the operator of the museum, did not become an insurer of his safety. *Kellogg* v. *H. D. Lee Mercantile Co.*, 160 S. W. 2d 838 (Mo., 1942); *Lindquist* v. *S. S. Kresge Co.*, 136 S. W. 2d 303 (Mo., 1940). Under the law of Missouri, it owed him only a duty to guard him against dangers known to it which are latent, concealed, and beyond his knowledge, while he, as an invitee, must exercise ordinary and reasonable care and prudence. *Small* v. *Ralston-Purina Co., Inc.*, 202 S. W. 2d 533, 539 (Mo., 1947); *Hudson* v. *Kansas City Baseball Club*, 164 S. W. 2d 318 (Mo., 1942); *Long* v. *F. W. Woolworth*, 159 S. W. 2d 619 (Mo., 1942).

It is alleged that the flagstones were uneven and slippery. It is well settled, however, that a floor is not considered hazardous *per se*, and that, for a claimant to recover for injury suffered when he falls on a floor he must show sufficient facts to indicate that the owner or keeper of the floor was so negligent in its maintenance that such negligence caused the fall and resulting injury. See *Copelan et al.* v. *Stanley Co. of America*, 17 A. 2d 659 (Pa. Super., 1941); *Knopp* v. *Kemp & Herbert*, 74 P. 2d 924 (Wash., 1938); *Garland* v. *Furst Store*, 107 Atl. 38 (N. J., 1919); *Wilson* v. *Werry*, 137 S. W. 390 (Tex. Civ. App., 1911). See also *Cates* v. *Evans*, 142 S. W. 2d 654 (Mo., 1940) (steps at drugstore entrance); *Lindquist* v. *S. S. Kresge Co.*, *supra* (stairs in store); *Evans* v. *Sears, Roebuck & Co.*, 104 S. W. 2d 1035 (Mo., 1937) (driveway into store).

No evidence, other than the statement in the claimant's appeal, has been offered to prove that this particular flagstone floor was slippery or irregular, or that the National Park Service was negligent in its upkeep. Therefore, without a specific showing of negligence on the part of the National Park Service or its employees at the museum, there could be no liability on the part of the National Park Service. Moreover, there is some evidence to the effect that the appellant was not exercising ordinary and reasonable care and prudence.

Accordingly, I conclude that Franklin E. Eddlemon's injury did not result from a negligent or wrongful act or omission on the part of Government personnel.

DETERMINATION

Therefore, in accordance with the provisions of the Federal Tort Claims Act (28 U. S. C. sec. 2671 *et seq.*) and the authority delegated to me by the Secretary of the Interior (sec. 21, Order No. 2509, as amended; 17 F. R. 6793), the administrative determination (T–NPS–2–52) of the Regional Counsel, Region Two, of the National Park Service, denying the claim of Franklin E. Eddlemon, is affirmed.

CLARENCE A. DAVIS,
Solicitor.

GREAT LAKES CARBON CORPORATION
OSCAR W. MOYLE, JR.
OWANAH OIL AND DEVELOPMENT CORPORATION

A–26804 *Decided November 9, 1953*

Noncompetitive Oil and Gas Lease—Application for Extension—Advance Payment of Rental.

Neither section 17 of the Mineral Leasing Act, as amended, which authorizes the single extension of the primary term of noncompetitive oil and gas leases,

nor the departmental regulation issued pursuant thereto requires that rental for the sixth-lease year accompany an application for an extension of the lease or that it be paid before the expiration of the primary term.

In cases not involving a requirement that rent must accompany lease applications, the regulation that rentals under oil and gas leases shall be payable in advance means that the annual rental is due on the first day of each lease year.

A 5-year extension of a noncompetitive oil and gas lease is properly granted where the application for extension was filed within 90 days prior to the expiration of the primary term of the lease and the sixth-year rental was paid on the first business day following the commencement of the sixth-lease year.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The primary term of noncompetitive oil and gas lease, Salt Lake 064855, which was issued on September 1, 1947, to the Great Lakes Carbon Corporation, expired by operation of law on August 31, 1952. On August 29, 1952, the corporation applied for a 5-year extension of this lease, and at 9:30 a. m. on September 2, 1952, paid the rental for the sixth-lease year (30 U. S. C., 1946 ed., sec. 226). Also at 9:30 a. m., on September 2, 1952, Oscar W. Moyle, Jr., and the Owanah Oil and Development Corporation filed separate lease applications for all the land included in the Great Lakes Carbon Corporation lease.

In a decision of September 15, 1952, the manager of the Salt Lake Land and Survey Office extended the term of the Great Lakes Carbon Corporation lease for 5 years from its expiration date. In separate decisions of September 15, 1952, the manager rejected the applications filed by Mr. Moyle and the Owanah Oil and Development Corporation. The manager's decision extending the Great Lakes Carbon Corporation lease was affirmed in a decision of April 7, 1953, by the Assistant Director of the Bureau of Land Management. Mr. Moyle and the Owanah Oil and Development Corporation have appealed to the Secretary of the Interior from the Assistant Director's decision.

On appeal, it is contended that the extension of the Great Lakes Carbon Corporation lease should not have been granted because the Corporation did not pay the sixth-year's rental on August 29, 1952, when the application for extension was filed, and that since the rental was not paid until after the expiration of the primary term of the lease, the extension of the lease was erroneous.

Section 17 of the Mineral Leasing Act, as amended, provides, in part:

* * * Upon the expiration of the primary term of any noncompetitive lease maintained in accordance with applicable statutory requirements and regulations, the record titleholder thereof shall be entitled to a single extension of the lease, unless then otherwise provided by law, for such lands covered by it as are not

on the expiration date of the lease within the known geological structure of a producing oil or gas field or withdrawn from leasing under this section. * * * Such extension shall be for a period of five years and so long thereafter as oil or gas is produced in paying quantities and shall be subject to such rules and regulations as are in force at the expiration of the initial five-year term of the lease. No extension shall be granted unless an application therefor is filed by the record titleholder within a period of ninety days prior to such expiration date.

The departmental regulation (43 CFR 192.120) issued pursuant to the above-quoted portion of the statute and in force when the lease in this case expired, provides, in part, that—

> The record title holder of any noncompetitive lease * * * maintained in compliance with the law and the regulations of this part, by filing his application therefor within the period of 90 days prior to the expiration date of the lease, may obtain a single extension of the primary term of the lease for an additional five years, unless then otherwise provided by law, as to all of the leased lands or any legal subdivision thereof which, on the expiration date of the lease, are not within the known geologic structure of any producing oil or gas field or have not been withdrawn from leasing * * *.

There is nothing in the above-quoted provisions of the statute and regulation which requires that the sixth-year's rental be submitted with an application for a 5-year extension of the primary term of a noncompetitive lease,[1] or that it be paid before the expiration of the primary term.

However, another departmental regulation (43 CFR, 1952 Cum. Pocket Supp., 192.80) which is incorporated in section 2(d) (i–iv) of lease form 4–1158 and which was in force when the aforesaid lease expired, provides, in part, that—

> Rentals shall be payable in advance at the following rates:
> (a) On noncompetitive leases issued under section 17 of the act, wholly outside of the known geologic structure of a producing oil or gas field: * * *
> (4) For the sixth and each succeeding year, 50 cents per acre or fraction thereof * * *.

The Department has construed the regulation requiring the advance payment of rentals (except in connection with a lease application) to mean that rentals are due and payable at the beginning of each lease year. Thus, under a 5-year noncompetitive lease issued July 1, 1945, rental for the fifth-lease year beginning July 1, 1949, has been held to become due and payable on July 1, 1949.[2] Since the sixth-lease year

[1] *Cf.* the regulation (43 CFR, 1952 Cum. Pocket Supp., 192.130) governing applications for preference-right leases under the act of July 29, 1942 (56 Stat. 726), which expressly requires that the first-year's rental must accompany an application under that act; and the regulation 43 CFR, 1952 Cum. Pocket Supp., 192.42(e) requiring that full payment of the first year's rental must accompany each noncompetitive lease application.

[2] *Gayle M. Gilbert,* A–25913 (October 20, 1950). Under a 5-year lease issued on March 1, 1947, the fourth-year's rental became due on March 1, 1950 (*Louis E. O'Brien,* A–26351 (June 30, 1952)); and under a 5-year lease issued on August 1, 1946, rental for the fourth year became due on August 1, 1949 (*Fred Blair Townsend,* A–26270 (October 30, 1951)).

in this case began on September 1, 1952, the sixth year's rental was due and payable on that date. As September 1, 1952, was a holiday on which the Land and Survey Office was closed, September 2, 1952, was the first date after the rental for the sixth year became due on which payment could be made. It appears, therefore, that the payment on September 2, 1952, was timely compliance with the requirement that the rent be paid on September 1, 1952. (*R. R. Rousseau*, 47 L. D. 590 (1920).) This conclusion is to be distinguished from one reached in *Mabel E. Hale, Grace E. Van Hook*, p. 55, on a question not here in issue, that is, whether the application for extension must be filed before the expiration of the primary term of the lease. Therefore, the decision in the *Hale* case is not applicable to this case.[3]

Inasmuch as there is no statutory or regulatory requirement that the sixth-year's rental accompany an application for extension, the application which the Great Lakes Carbon Corporation filed on August 29, 1952, prior to the expiration of the primary term of the lease was a proper basis for granting the extension.

The Assistant Director's decision stated that the payment of the rental on September 2, 1952, by the Great Lakes Carbon Corporation related back to August 29, 1952, when the application for extension was filed. The only reason for holding that the payment related back would seem to be the assumption that the payment was required as a part of the application. As has been pointed out above, such an assumption is incorrect. In these circumstances, reliance on the relation-back doctrine conflicts with departmental decisions holding that when rental payment is required to accompany an oil and gas lease application, failure to pay the rental results in a defective application; and although such an application may be subsequently corrected, the application takes effect only as of the time when the defect is cured (*Transco Gas & Oil Corporation, Joan Ford*, 61 I. D. 85 (1952); *James Des Autels*, 60 I. D. 513 (1951). There appears to be no reason for modifying these decisions in the instant case. Accordingly, the holding that the payment by the Great Lakes Carbon Corporation of the sixth year's rental on September 2, 1952, related back to August 29, 1952, was incorrect. However, because there was no requirement in this case that the rent be submitted as a part of the application for

[3] The question involved in the *Hale, Van Hook* case, unlike this case, was whether an application for a new lease under the act of July 29, 1942 (56 Stat. 726, as amended), was filed before the expiration of the primary term of the lease where the lease expired on a nonbusiness day and the application was filed on the first day after the expiration when the district land office was open for business. It was held in that case that as the statute terminated the right to file an application when the base lease expired, the application must be filed before the expiration of the lease, even though the expiration date fell on a nonbusiness day which was preceded and followed by nonbusiness days.

extension, the error does not alter the conclusion that the application for extension was properly allowed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Assistant Director of the Bureau of Land Management is affirmed.

CLARENCE A. DAVIS,
Solicitor.

G. G. STANFORD

A-26765 *Decided November 9, 1953*

Noncompetitive Oil and Gas Leases—Proper Applications—Conflicts.

The determination as to whether an application for a noncompetitive oil and gas lease covers public or acquired lands must be made, in a case of a proper application, from the application itself, and not from an accompanying letter.

Where departmental regulations required the listing of other public-land oil and gas interests in the same State in the filing of an application for a noncompetitive lease on public lands, and the listing of similar acquired-land interests in the same State with respect to the filing of an application for such a lease on acquired lands, the junior of two conflicting applications, neither of which was properly identified by the caption or by the citing of statutory authority for such application, was reasonably identifiable by its listing of public-land interests as pertaining to public lands, and established, as a proper application, a preference right to a lease covering the reserved oil and gas deposits in certain former public land in Mississippi, the senior application having been defective in listing acquired-land oil and gas interests and thus being reasonably identifiable as pertaining to acquired lands.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On June 23, 1948, the Bureau of Land Management at Washington, D. C., received a document signed by G. G. Stanford termed an "Application for Prospecting Lease," covering land in T. 3 N., R. 8 E., Smith County, Mississippi, described as "Section 27: SE¼ of NW¼, containing 40 acres, more or less, believed to be vacant land." The application stated that it was being made "under the provisions of the statutes of the United States," and listed as the applicant's other interests in oil and gas prospecting permits and leases "on lands or mineral deposits belonging to the United States" in Mississippi eight applications for leases on acquired lands of the United States.[1]

The Stanford application was submitted to the Bureau of Land Management by P. A. McKenna of Washington, D. C., as "authorized

[1] One application was listed twice.

agent" for Mr. Stanford together with a letter which stated, in part, as follows:

> I submit herewith an oil and gas lease application on acquired lands of the United States Government located in Smith County, Mississippi and containing approximately 40 acres.
>
> This application is made by Mr. G. G. Stanford and his check in the amount of $20 is attached to cover the cost of filing fees and one-half of the first year's rental at the rate of twenty-five cents per acre.

Penciled notations, apparently made by Bureau personnel, appear on the face of the application, to the effect that the land lay in the Bienville National Forest, Choctaw meridian, and that the application had been noted on the Serial Register. An acquired lands serial number (BLM–A 014678) was assigned the application.[2]

On April 27, 1949, official inquiry was made of the United States Forest Service, Department of Agriculture, regarding the status of the land in question, pursuant to the departmental regulations covering the leasing of mineral deposits in acquired lands of the United States, then contained in 43 CFR, 1947 Supp., Part 200.[3] On August 2, 1949, the Forest Service reported that the land applied for lay outside the national forest boundary.

On January 10, 1951, the Bureau of Land Management received a letter from Mr. McKenna with respect to the Stanford application, to the effect that through inadvertence he had characterized the application as applying to acquired lands, but that he had recently discovered that the land was subject to the Mineral Leasing Act of February 25, 1920, as amended,[4] and he requested that the application be considered under that act with the original filing date of June 23, 1948, being preserved.

Meanwhile, however, on October 7, 1948, the Bureau of Land Management in Washington received from Harry E. Koch a document termed an "APPLICATION FOR NONCOMPETITIVE OIL, GAS AND MINERAL LEASE ON VACANT LAND OWNED BY THE UNITED STATES," which described the land sought by Mr. Stanford. The statute under which the application was being made was not specified therein. Certain public-land serial numbers were listed as the applicant's only other interests in leases or lease applications "covering government lands or government owned oil, gas or other minerals, in the State of Mississippi, or any other State * * *." The Koch application was given public-land serial number BLM

[2] Apparently at the time it was not the practice of the Bureau to check filings for acquired lands against public-land tract books.

[3] The statutory authority for such leasing is found in 30 U. S. C., 1946 ed., Supp. V, secs. 351–359

[4] 30 U. S. C., 1946 ed., sec. 181 *et seq.*

016191, and a status check of the public-land tract books revealed that the desired land was contained in an allowed homestead entry subject to a mineral reservation. Since the record indicated no prior conflicting application, a noncompetitive oil and gas lease covering the land in question was issued to Mr. Koch as of February 1, 1949, pursuant to the provisions of the 1920 act.[5]

Upon receipt of the letter of January 10, 1951, from Mr. McKenna, requesting consideration of the Stanford lease application under the Mineral Leasing Act of 1920, the status of the land applied for was checked in the public-land tract books, and it was found that a lease had already been issued to Mr. Koch. In a decision dated February 2, 1953, the Chief, Division of Minerals, Bureau of Land Management, rejected the Stanford application, BLM–A 014678. The present appeal followed.

Regardless of the erroneous statement in the accompanying letter, the Stanford application, if it can be considered as proper and complete under the oil and gas leasing regulations for public lands current at the time, clearly gained for Mr. Stanford a preference right to the noncompetitive leasing of the oil and gas deposits in the land in question, assuming, of course, that such deposits were made available for such leasing. This was held to be the case in *Jane E. Brenton et al.*, A–26759 (July 30, 1953), in which proper oil and gas lease offers for public land were filed in the district land office, accompanied, however, by letters designating the desired lands as acquired lands. In that case, as against conflicting offers filed during a period when the original offers were being erroneously processed (as covering acquired lands) the original offers were allowed to prevail, the Department holding that proper offers having been filed in the proper land office, their erroneous transmittal to the Washington office for processing as acquired lands had no significance in determining which qualified persons were the first making applications for leases, as provided in the Mineral Leasing Act, *supra*.

From the *Brenton* case, then, it is seen that the application itself, if a proper one, must be looked to in order to ascertain whether Mr. Stanford was the first qualified applicant for a noncompetitive lease covering the land in question. The next question to be resolved is whether the Stanford application was a proper one.

The departmental regulations then covering applications for noncompetitive oil and gas leases on public land were set forth in Circular No. 1624, October 28, 1946 (43 CFR, 1946 Supp., Part 192), as amended.

[5] Mr. Koch subsequently assigned the lease to the Gulf Refining Company, and the assignment was approved by the Regional Administrator, Region VI, effective March 1, 1952. An assignment of royalty interest by Mr. Koch to Dr. Lauren Harper was received and filed with the record without approval.

Sec. 192.42 stated in part that "Applications for noncompetitive leases may be filed in the proper district land office, or, for lands or deposits in States in which there is no district land office, in the Bureau of Land Management addressed to the Director of the Bureau of Land Management." Certain information was required to be included in substance, one item being "A statement of the interests, direct and indirect, held by the applicant in oil and gas leases, and applications therefor on public lands in the same State, identifying by serial number the records wherein such interests may be found."

The regulations then current respecting the leasing of mineral deposits in acquired lands were set forth in Circular No. 1668, December 15, 1947 (43 CFR, 1947 Supp., Part 200). These regulations (sec. 200.4) adopted the regulations relating to the mineral development of public lands, insofar as the latter were consistent, and added in sec. 200.5 a requirement that acquired-land applications contain "a separate statement of the applicant's interests, direct and indirect, in leases or permits for similar mineral deposits, or in applications therefor, on Federally-owned acquired lands in the same State, identifying by serial number the records where such interests may be found * * *." Further, with respect to the describing of the desired land, it was stated that "The description should, if practicable, refer to (1) the administrative unit or project of which the land is a part, the purpose for which the land was acquired by the United States, and the name of the governmental body having jurisdiction over the lands, (2) the name of the persons who conveyed the lands to the United States, (3) the date of such conveyance, and the place, liber and page number of its official recordation.

"All applications under the act should be filed with the Bureau of Land Management, Department of the Interior, Washington 25, D. C."

Neither group of regulations discussed above made any requirement as to the proper caption of the lease application, nor was it specified that the application state clearly under what act it was being made. However, it does not seem reasonable to impose upon administrative personnel the burden of divining an applicant's wishes with respect to Government lands.[6]

The Stanford application covered "lands of the United States * * * believed to be vacant land." Since "lands of the United States" could be either public domain or acquired lands, and since "vacant land" is

[6] *Cf. Stanley W. Knott,* A–26379 (July 24, 1952), in which the Department rejected an application for a 5-acre tract because, among other things, the applicant failed to cite the statutory authority under which the application was made. See, also *E. A. Wight,* 60 I. D. 215 (1948).

merely land that is unoccupied,[7] this recitation offered no guidance in characterizing the application.

Most of the other information contained in the Stanford application was required by the leasing regulations for both public lands (Part 192, *supra*) and acquired lands (Part 200, *supra*). However, where section 192.5 required a statement of the applicant's other interests in applications and leases on *public* lands in the same State, section 200.5 required, in addition to the requirements in Part 192, a statement of the applicant's other interests in applications and leases or permits on federally owned *acquired* lands in the same State. By implication, an applicant for a lease on acquired lands would not have to list similar public-land interests in the State.

Since the Stanford application listed only acquired-land oil and gas interests in Mississippi, it would have been reasonable for the Bureau personnel processing that application to assume, under the regulations discussed above, that the application covered acquired lands,[8] regardless of whether this view was actually taken on the basis of the statement to that effect in the accompanying letter. It may be argued that if Mr. Stanford in fact held no other public-land oil and gas interests in Mississippi (as apparently he did not), he could have been acting in an excess of caution by listing any other such interests, whether covering public or acquired lands. However, it does not seem that Bureau personnel would have been justified in assuming such behavior.[9]

Thus it appears that the Stanford application was defective, in that the only information it contained as to its nature could in fact be reasonably interpreted as placing the application in the acquired-land category. Under the circumstances, the Stanford application cannot justifiably be regarded as the proper application which could have gained for Mr. Stanford a preference right to an oil and gas lease on the mineral deposits of the land in question.

Assuming, without deciding, that the letter of January 10, 1951, to the Bureau of Land Management from Mr. McKenna, pointing out that the Stanford application was intended to cover public land, was sufficient to remedy the defectiveness of the application in this respect, it is necessary to look at the conflicting application filed by Mr. Koch on October 7, 1948, to determine whether it justified the issuance of a lease to him.

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[7] *Cosmos Exploration Co.* v. *Gray Eagle Improvement Co.*, 112 Fed. 4, 13 (1901).

[8] The omission of the more detailed land description specified in the acquired lands leasing regulations was not significant, as it was not mandatory.

[9] The place of filing of the application could be of no help in interpreting its nature, since public-land applications in Mississippi (which has no district land office) were required to be filed in the Bureau of Land Management, Washington, D. C. (43 CFR, 1946 Supp., 192.42), as well as all acquired-land applications (43 CFR, 1947 Supp., 200.5).

Oddly enough, the Koch application, as discussed earlier, was invested with some of the defects found in the Stanford application. Its caption as an application for a noncompetitive oil and gas lease on vacant lands owned by the United States cannot be considered very helpful, inasmuch as a noncompetitive lease can and could then be issued on either public or acquired lands, and the term "vacant land" has been earlier found inconclusive. Again, there is the failure to specify statutory authority for the application. However, Mr. Koch listed only public-land oil and gas interests in the State. Under the line of reasoning set forth above with respect to the Stanford application, it was reasonable for the Bureau of Land Management to process the Koch application as covering public lands. Since the Koch application was reasonably identifiable, and was apparently proper in all other respects, it gained for Mr. Koch a preference right to a noncompetitive oil and gas lease covering such deposits in the land in question.[10] Since such a lease (BLM 016191) was properly issued to Mr. Koch as of February 1, 1949, the action of the Chief, Division of Minerals, Bureau of Land Management, in rejecting Mr. Stanford's conflicting application (BLM–A 014678), was proper.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Chief, Division of Minerals, Bureau of Land Management, is affirmed.

CLARENCE A. DAVIS,
Solicitor.

APPEAL OF MAC EXPLORATION COMPANY

CA–202 *Decided December 16, 1953*

Contract Appeal—Untimely Appeal—Reconsideration—Motives of Contracting Officer—Delay by Government—Liquidated and Unliquidated Damages—Termination.

A written decision of the contracting officer which is sufficiently informative to indicate that a request of the contractor has been considered and denied becomes final and conclusive upon the failure of the contractor to appeal to the head of the Department within the 30-day period prescribed by the contract.

When the privilege of appeal is lost by failure to take a timely appeal, it may not be revised by a request for reconsideration, even if reconsideration is given.

[10] The Department does not condone the laxity exhibited by each applicant in the filing of his application. Similar situations should be prevented, insofar as public lands are concerned, by the current regulations, which require the use of a special form in making offers for leases. See 43 CFR, 1952 Supp., 192.42.

For the purposes of a contract appeal, the motives of a contracting officer in taking any action in regard to a contract are immaterial, if the grounds for the action are proper.

Where a core-drilling contract provides that time consumed by contractor in operations incidental to actual operation of the drills, including fishing for lost tools, shall count as "*actual operation*" of the drills only with the contracting officer's approval, and further provides for the assessment of liquidated damages for each 8-hour shift that the contractor failed to maintain the drills in "*actual operation*," it was proper for the contracting officer not to count as "*actual operation*" time spent by the contractor in fishing for tools and otherwise reconditioning for drilling a hole which became jammed with lost tools because of the contractor's negligence. Under such circumstances, it was proper for the contracting officer to assess liquidated damages for such a period of time as would afford the contractor a reasonable opportunity to recondition the hole.

When the contractor had unsuccessfully engaged in fishing operations for approximately a month, and it was clear that even with prudent fishing operations, it might take a long, indefinite period of time to clean out a hole for core drilling, the contracting officer was arbitrary and erroneous in requiring the contractor, at the risk of having the contract terminated, to recondition the hole by a specified date. When such order resulted in a delay in the completion of the contract, the Government is responsible in part for such delay, and, therefore, liquidated damages should not be assessed against the contractor.

Where a contract provides for its termination if the contractor fails to perform any of its obligations thereunder, it would be proper as a matter of law to terminate the contract for any breach of contract; but the exercise of sound administrative discretion requires that a contract be terminated only for a substantial breach and not for a partial and immaterial breach.

A claim for the rental of equipment, allegedly made idle because of the improper termination of the contract by the Government is in the nature of a claim for unliquidated damages which an administrative official of this Department has no authority to consider or settle.

ADMINISTRATIVE DECISION

This decision disposes of an appeal by a co-partnership, consisting of F. W. McGray and J. L. McBride, doing business as the Mac Exploration Company, Garrison, North Dakota, from findings of fact and decisions of the contracting officer, Geological Survey, dated March 27, and April 25, 1953, as supplemented by findings of fact dated May 6, 1953, under contract No. I–gs–13575.

The appeal, which is timely,[1] concerns a contract for exploratory

[1] The appeal from the decision dated March 27, 1953, was filed by a letter to the Secretary of the Interior, dated April 15, 1953, which was within the 30-day requirement for the taking of appeals in most disputes concerning questions of fact which is prescribed by article 9 of the contract. The appeal from the decision dated April 25, 1953, as supplemented by the findings of fact dated May 6, 1953, was filed by a letter to the Secretary of the Interior, dated May 12, 1953, which was within the 30-day requirement for the taking of appeals in disputes concerning facts as to the causes of default prescribed by paragraph 4 (3) (d) of the specifications.

drilling on the Chief Oxide Exploratory Project, which is located within the Tintic Mining District, Eureka, Utah County, Utah. The contract which was entered into with the Geological Survey on June 23, 1952, provided for unit prices and various fixed expenditures, both of which would aggregate a minimum amount of $70,000, and a maximum amount of $105,000 (article 4 and Specifications for Core Drilling, paragraph 3).

Notice of the award was mailed to the contractor on July 8, 1952, together with an order to begin work on or before July 15, 1952. The contracting officer, however, fixed the effective date of the commencement of the contract as of July 24, 1952, in order to allow the contractor 14 days to begin work after receipt of the notice. Drilling was commenced on July 29, 1952.[2]

The purpose of the contract was to obtain for the Government certain geological information by means of rock cores, drill cuttings, and sludges taken from holes drilled from the surface by the contractor.[3] (Article 20, and Specifications, paragraph 8.)

The drill holes fell into two categories, shallow and deep, involving the use of "light" and "heavy" drills, respectively. (Specifications, paragraphs 2 and 5.) The shallow holes were to be drilled to a maximum depth of 500 feet while the deep holes were to range from 1,000 to 2,500 feet, and possibly 3,000 feet. Most of the shallow holes were to be drilled at angles other than vertical, while the deep holes were to be drilled vertically. (Specifications, paragraph 2.) The contractor was required to furnish all drilling and auxiliary equipment, materials, and supplies necessary for his work, including one light and one heavy core drill, as required. (Specifications, paragraph 5.)

[2] The contract provided that the contractor shall commence the operation under contract within 14 days after receipt of notice. (Specifications, paragraph 4 (a) (1).) However, although the contractor did not commence work on the contract until July 29, 1953, a week after the date which would be fixed under the terms of the contract, no liquidated damages were assessed against the contractor because originally the contractor was the second lowest bidder and had assumed that the E. J. Longyear Company, the lowest bidder, had been awarded the contract. (Tr. 380–381, 641–643.) However, on June 17, 1952, the contracting officer telephoned the contractor that the Longyear Company had been excused by the Comptroller General, and that the contract might be awarded to the Mac Exploration Company as the next lowest bidder. (Tr. 83–91, 640–643, 663–666, 794, 814–819; memoranda for record, one dated June 17, 1952, and the other undated, pp. 297–300; letter from contracting officer to project supervisor dated August 22, 1952, Government file, pp. 14–15, 297–300; also see Tr. 632–635.)

[3] Article 20 of the contract reads as follows:

"*Purpose*—The purpose of this contract is to procure for the Government certain geological information and rock cores. No construction work is included in the services provided for in the specifications and the contract is not to be considered a construction contract."

Paragraph 8 of the specifications provides that:

"*Performance of the Work.* All work shall be performed with the understanding that the objective is to secure accurate samples of the formations penetrated and shall be directed to this end. The Contractor shall make every effort to secure the highest recovery of core, cuttings and (or) sludge commensurate with good practice."

The first deep hole, designated OX25A,[4] was drilled by the contractor to a depth of 848 feet with a Failing 1500 Heavy Duty drill. On March 1, 1953, a Longyear Master Straitline drill, which had been purchased by the contractor, was substituted for the Failing 1500 Heavy Duty drill for the drilling beyond 848 feet because the contracting officer had decided on November 20, 1952, that the Failing 1500 Heavy Duty drill was inadequate for deep-hole drilling. On March 3, 1953, after the deep-hole had been drilled to a depth of 891 feet, the casing dropped into the hole. Drilling was discontinued on March 5, and from March 6 until April 27, the date of the notice of termination of the contract, the contractor unsuccessfully engaged in "fishing operations" in an attempt to remove the casing and drill rods, lost bits and fishing tools, which were also lost, and thus recondition the hole to permit a resumption of drilling.

On March 27, the contracting officer issued a finding of fact in which he found that: "the unsatisfactory condition of the hole has been brought about by the negligence and unworkmanlike performance on the part of the contractor." [5]

The decision of the contracting officer dated March 27, 1953, required the contractor to recondition the drill hole, designated OX25A, for the resumption of drilling by midnight, April 10, 1953, and stated also that failure to recondition the hole, as required, would result in termination of the right to proceed under the contract. The contractor was also notified that the rental payment would not be made and liquidated damages would be assessed against the contractor from and including March 6, 1953, in accordance with the requirements of paragraph 4 (c) of the specifications.[6] By a letter dated April 10, 1953, the contracting officer extended the time for compliance with his orders in the findings of fact dated March 27, 1953, until midnight, April 17, 1953, or until such date as may be necessary for the contracting officer to study an advisory report to be prepared by two consultants retained by the Geological Survey and to take appropriate action thereon.

The two consultants, Ray G. Sullivan and Stanley Jerome, submitted a joint report dated April 22, 1953, which concluded, among other things, that the contractor would not be capable of deepening the drill hole, designated OX25A, to a maximum depth of 3,000 feet, the permissible limit under the contract and the depth to which apparently the Geological Survey intended the hole be drilled. The joint

[4] Another deep hole, OX25, had been drilled, but it was declared a lost hole and abandoned at 570 feet because it was not straight. A new hole, OX25A, was drilled by the contractor to the depth of OX25 at the expense of the contractor. (Tr. 263–265; letter from project supervisor to contractor, dated January 8, 1953, Government file, p. 70.)

[5] The text of the finding was read into the record of the hearing. (Tr. 285–287.)

[6] The pertinent portion of this provision is quoted in a subsequent part of this decision. [P. 245.]

report, however, stated that although the condition of the hole resulted from unworkmanlike performance, the consultants believed that the contracting officer should have made his notice of liquidated damages effective as of March 27, 1953, and not retroactive to March 6, 1953.

Following the receipt of the joint report of the consultants, the contracting officer made findings of fact dated April 25, 1953, in which he declared that the contractor was in default on the contract for the following reasons: (1) the contractor had failed to recondition drill hole OX25A as required by the findings of fact dated March 27, 1953; (2) the contractor lacked suitable and effective equipment and sufficient tools, materials, and supplies; (3) the contractor's performance under the contract was inexpert and unworkmanlike; (4) the contractor took inadequate safety precautions; (5) the contractor's supervision was inadequate; and (6) the contractor incurred unnecessary costs. At the same time, the contracting officer transmitted to the contractor a notice dated April 25, 1953, which terminated the right of the contractor to proceed with the work under the contract, effective at midnight of the date of receipt of the notice of termination, which was April 27, 1953.

The attorney for the contractor in a letter dated April 30, 1953, requested of the contracting officer additional findings of fact in the form of answers to five specific questions raised by the attorney, which would state specifically the complete grounds for the termination order. The contracting officer acceded to this request by a letter dated May 6, 1953.

At the request of the contractor, hearings were held between June 10, 1953, and June 20, 1953, inclusive, before Theodore H. Haas, an attorney, designated by me for that purpose. The hearings took place in the grand jury room of the Federal Building, Salt Lake City, Utah, approximately 100 miles from the drilling site. The attorneys for the contractor were given access to the files submitted on the appeal by the Government, which included two notebooks kept by the project supervisors. Exhibits were also filed in the proceedings by both parties, including seven boxes of core, which were taken from drill hole OX25A.

I

The documents and briefs submitted by both parties and the transcript of the hearing comprise a voluminous record from which I have culled the following additional contentions of the parties which I regard as important to the issues involved in this appeal. The contracting officer maintains that the performance of the contractor in drilling and obtaining core was inefficient, unsafe, expensive, inexpert, and delayed excessively; that the Government was unable to attain its

contractual objective; that hole OX25A, the first deep hole, is in an unworkable condition because of the inexpertness and negligence of the contractor; that the contractor spent his working time from March 6 to April 27, 1953, in ineffectual and unworkmanlike attempts to recondition the deep hole; and that the contractor gave additional evidence of his inexpertness by failing to ask the Government for permission to abandon the deep hole.

The contractor, on the other hand, maintains that despite the fact that drilling in the Tintic mining area is most difficult, it extracted from the ground in a short time over 1,000 feet of core of which only approximately 150 feet are in evidence; that the drilling costs charged to the Government were not greater than the average costs paid for drilling under the same conditions; that the contracting officer erroneously ordered the contractor to purchase the Longyear drill for deep drilling in lieu of the Failing 1500 Heavy Duty drill which was adequate for this purpose; that the hole OX25A became clogged because of the unsuitability of the newly purchased drill, and not unworkmanlike performance; that the contracting officer and his aides did not properly assist and cooperate with the contractor; and that the contracting officer was influenced by improper motives in terminating the contractor's right to proceed.

The contractor asked that liquidated damages, which he calls "penalties", imposed under the contract should be remitted; that rental for the equipment should be paid for the period of time since the termination of the contract; that all payments due to the contractor up to the termination of the contract, including the footage and rental, be paid; and that the notice of termination should be set aside. (Tr., pp. 1292–1293; Appellant's brief, p. 6.)

II

Before deciding the merits of the findings of fact involved in this appeal, I shall dispose of two issues raised by the contractor. I refer to the decision of the contracting officer dated November 20, 1952, as corrected by the letter of November 28, 1952,[7] notifying the contractor that deep drilling was scheduled to begin on December 12, 1952, and directing the contractor to replace the Failing 1500 Heavy Duty drill by that date with an acceptable heavy duty rig complete with all necessary equipment for the deep hole drilling.

The record shows that the contractor had been notified by the contracting officer prior to the writing of these letters that the Failing 1500 Heavy Duty drill was not suitable for drilling the deep holes to be

[7] The correction was with respect to the examples given of an "acceptable heavy core drilling unit" which the contractor might use for the deep holes. *Also see* Tr. 144.

required under the contract.[8] Moreover, the contractor stated in a letter dated December 1, 1952, that although it believed that the equipment presently on the job (the Failing 1500 Heavy Duty drill) met the contract specifications, it would comply with the requirements in the letter dated November 20, 1952.[9] In fact, the contractor was aware of its right to appeal from the decision of the contracting officer, and it chose not to exercise this right. (Tr. 385–389.)

Subsequently, the contractor purchased a Longyear Master Straitline drill, which was approved by the contracting officer for deep-hole drilling by a telegram dated January 31, 1953, and which was in use in drilling hole OX25A from March 1, 1953, to March 5, 1953 (Tr. 249). Such actions, in conforming to the order rather than filing an appeal from it to the Secretary, constituted acquiescence on the part of the contractor in the decision of the contracting officer.

The first time the question of the adequacy of the Failing 1500 Heavy Duty drill was raised by a written appeal to the Secretary was in a letter dated May 12, 1953, which was several months after the contractor had been informed in writing by the contracting officer that the Failing 1500 Heavy Duty drill would not be adequate for the deep-hole drilling.

The written decision of the contracting officer, which was received by the contractor, was sufficiently informative to indicate to the contractor that his request for permission to continue to use the Failing 1500 Heavy Duty drill for the deep holes had been considered and denied by the contracting officer and that the decision made thereon was final. Hence, the failure by the contractor to file an appeal from the decision of the contracting officer within the 30 days prescribed by article 9 of the contract is a jurisdictional defect, which cannot be waived by the Secretary, Solicitor, or any other administrative officer

[8] The contracting officer stated that he advised the contractor against sending the Failing drill on the ground that it could not be used to drill the shallow-angle holes and that it was inadequate for the deep hole drilling (Tr. 635–637, 652–655, 661–664). Mr. McBride stated that he was informed by the contracting officer on July 17, 1952, that the Failing 1500 Heavy Duty drill was unsatisfactory for heavy core drilling. See Tr. 135–6, 369–373, 653–655; and memorandum of contracting officer dated August 7, 1952, Government file, p. 301. The Government contended that though the Failing 1500 Heavy Duty drill might reach the required depth, the draw-works and rotating speeds of the bit were insufficient to efficiently cut and recover acceptable core; while the contractor maintained that there was a dispute in the diamond core drilling industry regarding the relative merits of low and high rotation speeds (Tr. 227–229, 482, 822–826, 1203–1205, 1219; Joint Report, pp. 5–8; Government file, pp. 208–211).

[9] On December 5, 1952, the contracting officer replied to the portion of the contractor's letter which added a comment regarding the adequacy of the Failing drill. The contracting officer affirmed his decision in the letter of November 20, as supplemented by the letter of correction dated November 28, 1953, and stated that in the opinion of the Government "acceptable and efficient operations in the deep holes cannot be assured with a Failing drill and rigs now at the site of operations and will not permit the commencement of the deep holes with this equipment." The project supervisor sent the contractor a letter dated January 28, 1953, stating that the Failing 1500 Heavy Duty drill is no longer satisfactory for drilling hole OX25A (Tr. 274–275).

of the Department. *Independent Iron Works, Inc.*, CA–162 (June 11, 1952); *J. C. Boespflug Construction Co. et al.*, CA–155 (March 5, 1952). Consequently, the contracting officer's decision on the inappropriateness of the Failing 1500 Heavy Duty drill for drilling deep holes under the contract became final and conclusive when an appeal was not taken by the contractor within the 30-day period prescribed by the contract for such appeals.

The appeal privilege, once lost, may not be revived by a request for reconsideration, even if reconsideration is given. For a list of administrative decisions to this effect, see Austin, *Digest of Decisions, Army Board of Contract Appeals*, 1942–50, p. 24. Therefore, in the absence of anything in the record indicating that the appellant was prevented or misled by an act of any representative of the Government from taking its appeal to the Secretary, the contractor's right to a consideration by me of the determination of the contracting officer dated November 29, 1952, was lost because of the contractor's failure to give timely notice of an appeal. Moreover, the issues involved in such determination may not be revived because the Government states as a basis for its termination notice the delay by the contractor in effectuating the final order of the contracting officer from which a timely appeal was not taken.

The question of what might have motivated the contracting officer in making his decisions should not be considered in determining the issues of this appeal. Accordingly, it is concluded that, for the purpose of this appeal, the motives of a Government official in taking any action in regard to this contract are immaterial, so long as the grounds for the actions are proper.

III

The first issue to be determined on appeal is whether in connection with hole OX25A the contracting officer in his finding of fact and decision dated April 25, 1953, properly assessed liquidated damages against the contractor and ceased payment of equipment rental from and including March 6, 1953, to April 27, 1953. Specifically, the contracting officer stated that:

> As of this date the drill hole designated as OX25A has not been cleaned out of all metal in the hole and conditioned in such a manner as to provide resumption of continuous and efficient drilling. Operations from March 6, 1953, down to date including fishing operations will not, on account of negligent operations and unworkmanlike performance, count as actual operation of the drills. No rental shall be paid and liquidated damages will be assessed.

In additional findings of fact dated May 6, 1953, the contracting officer stated as follows:

> It is the contracting officer's contention that the unworkable condition of Hole OX25A on March 6, 1953, was caused by 1. neglect on the part of the contractor

to secure the BX casing at the surface with casing clamps, and 2. continued drilling after the casing had dropped into the hole. This occurred on March 3 and the contractor has spent his working time from March 6 until April 27 in uneffectual and inexpert attempts to clear the hole.

In determining the propriety of the assessment of liquidated damages and the refusal to pay equipment rental subsequent to March 6, it is necessary to examine pertinent provisions of the contract. Paragraph 4 (a) (3) of the specifications provides as follows:

> The contractor shall, when required, maintain in operation not less than two drills not less than *one* 8-hour shift per drill, per day, not less than *five* days per week, * * * PROVIDED, that with the approval of the Government Project Supervisor * * *, or the Contracting Officer, time necessarily consumed in operations incidental to actual operation of the drills, including fishing for lost tools, making repairs, and moving from drilling site to drilling site, shall count as actual operation of the drills; * * *.

The liquidated damages provision of the contract is contained in paragraph 4 (c) of the specifications. That provision states that:

> It is agreed that it will be impossible to determine the actual damages resulting from the Contractor's failure to commence the work or to prosecute the work continuously as provided herein, and in lieu thereof and in addition to any excess costs provided for in section (b) of this article, the contractor shall pay to the Government as fixed, agreed, and liquidated damages the sum of $20.00 for each day of failure to commence actual drilling operations within the time provided and the sum of *$20.00* for each 8-hour drill shift or fraction thereof in excess of two hours that the contractor fails to maintain each drill in actual operation as required and the contractor will not be paid rental for that drill shift.

In view of these provisions, it is quite clear that during the time the contractor was engaged in the "fishing operations," i. e., March 6 until April 27, the contractor was properly assessed liquidated damages and not paid equipment rental only if it can be said that the contractor during that time failed "to maintain each drill in *actual operation*" (emphasis supplied). At the termination of the right to proceed under the contract, after weeks of fishing operations, the hole still contained lost material which would prevent drilling and deepening of the hole and the procurement of core to the required depth (Tr. 638–640).

It is obvious that proper drilling for core could not be performed by the contractor unless the hole was reconditioned, and that such reconditioning required fishing operations. Clearly, therefore, the contracting officer by ordering the reconditioning of the hole did not necessarily decide that the time consumed in fishing constituted "actual operation" of the drills within the meaning of paragraph 4 (a) (3) of the contract. Moreover, it is my opinion that the evidence shows that the jamming of the hole resulted from the contractor's negligent workmanship (Tr. 278–282, 511–515, 555–556, 569–572, 800–890, 900–902, 1092–1093. *Cf.* Tr. 306–308). Therefore, the con-

tracting officer quite properly withheld his approval to counting the time consumed in fishing operations on hole OX25A as actual operation of the drills. It necessarily follows, therefore, that liquidated damages for a reasonable period commencing March 6 were properly assessed pursuant to paragraph 4 (c), *supra*, of the specifications. Likewise, the contractor would not be entitled, pursuant to paragraph 4 (a) (3), *supra*, to equipment rental commencing on that date.[10]

It is my further opinion, however, that liquidated damages for the delay caused by fishing operations were properly assessed from March 6 through March 27, 1953. On March 27, 1953, however, the contracting officer issued a further finding of fact which required the contractor to recondition the hole on or before midnight of April 10, and stated that a failure to do so would result in the termination by the Government of the contractor's right to proceed under the contract.

There is conflicting evidence with respect to whether the contractor employed customary methods and equipment in carrying out the fishing operations and with respect to how skillfully and effectively the operations were performed. (Tr. 213–220, 308–309, 328–330, 346–347, 349–350, 514–576, 598–605, 891–892, 1343–1344.) There is also a difference of opinion as to how much material was removed from OX25A and how much material remained in the deep hole at the time of the termination of the contract (Tr. 309, 345–346, 568, 918–924, 999–1013). The two Government consultants concluded in their report that it might take days, weeks, or even months to complete successfully the fishing operations. (Joint Report, p. 4, Government file, p. 212.) Certainly, however, the consultants made their estimate on the supposition that such fishing operations would be efficiently performed. Consequently, it is my conclusion that the finding of fact of the contracting officer dated March 27, which required the contractor to recondition the hole by a specified date at the risk of having the contract terminated, was unwarranted and arbitrary.

Although the argument is not explicitly made by the Government, perhaps the requirement that the contractor recondition the hole by a specified date was motivated in part by a desire on the part of the contracting officer to watch the proficiency of the contractor in fishing operations as an additional test to determine whether the contractor lacked the technical ability to secure adequate core from the deep holes. It seems to me that even if it be assumed that this objective was partially responsible for the Government order, it could not be justified

[10] It should be noted that paragraph 9 of the specifications provides as follows: "*Lost Holes.* The Contractor shall receive no compensation for holes lost before the desired depth has been attained, and he must bear the expense of pulling the casing and plugging the same, as well as moving his equipment to the site of the next hole, *PROVIDED* however, that if the hole is abandoned by order of the Project Supervisor, the Contractor shall be paid in full for all footage drilled in the abandoned hole."

on that basis. It appears to me arbitrary and erroneous to compel the contractor to engage in fishing operations at his own expense in order to assist the Government in a determination as to whether the contract should be terminated. For the foregoing reasons, it seems to me clear that the Government, by virtue of its arbitrary order, was at least partially responsible for the time lost after March 27, 1953, in the completion of the contract due to the prolongation of the fishing operations.

The Court of Claims stated in *Sun Shipbuilding Co.* v. *United States*, 76 Ct. Cl. 154 (1934):

> The rule is well settled that where both parties are responsible for the delay in completion of the contract and it is impossible to ascertain the true balance by setting off one against the other, no liquidated damages can be assessed.

See also *Needles* v. *United States*, 101 Ct. Cl. 535, 622 (1944), and cases cited therein.

The contract provides for a schedule of unit prices for exploratory drilling which includes a base rate or rental ranging from $300 to $675 per calendar week, depending on the type of drilling unit used in the exploratory drilling work. However, no provision is made for the payment of rental for equipment made idle because of an order by the Government to the contractor not to proceed with the contract. Although the claim asserted by the appellant for the rental of equipment may be computed, it is in the nature of a claim for unliquidated damages which an administrative official of this Department has no authority to consider or settle in proceedings of this type. *Wm. Cmap & Sons* v. *United States*, 216 U. S. 494, 500 (1910); *McWaters & Bartlett*, CA–196 (August 27, 1953); *Arizona Sand and Rock Company*, CA–165 (July 25, 1952). Therefore, irrespective of the merits, the contractor's claim to be paid rental for equipment during the period of time which has elapsed since the termination of the contract constitutes a claim beyond the scope of this appeal. Of course, contracting officers are authorized to execute termination agreements with contractors within the authority laid down by the Comptroller General. 18 Comp. Gen. 826 (1939).

Accordingly, although officials of this Department do not have any authority to waive the imposition of liquidated damages on equitable grounds or to remit liquidated damages properly assessed,[11] I conclude that such damages should not be assessed against the contractor for delays caused by Government officials preventing the contractor from performing his contract.

[11] *Rodarmel Plumbing Co.*, 61 I. D. 122. Also see *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 294 (1941).

DETERMINATION

Accordingly, the findings of fact and decision of the contracting officer concerning the hole designated OX25A should be modified as follows:

Liquidated damages should be assessed only for the period from March 6 through March 27, 1953.

IV

The second issue in this appeal is whether the contracting officer was justified in his decision dated April 25, 1953, in declaring that the contractor was in default on the contract and in terminating the contractor's right to proceed with the contract. The Government's power to terminate the contract is set forth in the first paragraph of paragraph 4 (b) of the specifications which reads in pertinent part:

> Should the Contractor default in any of his obligations under this contract, the Government, subject to any conditions provided herein, may at any time by written notice to the Contractor terminate his right to proceed with the work under this contract.

The essence of the reasons for the decision of the contracting officer is that the contractor lacked the skill, technical ability, personnel, and equipment to perform the contract in an expert and workmanlike manner, and, hence, that it has failed to fulfill the objectives of the contract. Such a failure would certainly constitute a condition of the contract, which would justify termination even in the absence of paragraph 4(a)(2) of the specifications, which requires that "the Contractor shall at all times prosecute the work diligently, expertly, and continuously as herein provided, and in a workmanlike manner, and shall at all times conform to adequate safety precautions." Accordingly, if I sustain this conclusion, there is no doubt that the order of the contracting officer terminating the contract should be sustained. See *S. D. Guggenheim* v. *United States*, 61 Ct. Cl. 571 (1926), *certiorari denied* 273 U. S. 704; Vol. 2, *Restatement, Law of Contracts*, sec. 397; 38 L. R. A. (N. S.) 539, 30 L. R. A. (N. S.) 1202; 66 A. L. R. 1434.

The contracting officer in the findings of fact which were attached to the notice of termination dated April 25, 1953, as supplemented by additional findings dated May 6, 1953, has listed eight reasons in support of his conclusion that the contractor was in default on the contract. Each of these reasons will be discussed seriatim.

FINDING NO. 1

The first reason is that the contractor failed to recondition drill hole OX25A as required by the contracting officer in his decision dated March 27, 1953. The facts which gave rise to the condition of this

hole are summarized in my discussion of the first issue of this appeal.

The Government in the brief filed after the hearing on this appeal states that the contractor should have been able to recondition the hole, and, in addition, the Government contends that the contractor should have abandoned this hole (pp. 2–3). The contracting officer in its decision dated March 27, 1953, required the contractor to recondition drill hole designated OX25A and gives as its first reason for declaring the contractor in default the contractor's failure to recondition the hole. It seems unreasonable for the Government to contend now that the contractor should have abandoned the fishing operation which it was conducting by order of the contracting officer under the threat of having its contract terminated if it did not obey the order.

FINDINGS NOS. 2, 3, AND 4

Findings of fact Nos. 2, 3, and 4, which are given as reasons for declaring the contractor in default, will be discussed together. Each of these findings is directed at the excessive loss of time in the performance of the contract because of defective or insufficient equipment and supplies.[12] Finding No. 2 blames the contractor for the loss of 55 days in the drilling of the first deep hole to its present depth of 891 feet because of its delay in securing a suitable heavy drill. Findings Nos. 2 and 3 charge the contractor with loss of considerable time because of the making of repairs and waiting for replacement for parts of the contractor's equipment, and because of insufficient and substandard tools, materials, and supplies and makeshift and improvised substitutions therefor.

Paragraph 5 of the specifications provides that:

> The Contractor's equipment and supplies shall be such as is necessary and proper to perform the work specified, * * *.
>
> * * * * * * *
>
> The Government may, at its option, inspect the Contractor's equipment, or any part thereof, at the drilling site or elsewhere, and if it or any of it is not, in the Government's opinion, sufficient or satisfactory for the purpose, the Contractor shall immediately make it sufficient and satisfactory to the Government or replace it with equipment that is sufficient and satisfactory.

It is undisputed that at the outset the contractor lacked tools, materials, and supplies, and that this deficiency had been remedied, at least partly, at the time that it received the termination notice.[13] The

[12] Counsel for the Government stated at the hearing that Finding No. 2 went solely to the amount of time that it took the contractor to furnish suitable equipment. (Tr. 24.)

[13] Witnesses Irvin D. Greenhalgh and Ed P. Hannifan were called by the Government in order to cover the inadequacy of the drilling equipment and safety standards adhered to by the contractor during the early period of the contract (Tr. 25). Mr. Greenhalgh was employed by the contractor for the drilling operations between July 29 and September 20, 1952. Mr. Hannifan similarly was employed between July 29 (Tr. 25) and November 14, 1952 (Tr. 50). See also Tr. 26–43, 46–48, 55–58, 65–77, 97, and 311–349, which

contractor states that it subsequently secured a regular source of supplies for equipment. (Tr. 454–456.) Although the contractor had continued at times to use makeshift and improvised tools, liquidated damages have been imposed for the loss of much of this time due to the repairs of equipment and the securing of tools, materials, and supplies (Tr. 110, 133–134, 141–142, 311–327, 382–385, 644–650; opinion of contracting officer, dated December 5, 1952, Government file, pp. 54–55). Moreover, the record does not contain any evidence that the contractor had failed to obey any order, issued during a period of several weeks preceding the issuance of the termination notice, that it secure any specific tools, equipment, materials or supplies. This appears to be an inopportune time to terminate a contract after the contractor, at the Government's request, had purchased a new drill for deep drilling and after it had been utilized for only a few days.[14] I conclude, therefore, that the delay in purchasing a new drill was not a material breach of the contract which would justify its termination. For these reasons, I conclude that the delays caused by the lack of suitable equipment (Finding No. 2); defective equipment (Finding No. 3); and insufficient tools, materials, and supplies (Finding No. 4); are not sufficiently substantial to warrant termination of the contract at this time.

Finding No. 5

The fifth finding of fact is that the contractor took inadequate safety precautions. Paragraph 4 (a) (2) provides in part that the "contractor * * * shall at all times enforce adequate safety precautions." It is undisputed that there were five accidents during the course of the job, and that the most serious one was a fall by a driller's helper from a derrick to the working deck, while he was being hoisted to the top of the masthead. At that time there was no way of ascending to the masthead by ladder. A ladder was subsequently installed. (Tr. 332–333, 426–431, 460–461.) The fact that at least 5 accidents occurred in work requiring danger to workers does not by itself show the inadequacy of the safety precautions taken by the contractor. Some accidents usually happen on work of this kind. (Tr. 599–600.) However, the record does not give any basis for comparison between the number of accidents which have occurred on this job and those on other comparable jobs. According to the joint report of the Government's own consultants, the contractor's operations, on the whole,

mainly contain McBride's answers to the findings concerning his equipment, tools, materials and supplies. The contractor moved its equipment to the drilling site on or about July 24, 1953. Also see footnote 2, *supra*.

[14] The contractor stated that the Longyear Master Straitline was purchased at a cost of $12,500 (Tr. 272–273), delivered on February 28, 1953, and operated beginning on March 1, 1953 (Tr. 277–278).

have not been abnormally unsafe. (Joint Report, p. 9; Government file, p. 207; also see Tr. 330–338.) For these reasons, I conclude that the violation of paragraph 4 (a) (2) by the contractor, in the early stages of contract performance, which were remedied subsequently, was not a sufficient ground for terminating the contract at this time.

Finding No. 6

Finding of Fact No. 6 charges the contractor with inefficient, unworkmanlike, inexpert and ineffective performance since the beginning of the project,[15] because it employed unworkmanlike methods and procedures in drilling, casing, fishing, and other operations which have resulted in crooked holes, stuck casing, and the loss of expensive equipment in the holes, and that it failed to produce representative core or cuttings in the desired critical sections of the deep hole OX25A.

The object of the contract is to secure core drillings and cuttings. However, in considering the amount of core obtained by the contractor, the difficulty of core drilling in the Tintic area should be given weight (Tr. 276–277, 371, 458–459, 502–505, 578–579, 585–588, 592–593, 1030–1033, 1190–1196; memorandum for record by contracting officer dated January 19, 1953; Government file, p. 85). There is considerable evidence in the record, both commending and criticizing the contractor for the core recovered in the 24 shallow holes, each of which was under 500 feet in depth. (Commendation: Tr. 110–111, 453, 795–796; Joint Report, pp. 2–3; Government file, pp. 213–214; memoranda for record, one undated, one dated October 30, 1952, and one dated December 5, 1952; Government file, pp. 54–55, 304, 312, 339. Criticism: Tr. 121, 226–227, 274–275, 365–370, 390, 638–640, 965–968, 1061–1092, 1102–1104, 1141–1149; letter from project supervisor to contractor dated August 4, 1952, Government file, pp. 7, 10.) The main criticism in the record of the core recovered in the shallow holes appears in the testimony at the hearing by Dr. Thomas Seward Lovering, geologist of the Geological Survey, who maintained that core recovery from three out of the 24 shallow holes drilled by the contractor was inadequate in certain critical areas to serve the Government's needs (Tr. 1141–1148). On the other hand, the joint report of the consultants retained by the Government concluded that "The contractor's core recovery on all holes previous to OX25A has been somewhat better than average for the Tintic area. In this he deserves and has

[15] The contractor is also charged with failing "to maintain his equipment in workable condition with the result that excessive delays have been caused by unnecessary breakdowns." This charge is a repetition of Finding No. 3, on which I have previously made a determination.

received commendation * * *." (Joint Report, pp. 2–3; Government file, pp. 213–214.)[16]

Much of the core from hole OX25A, the first deep hole drilled by the contractor, is criticized by the Government as fragmentary, and in four places there was no core recovery for several feet. (Tr. 226–227; Government exhibits Nos. 4 and 5.) Sludge recovery in some of the void places was insufficient and there was no sludge recovery in some of the other portions of the deep hole (*id.*).

The inadequacy of the core recovery for hole OX25A, the first deep hole drilled by the contractor, is due, according to the Government, partly to the inadequacy of the Failing drill that was used by the contractor for all but a small part of the deep hole core drilling. In fact, the Government states that the core recovery from the deep hole improved after the purchase of a new drill pursuant to Government orders.[17]

The contractor maintains that this difficulty in securing core was augmented by limitations imposed by the Government, and lack of assistance from Government officials. (Tr. 458–464, 477–478, 499–500.)[18]

It is concluded, therefore, that although the contractor's core recovery might have been more expensive to the Government than might have been anticipated for the Tintic area, the recovery from the shallow holes was better than average for the Tintic area. I conclude also that although the core in hole OX25A was insufficient and in some parts of poor quality, it would be unfair to hold on the basis of the core recovered from one hole with two different drills, one a new drill,

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[16] The remainder of the sentence criticizes the excessive costs of the contractor's work. The costs per footage of the contractor has been criticized frequently and cited as an exemplification of the low efficiency of the drilling operations (Tr. 638, 644—650; memoranda for the record and undated notes, Government file, pp. 301, 306, 312–314, 318, 339. *cf.* Tr. 111–112). Another criticism which does not appear in the findings of fact is the failure of the contractor to keep a driller's log and other records requested by the project supervisor and the Government geologists (Tr. 1108–1111; memorandum for the record by R. L. Grazier, project supervisor, dated December 18, 1953, p. 1; letter by H. F. McFarland, project supervisor, to contractor, dated August 12, 1952, p. 2; Government file, pp. 7 and 351). This requirement was in accordance with paragraph 5 (*l*) of the specifications, which reads as follows: "The Contractor shall keep accurate records of drilling operations and shall furnish the Project Supervisor with a daily report showing depth of hole at the beginning and end of each shift, size of hole, amount, size and position of casing, condition of hole and water conditions, sample data, thickness and character of each formation penetrated, and other information required by the Project Supervisor on forms supplied by the Government."

[17] The Government listed three heavy duty drills that were satisfactory for deep drilling and also gave the contractor an opportunity to purchase any comparable drill. (Letter from the contracting officer dated November 20, 1952, as corrected by a letter dated November 28, 1952. Government file, pp. 38 and 41.)

[18] "Regardless of the careful supervision an engineer may give to the drilling, the responsibility for good core recovery is largely in the hands of the drillers." *Diamond Drill Handbook*, by J. D. Cumming, p. 46. When core recovery is poor, sludge collection becomes all the more important. *Idem*, pp. 188–211.

that the contractor lacks the technical skill to secure adequate coring from the deep holes.

The fishing operations on the part of the contractor have been discussed under the first issue in this appeal. The fact that the fishing operations were not entirely successful does not *per se* indicate that the contractor used such unworkmanlike methods as would justify the termination of the contract at this time.

FINDING NO. 7

The seventh finding of fact charges the contractor with failing to comply with article 2 of the contract entitled "Superintendence by Contractor", with the result that the contractor's personnel were forced to discontinue their work while waiting for instructions and thus time was lost. Article 2 of the contract provides that:

> The Contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the Contracting Officer or Government Supervisor, on the work at all times during progress, with authority to act for the Contractor.

At the beginning of the project, with Government acquiescence, Mr. McBride, one of the partners of the appellant who has been in charge of the work under the contract, worked also on other contracts. (Tr. 96–97, 355–356, 426–433.) Subsequently, however, Mr. McBride moved to the project and took over supervision of the project (Tr. 111–112). There is no doubt that at times the employees of the contractor did not know how to proceed and that occasionally they wasted time. Liquidated damages were imposed on the contractor for some of the time lost.[19] Moreover, as Mr. McBride appears to have spent most of his time on the project during the few months prior to the termination of the contract, I do not consider that the contract should be terminated at this time because of the initial inadequacy of the contractor's supervision.

FINDING NO. 8

The eighth finding of fact charges that the Government has been subjected to excessive costs in enforcing and administering the contract and supervising the contractor's work because of the defaults of the contractor which have been previously discussed in these findings.[20]

[19] See opinion by the contracting officer, dated December 5, 1952, entitled Requirements for proposed deep drilling in Tintic Mining District under U. S. G. S. contract No. 13575, p. 2, Government file, p. 54.

[20] The contractor complains that the project supervisors and other Government officials were not helpful. (Tr. 306–308, 353–355, 362–365, 1239–1242; *also see* Tr. 512–515, 944–946, 964, 971–973.) For the contracting officer's testimony on costs of administering the contract, *see* Tr. 682–716, 728–732, 803–814; *also see* Tr. 973–981.

Undoubtedly, this contract gave rise to more disputes between the contractor and the Government than most contracts of this type which have been entered into between private contractors and the Geological Survey. Undoubtedly, these disputes have resulted in a high cost of contract administration, in terms of excessive time devoted to the contract by Government officials as well as high travel expenses. It appears clear to me, however, that all of the disputes were not due solely to the fault of only one of the two parties to the contract. Accordingly, it is my conclusion that such costs do not warrant the termination of the contract at this time.

V

The contract involved in this appeal gives very broad powers to the Government including the right to terminate the contract because of the default by the contractor in any of his obligations under the contract. (Specifications, paragraph 4 (b).)[21] However, the right of termination in the contract should not be exercised arbitrarily. *Anvil Mine Co.* v. *Humble*, 153 U. S. 540 (1894). Therefore, even though the Government has the power to terminate this contract because of a violation of any of its provisions, I believe that sound administrative policy which must be exercised in the interests of the United States and which must insure also fair treatment to private contractors, requires that the breach of contract must be substantial to justify a termination of a contract. It follows that if a contract is breached in a minor and immaterial respect, it would appear to be arbitrary and erroneous to terminate the contract for such a violation.

As previously noted in this opinion, the stated purpose of the contract "is to procure for the Government certain geological information and rock cores." Obviously, in view of the Government's admission that the core recovered by the contractor in several of the shallow holes has been better than the average recovery for this area, it would be difficult to conclude that the contractor has failed to fulfill this objective.

On the other hand, there is considerable evidence in the record that the performance of the contractor on some of the shallow holes and on the first deep hole has not been satisfactory, and that some of the

[21] Paragraph 4 (b) provides in pertinent part: "Should the Contractor default in any of his obligations under this contract, the Government, subject to any conditions provided herein, may at any time by written notice to the Contractor terminate his right to proceed with the work under this contract. * * * Termination of the Contractor's right to proceed shall not affect any right of the Government to liquidated damages for any default accrued prior to the time the termination becomes effective." Provisions for termination of a contract, when in the judgment of the contracting party for whom services are to be performed there is noncompliance with the terms of the contract, are valid. *Voss Bros. Manufacturing Co.* v. *Voss*, 157 F. 2d 263 (8th Cir. 1946); *Blain* v. *Sullivan-Waldron Products Co.*, 78 F. Supp. 661 (1948), affirmed 172 F. 2d 221 (3d Cir. 1949).

contractor's performance on the shallow holes has caused the Government excessive expense and has delayed the completion of this contract beyond a reasonable period of time. There is also some question concerning the adequacy of the experience of some of the contractor's personnel for the very difficult task of taking adequate core from deep holes in the broken formations of the Tintic Mining District.[22]

For the reasons given in a prior portion of this opinion, it is my opinion that the contractor has not been afforded sufficient opportunity to demonstate its ability to drill deep holes, especially when using a new drill which officials of the Government have deemed necessary for adequate exploratory work of deep holes at low expense to the Government.

Moreover, it would appear arbitrary and capricious to terminate this contract at this time when the contract has been in effect for almost a year and when over four-sevenths of the contract is completed, if the minimum amount prescribed by the contract is used as the basis for calculating the percentage of completion.[23]

Determination

For the foregoing reasons, I set aside the notice of termination issued by the contracting officer dated April 25, 1953, which terminated the right of the contractor to proceed with the work under the contract, effective at midnight of the date of the receipt of the notice of termination.

Clarence A. Davis,
Solicitor.

SAM D. RAWSON

A-26800 *Decided December 18, 1953*

Material Site Permit—Federal Highway Act—Mining Location.

A material site permit which was regularly issued under the Federal Highway Act to the Oregon State Highway Commission precludes the subsequent location of a placer mining claim on the same land.

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[22] Tr. 233–234, 397–426, 459, 856–860. Joint Report, pp. 10–12. Government file, pp. 204–206.

[23] United States Geological Survey, Summary of Account with Mac Exploration Company. The minimum amount of the contract was $70,000 and over $40,000 has been paid the contractor. Article 3 of the contract provides: "*Guarantee to Contractor.* The Government guarantees to the Contractor, units of work set forth in the Schedule of Unit Prices, sufficient to result in payments totaling a minimum of $70,000.00. The Government, at its option, may require the Contractor to perform any or all of the units of work specified in said Schedule of Unit Prices beyond the minimum amount guaranteed in this article, and up to a maximum amount of $105,000.00 including the minimum."

Where a highway being built under the Federal Highway Act is approximately 2 miles distant from public land on which a material site permit was issued to the State of Oregon Highway Commission, a determination that the land is "adjacent" to the road within the meaning of section 17 of the Federal Highway Act is not unreasonable.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

In a decision of April 16, 1952, the manager of the Portland land office granted an application by the Oregon State Highway Commission to use as a material site the N½SE¼SE¼ sec. 18, T. 14 S., R. 13 E., W. M., Oregon. The permit was granted pursuant to a determination by the Bureau of Public Roads that the land was necessary as a source of materials for the construction and maintenance of a highway under section 17 of the Federal Highway Act (23 U. S. C., 1946 ed., sec. 18), which authorizes *inter alia* the appropriation and transfer of land to a State highway department as a source of materials for use in connection with a Federal highway project.

On November 3, 1952, Sam D. Rawson attempted to locate a placer mining claim on the above-described land. In a decision of December 24, 1952, the Assistant Regional Administrator, Region I, declared Mr. Rawson's mining claim null and void. This decision was affirmed in a decision of April 8, 1953, by the Assistant Director of the Bureau of Land Management. Mr. Rawson has taken an appeal to the Secretary of the Interior from the Assistant Director's decision.

The questions on this appeal involve the validity of the material site permit granted to the Oregon State Highway Commission on April 16, 1952, and of the decisions holding that Mr. Rawson's conflicting mining claim is invalid.[1]

[1] In addition to the letters in support of this appeal filed by the appellant and by Mr. Fred P. Rawson, agent, there was submitted by the appellant and by Mr. Fred Rawson, for consideration with the appeal, material relating to alleged irregularities in connection with the administration of land described as the S½SE¼ sec. 13, T. 11 S., R. 12 E., W. M., Oregon, on which the appellant had attempted to locate a mining claim. Included with this material was a copy of a judgment and order for injunction of January 2, 1953, in the United States District Court for the District of Oregon in the case of *United States* v. *Sam D. Rawson.*

The judgment and order decreed that the defendant's mining claim on the above-described land is null and void; ordered that the defendant be permanently enjoined from entering, trespassing, occupying, possessing, and removing cinders from the tract; and retained jurisdiction of the cause for the award of damages to the United States against the defendant for the value of the cinders which the defendant had removed. The judgment held that the lands in issue are acquired lands and not a portion of the public domain and not subject to mineral entry. The suit was apparently instituted at the request of the Department of Agriculture.

The request that this Department grant the appellant a permit to remove cinders from the S½SE¼ sec. 13, and the N½NE¼ sec. 24, T. 11 S., R. 12 E., is not properly a part of the instant proceeding. In any event, the request cannot be granted for the reasons set forth in the departmental decision of February 11, 1952, in *Fred P. Rawson,* A–26302, and in the letter of April 10, 1953, from the Solicitor to Mr. Rawson explaining the bases for the rejection of Mr. Rawson's application to mine and remove cinders from this land.

The material-site permit under consideration here was issued for the purpose of providing a source of roadbuilding materials to the Oregon State Highway Department. Mr. Rawson attempted to locate the conflicting mining claim in order to market cinders. The Federal Highway Act under which the permit was issued provides that land necessary as a source of materials for highway construction to a State highway department may be "appropriated and transferred" to such a department. (23 U. S. C., 1946 ed., sec. 18.) Land so "appropriated and transferred" to a State highway department necessarily is not open to mining location under section 2319 of the Revised Statutes. (30 U. S. C., 1946 ed., sec. 22.) The Department has so ruled in *Nevada Department of Highways*, A–24151 *et al.* (September 17, 1945); and the basis upon which the appeal in that case was decided has been upheld in a recent court decision.[2]

The appellant contends that the material-site permit in this case is void because it was issued by the Department of Commerce when the law provides that it should have been issued by the Department of Agriculture. Mr. Rawson apparently refers to the fact that the permit which was issued by the manager of the Portland office of the Bureau of Land Management was based upon a recommendation therefor filed by the Bureau of Public Roads, Department of Commerce. The Federal Highway Act as originally passed was administered by the Department of Agriculture. As a result of a number of transfers, the most recent of which is Reorganization Plan No. 7 of 1949 (63 Stat. 1070), the Bureau of Public Roads in the Department of Commerce is now responsible for the administration of the act (see 5 U. S. C., 1946 ed., Supp. V, sec. 597 and note, and note sec. 133z–15, p. 67), and this permit was granted in accordance with this statute.

Section 17 of the Federal Highway Act provides that where public land is reasonably necessary "as a source of materials for the construction or maintenance of any such highway or forest road adjacent to such lands * * *" the lands may be appropriated. The appellant contends that the material site here involved is not adjacent to The Dalles-California highway for which the site was granted. The map accompanying the issuance of the permit shows that the distance from the material site to The Dalles-California highway is approximately 2 miles.

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[2] *United States* v. *Schaub*, 103 F. Supp. 873 (D. Alaska, 1952) held that a special-use permit issued by a Regional Forester on national forest lands reserving land for use of the Bureau of Public Roads as a source of roadbuilding material under section 17 of the Federal Highway Act and the act of March 30, 1948 (48 U. S. C., 1946 ed., Supp. V, sec. 341) was sufficient to be a valid withdrawal and appropriation of the land and to render it closed to entry or location under the mining laws. The court held in this case that as the United States had already made an appropriation of the minerals involved, the land was not open to another mineral location.

The word "adjacent" does not necessarily imply actual contact,[3] and its exact meaning depends upon the context in which it is used, the facts of each case, the subject matter to which it is applied, and the object sought to be accomplished. *Bituminous Casualty Corporation* v. *Walsh & Wells, Inc.*, 170 S. W. 2d 117 (Mo., 1943). In the instant case, an administrative finding that the land is adjacent, within the meaning and purposes of the Federal Highway Act, to the highway for which the materials are to be used is implicit in the issuance of the permit. In determining whether that finding is reasonable, it is appropriate to consider the purposes of the provision in the act.

The Federal Highway Act which provides, *inter alia*, for Federal aid to the States for the construction of rural post roads and a connected system of interstate highways, contains special provisions to facilitate the construction and maintenance of roads and highways serving lands owned by the United States (23 U. S. C., 1946 ed., secs. 3, 18; H. Rept. 451, 67th Cong., 1st sess. (1921)). The act also provides that only such durable types of surfaces and kinds of materials shall be used in the construction and maintenance of roads under the act as will adequately meet the existing and probable future traffic needs and conditions thereon. (23 U. S. C., 1946 ed., sec. 8.) The latter requirement necessarily limits the places from which material may be taken for building such roads. When the purpose of facilitating the construction of roads serving public lands is considered in relation to the requirement that durable construction material be used, and to the provision that public land adjacent to the highway may be transferred to State highway departments for material sites, it is obvious that a narrow interpretation of the word "adjacent" might defeat the intent of the statute. In view of this consideration, it is not unreasonable to conclude that public land 2 miles from a proposed highway may be found to be adjacent to the highway within the intent and purposes of this act. That this is a fair interpretation of section 17 of the Federal Highway Act is substantiated by cases interpreting the meaning of "adjacent" as it was used in a statutory provision similar in context and purpose to the provision involved in this case.

The act of March 3, 1875 (18 Stat. 482), granted to certain railroads "the right to take from public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad * * *." In *United States* v. *St. Anthony R. R. Co.*, 192 U. S. 524 (1904), it was held, without defining the exact distance within

[3] Adjacent means lying near or close to or neighboring. I Bouvier's Law Dictionary; Black's Law Dictionary, 4th ed.; Webster's New International Dictionary.

What is "adjacent" within the meaning of a statute must depend on the circumstances of each particular case (*United States* v. *Chaplin*, 31 Fed. 890 (C. C. D. Ore., 1887)); see cases under "Adjacent," Vol. II, *Words and Phrases*.

which lands must lie in order to be "adjacent" to a railroad passing through territory of the United States, that public lands lying in Idaho, more than 20 miles from a 200-foot right-of-way of a railroad, not exceeding 40 miles in length were not "adjacent public lands" within the meaning of the act of March 3, 1875. The court stated (at p. 539) in this case:

> Lands which are twenty miles off we cannot regard as adjacent to the line of a railroad within the meaning of this statute. On the other hand, lands within two miles, we assume all would agree, are so adjacent. Now, at what point between these two extremes lands are on one side adjacent and on the other not adjacent, is a very difficult matter to decide. It is necessarily somewhat vague and uncertain, and we are not called upon to determine it in this case.

In *United States* v. *Denver & R. G. R. Co.*, 190 Fed. 825, 853 (C. C. D. Colo., 1911), the court, relying on the *St. Anthony Railroad* case, *supra*, held that lands lying within 3 miles from the right-of-way of the Denver and Rio Grande Railway Company were "adjacent public lands" within the meaning of the act of March 3, 1875.

In view of the purposes which the Federal Highway Act sought to accomplish and court decisions construing a statutory provision similar to that here under consideration, there appears to be no substantial basis for modifying the determination that the material site involved in this proceeding is sufficiently close to the highway to comply with the requirement of the statute.

Inasmuch as the material-site permit gives express permission to use the site as a source of roadbuilding materials, there is no merit in the appellant's assertion that the permit does not authorize the State Highway Commission to remove cinders from the land.

For the above-mentioned reasons, the decision holding the mining location on this land null and void was correct.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Assistant Director of the Bureau of Land Management is affirmed.

CLARENCE A. DAVIS,
Solicitor.

HARRY A. SCHULTZ ET AL.

A–26917 *Decided December 18, 1953*

Mining Locations—Withdrawn Land—Federal Power Act.

Lands covered by a first-form reclamation withdrawal are not open to mining locations where they have not been opened to mineral entry by the Secretary of the Interior.

Lands included within a power-site reserve are not open to mining locations unless they have been restored to entry under the mining laws by the Secretary of the Interior in accordance with section 24 of the Federal Power Act.

Where land on which parts of several mining claims are located was not open to such location until 3 days after the locations were made, the mining locations on such land are invalid. But where the land in Idaho has been open to mining location for more than 15 years since the attempted locations were made, and the claimants assert that they have been in continuous possession of and working the claims during that time, the claimants should be given an opportunity to show whether a discovery has been made after the date when the land became subject to mining location so that it may be determined whether the claims may have been validated under section 2332 of the Revised Statutes.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Harry A. Schultz, Susann Schultz, and Alfred R. Schultz have appealed to the Secretary of the Interior from a decision of August 5, 1953, by the Associate Director of the Bureau of Land Management which held invalid mining claims in sec. 32, T. 3 N., R. 4 E., B. M., Idaho. The claims involved in this proceeding are—

P–4327, Little Placer, located on October 21, 1933, in lot 4.
P–4326, Little (Relocation) Placer, located on February 14, 1947, in lot 4.
P–4335, Rainbow (Amended) Placer, located on March 28, 1938, in lots 5 and 10.
P–4338, Rainbow #2 Placer, located on March 20, 1936, in lots 5 and 10.
P–4337, Rainbow #2 (Amended) Placer, located on March 28, 1938, in lots 10 and 5.
P—4339, Cottonwood Placer, located March 28, 1938, in lots 4, 5 and 10.
P–4359, Triangle No. 2 Placer, located on April 1, 1938, in lot 4.
P–4358, Triangle No. 2 (Amended) Placer, located on August 10, 1943, in lot 4.

Pursuant to an order of March 12, 1910, all of sec. 32, T. 3 N., R. 4 E., B. M., Idaho, was included in a first-form reclamation withdrawal (43 U. S. C., 1946 ed., sec. 416). Lots 4 and 10 are still covered by this withdrawal order, and have not been opened to mineral entry under the act of April 23, 1932 (43 U. S. C., 1946 ed., sec. 154). As these lots have not been open to mining location at any time since March 12, 1910, the attempted locations thereon after that date are invalid. (*Harry A. Schultz et al.*, A–26764 (October 26, 1953); *James C. Reed et al.*, 50 L. D. 687 (1924).) Accordingly, the decision that the Little Placer, the Little (Relocation) Placer, the Triangle No. 2, and the Triangle No. 2 (Amended), which are located wholly in lot 4, are invalid is correct. Likewise, such parts of the Rainbow (Amended), the Rainbow No. 2, the Rainbow No. 2 (Amended), and the Cottonwood claims as are on lots 4 and 10 are invalid.[1] This

[1] The appellants dispute the correctness of the land description in the Associate Director's decision as to several of these claims. The assertions on appeal do not establish

leaves for consideration only the validity of such portions of the three Rainbow claims and Cottonwood claim as are situated in lot 5.

By Executive order dated July 2, 1910, certain lands including lots 4, 5, and 10, sec. 32, T. 3 N., R. 4 E., B. M., Idaho, were withdrawn from mineral entry and included in Power Site Reserve No. 132. Pursuant to an application by Mr. Harry Schultz, one of the appellants in this case, a determination was made on March 15, 1938, by the Federal Power Commission that the value of lots 5 and 10 would not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws for mining purposes only, subject to the provisions of section 24 of the Federal Power Act (16 U. S. C., 1946 ed., Supp. V, sec. 818). Order No. 959 [BLM Restoration Order, sec. 24, Federal Power Act] of March 31, 1938, by the Assistant Secretary of the Interior, restored lots 5 and 10 to entry for mining purposes only in accordance with section 24 of the Federal Power Act. Lot 5 had been restored from the reclamation withdrawal on March 10, 1915, so this lot became open to mineral entry on March 31, 1938. However, lot 10 remained in the first-form reclamation withdrawal, and its restoration from the power site reserve did not make that lot subject to entry under the mining laws. *James C. Reed et al., supra.*

It appears that the portions of the Rainbow, the Rainbow No. 2, the Rainbow No. 2 (Amended), and the Cottonwood claims situated in lot 5 were held invalid because the claims were located on March 28, 1938, 3 days before the issuance of Order No. 959 opening the lot to entry under the mining laws.

Section 24 of the Federal Power Act authorizing the opening of lands withdrawn under the act provides, in part, that—

> * * * Whenever the [Federal Power] Commission shall determine that the value of any lands of the United States * * * heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this Part * * *. [49 Stat. 838, 847.]

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that the land description of the claims in the Associate Director's decision are incorrect. However, this decision is based upon the status of lots 4, 5, and 10, sec. 32, T. 3 N., R. 4 E., and it is not binding with regard to claims or parts thereof not actually situated on the above-described land.

In this connection it may be noted that an applicant may eliminate any part of a mining location which is not essential to its validity without prejudice to his claim for the residue. *Pittsburg-Nevada Mining Co.*, 39 L. D. 523 (1911); *J. Arthur Connell*, 29 L. D. 574 (1900); *Carrie S. Gold Mining Co.*, 29 L. D. 287 (1899).

Although the appellants assert that the claims which are partially situated on lot 5 were located in good faith only after receiving notice of the favorable determination of March 15, 1938, by the Federal Power Commission, the above-quoted statutory language precludes a valid mining location being made on lot 5 prior to the issuance of Order No. 959 of March 31, 1938, restoring the land to entry under the mining laws. This conclusion follows from the fact that the provision that the Secretary of the Interior shall declare land open subject to section 24 of the Federal Power Act would be meaningless if Congress had intended that the Commission's favorable determination, in itself, would open land, withdrawn under the act, to entry.

Moreover, the determination of March 15, 1938, by the Federal Power Commission does not purport to open the lands to mining entry, but is an administrative finding of the effect on the value of the land of location, entry, or selection for mining purposes only subject to section 24 of the Federal Power Act.[2] In contrast to the Commission's determination of March 15, 1938, Order No. 959 of March 31, 1938, specifically "restored" lots 5 and 10 "to entry for mining purposes only, subject to the terms and conditions of the Federal Power Act." [3] Accordingly, the assertion that lot 5 was open to mining entry on March 28, 1938, is not correct. See *Harry A. Schultz et al., supra; Coeur D'Alene Crescent Mining Company*, 53 I. D. 531, 537 (1931).

It is asserted on appeal that since the locations made on March 28, 1938, were not recorded until after March 31, 1938, and as recording is required in order to complete a location under the Idaho mining law, the locations were not made until after lot 5 was open to entry.

Section 2324 of the Revised Statutes (30 U. S. C., 1946 ed., sec. 28) makes the recording of claims subject to the regulations and laws of the locality in which the claims are situated insofar as these do not conflict with the laws of the United States. However, a mining location which is not valid because it was made on land not subject to such location under Federal law cannot be validated by the recording provisions of a State law. Such provisions are intended to give notice of the appropriation of a mining claim, and not to determine the date when a valid location was made. This is evident from section 2324 of the Revised Statutes which provides, *inter alia*, that all records of mining claims made after May 10, 1872, shall contain the date of the location. The recording of these locations by the appellants purported

[2] The Commission simply determined that "The value of said lands will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws for mining purposes only, subject to the provisions of section 24 of the Federal Power Act."

[3] It may be noted that Order No. 959 went on to state that lot 10 remained in a reclamation withdrawal and would not be open to mineral entry so long as the withdrawal remained in effect.

to give notice that a discovery, which would support an appropriation of the land under the Federal mining laws, had been made on the claims as of March 28, 1938, when the land was not open to mining entry. Thus, the contention that the locations involved were not made until after they were recorded cannot be sustained.

Section 2332 of the Revised Statutes (30 U. S. C., 1946 ed., sec. 38) provides that where any persons have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory in which they are situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under the applicable mining laws of the United States. The appellants contend that under this statutory provision they are entitled to the claims involved in this proceeding. The appellants assert that they have been in continuous possession of these claims for more than three times the period (5 years) prescribed by the Idaho statute of limitations after which an action for the recovery of the possession of a mining claim may not be brought;[4] that for more than 15 years, they have continuously worked the claims; and that they have lived on the Rainbow (Amended) claim for more than 15 years. However, section 2332 of the Revised Statutes does not dispense with the necessity of a valid discovery. *Cole et al.* v. *Ralph*, 252 U. S. 286, 307 (1919); *Susie E. Cochran et al.* v. *Effie V. Bonebrake et al.*, 57 I. D. 105 (1940).

It has been held that discovery may follow the marking and recording of a mining claim, and perfect the location as of the time, of the discovery, provided no rights of third parties have intervened. *Union Oil Co. of California* v. *Smith*, 249 U. S. 337, 347 (1918); *Bakersfield Fuel and Oil Co.*, 39 L. D. 460 (1911). In this case it does not appear that any rights of third parties have intervened, and it is possible that the appellants may have made discoveries since March 31, 1938, on lot 5 which, together with their compliance with section 2332 of the Revised Statutes, would be sufficient to establish the validity of the parts of their claims which cover land in lot 5. This possibility should be considered by the Bureau of Land Management before closing action on these claims, and the appellants should submit to the Bureau whatever evidence they may have on this point, particularly with respect to whether there has been any valid discovery of mineral on lot 5 since March 31, 1938.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Associate Director of the Bureau of

[4] Title 5, Idaho Code Annotated, sec. 203.

Land Management is affirmed subject to the modification regarding lot 5, and the case is remanded for further consideration with respect to the validity of the portions of the claims on lot 5.

CLARENCE A. DAVIS,
Solicitor.

CLAIM OF NATRONA COUNTY, WYOMING

Irrigation Claim—Public Bridge—Extraordinary Use—Damages.

Damages for the extraordinary use of a public highway bridge by Government personnel in the course of constructing the various units of the Kendrick project, Wyoming, are compensable from funds made available in the Interior Department Appropriation Act, 1954, for the payment of claims for damage to property arising out of activities of the Bureau of Reclamation. The measure of damages for injury to a public highway bridge ordinarily is the cost of repairing the injured bridge. However, where the bridge is out of date and has become a safety hazard because of the extraordinary use which causes the damage, the estimated cost of repairs may be applied against the cost of a new bridge designed to meet present-day traffic requirements.

T-512 (Ir.) DECEMBER 30, 1953.

The Board of County Commissioners of Natrona County, Wyoming, has filed a claim for damages, dated December 12, 1952, in the amount of $20,000, against the United States because of alleged extraordinary use of the Alcova Bridge and Kortes Road approaches thereto by personnel of the Bureau of Reclamation in the course of the development of the Kendrick project, Wyoming.

I

The Kendrick project comprises Seminoe Dam and Power Plant, located on the North Platte River, about 55 miles southwest of Casper, Wyoming, which was completed in 1939; the Alcova Dam located in Alcova Canyon on the North Platte River, about 29 miles southwest of Casper, which was completed in 1938; the Alcova Switchyard and Power Plant, now under construction; the Casper Canal and lateral system, located 1 mile west of Alcova Dam; and a power distribution system extending throughout Wyoming and into the States of Colorado and Nebraska.[1]

[1] The most recently authorized major undertaking of the Alcova Dam unit is the Alcova Power Plant and appurtenant facilities. The undertaking was reported in House Document No. 693, 81st Cong. (August 23, 1950). This report was supplemented by a Definite Plan Report, prepared by the North Platte River District office of the Bureau of Reclamation, at Casper, Wyoming, in March 1951, entitled "Alcova Power Plant and Appurtenant Facilities."

The Alcova Bridge is located in the SW¼SW¼ sec. 19, T. 30 N., R. 82 W., 6th P. M., Wyoming, on the Rawlins–Casper stretch of Wyoming State Highway No. 220, a macadamized roadway.[2] At the site of the Alcova post office, approximately 31 miles southwest of Casper, Wyoming, the highway divides, one branch continuing in a northeasterly direction toward Casper, and the other, known as the Kortes Road, continuing due south.

The Alcova Bridge was built with Natrona County funds just prior to 1925 for the purpose of transporting traffic using the Kortes Road across the North Platte River. The original bridge was a timber structure 20 feet wide and 345 feet long. In 1934, the bridge was lengthened and partially rebuilt in connection with the construction of Alcova Dam by the Bureau of Reclamation.[3] This work was paid for jointly by the County of Natrona, the Bureau of Reclamation, and the Alcova Dam construction contractor. The Bureau furnished the timber piling, the county furnished all other materials, and the Alcova Dam construction contractor performed the labor.[4]

Since 1950, the Kortes Road has been used principally by traffic going to and from the Alcova, Kortes, and Seminoe Dams and power plant areas and the related Government transmission line routes.[5]

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[2] See U. S. Geological Survey Quadrangle Map No. N4230–W10637.5/715 entitled "Alcova Quadrangle, Wyoming, Natrona Co. 7.5 Minute Series (Topographic) (1950)." The Kortes Road is also known locally as the Seminoe-Kortes Road and the Cottonwood County Road.

[3] The project construction plans of the Bureau of Reclamation called for a diversion tunnel with outlet works on the south side and a spillway and stilling basin on the north side of the North Platte River channel. In order to provide for a required discharge of 5,000 c. f. s., the plans called for the widening of the river channel at the bridge site. The three bents of the original bridge, which rested upon mud sills, were replaced with driven pile bents, and two new pile bents and two new 23-foot spans were added, as a result of which the length of the bridge was increased to 391 feet. New railings, road runners, and abutment wings were also installed at that time.

[4] The construction contractor, A. S. Horner Construction Co. (Contract No. I2r–19686), was engaged to construct and complete the Alcova Power Plant and appurtenant works. Paragraph 33 of the contract specifications (No. DC–3564) read as follows: "Access to the work from existing roads shall be provided by the contractor at his expense. The Government assumes no responsibility for the condition or maintenance of any existing road or structure thereon that may be used by the contractor for performing the work under these specifications and for traveling to and from the site of the work. No direct payment will be made to the contractor for constructing temporary roads used for construction operations, or for improving, repairing, or maintaining any existing road or structure thereon that may be used by the contractor for performance of the work under these specifications."

[5] The record discloses that construction of Alcova Dam began in October 1933 and continued until May 1938. Practically all cement and metal products used in the dam were hauled from Casper across the bridge to a storage yard on the south side of the river. Some of the materials were then hauled back across the bridge a second time to the point of use. Construction of Seminoe Dam and power plant began in December 1933 and continued until September 1939. A part of the construction materials and equipment were hauled across the bridge. In addition, the Government and the contractor each maintained a construction camp at the site which together housed over 400 workmen and some families. These camps increased considerably the amount of traffic to and from Casper. Construction of Kortes Dam and power plant began in the spring of 1946 and continued until December 1950. Construction forces of the Bureau of Reclamation and

Typical use made of Alcova Bridge and Kortes Road during the construction of the various units of the Kendrick project is reflected in the Alcova Power Plant contract specifications, dated December 5, 1951, covering the transportation of materials. It is there stated that the item of the bid schedule for transporting materials between the railhead and the power-plant site shall cover the transportation of machinery and materials for the Government, or its agents, or both, in either direction between Casper, Wyoming, and the Alcova Dam power-plant site; that the materials to be transported will consist of generators, all accessories, and generator installation equipment; that the approximate weight of the heaviest piece of material to be moved is 16 tons; and that the largest piece of material to be moved will have dimensions approximately 10 feet by 20 feet by 7 feet. (Specifications No. DC–3564, par. 225.)

The Definite Plan Report (*supra*, fn. 1) contains the following statements:

> The site of the proposed Alcova power plant is easily accessible from the Seminoe-Kortes road which joins Wyoming State Highway 220 at the Alcova Post Office within one mile of the site. * * *
>
> The nearest railhead to the Alcova site is Casper, Wyoming, 32 miles to the northeast. Casper is served by the Chicago, Burlington, and Quincy Railroad and the Chicago and Northwestern Railway. From Casper either Wyoming State highway 220 or the route [including the Alcova Bridge and the Kortes Road] over which the 76,000 pound Kortes transformers were hauled may be used. (Pp. 47–48.)

The claim filed by the Board of County Commissioners, Natrona County, states that "After careful study and engineering advice, it has been determined that it would be poor policy to expend any more money on the existing bridge because of its deteriorated condition and because of the poor alignment of the approaches, and that a new bridge should be constructed on a new alignment." (Claim, p. 7.) The Commissioners state that plans have been completed for the construction of a new, 405-foot-long timber bridge with a 20-foot roadway and one 4-foot walkway, the construction costs of which are estimated at approximately $60,000; that "in consideration of the responsibility which the County has to provide and maintain adequate roads for the use of

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the contractor, averaging 340 to 350 men, were housed in construction camps at the site of the work. This caused an abnormal use of the bridge because of the increased traffic between the camps and Casper. In addition, all materials and equipment for this project unit, with the exception of concrete materials, were hauled across the bridge from Casper to the job. Between September 1950 and September 1951, the Bureau of Reclamation built a power line switchyard at Alcova Dam. All materials and equipment for this switchyard were hauled across the bridge and work crews traveled back and forth daily. In December 1951, the Bureau began construction on the south side of the river of a permanent Government community below Alcova Dam and later began construction of the Alcova Power Plant. This work, still in progress, has resulted in a greatly increased use of the bridge.

the general public it has been determined that an equitable division of replacement construction costs would be for the Government to stand one-third of the replacement costs;" and that this determination was made between the three County Commissioners and the County Engineer of Natrona County, and the District Manager, District Engineer, and Power Superintendent of the Bureau of Reclamation district office at Casper, Wyoming, in a field conference which was held at the bridge site. (Claim, pp. 7–8.)

II

The Board of Commissioners of Natrona County are required by law to survey, establish, and maintain county roads.[6]

Kortes (Cottonwood) Road was formally established by the County Commissioners on January 2, 1915,[7] and the original Alcova Bridge was built at the time when the road was established. (Claim, p. 2.) Although the claim of the Board of Commissioners of Natrona County deals generally with damage done to the Kortes Road and Alcova Bridge, the damages claimed are limited to the injury to the bridge structure and the approaches to it.[8] The term "Alcova Bridge" as used hereafter will mean the Alcova (public) bridge structure and the Kortes (public) highway approaches to it.[9]

It is well established that persons using a public highway for the purpose of travel or transportation by ordinary methods, in a reasonable manner, and to a reasonable extent, are not liable for the natural wear and tear of the highway.[10] However, the rule in many jurisdictions is that in case of injury or damage incident to an extraordinary or unreasonable user of a highway, the political entity has such an interest in highways which it is its duty to repair and keep in order as

[6] Section 27–806 of the Wyoming Compiled Statutes, 1945 (Annotated) authorizes the Commissioners, among other things, "To lay out, alter or discontinue any road running through the County, * * * and also [to] perform such other duties respecting roads as may be required by law." *See, also,* section 48–305.

[7] See memorandum dated January 12, 1952, from the District Manager, Casper, Wyoming, to the Regional Director, Denver, Colorado, for the history of the establishment and subsequent changes affecting the Kortes (Cottonwood) Road, as reflected by land records on file in the County Clerk's Office, Natrona County, Casper, Wyoming.

[8] It has been judicially declared that the approaches to a bridge comprise the traffic arteries leading to the ends of the bridge proper and such adjustment of the alignments and grades of such arteries in the immediate vicinity of such ends as is necessary to afford the maximum convenience of access and render available to the public the entire capacity of the bridge proper. *State* v. *Zangerle,* 29 Ohio N. P., N. S., 531 (1929); *Bonneville County* v. *Bingham County,* 132 Pac. 431 (Idaho, 1913); *State v. Vantage Bridge Co.,* 236 Pac. 280 (Wash., 1925); *Foley* v. *State,* 11 P. 2d 928 (Okla., 1932); *City of San Antonio* v. *Haynes,* 5 S. W. 2d 205 (Tex. 1928).

[9] In the process of constructing the Alcova Switchyard, Bureau of Reclamation personnel relocated the Kortes Road at the construction site for the switchyard 120 feet to the northeast of its original location. (Memorandum dated January 12, 1952, from District Manager, Casper, Wyoming, to Regional Director, Denver, Colorado.)

[10] See 5 A. L. R. 768 and cases there cited.

will give it a right of action against those who make such repairs necessary,[11] and this has been held to be so, notwithstanding the existence of a remedy against such user by indictment or by proceedings to recover a statutory penalty.[12] Any extraordinary or unreasonable use which damages a highway also has been held to be a nuisance which may be enjoined or abated at the instance of the controlling public authority. In *Commonwealth* v. *Allen et al.*, 23 Atl. 1115 (1892), the Pennsylvania Supreme Court said:

> As a general rule, highways and bridges are constructed for ordinary use, in an ordinary manner, and not for an unusual or extraordinary use, either by crossing at great speed or by passing of a very large and unusual weight. A * * * [political entity] is not bound to do more than to so construct its bridges as to protect the public against injury by a reasonable, proper, and probable use thereof, in view of the surrounding circumstances, such as the extent, kind, and nature of the travel and business over them. (P. 1117.)

The damages recoverable for injury or damage incident to an extraordinary user of a highway are measured by the cost of repairing it.[13] And where a bridge so damaged is replaced by a new bridge designed to meet present-day traffic requirements, the estimated cost of replacing the old bridge can be used as a measure of damage.[14]

III

The record before the Department contains no evidence that prior to the submission of this claim Natrona County made a formal complaint against the extraordinary use of the Alcova Bridge by personnel of the Bureau of Reclamation in the development of the Kendrick project. A preponderance of the evidence of record establishes, however, that there was a tacit agreement between officials of the county and of the Bureau, developed in the course of numerous oral discussions that the activities of the Bureau constituted an extraordinary use of the Alcova Bridge for which the Government was liable in damages and for which reimbursement would be made to the county,[15]

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[11] *Sumner County* v. *Interurban Transportation Co.*, 213 S. W. 412 (Tenn., 1919); 5 A. L. R. 765.

[12] See *Troy* v. *Cheshire R. Co.*, 55 Am. Dec. 177 (N. H. 1851); *Woodring* v. *Forks Twp.*, 70 Am. Dec. 134 (Pa., 1857).

[13] *Troy* v. *Cheshire R. Co.*, *supra*, fn. 12.

[14] *State Highway Commission* v. *American Mut. Liability Ins. Co. of Boston*, 70 P. 2d 20 (Kan., 1937); see, also, *State* v. *F. W. Fitch Co.*, 17 N. W. 2d 380, 384 (1945).

[15] See, for example, the statement entitled "Alcova Bridge," dated December 21, 1951, in which I. J. Mathews, District Manager, Casper, Wyoming, furnished facts regarding the extraordinary use of the Alcova Bridge and the liability of the Government in damages; memorandum dated January 12, 1953, from District Manager Mathews to the Regional Director, Denver, Colorado, the subject of which is "Replacement of bridge across North Platte River at Alcova, Kendrick project, Wyoming"; memorandum for the Record (H. E. Prater) (Denver), dated January 18, 1952; memoranda (two) dated January 9, 1952, from the Regional Director, Denver, Colorado, to the District Manager, Casper, Wyoming, on the subject "Replacement of bridge across North Platte River at Alcova—Kendrick Project, Wyoming"; memorandum dated December 18, 1952, by which the District Manager

and that a remedy for such damages is provided under the reclamation laws.[16]

The Interior Department Appropriation Act, 1954 (67 Stat. 261), makes funds available for the "payment of claims for damage to or loss of property * * * arising out of activities of the Bureau of Reclamation."

After full consideration of all available evidence bearing upon the actions of personnel of the Bureau of Reclamation in the planning, construction, operation and maintenance of the various units of the Kendrick project, I am constrained to conclude that an extraordinary use of the Alcova Bridge was made, and that there exists a causal connection between the deteriorated state of the Alcova Bridge and the actions of personnel of the Bureau of Reclamation in the development of the Kendrick project sufficient to justify the payment of damages incident to such user as a claim "arising out of activities of the Bureau of Reclamation."

Although no itemized data are in the record before the Department reflecting the basis upon which the comparative benefits and costs of repairing the present bridge and of constructing a new bridge were estimated, there is sufficient evidence to support the conclusion that the costs were properly calculated and are a matter of local record. It is assumed, of course, that the amount of $20,000 does not exceed the

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transmitted to the Regional Director the claim of the County of Natrona, with the recommendation that "immediate action be initiated to validate the claim"; speedletter dated November 29, 1951, on the subject "Replacement: Alcova Bridge, Kendrick Project" by which the Regional Director was informed by the District Manager that, in addition to correspondence listed, "lengthy discussions have been held between members of your staff and district office personnel concerning the feature. I wish to call your attention to the fact that the bridge item appears in budget preparation 1949, requesting funds for construction in FY 51 (budget request and appropriation duly authorized by the Commissioner's office and 81st Congress). Subsequent budget preparations have included the bridge, classified as a General Property feature, as presently indicated in FY 52 program appropriation"; memorandum dated October 19, 1951, from the Acting District Manager, Casper, to the Regional Director, Denver, the subject of which is "Request for delegation of design and specification work for bridge over North Platte River at Alcova, Kendrick Project"; memorandum dated October 26, 1951, from the District Manager to the Regional Director, on the subject "Replacement Alcova Bridge, Kendrick Project"; memorandum dated October 2, 1951, from the District Manager to the Regional Director, on the subject "Replacing Alcova Bridge, Kendrick Project"; reflecting recent discussions between Bureau of Reclamation district office personnel and the Natrona County Commissioners which resulted in a "mutual understanding concerning the replacement of the county road bridge located on the North Platte River near Alcova Dam and Switchyard"; memorandum dated September 18, 1951, from the Acting Assistant Regional Director to the District Manager, noting that "issue of specifications for Roads and Bridge (Alcova) has been scheduled in your F. Y. 1953 Budget Submission for December 1951" and asking to be advised of "the progress you have made and your latest determination relative to the relocation and/or reconstruction of the bridge"; speedletter dated May 18, 1951, from the District Manager to the Regional Director, on the subject "Platte River Bridge, Kendrick Project," in which the District Manager describes the condition of the bridge and the activities of the Bureau of Reclamation which contributed to its deterioration.

[16] See, in this connection, *Morrison* v. *Clackamas County*, 18 P. 2d 814 (1933); *Horstmann Co.* v. *United States*, 257 U. S. 138 (1919); 48 Ct. Cl. 423 (1913).

proportionate part of the cost of repairing the present bridge fairly chargeable for the Bureau of Reclamation user, and that the payment of the $20,000, representing one-third of the cost of a modern bridge, reflects a compromise reached by the three county commissioners and the County Engineer of Natrona County, and the District Manager, District Engineer, and power superintendent of the Bureau of Reclamation's District Office at Casper, Wyoming, at the field conference held at the bridge site just prior to the submission of the claim of the County of Natrona in the amount of $20,000. (See Claim, pp. 7–8.)

IV

Therefore, in accordance with the provisions of the Interior Department Appropriation Act, 1954 (67 Stat. 261), and the authority delegated to the Solicitor by the Secretary of the Interior (sec. 22, Order No. 2509, as amended; 17 F. R. 6793):

1. I determine that—

(*a*) part of the damage to the Alcova Bridge which crosses the North Platte River in the SW¼SW¼ sec. 19, T. 30 N., R. 82 W., 6th P. M., Natrona County, Wyoming, attributable to the extraordinary use of the bridge incident to construction of the Kendrick project arose out of activities of the Bureau of Reclamation; and

(*b*) as a result of the activities of the Bureau of Reclamation, the County of Natrona, Wyoming, was damaged in the amount of $20,000.

2. Accordingly, I award to the County of Natrona, Wyoming, the sum of $20,000 as damages, and I direct that this amount be paid to it, subject to the availability of funds for such purpose.

WILLIAM J. BURKE,
For the Solicitor.

STATE APPLICATIONS TO EXCHANGE LANDS UNDER SECTION 8 OF THE TAYLOR GRAZING ACT

State Exchanges—Public Interest—Classification.

An application made by a State to exchange lands outside of a grazing district pursuant to section 8(c) of the Taylor Grazing Act, as amended, may not be rejected because the consummation of the proposed exchange will interfere with the administration and disposal of the remaining public lands.

The authority under section 7 of the Taylor Grazing Act, as amended, to classify lands does not extend to lands outside of a grazing district which are applied for in a State exchange under section 8(c) of the act.

M–36178 JANUARY 5, 1954.

TO THE SECRETARY OF THE INTERIOR.

The Director of the Bureau of Land Management has requested instructions as to the extent of his authority to reject applications by States to exchange lands outside of grazing districts under section 8(c) of the Taylor Grazing Act, as amended (43 U. S. C., 1946 ed., sec. 315g(c)). The Director states that two State applications have been filed for a 180-mile strip of land, presumably to be used for a pipeline right-of-way, and that if the applications are allowed, it will result in the separation of public lands on each side of the selected lands and prevent anyone having those public lands under grazing lease from driving his livestock from one portion of his lease to the other. He also states that, because the strip of land runs along a highway, allowance of the exchanges will prevent access to the highway from the remaining public lands. He asks whether such applications may be rejected:

(1) because the lands are selected in such a pattern as to interfere seriously with the administration and disposal of the remaining public lands; or

(2) because the lands are classified, pursuant to section 7 of the Taylor Grazing Act, as not suitable for disposition under section 8(c) thereof.

In my opinion, an application made by a State to exchange lands outside of a grazing district under section 8(c) of the Taylor Grazing Act, as amended, may not be rejected on either of the grounds proposed by the Director.

I

Stated in other words, the Director's first question is whether he may take into account the public interest in considering State applications under section 8(c).

Section 8 of the Taylor Grazing Act, as originally enacted on June 28, 1934 (48 Stat. 1269, 1272), authorized the Secretary of the Interior to accept on behalf of the United States any lands within the exterior boundaries of grazing districts as a gift "where such action will promote the purposes of the district or facilitate its administration." It also authorized and directed the Secretary "when public interests will be benefited thereby" to accept title to any privately owned lands within the exterior boundaries of a grazing district and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land. In addition, upon the application of any State to exchange lands within or

without the boundary of a grazing district, the Secretary was authorized and directed:

* * * in the manner provided for the exchange of privately owned lands in this section, to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end, but no State shall be permitted to select lieu lands in another State.

On October 25, 1934, shortly after the passage of the act, section 8 was construed by the Solicitor of this Department as authorizing only those exchanges with States which would benefit public interests in the regulation of grazing on the public range under the Taylor Grazing Act and as imposing upon the Secretary of the Interior the duty, upon application by a State for an exchange, to determine whether the public interests would be benefited by the proposed exchange. (55 I. D. 9.)

Section 8 was completely revised by the amendatory act of June 26, 1936 (49 Stat. 1976). Where under the original section all provisions relating to gifts and exchanges, both private and State, were contained in one paragraph, the amendatory legislation appears in four subsections. As revised, subsection (a) authorizes the Secretary to accept gifts of lands within or without the exterior boundaries of a grazing district "where such action will promote the purposes of the district or facilitate the administration of the public lands." Subsection (b) authorizes the Secretary to exchange lands within or without the boundaries of a grazing district for privately owned lands "when public interests will be benefited thereby." Subsection (c) provides:

Upon application of any State to exchange lands within or without the boundaries of a grazing district the Secretary of the Interior shall, and is hereby, directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end, but no State shall be permitted to select lieu lands in another State. The Secretary of the Interior shall accept on behalf of the United States title to any State-owned lands within or without the boundaries of a grazing district, and in exchange therefor issue patent to surveyed grazing district land not otherwise reserved or appropriated or unappropriated and unreserved surveyed public land; and in making such exchange the Secretary is authorized to patent to such State, land either of equal value or of equal acreage: *Provided*, That no State shall select public lands in a grazing district in furtherance of any exchange unless the lands offered by the State in such exchange lie within such grazing district and the selected lands lie in a reasonably compact body which is so located as not to interfere with the administration or value of the remaining land in such district for grazing purposes as set forth in this Act.

When an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent thereto shall contain a reservation of all minerals to the United States; and in making exchanges of equal acreage the Secretary of the Interior is authorized to accept title to offered lands which are mineral in character, with a mineral reservation to the State.

For the purpose of effecting exchanges based on lands of equal acreage the identification and area of unsurveyed school sections may be determined by protraction or otherwise. The selection by the State of lands in lieu of any such protracted school sections shall be a waiver of all of its right to such sections.

Subsection (d) contains general provisions relating both to private and State exchanges not material to this discussion.

The subsection relating to State exchanges, in mandatory language, directs the Secretary to proceed with an exchange upon application by a State. It places two limitations upon the State's selection of lands—first, that no State shall be permitted to select lieu lands in another State and, second, that no State shall select lands in a grazing district unless the lands offered by the State lie within such grazing district and the selected lands lie in a reasonably compact body which is so located as not to interfere with the administration or value of the remaining land in such district for grazing purposes. Thus, aside from the requirement that the selected land must be within the State, there is no limitation imposed by the subsection on the selection of lands outside of grazing districts. No discretion is vested in the Secretary to determine whether the consummation of a State exchange of lands otherwise available outside of grazing districts will "facilitate the administration of the public lands" as is provided in subsection (a) with respect to gifts; whether the public interests will be benefited, as is provided in subsection (b) with respect to private exchanges; or whether the selected lands are in a reasonably compact body so located as not to interfere with the administration or value of the remaining lands, as is provided in that part of subsection (c) governing State exchanges of lands within grazing districts. Nothing in the subsection indicates that the Secretary may take into account the effect that the consummation of such an exchange may have on the administration or disposal of other public lands outside of grazing districts.

The legislative history of the section shows rather plainly that the Congress intended to strip the Secretary of any discretion he may have had under section 8 of the original act to consider the public interest in acting upon State exchanges. Members of the Senate Committee which had the section under consideration expressed their opinion that the intent of Congress in the original act was to make State exchanges mandatory upon the Secretary and stated emphatically their intention to redraft the section so that there could be no doubt that the Secretary was to have no discretion to take into account the public interests in acting upon State applications for exchanges.[1] The Committee reports on the measure state that the purpose of the amendment of sec-

[1] See Hearings before the Committee on Public Lands and Surveys, United States Senate, on S. 2539, 74th Cong., 1st sess., pp. 47–49.

tion 8 is to make mandatory the exchange of lands upon the application of a State.[2]

Moreover, the Department has, since the 1936 amendment of the section, construed the section as requiring the consummation of State exchanges, where the State has met the other requirements of the section. Thus, while the regulations relating to State exchanges under the original act stated that exchanges might be made when such exchanges were in the public interest (55 I. D. 200, 484), the regulations promulgated shortly after the passage of the amendatory act deleted any requirement that a benefit to the public interest must be shown. (55 I. D. 582; 43 CFR, Part 147.)

One of the first State applications to exchange lands to come before the Department after the passage of the act of June 26, 1936, was considered in *State of Montana* (A–20068, November 3, 1936, modified January 13, 1937). In reviewing a decision by the Commissioner of the General Land Office which had rejected the State's application made under the act of June 28, 1934, the Acting Secretary said:

> The reason, however, assigned for this conclusion [that lands within a national forest may not be exchanged] was that the exchange of lands within a forest for lands within a grazing district would apparently not benefit the public interests. Public benefit was considered as a criterion for testing the validity of the application for exchange in the view that the authority of the Secretary of the Interior to make the exchanges of both private and State-owned lands under the provisions of section 8 was governed by the clause therein contained reading "when the public interests will be benefited thereby."

After referring to the amendment made to the section in 1936 and after quoting the first paragraph of subsection (c), the Acting Secretary continued:

> It will be noticed that the above-quoted portion of subdivision (c) contains no limitation or conditions on the right of exchange, except where the land selected is within a grazing district or without the State. No power is lodged in the Secretary of the Interior to determine whether the exchange will be a public benefit. The statute says, "The Secretary of the Interior *shall* accept on behalf of the United States title to any State-owned lands etc." It is, therefore, believed that this provision is mandatory and that the right of the State to select land not within a grazing district in exchange for land that it owns cannot be denied or abridged for the reason that the offered land lies within the exterior boundaries of a national forest.

In several cases the Department, recognizing the mandatory language of section 8 (c), has held that a protest against the allowance of a State's exchange application, made by one who had the selected public land outside of a grazing district under lease pursuant to section 15 of the Taylor Grazing Act (43 U. S. C., 1946 ed., sec. 315m)

[2] See Senate Report No. 1005, 74th Cong., 1st sess., and Senate Report No. 2371, 74th Cong., 2d sess.

must be dismissed so long as the State continued to assert its right to select the land. *David Hunt* v. *State of Arizona*, A–23246 (April 27, (1942); *Secundino Cocio* v. *State of Arizona*, A–23409 (January 30, 1943, February 23, 1943). Other instances of the Department's recognition that in processing State exchange applications, it is without discretion in the matter of determining whether an exchange application submitted by a State is in the public interest are to be found in Solicitor's Opinions M-31956 (October 26, 1942), and M-33608 (April 22, 1944), and in the case of *State of California*, 60 I. D. 322 (June 2, 1949, supplemented on August 4, 1950, p. 428). In discussing the two categories of exchanges provided for in section 8 of the amendatory act—private and State—the Department stated, on reconsideration of the case of *Sidney B. Moeur, State of Arizona, and New River Land and Livestock Company*, A-25548, A-25570 (original decision dated November 9, 1949), on March 31, 1950:

> Indeed, a belief upon the part of the Secretary that public interests would not be benefited by an exchange proposed by a State could not be regarded as an adequate reason for the rejection of the State's proposal.

I agree with this statement and conclude that the Director of the Bureau of Land Management has no authority to reject an application made by a State to exchange lands outside of a grazing district under section 8 (c) of the Taylor Grazing Act, as amended, on the ground that the consummation of the exchange would seriously interfere with the administration and disposal of the remaining public lands.

In this connection, however, the Director's attention should be called to the provision in subsection (d) which authorizes either party to an exchange based on equal values to reserve easements or rights of use. It would appear that much of the difficulty envisioned by the Director could be eliminated, where land is selected along a highway, if the Government were to reserve the right of access to the highway across the selected land.

II

Section 7 of the Taylor Grazing Act, as originally enacted, authorized the Secretary, in his discretion, to examine and classify any lands within grazing districts which were more valuable and suitable for the production of agricultural crops than for native grasses and forage plants and to open such lands to homestead entry.

Before any grazing districts, provided for by section 1 of the act (43 U. S. C., 1946 ed., sec. 315), were established, all of the vacant, unreserved, and unappropriated public lands in 12 of the western States were temporarily withdrawn from settlement, location, sale or entry and reserved for classification and pending a determination of the

most useful purpose to which such lands might be put in consideration of the provisions of the Taylor Grazing Act (Executive Order No. 6910, dated November 26, 1934, 43 CFR 297.11). A similar order later withdrew and reserved the public lands in 12 other States (Executive Order No. 6964, February 5, 1935, 43 CFR 297.12). Executive Order No. 6910 was held in a Solicitor's opinion of February 8, 1935 (55 I. D. 205) to permit the establishment of grazing districts under section 1 of the act but to prevent the exchange of lands under section 8, the sale of isolated tracts under section 14, and the leasing of lands under section 15 of the act. The two general withdrawals were amended at various times during the years 1935 and 1936 to permit exchanges, sales and leases under the act. (Executive Order No. 7048, May 20, 1935, 43 CFR 297.14; Executive Order No. 7235, November 26, 1935, 43 CFR 297.15; and Executive Order No. 7363, May 6, 1936, 43 CFR 297.17.)

However, all of the public lands in the named States having been withdrawn except from the operation of the Taylor Grazing Act, the operation of other public-land laws virtually ceased in those States. The initiation of rights to the public lands under those laws was prevented where the initiation of such rights depended upon the availability of vacant, unreserved, and unappropriated public lands. In addition, the withdrawals prevented the satisfaction of many rights which had previously been granted to the States and to private individuals by the Congress to select vacant, unreserved, and unappropriated public lands for various purposes. Many of these rights had been outstanding for years. Thus, States which had unsatisfied school grants were precluded from selecting lieu lands for those lost to the States under the original grants because of settlement, because of their inclusion in Indian or other reservations, or because of their mineral character. (See 43 U. S. C., 1946 ed., sec. 851 *et seq.*)

It is against this background that the amendment of section 7 on June 26, 1936, must be considered. As amended, section 7 (43 U. S. C., 1946 ed., sec. 315f), insofar as it is pertinent to this discussion, provides:

> * * * the Secretary of the Interior is hereby authorized in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act, or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grants, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws * * *.

The section added to the category of lands which the Secretary might, in his discretion, examine and classify those lands withdrawn by the two general withdrawal orders and authorizes the examination, classification, and opening of those lands which he finds to be "more valuable or suitable for any other use than for the use provided for in this Act, or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grants." Nothing in the section indicates that the exchanges provided for in section 8 (c) are within its scope.

The section permits classification for the satisfaction of outstanding exchange rights. It thus embraces only those exchange rights which had previously been granted. It does not include the right not previously enjoyed by the States to exchange lands which they owned with the United States, conferred by section 8 (c).

A construction of section 7 to permit the classification of lands outside of grazing districts applied for by States under section 8 (c) of the act would be inconsistent with the stated purpose of section 8 (c). The power to classify in one's discretion implies the power to refuse to classify. Thus by a refusal to classify or by a classification for another purpose than a State exchange, a State's application could be defeated. Surely it cannot have been intended to permit, by means of the power to classify, the rejection of the privilege conferred under section 8 (c). A more reasonable construction of section 7 is that lands applied for under section 8 (c) are not within the scope of the classification power conferred.

I conclude, therefore, that the authority of the Secretary of the Interior under section 7 of the Taylor Grazing Act, as amended, to classify lands does not extend to lands outside of a grazing district which are applied for by a State under section 8 (c) of the Taylor Grazing Act.

CLARENCE A. DAVIS,
Solicitor.

State Exchanges—Classification.

An application made by a State, pursuant to section 8 (c) of the Taylor Grazing Act, as amended, to select lands withdrawn by either of the two Executive orders mentioned in section 7 of the Taylor Grazing Act, as amended, or within a grazing district may not be rejected merely because the lands may have been classified pursuant to section 7 as being suitable for disposition under another of the public-land laws.

Unless rights have been initiated in the classified lands, any prior classification thereof must be disregarded in considering a State's exchange application.

M-36178 (Supp.) MARCH 4, 1954.

TO ASSISTANT SECRETARY ORME LEWIS.

This responds to your memorandum dated January 18, 1954, in which you requested my opinion whether, in view of the opinion expressed in my memorandum dated January 5, 1954, the Secretary has authority to reject a State application to exchange lands under section 8 (c) of the Taylor Grazing Act, as amended (43 U. S. C., 1946 ed., sec. 315g (c)), if the lands have been classified before the receipt of the State's application and, if so, what classification is necessary in order that such authority exist.

I shall assume for the purposes of this discussion that your question is directed to the classification of lands which were withdrawn by either of the two Executive orders [1] mentioned in section 7 of the Taylor Grazing Act, as amended (43 U. S. C., 1946 ed., sec. 315f), or which are now or may hereafter be included in grazing districts and that it does not relate to the Secretary's authority with respect to lands which may otherwise have been withdrawn for classification [2] or which may have been classified under some other authority.[3]

In my opinion, and speaking generally without regard to the particular facts which may exist in a given case, the fact that lands may have been classified under section 7 of the Taylor Grazing Act before the filing of a State application under section 8 (c) of the act provides no basis for rejecting a State's application. The mere classification of lands under section 7, without more, does not remove the lands from the operation of section 8. It would seem that if the lands selected by a State under an exchange application meet the requirements of section 8 (c), the fact that the selected lands may have been classified as suitable for some other use is immaterial.

There is nothing binding about a classification. While it may represent the considered judgment of the classifier based upon the best evidence available at the time of the classification, it is subject to revocation at any time or to revision upon a showing of changed conditions, additional facts, or other factors indicating error in the classification.

[1] Executive Order No. 6910, dated November 26, 1934 (43 CFR 297.11), and Executive Order No. 6964, dated February 5, 1935 (43 CFR 297.12).

[2] E. g., all lands containing oil shale deposits have been temporarily withdrawn for investigation, examination and classification (Executive Order No. 5327, dated April 15, 1930, 43 CFR 297.8). Such lands are, however, subject to oil and gas leasing under the terms of the Mineral Leasing Act (Executive Order No. 6016, February 6, 1933, 43 CFR 297.10).

[3] Lands classified as power sites, for example, may be disposed of only after a determination by the Federal Power Commission that the value of the lands for the purposes of power development will not be injured or destroyed by location, entry or selection under the public-land laws and then only subject to such conditions as the Commission may impose. 16 U. S. C., 1952 ed., sec. 818.

Since I have already concluded that the authority of the Secretary under section 7 to classify lands does not extend to lands outside of grazing districts which are applied for by a State under section 8(c), I am of the opinion that it would not be incumbent upon a State to disprove a classification already assigned to the selected land. Since lands applied for under section 8(c) are not within the scope of the power of classification conferred upon the Secretary by section 7, it follows that any classification which may have been assigned to lands prior to the recipt of a State's exchange application must be disregarded in considering the State's application.

Section 7, after authorizing the Secretary to classify lands "which are * * * more valuable or suitable for any other use than for the use provided for under this Act * * *," provides:

> * * * Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: * * * Where such lands are located within grazing districts reasonable notice shall be given by the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: *Provided*, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided.

Of course, if the lands selected by the State have, in addition to being classified, been opened to entry and if, as a result of such opening, rights in the classified lands have been initiated, the State's selection must be rejected. In such a case, however, the rejection would not be because the lands have been classified but because prior rights have been initiated and the lands selected do not meet the test prescribed in section 8(c) that the selected lands must be surveyed grazing district lands not otherwise reserved or appropriated or unappropriated and unreserved surveyed public lands.

A question arises whether, in view of the provision in section 7 granting a preference right to a qualified applicant to enter land classified as the result of his application, such an application would require the rejection of a subsequent State application to select the same land under section 8(c). In my opinion, if the application has not been allowed, the selected land is still available for acquisition by the State. This is so because an application to enter land subject to classification under section 7 confers no right in the land upon the applicant. It merely gives the applicant a preference right to enter the land if it is opened to entry as the result of his application. Thus,

if a State's application under section 8 were filed after the receipt of an application under section 7 to enter lands under the homestead laws and after the lands were classified pursuant to the homestead application, but before the allowance of the entry, the State's application could not properly be rejected merely because of that classification. Until the application to enter has been allowed, no rights have been initiated in the lands which could defeat the State's application. The Secretary would be compelled in such a situation, under the mandatory language of section 8(c), to allow the State's application, if the State otherwise met the requirements of section 8.

I conclude, therefore, that the Secretary does not have authority to reject a State's application to exchange lands under section 8(c) of the Taylor Grazing Act, as amended, merely because the lands may have been classified under section 7 of the act prior to the filing of the State's application, and that until rights have been initiated in the classified land by the allowance of a preference right application under section 7 or, following the opening of classified lands, by the entry on the opened land by qualified applicants, any such classification which may have been assigned to the lands selected by a State for exchange purposes must be disregarded in considering the State's exchange application.

I do not wish it to be understood by what has been said above that I hold the opinion that a State's application to exchange lands under section 8(c) of the Taylor Grazing Act, as amended, must be allowed in every case. No such application is, of course, subject to allowance unless and until the State has met all of the applicable requirements of section 8.

WILLIAM J. BURKE,
Acting Solicitor.

UNITED STATES v. AL SARENA MINES, INC.

A-26248 *Decided January 6, 1954*

Mining Locations—Application for Patent—Jurisdiction of Department.

This Department may entertain a protest filed by the Department of Agriculture and thereafter institute adversary proceedings against the validity of mining claims at any time prior to the issuance of patents covering such claims.

When an applicant for a mineral patent, after proper notice and full opportunity to be heard, withdraws from a hearing held to determine the validity of its claims without putting in its evidence, it is proper for the manager to proceed with the hearing and to base his decision on the evidence submitted against the claims.

When an applicant for a mineral patent charges that it submitted evidence at a hearing which does not appear in the transcript of the hearing and when the manager admits that a complete transcript at the hearing was not obtained because of the conduct of the applicant's counsel, this Department will not undertake to render a final opinion on a record admittedly incomplete.

When the evidence which the appellant claims is not included in the transcript consists largely of the reports of an assay and where it is admitted that the transcript of the hearing is not complete in that respect, then in order to prevent the very substantial delay necessarily occasioned by a remand of the proceedings, appellants are permitted under supervision of employees of this Department, to take new samples and submit new assay reports for the record in place of those alleged to have been omitted from the original transcript.

It appearing from all the evidence including new assay reports of samples taken jointly by the appellants and the Bureau of Mines that a sufficient mineralization of appellants' claims is established to justify a prudent man in the further development of the property and the other requirements of the statute having been complied with, patent to the appellants should issue.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Al Sarena Mines, Inc., has appealed to the Secretary of the Interior from a decision of the Assistant Director of the Bureau of Land Management dated April 27, 1951, holding for cancellation mineral entry, Oregon 0665, insofar as that entry embraces 15 lode mining claims situated within the Rogue River National Forest in Oregon.

I

On October 4, 1948, Al Sarena Mines, Inc., applied for mineral patents covering 23 lode mining claims situated in secs. 20, 21, 28, 29, and 30, T. 31 S., R. 2 E., W. M., Oregon. Thereafter, in accordance with the provisions of 30 U. S. C., 1946 ed., sec. 29, notice that application had been made to patent the claims was published. No adverse claims were made during the period of publication and, thereafter, the purchase price was paid. On April 6, 1949, a Final Certificate of Mineral Entry was issued to the applicant. The certificate recited that upon presentation of the certificate to the Director of the Bureau of Land Management "together with * * * the proofs required by law, a patent shall issue * * * if all then be found regular." The certificate contained the added statement that "Patent will be withheld by the Bureau of Land Management pending a report by the Regional Administrator, Region I, upon the bona fides of the claims."

On April 13, 1950, a protest against the validity of 15 of the 23 claims was filed with the land office by the Regional Forester, North Pacific Region, Department of Agriculture. The protest included a request that the 15 claims be declared null and void and that the appli-

cation for patents on the 15 claims be rejected. On April 25, 1950, adversary proceedings were instituted by the United States against the validity of the 15 claims involved in this proceeding and embraced in the entry of Al Sarena Mines, Inc. The notice of the contest, which was addressed to "Al Sarena Mines, Inc.," set forth the charges that the land involved in the 15 claims listed in the notice is nonmineral in character, that minerals have not been found on any of the claims in sufficient quantities to constitute a valid discovery, and that, as to five of the claims, the requisite expenditure of $500 in improvements and development had not been made.

On May 22, 1950, Al Sarena Mines, Inc., filed an answer to the charges, embodying what it designated as demurrers and a motion to dismiss.

A hearing was set for September 13, 1950, before the manager of the land office at Portland, Oregon. At the appointed time, representatives of the contestee appeared with counsel and the Department of Agriculture was represented by counsel. The contestee demanded at the outset of the hearing that its demurrers be acted upon before proceeding with the hearing on the merits of the case. The manager thereupon ruled on the demurrers as motions and denied them. The contestee then noted an appeal to the Solicitor of the Department. Contestee and its counsel then withdrew from the hearing.

Before the contestee departed, counsel for the Department of Agriculture stated that the intention of that Department was not to have the claims declared null and void but only that the application for patents be denied.

After the departure of the contestee and its counsel, counsel for the Department of Agriculture introduced its evidence relating to the validity of the claims.

On December 14, 1950, the manager sustained the protest and canceled the mineral entry with respect to the 15 claims. On April 27, 1951, the Assistant Director of the Bureau of Land Management affirmed the decision of the manager, stating that his decision did not invalidate the claims and that the claimant could retain possession of the claims for the purpose of continuing its efforts to make valid discoveries.

On appeal, Al Sarena Mines, Inc., makes 18 assignments of error. Briefly stated, its contentions are, first, that it was entitled to a patent prior to the filing of the protest and, therefore, that this Department had no authority to entertain the protest; and, second, that there were certain irregularities in the protest and in the manner in which the hearing was conducted.

II

The appellant's first contention is that it had acquired equitable title to the claims by reason of its payment of the purchase price, the submission of its proofs, the acceptance of those proofs by the local land office, the issuance to it of a final certificate, and the fact that no adverse claim had been made during the period of publication, and, therefore, that this Department had no jurisdiction to entertain the protest of the Department of Agriculture.

The contention is untenable. The power of this Department to supervise and control the sale and disposition of the public domain, including mineral lands, has long been recognized. *Knight* v. *United States Land Association*, 142 U. S. 161 (1891). Its jurisdiction to inquire into the extent and validity of rights to public land claimed against the Government does not cease until the legal title to the land has passed. *Michigan Land and Lumber Co.* v. *Rust*, 168 U. S. 589, 593 (1897). "A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws." *Cameron et al.* v. *United States*, 252 U. S. 450, 460 (1920). As the Supreme Court said in the *Cameron* case, "the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void."

Thus, there must be a determination by this Department, the tribunal in which jurisdiction is vested under the public-land laws, that the requisites of the mining laws have been fulfilled. *Cf. Cosmos Exploration Company* v. *Gray Eagle Oil Company*, 190 U. S. 301, 312 (1903). Among the requisites to obtain a patent to a lode mining claim is the discovery of "valuable mineral deposits" "within the limits of the claim located." (30 U. S. C., 1946 ed., secs. 22 and 23.) In determining whether mineral deposits discovered on public lands are "valuable," the test to be applied is whether they are "such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine." *Cameron et al.* v. *United States*, *supra*, 252 U. S. at p. 459.

The fact that the protest by the Department of Agriculture was not filed until after the expiration of the 60 days of publication of the application for patent does not deprive this Department of jurisdiction to inquire into the merits of the patent application nor does the fact that no adverse claim was filed within that period vest equitable title in the appellant.

Section 2325 of the Revised Statutes (30 U. S. C., 1946 ed., sec. 29), after providing for the publication of the notice of application for patent, provides:

> * * * If no adverse claim shall have been filed * * * at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent * * * and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

Under section 2325, third parties may object to the issuance of a mineral patent, even after the period of publication has passed, upon a showing "that the applicant has failed to comply with the terms of this chapter." If equitable title vested upon the expiration of the publication period in the absence of an adverse claim, there would be no justification for permitting third parties to show noncompliance with the law.

Section 2326 of the Revised Statutes (30 U. S. C., 1946 ed., sec. 30) provides that where an adverse claim is filed during the period of publication all proceedings shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived. That provision, however, has application only to claims of rival mineral claimants and has no application to adversary proceedings instituted by the Government. *Cameron et al. v. United States*, *supra*, 252 U. S. at p. 463.

The regulations of the Department relating to mineral entries within national forests (43 CFR, Part 205) require that the Department of Agriculture shall be notified of applications for patents (43 CFR 205.2) and they do not impose a mandatory time limit within which a protest against a mineral entry must be filed by the Department of Agriculture. In fact, the regulations provide that a protest on behalf of that Department may be initiated against any claim, mineral or nonmineral, embracing lands within a national forest "at any time prior to patent." (43 CFR 205.6.)

The fact that the appellant had paid the purchase price, submitted its proofs, and received a final certificate does not detract from this Department's authority to inquire into the merits of the claims. Unless there has been a discovery of valuable minerals within the limits of the claims, there have been no valid locations and the claims cannot go to patent.

The payment of the purchase price and the submission of proofs are but two of the requisites of the mining laws, and although the possession of a final certificate has been regarded by some courts as vesting equitable title in the holder thereof, nevertheless the courts recognize the authority of this Department to cancel such a certificate if it be shown that there has not been a compliance with the require-

ments of the law. *United States* v. *Record Oil Company et al.*, 242 Fed. 746 (D. C. Calif., 1917); *El Paso Brick Company* v. *McKnight*, 233 U. S. 250 (1914). Even after a judgment of a court in a proceeding by an adverse claimant under section 2326 of the Revised Statutes on the question of the right of possession, this Department may pass upon the sufficiency of the proofs to ascertain the character of the land and to determine whether the conditions of the mining laws have been complied with. See *Lane* v. *Cameron*, 45 App. D. C. 404 (1916). The cases cited by the appellant are not to the contrary. They deal with the right of possession as between rival mineral claimants and not with the question of title as between the Government and an applicant for a mineral patent. As between the Government and such an applicant, equitable title does not pass until the applicant has done everything which, under the law, is required of him to secure the legal title. *Teller* v. *United States*, 113 Fed. 273, 280 (8th Cir., 1901).

The final certificate issued to Al Sarena Mines, Inc., certainly does not imply that equitable title passes therewith. It recites on its face that patents will issue upon the presentation of the proofs required by law, and it contains the additional statement that the patents will be withheld pending a report on the bona fides of the claims. This latter statement is in accordance with the requirements of the departmental regulations that the Department of Agriculture must be notified of applications for patents to mineral lands within national forests and with the recognized authority of this Department to inquire into the question whether equitable title has vested. *Cf. Brown* v. *Hitchcock*, 173 U. S. 473, 476 (1899).

Thus, all that can be claimed by the appellant through the possession of the final certificate is that patents will be issued if all is found proper, i. e., if full compliance with the mining law is shown.

It is apparent, therefore, that until this Department had determined that all the requirements of the law had been met, it had ample authority to entertain the protest of the Department of Agriculture and to order adversary proceedings against the validity of the claims.

III

Turning now to the assignments of error respecting the protest and the conduct of the hearing to determine the validity of the claims, for the most part, they appear to be immaterial and without substance.

It is asserted that the protest was fatally defective because it was directed against the "Al Sarena Mining Company" and not "Al Sarena Mines, Inc.," was undated, and was not under oath.

The misnaming of the appellant in the protest was cured by the notice of contest addressed to the appellant under its proper name.

The appellant responded to the notice, and it was not misled or harmed in any way by the slight error made by the Department of Agriculture in naming the locator. *Cf. Cole* v. *Ralph*, 252 U. S. 286, 293 (1920).

As to the other two alleged irregularities in the protest, it is sufficient to say that the regulations of the Department do not require such protests to be dated, and they specifically provide that they need not be under oath. 43 CFR 205.6.

Of the numerous irregularities in the conduct of the hearing alleged by the appellant, only a few require mentioning.

The first of these is that the manager erred in conducting the hearing in accordance with the regulations of the Department as embodied in Title 43 of the Code of Federal Regulations instead of under the "rules of evidence and the rules of practice and procedure as obtain in Federal and State courts" as allegedly agreed upon between the appellant and the former Solicitor of the Department. The former Solicitor of the Department has denied that any such agreement was made.

The second charge to be mentioned is that the manager erred in continuing the hearing after the appellant had noted its appeal from the rulings on the demurrer, and that all the testimony offered by the Department of Agriculture after the appellant had withdrawn from the hearing is inadmissible and may not be considered.

This contention is based upon the assertion that the Federal Rules of Civil Procedure were applicable to the hearing, and that under those rules evidence on the merits of a case cannot be received during the pendency of an appeal from a ruling on demurrers filed in the proceeding. The Federal Rules of Civil Procedure were not applicable to the hearing, and the Rules of Practice of the Department (43 CFR, Part 221) do not provide for any such procedure. The purpose of the hearing under the Department's Rules of Practice is to give both parties full opportunity to present their evidence and if a claimant chooses to withdraw from the hearing without submitting his evidence or subjecting the Government witnesses to cross-examination, he must bear the consequences.

The appellant's claim that this Department refused to give the appellant a bill of particulars is without foundation. The notice of contest set out explicitly the charges brought against the claimant.

Nor was the appellant harmed in any way by the fact that the manager permitted the Department of Agriculture to change its plea that the claims be declared null and void to one that the application for patent be denied.

The contest was initiated to determine the validity of the claims. All that this Department was seeking to do was to obtain sufficient

information upon which to base a determination of the validity of the claims. Any charges made by the Department of Agriculture had to be proved to be substantiated, and the purpose of the hearing was to give the appellant a full opportunity to overcome these charges and to sustain its claim to a right to receive the patents. The appellant, having had full opportunity to participate in the hearing, chose to withdraw therefrom without submitting its evidence. The manager was, in such circumstance, fully justified in permitting the contestee to submit its evidence against the validity of the claims, and thereafter to base his decision on the testimony adduced at the hearing.

IV

However, after the present appeal reached the Department for consideration, representatives of the appellant were accorded an opportunity to present an oral argument to the then Solicitor. Following that oral argument, representatives of the appellant were permitted to examine the transcript of the hearing in the office of the Solicitor. Subsequently, the Solicitor received a letter dated June 23, 1951, from the appellant's secretary-treasurer in which the assertion is made that at the hearing there was read by the appellant into the record—

> * * * a wealth of legal prima-facie evidence, which evidence was received therefor without objection, but which evidence could not be found in the record by an inspection thereof.

The manager admits that a complete transcript of the proceedings was not made up to the point where the appellant and its counsel withdrew. He attributes the failure of the reporter to get a complete transcript to the boisterous conduct and the rapid and incoherent manner in which the counsel for the appellant proceeded.[1]

Neither the manager nor the reporter are to be censored if the conduct of counsel for the appellant was such that it was impossible to get a complete transcript. On the other hand, it is not the wish of this Department to penalize any claimant for the conduct of his counsel.

However, the reports of assays of samples of the various claims were not included in the file when it reached this office, and although copies thereof were later supplied, owing to the insistence of appellant that it had been greatly prejudiced by this and many other omissions in the formal record and because of the confusion resulting, it was determined to require new assays to be submitted. Pursuant thereto, by agreement between the claimant and this office, new samples were extracted from outcrops on each of the claims by a joint group consisting of a competent and registered mining engineer representing the

[1] See the manager's letter of October 2, 1950, to the Director.

appellant and a team of employees of the Bureau of Mines representing the Government. This group visited the property, inspected all the claims, and took samples from all of the claims which were carefully retained in their possession during the 5 days required to crush the samples and prepare them for shipment, and thereafter, under the control of this joint group, the samples were shipped to an acceptable laboratory for analysis. The resulting assay reports submitted and now on file show that the samples contained silver and gold of sufficient value to justify a person of ordinary prudence in further expending his time and money in an effort to develop a paying mine.

A report of the mineral examiner of the Department made in 1949 contained this statement:

> The indications are that the central mass is all mineralized to some extent, and if the prospective parallel shear and mineralized zones should prove to be extensive in length and depth, the possibilities are good that the whole mass could be developed, mined and milled at a profit by low cost large scale mining methods. The topography is such that any one of three methods might be employed, i. e., glory holing, shrinkage system and open pit mining. * * *

The examiner further discusses the costs under these various methods, and the costs estimated by him of mining and milling the material of the claims are well below the lowest of the assay reports of value. This would seem to confirm that by careful and prudent operation the appellants may continue to develop the property with reasonable hope of success. The assays, therefore, showing mineralization in paying quantities on all of the claims, and the cadastral engineer on September 27, 1948, having certified that more than $500 has been expended in development and improvements on each claim, the requirements of the statute would seem to be met.

While it may not be of legal significance, it should be noted that all of the persons, including Government employees, who have inspected this property, report that these appellants have quite obviously spent amounts estimated from $150,000 to $200,000 over a long period of years in the operation of the works, tunnels, removal of overburden, installation of a mill, etc., and this fact alone would seem to indicate that at least the appellants are themselves convinced of a future profitable development of the property. It might also be noted that the amounts already expended by the appellants are estimated to be two or three times the value of such timber as is located on the premises, which would seem to negative the suggestion which appears in the record that the appellants are more interested in the timber than in the mine.

The entire matter has had the most careful examination by this Department from all available sources, including the securing of new and independent assays of the claims under the Department's immedi-

ate supervision, and it seems that the statutory requirements have been complied with.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the case is remanded to the Bureau of Land Management with instructions to process the application for patent.

CLARENCE A. DAVIS,
Solicitor.

UNITED STATES v. M. W. MOUAT ET AL.

A–26181 *Decided January 11, 1954*

Reconsideration—Placer Mining Claim—Elements and Rule of Discovery of Valuable Mineral Deposit.

Change in factual situation by new evidence warrants modification of decision on reconsideration.

Discovery of valuable mineral deposit within limits of claim is essential to a valid location.

Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute are met.

To constitute the basis of a location, a discovery need not then yield a profit or be a paying mine provided it has a present or prospective commercial value.

RECONSIDERATION

Adversary proceedings were instituted by the United States against M. W. Mouat et al. to cancel the Lake Placer mining claim located in sec. 20, T. 5 S., R. 15 E., P. M., Montana. The manager's decision of November 5, 1947, was appealed to the Bureau of Land Management and later to the Secretary of the Interior. By his decision (A–25527) of January 27, 1949,* the second amended location was held invalid, but whether a valid discovery had been made on the original and first amended locations was not determined because the evidence "lacks the degree of completeness which would warrant an unequivocal finding that * * * the minerals on the claim do not constitute 'valuable mineral deposits.'" The case was remanded, and a second hearing was held before the manager. On March 4, 1950, he held that a valid discovery had not been made, "but inasmuch as the defendant has had, with the exception of the short time previous to the war, only since June, 1949, to do any development work on the claim, I recommend that he should have more time to conduct his hydraulic operations to see if he can present conclusive evidence

* 60 I. D. 280 (1949).

that he can develop the Lake Placer claim as a profitable placer operation."

The manager's holding was appealed to the Bureau of Land Management which held, "It does not appear that there has been a discovery." It disposed of the manager's recommendation for additional time to experiment with hydraulic operations by saying that appellant has had ample opportunity to develop the property, although when that opportunity was available was not disclosed.

The Bureau of Land Management decision was appealed again to the Secretary of the Interior. The appellants now seek to have the Secretary's decision (A-26181) of May 16, 1951,** reconsidered on two principal grounds, to wit, newly discovered evidence and errors of law.

A review of the decision indicates that the magnesium-bearing material on the claim did not constitute a "valuable mineral deposit" because "there is no demand or market" and "they have no economic value" and "there is no practicable method of using them for commercial purposes." A more careful examination of the testimony, however, reveals that the Government witnesses admitted that agricultural crops deplete the soil of magnesium and phosphate which must be restored with fertilizer (Tr. second hearing, pp. 52 and 244); that olivine is used in the process of the manufacture of such fertilizer (Tr. 33, 34); that there are unlimited quantities ("billions of tons") of olivine and other magnesium-bearing rocks on the claim (Tr. 11, 13); that these minerals have been used commercially in the manufacture of fertilizer in the States of Washington and Tennessee (Tr. 68, 34).

With regard to chromite, the decision turns on the lack of "economic value"[1] because "there is no available market"[2] and "the percentage of chromium * * * is insufficient to be regarded as a practical source of chromium."

Since the opinion was written, however, H. A. Doerner, of the Bureau of Mines, has reported a new smelting process in an article[3] in which it is said, "The preceding estimates and the excellent results

** 60 I. D. 473 (1951).

[1] The RFC engineer geologist testified as follows: "As I understand, counsel has informed me that for a discovery to be valid, it must be valuable as a matter of present fact, and anticipatory value is not to be considered." (Tr. p. 139.)

[2] However, the testimony of Mr. Sholes, a Government witness, disclosed that in the first quarter of 1949 the United States imported 306,240 short tons of chromite and produced domestically only 152 tons (Tr. p. 36). Mr. Sievers, a Government witness, testified there would probably be a market if the cost of milling could be reduced (Tr. p. 67).

[3] "Can the United States Use its Low-grade Domestic Chrome Ore?" *Engineering and Mining Journal*, August 1952. The author has left the Bureau and is employed on the appellant's property by the American Chrome Company.

achieved in smelting low-grade ore make it quite apparent that the cost of smelting 40 percent *Mouat* concentrates will not exceed the cost of smelting up-graded 48 percent material by more than 1.5 cents per pound of chromium in the alloy. The difference may be less, and it is certainly small if compared to the cost of chemical beneficiation or to the 10-cent bonus offered by GSA for up-graded or high-grade products."

The Bureau of Mines Report of Investigation 4929, dated December 1952, asserts that all of the Pacific Northwest chrome ores are suitable for making refractories. The Bureau's investigation was being conducted at the time of the second hearing and was alluded to in the testimony of one of the Government witnesses (Tr. p. 114). The results of that investigation, of course, were not then known.

In addition, Robert H. Nelson, the RFC's principal engineer and a professional mining geologist who testified in this case, has written a letter dated July 15, 1953, in which he states that he knew nothing of the Udy patents when he testified, but that he has since discovered that during the war Montana chrome concentrates were used in industry after being processed by the Udy method. That since the mineral has a demonstrable value "then a prudent man could well be justified in spending time and money to determine whether or not the chrome-bearing material occurred in sufficient amounts on the Lake Placer claim to make a paying mine out of the venture. I do not know if sufficient testing has been done on the property to determine this point."

Since the decision was written, the appellant has executed a contract with a corporation for extensive mining development operations of his chromite holdings, and the corporation in turn has a contract to produce many million dollars of concentrates for another Government agency.

The decision under review [A–26181, May 16, 1951] concludes that the claim is invalid because "the minerals discovered on the Lake Placer claim are of such a nature that they lack value as marketable commodities" and, accordingly, a person of ordinary prudence would not be justified in the further expenditure of his time or money in an effort to develop a paying mine.[4]

Even though the later factual developments mentioned above have clouded the wisdom of that finding, a brief review of the law is deemed advisable.

The congressional policy governing the case provides:

[4] Other placer locations in the proximity of this claim have been patented though the mineral discovered was chrome crystals (Tr. 155).

* * * all valuable mineral deposits in lands belonging to the United States * * * shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purcahse * * *. [30 U. S. C., 1946 ed., sec. 22.]

The discovery of a valuable mineral deposit within the limits of the claim is an essential to a valid location.[5] "To constitute a valid discovery upon a claim for which patent is sought, there must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes * * *." *East Tintic Consolidated Mining Claim*, 40 L. D. 271.

The rule of discovery was announced by the Department in *Castle* v. *Womble*, 19 L. D. 455, which was quoted and approved by the Supreme Court of the United States in *Chrisman* v. *Miller*, 197 U. S. 313. It reads:

Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

Some of the factors which the prudent man would be privileged to examine in determining whether he had made a discovery are announced in *Jefferson-Montana Copper Mines Company*, 41 L. D. 320, as follows:

The size of the vein, as far as disclosed, the quality and quantity of mineral it carries, its proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts, would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not. [P. 324.]

To hold that, in order to constitute a discovery as the basis of a location, it must be demonstrated that the discovered deposit will, when worked, yield a profit, or that the lands containing it are, in the condition in which they are discovered, more valuable for mining than for any other purpose, would be to defeat the object and policy of the law. It is enough if the vein or deposit has a present or prospective commercial value. * * * No court has ever held that in order to entitle one to locate a mining claim, ore of commercial value, in either quantity or quality, must be discovered. Such a theory would make most mining locations impossible. *Lindley on Mines*, sec. 336.

In other words, "Miners may be a hopeful clan, but they are not Don Quixotes tilting at imaginary windmills. They would be, if they prospected without hope of acquiring any claims, should fruition come to their efforts." *United States* v. *Mobley*, 45 F. Supp. 407.

[5] "* * * but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." 30 U. S. C., 1946 ed., sec. 23. "Claims usually called 'placers,' including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims * * *." 30 U. S. C., 1946 ed., sec. 35.

January 11, 1954

Neither the Federal nor State statutes require that, to constitute a placer, the ground shall yield any specific quantity of precious metals. Neither is it required that the deposits of mineral shall be sufficiently extensive to pay operating expense, in order to locate and maintain a valid placer claim. *Murray* v. *White*, 42 Mont. 483; 113 Pac. 756.[6]

It does not follow that because there is no clear profit arising from the sale of an article that has been manufactured or produced, that it therefore has no commercial value. *Narver* v. *Eastman*, 34 L. D. 123.

If it were the ordinary nature of valuable mining claims to appear, upon the instant of discovery, to be of sufficient value to pay to work them, why make the requirements of these expenditures in development before the issuance of patent? The whole spirit of the statute, and the construction given by the learned tribunals that have considered them, is not that the prospector must find a paying mine before be can locate his claim. If it were, mining prospecting in these regions would suffer an instant and well nigh total paralysis.[7]

* * * It is argued that a discovery sufficient to justify the expenditure of time and money in the development of a mining claim must necessarily be greater than that which is necessary to justify the expenditure of money for the purpose of exploration, with the reasonable expectation that, when developed, the claim will be found valuable as a placer mining claim. Counsel for the plaintiffs in error have assumed for the word "development" a broader meaning than was intended in the charge. The court did not mean that, in order to comply with the law, there must be such a discovery as to justify the expenditure of time and money upon a claim to the extent of opening up the whole thereof and acquiring an exhaustive knowledge concerning its resources. The word as it was used by the court, and as in connection with the whole charge it must have been understood by the jury, was equivalent to the word "exploration", and was used in the sense in which it was employed in *Chrisman* v. *Miller*, 197 U. S. 313 * * *. *Charlton et al.* v. *Kelly*, 156 Fed. 433, 436.

The claimant's good faith has not been impugned in any of the proceedings. The fact that the claim in question affords a camp site for the mining operations is recognized as an "incidental advantage" [8] to the locators, as long as the essentials of a valid location are present.

With regard to the absence of pyrrhotite on the claim and the invalidity of the second amended location, the decision is not modified. On reconsideration, the conclusion of the former decision is modified to conform with this opinion.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Acting Director of the Bureau of Land Management is reversed.

CLARENCE A. DAVIS,
Solicitor.

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[6] To the same effect, see *Tan* v. *Storey*, 21 L. D. 440, *Book* v. *Justice Mining Company*, 58 Fed. 106, 124.

[7] Judge De Witt, in dissenting opinion in *Shreve* v. *Copper Bell Mining Company* (Montana), 28 Pac. 315, 323, quoted with approval by Lindley and "concurred in by the majority of the court on this point." 139 Am. St. Rept. 182.

[8] *United States* v. *Iron Silver Mining Co.*, 128 U. S. 684.

VLADIMIR P. HAVLIK
JOSEPH V. HAVLIK

A-26824 *Decided February 8, 1954*

Desert-land Entries—Lands Enterable.

Lands which are timbered are not enterable under the Desert-Land Act.

Lands which are of submarginal agricultural value and adaptable only for the growing of pasture grasses and which are valuable for timber production or development cannot be classified as suitable for desert-land entry.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Vladimir P. Havlik and Joseph V. Havlik have appealed to the Secretary of the Interior from the decision of April 24, 1953, by the Assistant Director of the Bureau of Land Management, affirming the rejection by the manager of the Portland land office of their applications (Oregon 01611 and 01612, respectively) for desert-land entries on certain lands in secs. 5, 6, and 7, T. 23 S., R. 10 E., W. M., Oregon,[1] on the basis of a classification of the lands as commercial timberlands.

All of the vacant, unreserved, and unappropriated public land in Oregon was withdrawn from settlement, location, sale, or entry and reserved for classification by Executive Order No. 6910 dated November 26, 1934 (43 CFR 297.11). By section 7 of the Taylor Grazing Act, as amended (43 U. S. C., 1946 ed., sec. 315f), the Secretary of the Interior (or his designated representative) is authorized, in his discretion, to examine and to classify such withdrawn land and, when he finds that land to be more valuable or suitable for purposes other than those provided for by the Taylor Grazing Act, to restore such land to entry.

The lands in question are located about 30 miles south of Bend, Oregon, in an area where irrigation during part of the growing season is required for the production of cultivated crops. Because of the elevation (4,700 feet) the growing season is quite short.

The lands were formerly part of a Carey Act[2] irrigation project which failed. However, it has been held that the lands have a valid water right, and irrigation structures have been constructed which would permit irrigation.

The chief obstacle to the allowance of the Havliks' applications is the presence on the lands of a stand of lodge-pole pine.

Section 2 of the Desert-Land Act states that "All lands exclusive of timber lands and mineral lands which will not, without irrigation,

[1] The applications were filed pursuant to the Desert-Land Act (43 U. S. C., 1946 ed., sec. 321 *et seq.*).

[2] 43 U. S. C., 1946 ed., sec. 641. This act provides for the reclamation by public-land States of desert lands, as that term is defined in the Desert-Land Act.

produce some agricultural crops shall be deemed desert lands * * *." (43 U. S. C., 1946 ed., sec. 322.) In *Riggan* v. *Riley*, 5 L. D. 595 (April 12, 1887), involving a contest against a desert-land entry, there was a conflict between the contestant and the contestee as to the wooded nature of an 80-acre tract. The contestee produced evidence that the growth of trees on the land was scrubby and that there were from 1 to 3 acres of timber on the north forty and from 5 to 10 acres of timber on the south forty. The contestant's witnesses claimed that, apparently with respect to the south forty, there were timber trees from 2 to 3 feet in diameter and 40 to 60 feet in height growing on 15 to 35 acres of the tract. The Department held that a fair preponderance of the evidence showed that the south forty was timber land and, therefore, not subject to entry under the act. While the case was decided on another ground, it was stated that if the testimony shows "that there are several acres of timber on the land, such land cannot be entered under said act." (P. 596.)

On June 27, 1887, a circular from the Commissioner of the General Land Office to registers and receivers regarding desert-land entry announced that "Lands containing sufficient moisture to produce a natural growth of trees, are not to be classed as desert lands." (5 L. D. 709.)

In a letter from the Secretary of the Interior to the Commissioner of the General Land Office, dated May 11, 1888 (6 L. D. 662), the applicability of the Desert-Land Act to timber lands was further considered as a result of a petition from citizens of the Territory of Arizona, which charged that the General Land Office was canceling every entry which contained more than four mesquite trees per acre. After discussing the characteristics of mesquite trees, Secretary Vilas stated:

> * * * I think it can be fairly gathered also from the act and the reasons which brought about its passage that the phrase "timber lands" as used therein did not have reference to land upon which there were but few mesquite trees.
>
> It was well known at the time when the desert land law was enacted by Congress (and it must have been known to that body) that in the region of country to which its application extended there were extensive areas of land which in the main possessed the characteristics of desert land in that they were hilly and rocky, but which were covered with a growth of valuable timber. Such lands would not produce an agricultural crop after the timber had been cut from them without first being irrigated, and in many instances even irrigation would not make them productive. They were valuable chiefly for their timber. It was to such lands that the exception in the second section of the desert land act applied, and not necessarily to lands upon which mesquite trees were growing. If lands are not hilly and rocky and are covered with timber, they cannot be entered under the desert land act. They must be entered either under the timber land act, or under the settlement laws. If the lands are not hilly and rocky and have but few ordinary timber trees upon them, they are not subject to entry under the desert land act, because the existence of such trees is evidence of the fact that

the land is not desert. If the ordinary forest trees will grow upon land, there is sufficient moisture in the soil to render the land non-desert in character. But as before shown the fact that mesquite trees grow upon land is not evidence of the non-desert character of the soil.

From all which I am clearly of opinion and therefore advise you that where it is clearly shown that the land without irrigation will not produce an agricultural crop, it is subject to entry under the desert land act, even if such land has some or even a considerable growth of mesquite trees upon it. The mesquite is, sometimes at least, a desert tree, as sage brush is a desert shrub; and the character of the land must be determined by the other rule laid down by the statute. Nor can the mesquite be regarded as timber, and thus effect the question.

In *Houck* v. *Bettelyoun*, 7 L. D. 425 (1888), there was considered a desert-land entry lying for 2 miles on both sides of a river. There was also a 40-acre lake on the entry, with a 3- to 5-acre grove of trees on the shore of the lake, many of the trees having a diameter exceeding 12 inches. Timber also lined both banks of the river, extending back many rods in some places. Witnesses estimated that there were 2 or 3 or over 5,000 trees on the entry. The entryman himself admitted the existence of 343 trees over 12 inches in diameter, about 200 being on one 40-acre tract. One witness counted 53 trees over 2 feet in diameter. The Department said that as there were several acres of timber on the land, it could not be entered under the desert-land law. The Department also quoted the statement in Secretary Vilas' letter of May 11, 1888, *supra*, to the effect that if ordinary forest trees will grow on land, there is sufficient moisture in the soil to render the land not desert in character.

In *Dillon* v. *Moulton*, 15 L. D. 271 (1892), a contest was brought against a desert-land entry on the ground that the land was not desert land. The Department canceled the entry, holding that the evidence showed "that there is a natural growth of timber on the tract, which is sufficient to except the tract from entry under the desert land law" (p. 272). The Department also stated, "It is immaterial whether the growth of timber is of value or not. The mere fact that there is a natural growth of timber on the tract will except it from the operation of the act." (P. 272.)

It is apparent from the foregoing that the Department has considered that the presence of a natural growth of timber disqualifies land as desert land in two ways: (*1*) it brings the land into the category of "timber lands," which are excluded from the operations of the desert-land law, and (*2*) it indicates that there is sufficient moisture in the land to bar it from consideration as desert land. The Department, however, has not laid down any hard and fast rule or formula to apply to determine just what is sufficient to constitute land as timber land. Each case has apparently been considered on the basis of the evidence presented in the particular case.

The records on the appellants' applications contain reports of field investigations made on March 5, 1951, by the District Forester of the Bureau of Land Management. These reports characterize the entire areas applied for as being covered by a "heavy" or "dense" stand of lodge-pole pine of various ages, a large percentage of which is merchantable. The reports further state that the lands are under active forest management by the Bend Forest Office, Bureau of Land Management. Another report by the District Range Manager estimated the value of the timber on the lands applied for as being $9,578.25, and commented that there was active logging from deeded land in the area.

After the appellants appealed to the Director from the rejection of their applications by the manager, another field examination of the lands was made on June 5, 1951. The examiner reported that the lands were covered by a stand of lodge-pole pine varying from good to poor in quality, and that the lands were producing a crop of merchantable timber.

The appellants have not denied that the lands in question are covered with a heavy growth of lodge-pole pine. They assert only that the pine is practically worthless, that it has been used for fuel for the most part, and that it has never been used for lumber purposes.

Under the rule stated by the Department in *Dillon* v. *Moulton*, *supra*, the value of the timber on land is immaterial to a determination of whether or not the land is to be considered as timber land within the meaning of the desert-land act. The criterion is whether there is a natural growth of timber on the land. Without deciding whether this rule is too strict or limited and recognizing that no quantitative or qualitative standards for determining what constitutes timber lands have been established by the Department, it would seem that the lands in question would fall within any reasonable concept of timber lands. That is, the lands are apparently covered in their entirety with a substantial natural growth of ordinary forest trees, a portion of which has commercial value.

In the circumstances, it appears that the lands applied for are timber lands within the meaning of section 2 of the Desert-Land Act and, therefore, that they are not subject to entry under the act.

Even if the lands applied for were not considered to be timber lands within the meaning of the Desert-Land Act, the appellants would not be entitled to a classification of the lands as suitable for entry under the act. The authority of the Secretary of the Interior under section 7 of the Taylor Grazing Act to classify land is not limited to a mere determination as to whether a tract of land applied for under a certain act meets the requirements of that act. Other factors bearing upon the most appropriate use of the land can be considered. *J. C.*

Aldrich, A–24041 (February 26, 1947). Therefore, it is within the authority of the Department to consider the forested nature of the lands applied for by the appellants and determine whether they would be more valuable for timber production than for agricultural use. Cf. *Carroll Forest Linn*, A–26810 (December 1, 1953).

The field reports in this case indicate that, because of the elevation of the land (4,700 feet), the growing season is short; that the soil is coarse volcanic ash or pumice; and that the land is adaptable only for the production of pasture grasses and hay. The appellants themselves have said that they intended to seed the land to clover and other grasses and to devote the land exclusively to the production of beef cattle and hay.

In view of the submarginal agricultural value of the land and its value for timber production and development, the lands applied for cannot properly be classified as suitable for desert-land entry.

The decision of the Assistant Director of the Bureau of Land Management is affirmed.

ORME LEWIS,
Assistant Secretary.

PATENTS IN FEE

Indian Lands—Allotted and Heirship Lands—Issuance of Patents in Fee—Necessity for Applications—Discretion of Secretary of the Interior—Effects of Issuance of Patents in Fee—Termination of Indian Trusteeship—Civil and Criminal Jurisdiction Over Patent-in-Fee Indians.

The statutes authorizing the Secretary of the Interior to issue patents in fee to Indian allottees or to the heirs of such allottees do not permit him to issue such patents unless the allottee or his heirs have made an application for the issuance of such patents. As the issuance of a patent in fee abrogates the tax exemption of the land covered by the patent, the requirement of an application by the allottee or his heirs must be implied.

The issuance of patents in fee to Indian allottees or their heirs does not result in extinguishing Indian guardianship or trusteeship, since the restrictions on the alienation of allotted lands are in the nature of covenants running with the land, and are not personal to the allottee. As long as a patent-in-fee Indian maintains his tribal relations, he is entitled to the same consideration and services as other members of his tribe.

Under the statutes authorizing the Secretary of the Interior to issue patents in fee to Indian allottees or their heirs, he has a wide area of discretion, and the issuance of such patents may not be compelled by mandamus even if a showing of competency can be made, for the Secretary may legitimately consider other factors than competency, such as the effect of the issuance of a patent in fee upon the consolidation of Indian lands.

When an Indian to whom a trust patent has been issued under the General Allotment Act receives a patent in fee for the whole of his allotment, he becomes subject to the laws, both civil and criminal, of the State of his resi-

dence, notwithstanding the fact that he may subsequently come into the possession of other trust lands by inheritance, or devise, or further allotment of surplus lands, subject to the qualification, however, that he does not become amenable to State jurisdiction with respect to those matters which are reserved to Federal jurisdiction by Federal statutes.

The death of an Indian allottee does not in itself terminate the trust to which the allotment is subject, and while the Secretary of the Interior may issue patents in fee to his heirs, he is not compelled to do so, and may not do so unless the competent heirs have applied for the same.

M-36184 FEBRUARY 15, 1954.

To ASSISTANT SECRETARY ORME LEWIS.

This responds to your memorandum of September 8, relating to a letter dated September 17, 1952, from Mr. Paul L. Fickinger, Area Director of the Billings Area Office of the Bureau of Indian Affairs, to Mr. Dillon S. Myer, who was then Commissioner of Indian Affairs.

This office has been advised that while no response was ever formally made to the letter, the questions raised therein were informally discussed with Mr. Fickinger when he came to Washington shortly after the letter was received, and it was explained to him that his impression that Indian trusteeship could be extinguished by exercising the powers conferred upon the Secretary of the Interior by existing legislation was not well founded. I believe that the explanation so given him was correct.

Mr. Fickinger, in his letter, called attention to two statutes which, he believed, would make it possible to issue patents in fee to competent Indians, whether or not they made application for the issuance of such patents. He refers to the acts of May 8, 1906 (34 Stat. 182, 25 U. S. C., 1946 ed., sec. 349), amending section 6 of the General Allotment Act of February 8, 1887 (24 Stat. 390), which provided that the Secretary of Interior "may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple * * *," and to the act of May 29, 1908 (35 Stat. 444, 25 U. S. C., 1946 ed., sec. 404), which provided that the Secretary of the Interior "shall ascertain the legal heirs" of deceased allottees, and "if satisfied of their ability to manage their own affairs shall cause to be issued in their names a patent in fee simple" for their lands.

It is true that neither the act of May 8, 1906, nor the act of May 29, 1908, in terms requires that an application for a patent in fee must be made by the allottee or heirs of an allottee, but the courts have nevertheless held that a patent in fee may not properly be issued by the Secretary of the Interior under authority of the cited acts without the

application or consent of the allottee. It had previously been held in *Choate* v. *Trapp*, 224 U. S. 665 (1912), that the tax exemption of allotted lands was a vested right of the allottees, and could not constitutionally be abrogated even by Congress. As the issuance of a patent in fee would abrogate the tax exemption, the courts held that a requirement of an application by the allottee must be implied.[1] Most of the court contests were an outgrowth of the issuance by the Department of thousands of fee patents in 1918 and the following years without the application or consent of the allottees in an effort to hasten their emancipation.[2] After the courts had held that the issuance of the forced fee patents was not authorized, congressional recognition of that principle was given in legislation authorizing their cancellation by the Secretary of the Interior in cases in which the lands had not been mortgaged or sold.[3]

The act of May 8, 1906, insofar as it applies to the issuances of patents in fee to the heirs of deceased allottees, was virtually superseded, moreover, by the act of May 29, 1908,[4] which in turn was practically superseded by sections 1 and 2 of the act of June 25, 1910 (36 Stat. 855, 856), as amended by the act of February 14, 1913 (25 U. S. C., 1946 ed., secs. 372 and 373). This act authorized the Secretary of the Interior to determine the heirs of deceased allottees, and permitted allottees to make wills disposing of their allotments with the approval of the Secretary of the Interior; and also authorized the Secretary to issue patents in fee to competent heirs or devisees, or to cause their lands to be sold or partitioned under certain circumstances.[5] Although the 1910 act, like the preceding legislation, was silent on the question whether a patent in fee could be issued to the heirs of a deceased allottee without their application or consent, it has been held that a patent in fee could not be issued to an heir of an allottee unless he had made application for the same.[6]

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[1] See *United States* v. *Chehalis County*, 217 Fed. 28 (D. C. Wash., 1914); *Morrow* v. *United States*, 243 Fed. 854 (8th Cir. 1917); *United States* v. *Benewah County*, 290 Fed. 628 (9th Cir. 1923); *United States* v. *Dewey County*, 14 F. 2d 784 (D. C. S. D., 1926); *United States* v. *Comanche County*, 6 F. Supp. 401 (D. C. Okla., 1934); *Board of Commissioners of Caddo County* v. *United States*, 87 F. 2d 55 (10th Cir. 1936); *United States* v. *Board of Commissioners of Pawnee County*, 13 F. Supp. 641 (D. C. Okla., 1936); *United States* v. *Ferry County*, 24 F. Supp. 399 (D. C. Wash., 1938); *United States* v. *Nez Perce County*, 95 F. 2d 232 (9th Cir. 1938); *United States* v. *Lewis County*, 95 F. 2d 236 (9th Cir. 1938); *Glacier County* v. *United States*, 99 F. 2d 733 (9th Cir. 1938); *Board of Commissioners of Jackson County* v. *United States*, 100 F. 2d 929 (10th Cir. 1938).

[2] For a history of this episode, see H. Rept. No. 669, 76th Cong., 1st sess.

[3] Act of February 26, 1927 (44 Stat. 1247), as amended by the act of February 21, 1931 (46 Stat. 1205); *United States* v. *Nez Perce County, Idaho*, 95 F. 2d 232, 236 (9th Cir. 1938).

[4] See case of *Joseph Black Bear*, 38 L. D. 422 at 424.

[5] Under section 1 of the 1910 act, the Secretary could cause the lands to be sold if he found one or more of the heirs to be incompetent.

[6] See *United States* v. *Ferry County*, 39 F. Supp. 1007 (D. C. Wash., 1941) and *United States* v. *Nez Perce County, Idaho*, 95 F. 2d 232 (9th Cir. 1938).

Moreover, even if patents in fee could be issued to allottees or the heirs of allottees without their application or consent, such action would not result in extinguishing Indian guardianship, or trusteeship. A patent-in-fee Indian, who maintains his tribal relations, is entitled to the same consideration and services as other members of his tribe. The reason for this is that the restrictions on the alienation of allotted lands are in the nature of covenants running with the land, and are not personal to the allottee. Thus, the issuance of a patent in fee to an Indian does not betoken complete emancipation but merely enables the patentee freely to alienate the particular tract of land covered by the patent. If he inherits other land, he cannot alienate such land, unless another patent in fee is issued to him.[7]

On the basis of Mr. Fickinger's letter, you have formulated three particular legal questions relating to the issuance of patents in fee and their effect.

The first of these questions is whether, under existing law, the Secretary of the Interior has the power to issue patents in fee to the heirs of an allottee, and whether he must do this in the event that he ascertains that an heir has the ability to manage his own affairs. This question has already been partly answered; the Secretary does have the power under existing law, namely, the act of June 25, 1910, as amended,[8] to issue patents in fee to the heirs of an allottee, provided that they have made application for the issuance of such patents, and are found to be competent to manage their own affairs. As to the further question whether the patents in fee *must* be issued by the Secretary to such heirs as he finds to be competent, it may be said that the Secretary has, under the act of June 25, 1910, as amended, a wide area of discretion, notwithstanding the language of the statute which is, that if "the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he *shall* issue to such heir or heirs a patent in fee for the allotment of such decedent." In the context of the whole statute, the purpose of which appears to be to confer large discretionary powers on the Secretary, it is clear that the word "shall" is not mandatory. In law, the words "shall" and "may" are often convertible terms, and the almost identical language of the act of May 8, 1906, has been construed by the Department and by the courts as permissive rather than mandatory.[9] Since the Secre-

[7] See *Johnson* v. *United States*, 283 Fed. 954 (8th Cir. 1922); *United States* v. *Kilgore*, 111 F. 2d 665 (10th Cir. 1940).

[8] In Sol. Op., M–36003, dated June 7, 1950, the Department held that the Secretary also has the power to issue patents in fee under the act of May 14, 1948 (62 Stat. 236, 25 U. S. C., 1946 ed., sec. 483). This statute expressly provides that the patent in fee may be issued "upon application of the Indian owner."

[9] See cases of *Joseph Black Bear*, 38 L. D. 422 at 424, and *Ex Parte Pero*, 99 F. 2d 28, 34 (7th Cir. 1938).

tary must be "satisfied" of the competency of an applicant for a patent in fee, it is apparent that he has discretion. Indeed, there are other factors than competency that may legitimately be considered, and have been considered, by the Secretary in deciding whether to issue a patent in fee. Thus, it has been established policy to consider whether the issuance of the patent would adversely affect the consolidation of Indian lands. 25 CFR sec. 241.2 (a) expressly declares that "the issuance of a patent in fee to any Indian holding land under a trust patent is discretionary," and subdivision (c) of the same section of the regulations provides that a patent in fee may be denied "when the land applied for lies within an area largely occupied and used by Indians whose lands are held in a trust or restricted status."

Your second specific question is whether an Indian, having received a patent in fee to his allotment, becomes subject to the laws, both civil and criminal, of the State in which he resides, notwithstanding the fact that he may later come into the possession of other trust lands. The answer to this question would seem to depend upon how section 6 of the General Allotment Act of February 8, 1887, as amended by the act of May 8, 1906, is read in the light of various circumstances under which the question might arise. Section 6, as amended, declares that at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee "then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside * * *." In the first place, the allotment for which the patent in fee has been issued must have been made pursuant to the General Allotment Act, or some other allotment act which embodies its provisions by reference.[10] There are, however, many allotments which have not been so made. In the second place, the patent in fee must have been issued to the original allottee rather than to an heir of the allottee. The Department has held that an Indian who holds an allotment by inheritance or devise does not become subject to the criminal laws of the State of his residence when a patent in fee has been issued to him,[11] and the same conclusion would seem to hold with respect to the civil laws of the State of his residence.[12] In the third place, it would seem logical to hold that as long as part of an original allotment is still held in trust by the United States for an allottee, he is not subject to the civil

[10] See *Celestine* v. *United States*, 215 U. S. 278 (1909), and *Eugene Sol Louie* v. *United States*, 274 Fed. 47 (9th Cir. 1921).

[11] See 58 I. D. 455.

[12] A contrary conclusion was reached in *People* v. *Pratt*, 80 P. 2d 87 (Calif.). However, the court based its decision on the provisions of the General Allotment Act, as amended, relating to the issuance of patents in fee to "allottees." The act of 1910, as amended, which authorizes the issuance of patents in fee to heirs, and which contains no declaration that the issuance of the patent shall subject the patentee to the laws of the State, was neither mentioned nor discussed.

or criminal laws of the State of his residence even though a patent in fee has been issued to him for the remainder of his allotment.[13] In the fourth place, the allottee to whom a patent in fee has been issued for the whole of his original allotment may subsequently receive another allotment in trust by neither inheritance nor devise but by virtue of the enactment of a statute providing for additional allotments from the surplus lands of the tribe. In *State* v. *Munroe*, 274 Pac. 840 (Sup. Ct. Mont., 1929), the court held that a Blackfeet Indian who had been allotted under the act of March 1, 1907 (34 Stat. 1035), and received a patent in fee for this allotment, was subject to State criminal jurisdiction, notwithstanding the fact that he had subsequently received a trust allotment of surplus lands under the act of June 30, 1919 (41 Stat. 16).

While, on the basis of the decided case, it is my conclusion that when an Indian to whom a trust patent has been issued under the General Allotment Act receives a patent in fee for the whole of his allotment he becomes subject to the laws, both civil and criminal, of the State of his residence, notwithstanding the fact that he may subsequently come into the possession of other trust lands by inheritance, devise, or further allotment of surplus lands, an important qualification must be attached to this conclusion, namely, that he would not be subject to State jurisdiction with respect to those matters which are reserved to Federal jurisdiction by Federal statutes. For example, if such an Indian inherited an interest in a trust allotment, the interest would still be subject to probate by the Secretary of the Interior under the act of June 25, 1910, *supra*. Moreover, such an Indian, if he committed in the Indian country against the person or property of another Indian, or other person, one of the crimes specified in the so-called Major Crimes Act (now 18 U. S. C., sec. 1153), would be subject to prosecution in the Federal courts.[14]

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[13] There appear, however, to be neither departmental nor judicial decisions on this point, possibly because the issuance of a patent in fee for part of an allotment has not been too frequent.

[14] Prior to the revision of the Federal criminal code by the act of June 25, 1948 (62 Stat. 757), the governing provision on major crimes by Indians was 18 U. S. C., sec. 548, which was not entirely clear on the question whether an Indian who committed one of the major crimes against the person or property of another Indian on fee-patented lands within the exterior boundaries of an Indian reservation was subject to prosecution in the Federal rather than the State courts. Federal jurisdiction was denied in the cases of *Eugene Sol Louie* v. *United States*, *supra*, and *State* v. *Johnson*, 249 N. W. 284 (Wis., 1933), and upheld in *United States* v. *Frank Black Spotted Horse*, 282 Fed. 349 (D. C. S. D., 1922). The Department, in a letter dated November 20, 1942, to the Attorney General of the United States, espoused Federal jurisdiction. Whatever doubt existed seems to have been removed in the revision of the criminal code, which provides for Federal jurisdiction in such cases. 18 U. S. C., sec. 1151, defines the term "Indian country" as including all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent * * *." See *State ex rel. Irvine* v. *District Court*, 239 P. 2d 272 (Sup. Ct. Mont., 1951).

Such complexities and distinctions as these have rendered the grant of State jurisdiction over Indians contemplated by the General Allotment Act largely ineffective. The sponsors of that legislation assumed that the allotment of the Indians in severalty would be but the prelude to the termination of their tribal relations and the liquidation of Federal supervision over them. When that program failed to be carried out, and the Indians, despite the fact that they were now citizens, continued to maintain their tribal relations and the Government continued its guardianship over them, the subjection of the Indians to the jurisdiction of the States ceased to have much reality. State law-enforcement officers could not, after all, go around with tract books in their pockets, and being unable to distinguish a patent-in-fee Indian from a ward Indian, they did not commonly concern themselves with law violations by Indians,[15] and the theoretical jurisdiction of the States thus fell into innocuous desuetude. Thus, when it has been desired to confer on particular States criminal or civil jurisdiction over Indians, it has been accomplished by general statutes conferring such jurisdiction, irrespective of the tenure by which Indians held their lands.[16]

Your final question is whether an Indian who, after he has obtained a patent in fee to his allotment, receives other trust lands must be given those lands in trust, or whether the Secretary of the Interior may or must convey such other lands to him without restriction. It is assumed that the patent-in-fee Indian would receive the trust lands by inheritance or devise. Such being the case, it is apparent that the question has already been answered in the comments which have been made on the acts of June 25, 1910, and February 14, 1913, which are the foundation of the probate jurisdiction of the Secretary of the Interior. The death of the owner of the lands does not in itself terminate the trust under the 1910 act, and the 1913 act expressly declares that "the death

[15] This, at least, is the impression gathered from the reported cases. There are relatively few cases in which Indians have been subjected to State jurisdiction for the violation of State criminal laws because they were patent-in-fee Indians. See, in addition to the cases already mentioned, *In re Now-ge-zhuck*, 76 Pac. 877 (Kans., 1904), involving a breach of the peace; *Kitto* v. *State*, 152 N. W. 380 (Nebr., 1915), involving assault; *State* v. *Big Sheep*, 243 Pac. 1067 (Mont., 1926), involving unlawful possession of petote; *State* v. *Bush*, 263 N. W. 300 (Minn., 1935), involving trapping muskrat in closed season; *People* v. *Pratt*, 80 P. 2d 87 (Calif., 1938), involving illegal possession of metal knuckles; *United States ex rel. Marks* v. *Brooks*, 32 F. Supp. 422 (D. C. N. D. Ind., 1940), involving unlawful possession of raccoon.

[16] See the acts of June 8, 1940 (54 Stat. 249), applicable to Kansas; May 31, 1946 (60 Stat. 229), applicable to the Devils Lake Reservation, North Dakota; June 30, 1948 (62 Stat. 1161), applicable to the Sac and Fox Reservation in Iowa; July 21, 1948 (62 Stat. 1224), applicable to New York; October 5, 1949 (63 Stat. 705), applicable to the Agua Caliente Reservation, California; and finally the act of August 15, 1953 (67 Stat. 588), applicable to California as a whole, Minnesota (except Red Lake), Nebraska, Oregon (except Warm Springs), and Wisconsin (except Menominee). The last-mentioned statute also contains a general provision giving the consent of the United States to the assumption by any other State of the Union of civil and criminal jurisdiction over Indians.

of the testator shall not operate to terminate the trust or restrictive period * * *." Of course, the Secretary may under these statutes issue patents in fee to the heirs for these trust interests but the mere fact that a patent in fee has already been issued to one of the heirs for other lands would not oblige the Secretary to issue a patent in fee for the inherited lands, or otherwise terminate the restrictions. This follows from what has already been said concerning the effect of the issuance of a patent in fee, the discretionary nature of the Secretary's power, and the necessity for an application for a patent in fee by an heir or devisee.

It is apparent from the foregoing that Indian trusteeship cannot be terminated by invoking the powers available under existing law, and that if this objective is to be accomplished, additional legislation will be necessary.

WILLIAM J. BURKE,
Acting Solicitor.

ACQUISITION OF LAND AS REPLACEMENT OF WILDLIFE HABITAT

Recommendations Respecting Acquisition of Compensatory Lands for Wildlife Purposes—Adoption of Recommendations by Construction Agency—Acquisition of Such Lands.

Under section 2 of the act of March 10, 1934, as amended by the act of August 14, 1946 (16 U. S. C., 1946 ed., sec. 662), the Secretary of the Interior is authorized to recommend the acquisition of compensatory lands to replace wildlife habitat that would be lost as the result of the construction of a proposed reservoir, and a construction agency of the United States is authorized to include such recommendations as a part of its project plan.

Whether a construction agency may acquire such compensatory lands will depend upon the manner in which the construction of the project is authorized.

M–36212 MARCH 12, 1954.

TO THE ASSISTANT SECRETARY FOR WATER AND POWER DEVELOPMENT.

In a memorandum dated March 4, 1954, in substance you asked me the following question:

Does the act of March 10, 1934, as amended (16 U. S. C., 1952 ed., secs. 661–666c), authorize Federal construction agencies to include in project-planning reports, as one of the "means and measures that should be adopted to prevent loss of and damage to wildlife resources," the acquisition of compensatory lands to replace fish and wildlife habitat that would be lost as a result of the construction of a proposed reservoir?

I am of the opinion that this question must be answered in the affirmative. Section 2 of the act cited (16 U. S. C., 1952 ed., sec. 662), requires that the Fish and Wildlife Service and the head of any State agency exercising administration over the wildlife resources of the State be consulted in connection with any impoundment, diversion or other control of water "with a view to preventing loss of and damage to wildlife resources," and that the recommendations of the Secretary of the Interior and the head of the appropriate State agency "for the purpose of determining * * * means and measures that should be adopted to prevent loss of and damage to wildlife resources" "*shall* be made an integral part of any report submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects." [Italics supplied.] It is implicit in the law, I think, that the Federal agency may, although it is not required to do so if it disagrees, adopt these recommendations of means and measures, if they are within the scope of the legislative intendment, as part of its plan.

The language of the first paragraph of section 2 does not limit the character of the means and measures that may be recommended. The acquisition of land to replace habitat that will be destroyed is certainly an appropriate means or measure to prevent loss of and damage to the wildlife resources of the area. Accordingly, a recommendation by the Secretary of the Interior or by a State agency that land be acquired for this purpose and the adoption by a construction agency of such a recommendation as a part of a project plan would, in my judgment, be quite compatible with the statutory provision just referred to. If, pursuant to such a recommendation, the construction agency adopts as part of its project plan, either explicitly or implicitly, the acquisition of compensatory land for wildlife resources, authorization to construct the project substantially as reported would permit such acquisition. Of course, if the construction agency resisted recommendations of the Secretary of the Interior or of the head of the appropriate State agency that compensatory lands be acquired, the acquisition of such lands would not be included as a part of the project plan. In this situation, the acquisition of such lands would neither be required nor authorized unless authorization to construct the project went beyond the plan of the project as reported and dealt specifically with the matter of compensatory lands.

I am aware of the fact that the second paragraph of section 2 speaks of the "cost of planning for and the construction or installation and maintenance of any such means and measures," and requires such costs to be included as an integral part of the cost of a project. While it is true that one does not speak of the "construction or installation and maintenance" of land, I am not persuaded (as has been suggested)

that this language was intended to confine recommendations of the means and measures for the prevention of loss of or damage to wildlife resources only to things that might be constructed or installed in the ordinary and literal sense. Rather, I think these words were used broadly and were intended to convey the meaning of "putting into effect" of any such means and measures. The first paragraph of section 2 evinces a clear concern for the loss of or damage to wildlife resources and I find no evidence that the words "construction or installation and maintenance" were used in the second paragraph as words of limitation respecting the means and measures that might be recommended under the first paragraph to accomplish this purpose. Rather, it appears to me that the Congress invited State agencies and the Secretary to recommend whatever means and measures they might deem appropriate.

WILLIAM J. BURKE,
Acting Solicitor.

DOWER RIGHTS IN RESTRICTED INDIAN ESTATES

Restricted Indian Estates—Dower Rights and Estates by the Courtesy—Law of Montana.

The long-standing departmental practice of awarding dower rights to the widows, and estates by the courtesy to the widowers, of Indian spouses who died while owning restricted Indian allotments on the theory that such rights and estates are implied incidents of estates of inheritance should also be followed to the same extent as elsewhere in Montana, whose law on these subjects cannot be regarded as peculiar.

M–36192 MARCH 25, 1954.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

In your memorandum of December 2, 1953, you advised this office that the Area Counsel of the Billings, Montana, Area Office of the Bureau of Indian Affairs had expressed the opinion in a memorandum dated July 15, 1953, that restricted Indian lands in the State of Montana were not subject to dower rights, and requested that, in view of the long-standing departmental practice of awarding dower rights to the widows, and estates by the courtesy to the widowers, of Indian spouses who died while owning restricted Indian allotments, the validity of the practice be reexamined.

The appropriateness of the departmental practice appears to have been first recognized in 1898 in the cases of *St. Dennis* v. *Breedan*, 27 L. D. 312, which involved a tenancy by the courtesy in an allotment on the Umatilla Reservation in Oregon, and *Harrison McCauley et al.*,

27 L. D. 399, which involved dower rights in allotments on the Omaha Reservation in Nebraska. The Umatilla allotment was made pursuant to the act of March 3, 1885 (23 Stat. 340), and the Omaha allotment was made pursuant to the act of August 7, 1882 (22 Stat. 341). Each of these statutes provided, *inter alia*, that the law of descent in force in the State should apply to the allotments after patents thereof had been executed and delivered. It was declared in these cases that inasmuch as it was the policy of the Government to break up the tribal relations, and to bring the Indians under State law as fast as practicable, the policy would best be served by recognizing courtesy and dower. These rights were based on the view that the allotment acts provided for estates of inheritance rather than of purchase, and that courtesy and dower were implied incidents of all estates of inheritance. The decisions in both of these cases were made by Willis Van Devanter, who subsequently became an Associate Justice of the Supreme Court of the United States, and whose authority in all matters relating to the public lands came to be universally recognized. After these decisions were rendered, rights of courtesy and dower in restricted Indian estates were regularly recognized in all States in which they existed under State law, including Montana.[1]

The Department was not alone, moreover, in recognizing rights of dower and courtesy in restricted Indian lands. During this period, the courts participated in the administration of restricted Indian estates,[2] and this jurisdiction was not abandoned until the adoption of the act of June 25, 1910 (36 Stat. 855, 25 U. S. C., sec. 372), which not only conferred upon the Secretary of the Interior the function of ascertaining "the legal heirs" of decedents but declared that his decisions thereon should be "final and conclusive." The courts, like the Department, held during this period that rights of dower and courtesy attached to restricted Indian estates.

The leading cases were *Parr* v. *United States*, 153 Fed. 462, and *Wheeler* v. *Petite*, 153 Fed. 471, both decided on the same day, May 6, 1907, by the Circuit Court of the District of Oregon. In the first case, it was held that the surviving husband of a deceased allottee of

[1] Awards of dower were actually confined to a small number of States. Of the States in which allotted Indian lands were located, Arizona, California, Idaho, Nevada, New Mexico, Texas, and Washington had the community property system in which, of course, dower was not recognized. The States of Colorado, Iowa, Kansas, Minnesota, North Dakota, and Wyoming had abolished dower long before the General Allotment Act of February 8, 1887 (24 Stat. 388). Oklahoma abolished dower rights in 1890, South Dakota in 1893, Utah in 1898, and Nebraska in 1907. Thus, there are today only four States in which Indian allotted lands are located that still recognize dower, namely, Michigan, Montana, Oregon, and Wisconsin. See William F. Walsh, *Commentaries on the Law of Real Property*, vol. I (1947), ch. 12.

[2] The act of August 15, 1894 (28 Stat. 286, 305), was construed as conferring power to determine heirs upon the Federal courts. See *Hallowell* v. *Commons*, 239 U. S. 506 (1916). See, also, Cohen, *Handbook of Federal Indian Law* (1942), p. 110.

the Umatilla Indian Reservation in Oregon who had been allotted under the act of March 3, 1885, *supra*, was entitled to an estate by the courtesy, and in the second that the widow of an allottee of the Grand Ronde Reservation in Oregon who had been allotted under the General Allotment Act [3] was entitled to dower rights. As in the departmental decisions, the rights were deduced as an implied incident of estates of inheritance, and were justified as necessary to establish a permanent home for the Indian family. As the court explained in the *Petite* case:

> The general act for the allotment of lands upon Indian reservations * * * was to furnish a permanent home, ultimately, for the families of such Indians. The act of 1887 is in consonance with this idea. Indeed, the allotments were by that act to be made to the heads of families, and, where so made, of course, there was no allotment to the spouse. In order, therefore, to carry out the idea of affording a permanent home for the Indian family, there was a purpose, manifestly, to secure the widow in the home of a deceased head of a family by some permanent right. Dower is suited to this purpose. Many of the states and territories, perhaps, most of them, at the time of the adoption of the act of 1887, had, and have now, statutory regulations respecting dower, so that it may be reasonably inferred that, by the provision of the act that the allotted lands shall descend according to the laws of the state or territory in which they shall be situated, it was the purpose of Congress that the widow should have her dower in such allotments, and thereby be measurably secured in the permanent family home.[4]

In addition, there was a long line of Oklahoma cases in which rights of dower, as well as rights of courtesy, in restricted Indian lands were upheld.[5]

I proceed now to examine the grounds which have been advanced for questioning the traditional practice. While these grounds are seemingly diverse, they are readily reducible to a single basic contention. This is, that the substantive and procedural incidents of the Montana law of dower are so peculiar as to be irreconcilable with the basic provisions of the Federal statutes governing the probate of restricted Indian estates by the Secretary of the Interior. It is pointed out that section 1 of the act of June 25, 1910, directs the Secretary to ascertain "the legal heirs" of any Indian who has died before the expiration of the trust period without making a will disposing of his allotment, and that section 5 of the General Allotment Act provides that the allotment shall descend to "his heirs according to the laws of

[3] Section 5 of the General Allotment Act provided for patents, declaring that the United States would hold the land for a period of 25 years in trust for the benefit of the allottee, "or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located * * *."

[4] At page 473.

[5] See, for instance, *Cook* v. *Childs*, 152 Pac. 88 (1915); *Morris* v. *Sweeney*, 155 Pac. 537 (1915); *Bridges* v. *Wright*, 155 Pac. 883 (1916); *Longest* v. *Langford*, 242 Pac. 569 (1925); and *Patterson* v. *Joines*, 244 Pac. 585 (1925).

the State or Territory where such land is located * * *." Under the law of Montana, it is contended, however, that the estate which a widow obtains as her dower falls to her not as heir but by virtue of her marital right. It is true that the court said in *Dahlman* v. *Dahlman*, 72 Pac. 749, 750 (Mont., 1903):

> This estate falls to her, not as an heir, or by will of her husband, but by virtue of her marital right, and without regard to the law relating to the rights of heirs, or to any will made by her husband.[6]

Indeed, this is the general view of the nature of the right of dower. But neither this Department nor the courts which have allowed dower in restricted Indian estates have ever declared that the widow is endowed as an heir. They have proceeded rather on the theory that the right to dower is an incident of an estate of inheritance, which Congress intended should attach to the estate when its heirs were determined, and there is no denying that dower is such an incident since it attaches only to estates of which the husband was seized in fee simple during his lifetime.

As for the procedural incidents of the Montana law of dower, these are no more peculiar than the substantive law of dower. A comparison of the Montana law with the law of other States which provide for dower will show, indeed, that the Montana law on the subject is quite typical. As for the procedural incidents of dower under State law, they have never been a problem for departmental officials for the simple reason that the Department has never felt itself bound to carry them out. The 1910 act conferred on the Secretary of the Interior the power of determining heirs "under such rules and regulations as he may prescribe," and the procedural incidents of the State laws are not binding upon him.

It is argued also that if the Department allows dower rights, it will also be compelled to follow State law in such matters as widow's or widower's allowances and homestead rights. As a matter of fact, the Department has done so whenever such rights have been incidents of the distribution of interstate estates under State law.[7] Indeed, the practice of allowing dower and other rights under State law may well have been influenced and accelerated by the fact that when section 2 of the act of June 25, 1910, was amended by the act of February 14, 1913 (37 Stat. 678), it was provided that if the will of the testator

[6] The same doctrine is reaffirmed in the more recent case of *Mathey* v. *Mathey*, 98 P. 2d 373 (Mont., 1940), in which the court held that a deed by a widow conveying her distributive share of an estate did not relinquish her dower rights in shares of the estate received by the heirs of the decedent.

[7] As to widow's or widower's allowances, see estate of *May Caramony*, 35418–1916, Winnebago 350, and estate of *John Fisher*, 77919–1919, Winnebago 350. As to homestead rights, see estate of *Standing Bear*, 103091–11, Santee 350, and estate of *Lucy Lincoln*, 21693–1914, Winnebago 350.

were disapproved, "the property of the testator shall thereupon descend or *be distributed* in accordance with the laws of the State wherein the property is located * * *." "Distribution" is, of course, a wider concept than "descent."

An attempt is also made to weaken the authority of the judicial decisions which have recognized dower in restricted Indian estates by distinguishing them from the departmental decisions. It is said that because the Oregon cases involved the Umatilla Allotment Act of March 3, 1885, *supra*, which put into force in Oregon not only the State law of "descent" but also the law of "alienation," the courts were bound to recognize the right of dower, since it exists only "a rule of alienation of land." As a matter of fact, dower is an obstacle to the alienation of land; since the husband may not destroy the wife's inchoate right of dower by alienating the land, it is not a method of alienating but of preserving the husband's estate in the hands of the wife for her lifetime. Moreover, the contention that dower is a rule of alienation is wholly inconsistent with the theory that it is an incident of the wife's marital rights.

The long line of cases in Oklahoma is distinguished by the fact that they were decided under section 31 of the act of May 2, 1890 (26 Stat. 81, 94), which put in force in the Indian Territory the general laws of the State of Arkansas published in 1884 in Mansfield's Digest, which expressly included dower in the long catalogue of legal topics mentioned in the statute. But it is not apparent why the specific mention of dower in this statute, along with many other topics, is so much more significant or decisive than the general mention of the law of descent in one form or another in the allotment statutes. To accept such an argument would give altogether too much weight to what may be merely terminological accident.[8] Moreover, estates by the courtesy have been awarded under the 1890 act although courtesy is not expressly mentioned therein.

As for the cases decided primarily under the General Allotment Act, it is contended that these were decided upon an erroneous theory inasmuch as Congress had theretofore adopted the act of February 28, 1891 (26 Stat. 794), amending section 1 of the General Allotment Act, which had confined allotments to "heads of families." But this change in the General Allotment Act did not affect the basic theory of the court that it was necessary to secure to the widow a permanent family home. She may have been allotted prior to her marriage on another reservation than that upon which her husband resided, and

[8] As a former Solicitor of the Department said in 58 I. D. 499, 505 (1943), "it would be misleading to attribute a common and careful discrimination in phraseology to diverse draftsmen and Congresses."

in such a case to require her to return to the reservation of her origin would undoubtedly break up what had become the family home.

Of course, to say all this in justification of the departmental practice in awarding dower rights is not to say, however, that no adequate ground could originally have been found for denying dower rights. Any right which is only an implied right is always subject to attack. Nevertheless, the practice of awarding dower in restricted Indian estates has been in existence for more than half a century, and has become a rule of property, known to all who had any concern with Indian lands. If any change is to be made in the practice, it should be made prospectively by an act of Congress. Otherwise, untold confusion would result. Only very recently the Supreme Court of the United States had occasion to decline to disturb a long-standing practice in the field of the antitrust laws which exempted organized baseball from their scope even though the practice could not be said to be a rule of property, and its correctness was open to serious doubt. Said the Court:

> The present cases ask us to overrule the prior decision and, with retrospective effect hold the legislation applicable. * * * We think that if there are evils in this field which now warrant applications to it of the antitrust laws it should be by legislation.[9]

You are advised that rights of dower and courtesy in restricted Indian estates should be continued to be allowed in all States where they are recognized by State law, including the State of Montana.

WILLIAM J. BURKE,
For the Solicitor.

INDIAN IRRIGATION WELLS ON SAN CARLOS PROJECT LANDS

Indian Irrigation Projects—San Carlos Indian Irrigation Project—Pima-Maricopa Indians—Right of Indians To Drill Irrigation Wells on Project Lands—Acts of June 7, 1924, and March 7, 1928—Landowners' Agreement—Repayment Contract—Gila Decree.

Under the act of June 7, 1924, which authorized the construction of the Coolidge Dam for the purpose, first, of providing water for the irrigation of the lands allotted to the Pima Indians, and, second, for the irrigation of such other lands as in the opinion of the Secretary could be served with the water impounded by the dam, without diminishing the supply necessary for the Indian lands, the primary objective in the formation of the project was made the welfare of the Indians but the act did not necessarily grant them a perpetual preference to the use of the stored waters, and once the Secretary of the Interior had included in the San Carlos Indian irrigation project

[9] See *Toolson* v. *New York Yankees*, 346 U. S. 356 (1953).

equal amounts of Indian and non-Indian lands, all lands obtained an equal right to the use of the stored waters.

Moreover, the act of March 7, 1928, which authorized the Secretary of the Interior to merge the Florence-Casa Grande project with the San Carlos project, broadened the Secretary's power over both projects, and, in effect, therefore, modified the 1924 act.

In any event, the provision of the act of June 7, 1924, is limited to the waters stored by the Coolidge Dam, and, hence, has no bearing on the rights of the Pima-Maricopa Indians in the pumped water of the project.

Under the terms of the Landowners' Agreement, the Repayment Contract and the Gila Decree governing the operation of the San Carlos project, the pumped waters of the project are reserved as a common project water supply for the equal benefit of Indian, as well as non-Indian, landowners.

The departmental construction of the legislation and agreements governing the San Carlos project has been acquiesced in by Congress and confirmed by Congress in the adoption of the act of March 7, 1947, authorizing the San Carlos Irrigation and Drainage District to drill new irrigation wells as agent of the San Carlos project.

While the provision of the Landowners' Agreement governing the use of pumped water and irrigation wells in or upon Indian lands differs in its language from the corresponding provision of the Landowners' Agreement governing non-Indian lands, the differences in language are explained by the varying circumstances affecting Indian and non-Indian lands, and the language was not intended to confer greater rights on Indians than non-Indians, so far as the drilling and operation of irrigation wells are concerned.

Hence, the Pima-Maricopa Indians of the Gila River Indian Reservation may not drill and operate irrigation wells on lands of the reservation which are included in the San Carlos project.

M-36208 APRIL 28, 1954.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

You have requested that I express an opinion on the question whether the Pima-Maricopa Indians of the Gila River Indian Reservation may drill and operate irrigation wells on lands of the reservation which are included in the San Carlos Indian irrigation project.

This question appears to have arisen because in approving conditionally an employee-operator agreement between the Pima-Maricopa Indian Community and one W. N. Shawver for the proper cultivation and operation of tribal lands on the south side of the reservation, sections 3 and 8 of the agreement, dealing with the development of a supplemental water supply by means of the construction of irrigation wells, were deleted with the understanding that these sections might be restored if it should be determined that they were legally permissible.

The question has also arisen because in the suit entitled *United States of America* v. *Paul M. Brophy*, Civil No. 1703, in the District Court for the District of Arizona, in which the Government is seek-

ing to restrain the defendant from operating a private irrigation well on lands included in the San Carlos project, counsel for the Pima-Maricopa Indian Community has filed a brief *amicus curiae* in which it is asserted that the Indians have a right to construct irrigation wells on project lands, even though such a right may not be possessed by non-Indian landowners.

In this litigation, the Government upon recommendation of this Department is contending that, under the applicable legal provisions, the underground water supply which is being tapped by the defendant's privately constructed well is reserved as a common project water supply, and that the defendant's well is, therefore, being illegally operated.

It is, however, the contention of counsel for the Pima-Maricopa Indian Community that, whatever may be the rights of non-Indian landowners in the underground water supply of the project, the Indian landowners of the project have a superior right to drill wells for irrigation purposes by virtue of the provisions of the legislation governing the San Carlos project, and the agreements entered into, and the proceedings had pursuant to such legislation.

The San Carlos Indian irrigation project, which consists of 100,000 acres, of which 50,000 are in Indian and 50,000 in non-Indian ownership, may be traced back to the act of May 18, 1916 (39 Stat. 123, 130), which authorized the construction of a diversion dam and necessary controlling works at a site above Florence, Arizona, to provide for the irrigation of 27,000 acres of privately owned lands and 35,000 acres of Indian lands by utilizing the natural flow of the Gila River in accordance with the respective priorities of the lands as determined "by agreement of the owners thereof with the Secretary of the Interior or by a court of competent jurisdiction." As this project, which came to be known as the Florence-Casa Grande project, did not prove to be satisfactory because of its lack of storage facilities, the act of June 7, 1924 (43 Stat. 475), authorized the construction of a dam across the canyon of the Gila River near San Carlos, Arizona, now known as the Coolidge Dam, "for the purpose, first, of providing water for the irrigation of lands allotted to Pima Indians on the Gila River Reservation, Arizona, now without an adequate supply of water and, second, for the irrigation of such other lands in public or private ownership, as in the opinion of the said Secretary, can be served with water impounded by said dam without diminishing the supply necessary for said Indian lands." The construction of the project to be known as the San Carlos irrigation project was, however, made contingent upon the execution of a repayment contract by a State irrigation district representing the owners of the lands in private ownership. Before such a contract could be executed, the act of March 7, 1928 (45 Stat.

200, 210), provided for the construction of a pumping and drainage system for the San Carlos project, the development of power at the Coolidge Dam, and gave authority to the Secretary of the Interior "in his discretion to effect a merger of the Florence-Casa Grande project in whole or in part with the San Carlos project," and "to require payments for both projects under the terms of the San Carlos Act."

In accordance with the applicable legislation, the Secretary of the Interior approved, on March 24, 1926,[1] the form of a Landowners' Agreement to be executed by individual non-Indian landowners who wished to have their lands included in the San Carlos project, and the agreement was executed by them in subsequent years. The Secretary also elected to merge the Florence-Casa Grande project with the San Carlos project, and on June 8, 1931, the San Carlos Irrigation and Drainage District, having in the meantime been organized under State law, entered into a repayment contract with the United States providing for the inclusion in the San Carlos project of the Indian and non-Indian lands above mentioned, and for the fulfillment of the obligations of the respective parties.[2] On June 29, 1935, the United States District Court for the District of Arizona, in litigation to which the San Carlos Irrigation and Drainage District and the United States on behalf of the Pima-Maricopa Indians were parties, entered the so-called Gila Decree, which adjudicated the water rights in the Gila River to which the parties in the litigation were entitled.

The Landowners' Agreement, which was executed by non-Indian landowners, contained provisions defining the rights of Indian as well as non-Indian landowners to the use of the underground waters of the project. Thus, the first and third paragraphs on page 4 of the Landowners' Agreement provide, as follows:

> * * * All underground and also all diffused surface water under, in or upon the white lands embraced in the said San Carlos project, except such as may from time to time be needed and utilized by the owners of such lands for their domestic water supply, shall at all times be available to said project for development and use as an irrigation water supply for said project; and the undersigned promises and agrees, in respect to his land which shall be taken into said project, to give to the United States or said project the necessary rights of way for the use of such waters and agrees further not to drill or operate wells in any other way or use or permit others to use said waters for irrigation contrary to any rules, orders, or regulations promulgated by the Secretary of the Interior with relation to said waters on said project. * * *
>
> Such underground and diffused surface waters as may be under, in, or upon Indian lands embraced in said project and the wells, pumps, and facilities in connection therewith, in so far as shall be permitted by law and in so far as the Secretary of the Interior shall deem proper, shall be devoted to the use and benefit of said project and the lands thereof.

[1] See file 4038–16 San Carlos No. 013, Part 3.
[2] See file 4038–16 San Carlos No. 013, Part 20.

And the last paragraph on page 5 of the Landowners' Agreement provides, as follows:

> All Indian and white lands which shall be in said San Carlos project and under said Coolidge Reservoir shall be entitled to share equally in all of the stored and pumped water of said project in so far as that shall be physically feasible, and said lands shall share equally in all of the water of said project of every nature as long as the stored and unstored water supply for said project shall be sufficient for the project's needs, and as far as that shall be physically feasible; but when, through lack of stored and pumped water, there shall be an insufficient supply of water for all of the lands of said project lying under said reservoir, the said lands so situated shall enjoy in addition to their proper share of such stored and pumped waters as may be available to the project, but within a proper duty of water allowance, the following rights in the unstored flow of the Gila River * * *.

Paragraph 7 of the Repayment Contract between the United States and the San Carlos Irrigation and Drainage District also contained a provision governing the use of the stored and pumped water of the San Carlos project, as follows:

> The stored and pumped water of the San Carlos project shall be deemed a common project water supply in which all lands in the project and under the San Carlos Reservoir shall be entitled to share equally, and all such waters shall be distributed to the lands of the project as equitably as the physical conditions permit. * * *

Finally, the Gila Decree embodied almost verbatim the opening sentence of the last paragraph on page 5 of the Landowners' Agreement quoted above.

The basic contention of counsel for the Pima-Maricopa Tribe is that by the terms of the act of June 7, 1924, which appears to put the needs of the Indians first, they are given what amounts to a continuing preference to the use of the waters of the San Carlos project, and that the provisions of the Landowners' Agreement and the Repayment Contract must be read and interpreted in the light of this preference.

It is true that some semblance of support seems to be lent to part of this contention by the language of the 1924 act and by its legislative and interpretative history. It does put the irrigation of the lands of the Indians "first," and the rights of the non-Indian landowners "second," and expressly declares that only such of the lands of the latter shall be included in the project as can be served with water "without diminishing the supply necessary for said Indian lands." Moreover, the House Committee on Indian Affairs, in reporting the legislation, stated that it had been amended to make certain that "the San Carlos irrigation project shall be constructed primarily for the benefit of the Pima Indians and that only such part of the stored water as cannot be beneficially used by the Pimas may be made avail-

able to lands in private ownership." [3] And early in 1933, the Solicitor of the Department expressed the opinion that under the terms of the 1924 act the Pima Indians were entitled to a preference to the waters impounded by the Coolidge Dam in any period of water shortage.[4]

Yet, neither the language of the 1924 act nor the statement in the House Committee report compels such an interpretation. Both are actually ambiguous. The language of the act does not speak in terms of a perpetual preference but in terms of two objectives to be accomplished by the Secretary of the Interior. In determining how much non-Indian land was to be taken into the project, he was directed to put the needs of the Indians first, and to give only secondary consideration to the needs of the non-Indians. He might thus have included 50,000 acres of Indian lands in the project, and only 25,000 acres of non-Indian lands. But the preferential treatment of the Indians upon a continuing basis would, indeed, have been the height of the impractical. Once Indian and non-Indian lands had been included in the project in equal amounts, the non-Indian landowners would have hardly agreed to any arrangement for the unequal distribution of the waters which were developed and made available by the project.

The Indians did, as a matter of fact, have a preference to the use of the natural flow of the Gila River by virtue of the fact that they were the earliest cultivators of the soil in the region, having irrigated their lands with the river water from a period antedating the white settlement of the country, and these prior rights were clearly recognized in the provisions of the Landowners' Agreement, Repayment Contract, and the Gila Decree. In the early days, the natural flow of the Gila River had been sufficient for the irrigation of the lands of the Pima Indians, and they required neither stored nor pumped water, but as the white settlers increased, and the surrounding lands were eroded, it became necessary to secure for the Indians a supplemental water supply. The Pima Indians, who had never made war upon the whites, were regarded by their white neighbors with great favor, and Congress was highly disposed to consider their needs for irrigation water. However, all the early reports on the feasibility of constructing what came to be the San Carlos project recognized that its cost would be too high, and that to make it feasible it would be necessary to take into the project a sizable quantity of non-Indian lands whose owners could share the cost of constructing it.[5] S. 966, in the Sixty-Eighth

[3] See House Report No. 618, 68th Cong., 1st sess.

[4] See memorandum dated February 19, 1933, from the Solicitor to the Secretary.

[5] See Senate Document No. 27, 54th Cong., 2d sess.; Senate Document No. 37, 56th Cong., 1st sess.; Report of Commissioner of Indian Affairs for 1904, pp. 7–21; House Document No. 791, 63d Cong., 2d sess.; and Hearings before the Committee on Indian Affairs, House

Congress, the bill which, as amended, became the act of June 7, 1924, did not in its original form even contain a direction that the needs of the Indians be considered first. Indeed, the bill merely provided that "the total cost of the project shall be distributed equally among the lands in Indian ownership and the lands in private ownership that can be served from the waters impounded in said reservoir." [6]

It is apparent from the provision of the Landowners' Agreement, declaring that all the Indian and white lands shall be entitled to share equally in all of the stored and pumped water of the project, and from the provision of the Repayment Contract to the same effect, that the Department did not then construe the act of June 7, 1924, as conferring preferential rights to such waters upon the Pima Indians. The departmental interpretation was, moreover, well known to the House Appropriation Committees which were kept fully informed concerning the progress of the construction work on the San Carlos project, and the nature of the Repayment Contract being negotiated.[7] When the Repayment Contract was finally executed, the House Subcommittee on Appropriations was informed thereof, and a copy of the contract was printed in full in the hearings.[8] If there could be said to be any doubt concerning the correctness of the departmental construction of the 1924 act, it must be presumed to have been resolved by the acquiescence of Congress. Moreover, the act of March 7, 1928, in authorizing the Secretary of the Interior to merge the Florence-Casa Grande project with the San Carlos Project, may be considered to have broadened the discretion the Secretary possessed under the act of June 7, 1924, and to have modified it to the extent necessary to effect the merger. The preferential theory of the 1924 act was not advanced by the Solicitor until after the Repayment Contract had been executed and the question arose whether the Government should consent to the entry of the Gila Decree. In view of this opinion, the advice of the Attorney General of the United States was sought, and his advice was that the Secretary of the Interior might appropriately sign the stipulation consenting to the entry of the decree, notwithstanding the fact that it provided for the equal division of stored and pumped waters between the Indian and non-Indian lands of the San

of Representatives, 66th Cong., 1st sess. on "The Condition of Various Tribes of Indians," Appendices A, B, C, Washington, 1919; "The Pima Indians and the San Carlos Irrigation Project," Information Presented to the Committee on Indian Affairs, House of Representatives, 68th Cong., 1st sess., in connection with S. 966 (Washington, 1924).

[6] See Senate Report No. 129, 68th Cong., 1st sess., where the text of the bill before its amendment in the House is given.

[7] See Hearings on Interior Department Appropriation Bill, 1926, pp. 785–87, 788–91; 1927, pp. 187–93, 203–205; 1928, pp. 157–74; 1929, pp. 273–74, 276–87; 1930, pp. 855–69; 1931, pp. 316–24; 1932, pp. 872–93; 1933, pp. 344–56; 1934, pp. 647–68; 1935, pp. 508–510; 1936, pp. 831–35; 1937, pp. 879–89.

[8] See Hearings, 1932, pp. 346–55.

Carlos project. The Secretary of the Interior accepted this advice, and executed the stipulation.[9]

It would, of course, be utterly unthinkable at this late date to revive the preferential theory of the requirements of the 1924 act. Too many rights have intervened to make such a course of action possible. Moreover, even if it were possible, it would not help the position now taken by the Pima-Maricopa Tribe. It is claiming a right to drill irrigation wells and pump the underground waters of the project from these wells. The 1924 act, however, deals solely with stored waters. While it first refers generally to "water for the irrigation of lands allotted to Pima Indians on the Gila River Reservation, Arizona," it goes on to refer to the "water impounded by said dam" (namely, the Coolidge Dam), and it is obvious that these waters can only be stored waters. The statute does not provide an aura from which a right to pumped waters may also be adduced.

It is apparent that the Landowners' Agreement itself without any implementing orders or regulations makes in unlawful for any of the non-Indian landowners to drill or operate a well for irrigation purposes. Under the applicable paragraph of the agreement "all" the underground water under all the private lands of the project are reserved to the project for its use "at all times," except for its use for domestic purposes, and the key word in the provision is "available." Each non-Indian landowner promised that all the underground water would "at all times be available to said project for development and use as an irrigation water supply for said project." To be available at all times, the underground water must always be at the disposal of the Secretary of the Interior as the manager of the project. It could not be said to be always at his disposal if he first had to issue orders to prevent the individual landowners from tapping the project's underground water supply by means of privately owned and operated irrigation wells.

It is apparent that the provision making all the underground waters available to the project is a distinct and independent declaration of purpose which is complete in itself and in no way affected by the language following it, which is set off from the rest of the sentence by a semicolon. At this point, the language ceases to be declaratory and becomes promissory, and what follows is a series of separate undertakings by the landowner designed to implement the fundamental declaration that the underground waters are to be reserved exclusively for project use. First, the landowner promises and agrees

[9] See letter, dated June 7, 1935, from the Secretary of the Interior to the Attorney General in file No. 51 (part 8), Pima, Irrigation, San Carlos Project, General.

"to give to the United States or said project the necessary rights-of-way for the use of such waters." Secondly, the landowner agrees further "not to drill or operate wells in any other way," which obviously refers to the sole exception with reference to the use of underground waters for domestic purposes. Thirdly, the landowner finally agrees "not to use or permit others to use said waters for irrigation contrary to any rules, orders, or regulations promulgated by the Secretary of the Interior with relation to said waters on said project." But this last provision does not refer to the operation of *private wells* contrary to the Secretary's orders or regulations. Actually, it refers merely to the use of the *underground waters* contrary to the Secretary's orders or regulations, and was designed obviously to regulate the operation of the *project wells*.

Moreover, the reference to "pumped" waters in the Repayment Contract and the Gila Decree must be read in the light of the provision of the Landowners' Agreement which plainly reserves or sets aside "underground waters" to the project, and thus prohibits their utilization for irrigation purposes by means of private wells, and in the light of other phrases in the provisions of the agreements which betoken that all the waters of the project are to be regarded as a common water supply or are to be distributed on a basis of equality, which could not be realized if the construction and operation of private irrigation wells were to be permitted. Thus, while a perverse reader might conceivably argue that the term "pumped waters" wherever it occurs in these provisions of the documents might in itself denote only the waters pumped through the project system of wells, such a reading becomes demonstrably untenable and utterly impossible when the term is followed as it is in the Repayment Contract, by the declaration that both the stored and pumped waters shall be deemed "*a common project water supply* in which *all* lands in the project and under the San Carlos Reservoir shall be entitled to share *equally*," and in the Gila Decree by the declaration that the lands of the project shall "share *equally* in *all* of the waters of said project of every nature" except in periods of water shortage, in which case a preference only to the natural flow of the Gila River in accordance with established priorities shall be allowed.

Finally, if there can be said to be the slightest doubt concerning the conclusion that the underground waters under project lands belong exclusively to the project, and may not be appropriated by any project landowner who has executed the Landowners' Agreement and bound himself by the Repayment Contract, it must be deemed to be completely dispelled by the legislative history of the act of March 7, 1947 (61 Stat. 8).

In that year, a condition of severe drought existed on the San Carlos project. There were, as of February 1 of that year, only 12,000 acre-feet of water in the San Carlos Reservoir, and it became imperative that new wells be drilled in a great hurry to supplement the stored water with a large amount of undeground water. Normally, the drilling of the new wells would have been a project function but so great was the emergency that it was decided to permit the San Carlos Irrigation and Drainage District to undertake the drilling of the wells as agent of the project. The act of March 7, 1947, was adopted for this purpose.

It is significant that the act authorized the district "to develop underground water within and without the area of the San Carlos irrigation project exclusively for use as a part of the common stored and pumped water supply of said project," and "to drill irrigation wells within and without the project area necessary for making underground waters available exclusively for use on all lands of the project * * *." The reports to Congress which accompanied this legislation are, however, even more significant, for they reveal the understanding of the Congress itself that the project landowners had surrendered their rights to underground waters to the project to be developed as a part of the common water supply of the project. Thus, the Senate Committee on Public Lands stated in its report:

> The San Carlos irrigation project, Arizona, comprises 100,000 acres of land, 50,000 acres of which are Indian lands, and the remaining 50,000 acres in white ownership. The project was built by the Indian Service; and, under contracts entered into between the Interior Department and the white landowners, *these deeded their right to the use of the underground water to the Department of the Interior to be developed as a part of the common water supply for the project.* [Italics supplied.] [10]

Similarly, the House Committee on Public Lands stated in its report:

> To prevent dissipation of the undergound waters, these farmers were required by the Government *to surrender their ordinary privileges of land ownership in tapping the underground water supply.* [Italics supplied.] [11]

No less explicit was the statement made on the floor of the Senate by Senator McFarland when the legislation was under consideration. He told the Senate:

> When the original bill authorizing the project was passed and the contracts were executed, the white owners were compelled to deed all their rights to underground water to the Secretary of the Interior, with the understanding, of course, that the Secretary of the Interior would develop the water for the benefit of the whole project.[12]

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[10] See Senate Report No. 23, 80th Cong., 1st sess.
[11] See House Report No. 51, 80th Cong., 1st sess.
[12] See Cong. Rec., Senate, February 11, 1947, p. 1016.

Quite apart from its legislative history, however, the very enactment of the legislation demonstrates that no project landowner was ever privileged to drill wells on project lands to tap the underground waters for irrigation purposes. The San Carlos Irrigation and Drainage District had to come to Congress to secure permission to drill wells on project lands even for the use and benefit of all project landowners, for the simple reason that the drilling of irrigation wells was under the Landowners' Agreement and the Repayment Contract reserved exclusively to the project. If any project landowner could drill irrigation wells, so could the district which represented all the district landowners, and certainly stood in no worse position than any individual project landowner. But since neither could drill irrigation wells, legislation was necessary to authorize the district to drill the needed wells as agent of the project in which the right was exclusively vested.

So far as pumped waters are concerned, the right of project landowners, whether Indian or non-Indian, to the use of such waters must be determined solely in accordance with the provisions of the agreements and the Gila Decree, and, so far as the right of non-Indian landowners to drill or operate irrigation wells are concerned, it must be concluded that such a right does not exist.

The San Carlos project is dependent upon the underground water supply for the irrigation of 20,000 acres of the project lands,[13] and the reservation of the underground water as a common project water supply is essential to the successful operation of the project. Only the plainest language in the applicable legal provisions would justify an interpretation that would deprive the project of its control over this water supply.

Although counsel for the Pima-Maricopa Indian Community concedes apparently that the project landowners who are not Indians may not drill or operate irrigation wells, he finds the right to do so of the project landowners who are Indians in the third paragraph on page 4 of the Landowners' Agreement, which, as he correctly points out, differs from the language of the first paragraph on the same page of the agreement. The difference in language does not necessarily betoken, however, a difference in purpose or result. It is true that the provision with reference to the white lands begins with "All underground and also all diffused surface water under, in or upon the white lands embraced in the said San Carlos project," while the provision with reference to the Indian lands begins with "Such underground and diffused surface water as may be under, in, or upon Indian lands embraced in said project." But various reasons suggest

[13] Hearings on Interior Department Appropriation Bill, 1929, p. 277; 1932, p. 876; 1936, pp. 834–35.

themselves to explain why the one sentence should begin with "all" while the second begins with "such."

The variations in phraseology may be wholly accidental. The two paragraphs under consideration are separated by a longish intervening paragraph which deals with the purchase by the project of wells, pumps, and other irrigation equipment that may be upon the land of white landowners, and the person who was drafting the agreement may have shifted from "all" to "such" either because he had forgotten what adjective he had employed in the previous paragraph or because he preferred variation in the phraseology. One might just as well attempt to explain why he inserted the adverb "also" before "all diffused surface waters" in the first paragraph and omitted the "also" in the third paragraph in referring to diffused surface waters. But if a more purposeful explanation is at all necessary, it may be found also in the varying circumstances with which the drafter of these provisions had to deal. One of these circumstances was that "the white lands" could be identified by a mere reference to them as such and it was possible, therefore, to speak simply of "all" the underground waters underlying *the* white lands. On the other hand, there were some Indian lands relying on pumped water which, although within the Gila River Reservation, were not brought within the project. As it was not possible to speak of the Indian lands, it became necessary to refer to "such" underground water as underlay "Indian lands embraced in said project." Another of these circumstances was that at the time the Landowners' Agreement was being drafted, a suit to adjudicate the extent of Indian water rights was being contemplated.[14] It may have been thought desirable, therefore, to be more cautious in dedicating to the project Indian rights to pumped water, and this more limited possibility could be adequately expressed by referring not only to "such" underground water but also to the use of such underground water "insofar as shall be permitted by law and insofar as the Secretary of the Interior shall deem proper." Moreover, these phrases would also take care of the domestic water problem without specifically mentioning it. Finally, there was the circumstance that, while the right to use the wells, pumps, and other similar facilities of white landowners could be acquired only by purchase, and was for this reason probably made the subject of a separate paragraph, the right to use pumps, wells, and other facilities on Indian lands was under the control of the Secretary of the Interior, and was being covered in the same paragraph as the right to use the underground waters. Again, the introductory "such"

[14] The act of May 18, 1916, *supra*, contemplated such a suit, and the proceedings which were instituted resulted in the Gila Decree.

was natural in this context. Indeed, it is possible that the qualifying phrases "insofar as shall be permitted by law" and "insofar as the Secretary of the Interior shall deem proper" may have been intended to refer only to the use of wells, pumps, and similar facilities.

Whatever may be the true explanation of the somewhat enigmatic phraseology of the Indian paragraph of the Landowners' Agreement, it certainly cannot be accorded an interpretation which would be wholly inconsistent with other plain provisions of the Landowners' Agreement, the Repayment Contract, and the Gila Decree, which reserved the underground water as a common water supply of the project, and established an equality of right in its use.

Counsel for the Pima-Maricopa Indian Community also contends that while the agreements and the decree speak of "stored and pumped water" of the project, these documents nowhere define what is meant by the project water supply, or by pumped water. In the sense that the documents do not begin with a paragraph headed "Definitions," this is true. However, the provisions which they do contain, and which have already been analyzed make it perfectly plain that all the underground water underlying project lands, whether Indian or non-Indian, are dedicated to the project, and hence constitute implied definitions. Indeed, the contention that the agreements and the decree do not define what is meant by pumped waters harbors an inherent contradiction. If they do not, then non-Indian, as well as Indian, landowners of the project may construct and operate their own irrigation wells. Yet it is conceded on behalf of the Indians that the non-Indian landowners possess no such rights.

The construction of the documents governing the rights of the landowners of the San Carlos project that has been advanced in this opinion is completely borne out by various memoranda or letters from John F. Truesdell to the Commissioner of Indian Affairs during the period when the project was being formed. Although Truesdell bore the official title of "Superintendent of Irrigation," he was a lawyer rather than an engineer, and he was in charge of drafting not only the Landowners' Agreement but also the Repayment Contract. He was, indeed, the central figure in the negotiations with the landowners who organized the San Carlos Irrigation and Drainage District and executed the Repayment Contract.

From the very beginning Truesdell was a champion of equality in the treatment of both the Indian and non-Indian landowners, and of the view that the act of June 7, 1924, permitted such equal treatment. Thus, in a memorandum dated February 20, 1930, summarizing a discussion in Washington, D. C., of a draft of the Repayment Contract dated January 11, 1930,[15] he stated:

[15] See File No. 4038–16 San Carlos 013, Part 16.

Turning to the stored flow, the Landowners' Agreement provided, as this contract provides, that each acre of land in the project should be entitled to share equally with all other acres in the stored and pumped waters, so that whatever amount of water should at any time be stored in the San Carlos Reservoir each acre of land would have an equal right to it and the same would be true as to pumped waters in so far as they might turn out to be physically available for the particular lands in question.

Speaking of the 1924 act, he expressed the same view more poetically in a memorandum dated March 18, 1931, from him to the Commissioner of Indian Affairs in which he discussed a proposed change in paragraph 7 of a draft of the Repayment Contract dated February 27, 1931.[16] It was then in the same language as at present, but it had been suggested that it should be made to provide that all the stored and pumped water should be deemed to be a common water supply in which all the lands of the project shoud be entitled to share "in the manner provided in sec. 1 of the Act of June 7, 1924 (43 Stat. 475), and all such waters shall be distributed to the lands of the project as equitably as the physical conditions make possible." Truesdell objected to such a provision because it might result in an unequal distribution of the stored and pumped waters of the project. He pointed out that it was based upon the erroneous conception that the 1924 act "means or may mean that the Indian lands of the project are to enjoy some priority or preference in such waters, and especially the stored ones, over the non-Indian lands in the project," and took the position that it would leave the non-Indian landowners of the project who were surrendering to the project their water rights, which in many instances had high priorities, "up in the air as to a most vital element of value of their property." He reminded the proponents of the proposed change in the Repayment Contract that "All figures on the economic feasibility of the project have been based upon no lands enjoying any priority in the stored or pumped water," and that this plan had been carried out in the passage of the 1924 act. Speaking of the requirements of the act, he said:

This clause about the public and private lands does not, as the new draft assumes, provide a way for the lands of the project sharing in stored and pumped waters. It merely gives the Secretary a guide or yard stick for determining how many acres of private and public land to take into the project. All the lands are to pay the same price and all are to have the same rights in what the money provides. The Whites are invited to the table to share the meal with the Indians. The Secretary is directed not to invite so many as to diminish the supply of food necessary for the Indians. When once at the table they all share alike, and it is the realization of that fact which prompted the admonition not to invite too many. It is not at all a case of instructing that the Indians be fed first and then that the leavings be given to others.

[16] See File No. 4038–16 San Carlos 013, Part 20.

While Truesdell never commented directly on the third paragraph on page 4 of the Landowners' Agreement relating to the use of underground waters and wells "in or upon Indian lands" embraced in the San Carlos project, he did make various comments on drafts of the Repayment Contract which also serve to illuminate the meaning of this paragraph of the Landowners' Agreement. Thus, he made statements which serve to explain the shift from the adjective "all" in the first paragraph to the adjective "such" in the third paragraph on page 4 of the Landowners' Agreement. In a letter dated November 16, 1929, from him to the Commissioner of Indian Affairs,[17] he commented that "the Indian side of the project is not defined as to lands, canals, or other structures, or otherwise," but added: "We do know, however, what the White lands of the Project consist of at the present time." Thus, too, in a memorandum dated July 17, 1930, commenting on a draft of the Repayment Contract dated July 1, 1930,[18] he made comments which serve to explain the clause in the third paragraph on page 4 of the Landowners' Agreement, which provides for the use of Indian underground waters and wells "insofar as shall be permitted by law and insofar as the Secretary of the Interior shall deem proper." This draft of the Repayment Contract then contained a clause on page 7 under the heading "Project Works" which provided that "the irrigation works, consisting of dams, canals, and other structures on or serving the Gila River Indian Reservation to the extent that they may be devoted, by agreement between the parties hereto,[19] and in accordance with law, to the said Project * * *," should be included in the project works. Truesdell's comment on this provision was as follows:

> The foregoing provision is meant to take care of the situation which exists by reason of the Indian part of the Project not as yet being defined. It is realized that irrigation structures exist upon the reservation and that to a certain extent they will be relied upon to serve with water the Indian lands which are to be included in the Project. These structures are already owned by the United States so it is not necessary, as it is with regard to similar things owned by private persons, to obtain conveyances. It is thought, however, that the whole Project, including the Indian lands and Indian structures, should be a thing defined in so far as that is feasible. We contemplate therefore that through an order of the Secretary of the Interior made under existing legislation, or if that is insufficient under new legislation, the proper Indian structures will be devoted to the Project and held as nearly as may be as are the San Carlos Reservoir, the Ashurst-Hayden Dam and the canals on the White part of the Project, for the Project benefit.

It is my opinion, therefore, that the Pima-Maricopa Indians of the Gila River Indian Reservation may not drill and operate irriga-

[17] See File No. 4038–1916 San Carlos 013, Part 14.
[18] See File No. 4038–1916 San Carlos 013, Part 17.
[19] One of these parties was, of course, the Secretary of the Interior.

tion wells on lands of the reservation which are included in the San Carlos Indian irrigation project.

WILLIAM J. BURKE,
For the Solicitor.

EDWIN J. KEYSER

A–26836 *Decided May 21, 1954*

Oil and Gas Lease—Accretion—Boundary of Indian Reservation.

Title to land formed by accretion to public land which extends across the former bed of a river to the record position of land disposed of when it was on the opposite bank vests in the United States and as public land is thereafter subject to disposition under the Mineral Leasing Act.

Where the boundary of an Indian reservation is stated to be the middle of the channel of a river, the boundary shifts with the middle of the channel.

Where land which was originally within the boundaries of an Indian reservation has been eroded away by the current of a river which was the boundary of the reservation, and, after being submerged, has reappeared as fast land attached to the opposite bank, the land is no longer within the reservation.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Edwin J. Keyser has appealed to the Secretary of the Interior from two decisions, the first dated May 11, 1953, by the Assistant Director of the Bureau of Land Management, and the second dated May 18, 1953, by the Administrator (now the Director) of the Bureau of Land Management, each of which modified the action of the manager of the Billings land office, rejecting completely an offer by Keyser to lease certain lands in Montana for oil and gas. The Assistant Director and the Administrator allowed leasing of parts of the lands applied for and permitted Keyser to amend his offers to include the land deemed available for leasing. The appellant contends that all of the lands covered by his offers are subject to leasing under the Mineral Leasing Act. (30 U. S. C., 1952 ed., sec. 226.)

To facilitate an understanding of this case, the physical situation involved in this appeal may be generalized as follows: A tract of land on the east bank of a navigable river is surveyed as lot X and is patented or reserved. Subsequently, the river shifts gradually eastward, eroding away part of lot X. At the same time, land is gradually added by accretion to the west bank of the river across from lot X. Ultimately the river shifts so far eastward that the accreted land occupies not only what was the bed of the river at the time lot X was surveyed but also a portion of the area which had been included in the surveyed boundaries of lot X. In other words, the accreted land has invaded the record position of lot X. At this point, an oil and

gas application is filed for all the accreted land, including the portion within the record position of lot X.

Specifically, Mr. Keyser's first application, Montana 03754, covered lands situated on the south bank of the Missouri River. The offer to lease described the land by metes and bounds as unsurveyed land attached by accretion to lot 1, sec. 23, T. 27 N., R. 50 E., P. M., Montana.

The plat of a dependent resurvey of T. 27 N., R. 50 E., accepted September 9, 1948, shows that the Missouri River apparently has moved north and east by a gradual process of erosion of the north bank and accretion to the south bank. The area described by metes and bounds in the lease offer seems to be an accretion to lot 1, sec. 23, on the south bank of the river in its original position, and the area invades the record position for lots 1 and 3 and the E½SE¼SW¼ sec. 14, and lot 5, sec. 23, which were originally situated on the north bank. Lot 3, sec. 14, is covered by a patented Indian allotment and lot 1 and the E½SE¼SW¼ sec. 14, and lot 5, sec. 23, are covered by a withdrawal made by departmental order of September 19, 1934 (54 I. D. 559), which withdrew all undisposed-of lands lying within the former Fort Peck Indian Reservation until permanent restoration of the lands to tribal ownership, as authorized by section 3 of the act of June 18, 1934 (48 Stat. 984), could be given consideration.

The Assistant Director held that Keyser was entitled to a lease for only the land lying in the former bed of the river, that is, the accreted land between lot 1, sec. 23, and the record position of lot 1, lot 3, E½SE¼SW¼, sec. 14, and lot 5, sec. 23, but not for land which had reappeared within a portion of the record position of the latter group.

The second application, Montana 03795, covers land situated on the west bank of the Yellowstone River and described by metes and bounds as unsurveyed land, the land adjoining lots 10, 11, 12, 13, sec. 5, T. 14 N., R. 55 E., P. M., Montana. It appears that the land applied for was added to these lots by accretion and in part invades the record position of lots 6 and 9 on the east bank of the river, according to the original survey of September 5, 1883. Lots 6 and 9 were patented to the Northern Pacific Railroad Company on May 26, 1896.

The Administrator held that Keyser could have a lease only for that portion of the land applied which accreted to lots 10, 11, 12 and 13, but which is not in the present bed of the river or within the record positions of lots 6 and 9, according to the plat of survey approved September 5, 1883.

Both of the decisions were rested on the ground that "the Department has held that resort should not be had to nice distinctions or technicalities in order to make two disposals of the same area, meaning that as a matter of policy, no claim to accretion should be made

which extends into previously patented areas." This statement was based upon a letter dated October 9, 1926, M–11903, from the First Assistant Secretary to the Commissioner, General Land Office; see, also, *R. M. Stricker et al.*, 50 L. D. 357, 358 (1924).

The generally stated and accepted rule concerning the rights of original riparian owners to accretion is that a person whose land is bounded by a stream of water which changes its course gradually by alluvial formations shall still hold the same boundary, including the accumulated soil. *Arkansas* v. *Tennessee*, 246 U. S. 158 (1918); *Nebraska* v. *Iowa*, 143 U. S. 359 (1892); *Towl et al.* v. *Kelly and Blankenship*, 54 I. D. 455, 458 (1934). Montana has adopted the common-law rule by statute. Revised Codes of Montana, 1947, Annotated, sec. 67–1302; *Bode* v. *Rollwitz*, 199 Pac. 688 (Mont., 1921).

Although the common-law rule is easily applied where the land formed by accretion is relatively small in area, changes in the location of the river banks caused by accretion can be dramatic. Such changes have given the courts considerable difficulty. However, there appears to be a substantial unanimity of opinion where, as in the situation presented by these appeals, the land of one original riparian owner is increased by accretion until it extends across the former bed of the river and covers land which was originally on the other side of the river and owned by the other person. A leading textbook writer has stated:

> In case the river shifts its position so as to submerge land on one shore, the question is one of boundary * * *. In the course of time the river, although the changes are gradual and imperceptible when they are taking place, may be so extensive that the accretions from one side may cover a spot which formerly was on the other side of the stream. In such cases, so long as the gradual and imperceptible character of the change is maintained, the river will still remain the boundary, and the owner of the shore to which the accretion attach will gain title to land formerly belonging to the opposite owner. [3 Farnham, Waters and Water Rights, 1904 ed., sec. 848.]

This view appears to have been followed by all the courts which have considered the same problem.[1]

The Bureau decisions followed this rule only up to the point where the land added to one bank by accretion begins to restore, as fast land, land which formerly was on the opposite shore and which had been disposed of in its former location.

In the absence of strong considerations requiring another conclusion, it would seem that the Department should follow the general

[1] *Welles* v. *Bailey*, 10 Atl. 565 (Conn., 1887); *Naylor* v. *Cox*, 21 S. W. 589 (Mo., 1892); *Morrow* v. *Mutz*, 140 N. W. 896 (Iowa, 1913); *Schroeder* v. *Freeland*, 89 F. Supp. 169 (D. C. D. Nebr., Omaha Div., 1950), *dismissed* for want of jurisdiction, 188 F. 2d 517 (8th Cir. 1951); *Kimble* v. *Willey*, 98 F. Supp. 730 (D. C. E. D. Ark., 1951), *rev'd on other grounds*, 198 F. 2d 813 (8th Cir. 1952).

rule. Apparently the only obstacle to adopting the general view is the First Assistant Secretary's letter of October 9, 1926, *supra*.

That letter was concerned with the proper method of surveying land which had formed in the former bed of the Mississippi between the Mississippi shore and the eastern edge of Glasscock's Island, Louisiana. While there still was a channel, the river had washed away part of the eastern shore of the island. It appears that accretion from the Mississippi shore advanced across the old channel and occupied part of what had been the eastern shore of the island and that later the entire former channel was abandoned by the river and became fast land. The issue was whether what had formerly been the eastern shore of the island should remain with the original patentees of the island or pass to the Government as the owner of the riparian land in Mississippi to which the accretions had attached. The First Assistant Secretary was of the opinion that—

> * * * Certainly this does not present a case where the doctrine of title by accretion should prevail over the doctrine of title by reappearance of submerged areas. There is now no stream involved in that area and therefore the right to follow the water, which is the only foundation for invading an adverse title, a harsh rule at best, does not exist under the conditions here shown. * * *.

Aside from any other considerations, the appeal now under discussion involves situations in which there is a river and where the right to follow the water exists. This factor is sufficient to differentiate this case from the Glasscock Island matter. This case, therefore, falls squarely within the generally accepted rule set forth above.

Although this particular point has not been passed upon by the Montana courts, the general rule set forth above is so well established that it may be taken as the common law, and therefore as the law of Montana. See *Fordham* v. *Northern Pacific Ry. Co.*, 76 Pac. 1040 (Mont., 1904).

Therefore, as to Montana 03795, the land which has formed by accretion within the record position of lots 6 and 9 is public land of the United States and is subject to disposition under the terms of the Mineral Leasing Act.[2]

The conclusions reached above are equally applicable to the land for which the appellant was denied a lease in Montana 03754.

As has been stated above, this lease offer involves lands which were at one time within the former Fort Peck Indian Reservation established in 1888. The act of May 30, 1908 (35 Stat. 558), opened up to entry, sale, and other disposition lands in the reservation which were not needed for allotment to individual Indians or other special

[2] Compare *Towl et al.* v. *Kelly and Blankenship*, 54 I. D. 455, 462 (1934); *Madison* v. *Bassart*, 59 I. D. 415, 428 (1947); *Earle T. Miller*, 60 I. D. 387 (1949).

purposes, the Government taking over the lands only as trustee for the Indians (54 I. D. 559, 560). On September 19, 1934, the undisposed-of lands in the reservation were temporarily withdrawn from disposal of any kind, including leasing under the Mineral Leasing Act (*id.*). *Edward M. Bonn*, A–26523 (December 11, 1952). This withdrawal is still in effect.[3]

The situation, therefore, was that on one side of the river public land was held by the United States in complete ownership subject to disposal under the general-land laws. On the other side was land the equitable title to which was in the Indians while the legal title only remained in the United States. Therefore, although the legal title was in the United States in either event, the consequences of land being in or out of the reservation were markedly different. The boundary of the reservation was the "middle of the main channel of the Missouri River * * *." (25 Stat. 113, 116.) As the Supreme Court said in *Arkansas* v. *Tennessee*:

> * * * It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual process known as erosion and accretion, the boundary follows the varying courses of the stream, * * *. [246 U. S. 158, 173.]

Thus the boundary of the reservation changed as the river changed its course.[4]

Upon the formation of land added by accretion to the public land on the opposite bank within the original limits of the reservation, the title to the accreted lands passed to the United States as the owner of the riparian land free from any claims or restrictions attaching to it as reservation land.

Similarly, the United States has regained legal and equitable title to lot 3 on the north bank of the river which had been covered by a patented Indian allotment.

Therefore, the land in question in both applications is now public land of the United States subject to disposition under the terms of the Mineral Leasing Act.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), so much of the decisions of the Administrator and the Assistant Director which rejected in part Mr. Keyser's applications

[3] Lands in the reservation are subject to leasing for oil and gas pursuant to the act of May 11, 1938 (25 U. S. C., 1952 ed., sec. 396a *et seq.*).

[4] This rule was recognized by the Department as controlling the boundary of an Indian Reservation bounded by the "medial line of the Canadian River." *Earle T. Miller*, 60 I. D. 387 (1949). See, also, *United States* v. *Flower* et al., 108 F. 2d 298 (8th Cir. 1939).

are reversed, and the case is remanded for further proceedings consistent herewith.

WILLIAM J. BURKE,
Acting Solicitor.

ETHEL T. MORGAN
KATHERINE T. MEAGHER

A–26962 *Decided May 25, 1954*

Noncompetitive Oil and Gas Lease — Preference Right — Cancellation of Lease.

Where the surface of a desert-land entry held by an entryman who is entitled to a preference right under section 20 of the Mineral Leasing Act is taken as a perpetual easement pursuant to a condemnation suit, the entryman does not thereby lose his preference right.

Where an oil and gas lease was issued to an applicant who had not complied with the regulations relating to notice to possible section 20 preference-right claimants and the preference right claimant timely asserts her preference right, the lease must be canceled as to the lands subject to the preference right.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Ethel T. Morgan has appealed to the Secretary of the Interior from a decision of the Associate Director of the Bureau of Land Management dated September 14, 1953, which reversed the action of the manager of the Salt Lake City land office dismissing a protest filed by Katherine T. Meagher against the issuance of noncompetitive oil and gas lease, Utah 04260, to Mrs. Morgan as to certain land, and held the lease for cancellation in part.

The land involved in the appeal consists of 76.65 acres of the 320-acre desert-land entry (Vernal 05307), comprising the S½NE¼ S½NW¼, SW¼ sec. 28, T. 7 S., R. 20 E., S. L. M., Utah, patented to Mrs. Meagher on December 12, 1922, with a reservation of the oil and gas to the United States, pursuant to the act of July 17, 1914 (30 U. S. C., 1952 ed., sec. 121 *et seq.*). Mrs. Meagher's entry was made on September 9, 1914, and on February 12, 1917, the land in T. 7 S., R. 20 E., S. L. M., was classified as valuable for petroleum and nitrogen.

The Associate Director held that Mrs. Meagher was entitled to a preference right for a lease to these 76.65 acres pursuant to section 20 of the Mineral Leasing Act (30 U. S. C., 1952 ed., sec. 229), which provides, in part:

> In the case of lands bona fide entered as agricultural, and not withdrawn or classified as mineral at the time of entry * * * the entryman or patentee, or assigns, where assignment was made prior to January 1, 1918, if the entry has been patented with the mineral right reserved, shall be entitled to a pref-

erence right to a permit and to a lease, as herein provided, in case of discovery * * *.

Mrs. Meagher was issued an oil and gas lease (Utah 08048), effective December 1, 1952, for the remaining 240 acres in her entry upon the basis of her preference right.

Mrs. Morgan contends that Mrs. Meagher transferred her interest in the 76.65 acres prior to the date of Mrs. Morgan's application for a lease and consequently had lost her preference right. The allegation that Mrs. Meagher had alienated her interest is based upon the following facts:

On March 15, 1948, the Fourth Judicial District Court of the State of Utah, in a suit brought against Mrs. Meagher by the Ouray Park Irrigation Company, entered an order and decree in condemnation, which held "that the plaintiff take and acquire and have for its use [the 76.65 acres] * * *.

It is further ordered and adjudged that the parcels of land above described be and they are hereby condemned for the following uses and purposes, to wit: for the construction of a storage reservoir for the storage of irrigation water to be used for beneficial purposes by the plaintiff together with the construction of an outlet for said reservoir from the body of said reservoir over, across, and through the land above described.

This condemnation suit was brought pursuant to a Utah statute (Utah Code Anno. 1943, sec. 104–61–1) [1] which authorized condemnation proceedings for irrigation reservoirs and ditches. The Utah Code also stated the rights and estates that may be taken by condemnation, as follows:

The following is a classification of the estates and rights in lands subject to be taken for public use:

(1) A fee simple, when taken for * * * reservoirs and dams and permanent flooding * * *; provided that where surface ground is underlaid with minerals, coal or other deposits sufficiently valuable to justify extraction, only a perpetual easement may be taken over the surface ground over such deposits.

(2) An easement, when taken for any other use.

* * * * * * *

(Utah Code Anno., 1943, sec. 104–61–2.) [2]

According to a portion of the transcript of the condemnation proceedings, submitted by Mrs. Meagher on her appeal to the Director of the Bureau of Land Management, the court and the parties agreed that all mineral rights were to be reserved to the defendant.

Therefore, pursuant to the proviso of the Utah statute, the irrigation company took not a fee simple but only a perpetual easement over

[1] Now Utah Code Anno., 1953, secs. 78–34–1.
[2] Now Utah Code Anno., 1953, secs. 78–34–2.

the surface ground. Mrs. Meagher remained possessed of the fee and, as the entrywoman still holding the fee, retained her preference right to an oil and gas lease.

The pertinent regulation provides:

> Any offeror for a lease to lands owned, entered or settled upon as stated above must notify the person entitled to a preference right of the filing of the offer and of the latter's preference right for 30 days after notice to apply for a lease. If the party entitled to a preference right files a proper offer within the 30-day period, he will be awarded a lease; but if he fails to do so, his rights will be considered to have terminated. [43 CFR, 1952 Supp., 192.70 (b).]

Mrs. Morgan did not comply with this regulation and thus Mrs. Meagher was deprived of the preference right granted her by section 29. An oil and gas lease issued to other than a person having a preference right to it, who timely asserts it, must be canceled. *D. Miller*, A–26768 (November 12, 1953); *Transco Gas & Oil Corporation*, 61 I. D. 85 (1952).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Associate Director of the Bureau of Land Management is affirmed.

WILLIAM J. BURKE,
Acting Solicitor.

STATE OF CALIFORNIA

A–26777 *Decided June 1, 1954*

State Indemnity Selection—Classification—Small-Tract Applications.

Land which is withdrawn from entry by Executive Order No. 6910 [Nov. 26, 1934] is subject to indemnity selection by a State only if the land is classified by the Secretary of the Interior as available for such disposition.

Where small-tract applications have been filed for land 3½ years before a State selection is filed for the same land and the land is suitable for small-tract development, it is proper to classify the land for small-tract disposition despite the pendency of the State's application.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

In October and November 1946, several applications, including those listed below,[1] were filed for leases under the Small-Tract Act (43 U. S. C., 1952 ed., sec. 682a) on lots 3 and 4, sec. 24, T. 3 S., R. 3 E., S. B. M., California. The land applied for is 6 miles northwest of Palm Springs and about 95 miles east of Los Angeles.

[1] Los Angeles 064785, filed on October 29, 1946, by Rodney C. Inger for the W½ of lot 4.
Los Angeles 064786, filed on October 29, 1946, by Rae A. Wheeler for the E½ of lot 3.
Los Angeles 065039, filed on November 18, 1946, by Paul E. Traver for the W½ of lot 3.

A report dated June 6, 1949, of a field examination of the land indicates that its proximity to Palm Springs makes it desirable for small-tract development, but that the portion of lot 4 lying north and east of State Highway 111, which divides lot 4, is in the Whitewater River wash area and unsuitable for small-tract development. It appears further that the land is located in an area near which it is anticipated that a cement plant will be built; that the area is zoned for unrestricted industrial use; that a power line and telephone line parallel the highway; and that electricity and telephone services are available for the area. The report of June 6, 1949, found that lot 3 and the portion of lot 4 lying south and west of State Highway 111, were suitable for development as business sites under the Small-Tract Act, and recommended their classification for that use.

On April 26, 1950, after the recommendation for small-tract classification of this land had been made, but before a small-tract classification order was issued, the State of California filed an indemnity school-land selection (43 U. S. C., 1952 ed., sec. 851) for the lots 3 and 4 in behalf of Harold L. Pierce. The application was accompanied by Mr. Pierce's petition for classification of the land under section 7 of the Taylor Grazing Act (43 U. S. C., 1952 ed., sec 315f). The petition stated that the land was valuable for a desert house only, and was accompanied by a nonmineral, nonsaline affidavit dated April 17, 1950, by Mr. Pierce, which stated, *inter alia*, that to the affiant's knowledge, there was no "placer, cement, gravel, phosphate, or other valuable mineral deposit" on the land; that "no portion of said land is claimed for mining purposes;" and that the land is "essentially nonmineral in character." [2]

In a decision of August 6, 1952, the Director of the Bureau of Land Management rejected the State's application for lot 3 and the portion of lot 4 lying south and west of the highway on the ground that the lands are suitable for small-tract development and are classified as

[2] It appears that on March 8, 1949, Mr. Pierce filed for recording a notice of location of a placer mining claim on lots 3 and 4 for all rock, sand, gravel and clays. A report of a field examination dated July 26, 1950, states that a discovery of valuable mineral deposits was not made. Thereafter, on September 15, 1950, a notice of adverse proceedings against the claim issued. In a letter of October 4, 1950, to the State Lands Commission, Mr. Pierce wrote, in part, as follows:

> "I hereby agree to the release of my claims to mineral rights that I have developed on the above mentioned claim and land to the U. S. Department of Interior, as the present conditions do not warrant the commercial development of the sand, clay and gravel * * *."

Mr. Pierce conditioned this "release" on his receiving a preference right to purchase the land from the State of California if it acquired title to the land. The Regional Administrator, Region II, held that the above-quoted portion of Mr. Pierce's letter of October 4, 1950, constituted a waiver of any rights to the mining location, and the contest involving the claim was considered to be closed.

The validity of Mr. Pierce's mining claim and the effect of his release and affidavit of April 17, 1950, are not before the Department in this proceeding.

business sites under the Small-Tract Act. The State of California and Mr. Pierce have appealed to the Secretary of the Interior from the Director's decision.[3]

On appeal, it is asserted that the land is not suited for business sites under the Small-Tract Act, and that the allowance of the State's application would result in the mining of gravel and clay deposits for which the land is valuable. However, information in the record indicates that the land is nonmineral in character. Moreover, the State's applicant stated in his petition for classification that the land had special value for a desert house only, and stated further, in his nonmineral affidavit, that to his knowledge, the land contained no valuable mineral deposit. A review of the record fully substantiates the classification of lot 3 and the portion of lot 4 lying south and west of the highway for business sites under the Small-Tract Act.

Lot 3 and the portion of lot 4 lying south and west of the highway were classified for small-tract disposition on August 6, 1952, after the State filed its indemnity selection for the land. The small-tract applicants were not entitled to the land as a result of filing applications therefor (*George T. Aldridge et al.*, A–26805 (February 8, 1954)), and they had no right to the land when the State's selection was filed. In *State of California*, A–25855 (August 14, 1950), the Department held that the classification of land as suitable for disposition under the Small-Tract Act is not sufficient, standing alone, to warrant the rejection of an indemnity selection of the land by a State. It was not stated in the decision whether any small-tract applications for the land had been filed before the State selection was filed. The Department has also held that a State school indemnity selection should be given preference over a public-sale application,[4] over a homestead-entry classification,[5] and over public-sale classification.[6] A State selection under the Morrill Act was preferred over classification for disposition under the Small-Tract Act,[7] and a State selection of lands for internal improvement was given preference over a recommended classification for small-tract disposition.[8]

The reason given in these decisions for giving preference to selections by States is that the United States is obligated to fulfill certain statutory land grants to the States, and that if land may be properly classified for State selection pursuant to such statutory grants, a State

[3] In a letter in support of the appeal, Mr. Pierce asks that favorable action be taken on his request to purchase lots 1, 2, and 7, which are situated near the land covered by this application. The decision on this appeal relates only to the lands included in State indemnity selection, Los Angeles 083029.

[4] *State of California*, A–25971 (March 6, 1951).

[5] *State of California, Joseph L. Freeman, Sr.*, A–26255 (July 25, 1952).

[6] *State of California*, A–25744 (January 18, 1950).

[7] *State of Nevada*, A–25832 (May 12, 1950).

[8] *State of Nevada*, A–26745 (May 20, 1953).

selection should ordinarily be preferred over disposition of the land to private persons, all else being regular.

It does not appear in any of the decisions cited above involving small-tract applications that such applications were filed prior to the filing of the State selection. In the instant case, the fact that the small-tract applicants applied for the land approximately 3½ years before the State selection was filed, and the fact that the classification of the land pursuant to the small-tract applications was delayed chiefly because the validity of the conflicting mining claim [9] was, as a matter of proper administrative practice, determined before the land was classified, outweigh the reason for ordinarily giving preference to the State's selection insofar as it conflicts with the small-tract applications.

In the circumstances of this case, the decision rejecting the State selection for lot 3 and the portion of lot 4 lying south and west of the highway is proper. The decision of the Director of the Bureau of Land Management is affirmed.

ORME LEWIS,
Assistant Secretary.

BARBARA M. SMOOT

A-26855 *Decided June 21, 1954*

Rules of Practice—Appeals.

An appeal to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management will be dismissed where notice of appeal is not filed within 30 days from service upon the appellant of the decision from which an appeal is taken.

Where several applicants are waiting to file applications when a land office opens for business and, because only one clerk is on duty, the applications are actually received one after the other, the applications will be deemed to have been simultaneously filed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Barbara M. Smoot has appealed to the Secretary of the Interior from a decision of January 2, 1953, by the Associate Director of the Bureau of Land Management which affirmed a decision of the acting manager of the Land and Survey Office, Salt Lake City, holding that conflicting oil and gas lease applications, Utah 06604, 06605, 06606, were submitted simultaneously to the Land and Survey Office and that a drawing would be held to determine the priority to be given the respective applications to lease the land.

[9] See note 2, *supra*.

The final paragraph of the Associate Director's decision allowed the right of appeal and stated: "If an appeal is filed it must be in accordance with the regulations contained in the enclosed copy of circular 1818." Circular 1818 contains a reprint of departmental regulations (43 CFR, 1952 Supp., 221.75 and 221.76) governing the procedure to be followed in filing appeals to the Secretary of the Interior. 43 CFR 221.75 provides, in part:

(a) An aggrieved person desiring to appeal to the Secretary of the Interior from a decision rendered by the Director of the Bureau of Land Management must, within 30 days from the date of the service upon such person or his authorized representative of notice of the Director's decision, file a notice of appeal with the Director, Bureau of Land Management, Department of the Interior, Washington 25, D. C.

* * * * * * *

(d) An appeal shall be subject to summary dismissal for failure to comply with any of the requirements prescribed in this section.

A registry return receipt card in the record indicates that the appellant received a copy of the Associate Director's decision on January 6, 1953. Thus, notice of appeal to the Secretary from this decision was required to be filed not later than February 5. The notice of appeal in this case was filed on February 6. Appeals filed only a day late have been consistently dismissed. *Ted C. Mathews*, A–26928 (January 6, 1954); *Bonelli Cattle Company*, A–26709 (June 18, 1953). In accordance with these decisions, the appeal in this case must be dismissed.

Even if there were no procedural defect in the appeal, the Associate Director's decision would not be modified.

It appears that on April 7, 1952, three persons were waiting to file the applications under consideration when the Land and Survey Office was opened for business at 9 : 30 a. m.; that the applications had already been prepared for filing at that time; that one of the persons had arrived before the other two, stood in a queue ahead of the other two, and entered the office ahead of the other two; that as there was only one clerk to receive applications, the application of the person who first entered the office was received by the clerk first; and that an interval of several minutes elapsed between the time when the first and the last of these applications were accepted and stamped. All three applications were accepted as simultaneous filings and stamped as having been received at 9 : 30 a. m., April 7, 1952. Each of the applications covered the same land.

Section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226), gives to the "person first making application" who is qualified to hold a lease the right to a noncompetitive lease if the

lands applied for are to be leased. Pursuant to the acting manager's decision that these applications were simultaneously filed by qualified applicants, a drawing was held to determine the order of priority as between the conflicting applicants, and the results of the drawing were announced in a manager's decision of October 15, 1952.[1] As a result of the drawing, first priority was awarded to application, Utah 06605, filed by Frances L. Neely; second, to Utah 06606, filed by Daisy R. Morgan; and third to the appellant's application.

The appellant asserts that as the person who filed her application was the first waiting in line for the Land and Survey Office to open on April 7, and that as her application was actually received and stamped by the clerk ahead of the other two applications, her application is entitled to priority. Thus the question raised by this appeal is whether, when persons arrive at the land office before it is open for business, it is proper to treat as simultaneously filed the applications of all who are waiting to file when the office opens for business and who immediately proceed to the counter, even though the applications are actually received, one after the other, by the single clerk in attendance.

With respect to the question of what applications shall be considered as simultaneously filed, the applicable departmental regulation (43 CFR, 1952 Supp., 295.8) provides, in part, that—

> * * * When no order of restoration or notice of opening is involved, the applications will be treated as having been filed simultaneously if they are received by a land office * * * over the counter at the same time, or are received in the same mail * * *.

Inasmuch as applications can be filed in a land office only when it is open for business (43 CFR, 1952 Supp., 192.42 (b)), it is immaterial in what order or at what time applicants may line up at the office door before opening time. If, when the door is opened, the physical situation is such that in accordance with normal behavior and ordinary courtesy one or more of the waiting applicants must necessarily enter before the others and arrive at the counter before the others and, if because only one clerk is on duty, it is physically necessary that the applications be received one after the other, it seems perfectly reasonable to hold that the applications are received over the counter "at the same time" within the meaning of the regulation just quoted. To hold otherwise would be to place a premium upon one applicant outjostling other applicants at the door and beating them in a footrace to the counter.

[1] The departmental regulation (43 CFR, 1952 Supp., 191.10) governing disposition of conflicting lease applications filed simultaneously provides, in part, that—

> "Where applications or offers received by mail or filed over the counter at the same time are in conflict, the right of priority of filing will be determined by public drawing * * *."

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the appeal is dismissed.

WILLIAM J. BURKE,
Acting Deputy Solicitor.

D. C. JONES

A-26832 *Decided June 22, 1954*

Coal Lease—Assignment—Liability for Accrued Obligations.

A requirement that an assignee of a coal lease pay charges which became due under the lease before the lease was assigned to him is proper where the assignment recites that the assignee desires to assume all of the obligations of the lease and where one of the lease covenants provides that obligations thereunder shall extend to and be binding upon assigns, even though, when the assignment was approved, the Department erroneously stated that the lease account was in good standing.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

D. C. Jones has appealed to the Secretary of the Interior from a decision of April 21, 1953, by the Assistant Director of the Bureau of Land Management which dismissed Mr. Jones' protest against the payment of $141.64 made by Mr. Jones on May 22, 1951, for charges due under coal lease, Great Falls 082085. This lease was issued on May 21, 1937, to Floyd Sturgis and Ray Thiel and, as amended, covers 81.85 acres of land in Montana. (30 U. S. C., 1952 ed., sec. 181 *ff.*)

By an instrument dated January 2, 1945, Mr. Sturgis and Mr. Thiel assigned the lease to the appellant and to Mr. E. B. Porter.[1] A decision of August 30, 1945, by the Commissioner of the General Land Office (predecessor of the Director of the Bureau of Land Management) indicated that $108.57 was due under the lease at the time and that it would be "necessary for all money due under the lease to be paid" before the assignment could be approved. The appellant was a party to this decision. In a recommendation of November 19, 1945, to the Secretary of the Interior that the assignment be approved, the Commissioner of the General Land Office stated: "According to the records of this office the account under the lease is in good standing." Thereafter, the assignment was approved, effective January 1, 1946.

On September 1, 1949, an audit by the General Accounting Office of the lease account disclosed that an amount which had become due

[1] On May 22, 1951, the appellant and Mr. Porter filed for approval an assignment of the lease to Mr. Merril Dunbar. The assignment has not yet been approved. Mr. Porter and Mr. Dunbar were made parties to the Assistant Director's decision, but did not appeal to the Secretary from the decision.

under the lease before the assignment to the appellant was executed had not been paid and was still owing to the United States. The appellant was billed for this amount in accordance with a statement of the auditors' adjustments dated February 15, 1950.

It appears that on January 18, 1944, a check for $120.30 was tendered in behalf of Sturgis and Thiel as payment for charges due under this lease and that the check was returned because of insufficient funds. A notation on the lease account indicates that the check was returned but, through inadvertence, the amount of the check was not added to the ledger column showing the balance due to the United States, as should have been done. Thus, the $120.30 was not included in charges due under this lease until after the error was discovered as a result of the audit. An additional amount of $21.34 was found by the audit to be the balance of unpaid royalty due under this lease since April 1, 1945, making a total of $141.64 for which the appellant was billed, although this entire amount had become due before the effective date of the assignment to the appellant.

An assignee of a lease is not liable on account of a breach of a lease covenant which occurred before the assignment unless he assumes such liability. Tiffany, *The Law of Real Property* (3d ed.), sec. 131; 3 Thompson, *Commentaries on the Modern Law of Real Property*, secs. 1416, 1424, 1425. Where, in an instrument of assignment, an assignee agrees to assume all of the obligations of a lessee, privity of contract is established between the lessor and the assignee, and the assignee becomes liable for the performance of the provisions of the lease which the assignor promised to perform. *Rosenkranz* v. *Pellin*, 222 P. 2d 249 (D. Calif., 1950); *Puget Mill Co.* v. *Kerry*, 49 P. 2d 57 (Wash., 1935); *Springer* v. *De Wolf*, 62 N. E. 542 (Ill., 1901); *Tiffany*, *supra*, sec. 131, note 15; *Thompson*, *supra*, secs. 1424, 1425. Thus, an assignee who assumes the lease obligations of his assignor has been held liable for the payment of rentals due under a lease, even though the rentals accrued before the assignment was executed. *Woodland Oil Co.* v. *Crawford*, 44 N. E. 1093 (Ohio, 1896); *The Farmers Bank* v. *The Mutual Assurance Society*, 4 Leigh (Va.) 69, 87 (1832); see *Fountain* v. *Schulenberg & Boeckler Lumber Co.*, 18 S. W. 1147 (Mo., 1892).

In the instant case, the original lessees were obligated under sections 2 (c) and 2 (d) of the lease to pay the prescribed rental and royalty charges. In the instrument of assignment from the original lessees to the appellant, it was stated that "it is the desire of the Assignees to assume all of the benefits and obligations set forth in the above described Lease and to operate thereunder in the same manner as the Assignors have been operating * * *." This statement may prop-

erly be regarded as one of the conditions of the assignment. Moreover, section 8 of the lease provides:

> It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the * * * assigns of the respective parties hereto.

The provision in the assignment, together with section 8 of the lease, makes it amply clear that the appellant assumed all the obligations of his assignors under the lease. And, under the cases cited, the appellant's obligations included the payment of rental and royalty charges which had accrued prior to the assignment. In the circumstances, the decision holding the appellant liable for an amount which became due under the lease before he became a lessee is proper.

The appellant's contention that the United States is estopped by laches from asserting this claim is without merit because the United States is not subject to the defense of laches in enforcing its rights. *United States* v. *Summerlin*, 310 U. S. 414, 416 (1940).

Although it is unfortunate that the bookkeeping error was made and that it was not discovered until several years after it occurred, there is no legal basis for holding that the appellant is not liable for payment of the amount for which he has been charged and which he has paid.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Assistant Director of the Bureau of Land Management is affirmed.

WILLIAM J. BURKE,
Acting Deputy Solicitor.

APPEAL OF McCANN CONSTRUCTION COMPANY

CA-204 *Decided July 30, 1954*

Contract Appeal—Material Shortage—Korean Conflict—Timely Notice of Delays.

Where a Government contract was entered into after June 25, 1950, the beginning of the Korean conflict, the resultant delays in the completion of the contract were foreseeable and liquidated damages were properly assessable.

Where a Government contract was awarded prior to June 25, 1950, but notice to proceed was issued subsequent thereto, delays resulting from material shortages were foreseeable, and liquidated damages were properly assessed if there was an initial and unreasonable delay by the contractor in ordering materials or proceeding with the project.

A letter by the contractor to the contracting officer informing him that requested changes may require an extension of time is a proper notice under article 9 of the standard form of construction contract.

July 30, 1954

ADMINISTRATIVE DECISION

An appeal dated April 22, 1953, was filed by McCann Construction Company from the findings of fact and decision of the contracting officer dated March 6, 1953, but not transmitted to the contractor until March 23, 1953, under Bureau of Reclamation Contract No. I79r—1690, denying certain requests of the contractor for additional time. The contract, on U. S. Standard Form No. 23 for Government construction contracts (revised April 3, 1942), was entered into on June 9, 1950, and provided for the construction of 21 residences, office buildings, bunkhouse, and laboratory for Tiber Dam Government Camp, Missouri River Basin project, Montana.

This appeal concerns the construction under schedules 5 and 6, and the bunkhouse of schedule 9 of the specifications. The contractor's right to proceed with the remainder of the work was terminated and is not involved in this appeal. The contractor protested the deduction of $3,490 for liquidated damages, which is the basis of this appeal.

The contractor commenced work on August 22, 1950, 55 days after the receipt of notice to proceed, and completed all work involved in this appeal on August 31, 1951. The final date for completion of schedules 5 and 6 was June 30, 1951, and the bunkhouse of schedule 9 was June 22, 1951. The total delay amounted to 132 days.

The contractor's requests for extension of time are based for the most part on shortages of labor and materials resulting from the outbreak of hostilities in Korea. Although the contract was executed on June 9, 1950, notice to proceed was not given until June 28, 1950, which was 3 days after South Korea had been invaded and the United States had indicated its intention to intervene.

The economic impact of the Korean conflict as affecting Government contracts has been the subject of several appeals decided by administrative decisions of this office. As a general rule, it has been held that where bid for the contract was made after June 25, 1950, the resultant delays were foreseeable and liquidated damages properly assessed. *Riverman & Sons*, CA–143 (December 6, 1951); *Porcelain Products, Inc.*, CA–144 (January 16, 1952); *George E. Kellar*, CA–121 (July 16, 1951). Also, where the bid for the contract was made shortly prior to June 25, 1950, and the contractor thereafter delayed for an unreasonable length of time in placing orders for vital materials, no relief from liquidated damages was given. *Pacific Coast Engineering Company*, CA–158 (August 27, 1952), (March 6, 1953, Supp.); *Lakeside Bridge & Steel Co.*, CA–137 (November 27, 1951).

On the other hand, where an award of a contract was received a day after the outbreak of hostilities and the contractor thereafter acted promptly and with diligence in placing his orders for materials,

liquidated damages for delay were remitted. *Judson Pacific-Murphy Corporation*, CA–122 (July 13, 1951). In that case, the notice of award was received on June 26, 1950, and presumably was in the mail at the time the conflict began. Immediately upon receipt of the notice, the contractor dispatched, by messenger, its order for steel to its supplier. Although a delay of 48 calendar days subsequently developed, it was held that the assessment of liquidated damages was not justified.

The contractor in the present situation, by not starting work on the project until 55 days after the notice to proceed, seems to have placed himself in a position very similar to that discussed in administrative decisions on the appeals of *Pacific Coast Engineering Company* and *Lakeside Bridge & Steel Company*, *supra*. This delay is not satisfactorily explained other than by a general recital of difficulties encountered in obtaining materials and recruiting a labor force. Such conditions must have become worse rather than better during the 55 days following the notice to proceed, and the contracting officer was correct in finding that the contractor did not act with diligence or efficiency during this crucial period.

The record discloses that while appellant wrote several anticipatory letters upon the subject of possible delays, it failed, with one exception, to comply with the procedural requirements of article 9 of the contract, which provides, in part:

> * * * If the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head of the Department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay * * *.

The necessity of complying with this provision as to written notice is pointed out in *Dunnigan Construction Company, et al.* v. *United States*, 122 Ct. Cl. 262 (1952), and *Porcelain Products, Inc.*, CA–144 (January 16, 1952).[1]

The exception referred to above was in connection with a request by the Government for a change in the size of windows in the two- and three-bedroom houses. The contractor answered this request, in part, as follows:

> This smaller size window may result in a slight saving to us in the purchase price. However, as we have ten of these buildings framed in to date, it will necessitate our going back and reframing the openings for these windows, resulting in an increased cost to us and a delay in performance of the contract. We are willing to furnish either of the above-mentioned windows with no increase or decrease in the cost of the contract. However, we will expect an extension of time in the performance of the contract should the need for it arise.

[1] Certain acts of the Government officials may constitute a waiver of the notice. *Porcelain Products, Inc., CA–144* (January 16, 1952).

Delays resulting from this change, being beyond the control or fault of the contractor, justified an extension of time, and this letter was, in my opinion, a proper and sufficient notice within the meaning of article 9 of the contract. It also served as a timely protest in accordance with paragraph 12 of the specifications. The contracting officer did not question the contractor's acceptance of the change with the proviso that he might require more time.

The actual extent of the delay caused by this change is not shown but the contracting officer had ample opportunity to inquire into the question as to how much extra time was necessary. The decision of the contracting officer assessing liquidated damages for the delay in making such change is reversed and remanded to the contracting officer to ascertain the extent of the delay and determine the amount of liquidated damages imposed upon the contractor in this connection which should be remitted.

The contention by the contractor that the work was slowed by adverse weather conditions is without merit because there is no evidence in the record showing that the weather conditions were unusually severe or unforeseeable. *United States* v. *Brooks-Callaway Co.*, 318 U. S. 120 (1943).

Finally, the contractor contends that the imposition of liquidated damages in this instance would impose an unfair burden on the contractor, and that the Government actually suffered no damage as a result of the delay in the completion of the work. It is well established that, if a provision for liquidated damages in a contract is a reasonable one, it is not necessary for the party enforcing it to show that any actual damage was sustained. *Wise* v. *United States*, 249 U. S. 361, 364–367 (1919); *United States* v. *Bethlehem Steel Company*, 205 U. S. 105, 120–121 (1907). Moreover, the authority of administrative officials of the Department to excuse the contractor from the payment of liquidated damages in the event of a delay in the performance of the contract is limited by the terms of the contract to situations where the failure to perform on time is attributable to "causes beyond the control and without the fault or negligence of the contractor." Officials of this Department do not have any authority to waive the imposition of liquidated damages on equitable grounds. See *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 294 (1941).

Conclusion

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior, the decision of the contracting officer in imposing liquidated damages for delay caused by changes in specifications of the windows is reversed, and the case is remanded to the contracting

officer to remit to the contractor the amount of such liquidated damages, but in all other respects the contracting officer's findings of fact and decision dated March 6, 1953, are affirmed.

CLARENCE A. DAVIS,
Solicitor.

S. J. HOOPER

A–26976 *Decided August 3, 1954**
A–26996

Applications for Oil and Gas Leases—Acquired Lands—Amendment of Regulations—Cancellation of Lease—Defective Application.

An amendment of a regulation governing the issuance of future interest oil and gas leases will not be applied retroactively to the detriment of one whose application was filed before the effective date of the amendment and to whom a lease was thereafter issued without a requirement that he comply with the amended regulation.

An oil and gas lease cannot be canceled where the lease was issued to the first qualified applicant who submitted a proper application therefor, and where the issuance of the lease was not in violation of any statutory or regulatory provision.

An oil and gas lease application for acquired lands is correctly rejected where the application does not contain a statement of the applicant's interests in oil and gas leases or permits or applications therefor on federally owned acquired lands in the same State, as required by regulation.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

In a decision of December 21, 1953, the Chief, Branch of Leasing, Division of Minerals, Bureau of Land Management, held for cancellation oil and gas lease, BLM–A 022726, covering 578.07 acres of acquired land described as the S½S½ sec. 28 (less 3.05 acres); the NE¼, N½SE¼, SW¼ sec. 32; and the S½SE¼SW¼ sec. 34, T. 1 S., R. 12 W., St. Stephens meridian, Mississippi. The lease was issued to S. J. Hooper as of November 1, 1952, pursuant to the Mineral Leasing Act for Acquired Lands (30 U. S. C., 1952 ed., sec. 351 *et seq.*).

The decision of December 21, 1953, was modified by a Bureau decision of February 2, 1954, which allowed the lease to remain in full force and effect as to the land in sec. 34 because the reasons for canceling the lease as to the remainder of the land were not applicable to the land in sec. 34. Mr. Hooper has appealed (A–26976) to the Secretary of the Interior from the decision of December 21, 1953.

The decision of December 21, 1953, was rendered after a protest was filed by Robert William Polchow against the issuance of the lease on

*See Supplemental Decision, p. 350.

the lands in secs. 28 and 32.[1] As the land in sec. 34 was not included in the protest and no one appears to have been prejudiced by the decision of February 2, 1954, the decision on this appeal is limited to consideration of the cancellation of the lease as to the lands in secs. 28 and 32.

Mr. Hooper has taken a separate appeal (A–26996) to the Secretary of the Interior from a decision of February 10, 1954, by the Chief, Branch of Leasing, Division of Minerals, Bureau of Land Management, insofar as it rejected his oil and gas lease application BLM–A 026734, for the W½SW¼ and the SE¼ sec. 25, T. 1 S., R. 13 W., St. Stephens meridian, Mississippi, filed pursuant to the Mineral Leasing Act for Acquired Lands. This decision was also rendered after a protest was filed by Mr. Polchow against allowance of the application.[2] Inasmuch as the appeals from the cancellation of lease, BLM–A 022726, and from the rejection of application, BLM–A 026734, initially involve consideration of the same question, the two appeals are being decided together.

I

The lands here involved, now a part of the Desoto National Forest, were conveyed to the United States by the Bond Lumber Company in a deed dated December 29, 1941, which reserved to the grantor (subject to conditions not here relevant) the mineral rights in the land for a period ending July 1, 1952. The interest of the United States in the land prior to July 2, 1952, was subject only to future interest leasing, as title to the present mineral rights did not vest in the United States until after the expiration of the reservation in the deed. The appellant's application upon which the issuance of lease, BLM–A 022726, was based was filed on March 5, 1951, and application, BLM–A 026734, was filed on October 2, 1951, when the land was subject only to future interest leasing. As lease 022726 was issued on November 1, 1952, after the present interest in the minerals vested in the United States, it was a present interest lease which issued to the appellant.

The basis for the cancellation of the lease and the rejection of the application in the Bureau decisions apparently was that the above-described lands were subject only to future interest leasing when the applications were filed and that the applications did not comply with the regulatory requirements governing the filing of applications for future interest leases on acquired lands. The protests which were filed against the appellant's lease and application refer specifically to the

[1] Mr. Polchow had filed an application (BLM–A 031755) on July 2, 1952, for the lands in secs. 28 and 32 which were later included in Mr. Hooper's lease.

[2] The protest stated that Mr. Polchow had filed an application (BLM–A 031753) on July 2, 1952, for the land in sec. 25.

fact that the appellant was not qualified to hold a future interest lease at the time when the applications were filed because he did not own all or substantially all of the operating rights in the lands covered by his application. This contention apparently refers to the following provision in 43 CFR 1952 Supp., 200.7(b):

> A future interest lease, whether the future interest of the United States is whole or fractional, will be issued only to an applicant who shows that he owns all or substantially all the present operating rights (either as a mineral fee owner, oil and gas lessee, or as an operator holding these rights under an oil and gas lease) in the lands covered by his application. * * *

This provision was added to the regulation governing the issuance of future interest leases by an amendment effective November 16, 1951. There is nothing in the records to indicate that after Mr. Hooper filed his applications on March 5 and October 2, 1951, he was requested to show that he was a qualified applicant in accordance with the amended regulation. In the absence of such a request, Mr. Hooper's applications were not subject to the amended provision because the provision was not in effect when his applications were filed. *S. J. Hooper, Humble Oil and Refining Co.*, A–26861 (March 12, 1954);[3] *cf. Levi A. Hughes et al.*, 61 I. D. 145 (1953). Accordingly, the cancellation of Mr. Hooper's lease, and the rejection of his application because of the failure to show that he was qualified to hold a future interest lease under the amended provisions of 43 CFR, 1952 Supp., 200.7 were incorrect.

An examination of the appellant's application upon which issuance of the lease was based indicates that it complied with the mandatory requirements of the regulations (43 CFR 200.1–200.10) governing the issuance of future interest leases on acquired lands at the time when the application was filed.[4] As it appears that Mr. Hooper was the first qualified applicant for the lands included in lease, BLM–A 022726, he is entitled to a lease on the land. *Transco Gas & Oil Corporation et ano.*, 61 I. D. 85 (1952). Inasmuch as the issuance of a present interest lease to Mr. Hooper did not violate any of the statutory or regulatory provisions which are applicable in this case, the decision holding the lease for cancellation as to the lands in secs. 28 and 32, T. 1 S., R. 12 W., was erroneous. *L. N. Hagood*, 60 I. D. 462 (1951).

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[3] This case involved substantially the same facts and the same issues as the present case with respect to lease BLM–A 022726.

[4] Although the appellant did not submit any contemplated development plan with this application, in accordance with one of the provisions of 43 CFR 200.7, the Department has held that this was not a mandatory requirement that an applicant for a future interest lease submit with, or as a part of, his application the showing as to the contemplated development plans. *S. J. Hooper, Humble Oil and Refining Co., supra.*

II

With respect to application BLM–A 026734, however, it appears that a defect in the application, which was not mentioned in the Bureau's decision of February 10, 1954, requires the rejection of the application.

A departmental regulation (43 CFR 200.5), which was in effect when this application was filed, requires that each application for a lease on acquired lands "must contain (1) a separate statement of the applicant's interests, direct and indirect, in leases or permits for similar mineral deposits, or in applications therefor on federally owned acquired lands in the same State, identifying by serial number the records where such interests may be found * * *."

Paragraph (c) of the application which Mr. Hooper filed states, in part, that—

> My other interests, direct and indirect, in permits and leases and applications therefor, in the same state, with identification of records wherein such interests may be found are as follows: * * *.

In the space following this statement are listed the lands for which the applicant applied. The space following paragraph (d), requiring a description of the lands for which a lease is desired, is left blank. It is apparent that the description of the lands applied for was inadvertently listed under paragraph (c) rather than paragraph (d) and would be without consequence here if the applicant had submitted in the application the information concerning his other interests as required by 43 CFR 200.5. However, in no place in this application does the appellant list his other interests in leases or permits for similar mineral deposits, or in applications therefor on federally owned acquired lands in the same State, identifying the serial numbers thereof, even though he had at least two applications (BLM–A 022726 and 022727)[5] covering lands in Mississippi pending when the instant application was filed on October 2, 1951.[6]

The language of 43 CFR 200.5 is mandatory, and the Department has held that an application which does not comply with the regulation is properly rejected and will confer no priority on the applicant.[7] *Clifford Thorp Woodward*, A–25905 (Supp.) (June 15, 1951); *cf.*

[5] Application 022727 was involved in the case of *S. J. Hooper, Humble Oil and Refining Co., supra*, and was filed on March 7, 1951.

[6] Paragraph (c) of the application concludes with the statements: "Such interests, with the acreage applied for, do not exceed in the aggregate 15,360 acres in the state of *Miss.*"

[7] Although the ruling that an application is defective where the other interests of an applicant are not listed has been made in cases involving applications under the Mineral Leasing Act, rather than under the Acquired Lands Act, there seems to be no basis for distinguishing between the two types of applications, as the wording of the regulatory provisions requiring the listing of other interests under the respective acts is almost identical.

Annie L. Hill et al. v. *E. A. Culbertson*, A–26150–26157 (August 13, 1951).[8] Although such a defect in an application is curable, the application becomes effective for purposes of establishing priority only as of the time the required information is filed as a part of the application. *Clifford Thorp Woodward, supra; cf. Mary I. Chapman, Harry Kirchner*, 60 I. D. 377 (1949). Accordingly, because the appellant did not submit, with application BLM–A 026734, a statement of his other interests in leases or permits or applications therefor, the rejection of this application was correct.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Bureau of Land Management of December 21, 1953, holding lease BLM–A 022726 for cancellation is reversed, and the case is remanded for action in accordance with this decision. The decision of the Bureau of Land Management dated February 10, 1954, rejecting application BLM–A 026734, is affirmed.

CLARENCE A. DAVIS,
Solicitor.

A–26976 *Decided October 28, 1954*
A–26996 (Supp.)

Application for Oil and Gas Lease—Acquired Lands—Regulations—Correction of Defective Application.

Where the Bureau of Land Management has not interpreted as mandatory the requirement that applicants for oil and gas leases on acquired lands submit with their applications the detailed statement of other interests required by regulation (43 CFR 200.5), and the Department holds that compliance with the regulation is mandatory, a period of time may be allowed for the correction of applications defective only in this respect, without loss of priority, in order to prevent unfairness to applicants who relied on the Bureau's interpretation of the regulation.

SUPPLEMENTAL DECISION

In a memorandum of August 31, 1954, to the Secretary of the Interior, the Director of the Bureau of Land Management requested

[8] The departmental decision in the *Hill* v. *Culbertson* case, *supra*, was reversed in a recent decision by the District Court for the District of Columbia (*L. C. Wahlenmaier* v. *Douglas McKay*, Civil No. 4087–51). An appeal is being taken from this decision. However, with respect to the question here involved, the court's decision in the *Wahlenmaier* case seems strongly to support the Department's decision in the *Woodward case*. In the *Wahlenmaier* decision (as supplemented by the findings of fact and conclusions of law), the court apparently held that a lessee who did not comply with the requirement that he list in his application his other interests was not a qualified lease applicant, even though the acreage held by the lessee did not, in fact, exceed the legal limitation, and directed the Secretary of the Interior to cancel the lease which was issued on the basis of an application defective in this respect. *A fortiori*, it would be proper to reject an application to lease which is defective because of the failure of the applicant to list his other interests.

reconsideration of Part II of the departmental decision of August 3, 1954, in the case of S. J. Hooper (A–26976, A–26996), p. 346.

Pursuant to this request, the Department agreed to reopen proceedings relating to Part II of the decision of August 3, and counsel for the appellant and for the protestant in the *S. J. Hooper* case were notified that Part II of the August 3 decision would be reconsidered. Both parties to the decision submitted briefs in this proceeding.

Counsel for the protestant has also requested that Part I of the August 3 decision relating to lease, BLM–A 022726, be reconsidered. The matters mentioned in support of this request for the protestant have been carefully considered. Inasmuch as lease, BLM–A 022726, is a present interest lease, the issuance of which was based upon a proper application in compliance with the mandatory requirements of the applicable regulatory and statutory provisions, it is concluded that there is no valid basis for reopening the proceedings relating to Part I of the August 3 decision.

The memorandum of August 31, requesting reconsideration of Part II of the August 3 decision, indicates that the Bureau has been processing acquired-land-lease applications and issuing leases without requiring the compliance of applicants with 43 CFR 200.5, a departmental regulation which sets forth information required in applications for leases under the Mineral Leasing Act for Acquired Lands (30 U. S. C., 1952 ed., sec. 351 *et seq.*).

43 CFR 200.5, approved on December 15, 1947, provides in pertinent part that—

> In addition to the information required by the appropriate regulations, referred to in sec. 200.4, each application for a lease or permit must contain (1) a separate statement of the applicant's interests, direct and indirect, in leases or permits for similar mineral deposits, or in applications therefor, on federally owned acquired lands in the same State, identifying by serial number the records where such interests may be found * * *.[1]

Part II of the August 3 decision held that Mr. Hooper's application, BLM–A 026734, was defective and was properly rejected because the applicant did not submit a statement of his interests as required by this regulation. The decision held that although such a defect in an application is curable, the application becomes effective for purposes of establishing priority only as of the time the required information is filed as a part of the application.

Between December 29, 1948, and January 28, 1951, the regulation

[1] 43 CFR 200.4 provides that, except as otherwise specifically provided in sections 200.1 to 200.36, the regulations prescribed for the leasing of minerals on public lands shall govern the disposal and development of minerals on acquired lands to the extent that the public-land-leasing provisions are not inconsistent with the provisions of the Mineral Leasing Act for Acquired Lands. 43 CFR 200.5 is, of course, a specific provision within the excepting clause of this regulation.

governing the showing with respect to acreage holdings which must be made by a public-land-lease applicant was substantially the same as that required of an acquired-lands-lease applicant. 43 CFR, 1949 ed., 192.42(a)(3) provided:

> The application must contain in substance the following:
>
> * * * * * * *
>
> A statement of the interests, direct or indirect, held by the applicant in oil and gas leases issued under the act of February 25, 1920 (41 Stat. 437; 30 U. S. C. 181) as amended, and applications for such leases, covering lands in the same State, identifying by serial number the records wherein such interests may be found, together with a statement that such interests, with the acreage applied for, do not exceed in the aggregate 15,360 acres in the State.

This regulation was amended on November 29, 1950, effective as of January 28, 1951, to eliminate any provision for an acreage showing except in cases where an oil and gas lease offer is signed on behalf of the offeror by an attorney in fact or agent. The regulation requires in that case that the offer must be accompanied by "a statement over the offeror's signature setting forth * * * whether the offeror's direct and indirect interests in oil and gas leases, applications, and offers therefor in the same State exceed 15,360 chargeable acres." In the case of ordinary lease offers which are signed by the offerors, the revised regulation made no provision for an acreage showing. However, the mandatory offer to lease and lease form which was adopted by the Department at the same time contained a statement to be signed by the offeror that "Offeror's other interests direct and indirect in oil and gas leases and applications or offers therefor in the same State do not exceed 15,360 chargeable acres."

The Director's memorandum of August 31 indicates that the revision of 43 CFR 192.42, effective January 28, 1951, to eliminate the requirement of a detailed listing of other interests by applicants for leases on public lands was considered by the Bureau to be applicable to acquired-land-lease applications, and that the Bureau regarded the additional showing required of acquired-land applicants by 43 CFR 200.5 as supplemental to the requirements of Part 192. It appears that after November 29, 1950, the Bureau processed many acquired-lands applications and issued leases based upon such applications without requiring compliance with 43 CFR 200.5.

Apparently as a result of the Bureau's interpretation of 43 CFR 200.5 after November 29, 1950, many acquired-lands applications have been filed without the detailed statement of the applicant's other interests required by 43 CFR 200.5, and leases have been issued on the basis of such applications. The Bureau believes that in these circumstances it is unfair to penalize applicants and possibly lessees for failing to comply with a requirement which the Bureau has not en-

forced. That is, to deny priority to all applications filed before August 3, 1954, which do not contain the required statement of other interests, as would be necessary if Part II of the August 3 decision is not modified, is a harsh result in view of the administrative practice regarding this regulation.

When regulations have been amended in the past making mandatory the performance by applicants of an act which was not previously required, the Department has allowed, without loss of priority, additional time for complying with the new requirement to persons who filed applications, without knowledge of the new requirement, immediately after the new requirement became effective. *Dorothy Bassie et al., Applicants, Mary I. Chapman and Harry M. Kirchner, Protestants.* 59 I. D. 235 (1946). In the *Bassie* case the Department held that noncompetitive oil and gas applications which were not accompanied by the first year's rental as required by new departmental regulations published in the Federal Register on the day on which the applications were filed should not result in a loss of priority to the applicants who complied with the additional requirement as soon as they learned of it, even though intervening applications which were accompanied by the first year's rental had been filed before the applications, defective in this respect, were corrected. The allowance of additional time to comply with the new requirement without loss of priority in the *Bassie* case was not a legal requirement but seems to have been based chiefly on a notion of administrative fairness.

The circumstances under consideration in this proceeding are analogous to those arising in the *Bassie* case to the extent that the Bureau's failure to enforce 43 CFR 200.5 after November 29, 1950, constituted, in fact, an administrative interpretation that the regulation was not mandatory. Thus, the decision of August 3, holding that the submission of the statement required by 43 CFR 200.5 was mandatory, had the effect of adding a new requirement. It is believed that where, as here, a regulation has been administered over a period of time as not mandatory, a decision holding such administration to be erroneous should provide for the correction of the error with as little prejudice as possible to persons relying on the erroneous administrative construction.

When the departmental decision of August 3 in the *Hooper* case was promulgated, the Department was not aware of the Bureau's practice of not enforcing 43 CFR 200.5. Although the practice is not legally justifiable, and acquired-land-lease applications which do not contain the statement required by 43 CFR 200.5 are defective, fairness and equity would seem to require that an applicant or a lessee who has filed an application deficient in this respect in reliance upon

the administrative construction should be given time to cure the defect by supplying the details required by the regulation without loss of priority, if all else is regular. It is concluded that such action should be taken in this proceeding in order to prevent harsh and unjust consequences to applicants for and lessees of acquired lands.

Another circumstance may be mentioned in support of this conclusion in the instant proceeding. Mr. Hooper stated on his application, which is headed "Acquired Lands," that his other interests including the acreage applied for did not exceed in the aggregate 15,360 acres in the State of Mississippi. Thus, assuming that this statement referred to Mr. Hooper's interests in acquired lands,[2] the application itself indicated that at the time of the filing, Mr. Hooper was a qualified applicant with respect to the acreage-holding requirement of the statute. This circumstance is a proper basis for distinguishing the instant case from the case of *Clifford Thorp Woodward*, A–25905 (Supp.) (June 15, 1951), which was relied on in the August 3 decision, because the *Woodward* application did not indicate anything regarding the acreage-holding requirement.

Since the purpose of the regulation requiring a statement of an applicant's other interests in mineral leases, permits, and applications therefor is to determine whether an applicant is qualified under section 27 of the Mineral Leasing Act, as amended,[3] it is reasonable that a person whose application shows that he is a qualified applicant with respect to acreage holdings should be allowed to submit the detailed showing required by 43 CFR 200.5 without a loss of priority.

In the circumstances, in the interest of administrative fairness, Mr. Hooper and others similarly situated who prior to August 31, 1954, filed applications defective in the respect described in this decision will be allowed to and including December 1, 1954, to submit the statement of other interests required by 43 CFR 200.5 without loss of priority to their applications. Part II of the decision of August 3, 1954, is modified in this respect.

ORME LEWIS,
Assistant Secretary.

[2] Cf. *G. G. Stamford*, 61 I. D. 232 (1953).

[3] 30 U. S. C., 1952 ed., sec. 184, as amended by the act of August 2, 1954, P. L. 561, 83d Cong., 2d sess. [68 Stat. 648.]

CHARLES D. EDMONSON
MANER GRAHAM
VIRGIL PETERSON ET AL.

A–26834
A–26921
A–26932

Decided August 10, 1954

Oil and Gas Leases—Preference Right—Reinstatement of Applications—Cancellation—Rules of Practice—Appeals.

An applicant for a noncompetitive oil and gas lease whose application is rejected and who fails to appeal within the time allowed for appeal loses his preference right to a lease as against a subsequent qualified applicant and is not entitled to a reinstatement of his application with priority over the subsequent applicant. *Bettie H. Reid, Lucille H. Pipkin*, and *John F. Deeds, Jeff Hawks* overruled.

The holder of an oil and gas lease whose lease is improperly canceled and who fails to appeal from the cancellation loses his rights in his lease.

An appeal will be dismissed where a copy of the appeal was not served upon an adverse party.

An assignee of an oil and gas lease whose assignment has not been approved but is apparently in compliance with applicable statutory and regulatory requirements has standing as an "aggrieved person" to appeal to the Secretary from a decision canceling the assigned lease.

Where several oil and gas leases are canceled for the same reason, an appeal by one lessee does not bring before the Department the interests of the other lessees who have failed to appeal.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

The appeals in these cases have been consolidated for action because they all involve the same basic question. The facts in each case are separately stated.

I

A–26834—*Charles D. Edmonson.*—On July 19, 1950, Charles B. Elmgren applied under section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226), for a noncompetitive oil and gas lease on 2,322 acres of public land (Colorado 01440). In a decision dated March 12, 1951, the acting manager of the Denver land office sent lease forms to Mr. Elmgren for execution, covering 800.80 acres, and rejected his application for the balance of the land on the ground that the land was either leased for oil and gas or patented without a reservation of the oil and gas to the United States. Included in the land as to which the application was rejected was a 40-acre tract SE¼SE¼ sec. 35, T. 3 N., R. 77 W., 6th P. M., Colorado). The decision stated that the "right of appeal is allowed," but Mr. Elmgren

did not appeal from the partial rejection. The lease for the 800.80 acres was issued to him effective as of May 1, 1951.

On October 21, 1952, Charles D. Edmonson filed an application for a lease (Colorado 05622) on certain land, including the 40-acre tract mentioned above. Before action on his application was taken, the manager, in a decision dated October 29, 1952, offered Mr. Elmgren an amendment to his lease covering the 40-acre tract, stating that his application had been erroneously rejected as to that tract on the ground that it was believed to be included in a prior lease, whereas the tract was not in a prior lease and had been available for lease when Mr. Elmgren's application was filed. Accordingly, Mr. Elmgren's lease was amended to include the 40-acre tract.

On December 2, 1952, Mr. Edmonson filed a protest against the amendment of Elmgren's lease. The protest was dismissed by the Assistant Director of the Bureau of Land Management on March 30, 1952, whereupon Mr. Edmonson took this appeal to the Secretary.

II

A-26921—*Maner Graham.*—On July 24, 1950, Maner Graham filed an application for a noncompetitive oil and gas lease (N. M. 02894) on 2,560 acres of public land. His application was rejected on March 24, 1952, by the Regional Chief of Adjudication on the ground that—

> this land was included in the area declared by the act of August 13, 1949 (63 Stat. 604) to have the status of Indian Reservation. The area (III-7-B) was defined by the Secretary of the Interior by order dated March 25, 1950, published in the Federal Register March 30 [31], 1950, as Document 50-2679. Indian Reservation lands are not leasable by the Bureau of Land Management.

Mr. Graham was given 30 days to appeal. Within the 30-day period, the attorneys for Humble Oil & Refining Company wrote the Regional Chief of Adjudication on April 17, 1952, stating that the company held an option on the land in Graham's application and that they were authorized to represent Graham in connection with his application. They requested a 30-day extension of time in which to appeal, saying that they had a letter dated April 16, 1952, from the Albuquerque area office of the Office of Indian Affairs indicating that the lands in the Graham application were not affected by the act of August 13, 1949. The manager of the Santa Fe Land and Survey Office granted the extension in a letter dated April 22, 1952, adding, however, that "we have checked our records further and find no error in the action taken in rejecting the application 02894." No further action being taken by the attorneys or by Graham, the case was closed on June 4, 1952.

On November 14, 1952, Claude Teel filed an application for a lease (N. M. 09776) on 640 acres, including 480 acres that had been included

in Graham's application. A lease was issued to him effective as of December 1, 1952.

On November 17, 1952, Mrs. Vera H. Jones filed an application for a lease (N. M. 09799), which included 1,440 acres of the land in the Graham application. A lease was issued to her effective as of January 1, 1953.

Also, on November 17, 1952, Mr. Teel filed a second application for a lease (N. M. 09802) on 640 acres of land all of which had been included in Mr. Graham's application. A lease was issued to Mr. Teel effective as of January 1, 1953.

The two leases issued to Mr. Teel and the lease issued to Mrs. Jones included all the land for which Mr. Graham had applied.

On January 30, 1953, Mr. Graham wired a request to the manager of the Santa Fe Land and Survey Office that his application be reinstated. He followed his telegram with a letter making the same request and also requesting the cancellation of the leases issued to Mr. Teel and Mrs. Jones.

Mr. Graham's requests were denied by the manager on March 24, 1953. On Graham's appeal, the manager's decision was affirmed by the Assistant Director of the Bureau of Land Management on July 8, 1953. Mr. Graham thereupon appealed to the Secretary.

III

A–26932—*Virgil Peterson et al.*—On April 4, 1949, J. R. Gillbergh filed an application for a noncompetitive oil and gas lease (Salt Lake 071266) on 760 acres of land in the Ashley National Forest. The manager of the Salt Lake City land office rejected his application as to part of the land on November 29, 1950, and as to the remainder of the land on December 13, 1950, on the ground that all the land had been patented without a reservation of the oil and gas to the United States.

Mr. Gillbergh had filed, on April 8, 1949, a second lease application (Salt Lake 071309) for an additional 1903.09 acres in the Ashley National Forest. This application was also rejected by the manager on December 5, 1950, on the ground that some of the land was State owned and the remainder was in patented entries which contained no reservation of oil or gas to the United States.

Mr. Gillbergh did not appeal from the rejection of either application, and the cases were closed.

Subsequently, Paul H. Dudley on February 27, 1951, Virgil V. Peterson on April 19, 1951, and Hugh Burton on May 14, 1951, filed individual applications for oil and gas leases on practically all the land which had been included in Gillbergh's second application. On

August 7, 1951, Beverley Lasrich filed an application for most of the land in Gillbergh's first application. Leases were issued to these applicants.[1] On November 2, 1951, an assignment of Mrs. Lasrich's lease to H. H. Griffin was filed for approval. No action has been taken on the assignment.

On January 16, 1952, Mr. Gillbergh filed separate appeals from the rejection of his two applications, claiming that his applications had precedence over those later filed by Dudley, Peterson, Burton, and Lasrich. On September 17, 1953, the Associate Director of the Bureau of Land Management held the Dudley, Peterson, Burton, and Lasrich leases for cancellation and reinstated Gillbergh's applications.[2]

Mr. Peterson appealed to the Secretary from the Associate Director's decision. Mrs. Lasrich did not appeal but Mr. Griffin, her assignee, filed an appeal and brief. Mr. Burton and Mr. Dudley did not appeal. On the contrary, Mr. Dudley wrote the Associate Director on September 23, 1953, stating that he was "willing to accept without protest your final decision," and requesting the return of his advance rental payment. Mr. Dudley's letter was accepted as a relinquishment of his lease.

IV

The basic question which is common to all the appeals is whether an applicant for a noncompetitive oil and gas lease whose application is erroneously rejected and who fails to appeal from the rejection within the time permitted for appeal is entitled either as a matter of law or as a matter of administrative discretion to the reinstatement of his application with priority over one who filed an application for a lease following the rejection of the first application.

This question has been considered by the Department in the two leading cases of *Bettie H. Reid, Lucille H. Pipkin*, 61 I. D. 1 (1952), and *C. A. Rose*, A–26354 (May 13, 1952). It involves the following provision of section 17 of the Mineral Leasing Act, as amended, *supra*, which governs the issuance of oil and gas leases:

> * * * When the lands to be leased are not within the known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding.

The Department has consistently held that under this provision the first qualified applicant for a lease is entitled to a lease over any sub-

[1] Paul H. Dudley Utah 03804 effective April 1, 1951.
Virgil V. Peterson Utah 04158 effective July 1, 1951.
Hugh Burton Utah 04313 effective July 1, 1951.
Beverley Lasrich Utah 04891 effective October 1, 1951.

[2] The reinstatement of Utah 071266 was suspended as to two tracts which were included in the Cedar Butte Nos. 1 and 3 mining claims, mineral entry Salt Lake 066330. These two tracts had not been included in the Lasrich lease.

sequent applicant and that any lease issued to a second applicant in derogation of the preference right given by statute to the first applicant is unauthorized and subject to cancellation. *Russell Hunter Reay* v. *Gertrude H. Lackie*, 60 I. D. 29 (1947); *Transco Gas & Oil Corporation et ano.*, 61 I. D. 85 (1952).

This principle was applied to the following facts in the *Reid-Pipkin* case, *supra*: Mrs. Reid's application for a lease was rejected by the manager as to the NE¼ sec. 18 on the ground that the land had been withdrawn for reclamation purposes. Actually, only the west half of the tract had been so withdrawn; the east half was available for leasing. Mrs. Reid did not appeal. A little over 2 months later, Miss Pipkin applied for a lease on the east half of the tract and was issued a lease on May 14, 1951, to be effective June 1, 1951. On May 28, 1951, Mrs. Reid applied for a reinstatement of her application with respect to the E½NE¼ sec. 18. The Department held that Miss Pipkin's lease should be canceled and that Mrs. Reid should be offered a lease for the E½NE¼ sec. 18, as she was the first qualified applicant for the land. The Department declared that although Mrs. Reid had delayed from February 7, 1951 (the date on which she was notified of the partial rejection of her application), until May 28, 1951, before she applied for reinstatement, she was not lacking in reasonable diligence because the question whether the E½NE¼ sec. 18 had been withdrawn was a question of fact the answer to which was reflected in the official records of the Land and Survey Office. There was no reason why Mrs. Reid should have questioned the accuracy of the manager's statement concerning the status of the land since this was a factual matter within the peculiar competency of the manager. The Department emphasized the fact that in any event, when Mrs. Reid applied for reinstatement, the effective date of Miss Pipkin's lease had not been reached.

The *Reid-Pipkin* decision was followed in *John F. Deeds, Jeff Hawks*, A–26287 (June 26, 1952). There Mr. Hawks' application was partially rejected on May 25, 1950, for the reason that the E½SW¼ sec. 5 had been patented without a mineral reservation. On January 23, 1951, Mr. Deeds applied for a lease on the same land, stating that the patent had contained a mineral reservation. On January 25, 1951, Mr. Hawks, who had not appealed from the partial rejection of his application, requested the reinstatement of his application. Citing *Reid-Pipkin*, the Department directed the reinstatement of Hawks' application with priority over Deeds' application. The Department said that whether the E½SW¼ sec. 5 had been patented with a mineral reservation was a matter reflected in the official records of the Bureau of Land Management and that there was no

reason why Mr. Hawks should have questioned his rejection on the ground assigned.

In *C. A. Rose*, A–26354 (May 13, 1952), however, the opposite conclusion was reached. Mr. Rose applied for two tracts of land, one of which was included in a prior application by Denn Pieratt. When a lease was issued to Pieratt for the one tract, Rose's application was rejected in its entirety on March 10, 1949, on the ground that the land had been leased. On June 26, 1951, Rose reapplied for the tract which had not been included in Pieratt's lease. However, by this time the tract had been leased to intervening applicants. The Department held that although Rose had been the first qualified applicant for the tract and although his first application had been erroneously rejected, he had lost his preference right by his failure to appeal from the rejection. *Reid-Pipkin* was distinguished on the ground that the error in rejecting Rose's application was apparent on its face and as obvious to Rose as to anyone else.

The *Rose* decision was followed in *Jeanette L. Luse et al.*, 61 I. D. 103 (1953). Mrs. Hornung applied for, among other land, lot 14, sec. 6. She was sent lease forms on September 8, 1949, which omitted lot 14, sec. 6, but included lot 1, sec. 6, for which she had not applied. Over 2 years later, on November 26, 1951, Mrs. Hornung requested that lot 14 be substituted for lot 1. Meanwhile, however, lot 14, sec. 6, had been leased to Mrs. Luse. Following *C. A. Rose*, the Department held that because the error in substituting lot 1 for lot 14 in Mrs. Hornung's lease was as obvious to her as to anyone, her failure to take an appeal constituted an abandonment of her preference right.

The distinction between *Reid-Pipkin* and *John F. Deeds* on the one hand and *C. A. Rose* and *Jeanette Luse* on the other hand is whether the erroneous ground of rejection is a matter reflected on the official records of the Bureau of Land Management and within the peculiar competency of the officials of that Bureau or whether the erroneous ground of rejection is as apparent to the applicant as to anyone else. In *Reid-Pipkin* it was also stressed that Mrs. Reid's application for reinstatement was filed before Miss Pipkin's lease became effective, even though the lease had already been executed by both parties. In *John F. Deeds*, of course, no lease had been issued to the junior applicant. It may also be noted that the delay between rejection and application for reinstatement was much greater in *C. A. Rose* (over 2 years and 3 months) and *Jeanette L. Luse* (over 2 years and 2 months) than in *Reid-Pipkin* (over 3 months) and *John F. Deeds* (8 months). However, this point of distinction was not mentioned in the decisions.

A fifth decision should be mentioned at this point: M. T. Myers

filed 5 applications for leases effective as of November 22, 1943. Subsequently, six separate conflicting applications were filed by others for lands included in the Myers applications. The Myers applications were rejected on March 28, 1945, on the ground that the lands applied for were withdrawn ceded Indian lands. Myers did not appeal. Thereafter, leases were issued on three of the six conflicting applications. On April 29, 1946, Myers requested the reinstatement of his applications for the reason that the lands applied for were not ceded Indian lands. The lands in fact were not Indian lands (except for one tract). In a decision dated August 20, 1946, by the Acting Director of the Bureau of Land Management, which was approved by the Acting Assistant Secretary on September 24, 1946 (G. L. O. 09845, etc.), it was held that Myers' failure to appeal from the erroneous rejection of his applications cost him his preference right as to the lands on which the three leases had been issued. However, as to the three remaining conflicting applications, it was held that since leases had not been issued, Myers' applications would be reinstated with priority over the three conflicting applications.

It will be observed that the ruling in the *Myers* decision with respect to the lands included in the conflicting applications on which leases had not been issued is consistent with the *John F. Deeds* case. The ruling with respect to the lands included in the three conflicting applications on which leases had been issued can be reconciled with *Reid-Pipkin* only on the ground that in the *Myers* case the effective dates of the conflicting leases issued to the junior applicants had been reached before Myers requested reinstatement. The *Myers* decision was not referred to in the *Reid-Pipkin*, *John F. Deeds*, *Rose*, or *Luse* decisions.

Turning to the appeals at hand, we find that in the *Edmonson* case, the Assistant Director followed *Reid-Pipkin* and *John F. Deeds*, holding that the erroneous ground of rejection (that the tract in question had already been leased) was a matter reflected in the official records of the land and survey office which Mr. Elmgren had no reason to question. The Assistant Director also referred to the fact that when Elmgren's lease was amended to include the disputed tract, the latter had not yet been leased to another.

In the *Maner Graham* case, the Assistant Director held *Reid-Pipkin* to be inapplicable for the sole reason that the effective dates of the leases issued to Mr. Teel and Mrs. Jones had been reached before Mr. Graham applied for a reinstatement, and relied upon the *Myers* case.

In the *Virgil Peterson* case, the Associate Director relied upon *Reid-Pipkin*, *Reay* v. *Lackie*, and *Transco Gas & Oil Corporation*, without discussion of those cases.

V

The basic question with which we are confronted is whether the *Reid-Pipkin* decision is sound and should continue to be followed.

An examination of departmental decisions reveals that the long-established and invariable rule which has been followed by the Department is that an applicant for public land whose application is rejected and who fails to appeal within the time allowed for appeals loses whatever rights he had under his application, particularly where adverse claims or rights have intervened.[3] This is so even though the right lost by the applicant was a preference right to enter land.[4] That the statutory preference right of the first qualified applicant for a non-competitive lease under section 17 of the Mineral Leasing Act, as amended, can be lost by the failure of the applicant to appeal was squarely held in the *C. A. Rose* and *Jeanette Luse* decisions. The only question, therefore, is whether the grounds relied upon in *Reid-Pipkin* justify a departure from the established rule.

The major premise of *Reid-Pipkin* is that the erroneous ground for rejection of Mrs. Reid's application was a matter of fact reflected in the official records of the Bureau of Land Management and within the peculiar competency of the official in charge of the records and acting upon the application, and that the applicant had no reason to question the factual determination of the official. However understandable this position may be, it is at variance with previous decisions of the Department. In *McKernan* v. *Bailey*, *supra* (footnote 3), Ella F. Bailey's preemption declaratory statement was rejected on the erroneous ground that title to the land involved was in the State of Michigan pursuant to a grant for railroad purposes. In fact, the grant had been forfeited and title to the land restored to the United States by an act of Congress. The Department first held that Miss Bailey's failure to appeal from the rejection of her declaratory statement did not bar her priority of claim to the land as against a subsequent homestead applicant. 16 L. D. 368 (1893). However, on review, the Department reversed itself, citing the earlier cases listed in footnote 3. The Department stated that "the fact that 'the title to the land was erroneously believed to not be in the United States' is no excuse for a failure to pursue the remedy of appeal." 17 L. D. 496.

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[3] *Wesley A. Cook*, 4 L. D. 187 (1885); *Smith* v. *Green*, 5 L. D. 262 (1886); *Arthur B. Cornish*, 9 L. D. 569 (1889); *Drummond* v. *Reeve*, 11 L. D. 179 (1890); *MacBride* v. *Stockwell*, 11 L. D. 416 (1890); *Parker* v. *Gray*, 11 L. D. 570 (1890); *John A. Stone*, 13 L. D. 250 (1891); *Henry Hale*, 13 L. D. 365 (1891); *McKernan* v. *Bailey*, 17 L. D. 494 (1893); *Pehling* v. *Brewer*, 20 L. D. 363 (1895); *Olsen* v. *Simonson*, 27 L. D. 689 (1898); *Charles R. Haupt*, 48 L. D. 355 (1921); *Cummings, Jr.* v. *Johnson-Fenner and Murdi*, 52 L. D. 529 (1928), 52 L. D. 532 (1929); and *Annie L. Hill* v. *N. S. Williams et al.*, 59 I. D. 370 (1947).

[4] *Arthur B. Cornish*; *Drummond* v. *Reeve*; *Cummings, Jr.* v. *Johnson-Fenner and Murdi*; all *supra*, footnote 3.

In *Pehling* v. *Brewer*, *supra* (footnote 3) the erroneous ground of rejection was that Brewer's soldiers' additional homestead entry conflicted with a State swampland selection. Actually, the State selection was invalid because the land had been included in a railroad grant before the swampland grant had been made and was, therefore, excluded from the swampland grant. Soldiers' additional entries could be made on lands in the railroad grant. Nonetheless, Brewer was held not to be entitled to the reinstatement of his entry because of his failure to appeal from the erroneous rejection.

In *Olsen* v. *Simonson*, *supra* (footnote 3), Olsen's application for homestead entry was rejected on the ground that the land was included in a railroad selection. The selection in fact had been rejected but the rejection had not been noted in the land-office records. Olsen did not appeal and was held to have lost his priority over a subsequent applicant whose application was rejected on the same erroneous ground but who appealed from the rejection.

The three cases just summarized appear to be indistinguishable from *Reid-Pipkin* in the particular with which we are concerned. That is, the applications involved were rejected because of a land office error as to the status of the land. There was no more reason for the applicants in those cases to question the determinations by the land office that the lands for which they had applied were unavailable for entry than there was for Mrs. Reid to question the land-office statement that the land for which she had applied was withdrawn.

The second factor stressed in *Reid-Pipkin* was that the effective date of the Pipkin lease had not been reached at the time when Mrs. Reid petitioned for the reinstatement of her application. This factor does not appear to require or justify the conclusion which it was adduced to support. Although the Pipkin lease had an effective date of June 1, 1951, all the administrative action necessary to accomplish the issuance of the lease was completed by May 14, 1951. Thereafter, although the lessee's obligations and rights under the lease did not accrue until June 1, 1951, the lease was a binding instrument with respect to both parties and could not be vitiated by unilateral action. The delayed effective date was adopted only as a matter of administrative convenience to facilitate accounting and record-keeping purposes. Accordingly, it seems clear that a binding contract existed between the United States and Miss Pipkin at the time when Mrs. Reid filed her application for reinstatement.

It appears, therefore, that the decision in the *Reid-Pipkin* case was not required as a matter of law and that it runs counter to the long-established rule of the Department that an applicant who fails to appeal from an erroneous rejection of his application loses his rights

under the application, regardless of whether the error should have been apparent to him or whether it related to a question of fact reflected in the official records of the Department and within the peculiar competency of the land-office personnel to answer.

It is easy to understand the motivation for the *Reid-Pipkin* decision. It is undeniably harsh that one who deals with a land agency of the Government is not entitled to rely upon that agency's determination as to what its own records show as to the status of the land under its jurisdiction. To abandon *Reid-Pipkin* means that an applicant who is told by the Bureau of Land Management that the land for which he has applied has been patented or leased or withdrawn or otherwise made unavailable accepts that information at his own peril.

On the other hand, equally undesirable results flow from *Reid-Pipkin*. Principal among these is uncertainty of lease titles. One who has applied for apparently available land and received a lease may awake one day to find that he has lost his lease to a prior applicant about whose existence he did not even know. The result is that one who receives a noncompetitive oil and gas lease cannot be sure of his title until he checks all prior applications for the same land and satisfies himself that they cannot be reinstated under the *Reid-Pipkin* doctrine. This would place an even greater burden upon him than would be placed on a prior applicant if *Reid-Pipkin* were not followed.

The *Reid-Pipkin* decision also nullifies the idea of administrative finality. When adverse administrative action is taken upon an application and the applicant does not exercise his right to appeal within the time provided for that purpose, orderly administration requires that the case be closed as to that application so that the record will be clear when succeeding applications are considered. Under *Reid-Pipkin*, however, a presumably closed case may have to be reopened and readjudicated long after its closing was acquiesced in by the person later seeking to reopen the case. There can be no real finality of administrative decisions in such circumstances.

The long periods of uncertainty engendered by the *Reid-Pipkin* decision are clearly illustrated by the appeals under consideration. In the *Edmonson* case, over 1 year and 7 months elapsed between the partial rejection of Elmgren's application and the offer to him of an amendment to his lease. In the Graham case, 10 months intervened between the rejection and request for reinstatement. In the *Peterson* case, 13 months elapsed between rejection and request for reinstatement. These periods of time could have been much greater (compare the elapsed times in the *Rose* and *Luse* cases).

On balance, it seems that the factors militating against acceptance of the *Reid-Pipkin* decision appreciably outweigh those justifying a continuance of the principle established in that case. Accordingly,

the ruling laid down in that case and in the *John F. Deeds* case will no longer be followed. The rule long established in the decisions cited in footnote 3, *supra*, and in *C. A. Rose* and *Jeanette Luse* will continue to be applied; that is, an applicant for a noncompetitive oil and gas lease whose application is rejected and who fails to appeal within the time allowed for appeal will lose his preference right to a lease as against subsequent qualified applicants.

VI

With the establishment of this rule, we turn to the specific appeals involved here:

1. The *Edmonson* case.—It must be held in this case that when Elmgren failed to appeal from the rejection of his application as to the 40-acre tract which was later included in Edmonson's application, he lost his preference right to a lease on that tract. It follows that, as between Elmgren and Edmonson, the latter has a preference right to a lease on the tract and that the amendment of Elmgren's lease to include the tract was improper.

2. The *Graham* case.—Graham lost his preference right to a lease by his failure to appeal. His request for reinstatement of his application was, therefore, properly denied with respect to the land included in the subsequent leases to Mr. Teel and Mrs. Jones.

3. The *Peterson* case.—It is clear that Mr. Gillbergh lost his preference right with respect to his two applications when he did not appeal from their rejection.[5] However, when he applied for reinstatement, his applications were reinstated and the subsequent leases issued to Messrs. Dudley, Peterson, and Burton and to Mrs. Lasrich were held for cancellation. From this second decision, all the lessees did not appeal. In fact, Mr. Dudley expressly acquiesced in the can-

[5] Mr. Gillbergh has submitted a photostatic copy of a letter dated March 30, 1951, to the manager of the Salt Lake City land office, in which he requested a refund of his advance rental payments on his two applications "provided, of course, that there is no further change in status of the lands, as stated in your letters of Dec. 5, 50 for S. L. 071309 and Dec. 13, 50 for S. L. 071266." Mr. Gillbergh contends that the quoted language constituted a request for reconsideration of the manager's decisions rejecting his applications, and that the request was never acted on. Even if the quoted language could be construed as a request for reconsideration, the request was answered by the following language typed on the bottom of the letter and signed by the manager:

> "We regret the unavoidable delay that has occurred in the processing of refunds. However, this has been occasioned by the heavy load of oil and gas work. It will be approximately thirty to sixty days before February and March refunds can be made."

That this answer was accepted by Gillbergh as meaning that the rejection of his applications was final is indicated by the following notation added after the manager's typed statement:

> "Wrote House [manager] again on June 27, 1951, requesting action on mailing refund."

This was before Mrs. Lasrich had filed her application.

cellation of his lease. Applying to Mr. Dudley and Mr. Burton the same rule that is being applied to Mr. Gillbergh—and there is no perceptible reason why the same rule should not be applied—it is plain that they lost their rights in their leases upon their failure to appeal from the cancellation of their leases.

Mr. Peterson did appeal from the cancellation of his lease. But he failed to serve a copy of his notice of appeal upon Mr. Gillbergh, as required by the Department's Rules of Practice. 43 CFR, 1952 ed., 221.75(c). Accordingly, in accordance with the consistent rulings of the Department, Mr. Peterson's appeal must be dismissed. *Lawrence T. Epperson et al.*, A–26840 (April 30, 1954); *Arthur L. Wingard et al.*, A–26977 (June 3, 1954). This puts Mr. Peterson in no better position than if he had failed to appeal.

As for Mrs. Lasrich, she also failed to appeal. However, her assignee, Mr. Griffin, did appeal. This presents the question whether Mr. Griffin was entitled to appeal. The record shows that the assignment of the Lasrich lease to Mr. Griffin was filed about 2½ months before Mr. Gillbergh in effect requested the reinstatement of his applications. So far as the record shows, the assignment was in compliance with the statute and the regulations, and action on approval of the assignment was withheld only because of the filing of Mr. Gillbergh's requests for reinstatement. Section 30a of the Mineral Leasing Act (30 U. S. C., 1952 ed., sec. 187a) permits the disapproval of assignments only for limited reasons, none of which appears to be pertinent here. It seems, therefore, that Mr. Griffin has a very substantial interest in the outcome of Mr. Gillbergh's applications for reinstatement and that he may be recognized as a party in interest with respect to actions taken concerning the Lasrich lease. The Department's Rules of Practice permit an appeal by any "aggrieved person." 43 CFR, 1952 Supp., 221.75 (a). Mr. Griffin would seem clearly to fall in that category. See *Henry E. Kaune et al.*, A–24665 (December 12, 1947).

It is contended, however, by Mr. Gillbergh that the Griffin appeal was late. The record shows that the Associate Director's decision of September 17, 1953, was served upon Mrs. Lasrich on September 21, 1953, and that the Griffin appeal was filed with the manager on December 22, 1953, and received in the Director's office on December 28, 1953, over 3 months after the service on Mrs. Lasrich. However, a copy of the decision was not sent to Mr. Griffin and he asserts that he learned of the decision only informally. Since the time for appeal by an aggrieved person runs from the date of service upon the person and it is not known even on what date Mr. Griffin was informally advised of the decision, it cannot be said that his appeal was late. That being the case, the reinstatement of the Gillbergh application

with respect to the land included in the Lasrich lease cannot stand.[6]

It may be noted that the Griffin appeal does not serve to bring before the Department the interests of the other lessees. *McReynolds* v. *Weckey et al.*, 39 L. D. 498 (1911). By their failure to appeal, they lost whatever interest they had in their leases.

VII

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised, 17 F. R. 6794), the following actions are taken:

1. The Assistant Director's decision of March 30, 1953, dismissing Mr. Edmondson's protest against the amendment of Mr. Elmgren's lease is reversed; the amendment of the Elmgren lease is canceled; and the case is remanded for further action in accordance with this decision.

2. The Assistant Director's decision of July 8, 1953, rejecting Mr. Graham's application for the reinstatement of his oil and gas lease application is affirmed.

3. The appeal of Virgil Peterson from the Associate Director's decision of September 17, 1953, is dismissed; the Associate Director's decision is allowed to stand to the extent that it held the Dudley, Peterson, and Burton leases for cancellation, and is reversed to the extent that it held the Lasrich lease for cancellation; and the case is remanded for the reinstatement of Mr. Gillbergh's applications to the extent indicated in this decision.

CLARENCE A. DAVIS,
Solicitor.

THE TEXAS COMPANY, THOMAS G. DOROUGH, APPELLANTS, JOHN SNYDER, INTERVENER

A-27021 *Decided August 10, 1954*

Oil and Gas Leases—Acquired Land—Public Domain—First Qualified Applicant—Cancellation of Lease—Reinstatement of Application—Rules of Practice—Contest—Supervisory Authority of the Secretary.

Where an applicant files an application for an oil and gas lease on acquired lands which includes a tract of public land, he does not earn a preference right to an oil and gas lease on that tract as against an applicant who files

[6] This disposition of the case renders it unnecessary to consider the contention advanced by Griffin that Gillbergh's application (Salt Lake 071266) was invalid because, at the time when it was filed, the land applied for was included in a mineral entry (Salt Lake 066330) on which a final certificate had been issued. The mineral entry was apparently later canceled on October 27, 1950, and notation of the cancellation entered on the tract books on June 25, 1951.

a subsequent proper public-domain application for an oil and gas lease on the same tract.

Where an acquired land oil and gas lease includes a tract of public-domain land, the acquired land lease is subject to cancellation as to the tract of public domain land.

If the Department determines that a tract of public land which is not within any known geological structure of a producing oil or gas field will be made available for oil and gas development, the Department is under a mandatory duty, imposed by statute, to lease the land to the qualified person who first submits a proper application for it.

Where an applicant for a public-land oil and gas lease acquiesces in an erroneous determination by a Bureau official that his application covers acquired lands and in the processing of his application as one for an acquired-land lease, and action on his case as a public-land application is closed, he will not be granted a reinstatement of his application as a public-land application where the land has been leased to an intervening applicant pursuant to a proper public-land-lease application.

A contest will not be allowed where the grounds for an alleged contest are shown by the records of the Department.

When a matter pending before the Department of the Interior has been considered at the highest level in the Department, no interested party may be heard to complain of defective consideration at a lower level, since the Secretary of the Interior has authority under the law to assume jurisdiction at any stage of the proceedings.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Texas Company has appealed to the Secretary of the Interior from a decision by the Chief, Division of Minerals, Bureau of Land Management, dated February 16, 1954, which canceled in part an oil and gas lease for acquired lands (BLM–A 016898) which The Texas Company holds as assignee of Thomas G. Dorough, the original lessee.

On April 19, 1948, Dorough filed with the Bismarck district land office an application for a noncompetitive oil and gas lease pursuant to the act of February 25, 1920, as amended (30 U. S. C., 1952 ed., sec. 181 *et seq.*), covering 2,080 acres of land situated in T. 153 N., R. 95 W., 5th P. M., McKenzie County, North Dakota. Included in this land was the NE¼SW¼ sec. 7, the tract involved in this appeal. The application was given serial number Bismarck 025004 and held in the local office for processing. On January 19, 1949, Dorough wrote to the Bureau of Land Management office in Billings, Montana,[1] inquiring as to the status of his application. In this letter he stated:

Since filing the above numbered oil and gas lease application, I have learned that applications for acquired lands should be filed direct to Washington, D. C. Therefore, if any part of this application is considered acquired land, please accept this letter as formal notice that it is my desire that the matter be forwarded to your proper land office in order that an oil and gas lease can be issued.

[1] The land office at Bismarck, North Dakota, was discontinued as of the close of business on July 30, 1948, pursuant to Executive Order 9977, dated July 17, 1948 (13 F. R. 4033).

The Regional Chief of Adjudication, Region III, replying to this letter on January 25, 1949, informed Dorough that of the lands included in Dorough's application, only certain lands in secs. 5 and 8 were public domain land. He then stated:

> In view of the fact that the above land is the only land that may be included in a lease under the leasing act of February 25, 1920, it is suggested that you file a new application covering the balance of the land. Such application should be filed direct in the Bureau of Land Management office in Washington, D. C. Your application should clearly show that it is an application for acquired land.

Dorough apparently did not file a new application. But on February 4, 1949, the Regional Chief of Adjudication forwarded three applications by Dorough, including Bismarck 025004, to the Director of the Bureau of Land Management, together with a memorandum in which he stated that he was attaching a letter from Dorough in each case showing that Dorough wanted the applications to be considered as for acquired land only.[2] He also informed the Director that Dorough had amended two other applications filed by him to include the public-domain lands listed in the three applications being forwarded to Washington [3] and that the cases as to the three applications being transmitted had been closed by the regional office.

The Washington office assigned acquired-land serial numbers to the three applications and held them for processing. Application, Bismarck 025004, became BLM–A 016898. By a decision dated October 29, 1951, Dorough was sent for execution acquired-land oil and gas lease forms covering 1669.4 acres, which included the NE¼SW¼ sec. 7. Following execution of the forms by Dorough, the lease was issued with an effective date of December 1, 1951.

Meanwhile, on May 14, 1951, John Snyder filed an offer to lease for oil and gas on form 4–1158,[4] embracing the NE¼SW¼ sec. 7, among other land, with the Bureau of Land Management, Washington, D. C. The offer was numbered BLM (ND) 023993 and transmitted to the Billings land office for adjudication. The offer was rejected as to the NE¼SW¼ sec. 7 by a decision of the manager of the Billings land office dated October 23, 1952, on the ground that the tract had been patented without an oil and gas reservation to the United States. A lease BLM (ND) 023993, effective November 1, 1952, was issued for other of the lands applied for. Snyder appealed

[2] The letter in the case of Bismarck 025004 was presumably Dorough's letter of January 19, 1949.

[3] The public domain land in Bismarck 025004 was transferred to Bismarck 025003. See the Bureau's decision of October 29, 1951, referred to later in the text, in which the statement was made that the public-domain land in Bismarck 025004 had been included in lease, Bismarck 025003.

[4] This is the form required by regulation (43 CFR, 1952 Supp., 192.42) to be used for applications for noncompetitive oil and gas leases pursuant to the Mineral Leasing Act of February 25, 1920, supra.

from the manager's decision, alleging that the patent had contained an oil and gas reservation. The status of the tract was thereupon checked in the records of the Bureau of Land Management in Washington where it was ascertained that the land had been patented with an oil and gas reservation pursuant to the act of July 17, 1914 (30 U. S. C., 1952 ed., sec. 121 *et seq.*). Accordingly, on March 18, 1953, the manager revoked his decision of October 23, 1952, as to this tract, and on April 24, 1953, Snyder's lease was amended to include the NE¼SW¼ sec. 7.

Snyder, by a letter to the Director of the Bureau of Land Management dated January 22, 1954, pointed out the conflict between his lease and Dorough's, which, by assignment approved by the manager of the Billings land office on June 1, 1952, has been assigned to The Texas Company. On February 16, 1954, the Chief, Division of Minerals, Bureau of Land Management, held BLM–A (ND) 016898 for cancellation in part as to the NE¼SW¼ sec. 7.

The Texas Company and Dorough filed a timely appeal to the Secretary (43 CFR, 1952 Supp., 221.75).

On March 22, 1954, Dorough filed a petition for the reinstatement of his original application, Bismarck 025004, with the Billings land office. On May 20, 1954, Snyder submitted a petition to consolidate Dorough's petition for reinstatement with the appeal from the decision of February 16, 1954.

The tract in dispute was entered (Bismarck 024344) by Selmer K. Danielson on March 26, 1934, under the provisions of the homestead act (43 U. S. C., 1952 ed., sec. 161 *et seq.*). On April 11, 1940, a patent (No. 1107828) was issued to Danielson in which the coal and the oil and gas deposits were reserved to the United States pursuant to the acts of June 22, 1910, and July 17, 1914, respectively (30 U. S. C., 1952 ed., secs. 81 *et seq.* and 121 *et seq.*). On January 2, 1942, Selmer K. and Helen Danielson reconveyed the tract to the United States by a warranty deed. The title has since then remained in the United States.

Thus, although the title to the surface of the land in dispute and to the nonreserved minerals have been reacquired by the United States, the title to the coal and oil and gas deposits has always been in the United States. Such reserved deposits are specifically made subject to leasing under the Mineral Leasing Act of February 25, 1920, as amended, by section 34 of that act (30 U. S. C., 1952 ed., sec. 182).

If the Department determines that a tract of public land which is not within any known geological structure of a producing oil or gas field will be made available for oil and gas development, it is under a mandatory duty imposed by statute to lease it to the first qualified person who files a proper application for it. 30 U. S. C., 1952 ed., sec. 226; *Transco Gas & Oil Corporation et ano.*, 61 I. D. 85 (1952). A

lease issued in disregard of this obligation of the Department must be regarded as having been issued without authority of law and, indeed, in contravention of the plain statutory mandate. Such an oil and gas lease is subject to cancellation. *Transco Gas & Oil Corporation et ano., supra.*

Dorough's original application for the NE¼SW¼ sec. 7 (Bismarck 025004) appears to have been a proper application for a noncompetitive public-domain oil and gas lease and a lease could have been issued on it. However, the greater portion of the acreage listed in the application covered acquired lands as to which the application would have had to be rejected. Thus, when Dorough was informed on January 25, 1949, by the Regional Chief of Adjudication that the disputed tract was not public domain land, he amended another of his applications to include the public-domain land first listed in Bismark 025004. The Regional Chief of Adjudication then transmitted Bismarck 025004, with a letter from Dorough showing that he wanted the application to be considered as for acquired lands only, as an acquired-land application to the Bureau of Land Management in Washington, where it was received in February 1949, and numbered BLM–A 016898. Prior to sending the application to Washington, the local office closed the case as to Bismarck 025004. Thereafter Dorough's only valid application for the disputed tract was BLM–A 016898, and acquired-land application filed in accordance with the pertinent regulation (43 CFR 200.5(b)) with the Bureau of Land Management in Washington.

While Dorough's application was in this status, Snyder filed his application on May 14, 1951, with the Bureau of Land Management in Washington, from which it was sent to the Billings land office for adjudication in accordance with the procedure which was in effect at that time.[5]

Dorough's application was reached for processing in Washington after Snyder's had been filed but before the latter had been acted upon in Billings. At this stage there was a conflict as to the disputed tract between a properly filed public-domain application and a prior acquired-land application. Since Dorough had sought as acquired land land available for leasing only as public domain, his application was not a proper one and failed to earn him a preference right to a public land oil and gas lease. *E. A. Wight*, A–25408 (July 16, 1946); *G. G. Stanford*, 61 I. D. 232 (1953). His application, therefore, should have been rejected as to the NE¼SW¼ sec. 7. *Id.*

Snyder's offer was filed under the proper statute and regulation

[5] At the time Snyder filed his application, there was no land office in North Dakota. Consequently his public domain application was properly filed in Washington in accordance with the pertinent regulation. 43 CFR, 1952 Supp., 192.42(b).

and, as the first qualified applicant to file a proper application, he had earned a statutory preference right to a public-land oil and gas lease for the land in question. He cannot be deprived of his statutory preference by a lease issued to another person in disregard of it.[6] Therefore, in the absence of any other factors, the decision canceling The Texas Company lease as to the tract in question was correct.

Dorough's petition for the reinstatement of his original application (Bismarck 025004) as an application for a public-land lease on the NE¼SW¼ sec. 7 points up a substantial similarity between this case and the cases of *Charles D. Edmonson*, A–26834, *Maner Graham*, A–26921, and *Virgil Peterson et al.*, A–26932, p. 355, decided in a single decision today. The basic-fact situation involved in these cases is as follows: An application for a noncompetitive oil and gas lease is erroneously rejected on the ground that the land is withdrawn or that the land has been patented without a mineral reservation or for some other reason. The applicant does not appeal. Subsequently a lease is issued to a junior applicant for the same land. The senior applicant thereupon petitions for the reinstatement of his rejected application.

In the *Edmonson et al.* decision, it it held that by his failure to appeal from the rejection of his application, the senior applicant loses his preference right to a lease as against the subsequent applicant, even though the rejection was based upon an erroneous ground.

The situation presented in the immediate case is substantially similar. Dorough applied for a public-land lease on the NE¼SW¼ sec. 7. He was erroneously informed on January 25, 1949, by a Bureau official that the tract was acquired land and that a new application should be filed for the land. Dorough did not question this advice or appeal but instead acquiesced in it by permitting his application to be forwarded to the Director as an acquired-land-lease application.[7] Action on his case as involving a public-land application was closed. Thereafter, Snyder filed a proper application for a public-land lease on the tract. Dorough's acquiescence in what was equivalent to a rejection of his public-land application for the NE¼SW¼ sec. 7 continued through his acceptance of an acquired-land lease for the tract. It was not until a considerable time after Snyder had received his lease that Dorough attempted to reassert his rights under his original applica-

[6] *Transco Gas & Oil Corporation, supra; Annie L. Hill et al.* v. *E. A. Culbertson*, A–26150–26157, August 13, 1951; *R. H. Reay* v. *G. H. Lackie*, 60 I. D. 29 (1947).

[7] The case record on Dorough's application contains a status sheet dated October 21, 1948, which carried the following item under "Conflicts": "Hd 024344 Bis. (O & G res'd act 7/17/14) as to NE SW sec. 7." This clearly showed that the oil and gas deposits in the tract had not been patented and later reacquired by the United States but that they had never lost their public-domain status. If Dorough had checked the case file after receiving the erroneous letter of January 25, 1949, he would have noted the inconsistency between the letter and the status sheet.

tion. In accordance with the *Edmonson et al.* decision, it must be held that he had lost his preference right to a public-land lease on the tract in question when he did not appeal from what was the equivalent of a rejection of his application for a public-land lease on the land. Consequently, Dorough's petition for the reinstatement of his original application as to the NE¼SW¼ sec. 7 must be denied.

The appellants contend that in any event they were entitled to a notice of contest pursuant to 43 CFR, Part 221, but did not receive such notice, and that they were, therefore, deprived of an opportunity to answer or defend. The pertinent regulation governing the initiation of contests provides:

> Contests may be initiated by any person seeking to acquire title to, or claiming an interest in, the land involved, against a party to any entry, filing, or other claim under laws of Congress relating to the public lands, because of priority of claim, or for any sufficient cause affecting the legality or validity of the claim, not shown by the records of the Bureau of Land Management. [43 CFR 221.1(a).]

Thus, even assuming that a conflict between two applicants for an oil and gas lease may provide the basis for a contest, the fact that all of the matters affecting the validity of lease BLM–A 016898 are shown by the records of the Bureau of Land Management prohibits the initiation of a contest by Snyder. *Margaret M. Redmond*, A–25907 (August 21, 1950). This rule has been specifically applied to oil and gas matters. *Purvis* v. *Witt*, 49 L. D. 260 (1922).

As to the appellants' assertion that they were deprived of an opportunity to answer or defend, it appears that the decision of February 16, 1954, canceling in part The Texas Company lease stated: "This action will become final thirty days from receipt hereof. The right of appeal is allowed * * *." Within the 30-day period, the appellants filed a notice of appeal and thereafter have filed a brief and a reply brief. They have had an opportunity to support their position to the fullest extent. There is no indication that there are matters of fact or law which they have been unable to present for the consideration of the Department.

Although it might have been better practice for the Director of the Bureau of Land Management in this case to issue a notice to the appellants to show cause why their lease should not be canceled as to the NE¼SW¼ sec. 7 (cf. 43 CFR, 1952 Supp., 192.42 (m)), the procedure followed in this case has not injured the appellants. The final authority in the Department to cancel the lease rests with the Secretary who may exercise his supervisory authority at any stage of the proceedings. *Levi Hughes et al.*, 61 I. D. 145 (1953). Thus the Secretary might in the first instance have assumed control of the proceedings to cancel

the lease as to the NE¼SW¼ sec. 7. If the Secretary had done so, the appellants could not properly contend that the Director should first have considered and decided the matter. The appellants, having had the opportunity to present their case fully at the highest level in the Department, cannot rightly complain of defective consideration below. (*Id.*)

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Chief, Division of Minerals, Bureau of Land Management, is affirmed and Dorough's petition for the reinstatement of application, Bismarck 025004, as an application for a public-land lease on the NE¼SW¼ sec. 7 is denied.

CLARENCE A. DAVIS,
Solicitor.

DWIGHT S. YOUNG
JOHN VAOS

A–26856 *Decided August 13, 1954*

Homestead Entry—Proviso to Section 7 of Act of March 3, 1891—Pending Contest or Protest—Mining Claims.

An uncorroborated, unsworn allegation that valid mining claims were located in 1917 on land upon which a homestead entry was allowed in 1940, and a field report confirming the existence of the mining claims do not, without further proceedings, amount to a pending contest or protest within the meaning of the proviso to section 7 of the act of March 3, 1891.

Where 2 years have elapsed after the issuance of a receipt upon a final homestead entry and no contest or protest was pending against the validity of the entry at the end of the 2-year period, the entryman is entitled to the issuance of a patent on the entry, even though after the 2-year period has run, a mining claimant asserts the existence of valid conflicting mining claims located prior to the initiation of any rights to the land by the homestead entryman.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Dwight S. Young has appealed to the Secretary of the Interior from a decision of June 17, 1953, by the Associate Director of the Bureau of Land Management which reinstated the enlarged homestead entry of John Vaos on the W½SE¼, SE¼SE¼ sec. 1, NE¼, NW¼SE¼ sec. 12, T. 5 S., R. 100 W., 6th P. M. Colorado, containing 320 acres, and held that the Department is required to issue a patent on the entry to Mr. Vaos (43 U. S. C., 1952 ed., sec. 218). Mr. Young asserts ownership of oil shale placer claims, located prior to Mr. Vaos' settle-

ment on the land, on a large portion of the land covered by the homestead entry.

Mr. Vaos made entry on the above-described land on August 6, 1940.[1] It appears that he initiated a settlement claim on the land in July 1929. A receipt acknowledging payment of final commission and testimony fees was issued to Mr. Vaos on July 30, 1947, on which date final proof on the entry was submitted. Final-proof testimony indicates that improvements valued at $2,100 have been placed on the land by the entryman.

On February 18, 1949, the Regional Administrator, Region IV, made a determination that the final proof should be accepted and the final certificate issued. Before the certificate was issued, however, on March 9, 1949, the Regional Administrator notified the manager of the district land office at Denver, by teletype, that a protest against the Vaos homestead entry, alleging the existence of mining claims located before Mr. Vaos settled on the land, had been received, and that issuance of the final certificate should be withheld until a supplementary investigation could be made.

The day before (March 8, 1949), the Regional Administrator had written to Mr. Young that he understood that Mr. Young claimed to be the owner of oil-shale claims which might be in conflict with Mr. Vaos' entry. The Regional Administrator requested the names and legal description of any such claims.

On April 22, 1949, a letter was received by the Regional Administrator from Courtland R. Jones on behalf of the appellant which stated, in effect, that Mr. Young owned mining claims on the land covered by the Vaos entry. Mr. Jones submitted with this letter data from the records of the county clerk and recorder, Garfield County, Colorado, purporting to indicate that Mr. Young was the owner of mining claims in secs. 1 and 12, T. 5 S., R. 100 W., 6th P. M., Colorado, located on December 18, 1917, and recorded on January 15, 1918, long before Mr. Vaos made settlement on the land.[2] The letter by Mr. Jones was not in the form of an application to contest the Vaos entry; it did not contain the statement under oath of the facts required by departmental regulation (43 CFR 221.2) governing applications to contest; nor were the statements in the letter corroborated by the

[1] On May 23, 1916, the land was classified (but not withdrawn from entry) as mineral and valuable as a source of petroleum and nitrogen. Thus, entries after that date under the nonmineral land laws became subject to the act of July 17, 1914 (30 U. S. C., 1952 ed., sec. 121 *et seq.*), which requires a reservation to the United States of the minerals for which the land has been classified as valuable.

[2] The land has been resurveyed since the time when the claims were recorded. The exact extent of the conflict between the mining claims and the homestead entry is not evident from information in the record.

affidavit of a witness, as is also required by regulation (43 CFR 221.3).

A report of field examination dated June 9, 1949, confirmed the existence of three mining claims which conflicted in part with the Vaos homestead entry. The report stated that the claims were located on December 18, 1917. There apparently was no further action taken in this case until February 21, 1950, when the Regional Administrator issued a determination directing that the homestead entry be canceled because of conflict with valid placer mining locations made in 1917 and 1918. In a decision of March 3, 1950, the acting manager of the Denver land office held Mr. Vaos' entry for cancellation on the ground that the land was not public land at the time of the entryman's settlement.

The Associate Director's decision which reinstated the Vaos entry held that as the final receipt on the Vaos entry was issued on July 30, 1947, and that as no contest or protest was pending against the entry 2 years after the issuance of that receipt, the Department must issue a patent on the entry to Mr. Vaos in accordance with the proviso to section 7 of the act of March 3, 1891, as amended (26 Stat. 1098, 1099; 43 U. S. C., 1952 ed., sec. 1165). This proviso reads in pertinent part as follows:

> * * * after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead * * * laws, * * * and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him * * *.

The question whether any contest or protest was pending against this homestead entry on July 30, 1949, 2 years after the issuance of the receipt to Mr. Vaos upon the final entry of the land depends upon whether either Mr. Jones' letter of April 22, 1949, or the field report dated June 9, 1949, may be regarded as a protest or contest within the meaning of the proviso to section 7 of the act of March 3, 1891.

The departmental decision in the case of *Jacob A. Harris*, 42 L. D. 611 (1913), held that a contest or protest to defeat the confirmatory effect of the proviso to section 7 of the act of March 3, 1891, must be a proceeding sufficient, in itself, to place the entryman on his defense or to require of him a showing of material fact, when served with notice thereof; and such a proceeding will be considered as pending from the moment the affidavit is filed, in the case of a private contest or protest, or from the moment the Commissioner of the General Land Office (predecessor of the Director of the Bureau of Land Management), on behalf of the Government, requires something to be done by the entryman or directs a hearing upon a specific charge. The date of the issuance and service of notice was held to be immaterial, if

without undue delay and pursuant to the orderly course of business under the regulations.

The decision in the *Harris* case was quoted with approval by the Supreme Court in *Stockley* v. *United States*, 260 U. S. 532 (1923); *Payne* v. *Newton*, 255 U. S. 438 (1921); and *Lane* v. *Hoglund*, 244 U. S. 174 (1917), all of which cases required determination of the meaning of "pending contest or protest" within the scope of the proviso to section 7 of the act of March 3, 1891. In *Lane* v. *Hoglund*, *supra*, it was held expressly that the filing of an adverse field report before the expiration of the 2-year limitation period was not a bar to the running of the statute where no action was taken nor proceeding begun until after the expiration of the 2-year period.

On the basis of these decisions it is concluded that neither Mr. Jones' letter of April 22, 1949, containing the uncorroborated, unsworn allegation of mining claims in conflict with the Vaos entry, nor the field report regarding these claims was a contest which would toll the running of the confirmatory proviso. The appellant has not yet filed a protest against the entry, and no proceeding within the rule established by the *Harris* case was started on behalf of the Government until the Regional Administrator issued the determination of February 21, 1950, directing that the homestead entry be canceled. As the 2-year period after the issuance of the receipt on Mr. Vaos' final entry expired on July 30, 1949, the determination of February 21, 1950, did not defeat the confirmatory effect of the proviso to section 7 of the act of March 3, 1891. As the record now stands, there is no basis for canceling the homestead entry.

Unlike the above-cited cases, however, a further question is raised by this appeal with respect to whether the land which Mr. Vaos' entry covers was public land when the entry was allowed. A valid location of a mining claim segregates the area which it covers from the public domain, and such a claim becomes the property of the locator or his assigns for whom the Government holds the title in trust. *Clipper Mining Co.* v. *Eli Mining & Land Co.*, 194 U. S. 220 (1904); *St. Louis Mining Co.* v. *Montana Mining Co.*, 171 U. S. 650, 655 (1898); *Noyes* v. *Mantle*, 127 U. S. 348 (1888). Thus, if the Vaos entry covers land included in valid mining claims located in 1917, the entry was, to that extent, void *ab initio*.

The Department has held that a purported entry which was void *ab initio*, because it was made at a time when the land entered was withdrawn, is not capable of passing to patent under the proviso to section 7 of the act of March 3, 1891. Solicitor's opinion M–36218 (May 21, 1954). But, as it has not yet been determined whether the mining claims are valid, there is no basis for concluding whether or to what

extent the entry may be void. Accordingly, the instant case does not present the same situation as that considered in the Solicitor's opinion of May 21, 1954, because there has been no determination that the Vaos entry was void *ab initio*, and a determination of the question would require a further administrative hearing by the Department. The proviso to section 7 of the act of March 3, 1891, was apparently intended to bar, after the 2-year period has elapsed, just such further administrative proceedings as would be required in this case if a departmental determination of the validity of the Vaos entry were to be made. *Jacob A. Harris*, *supra*, pp. 613–614. This conclusion is supported by the decision in *Payne* v. *Newton*, *supra*, p. 444, where the Court, in discussing the purpose of the proviso to section 7 of the act of March 3, 1891, stated:

> That purpose is to require that the right to a patent which for two years has been evidenced by a receiver's receipt, and at the end of that period stands unchallenged, shall be recognized and given effect by the issue of the patent without further waiting or delay,—and thus to transfer from the land officers to the regular judicial tribunals the authority to deal with any subsequent controversy over the validity of the entry, as would be the case if the patent were issued in the absence of the statute.

It follows that if the objections of a mining claimant against the validity of an agricultural entry affected by the proviso to section 7 of the act of March 3, 1891, are to be considered by the Department, proceedings based upon such objections must be instituted before 2 years have elapsed after the issuance of final receipt upon the entry. *Cf. Caribou Lode*, 24 L. D. 488 (1896).

When the Vaos entry was allowed, departmental records showed no conflicting rights to the land, and the Department, *prima facie*, was authorized to allow the entry. As no contest or protest against the validity of the entry was instituted until after 2 years from the date of the issuance of final receipt on the entry, the Associate Director's decision that Mr. Vaos is entitled to the issuance of a patent on the entry and that the mining claimant must seek his remedy in the courts is correct.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Associate Director of the Bureau of Land Management is affirmed.

CLARENCE A. DAVIS,
Solicitor.

LYTLE AND GREEN CONSTRUCTION COMPANY
WILLIAM DITTMAN

A–26849 *Decided August 20, 1954*

Rules of Practice—Service on Attorney—Homestead Entry—Land Containing Improvements of Unauthorized Occupant—Good Faith.

An appellant taking an appeal to the Secretary of the Interior complies with the Rules of Practice requiring service of notice of the appeal upon the adverse party by serving the attorney who represented that party in the proceeding before the Director of the Bureau of Land Management, even though the attorney has meanwhile been dismissed, where the record fails to show that the adverse party gave notice to the appellant of the attorney's dismissal.

The improvement of public land without authority of law or under any claim of right or color of title does not constitute an appropriation of the land that will take it out of the class of lands subject to homestead entry.

The Department cannot infer bad faith on the part of a homestead entryman from the mere fact that he knew several buildings belonging to a third party were on the land at the time he applied for entry.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

William Dittman applied on December 16, 1950, for homestead entry on those portions of the E½SE¼ sec. 5 and of the SW¼ sec. 4, T. 3 N., R. 1 W., Copper River meridian, Alaska, lying west of the Richardson Highway. Entry was allowed by the acting manager of the Anchorage land office on January 10, 1951.

On July 23, 1951, the Acting Regional Administrator of the Bureau of Land Management, Region VII, issued the following decision, which was served on Mr. Dittman on July 26, 1951:

On January 10, 1951, William Dittman was allowed homestead entry to the SW¼ of Section 4, E½SE¼, Section 5, T. 3 N., R. 1 W., C. R. M. It appears from the field examination dated June 13, 1951 that at the time of the allowance of the entry and for approximately a year prior thereto, that a portion of the land comprising some five acres had been used as a construction camp by the Lytle and Green Construction Co., who had applied through the Land Office February 20, 1951 for a special land use permit to use these lands. They have constructed in the SW¼NW¼SW¼, N½NW¼SW¼SW¼, Section 4, T. 3 N., R. 1 W., C. R. M. a number of buildings of considerable value. These buildings were on the land prior to the application for homestead entry of William Dittman, and in Dittman's application for homestead entry no information was furnished that there were buildings on this land belonging to another.

It is a well established rule that no homestead entry will be allowed for land embracing the improvements of another and the burden of coming forth with this information at the time of the filing of the homestead application is squarely upon the applicant Dittman.

Therefore Dittman is requested to show cause within 30 days after receipt of this decision why the homestead entry should not be cancelled as to the land occupied by the Lytle and Green Construction Co. described as: * * * and why

a special use permit should not be issued to the Lytle and Green Construction Co. for the use of such land described supra.

Mr. Dittman answered as follows in a letter received in the Regional Office on August 28, 1951:

The "Decision" is opposed on the grounds that it is not made in accordance with proper procedure, that the facts upon which it is based are untrue, that the field report upon which it is based is improper and obviously prepared to accommodate Lytle and Green Construction Co., and that the contemplated action is contrary to law.

On September 11, 1951, the Regional Administrator issued a decision, the pertinent parts of which follow:

* * * While the answer was not filed within the time allowed, it will nevertheless be considered.

* * * * * * *

I find nothing improper in the procedure requiring the entryman to show cause. Moreover, the statement that the facts upon which the action is based are untrue, is negatived by the sworn statement made June 8, 1951, by the entryman, on file in the record, to the effect that the Lytle and Green Construction Company started their camp about August 15, 1950, and started erecting buildings on the place in September, and had constructed about 15 buildings on the ground before the winter, which occupancy by the company was prior to the filing of his homestead application December 16, 1950, allowed January 10, 1951. **Thus, this portion of the answer to the order to show cause is considered insufficient and may be disregarded.**

As to that part of the answer, which alleges that the contemplated action is contrary to law, it will be stated that it has long been a settled rule of law that public land in the actual possession and occupancy of one under claim of right is not subject to entry by another, and the fact that the occupant is not qualified to make homestead entry is immaterial (see *Lindgren* v. *Shull* (49 L. D. 653) and the cases therein cited).

An application to make entry presupposes good faith on the part of the applicant and when he seeks to enter land personally known to be occupied by another, is chargeable with bad faith, and the application to make entry may not be entertained (51 L. D. 584, 587). It is evidenced by the entryman's own sworn statement that he had personal knowledge of the occupancy by the construction company of the land at the time of making application to enter. It cannot therefore be said that Dittman acted in good faith in including the land in his application and entry.

In view of the foregoing, Dittman's entry, Anchorage 017548, is hereby cancelled as to the following described tract of land presently occupied by the Lytle and Green Construction Company, as a road construction camp in connection with its road work under contract with the Alaska Road Commission, and the company will be permitted the use of the tract for the purpose now occupied, under any applicable law: * * *.

Mr. Dittman appealed to the Director of the Bureau of Land Management, and, on January 12, 1953, the Associate Director reversed the Regional Administrator's decision. The Lytle and Green Construction Company has appealed to the Secretary of the Interior.

Mr. Dittman has submitted a motion to dismiss the construction company's appeal on the ground that a copy was not served on him within the 30 days allowed by the Rules of Practice. 43 CFR, 1952 Supp., 221.75(c). It appears that the Company served its notice of appeal in due time upon the attorney who represented Mr. Dittman in his appeal to the Director of the Bureau of Land Management, but that Mr. Dittman had meanwhile discharged this attorney. There is nothing in the record, however, to show that the Company had notice of the attorney's dismissal. The first notice the Department or the Bureau of Land Management had of this was by Mr. Dittman's motion to dismiss. Under the circumstances the Company was justified in assuming that the attorney still represented Mr. Dittman and in serving the required notice of appeal upon the attorney. 7 C. J. S., "*Attorney and Client*," sec. 123, note 32, p. 956, and cases cited; 43 CFR 221.85. The motion is accordingly denied.

We pass now to the merits of the Associate Director's decision.

The Associate Director wrote:

> The decision of September 11, 1951 citing *Lindgren* v. *Shull* (49 L. D. 653) states that it has been a settled rule of law that public land in the actual possession and occupancy of one under claim of right is not subject to entry by another, and the fact that the occupant is not qualified to make homestead entry is immaterial. However, the record does not show that the company was occupying the land under claim of right. This view is further buttressed by the fact that the company subsequently filed a special land-use application thus impliedly admitting that its previous occupancy rested upon no authority of law and that it was not occupying the land under claim or color of title.
>
> The improvement of public land without authority of law or under any claim of right or color of title does not constitute an appropriation of the land that will take it out of the class of lands subject to homestead entry. *Wheeler* v. *Rodgers*, 28 L. D. 250 (1899); *Cf. Nichols et al.* v. *Stevens*, 51 L. D. 584, 586 (1926).

The Associate Director's understanding of the law, as set out in the paragraph quoted immediately above, is clearly correct. See, in addition to the cases cited in his opinion: *Powers* v. *Forbes*, 7 C. L. O. 149 (1880) (Interior Department Decision); *Stoddard* v. *Neigel*, 7 L. D. 340 (1888); *Norton* v. *Westbrook*, 9 L. D. 455 (1889); *Stovall* v. *Heenan*, 12 L. D. 382 (1891); *Jones* v. *Kirby*, 13 L. D. 702 (1891); *Thompson* v. *Holroyd*, 29 L. D. 362 (1899); *Roumagoux* v. *Erickson*, 45 L. D. 315 (1916).

The appellant cites *Bradford* v. *Danielson*, 11 Alaska 406 (1947), and similar Alaskan cases, for the proposition that one in possession of public lands in Alaska can hold them against all adverse claimants except the United States. Actually, this is no more than a local adaptation of the ancient rule in actions of trespass *quare clausum fregit* that holds a showing of title in a stranger to be no defense. 63

C. J., "Trespass," sec. 28, p. 910. These cases have no application here. The allowance of Mr. Dittman's entry segregated the area it embraced from the public domain. *Parsons* v. *Venzke*, 164 U. S. 89, 92 (1896). Thereafter, the Company was not asserting a possessory claim against another mere occupant of public land, but against the United States, which had appropriated the land to Mr. Dittman's use under the homestead law. *Cf. Kansas Pacific Ry. Co.* v. *Dunmeyer*, 113 U. S. 629, 644 (1885); *Hastings and Dakota R. Co.* v. *Whitney*, 132 U. S. 357 (1889). To prevail under such circumstances the Company would have to show not merely prior occupancy, but prior occupancy under authority from the United States. *Hosmer* v. *Wallace*, 97 U. S. 575 (1878). I have carefully examined the Company's appeal, as well as the case record, and fail to find even a claim of such authority. Consequently, in the absence of some other invalidating defect in Mr. Dittman's entry, the Associate Director's decision must be affirmed.

It is urged, however, in the words of the appellant, "that the homestead laws contemplate good faith on the part of applicants and from the record in this case, this element is definitely lacking." The record in this case contains several unproved charges by the Company against Dittman, and by Dittman against the Company. The only one we may accept as true, since it is admitted by the entryman, is that he knew that several of the Company's buildings were on a small part of the land on which he applied for homestead entry. The Department, however, cannot infer bad faith from this alone. *Wheeler* v. *Rodgers*, 28 L. D. 250, 252 (1899).

The appellant has shown no error in the Associate Director's decision.

Besides the Company's appeal, the present case file contains an appeal by Mr. Dittman from a decision of March 18, 1954, by the manager of the Anchorage land office. It appears that during the pendency of the Lytle & Green protest, two contests were filed against Mr. Dittman's entry, one by a certain Henry N. Kvalvik (No. 836?) and the other by a certain Fred Walker (No. 828?). The official records relating to these contests have apparently not been forwarded to Washington, for the only mention of them in the file now before the Department is contained in material submitted by Mr. Dittman. The only copy of the decision of March 18, 1954, in the file now before me is one submitted by Mr. Dittman. It appears this decision held Mr. Dittman's answer to the Kvalvik contest insufficient, and required an amended answer supplying certain facts.

Obviously the Kvalvik and Walker matters are not properly before the Department at this time. Accordingly, the file will be returned to the Bureau of Land Management so that Mr. Dittman's appeal from the manager's decision of March 18, 1954, may be considered by the

Director. Without determining what would constitute a sufficient answer to the Kvalvik contest, however, I do not believe it inappropriate to remark that the affirmative averments required from the contestee by the decision of March 18, 1954 (assuming the copy Mr. Dittman has supplied is genuine), clearly go beyond what should be required and appear to shift the burden of proof to the entryman. See 43 CFR 221.13; *Paris Gibson*, 47 L. D. 185 (1919); *cf. Crisp* v. *Maine*, 59 I. D. 406 (1947).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Associate Director of the Bureau of Land Management is affirmed.

J. REUEL ARMSTRONG,
Acting Solicitor.

APPEAL OF REALS ROOFING COMPANY, INC.

CA–199 *Decided August 30, 1954*

Contract Appeal—Construction Contract—Timeliness of Appeal—Liquidated Damages—Remission.

Failure of a contractor to file a timely appeal precludes a review of the findings of fact of a contracting officer, who assessed liquidated damages for delivery in the completion of a construction contract on Standard Form No. 23.

Where no timely appeal was taken to an assessment of liquidated damages by the contracting officer, the question could not be raised subsequently by the contractor, by objections to the deduction of the liquidated damages in a final payment estimate.

Relief from liquidated damages will not be granted merely because the Government failed to suffer an inconvenience or loss by reason of the delay.

The remission of liquidated damages is an extraordinary remedy which is exercised only in cases where the claim for relief is supported by substantial equities in the contractor's favor. There is no basis for remission where the contractor's delay in completing the contract is attributable to his failure to prosecute the work with reasonable diligence or because of his negligence in other respects.

ADMINISTRATIVE DECISION

The Reals Roofing Company, Inc., of Elmhurst, New York, has appealed from the assessment of liquidated damages in the amount of $2,460 under Contract No. I–56np–42 with the National Park Service. That contract, which was executed on the standard form for Government construction contracts (Form No. 23, Revised April 3, 1942), was entered into on April 26, 1950, and it provided that the contractor would furnish the materials and perform the work for the

underground utilities in the residence area at the Statue of Liberty National Monument, Bedloe's Island, New York.

Neither the contractor nor the contracting officer appears to have been much concerned with the administrative procedure required in an appeal of this nature. The record before me is sketchy, and it is not clear as to what documents constitute notice on the part of the contractor and what can be designated as findings of fact by the contracting officer. Nevertheless, the then Acting Chief Counsel of the National Park Service was of the opinion that the essentials of an appeal have been submitted, and by a careful reading and analysis I have been able to consider the claim.

Paragraph 36 of the specifications provided that all work under the contract was to be completed within 180 calendar days after the date of receipt of the notice to proceed. Liquidated damages were to be assessed, in accordance with the provisions of paragraph 37 of the specifications, at the rate of $10 for each calendar day of delay.

According to the record, the original contract time expired on December 16, 1950. Change Orders Nos. 2, 3, and 5, and a Resume Order, effective January 7, 1952, granted extensions of time so that the completion time finally became January 17, 1952. All work, however, was not completed until September 19, 1952, or after a delay of 246 calendar days. The contractor was assessed liquidated damages, therefore, in the amount of $2,460.

The first reference in the record to liquidated damages appears in a letter dated January 21, 1952, from the contracting officer to the contractor. In this letter, the contractor is notified that each calendar day subsequent to January 17, 1952, would be in the liquidated damages period under the provisions of paragraph 37 of the specifications.

Apparently in answer to this letter and as a protest against the assessment of liquidated damages, the contractor wrote to the contracting officer on June 9, 1952, and listed several reasons for his delay in completing the contract. The contracting officer replied on June 16, 1952, in a letter which had the elements of a findings of fact but was not so designated. In any event, the contractor did not process an appeal within 30 days thereafter. However, in a communication signed by the Chief Clerk, Statue of Liberty National Monument, and approved by the contracting officer under date of December 1, 1952, there was listed the deduction of $2,460 as liquidated damages. The contractor, in an invoice dated December 12, 1952, addressed to the Superintendent, Statue of Liberty National Monument, protested this deduction in the following words:

> We will not consent to a deduction of liquidated damages, as the delay in completing this contract to "substantial completion" was not due to our negligence.

The contractor followed this up with a letter to the contracting officer dated February 4, 1953, in which it stated: "Therefore, we herewith make Formal Appeal for balance due under this Contract." The letter also cited as excusable grounds for delay the fact that work on the residences was not completed under the building contract when anticipated, thus preventing contractor from testing his utility installations.

The contracting officer took cognizance of this letter as an appeal, and on February 12, 1953, forwarded the record to the Regional Director of Region One "for your decision." It was subsequently sent to this office under date of April 1, 1953, with an accompanying letter by the Acting Chief Counsel.

It is well established that the failure of a contractor to file a timely appeal constitutes a jurisdictional defect, with the result that any findings of fact of a contracting officer becomes the final decision of the administrative agency concerned under the contract. The failure on the part of the contractor to file a timely appeal from the letter dated June 16, 1952, referred to previously in this decision, which charged the contractor with liquidated damages, precluded the contractor from again appealing subsequently the assessment of such damages when he was informed of a deduction of liquidated damages from his payment under the contract by the contracting officer in a final payment estimate dated December 1, 1952.

It should be noted that the amount of the deduction corresponded exactly with the amount originally assessed by the contracting officer almost a half year earlier. There can be no question, therefore, that the contractor by appealing the deduction of $2,460 as liquidated damages was attempting to revive by a request for reconsideration an appeal privilege which he had previously lost. Such appeal privilege may not be revived in this way. For a list of administrative decisions to this effect, see Austin, *Digest of Decisions, Army Board of Contract Appeals*, 1942–50, p. 24; *Mac Exploration Company*, p. 237.

For these reasons, irrespective of whether the contentions of the contractor are valid, I must dismiss the appeal.

However, inasmuch as the contention of the contractor that his delays did not prevent operations on the residence buildings as they were not furnished by the time he had completed his contract seems to be conceded by the administrative officer, I deem it advisable to discuss briefly this issue raised by the contractor.

It is well established that if a provision for liquidated damages in a contract is a reasonable one, it is not necessary for the party enforcing it to show that any actual damage was sustained. Relief from liquidated damages, therefore, will not be granted merely because the Gov-

ernment failed to suffer an inconvenience or loss by reason of the delay. *Wise* v. *United States*, 249 U. S. 361, 364–367 (1919); 32 Comp. Gen. 67 (1952).

The remission of liquidated damages is an extraordinary remedy which is exercised only in cases where the claim for relief is supported by substantial equities in the contractor's favor. There is no basis for remission where the contractor's delay in completing the contract is attributable to his failure to prosecute the work with reasonable diligence or because of his negligence in other respects. 32 Comp. Gen. 67 (1952).

It is my opinion that the contractor was not free from fault in the prosecution of the work.

The contracting officer, in his letter of June 16, 1952, said:

> We do not consider the reasons outlined in your letter sufficient to justify relief from the contract penalty. The electrical connections referred to are minor, the Contractor for the Residences, made all water line connections outside the buildings, you had no piping in the crawl spaces other than a water supply line which you had failed to install as called for on the plans. The Street washers should have been installed when you laid the supply pipes to them, and prior to other contract work in the same area.

Accordingly, on the record before me, I conclude that the contractor has not sustained the burden of proof with respect to this issue.

Determination

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior, I determine that the findings of fact and decision of the contracting officer dated January 21, 1952, will not be disturbed.

J. Reuel Armstrong,
Acting Solicitor.

APPEAL OF SAMUEL N. ZARPAS

CA–222 *Decided September 2, 1954*

Contract—Delay—Interpretation of Specifications—Unforeseeable Cause—Delay by Supplier.

A cause for delay which is asserted for the first time after the performance of the contract and as to which the contracting officer was not notified within 10 days from the beginning of such delay, pursuant to article 9 of Standard Form No. 23 of construction contracts, may be dismissed without consideration.

Where contract specifications require the submission of detailed shop drawings by the contractor for approval by the Government prior to fabrication

in a construction contract, time spent in reaching agreement upon modifications of shop drawings which did not consume an unreasonable amount of time does not constitute a basis for remission of liquidated damages assessed for delay in completion of the work.

The failure of a subcontractor's supplier to perform his obligations is a normal hazard of business.

Delays of a subcontractor in making delivery will not excuse the prime contractor from making timely performance, unless the difficulty resulted from an excusable cause under the contract.

Officials of this Department do not have the authority to waive the imposition of liquidated damages on equitable grounds and can excuse a delay in performance only if it is attributable to "causes beyond the control and without the fault or negligence of the contractor."

ADMINISTRATIVE DECISION

Samuel N. Zarpas, Washington, D. C., filed an appeal dated August 17, 1953, from a decision of the contracting officer dated July 24, 1953, which denied his request for an extension of time and the remission of liquidated damages in the amount of $915 assessed against him for delay in the completion of the work under Contract No. 14–10–028–154, entered into on December 22, 1952, with the National Capital Parks, National Park Service.

The contract, which is on the standard form for Government construction contracts (Form No. 23, revised April 3, 1942), and specifications made a part thereof, provided that the contractor would furnish materials and perform the work necessary for the construction of a band shell at the Carter Barron Amphitheater in Rock Creek Park, Washington, D. C.

Section 3–1 of the specifications provided that all work under the contract should be completed within 90 calendar days after the date of the receipt of notification to proceed. Notification to proceed was received by the contractor on January 7, 1953, thereby establishing the date for final completion of the work as April 7, 1953. The work was accepted as complete on October 2, 1953. Liquidated damages in the amount of $915 were assessed by the contracting officer for 61 days of the delay in the completion of the work, pursuant to article 9 of the contract and section 3–2 of the specifications providing for the assessment of liquidated damages at the rate of $15 per calendar day for delay in the completion of the work.[1]

The contractor, on appeal, seeks an extension of time, under article 9 of the standard "Delays—Damages" clause of the contract, for the

[1] In "Payment Estimate No. 3—Final Payment," dated October 19, 1953, the Chief Engineer made the following statement: "The original completion date was April 7, 1953. A stop order was in effect from May 19, to September 14, 1953. The work of this contract was substantially completed on October 2, 1953. Liquidated damages for 42 days, April 8, to May 19, both dates inclusive, for a total of 61 days at $15.00 in the total amount of $915.00 are being assessed."

period April 7 through May 19, 1953.[2] He alleges that the delay in completing the work was due to unforeseeable causes beyond his control, namely, (1) incompleteness of the plans and drawings offered by the Government for bidding purposes and the failure of the Government to note the sizes of the materials to be used in the construction of the band shell on the contract drawings, and (2) inability of his subcontractor to obtain steel and consequent failure to make timely delivery of steel materials and supplies.

I

The first excusable cause for delay was asserted by the contractor for the first time on appeal. A cause for delay which is asserted for the first time after the performance of the contract and as to which the contracting officer was not notified within 10 days from the beginning of such delay, pursuant to the provisions of article 9 of the contract, may be dismissed without consideration. *Dunnigan Construction Co. et al.* v. *United States*, 122 Ct. Cl. 262 (1952).

The crux of the complaint is reflected in the following statement of its subcontractor:

> It appears to us that the design staff of the Interior Department was not fully performing their duties and obligations by merely outlining how they wished the finished product to appear while leaving the actual design of the finished product to the contractor. As can be readily seen from the foregoing, we *could not* order our material until such time as the Interior Department approved the [steel] angles which we intended to use by approving our shop drawings.[3]

It is noted that the first shop drawings were submitted by the contractor on February 3, 1953, 28 days after the notice to proceed. These drawings were disapproved and returned by the contracting officer on February 16, 1953 (within 13 days), because they failed to indicate all details and the method of connecting the members. Revised shop drawings were submitted by a letter dated March 2, 1953, and returned, approved, by a letter dated March 10, 1953 (within 8 days). The first

[2] In a letter dated June 30, 1953, the contractor requested that the contract time be extended from April 7, 1953, the original contract completion date, through May 19, 1953, the effective date of the stop order (dated May 20, 1953) (mentioned in footnote 1, *supra*), and requested "that no liquidated damages be assessed for the time it takes to install the Band Shell anchors at the end of the summer season."

[3] The appeal consists of a letter dated August 17, 1953, from Samuel N. Zarpas, the contractor, which transmitted with approval a letter dated August 10, 1953, from Criss Brothers and Company, Washington, D. C., the miscellaneous iron subcontractor, in which this cause for delay was first stated. Section 1–3 of the specifications provides under "Definition of terms" that "Whenever the term 'subcontractor' is used, it is understood to refer to the second party of the contract. Subcontractors, as such, will not be recognized." The use hereafter in this decision of the term "contractor" with respect to this appeal therefore includes the contentions made by the subcontractor and endorsed by the contractor.

shop drawing of the anchoring of the sections of the band shell was submitted by a letter dated April 30, 1953, disapproved and returned by a letter dated May 5, 1953 (within 5 days). Revised shop drawings of the anchoring of the sections were submitted by a letter dated June 15, 1953, and returned, disapproved, by a letter dated July 20, 1953 (within 35 days, but time was not of the essence in this instance since a stop order had been issued on May 19, 1953, stopping work on the undertaking until September 14, 1953). The third revision of the shop drawings was submitted by a letter dated August 28, 1953, and "approved as corrected" and returned by a letter dated September 3, 1953 (within 6 days).

Paragraph 2 of section 5–1 of the specifications, captioned "Work to be done," provides that "Shop drawings shall be submitted by the Contractor showing complete details including member sizes for the sections comprising the band shell. Details relative to the anchoring of the sections when in use shall be included in the drawings subject to the approval of the Contracting Officer." The quoted language of the specifications is unambiguous with regard to the obligation of the contractor to submit shop drawings for approval by the Government delineating the details of the band shell, a fact which was indicated on the contract drawings accompanying the specifications of November 14, 1952, upon which his bid was submitted. Although several revisions of the various drawings were required, the time consumed in arriving at final agreement does not appear to have been excessive in the circumstances.

It was the sense of the contract that the time when the Government finally approved the shop drawings would control the time when the fabrication work could commence. Under the terms of the contract, the contractor should have anticipated possible delay in the commencement of the work incident to approval of shop drawings. Contracts must be presumed to be executed with full knowledge of the requirements of the obligation to be undertaken by both parties.[4]

I conclude that the grounds urged by the contractor as a basis for allowance of this claim must be rejected as incompatible with the express provisions of the contract.

II

The second cause for excusable delay asserted by the contractor is the alleged failure of his subcontractor's supplier to make timely delivery of steel.

[4] *Wells Bros. Co.* v. *United States*, 254 U. S. 83, 87 (1920); *Carnegie Steel Co.* v. *United States*, 240 U. S. 156, 165 (1915); 18 Comp. Gen. 709, 711, and 855, 857 (1939).

The findings of fact of the contracting officer upon which he denied the contractor's request for an extension of time through May 19, 1953, were conveyed to the contractor in a letter dated July 24, 1953.[5] The contracting officer pointed out that a letter from the contractor dated April 13, 1953, contained the first indication to the Government that the contractor had encountered difficulty in procuring steel, "it then being six (6) days after the completion date of your contract; * * *."

The contracting officer denied the contractor's request for an extension of time, on the grounds that the contractor had not shown that the delay was due to "unforeseeable" causes beyond the control and without the fault or negligence of the contractor, as required for the granting of an extension of time under article 9 of the contract. Moreover, there had not been established the fact that the failure of supply was caused by conditions so abnormal, extraordinary, or unusual that they reasonably could not have been anticipated or foreseen at the time when the contract was formulated. In the absence of such a showing, the delay is not excusable under the terms of the contract.

I conclude that the evidence of record supports the decision of the contracting officer denying the contractor's request for an extension of time, and, as an incident thereto, the remission of the liquidated damages assessed for the period of the delay attributed to the alleged failure of the subcontractor's supplier to make timely delivery of steel. The failure of the subcontractor's chosen supplier to perform its obligation, if indeed it did default, was a normal hazard of business which a contractor assumes, and, accordingly, falls within the rule that delays by a subcontractor for this reason will not excuse the prime contractor from making timely performance unless the difficulty resulted from an excusable cause under the contract, which in this instance was not established.[6]

Officials of this Department do not have the authority to waive the imposition of liquidated damages on equitable grounds, and can excuse a delay in performance only where it is established that the failure to perform on time is attributable to "causes beyond the control and without the fault or negligence of the contractor." [7]

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[5] The contracting officer states, in part: "it appears that this period [approximately 34 days between March 10, 1953 when the drawings were returned to the contractor, and April 13, 1953, when the materials appear to have been received] is not an unreasonable time in which to procure the required materials."

[6] *Walsh Brothers* v. *United States*, 107 Ct. Cl. 627, 645 (1947); *American Transformer Co.* v. *United States*, 105 Ct. Cl. 204, 220 (1945); *Krauss* v. *Greenbarg*, 137 F. 2d 569 (3d Cir., 1943); *Segreti Construction Company*, CA–172 (January 15, 1953); *Porcelain Products, Inc.*, CA–144 (January 16, 1952); *C. B. Lauch Construction Company*, CA–133 (October 10, 1951); *California Steel Products Company*, CA–61 (December 15, 1949).

[7] See *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 294 (1941).

III

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior, the findings of fact and decision of the contracting officer are affirmed.

J. REUEL ARMSTRONG,
Acting Solicitor.

SUN OIL COMPANY
A. J. PRESTON

A-27015 *Decided September 2, 1954*

Oil and Gas Lease—Reinstatement of Application—School-Land Grant—Withdrawal—Restoration.

Where a surveyed mineral school section is within a reservation on the date of the enactment of the act of January 25, 1927, and is thereafter placed within another reservation, title to the school section does not pass to the State upon the termination of the first reservation so long as the second reservation remains in effect.

Where an oil and gas lease applicant withdraws part of the land covered by his application upon the erroneous advice of a Bureau official that the land is State owned, his application will not be reinstated with priority over a subsequent applicant.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Sun Oil Company has appealed to the Secretary of the Interior from a decision dated March 17, 1953, by the Assistant Director of the Bureau of Land Management, which dismissed its protest against the issuance of oil and gas lease, Utah 05050, to A. J. Preston.

Preston's lease, issued on September 1, 1951, encompasses the NE¼SE¼, SW¼SE¼, SW¼, N½ sec. 16, T. 9 S., R. 20 E., S. L. M., Utah, an area of 560 acres.[1] The Sun Oil Company holds an oil and gas lease from the State of Utah for the same land.

The appellant contends that title to the land vested in the State of Utah, pursuant to the school-land grants made in section 6 of the Enabling Act for the State of Utah (act of July 16, 1894, 26 Stat. 107), as supplemented by the act of January 25, 1927, as amended by the act of May 2, 1932 (43 U. S. C., 1952 ed., secs. 870, 871).

The act of July 16, 1894, granted to the State only nonmineral school sections. *United States* v. *Sweet*, 245 U. S. 563 (1918). On June 20, 1924, adverse proceedings were ordered against the State of Utah with respect to the above-described land on the charge that

[1] The lease was issued pursuant to section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226).

the land was mineral in character, containing valuable deposits of oil shale and gilsonite, and was known to be of such character prior to the date the rights of the State would have vested. The State answered, denying the charge, and a hearing was held. By a decision approved by the Secretary of the Interior on August 28, 1926 (Misc. 1137480), the land was held to be of known mineral character at the date the State's rights would have attached under the original grant.

The following year the act of January 25, 1927, was enacted. Section 1 of the act extended the grant of school sections to the States to include mineral lands, "subject to the provisions of subsections (a), (b), and (c) of this section." Subsection (c) read, in part, as follows:

> (c) That any lands included within the limits of existing reservations of or by the United States, or specifically reserved for water-power purposes, or included in any pending suit or proceedings in the courts of the United States, or subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such application, claim, or right is relinquished or canceled * * * are excluded from the provisions of this Act.

In a decision dated November 23, 1928, which promulgated the Secretary's decision of August 28, 1926, the Assistant Commissioner of the General Land Office held that as the land had been included in a first-form reclamation withdrawal made on November 6, 1917, and "as such withdrawal has been at all times and still remains in full force and effect," [2] the right of the State did not attach either under the act of July 16, 1894, or under the 1927 act.

The act of January 25, 1927, was amended by the act of May 2, 1932, so as to grant to the States mineral school sections which were included in existing reservations upon the extinguishment of the reservations. This was done by amending the last clause in subsection (c), quoted above, to read as follows: "unless or until such *reservation*, application, claim, or right is *extinguished*, relinquished, or canceled * * *." (Italics supplied.) The two italicized words were the only two words added; no other change was made in subsection (c).

Section 2 of the 1932 act also provided:

> This amendatory Act shall take effect as of January 25, 1927; and in any case in which a State has selected lieu lands since such date under the Act approved February 28, 1891 (26 Stat. 796), and still retains title thereto, such State may, within 90 days after the enactment of this Act, relinquish to the United States all right, title, and interest in such lands and shall thereupon be entitled to all the benefits of the Act of January 25, 1927, as amended by this Act.

In his decision rejecting the appellant's protest, the Assistant Director stated that the land in question had been included in an oil-shale withdrawal by Executive Order 5327, dated April 15, 1930 (see Circu-

[2] The reclamation withdrawal was revoked on October 28, 1937.

lar No. 1220, 53 I. D. 127), which has not been revoked, and that, as both this withdrawal and the reclamation withdrawal were in effect when the 1932 act was passed, title to the land has not vested in the State. In other words, the Assistant Director construed the words "existing reservations" in subsection (c) to relate not only to the time when the 1927 act was enacted but also to the date of the 1932 amendment.

The appellant contends that the retroactive effect of section 2 of the 1932 act made only the reclamation withdrawal a bar to the passage of title to the State, and that the revocation of this withdrawal on October 28, 1937, eliminated this obstacle. In other words, it argues that only a reservation existing on January 25, 1927, can prevent title to a school section within such a reservation from passing to a State under the 1927 act, as amended. In this view, the oil-shale withdrawal of April 15, 1930, is of no effect.

As indicated above, the 1932 amendment of subsection (c) was a very limited one. Except for the addition of two words, the language of the subsection was continued without change. This fact, coupled with section 2 of the 1932 act, seems to make it clear that the words "existing reservations" were not intended to relate to any time other than January 25, 1927.

As originally enacted, subsection (c) excluded from the grant made by the 1927 act school sections which were within an existing reservation or subject to or included in any litigation, application, claim, or right. It also provided that upon the relinquishment or cancellation of any such application, claim, or right the grant should take effect. However, school sections excluded from the grant because they were within an existing reservation did not become subject to the grant even upon restoration of the land from the withdrawal. The States had only the right of making lieu selections for such reserved school sections.

The act of May 2, 1932, in the form in which it was originally introduced in Congress, was intended to correct this situation by making the grant effective as to reserved lands upon the termination of the reservation. Section 2, *supra*, was added to the act by the Senate Committee on Public Lands (S. Rept. No. 420, 72d Cong., 1st sess.), which stated:

> The amendment * * * is for the purpose of removing any possible ambiguities from the bill as introduced by establishing the effective date of the bill as of January 25, 1927, the date of the act which it amends, and by authorizing the States which have selected lieu lands subsequent to such date to relinquish the rights in such lieu lands before they may be entitled to the benefits of such act as amended.

Thus, it seems quite clear that there was no intent in enacting the 1932 act to extend the words "existing reservations" to relate to the date of the 1932 act.

This does not dispose of the principal question in this case, namely, whether by providing in the 1927 act, as amended, that the grant of mineral school sections should not apply to lands in a reservation existing on January 25, 1927 Congress intended that no future reservation or withdrawal of the land could be made which would have the effect of continuing to exclude the land from the grant despite the termination of the reservation which was in existence on January 25, 1927. The language of the act is not plain or express on this point. Such an interpretation can be founded only upon implication. To determine whether such an implication is justified, we turn to the legislative history of the 1927 and 1932 acts.

The 1927 act was introduced in Congress as S. 564 (79th Cong., 1st sess.). This bill simply relinquished to the States all title of the United States to school sections regardless of their character. It excluded from the bill any lands "included within a permanent reservation for national purposes" and provided that "lands included within any military, Indian, or other reservation, or specifically reserved for water-power purposes, are included within the purposes of this Act only from the date of extinguishment of such reservation and the restoration of such land to the public domain."

In its report on the bill (S. Rept. No. 603, 69th Cong., 1st sess.), the Senate Committee on Public Lands and Surveys stated:

> The bill relinquishes to the States and Territories the title of the United States to all lands designated in the grants * * * excepting such as are * * * included in existing reservations established by the United States. With respect to such designated lands as are in such reservations, the bill provides that relinquishment of title thereto by the United States shall be effective "from the date of extinguishment of such reservation and the restoration of such land to the public domain." Hence the designated lands situated in existing reservations are unaffected by the bill. They remain subject to present law until disestablishment of the reservations, whereupon, if indemnity has not been received therefor, all the title of the United States thereto is relinquished.

After S. 564 was passed by the Senate without change, it was completely revised by the House Committee on Public Lands. However, except for a slight revision of language, no change was made in the provisions of the bill relating to reservations. With respect to these provisions, the House Committee made the same comments as did the Senate Committee in the extract quoted above from the Senate report (H. Rept. No. 1617, 69th Cong., 2d sess.).

The bill was subsequently recommitted to the House Committee which then reported it out in the form in which it became law. The final draft of the bill was prepared by this Department which had op-

posed S. 564 as it was introduced. Referring to subsection (c), the House Committee stated:

> It will be further noted that the designated lands or numbered sections situated in existing reservations are unaffected by the bill. They remain subject to the present law until such time as the reservation is disestablished, and if indemnity has not been received therefor the State's title to the same attaches. [H. Rept. No. 1761, 69th Cong., 2d sess.]

It is possible to view the statements in the Senate and House Committee reports as evidencing the intent or understanding that mineral school sections could not be included in reservations made after the effective date of the statute which would have the effect of continuing to exclude the lands from the operation of the grant despite the termination of reservations in existence on the effective date of the statute. However, it is equally possible to read the statements as simply stating the consequences of the termination of existing reservations in the absence of any additional reservations which may have been made after the enactment of the statute.

The latter conclusion is substantiated by a consideration of subsection (a) of section 1 of the 1927 act, which was not added until the final draft of the bill was prepared by the Department. Subsection (a) reads as follows:

> That the grant of numbered mineral sections under this Act shall be of the same effect as prior grants for the numbered nonmineral sections, and titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections.

In the brief debate on the 1932 act in the House of Representatives, Representative Colton, Chairman of the House Committee on Public Lands, stated:

> This bill will place all school lands in the same class. That is, the act of January, 1927, was only to lift a cloud that was upon the school lands because of the minerals, and the Federal Government said in effect, "If you will keep the mineral for the benefit of the schools, we will grant them to you." This would place lands affected by the act of January 25, 1927, in the same position as all the rest of the school lands that belong to the States. [75 Cong. Rec. 8416.]

There seems to be no doubt, therefore, that Congress intended that mineral school sections should have the same status as nonmineral school sections.

The general school-land indemnity act of February 28, 1891 (43 U. S. C., 1952 ed., sec. 851), authorized the States to select indemnity lands for school sections falling within a reservation or to await the extinguishment of the reservation and take the granted sections.

In *State of Utah*, 53 I. D. 365 (1931), it was held that a school section placed in a reclamation withdrawal prior to survey, when title would

otherwise pass to the State, and in a phosphate reserve after survey, did not pass to the State upon the subsequent termination of the reclamation withdrawal so long as the phosphate reserve was still in existence.

If the act of May 2, 1932, only equated the provisions of the act of January 25, 1927, with the provisions of the general school-land indemnity act, then the oil shale withdrawal of April 15, 1930, would prevent section 16 from passing to the State because it was made during the existence of a prior withdrawal and survived the termination of the earlier withdrawal.

To agree with the appellant that the act of 1927, as amended, excludes from the grant to the States only those mineral school sections within reservations existing at the date of the enactment of that statute and that a reservation of such sections after that date cannot prevent the vesting of the State's title after the termination of the earlier reservations would be to place mineral school sections in a status different from nonmineral school sections. This conclusion would be contrary to subsection (a) of the 1927 act and to Representative Colton's statement, quoted above, which indicates that the purpose of the 1927 act was simply to place mineral school sections in the same status as nonmineral school sections.

There is no persuasive indication in the statute or its legislative history that it was intended to diminish the authority of the Government to deal with mineral school sections as it saw fit prior to the vesting of title in the States. Until title to a school section vests in the State, the Government may dispose of it as it sees fit.[3]

Consequently, since the Government may impose a second valid reservation upon a nonmineral school section already in a prior reservation, which will survive the termination of the latter, and since the grant of mineral school sections is of the same effect as the grant of the nonmineral sections, the same rule applies to mineral school sections.

Therefore, the oil-shale withdrawal of April 15, 1930, was valid when made, and remains valid until it is revoked by competent authority. It follows that the title to the land in question has never vested in the State, that the land is subject to leasing under the Mineral Leasing Act, and that the lease issued to Preston is valid.

The appellant also contends that if the State's title to the land in dispute is not recognized, a prior lease issued to one Matthew C. Leonard on March 1, 1951, under the Mineral Leasing Act, should be amended to include this land. This contention is based on the fact that when Leonard filed his application, Utah 0574, on October 24, 1949, for this and other land, he was informed by the Bureau of Land Management that the area here in dispute was owned by the State. He,

[3] See *United States* v. *Wyoming*, 331 U. S. 440, 444, 454 (1947).

thereupon, withdrew his application as to this land, and a lease was issued to him only for other land included in his application. The appellant states that "the Leonard application was optioned to the Sun Oil Company" and that the Leonard application is entitled to priority if a Federal oil and gas lease can properly be issued. The appellant cites the case of *Bettie H. Reid, Lucille H. Pipkin*, 61 I. D. 1 (1952), in support of this contention.

However, this case was overruled in the recent case of *Charles D. Edmonson et al.*, A–26834, A–26921, A–26932 (August 10, 1954), p. 355, wherein it was held that an applicant for an oil and gas lease who does not appeal from the rejection of his application, even though the ground on which the rejection is based is erroneous, loses his preference right to a lease and is not entitled to a reinstatement of his application with priority over a subsequent applicant. This principle was applied in another case, *The Texas Co. et al.*, 61 I. D. 367 (1954), where an applicant acquiesced in the erroneous determination that his application covered acquired land and in the processing of his application as one for acquired land when the land in fact was public land.

Consequently, it must be held that Leonard, having withdrawn his application as to the land in dispute, lost his preference right to a lease and is not entitled to have his application reinstated with priority over a subsequent applicant and his lease amended to include such land.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Assistant Director of the Bureau of Land Management is affirmed.

J. REUEL ARMSTRONG,
Acting Solicitor.

EVERETT ELVIN TIBBETS

A–26908 *Decided September 7, 1954*

Patent—Effect of Issuance by Mistake—Cancellation of Patent—Rules of Practice—Appeal.

Although issued by mistake and inadvertence, a patent issued under authority of law vests title in the patentee and removes from the jurisdiction of this Department inquiry into and consideration of all disputed questions of fact, as well as of rights to land.

A mistake in the issuance of a patent may justify a recommendation by this Department that the Attorney General start suit to cancel the patent.

Such suit would generally be recommended where (1) the Government has an interest in the remedy by reason of its interest in the land; (2) the

interest of some party to whom the Government is under obligation has suffered by issue of the patent; (3) the duty of the Government to the people so requires; or (4) significant equitable considerations are involved.

Where the mistake in the issuing of a patent was to issue it without having afforded to a conflicting applicant an opportunity to appeal under the Rules of Practice of this Department from an adverse classification of the land embraced by his application, insufficient grounds exist for seeking judicial annulment of the patent.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Everett Elvin Tibbets has taken an appeal to the Secretary of the Interior from a decision of August 25, 1953, by the Administrator for Land Management, Bureau of Land Management, which dismissed his appeal from a decision by the manager of the Denver Land and Survey Office, rejecting his application (Colorado 0386) for an enlarged homestead entry (43 U. S. C., 1952 ed., sec. 218 *et seq.*) on the N½SE¼ of sec. 21 and the S½NW¼, N½SW¼, W½SE¼ sec. 22, T. 41 N., R. 14 W., N. M. P. M., Colorado.

Tibbets' application was filed in the district land office at Denver on November 10, 1949. On December 2, 1949, public-sale application Colorado 0458 was filed in the Denver office by Melvin J. Adams.[1] The land embraced by Adams' application included the land covered by Tibbets' application. On March 19, 1951, the Regional Administrator classified the land in Adams' application as suitable for public sale as an isolated tract. On April 13, 1951, he classified the land in Tibbets' application as unsuitable for homestead entry. Pursuant to the classification, the land was sold to Adams at public sale on May 31, 1951, and a patent was issued to him on July 24, 1952. On March 3, 1953, the manager rejected Tibbets' application "for the reason that the tract was sold to Melvin J. Adams under Public Sale Application Colorado 0458, a prior application, on May 31, 1951."

On Tibbets' appeal from the rejection, the Administrator dismissed the appeal with the following statement of his reasons:

> Lacking a final adjudication of the conflict between the public application and the homestead application of Tibbets, the patent should not have been issued. However, notwithstanding the inadvertent issuance, it divests the United States of title to the lands described therein and consequently this Department no longer has the jurisdiction necessary to give consideration to the appeal of Mr. Tibbets. * * *

In his appeal, Tibbets asserts that his records show his application to be senior to Adams', and that it had been stated to him "in a registered letter received by me on August 25, 1953, from the Director of

[1] The application was actually filed with the range manager at Durango, Colorado, who forwarded it to Denver on November 30, 1949. However, the date of filing a document is fixed as of the time it is received by the office in which it should have been filed, in this case the Denver land office. See *Eligio Ballotti*, A–26815 (July 30, 1953).

the Bureau of Land Management, that 'due to a conflict,' the public-sale application of Melvin J. Adams, Colorado 0458, should have been disallowed." Tibbets also argues that the land for which he applied is suitable for cultivation, and that he desires to make his home there and knows that he can support his family from the land.

The controlling fact in this case is that a patent has been issued to Adams for the land sought by Tibbets. The effect of the issue of a patent is to transfer the legal title from the United States and to remove from the jurisdiction of this Department the inquiry into and consideration of all disputed questions of fact. *Germania Iron Company* v. *United States*, 165 U. S. 379, 383 (1897); *United States* v. *Central Pacific Railway Company*, 51 L. D. 403, 404 (1926). This includes the determination of a question of rights to land. *Heirs of C. H. Creciat*, 40 L. D. 623, 624 (1912).

Upon determining that the facts of the case warrant such action, the Secretary may recommend that the Attorney General institute suit to cancel the patent. See *Santa Fe Pacific R. R. Co.* v. *Northern Pacific Ry. Co.*, 37 L. D. 669, 673 (1909). The Supreme Court of the United States affirmed the existence of the Attorney General's right to do this in *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 284 (1888). The Court cited this case in *United States* v. *Beebe*, 127 U. S. 338 (1888), in which it discussed the matter in broader terms (p. 342):

> The authority of the Attorney General under the Constitution and laws of the United States to institute a suit in the name of the United States to set aside a patent alleged to have been obtained by fraud or other mistake, whenever denied by a specific pleading before this court, has been uniformly maintained. And it may now be accepted as settled that the United States can properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued in mistake, or obtained by fraud, where the Government has a direct interest, or is under an obligation respecting the relief invoked.[2]

Also, it would be within the established power of this Department to order hearings, if need be, in order to obtain information relating to the advisability or necessity of bringing suit for cancellation of a patent. *Mary E. Coffin*, 34 L. D. 298, 300–301 (1905).

Accordingly, the only possible action left to the Department in this case is to consider whether it would merit a recommendation to the Attorney General that he commence an action to cancel the patent.

The quotation appearing above from *United States* v. *Beebe* indicates that it would become the duty of the Secretary to take such action where the Government has a direct interest or is under an obligation respecting the relief invoked. A more particularized state-

[2] See, also, *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 692 (1914); *United States* v. *Price et al.*, 111 F. 2d 206, 209 (10th Cir. 1940).

ment of this rule appears in *St. Louis, Iron Mountain and Southern R. R. Co.*, 13 L. D. 559, 561 (1891):

> The right to bring a suit in the name of the United States exists only when the government has an interest in the remedy sought by reason of its interests in the land, or fraud has been practiced on the government and operates to its prejudice, or it is under obligation to some individual to make his title good by setting aside the fraudulent patent, or the duty to the public requires such action.

In *Santa Fe Pacific R. R. Co.* v. *Northern Pacific Ry. Co.*, *supra*, at page 673, it was held:

> * * * a suit may be brought by the United States in any court of competent jurisdiction to set aside or annul a patent for lands issued in its name on the ground that it was obtained by fraud or mistake, but that the right to bring such a suit exists only where the Government has an interest in the remedy sought by reason of its interest in the land, or when the fraud has been practiced on the Government and operates to its prejudice, or the Government is under obligation to some individual to make his title good by setting aside the fraudulent patent or where the duty of the Government to the people requires such action (21 L. D., 179.) Moreover, the Supreme Court of the United States has decided that when it is apparent that the only purpose for bringing the suit to cancel the patent is to benefit one of two claimants to the land, and the Government has no interest in the matter, the suit must fail. United States v. San Jacinto Tin Company (125 U. S., 273).

Again, in *Heirs of C. H. Creciat*, *supra*, at page 625, it was held:

> Suit for cancellation of patent will not be advised by the land department merely because patent inadvertently issued, but it must appear that some interest of the Government, or of some party to whom it is under obligation has suffered by issue of patent.

And, in *Mary E. Coffin*, *supra*, at page 300, it was held:

> * * * It is the duty of this Department, before asking aid of the Department of Justice for correction of its errors, to ascertain whether the interest of the United States, or of some party to whom it is under obligation, have suffered by its own misprision.

There is no reason to doubt that purely equitable considerations, when of significant proportions, will justify a suit to cancel a patent. In *Williams* v. *United States*, 138 U. S. 514 (1891), the Government brought suit to cancel a land-purchase contract between the appellant and the State of Nevada, where the lands involved had been certified to the State through inadvertence and mistake. Certification had occurred because there had been an erasure from the records of the Department of a customary notation of an adverse claim. Observing that certification had transferred legal title to the State and that the State had passed equitable title to the appellant through the land-purchase contract, the Court upheld the lower court's cancellation of the contract and divestiture of the appellant's title. The opinion emphasized the necessity for acting to prevent "a monstrous injustice," and concluded with the following statement, at page 524:

* * * It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, *equities* not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do *justice.* [Italics supplied.]

Measured against the criteria discussed above, is appellant's grievance such as would justify a suit to cancel Adams' patent?

The real fault committed in connection with the appellant's application is that in effect he has been deprived of an opportunity to appeal from the classification of the land included in his application as unsuitable for disposal in accordance with that application. It is well expressed in a letter from the Administrator for Land Management to the Regional Administrator, dated August 25, 1953. After pointing out that the record of Adams' application shows the existence of the conflict with Tibbets' application, the Administrator stated:

By the processing of the public sale case to final certificate and patent, Mr. Tibbets has been effectively deprived of an opportunity to acquire the land under his application and of consideration of his claim on its merit. Since the land has been patented this bureau has no further jurisdiction over it. The sequence of events clearly demonstrates that an examination of either of the cases prior to taking final action would have revealed the existence of the conflict.

* * * * * * *

I would like to call to your attention that a classification made by a field employee is subject to reversal on appeal to this office or on appeal to the Secretary of the Interior. It follows, therefore, *that no final action should be taken in any particular case unless and until all conflicting applications have been rejected and closed.* This principle holds regardless of the basis upon which field employees believe that a conflicting application is without merit.

Since the record contains neither evidence nor allegation of fraud, it will be presumed that the premature issuance of the patent to Adams was due merely to mistake and inadvertence.

It is extremely regrettable that the appellant was not given an opportunity to have a review of the factual determination involved in the classification of his land as unsuitable. Nevertheless, no personal or property rights inured to him merely upon the filing of his homestead application.

What the appellant has been deprived of is a procedural privilege granted under Secretarial regulation; namely, the privilege of having the merits of his case reviewed by the Director of the Bureau of Land Management and by the Secretary of the Interior. 43 CFR 221.41, 296.9; 43 CFR, 1952 Supp., Part 221. These appeals are not matters of statutory right. The Rules of Practice, which provide for these appeals, are based on the broad authority of the Secretary, as de-

clared by Congress, to prescribe regulations not inconsistent with law for the government of this Department. 43 U. S. C., 1952 ed., sec. 1201; 5 U. S. C., 1952 ed., sec. 22.

It cannot be argued that the appellant is entitled to rely on section 1 of the act of March 4, 1915 (43 U. S. C., 1952 ed., sec. 220), which provides for withholding from entry land included in an enlarged homestead application pending determination of the character of the land, with the right of appeal from such determination. For the provisions of section 1 are concerned solely with land "which has not been designated as subject to entry" under 43 U. S. C., 1952 ed., secs. 218 or 219. The tract books of the Bureau of Land Management show that both sections involved in the tract described in the appellant's application were designated previously to the application, under the act of February 19, 1909 (43 U. S. C., 1952 ed., sec. 218a).

Nor can it be argued that, notwithstanding the previous designation of the lands under the act of February 19, 1909, *supra*, the mere act of filing his application could give Tibbets a preference right of entry. The lands described in his application are vacant, unreserved, and unappropriated public lands located in Colorado which were withdrawn under Executive Order No. 6910 of November 26, 1934 (43 CFR 297.11; 54 I. D. 539), and became subject to section 7 of the Taylor Grazing Act, as amended (43 U. S. C., 1952 ed., sec. 315f). Section 7 provides, in part:

> * * * Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: * * * *Provided*, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided.

It should be noted, moreover, that designation under the act of February 19, 1909, *supra*, is not the legal equivalent of classification under section 7 of the Taylor Grazing Act, as amended, *supra*.[3]

When each of the criteria discussed above is applied to the erroneous deprivation of a privilege to appeal, it becomes clear beyond doubt that there is no basis here for recommending that a suit for cancellation of the patent be sought.

The Government has no interest in the land in question. It has sold the land under authority of law to the patentee, in whom title is now vested. Furthermore, the Government is under no legal obligation

[3] See *Cecil G. Huskey*, A–26607 (April 16, 1953), which involved an application for an additional homestead entry on land which, as the record shows, had previously been designated under the act of February 19, 1909; see also, *John H. Meikle et al.*, A–26785, A–26786 (January 6, 1954), footnote 1.

to the appellant, since he has no legal rights in respect of this matter. Nor is this a case which presents any circumstance which would impress upon the Secretary a duty to the public to proceed toward cancellation of the patent.

Finally, there are no equitable considerations involved in the case of sufficient gravity to justify the extreme and unsettling action of seeking judicial cancellation of the patent. Such equitable considerations as may exist in the case bear a closer relationship to matters of privilege under administrative regulations than to equitable concepts involving private rights. Furthermore, cancellation of Adams' patent would pose serious legal and administrative complications. "A patent from the United States is a solemn muniment of title not lightly to be challenged or set aside * * *." *Germania Iron Company* v. *United States*, *supra*, at p. 382.

Aside from the legal aspects of this case, which have just been discussed, it would be unrealistic not to emphasize to the appellant, first, that the land patented to Adams was properly classified as suitable for disposal by public sale as an isolated tract, and, second, that the classification of land covered by the appellant's application as unsuitable for enlarged homestead entry was based on the Regional Administrator's review of a detailed field examiner's report which gives every indication of completeness.

In view of the failure of the circumstances of this case to meet any of the criteria recognized as justification for seeking cancellation of a patent, the Administrator's decision dismissing Tibbets' appeal from the rejection of his application is affirmed.

ORME LEWIS,
Assistant Secretary.

CONTINENTAL OIL COMPANY

A-26772 *Decided September 8, 1954*

Rights-of-Way—Natural Gas Pipelines.

The Secretary of the Interior has no discretion to excuse any applicant for a right-of-way for a natural gas pipeline across public land from a statutory requirement to maintain such pipeline as a common carrier.

Where it appears possible that an applicant for a right-of-way for a natural gas pipeline across public land, who filed his application before the act of August 12, 1953, was approved, and who has refused to file a common-carrier stipulation, may be exempted by that act from the common-carrier provision of section 28 of the Mineral Leasing Act, but the record does not so show, the case will be remanded to the Bureau of Land Management with instructions to allow the applicant 60 days to make such showing.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On April 5, 1951, the following letter from the Continental Oil Company was received in the Land and Survey Office of the Bureau of Land Management at Cheyenne:

Gentlemen:

This letter will serve as our application for right-of-way under provisions of the act of February 15, 1901 (31 Stat. 790).

The right-of-way covered by this application is for the purpose of laying a 4½" O. D. field fuel gas line on the surface, approximately paralleling our present 6⅝" O. D. gas gathering line and 3" water line. The attached map locates the center line across the following-described Government land:

N½, NE¼, Section 35, T36N–R65W
SE¼, SW¼, Section 35, T36N–R65W
SW¼, SE¼, Section 25, T36N–R65W
S½, SW¼, Section 30, T36N–R64W

Attached are copies of the map of the proposed right of way.[1]

Very truly yours,

(Sgd.) BURTON HALL,
Plant Superintendent,
Gasoline Plant No. 26.

On August 30, 1951, the manager allowed the Company 30 days in which to execute a stipulation to operate the proposed pipeline as a common carrier, or to appeal to the Director of the Bureau of Land Management.[2] Mr. Burton Hall, Superintendent of the Continental Oil Company's Gasoline Plant No. 26, responded as follows in a letter to the manager, received on September 17, 1951:

The line covered by this application is to be used for the purpose of returning residue gas back to the leases for lease operations as covered by a casinghead gas purchase contract. Since we do not wish to be a common carrier but only to return fuel gas to the leases for development and operations purposes, we do not believe it necessary for us to file the "Common Carrier Stipulation."

Please advise.

The manager replied, on September 19, 1951, that the new regulation of the Department (43 CFR 244.53, as contained in Circular 1795, 16 F. R. 7570) required the stipulation from every applicant for a natural gas pipeline. He allowed the Company 30 days from receipt of his letter either to execute and return the stipulation or to appeal to the Director of the Bureau of Land Management. The Company appealed.

[1] The map submitted by the Continental Oil Company shows the proposed route of the line as crossing the N½NE¼ sec. 35, SE¼SW¼, SW¼SE¼ sec. 25, T. 36 N., R. 65 W., and the S½SW¼ sec. 30, T. 36 N., R. 64 W., 6th P. M. The intervening land in the SE¼SE¼ sec. 25 is apparently patented, and sec. 36 is a school section.

[2] For the form of stipulation see Circular 1795 of July 27, 1951 (16 F. R. 7570). The form of stipulation was slightly amended on June 24, 1952 (see 43 CFR, 1952 Supp., 244.63), and was greatly abbreviated on May 18, 1953 (Circular 1847, 18 F. R. 2953). It was again amended on December 11, 1953 (43 CFR, 1953 Supp., 244.62).

The Assistant Director of the Bureau of Land Management, in his decision on the appeal, dated January 27, 1953, modified the manager's decision to constitute a rejection of the Company's application.

43 CFR 244.53, *supra*, was issued under authority of section 28 of the Mineral Leasing Act of February 25, 1920, as amended by the act of August 21, 1935 (30 U. S. C., 1946 ed., sec. 185). Consequently, both the manager and the Assistant Director in requiring compliance with that regulation by implication held the Continental Oil Company's right-of-way application to be governed by the Mineral Leasing Act rather than by the act of February 15, 1901 (43 U. S. C., 1946 ed., sec. 959), cited in the Plant Superintendent's letter.

The Company has appealed to the Secretary of the Interior, contending that the regulation does not apply to a pipeline such as the one it proposes to build. This pipeline, it appears, is intended to be used only to return dry gas from the Company's casinghead gasoline plant back to its leased land for use as fuel.

Section 28 of the Mineral Leasing Act, as amended by the act of August 21, 1935, read as follows:

> Sec. 28. That rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this Act, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers * * * *Provided further*, That no right-of-way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. * * * [49 Stat. 678.]

It is apparent from the proviso quoted that the Bureau of Land Management officials who ruled on this case below were correct in holding it to be governed by the Mineral Leasing Act rather than by the act of February 15, 1901, *supra*.[3] It is equally apparent that the Department of the Interior has no discretion to excuse any applicant from the statutory common-carrier requirement in respect to any proposed line of pipe carrying natural gas across public land. See *Frances R. Reay et al.*, 60 I. D. 366 (1949).

Congress, in its latest session however, added the following proviso to section 28 of the Mineral Leasing Act:

> *Provided*, That the common carrier provisions of this section shall not apply to any natural gas pipeline operated by any person subject to regulation under

[3] The 1901 act authorizes the grant of rights-of-way "for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits * * *." It obviously applies only to water-pipe lines.

the Natural Gas Act or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality: * * *. [Act of August 12, 1953, Public Law 253, 83d Cong., 1st sess. (67 Stat. 557)]

It is possible that the Continental Oil Company comes within the exemption of the quoted proviso, although there is insufficient information in the present record so to hold. For this reason, the case should be remanded to the Bureau of Land Management in order to give the Company an opportunity to show that it qualifies for such exemption.

The records of the Bureau of Land Management reveal that under a previous application (Cheyenne 080453) the Continental Oil Company was granted a right-of-way for a 6⅝-inch gas-gathering line and a 3-inch residue gas line over the identical route now requested for the proposed 4½-inch residue line. There is no proof of construction in the file of Cheyenne 080453, but the Company's briefs in the present case refer to the 6⅝-inch line as in existence; and a report of field examination made by the Bureau of Land Management on June 12, 1951, also mentions an existing 6⅝-inch gas-gathering line. Apparently, however, the 3-inch residue line has not been constructed and the 4½-inch line of the present application is being proposed in lieu of it. It should be pointed out here that the permission to construct a 3-inch residue line granted in Cheyenne 080453 by a decision of the land office manager dated January 9, 1950, is still effective, and will remain so until January 9, 1955. 43 CFR, 1952 Supp., 244.15.

As asserted by counsel for the appellant, no common-carrier stipulation was required prior to approval of right-of-way application, Cheyenne 080453. This is because the Department did not impose such a requirement at the time that right-of-way was granted. However, both the existing 6⅝-inch pipeline and any 3-inch residue line which may hereafter be constructed pursuant to the manager's decision in that case are subject to the common-carrier provision of section 28 of the Mineral Leasing Act, *supra*, unless that provision has been rendered inapplicable to the Company by the act of August 12, 1953 (quoted above).

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the case is remanded to the Bureau of Land Management with instructions to allow the Continental Oil Company 60 days from the date of receipt of this decision to present evidence to the manager of the Land and Survey Office at Cheyenne proving that it is a "person subject to regulation under the Natural Gas Act" (15 U. S. C., 1946 ed., secs. 717–717w) or a public utility subject to State

or municipal regulation, within the meaning of the act of August 12, 1953, *supra*.

J. REUEL ARMSTRONG,
Acting Solicitor.

L. D. CRAWFORD, HALVOR F. HOLBECK

A–26784 *Decided September 8, 1954*

Rules of Practice—Appeals—Regulations—Oil and Gas Leases—Sufficiency of Payment of First Year's Rental.

In the absence of an appeal to the Secretary, the Director of the Bureau of Land Management may, on his own motion, reconsider a decision previously rendered by him and correct any errors which may have been made in the former decision.

When an appeal is taken to the Secretary from a decision of the Director of the Bureau of Land Management, the Director loses his jurisdiction in the matter and may not, thereafter, in the absence of authority from the Secretary, render a supplemental decision in the matter.

The authority conferred upon the Director of the Bureau of Land Management to reconsider his decisions after the filing of appeals to the Secretary does not extend to those cases in which the Director's decisions indicate that other persons have an interest in the proceedings adverse to the appellant.

Under a departmental regulation in effect on May 1, 1951, the offeror of a noncompetitive oil and gas lease who submitted with his offer advance rental sufficient to cover the acreage in the one lot contained in the offer and sufficient to cover the other legal subdivisions contained in the offer on the basis of 40 acres in each of the other legal subdivisions had complied with the regulation and was entitled to priority as of the time of the filing of the offer, despite the fact that some of the other legal subdivisions exceeded the usual 40 acres and thus the rental submitted was actually deficient on the basis of the correct acreage in the lease offer.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior by L. D. Crawford from a decision dated March 17, 1953, by the Assistant Director of the Bureau of Land Management which held for cancellation Mr. Crawford's noncompetitive oil and gas lease, Montana 02293, issued under section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226), and which revoked a previous decision dated May 22, 1952, holding that the lease had been properly issued.

Mr. Crawford's lease offer was filed on May 1, 1951. The land sought was described in the offer as including one lot and several half sections, quarter sections, half-quarter sections and quarter-quarter sections, in T. 29 N., R. 54 E., and Tps. 29 and 30 N., R. 55 E., M. P. M.,

Montana. The total acreage in the offer was stated by Mr. Crawford to be 1417.29 acres. Mr. Crawford submitted with his offer $709 for the first year's rental. On August 9, 1951, the manager of the Billings land office notified Mr. Crawford that the correct acreage in the offer was 1418.64 acres and that the advance rental due was $709.50 instead of the $709 which Mr. Crawford had submitted. The manager allowed Mr. Crawford 15 days within which to pay the 50 cents balance due on the advance rental. The payment was made by Mr. Crawford on August 15, 1951.

Meanwhile, on August 14, 1951, Halvor F. Holbeck offered to lease the same land as that embraced in the Crawford offer. Mr. Holbeck's offer, Montana 03481, described the land in the same manner as it was described in the Crawford offer. Mr. Holbeck, however, stated that his offer embraced 1418.64 acres and submitted rental in the amount of $715.

Subsequently, a lease was issued to Mr. Crawford, effective October 1, 1951.

On January 9, 1952, the manager rejected Mr. Holbeck's offer because of its conflict with the Crawford lease. Mr. Holbeck appealed to the Director of the Bureau of Land Management on the ground that he was the first qualified applicant for the land. He stated that at the time he filed his offer, Mr. Crawford's offer had no priority due to Mr. Crawford's failure to comply with section 9 (c) of the General Instructions printed on the back of the form "Offer to Lease and Lease for Oil and Gas" then in use.

On May 22, 1952, the Assistant Director of the Bureau of Land Management held that Mr. Crawford's lease had been properly issued and affirmed the action of the manager in rejecting Mr. Holbeck's offer. Mr. Holbeck thereupon appealed to the Secretary of the Interior. His appeal was not forwarded to the Secretary.

On March 17, 1953, the Assistant Director, in a decision directed to Mr. Crawford, reciting the fact that Mr. Holbeck had appealed from the decision of May 22, 1952, revoked that decision and held the Crawford lease for cancellation on the ground that the offer should have been rejected because of Mr. Crawford's failure to comply with section 9 (c) of the General Instructions.

Mr. Crawford has now appealed to the Secretary. He contends that the decision of May 22, 1952, terminated the jurisdiction of the Director in the matter, and that his only function thereafter was to transmit to the Secretary any appeal which may have been filed from that decision; that the decision of March 17, 1953, was based upon an erroneous construction of the applicable regulation; and that Mr. Holbeck's appeal from the decision of May 22, 1952, is subject to summary dismissal because of his failure to comply with the rules of

the Department governing the procedure to be followed in filing appeals to the Secretary of the Interior.

I

Nothing in the Rules of Practice of the Department (43 CFR, Part 221) causes the Director to lose jurisdiction of a matter simply by rendering a decision thereon. The Director may, before an appeal is taken to the Secretary, reconsider a previous decision, on his own motion, and correct any errors that may have been made in the former decision. *United States* v. *State of New Mexico*, 48 L. D. 560 (1922); *Stewart Campbell*, 42 L. D. 55 (1913); and *Nathan H. Pinkerton*, 40 L. D. 268 (1911).

But the general rule has long been that when an appeal is taken to the Secretary from a decision of the Commissioner of the General Land Office, now the Director of the Bureau of Land Management, the case is withdrawn from the jurisdiction of that officer and he cannot, while the appeal is pending in the Department, exercise any further jurisdiction in the matter. *Price* v. *Schaub*, 16 L. D. 125 (1893); *Henry* v. *Stanton et al.*, 12 L. D. 390 (1891); *Sapp* v. *Anderson*, 9 L. D. 165 (1889). See *United States* v. *State of New Mexico*, *supra*, and *Salmon River Lumber Company*, A–26820 (December 17, 1953), wherein the reconsideration by the Director of a decision while the matter was pending on appeal to the Secretary was characterized as extrajudicial.

An apparent exception to that rule is contained in a Secretarial directive dated March 21, 1946.[1] There the Assistant Secretary outlined the procedure to be followed when parties aggrieved by decisions of the Director file appeals to the Secretary. That directive requires the transmission of such appeals to the Secretary within 10 days—

> unless upon reconsideration of the decision, you [the Director] have concluded within that time to grant the appellant all the relief he requests, in which event the new decision shall be rendered by you within 30 days after the receipt of the appeal.

It has been held, however, that the authority conferred by that directive upon the Director to reconsider his decisions after the filing of appeals to the Secretary does not extend to those cases in which the Director's decisions indicate that other persons have an interest in the proceedings adverse to the appellant. *Herbert R. Lewis, Charlotte L. Murphey*, A–26819 (June 30, 1954).

As the decision of May 22, 1952, indicates clearly that another person, the holder of the outstanding lease, had an interest in the proceed-

[1] File No. 215 General, Part 5.

ing adverse to Mr. Holbeck, the decision of March 17, 1953, should not have been rendered by the Assistant Director.

However, as Mr. Crawford exercised his right to appeal from that decision, consideration will be given to the appeal on its merits. Even if Mr. Crawford had not appealed from the March 17, 1953, decision, the Secretary would have authority to review the case in the exercise of his supervisory authority over all matters within the jurisdiction of the Department. *West* v. *Standard Oil Company*, 278 U. S. 200, 213 (1928); *Knight* v. *U. S. Land Association*, 142 U. S. 161, 177–178 (1891); *Herbert R. Lewis, Charlotte L. Murphey, supra; George C. Vournas*, 56 I. D. 390 (1938); *United States* v. *State of California* (On Rehearing), 55 I. D. 532, 543 (1936).

II

Turning now to the merits of Mr. Crawford's appeal, the question arises whether the Assistant Director correctly interpreted the applicable regulation in force at the time Mr. Crawford submitted his offer.[2] The regulation, so far as pertinent to this inquiry provides:

(e) Each offer, when first filed, shall be accompanied by:

* * * * * * *

(2) Full payment of the first year's rental based on the total acreage if known, and if not known, on the basis of 40 acres for each smallest legal subdivision.

* * * * * * *

(g) An offer will be rejected and returned to the offeror with any rental paid, and it will confer no priority if it is not filled in and accompanied by the payments and documents required by the regulations in Parts 191 and 192 and the instructions printed on the lease form * * *.

Section 9 of the General Instructions reads in pertinent part:

The offer will be rejected and returned to the offeror with any rental paid and will afford the applicant no priority if * * * (c) The full filing fee and the first year's rental do not accompany the offer, the rental payment to be for the total acreage if known, and if not known, for the total acreage computed on the basis of 40 acres for each smallest legal subdivision * * *.

There are, in addition to the General Instructions, Special Instructions to be followed in filling out the form. Item 4 of the form calls for a statement of the total amount of money accompanying the offer, including the filing fee and the advance rental payment. The Special Instruction for that item is—

The total amount remitted should include a $10 filing fee and the first year's rental of the land requested at the rate of 50 cents an acre or fraction thereof. * * * In order to protect the offeror's priorities with respect to the land requested, it is important that the rental payment submitted with the offer be sufficient to cover all the land requested at the rate of 50 cents per acre or fraction thereof. If the land requested included lots or irregular quarter-quarter

[2] 43 CFR 192.42, as set forth in Circular No. 1773, November 29, 1950 (15 F. R. 8582).

sections, the exact area of which is not known to the offeror, rental may be submitted for the purpose of the offer on the basis of each such lot or quarter-quarter section containing 40 acres. * * *

The Assistant Director held that as the Crawford offer covered 36 legal subdivisions—"either lots or 40 acre regular subdivisions"—Mr. Crawford, in order to achieve priority for his offer, should have made an advance rental payment of $720.

However, the Department has recently held in *Paul Grafe, Halvor F. Holbeck*, A–26750 (August 17, 1954), that—

> It is apparent from the Special Instructions that the purpose of the regulation is to provide a rule of approximation for those legal subdivisions included in the lease offer which vary from the ordinary 40-acre tract by reason of survey correction lines and that it is not intended to cover those tracts included in the lease offer which obviously are a fractional part of a 40-acre subdivision where the offeror knows the number of acres in the tract. In many lease offers, such as the Grafe lease, while the total acreage is not known, the number of acres in one or more of the subdivisions may be known and in the remainder not known. Under such circumstances the regulation and the instructions permit the offeror to compute the rental on the basis of the correct acreage for each legal subdivision where the area is known and on the basis of 40 acres for each legal subdivision where the area is not known.

Mr. Crawford's offer included one lot and 35 other supposedly regular legal subdivisions. He apparently computed his rental payment by multiplying 40 by 35 for a total of 1,400 acres to which he apparently added 17.29 acres as the acreage covered by the lot, making the total of 1417.29 acres stated in his offer. He paid a rental of $700 on the supposedly regular subdivisions and $9 on the lot—a total of $709. However, two of the supposedly regular subdivisions exceed the usual 40 acres by less than one acre each.[3] The lot, on the other hand, contains only 16.72 acres. Taking into account these corrections, the amount submitted with the offer was, as the manager held, 50 cents less than the advance payment required before the issuance of a lease. However, as Mr. Crawford paid an advance rental of more than enough to cover the lot, as to which he apparently thought that he knew the exact acreage, and as he paid for the balance of the land at the rate of 40 acres for each smallest legal subdivision, it must be held that, notwithstanding the fact that two of these subdivisions actually exceeded 40 acres, Mr. Crawford's offer was accompanied by the required payment of rental to protect his priority to a lease. He paid the balance due within the time allowed by the manager. He, therefore, as the first qualified applicant, had a preference right to a lease under section 17 of the Mineral Leasing Act, as amended. It must be held,

[3] The manager states that the NW¼NW¼ sec. 2, T. 29 N., R. 55 E., should be described as lot 4 and that the NE¼NE¼ sec. 3 of the same township and range should be described as lot 1. Lot 4 is said to contain 40.93 acres and lot 1 is said to contain 40.99 acres.

therefore, that the Assistant Director's decision dated March 17, 1953, holding the Crawford lease for cancellation, was in error and that his earlier decision of May 22, 1952, holding that the lease had been properly issued, was correct.

III

In view of this conclusion, it is unnecessary to discuss Mr. Crawford's contention that Mr. Holbeck's appeal from the Assistant Director's decision of May 22, 1952, is subject to summary dismissal because of Mr. Holbeck's alleged failure to comply with the rules of the Department governing the procedure to be followed in filing appeals to the Secretary of the Interior.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Assistant Director of the Bureau of Land Management dated March 17, 1953, is vacated, and his decision of May 22, 1952, is affirmed.

J. REUEL ARMSTRONG,
Acting Solicitor.

APPEAL OF BUTLER CONSTRUCTION AND ENGINEERING CO.

CA–219 *Decided September 15, 1954*

Contract Appeal — Head of the Department — Representation — Equitable Adjustment—Extra Work.

The Secretary of the Interior, not the General Manager of The Alaska Railroad, is the "head of the department," within the meaning of article 15, the disputes provision of the standard construction contract (No. 23).

An ambiguous provision in a contract and specifications drafted by the Government should be construed against the Government.

A provision in a contract that the Government will deliver material "at the construction site" means that the materials will be delivered at the actual site and not merely in the vicinity thereof.

A statement in the specifications of a Government contract that material to be excavated is "assumed to be primarily gravel" constitutes a representation upon which the contractor may rely, and, accordingly, if the soil proves to be deficient in gravel, the contractor is entitled to an equitable adjustment under article 4 for the extra work required of it by the contracting officer.

ADMINISTRATIVE DECISION

This decision considers the appeal of Butler Construction and Engineering Co., of Seattle, Washington, as presented by exception in final release of contract No. I–3arr–9468 of two claims for additional compensation totaling $44,023. The exception, dated April 21, 1953, listed the claims, as follows:

(1) Claim dated December 12, 1951, pertaining to the riprap amounting to $5,871.00;

(2) Claim dated November 20, 1952, pertaining to material (excavated) being other than specified in the specifications and increased cost due to extra work ordered by the engineers amounting to $38,152.00.[1]

The contract on Standard Form 23 (revised April 3, 1942) and dated September 11, 1951, provided for the construction of the Diversion Dam, Cooling Pond, and Roadway, to be completed by September 2, 1952, under supplemental specifications dated August 13, 1951. These original specifications were dated April 18, 1951, and provided for the construction of a power and heating plant for The Alaska Railroad at Anchorage, Alaska.

Before considering the merits of the contractor's claims, some explanation of the administrative procedure employed by The Alaska Railroad in the consideration of the contractor's claims is deemed advisable.

By a letter dated November 13, 1951, to the Director of Territories, Department of the Interior, the contractor filed an appeal from a decision of the contracting officer dated October 17, 1951. Article 15 of the contract provides that all disputes concerning questions of fact under the contract are to be decided by the contracting officer subject to appeal within 30 days "To the head of the department concerned or his duly authorized representative." The contractor's letter of appeal was forwarded by the Director of Territories to the General Manager of the Railroad who, in a letter to the contractor dated December 27, 1951, stated that—

> In accordance with the organizational delegation, the General Manager of the Alaska Railroad serves as "head of the department", and all facts rising out of subject contract which are beyond the normal scope of the Contracting Officer should be handled directly with me.

Subsequently, the General Manager rendered a decision dated December 19, 1952, entirely denying the appeal taken on November 13, 1951. In a decision dated January 22, 1952, he rejected an appeal of the contractor dated December 12, 1951, and stated, in part, that—

> * * * After the contract has been completed, if you still feel that you have a just claim you, of course, have the right of carrying your appeal to the U. S. Court of Claims.

It is clear that the Secretary of the Interior, not the heads of the

[1] In addition to these claims, there was included in the contractor's brief dated October 29, 1953, a claim in the amount of $426 for the purchase and spreading of gravel on roads, and two claims pertaining to errors in the extension of unit prices in the bid amounting to $29,300 and $13,295, and a fourth claim in the amount of $10,000 arising from an alleged error in figuring the weight of creosote piles. However, the parties have agreed that a release executed by a contractor saving and excepting certain claims operates as a bar to all claims except those specifically excepted in the release.

various agencies, bureaus, or offices within the Department, is "the head of the Department," within the meaning of article 15. The Secretary has authorized the Solicitor to decide appeals from the findings of fact and decisions of all contracting officers throughout this Department (sec. 24, Order No. 2509, as amended; 17 F. R. 6793). As the General Manager of the Railroad was without authority to entertain and consider appeals under the contract, his decisions dated January 22 and December 19, 1952, are void.

I

Claim No. 1 is for additional compensation in the amount of $5,871, which represents the cost incurred by the contractor in loading into trucks riprap dumped from railroad cars by The Alaska Railroad at a siding near the construction site and hauling it to the construction project. There is a difference of opinion on the part of the parties as to the length of the haul, the conflicting contentions ranging from 300 to 1,200 feet.

Paragraph 2–06 of section II—EARTHWORK AND RIPRAP—of the specifications, provided:

RIPRAP.—All rock for bank and channel protection shall be durable as approved by the Contracting Officer. Suitable riprap material may be secured from The Alaska Railroad at commercial rates. Base for riprap shall be inspected and approved by the Construction Engineer before riprap is placed.

Addendum No. 4, dated May 14, 1951, provided:

Section II—EARTHWORK AND RIPRAP, paragraph 2–06 RIPRAP.—Add the following: The Alaska Railroad will furnish rock for riprap at $5.00 per cubic yard dumped at the construction site. The contractor shall notify The Alaska Railroad not less than 30 days prior to delivery requirements.

Between the opening of bids on August 30, 1951, and the making of an award, the contractor, in a letter dated September 4, 1951, stated that—

* * * The Addendum No. 4 states The Alaska Railroad will furnish riprap at $5.00 per yard dumped at the job site. Our figure contemplates that the riprap will meet specifications in full, and since there is no railroad to the site it will be furnished in dump trucks at the nearest proximity where it will be used.

After receiving the notice of award, the contractor, in letters dated September 20 and 25, 1951, sought to obtain the position of the contracting officer with respect to the delivery of riprap.

In a letter to the contracting officer dated October 5, 1951, the contractor stated:

* * * We feel the only way this riprap could be dumped at the construction site would be in dump trucks and we figured accordingly. It is now our understanding that the Alaska Railroad are dumping this material off the construction site where it will be necessary that we load and haul to the construction

site. If that is the case it is felt that we should have extra compensation for the loading and hauling.

In a letter dated October 23, 1951, the contracting officer stated that the riprap would be delivered by the Railroad to a track near the construction site, and in a letter dated November 1, 1951, he stated that the "farthest north track on the south side of Ship Creek may be used for dumping riprap, and the track which we now have installed on the north side of Ship Creek for use in power-plant operations may be used for dumping of riprap." In reply, the contractor stated (letter dated November 23, 1951):

With reference to your letter of November 1, 1951, it is our belief that the dumping of the riprap as specified in this letter does not conform to the specifications. We feel this dumping area is not within the construction site and delivery of the riprap as outlined means that we will have to ship additional equipment to Alaska and be put to additional expense.

In a letter dated December 3, 1951, the contracting officer stated that—

In accordance with our letter of November 1, the tracks in the third paragraph of our letter will be available for the riprap dumping operation. It is the interpretation of the Contracting Officer that these delivery points are in accordance with the Contract terms.

From that decision of the contracting officer, the contractor appealed in a letter dated December 12, 1951. The crucial provision on this issue, paragraph SR–13 of the specifications, provides, in part, as follows:

PROPERTY FURNISHED BY THE ALASKA RAILROAD—Unless otherwise stipulated by Exhibit B2 such material will be available to the contractor at the Alaska Railroad Storage Yards which are located *in the vicinity of the construction site.* (Emphasis supplied.) The contractor will be required to move this material from the storage yards and install or incorporate it into the work at his own expense. * * *

As previously noted, under addendum No. 4 to the specifications, The Alaska Railroad agreed to deliver the riprap "*at the construction site*," not "*in the vicinity of the construction site.*"

The Railroad argues that "at the construction site," under the circumstances, can reasonably be construed only to mean "in the vicinity of the construction site," and that the contractor should have realized this in preparing its bid. (Reply brief, p. 4.)

Attorneys for the contractor maintain that the contract and specifications are ambiguous and the ambiguity should be resolved against the drafter, the Government. (Appellant's brief, p. 15.)

It is my belief that the language of addendum No. 4 does not necessarily contemplate that the contractor would be required to move the riprap from the railroad siding to the construction site, and, indeed, when viewed with the language of paragraph SR–13 of the specifi-

cations, the contractor's interpretation of the addendum was reasonably justified.

My conclusion is supported by the clear weight of authority. *Words and Phrases*, vol 39, page 459, states the rule to be, as follows:

> *Site of the Work.*—Under a subcontract relative to construction of a highway, whereby contractor agreed to deliver materials at the site of the work, it was the duty of the contractor to deliver the materials at points on the projected highway where they were needed for the work in the course of its normal progress, and not at some point remote from the scene of operation, Fisher v. Vandevanter, 112 A. 296, 297 (137 Md. 249).

In *Peter Kiewit Sons' Co.* v. *United States*, 109 Ct. Cl. 390,418 (1947), the court stated:

> Where the Government draws specifications which are fairly susceptible of a certain construction and the contractor actually and reasonably so construes them, justice and equity requires that that construction be adopted. Where one of the parties to a contract draws the document and uses therein language which is susceptible of more than one meaning, and the intention of the parties does not otherwise appear, that meaning will be given the document which is more favorable to the party who did not draw it. This rule is especially applicable to Government contracts where the contractor has nothing to say as to its provisions.

Accordingly, I conclude that the requirement of the contracting officer that the contractor haul the riprap to the construction site from the place of dumping constituted a change in the specifications within the meaning of article 3, relating to changes, of the contract for which a change order should be issued compensating the contractor in the amount of $5,871, the cost of performing such work.

II

The contractor's second claim, in the amount of $38,152, is based upon a claim dated November 20, 1952, and includes the following items, each of which will be separately considered:

(*a*) Additional expense in the amount of $36,000 due to the material excavated being other than indicated by the specifications and for expenditures incurred in compaction of certain dikes.

(*b*) Expense incurred in the amount of $1,192 in performing extra work on the cooling-pond dike.

(*c*) Expense incurred in the amount of $960 in connection with the placing of a concrete pipe.

With respect to the soil composition question, paragraph 2–03 of the specifications provides, in part, as follows:

> EXCAVATION.—All excavation shall be done with sufficient working space to permit the placing, inspection, and completion of all work embraced in the contract. Excavated material that is unsuitable or not required for filling or grading shall be removed from the premises.

Material excavated for pond and channel is assumed to be primarily gravel and suitable for use in the construction of roads, dams and levees.

After the award of contract but prior to its signing, the contractor, in a letter to the contracting officer dated September 20, 1951, stated:

We have been further informed by our engineers that the material referred to in Paragraph 2–03 of the specifications is not primarily gravel which is suitable for use in the construction of the project but rather is primarily clay and mud and which will cause a considerable change in all phases of the construction and increase the cost considerably. It is our opinion that this discovery changes the entire complexion of this contract and at the same time we made our bid there could have been no meeting of the minds between the Alaska Railroad and ourselves as bidders because we were both in error as to the type of material to be encountered.

In a letter dated October 8, 1951, the contractor again stated that the material being excavated was not primarily gravel but primarily mud, clay, gumbo, topsoil, and quicksand, and that the cost of handling the material would be "considerably more" in that "more time" would be necessary to complete the work and different equipment would have to be brought in.

In a letter dated October 17, the contracting officer stated that—

Upon investigating the area I find that the conditions as very close to those as set forth in the specifications which our Consultant Mr. Beecher prepared. There are local areas where clay is more predominant than gravel. However, in the general scope of the project this is not the case.

We cannot find any change of condition; therefore, your letter is being rejected in its entirety unless further investigation reveals conditions that differ from the specifications.

Again, in a letter dated October 19, the contractor stated:

* * * Mr. Griffith has instructed us to push or convey the clay in the Northwest area across the river or if we desire we can place it in the dike in this area. He has not classified it as unsuitable material so I presume it is satisfactory to the Alaska Railroad if we place it in the dike but it is our opinion that it is going to take more time and cost considerably more money to move than if it was primarily gravel.

As pointed out to you at our conference on Monday, October 15, 1951, we feel that there is approximately fifty percent clay and mud in this project. I think Mr. Hollingsworth's survey, copy of which has been previously mailed to you, outlines very clearly what is in the project. As you know we stated we have been placing clay and mud in the dikes and a portion of the dikes are constructed on clay as per Mr. Bragg's instructions, and it is our understanding that this is satisfactory to you, however we feel that in doing this considerably more expense is involved than if the material had been primarily gravel.

Your engineers have stated that in their opinion the material is ninety percent gravel. We do not feel that this is the case whatsoever, perhaps they mean that ninety percent of the material is suitable for road and dike construction. Mr. Bragg has stated to disregard the clause in the specifications "Primarily gravel and so forth" and just go ahead and construct the dikes and is necessary borrow satisfactory material below grade. That is satisfactory with us with

the exception that we want you to know that it is costing us extra money and additional time than if the material had been primarily gravel.

Again, in a letter dated November 15, the contractor stated that—

> * * * From information we have obtained there has never been any test pits dug and as a result no soil classification, and we believe the assumption that the material was primarily gravel is in considerable error.
>
> As a result of this error it has been necessary to dispose of considerable material which just would not go in the dikes and some of the material placed in the dikes even when mixed with gravel as directed by the engineers would not confine itself to the slopes and as a result we have had to excavate thirteen thousand yards of additional material below grade. Heretofore in all such extra excavation we have been paid for it and we feel we should be paid for this as an extra.

In April of 1952, The Alaska Railroad secured from the Corps of Engineers, Fort Richardson, Alaska, the services of a Soils Engineer for the purpose of classifying the soil materials on the project. His report shows a deficiency of gravel in the soil.

In its reply brief, The Alaska Railroad states that use of the word "assumed" in connection with the material to be excavated merely indicated a belief that the soil was gravel and suitable for roads, and that, contrary to the contention made by the contractor, no warranty or representation was made in the specifications that the material to be excavated would, in fact, be primarily gravel. The Railroad also claims that under paragraph GR–08 of the specifications it was the contractor's duty, prior to submitting its bid, to inform itself concerning soil conditions at the site, and because of its failure to do so, it cannot now recover additional compensation by reason of an alleged changed condition.[2]

There is a suggestion here that the contractor should have made an investigation of the soil conditions at the site, but it was not expressly required to do so. Had the specifications been silent as to the type of soil expected to be encountered, the obligation would be much more apparent. As it is, the language of the specifications was sufficiently descriptive to justify the contractor in proceeding as it did.

The contractor in computing its bid could assume, as stated in the specifications, that the material to be excavated was primarily gravel and suitable for the construction of the dikes, etc., without the necessity of conducting an investigation of soil conditions. If, after entering into the work, that assumption was shown to be wrong, i. e., the material excavated proved to be other than primarily gravel and/or unsuitable for the required construction, thereby increasing the cost of

[2] Paragraph GR–08 of the specifications provides that "Bidders should fully inform themselves as to the locations of the site and as to the conditions under which the work is to be done. Failure to take this precaution will not relieve the successful bidder from furnishing all material and labor necessary to complete the contract without additional cost to the Government."

performance, article 4 of the contract provides a remedy. That article provides as follows:

> Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or *indicated* in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions. [Italics supplied.]

It is clear from the report of the Soils Engineer that the material excavated was not primarily gravel as assumed or indicated in the specifications. Moreover, although it appears that the construction was performed exclusively with the excavated material, the report also indicates that a percentage of such material was unsuitable. In any event, I am convinced that a changed condition within the meaning of article 4 of the contract was in fact encountered. The contractor asserts, and it is undisputed by the Railroad, that as a result of such changed condition, additional uncontemplated expenses were incurred. Thus, it was necessary to ship additional equipment to Alaska, more time was required to perform the work, and it was necessary in order to obtain sufficient suitable material to excavate 13,000 cubic yards of material from below the channel level specified in the contract. Accordingly, the contractor should be compensated for expenditures incurred in excavating material other than gravel, and the contracting officer should provide for such increased costs, in accordance with the provisions of article 4.

An undisclosed amount of this second claim, which is for $36,000, represents additional expenditures allegedly incurred as a result of the requirement made by the Resident Engineer and the contracting officer that the material in all dikes and embankments on the project be compacted. Just as in the claim pertaining to the riprap, the disposition of this aspect of the claim depends entirely upon an interpretation of the specifications.

In the letter to the contracting officer dated September 4, 1951, before the contract had been signed, the contractor stated:

> Dikes.—Regarding the dikes, we have contemplated no compaction of this material as there is none stated anywhere in the specifications. * * *

Nothwithstanding the fact that the Railroad was aware of the contractor's interpretation of the specifications in this regard, no clarification was made by the Railroad prior to entering into the contract.

Subsequently, in a letter dated October 12, 1951, the Resident Engineer stated:

> The placing and compaction of fill material for the earth dikes surrounding the diversion dam and cooling pond is not proceeding according to the contract specifications.
>
> Your attention is invited to Section II of the Specifications entitled "Earthwork and Riprap"—under paragraph 2–04, we quote in part, "All backfilling shall be clean material placed in layers not over 12" in depth. Each layer shall be thoroughly tamped, packed or puddled as directed so that no settlement shall occur.
>
> Under Addendum No. 2 Section II, paragraph 2–08, it is further stated that dikes surrounding the cooling pond shall have a watertight core of selected material.
>
> In order to obtain this watertight core, the selected material being used must be compacted to the utmost. Suitable compaction can be obtained by placing the fill material onto the dike in layers not exceeding 12" and compacting each layer thoroughly with a "sheeps foot" type roller or similar device.
>
> A similar degree of compaction must be obtained in conjunction with the placing of fill material into all other dikes and fills surrounding the dam area in order to meet the contract specifications.

The contractor, in a letter dated October 12, informed the contracting officer that although it would comply with the requirement that the soil in all dikes be compacted, it believed that such work on all dikes other than the dike surrounding the cooling pond was extra work for which it should be paid. However, in a letter dated October 24, the contracting officer adopted the position taken by the Resident Engineer that compaction of the material for all dikes in layers was necessary.

It is indisputably clear, in my opinion, that there is nothing in the specifications requiring compaction of the dikes around the Ship Creek and Diversion Pond. Addendum No. 2 dated May 8, 1951, relied upon in part by the Railroad as establishing such a requirement, provides:

> Section II—EARTHWORK AND RIPRAP, Page II—2. Add the following new paragraph:
>
> 2–08—CIRCULATING WATER POND MATERIAL—All dikes and embankments surrounding the cooling pond shall be made water tight by the use of selected material as approved by the Contracting Officer. The exterior surface of the embankments shall be gravel, and the interior of the embankments shall consist of the water tight core.

The drawing of the "Dam and Cooling-Pond Channel Above Dam," No. 4204–181–D–1, shows the cooling pond to be completely surrounded by dikes and embankments. Consequently, as contended by the contractor, paragraph 2–08 by its terms is limited to those dikes and cannot be construed as applying to the dikes around the Diversion Pond and Ship Creek which are not in any way connected with the Cooling Pond. Moreover, I cannot conclude that paragraph 2–04 of

section II of the specifications requires compaction of the dikes and embankments. That paragraph provides, in full, as follows:

FILLING—Excavations shall be backfilled to the level of the final grade. All temporary planking, timbering, piling or other lumber shall be removed as the backfill is placed.

No backfilling shall be done until so directed and until all concrete, or waterproofing has set sufficiently so that it will not be injured. Any caving of excavations that may occur or any backfill placed before inspections are complete shall be removed as deemed necessary in the opinion of the Construction Engineer and at the expense of the Contractor.

All backfilling shall be clean material placed in horizontal layers not over 12" in depth. Each layer shall be thoroughly tamped, packed, or puddled as directed so that no settlement shall occur. Where concrete slab rests on filled ground, the fill shall be of pit run gravel placed as directed to produce a uniform, hard surface before the slab is poured.

Fill around drain tile shall be made with clean gravel or crushed rock between 2" and ½" in size.

Filling around sheet piling shall proceed simultaneously on each side. Place and compact as required above and grade to plane surfaces as shown on drawings.

Here again, this section requires merely that "backfilling" shall be compacted, and does not expressly or impliedly apply to dike and embankment construction where no backfilling was involved but "merely an erection of earthwork and riprap," as stated by the contractor on page 9 of its brief.

Finally, drawing No. 4204–182–D–1, "Dam and Cooling-Pond Earthwork Cross Sections" shows cross sections of all dikes and embankments on the project. These drawings show only that the embankments shall have a "Gravel and Earth Fill" and do not in any manner indicate a compaction requirement.

Accordingly, it must be concluded that the work involved in compacting the dikes and embankments around the Diversion Pond and Ship Creek was not required by the contract, but was performed pursuant to the written order of the contracting officer. Hence, the contractor should be compensated for such extra work under article 5 of the contract.

The contractor has not presented sufficiently specific data upon which a determination can be made as to what would constitute a just and equitable price for the work involved in this claim. It is not shown how the figure of $36,000 was arrived at or what portion of it is divided as between labor and equipment costs. Consequently, the matter will be remanded to the contracting officer with instructions to obtain from the contractor information supporting and breaking down the costs involved in this claim and, if found to be reasonable, the contracting officer is instructed to make the necessary

equitable adjustment in the contract, as provided in article 4, to cover the costs incurred as a result of the material excavated being other than primarily gravel, and to issue an extra work order pursuant to article 5 of the contract to cover the costs entailed in compacting the dikes around the Diversion Pond and Ship Creek.

III

Two items included in the contractor's claim dated November 20, 1952, remain to be considered. The first is for additional work costing $1,192 allegedly resulting from the requirement that portions of the cooling-pond dike be reconstructed, necessitating the locating and rental of extra equipment. In addition, it is alleged that Mr. Bragg and Mr. Griffith required that a part of the dike be removed and a trench dug and backfilled, all of which was work not called for under the contract.

The second item involves work costing $960 performed in connection with the placing of concrete pipe underneath the road connecting the screen house to the power house. It is alleged that in October and November 1951, the contractor had pipe ready to place which conformed to the specifications but was not allowed to place it by Mr. Bragg who requested that other pipe be obtained which was unavailable and which did not conform to the specifications. Permission was subsequently granted to use the pipe originally obtained. It is alleged, however, that the job of placing the pipe was rendered more costly because of the necessity of excavating through additional road fill which had since been placed.

I am convinced that these two claims are also meritorious, but here again there should be specific cost figures supplied by the contractor. Such claims are remanded, therefore, to the contracting officer with instructions to obtain such information, and, if such costs are found to be reasonable, to issue an extra work order pursuant to article 5 of the contract.

CONCLUSION

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior, the decisions of the contracting officer of October 17, 1951, and December 19, 1952, are reversed, and the case is remanded to the contracting officer, who is directed to proceed in accordance with the conclusions and directions expressed in this decision.

J. REUEL ARMSTRONG,
Acting Solicitor.

APPEAL OF WISCOMBE PAINTING AND DECORATING

CA-211 *Decided September 15, 1954*

Contract Appeal—Davis-Bacon Act—Minimum-Wage Provision.

The minimum-wage provision in a Government contract is not a representation or warranty to the contractor that such wages are those actually prevailing in the area.

The Davis-Bacon Act is not for the benefit of contractors but for the protection of their employees against substandard earnings.

ADMINISTRATIVE DECISION

This appeal is concerned with an interpretation of the minimum-wage provision in the standard form of Government contract, and permits this office, for the first time, to give consideration to two recent decisions on the subject—one by the United States Supreme Court and the other by the United States Court of Claims.[1]

The contract involved was with the Bureau of Reclamation [2] and was for the painting of the power plant and switchyard at Shasta Dam, Central Valley project, California. Wiscombe Painting and Decorating, a partnership of Salt Lake City, Utah, was the contractor.

Pursuant to the provisions of the Davis-Bacon Act,[3] the contract, dated February 26, 1951, included a schedule of minimum-wage rates for the work, as determined by the Secretary of Labor. The rate for brush painters was set at $2.25 per hour. It is alleged by the contractor that it was unable to employ painters at this rate and was compelled, instead, to pay $2.625 per hour. The claim is for the difference between these two rates involving 7,232½ hours, or a total of $2,712.19. The appeal dated December 22, 1953, was from the findings of fact and decision of the contracting officer dated November 24, 1953.

Prior to the November 24 findings, the claim had been considered by the contracting officer on July 30, 1952. At that time, he dismissed the claim on the ground that it was for unliquidated damages which administrative officers of the Government may not consider. Consequently, no formal findings of fact were made by the contracting officer.

As a result, when claimant originally processed his appeal there was no adequate record available to permit this office to give it proper consideration. Accordingly, the contracting officer was directed to prepare the findings which superseded the determination of July 30, 1952, and these are the subject of this decision.

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[1] *United States* v. *Binghamton Construction Co., Inc.*, 347 U. S. 171 (1954); *Ottinger Brothers Construction Company* v. *United States*, 121 F. Supp. 640 (128 Ct. Cl. 613 (1954)).

[2] Contract No. I75r–2609, schedule 1 of Specifications No. 200C–148.

[3] 49 Stat. 1011; 40 U. S. C. secs. 276a–276a–5.

The contractor's claim appears in the form of an exception to the contract release dated March 3, 1952. Such exception reads as follows:

> Claim for increase in contract of $2,712.19 for increased cost of wages resulting from mistake in specifications * * * to be filed.

A more detailed explanation of the alleged "mistake in specifications" is contained in memoranda submitted by attorneys for claimant. It is contended that the determination of the hourly rate for brush painters, as shown in the specifications, was misleading insofar as it represented conditions actually existing at the work site. The contractor also claims to have been misled by the office of the Associated General Contractors in Salt Lake City, which office confirmed the rate for the area to be the same as that given in the specifications.

The contractor contends that while the rate of $2.25 per hour might have prevailed in the area generally, at the dam itself the rate was actually $2.625 per hour. It is alleged that this rate resulted from an agreement made between the Local Painters Union No. 315 and the Bureau of Reclamation, and was accomplished by classifying brush painters doing strictly brush painting as "swing stage and structural steel painters." An affidavit by A. S. Miller, business representative of the union, is submitted by the contractor in support of this contention.

The listing of the rate of $2.25 per hour in the specifications is considered by the contractor as a representation on the part of the Government that brush painters could actually be procured on this particular job at that figure. We do not believe that the specification can be interpreted as containing such an assurance.

The contracting officer denies the payment of a wage rate of $2.625 or the existence of any agreement with the painters' union in the following words:

> * * * With respect to wages paid Government wage hour employees, official records show that at no time during the period in question did the Bureau of Reclamation pay $2.625 per hour for brush painters at Shasta Dam, and that at no time did the government enter into any agreement with the union or with any other organization agreeing to pay a particular rate for brush painters. Further I find no evidence that any conference was held between Bureau representatives and the local painters union during the latter part of 1950 to establish wage rates * * *.

The only classification of painters listed in the specifications (paragraph 19) was as follows:

> * * * The Secretary of Labor has determined that the following rates of wages are the prevailing rates of wages for the classifications specified in the locality of the work covered by these specifications, and said rates of wages shall be the minimum rates per hour to be paid for the work covered by these specifications:

Classification	*Rate per hour*
Painters, brush	$2.25

It will be noted that there is no reference to "swing stage and structural steel painters."

The rate so fixed in the specifications was the same rate paid to Government employees up to late April 1951 when an increase to $2.375 was authorized through proceedings by the Wage Board appointed by the Secretary of the Interior. It appears also from the record that so far as the Secretary of Labor's determinations in the area generally are concerned the rate of $2.25 per hour prevailed until October 1951, when a rate of $2.275 was established.

Regardless, however, of whatever labor conditions the contractor encountered on the project, it is impossible to see how its difficulties could be attributed to the specifications. They were not intended to guarantee the contractor an ideal labor market; they constituted only an admonition that he must not pay an hourly wage *lower* than $2.25 per hour to brush painters. The specifications make it the particular responsibility of the contractor to investigate local labor conditions. If, in conforming to the specifications, an inquiry is made of an independent contractor's organization and the information received proves to be incorrect, the Government can hardly be charged with contractor's failure to make his own diligent investigation.

The language of paragraph 19 of the specifications is so clear that it would seem to preclude on its face any possibility of a successful appeal on the question raised. This paragraph, in part, states:

> * * * While the wage rates shown are the minimum rates required by these specifications to be paid during the life of the contract, it is the responsibility of bidders to inform themselves as to local labor conditions such as the length of work day and workweek, overtime compensation, health and welfare contributions, labor supply, and prospective changes or adjustments of wage rates. *No increase in the contract price will be allowed or authorized on account of the payment of wage rates in excess of those listed herein.* [Italics supplied.]

The Supreme Court of the United States in the recent case of *United States* v. *Binghamton Construction Co., Inc.*, *supra*, stated most positively that the Davis-Bacon Act "was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects."

The Court of Claims in the even more recent decision in *Ottinger Brothers Construction Co.* v. *United States* (June 8, 1954), *supra*, quotes from the *Binghamton* case, as follows:

> * * * The question presented is whether the schedule of minimum wage rates included in a Government construction contract, as required by the Davis-Bacon Act [citing it] is a representation or warranty as to the prevailing wage rates in the contract area. We hold that it is not.

> The Davis-Bacon act requires that the wages of workmen on a Government construction project shall be "not less" than the "minimum wages" specified in a schedule furnished by the Secretary of Labor. The schedule "shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing" for corresponding work on similar projects in the area. * * * The Act also provides for penalties, including termination of the contract, if it is found that the contractor is paying less than the schedule rate.
>
> * * * * * * * * *
>
> * * * On its face, the Act is a minimum wage law designed for the benefit of construction workers. The Act does not authorize or contemplate any assurance to a successful bidder that the specified minima will in fact be the prevailing rates. Indeed, its requirement that the contractor pay "not less" than the specified minima presupposes the possibility that the contractor may have to pay higher rates. Under these circumstances, even assuming a representation by the Government as to the prevailing rate, respondent's reliance on the representation in computing its bid cannot be said to have been justified.

The Court of Claims, after quoting the above, concludes its own opinion, as follows:

> In the light of this decision by the highest court in the land, it would be a waste of time to both the court and the litigants to refer the case to a commissioner for a further hearing of evidence and finding of facts.

On April 6, 1954, shortly prior to this decision, the Court of Claims had found in favor of the contractor in a situation, which, before adequate analysis, would appear to resemble the present case. In *Toirier & McLane Corp.* v. *United States*,[4] it was held that where the Secretary of Labor had made a predetermination of prevailing wage rates of $.85 per hour and later admitted error and issued a new retroactive classification of $1 per hour, the contractor was entitled to recover the increased labor costs represented by the higher wage rate as compared to the wage rate stated in the contract specifications. In the present appeal, however, there has been no admission of error or any subsequent order by the Secretary of Labor.

Because of the importance of the *Binghamton* and *Ottinger* decisions in the interpretation of contract provisions under the Davis-Bacon Act, this appeal has been considered in considerable detail. The contracting officer has suggested that a determination be made on procedural grounds, upon the basis of his original contention that the claim is one for unliquidated damages, involving the exercise of judgment and discretion on the part of an administrative officer of the Government. In view of these new decisions, however, we deem it advisable to consider the case on its merits, and particularly as to whether there is any legal basis for a claim of this nature. We hold that there is not.

[4] 120 F. Supp. 209 (128 Ct. Cl. 117 (1954)).

CONCLUSION

I find, therefore, that the findings of fact and decision of the contracting officer in disallowing extra compensation must be upheld.

J. REUEL ARMSTRONG,
Acting Solicitor.

APPEAL OF S & S ENGINEERING CORP.

CA-184 *Decided October 29, 1954*

Contract Appeal—Unit Contract for Repair of Turbine Runners—Claim for Additional Compensation—Excess Quantities—Unforeseen Conditions Increasing Difficulty of Work—Deletion of Items—Exception of Items on Settlement of Claim—Items in Same Range—Change of Nature of Claim—Failure to Make Timely Protest—Right to Equitable Adjustment—Fixed Costs, General Overhead and Profits as Elements of Additional Compensation.

A contractor employed to repair turbine runners of a power project of the Bureau of Reclamation may not be allowed additional compensation by reason of the installation of excess quantities of units of welding, in view of the inclusion in the contract of an "approximate quantities" clause providing that the estimated quantities are approximations for comparing bids.

Such a claim is not barred by the failure to except both units of the work in making settlement, since the work was divided into related ranges, and one of these ranges was excepted in making settlement. But the contractor may not alter the nature of the claim on appeal by basing it upon alleged defects in the specifications and a change in the welding procedure. Such a claim is barred by the failure to make timely protest.

Insofar as the claim for additional compensation based on increased costs in executing additional units of welding could be considered as an inept expression of a timely claim based upon the discovery of latent conditions which magnified the difficulties of the work, the claim is barred by provisions of the specifications requiring all necessary welding to be done, and requiring bidders to make their own estimates concerning the difficulty of the work.

The contractor is entitled to an equitable adjustment when items of the work calling for the installation of insert plates were entirely eliminated, since such deletions cannot be regarded as mere variations from estimated quantities, and the work deleted was an integral part of a composite job. Such an equitable adjustment is not barred by the "ranges" clause of the specifications dividing each unit of work into two ranges in the first of which fixed costs were included. The contractor is entitled to payment not only of its fixed costs but also of general overhead and reasonable anticipated profits.

ADMINISTRATIVE DECISION

The S & S Engineering Corp., of Los Angeles, California, has appealed from the contracting officer's determination, denying its claim for additional compensation under contract No. I2r–19662, for work and materials in the repair of turbine runners, Units Nos. 1 to 4, inclusive, at the Parker Dam power project, Arizona-California, in accordance with specifications No. DC–3561, Bureau of Reclamation.

The contract, which was on U. S. Standard Form No. 23 (revised April 3, 1942), provided for the repair of the turbines by chipping or grinding cracked or pitted areas, the installation of insert plates and stainless steel inlays, as well as for the modification of the fillets at the outflow edge of the runner vanes. The contractor was to be paid for its labor and materials at the unit prices stated in the schedule included in the specifications, which listed 12 different items of work or material.

Bidders were invited to visit the site, and satisfy themselves concerning the conditions which they would encounter in the performance of the work. However, only one turbine was made available for inspection by bidders, and this one for only a 10-hour period on Sunday, October 14, 1951.

The estimate of the project engineers was that the repair job on the Parker Dam turbines, which were believed to be in an extremely bad state of disrepair, would cost the Government $86,160. The bid of the appellant was $14,760.35, and the next bid was $57,807. The bid of the appellant was so low that conferences attended by engineering representatives of the parties ensued, and the project engineers were satisfied that the appellant could undertake and successfully prosecute the work. The appellant received notice to proceed on November 23, 1951. Since completion of the work was required within 120 calendar days from the date of receipt of this notice, the required completion date became March 24, 1952. Work was begun by the appellant on November 26, 1951, and completed on February 28, 1952, which was 24 days ahead of schedule.

In the performance of the job, the contractor apparently was of the opinion that the welding procedure outlined in the specifications was inadequate, and by letter dated December 7, 1951, addressed to the Chief of the Hydraulic Machinery Branch of the Bureau of Reclamation, it suggested that a different procedure described in an attachment to the letter be adopted. By letter dated December 14, 1951, the Chief of the Hydraulic Machinery Branch of the Bureau acknowledged the receipt of the letter of December 7, and stated: "We have reviewed this welding procedure, and it appears to be satisfactory insofar as the repair of the cracks in the runner blades is

concerned." It should be noted that in this exchange of correspondence no question concerning any increase in the cost of the job resulting from the change of the welding procedure was raised.

In a letter dated January 28, 1952, to the Project Engineer, the contractor made a request for additional compensation based principally upon increased costs in executing items 1 and 2, and upon the entire deletion of items 7 and 8. However, this letter, which was written prior to the completion of the whole job, did not attribute the increase in costs to any particular factor, whether the change in the welding procedure or any other. It was informed on February 19, 1952, by the Project Engineer that its request would be given consideration in the final settlement of its account. However, by letter dated April 23, 1952, the contracting officer rejected the contractor's request for additional compensation, and when settlement was made, it was paid only at the contract rates for executing the various items specified in the contract. As these involved in some instances far greater quantities than those which had been estimated, the contractor received $7,597.33 more than the amount of its bid, namely $22,357.68, but the payment of this amount was based entirely on the rates specified in the contract.

G. L. Yetter, the engineer who inspected the work after its completion, commented on "the extraordinary difficulties" which had been involved in its performance[1] and declared the work to be "first class in all respects."[2] In summarizing the cost of the work, he pointed out that due to "the inability to fully determine beforehand the full extent and nature of the repairs to be made, it was necessary to decrease the quantities in some items and increase the quantities in others * * *."[3] Thus, in executing items 1 and 2, which required the repair of cracks by single U-groove welds, the first 325 linear inches of weld to be executed at $3.09 a linear inch (item 1), and all over 325 inches at $2.90 a linear inch of weld (item 2), it was found that more single U-welds were necessary than contemplated by the specifications because of the decrease in the number of double U-welds, and item 2 was increased from an estimated 325 linear inches to 809.75 linear inches. On the other hand, it was found upon exploration of the cracks that it would be unnecessary to install the insert plates specified in items 7 and 8. Item 7 required the installation of the insert plates at $4.16 per linear inch for the first 200 linear inches of weld, and item 8 required the installation of the insert plates at $3.57 per linear inch of weld for all over 200 linear inches.

In accepting payment, and executing a release on the contract, the

[1] See page 7 of the report.
[2] See page 9 of the report.
[3] See page 15 of the report.

contractor excepted items 1 and 7 of the schedule of specifications in the following language:

> * * * except our claim for adjustment of shortage in entirety of item 7 and our claim for extra compensation on additional inches of U-weld on item 1.

Moreover, in taking the present appeal, the contractor attempted, in effect, to amend this exception by explaining that the reference therein to item 1 was intended to save its rights under items 1 and 2 of the schedule of specifications.

In connection with items 1 and 2, the contractor requested, in its letter of January 28, 1952, as well as in the present appeal, that its additional costs on these items be met by increasing the unit bid rate under item 2 from $2.90 to $4.90 per linear inch of single U-groove welds in excess of 10 percent above the amount estimated in the specifications. As 1,134.75 inches of such welds were installed, the overrun was 419.75 linear inches. At the increased price, the contractor would be entitled to an additional $839.50. As for items 7 and 8, which were entirely eliminated, the contractor proposes that its claim based on these items be settled by payment on the basis of the contract unit price of $4.16 a linear inch for the estimated 200 linear inches included in the specifications, which would entitle it to receive an additional $832 of compensation. The appellant's total claim is thus for $1,671.50.

The contracting officer denied the claim based on items 1 and 2 in its entirety, and allowed $118 on the claim based on items 7 and 8. The basis for his decision was that under paragraph 4 of the specifications the quantities noted in the schedule were only approximations for comparing bids, and that, therefore, no claim based upon any excess or deficiency could be allowed.[4] The $118 which he allowed, nevertheless, on items 7 and 8 was based on the view that the contractor was entitled to recoup its fixed job costs on these items, since they were required by paragraph 22 of the specifications to be included in the first of the two items, or ranges.[5] As the contractor had bid $4.16 per linear inch on item 7 and $3.57 per linear inch on item 8, the difference of 59 cents between these two prices represented its fixed job costs. At 59 cents a linear inch, the fixed costs on 200 linear inches would be $118.

In prosecuting the present appeal, the contractor now bases its claim for additional compensation in executing items 1 and 2 not upon any claim of excess quantity, but upon factors not previously advanced,

[4] Paragraph 4 of the specifications provides: "The quantities noted in the schedules are approximations for comparing bids, and no claim shall be made against the Government for excess, or deficiency therein, actual or relative."

[5] Paragraph 22 of the specifications is quoted in full, *infra*, in connection with the discussion of this point.

namely, that (1) it had not had an adequate opportunity to examine all the turbine runners prior to making its bid, (2) the drawings and specifications upon which it relied were inaccurate and misleading, failing to reveal latent conditions which greatly increased its costs, and (3) the changes in the welding procedures. "Upon entry into the draft tubes," the contractor explains in particular "we found that the cracks in the runners were not confined to the positions as were indicated on the drawings, and at times work was done on cracks extending far into the shroud bands. Neither the drawings nor the specifications made mention or showed any cracks in the shrould bands."

In these circumstances, the preliminary question arises whether the claim based upon items 1 and 2 may now be considered. Ordinarily, the failure to except item 2 from the settlement of the account would have the effect of barring any claim based on this item.[6] Notwithstanding the failure to mention item 2 in executing the release on the contract, it would seem that the claim is not barred for this reason, since items 1 and 2 represented a single job, and as provided in paragraph 22 of the specifications the job had been divided (as were all others) into two so-called ranges in the higher of which were required to be included the contractor's fixed costs on the job. Similarly, items 7 and 8 represented two ranges of a particular job.

A more serious obstacle to the consideration of the claim, based upon items 1 and 2, is presented by the failure of the contractor in executing the release on the contract to advance any of the reasons for allowing it which appear to be the basis of the present appeal in which the claim of excess quantity has been transformed into a claim based upon alleged defects in the specifications and a change in the welding procedure. The decided cases in the Court of Claims, involving the failure to except a claim on executing a release under a contract, have all involved attempts to increase the amount of a claim above the amount stated in the exception. The present case involves, however, an attempt to change the nature of a claim without altering its amount. It is nonetheless a totally different claim, and the fact that the amount of each claim remains identical must be regarded as irrelevant.

A claim never presented to the contracting officer cannot, moreover, be considered on appeal. Under paragraph 12 of the specifications, the contractor is required to protest within 20 calendar days against any demands for the performance of work which he considers to be

[6] See *P. J. Carlin Construction Company* v. *United States*, 92 Ct. Cl. 280, 303, 305 (1940); *Eastern Contracting Company* v. *United States*, 97 Ct. Cl. 341, 355 (1942); *Bein* v. *United States*, 101 Ct. Cl. 144 (1943); *W. C. Shepherd* v. *United States*, 125 Ct. Cl. 724, 750 (1953); *Torres* v. *United States*, 126 Ct. Cl. 76, 99 (1953); *J. M. Montgomery & Co., Inc.*, CA–193 (April 9, 1954).

outside the requirements of the contract, and the failure to file timely protest ordinarily bars consideration of the claim.[7]

This rule clearly applies to the contractor's claim insofar as it is based upon the adoption of a different method of welding, since this method was adopted upon a particular date when the contractor's proposals were approved. But even if the claim for additional compensation based on increased costs in executing the additional inches of welding could be considered as an inept expression of a claim based upon the discovery of latent conditions which magnified the difficulties of the work, and which were not fully discovered until a short time before the contractor's letter of January 28, 1952, was written, so that its protest on this score could be considered timely, the contractor cannot be said to have established an adequate basis for relief.

While it is apparent merely from the wide discrepancy in the bids that it was not possible prior to the letting of the contract to determine with any degree of accuracy the precise nature and extent of the repairs that would be required, the project engineers made no pretense of any such accuracy. This must be apparent alone from their invitation to bidders to inspect one of the turbine runners to be repaired which they regarded as the most defective. While it has been held that the mere availability of inspection will not relieve the Government of liability for inaccurate or misleading specifications and drawings,[8] the specifications and drawings in this case were not of such a nature. It may be true, as the contractor contends, that some cracks were not confined to the precise positions indicated on the drawings but the principal drawings showing a section through a runner bore a subcaption reading "Repair of typical cracks," and the general provisions of the specifications were such as to put the contractor on notice that repairs would be required wherever cracks might occur. Thus paragraph 37 of the specifications provides:

> *Repairs to turbine runners, general.—All* cracks and pitted areas in the turbine runners shall be repaired by welding. The existing fillets at the outflow edge of the runner vanes shall be modified. Details of joint preparation, welding and modifications of fillets are shown on Drawing No. 3 (231–D–3253). [Italics supplied.]

This is the drawing on which the cracks are described as typical. There are, moreover, other provisions of the specifications describing the work to be done that make it apparent that no attempt was being made to locate all cracks or damaged areas, or to provide an exhaustive description of the work. Thus paragraph 17 of the specifications de-

[7] See *Peter Kiewit Sons' Company*, CA–50 (March 24, 1950); *The Shoshone Company*, CA–112 (April 23, 1951); *Welch Industries, Inc.*, 61 I. D. 63 (1952); *Trans-Electric Company*, CA–156 (October 9, 1952).

[8] See *Hollerbach* v. *United States*, 233 U. S. 165 (1913), and *United States* v. *Spearin*, 248 U. S. 132 (1918).

scribes the repair work simply as consisting of certain "principal items," and subsection (b) of this paragraph directs the welding of "all cracks." In these circumstances, the invitation to bidders to inspect one of the turbines must be regarded as justification for the rejection of any claims based merely on the position of the cracks. Finally, insofar as the position of the cracks may have required work at a greater depth than may have been indicated by any of the drawings, the allowance of the claims would be barred by the provision in paragraph 39 of the specifications which reads: "During the investigation of the site, as provided in paragraph 35, bidders shall make their own determinations and conclusions regarding the effect of depth on the difficulty and cost of performing the work." [9]

Insofar as the contracting officer did consider on its merits the claim as one based on the "approximate quantities" clause, his decision was correct. Such a clause would not bar recovery on a claim, based on unforeseen difficulties in the execution of the work or material changes in the specifications.[10] But it does bar any claim based on excess quantities alone.[11] The only requirement is that the estimates of the Government be in good faith. Certainly the excess in the present case was not so great that bad faith can be implied, and it must not be forgotten that the contractor was paid at the unit price rate specified in the contract for the extra quantities of welding done.[12]

The contractor's claim based on the entire deletion of items 7 and 8 presents, however, a problem which could not be adequately disposed of by applying the "approximate quantities" clause. The complete elimination of the installation of the insert plates, which represented almost 10 percent of the bid price, obviously differs from a miscalculation of the precise quantity of such plates which might be required. In *Peter Kiewit Sons' Co.* v. *United States*, 109 Ct. Cl. 517 (1947), the court went so far as to declare that an approximate quantities clause does not mean that "all considerations of equity and justice are to be disregarded, and that a contract to do a useful job for the Government is to be turned into a gambling transaction." In general, the courts have scrutinized closely the entire deletion of items of work from a Government construction contract, and have been disinclined

[9] See *MacArthur Bros.* v. *United States*, 258 U. S. 6 (1922), involving a similar clause putting on the contractor the responsibility of correctly estimating the difficulties attending the execution of the work.

[10] See *George P. Henly Construction Co., Inc.*, CA–120 (November 1, 1951); *Durham and Sauer*, CA–124 (December 19, 1951).

[11] *Dawson & Corbett*, CA–89 (April 3, 1951), and *C. F. Lytle Company* and *Green Construction Company*, CA–99 (May 3, 1951), together with the judicial authorities there cited.

[12] See *Sandor S. Hirsch v. United States*, 104 Ct. Cl. 45 (1945), where contractor was denied additional compensation for clearing airport site when acreage had proved to be considerably in excess of the estimate, and he had been paid at the unit prices specified in the contract which included an "approximate quantities" clause.

to regard such deletions as mere variations from estimated quantities.[13] While the percentage of the total bid is undoubtedly a relevant factor in determining whether the contractor is entitled to relief, the primary consideration which has influenced the judicial decisions is whether the deleted work may be regarded as independent or incidental. If it is, relief has been denied. On the other hand, if the work appears to be such an integral part of a composite job that its deletion can be said to disappoint the reasonable expectations of the contractor, relief has been granted. The mere fact that a unit-price contract is involved is not decisive.

Applying this test in the present case, it would seem reasonable to conclude that not only the contractor but the Government engineers regarded the installation of the insert plates as an integral part of the job of repairing the turbines. It was a repair job involving a number of distinct procedures, which could be enumerated for the purpose of determining unit prices, but all the procedures were deemed necessary to accomplishment of the repair job. It was, indeed, the superior skill and initiative of the contractor in devising a welding procedure that differed radically from that prescribed in the specifications that was responsible for the elimination of the insert plates, and to deny any relief to the contractor except for an allowance of his fixed-job costs would only be penalizing the contractor for doing a better job for the Government.

The contracting officer believed, however, that such a result was required by the provisions of paragraph 22 of the specifications dividing each unit of work into ranges, and it becomes necessary, therefore, to inquire whether such a conclusion is unavoidable. Paragraph 22 of the specifications reads as follows:

> All items of work of the schedule have been divided into 2 ranges. Each range represents approximately 50 percent of the estimated work to be performed under an item. It is the intent that the division of work into ranges will permit bidders to include in the unit price bid for work under range 1 that part of the contractor's costs for contractor's camp, mobilization and demobilization, and special plant properly allocated to work under such item. It is further intended that the unit price bid for work under range 2 will exclude any part of the contractor's costs for contractor's camp, mobilization and demobilization, and special plant.

The contracting officer thus explained his conclusion that by virtue of this provision the contractor was entitled only to his fixed-job costs when items 7 and 8 were eliminated:

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[13] *General Contracting & Construction Co.* v. *United States*, 84 Ct. Cl. 570 (1937); *Blair* v. *United States*, 147 F. 2d 840 (8th Cir. 1945); *Boomer* v. *Abbett*, 263 P. 2d 476 (Calif., Dist. Ct. of App., 1954); see *Litchfield Const. Co.* v. *City of New York*, 155 N. E. 116 (N. Y., 1926); *Del Balso Construction Corp.* v. *City of New York*, 15 N. E. 2d 559 (1938).

In dividing an item of work into two ranges, it is the intention * * * that the contractor be assured of the quantity of work stated in the first range so that fixed costs can be distributed over such guaranteed items of work. This removes the necessity for the contractor to increase his bid on all or selected items of work to provide a contingency to cover the risk of a possible underrun in the quantity of work. Also, by excluding fixed costs from the second range, the Government avoids paying an excessive price where there is an overrun in the quantity of work.

The theory would seem to harbor an inherent contradiction. If it was the purpose of the clause dividing each unit of work into two ranges to guarantee the work in the first range, notwithstanding the inclusion in the specifications of the "approximate quantities" clause, there would seem to be no good reason for confining the guarantee to the contractor's fixed costs, as defined in paragraph 22 of the specifications. If the work was guaranteed to the extent of one-half thereof, the contractor would seem to be entitled also to at least one-half of his general overhead and anticipated profits.

It is apparent that the "ranges" clause does not speak in terms of any guarantee. It is also apparent that the "intention" of which the contracting officer speaks is similarly not to be found in the literal language of the clause. The only "intent" expressly mentioned therein is to permit bidders to include their fixed costs in the first of each two ranges. Actually, the purpose of the clause is not declared but left to implication. As such is the case, there would seem to come into play the familiar rule of interpretation applicable to Government contracts that when an ambiguity is present in a contractual provision, it is to be construed against the party who prepared the contract and specifications, namely the Government.[14] Approached from this viewpoint, the purpose of the ranges clause could reasonably be said to be merely to give the Government the advantage of the lower price in the second range of each unit in the more likely contingency that there will be an overrun in the second range of a unit of work. The inclusion of the contractor's fixed costs in the first range of the item then becomes simply a method of calculating the lower price in the second range. Thus, it would not necessarily follow that the elimination of both ranges of a unit of work, which was an integral part of the contract, entitles the contractor merely to the recovery of his fixed costs in connection therewith.

It cannot be said, moreover, that the contractor's claim, based on the entire elimination of items 7 and 8, is actually a claim for unliquidated damages. The claim comes within the proper scope of

[14] See *Ambursen Dam Co.* v. *United States,* 86 Ct. Cl. 478 (1938); *Callahan Const. Co.* v. *United States,* 91 Ct. Cl. 538 (1940); *Blair* v. *United States,* 99 Ct. Cl. 71 (1942); *George P. Henly Const. Co.,* CA–120 (November 1, 1951); *Durham & Sauer,* CA–124, December 19, 1951.

article 3, the "changes" article of the contract, which permits changes to be made within the general scope of the contract, and entitles the contractor to an equitable adjustment when such changes are made. It is true that in *General Contracting Co.* v. *United States*, *supra*, the Court of Claims, in holding that the elimination by the Government of a large and independent part of a Government contract for the construction of a veterans' hospital, namely the nurses' quarters, could not be justified by the "changes" clause of the contract, declared that such a clause had reference "entirely to structural changes like the substitution of one kind of material for another, changes in architectural design, the addition to or subtraction from work required by the specifications, etc." However, the deletion in the present case involves an integral part of the contract, and the dictum of the Court of Claims itself can no longer be regarded as authoritative, in view of the recent pronouncement of the Supreme Court in *United States* v. *Rice*, 317 U. S. 61, 68, that both the "changes" and "changed conditions" clauses of Government contracts "deal with changes made necessary by new plans and new discoveries made subsequent to the signing of the contract." In this pronouncement, no limitation is imposed on the types of changes which come within the scope of the "changes" clause, and so permit equitable adjustment to be made.

The deletion of items 7 and 8 appears to have been brought about by the changes in welding procedure resulting from the exchange of correspondence between the contractor and the project engineer who undoubtedly acted on behalf of the contracting officer. This exchange of correspondence may be regarded as the equivalent of a formal change order, and the contractor is entitled to an equitable adjustment under the terms of article 3 of the contract. However, the proposal of the contractor to settle its claim based on items 7 and 8 for $832, which represents the estimated contract price on item 7, is not supported by any evidence and is, indeed, based upon an arbitrary theory. What the contractor is entitled to by reason of the deletion of items 7 and 8 is not only its fixed costs on these items but its general overhead expenses and reasonable anticipated profits.[15] The amount should be calculated by the contracting officer upon submission to him by the contractor of adequate proof. If the parties fail to agree upon a settlement, the matter may again be referred to the Department in accordance with article 15, the disputes clause of the contract, together with a record adequate to permit the making of a determination.

[15] See *Stiers Bros. Construction Co.* v. *Broderick*, 60 F. Supp. 792 (D. C. Kans., 1945).

DETERMINATION

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior, the findings of fact and decision of the contracting officer are affirmed with respect to the claim based on items 1 and 2 of the schedule of specifications, but reversed with respect to the claim based on items 7 and 8 thereof, together with directions to proceed as outlined above.

J. REUEL ARMSTRONG,
Acting Solicitor.

BILL FULTS

A-26927 *Decided October 29, 1954*

Reclamation Withdrawal—Desert-Land Entry—Independent Resurvey—Irrigation District—Smith Act.

An independent resurvey which merely added new lots on the plat to make an accurate description and subdivision of what since the original survey had been an oversized section on the ground and which did not involve relocation of any range line did not affect the area of an earlier reclamation withdrawal of this section.

Unentered public land designated by the Department as subject to the Smith Act carried with it a valid existing right in the Imperial Irrigation District to impose a lien against such land for its proportionate share of construction and operation and maintenance charges, with a view toward having such a lien satisfied by an applicant for entry as a condition precedent to entry. Because of the existence of this right, a subsequent first-form reclamation withdrawal did not operate to withdraw such land from public entry, as contemplated by the Smith Act; hence, the original allowance of the appellant's desert-land entry was correct and its subsequent cancellation improper.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Bill Fults has brought this appeal to the Secretary of the Interior from a decision dated October 15, 1953, by the Chief, Division of Lands, Bureau of Land Management, which affirmed a decision of the manager of the land office at Los Angeles, canceling the allowance of his desert-land entry on the ground that the land had been previously withdrawn for reclamation purposes. The land included in Fults' entry consists of lots 9 and 10, sec. 30, T. 12 S., R. 16 E., S. B. M., totaling 72.88 acres.

After first allowing this entry on June 18, 1952, the manager was advised that the land included within the entry had been previously withdrawn for reclamation purposes under a first-form withdrawal [1]

[1] Section 3 of the Reclamation Act of 1902 (act of June 17, 1902, 32 Stat. 388; 43 U. S. C., 1952 ed., secs. 416, 432, 434) authorizes two classes of withdrawals for reclamation purposes. One, commonly referred to as "withdrawal under the first form," withdraws from

since June 4, 1930, and, therefore, had not been open to public entry. The manager's decision canceling the allowance of the entry followed.

In his appeal to the Director of the Bureau of Land Management, Fults asserted that the land was within the Imperial Irrigation District, that it was subject to gravity irrigation from existing works, that on the strength of the original allowance of his entry he had expended $837 in improvements in addition to payment of charges to the Imperial Irrigation District, and that in good faith he had proceeded to prepare the land for farming.

The Imperial Irrigation District has certified that when the land included within Fults' entry is ready to receive water, it will be delivered upon request of the entryman, and that as of May 24, 1952, there were no assessments against the land remaining unpaid. The map furnished by Fults with his application for desert-land entry shows that the land in question would be served with water from the East Highline Canal, a private canal of the Imperial Irrigation District.

In the instant appeal, Fults presents two arguments. The first, stated briefly, appears to be this: The land involved in his application was originally withdrawn under a first-form reclamation withdrawal on April 2, 1909. This land was restored to settlement on April 29, 1913. On June 4, 1930, all of T. 12 S., R. 16 E., was withdrawn again for reclamation purposes under a first-form withdrawal. At that time section 30 of T. 12 S., R. 16 E., had been subdivided into conventional quarter-sections, in accordance with the original survey plat approved December 20, 1856. In 1939, an independent resurvey of this township was made. It was approved by the Acting Assistant Commissioner of the General Land Office on July 3, 1940. As a result of this resurvey the west halves of sections 6, 7, 18, 19, 30 and 31 (forming the west side of the township) were redrawn and enlarged on the plat to include an additional strip of lots. Thus, according to the original survey of 1856, the SW¼ of section 30 consisted of an E½ of 80 acres and a W½ of two quarters containing 40.72 and 40.64 acres, respectively. However, according to the 1940 independent resurvey, the SW¼ of section 30 now consists of an E½ of 80 acres and lots 7, 8, 9, 10, 11, and 12, each of which contains 40 acres except for lots 9 and 10, each of which contains 36.44 acres.

public entry lands which may be needed in the construction and maintenance of irrigation works. The other, known as "withdrawal under the second form," embraces lands seemingly not needed in connection with the construction and maintenance of irrigation works, but which may possibly be irrigated from such works. (See 43 CFR 230.12.) Second-form withdrawals effect withdrawals from entry, except under the homestead laws; however, section 5 of the act of June 25, 1910, as amended (43 U. S. C., 1952 ed., sec. 436), modified the effect of the second-form withdrawal by prohibiting entry upon such lands until units of acreage per entry are established and announcement has been made of the availability of water for the lands.

With respect to this point, the appellant would seem to be contending that the withdrawal order of June 4, 1930, which, as stated, was of the entire township, in withdrawing the W½SW¼ of section 30 as shown on the 1856 survey plat, did not withdraw the land which is now designated as lots 9 and 10. In other words, he is presumably arguing that as a result of the 1940 resurvey the west line of the township (i. e., the line of R. 15 E.) was relocated on the ground to a locus west of the old line drawn in the 1856 survey. If this were so, it would follow that all the land by which section 30 (as well as sections 6, 7, 18, 19, and 31) was enlarged on the plat would be land which was not within the township when the withdrawal of 1930 was made.

Inspection of the plats of the lands involved shows that the appellant has apparently misinterpreted the effect of the 1940 resurvey. The west line of the township (i. e., R. 15 E.) remains today in its original location. It was not relocated on the ground as a result of that resurvey. This is obvious from the fact that the plat resulting from the 1940 resurvey indicates that the west line of the township (R. 15 E.) is the line as "resurveyed by Lightfoot and Cummings in 1916." This refers to a resurvey for T. 12 S., R. 15 E., approved February 8, 1916. Furthermore, the 1940 resurvey plat is supplied with an index to segregated tracts, which shows that three such tracts in sections 30 and 31, shown on the 1940 survey plat to be abutting on the west line of the township, were, on the 1856 survey plat, the N½NW¼ of section 30, the NW¼ of section 31, and the SW¼ of section 31, respectively. Clearly, therefore, when the township was withdrawn in 1930, all the land in section 30 as now resurveyed, was withdrawn, the west line of the township being the same for the 1856 survey as for the 1940 resurvey.

The second argument which the appellant appears to be making is more substantial. In his appeal he states:

> Your attention is called to the fact that the later withdrawal was for lands subject to irrigation under the Reclamation Act as is proven lots 9 and 10 in a State approved Irrigation Project and so approved under the restoration of letter "K" May 31st, 1913 and Mr. Fult's Entry should not have been so rejected by said reason.

This argument seems to be that the cancellation of appellant's entry on the ground that the land included therein was under withdrawal was improper. He refers to the fact that this land is included within a State-approved irrigation district. This fact becomes significant when it is related to the effect which the act of August 11, 1916 (39 Stat. 506; 43 U. S. C., 1952 ed., secs. 621–630), popularly known as the Smith Act, has on the land in question.

The record discloses that on February 26, 1921, pursuant to application by the Imperial Irrigation District, the land involved in this case was designated by the Secretary as being subject to the Smith Act. The principal purpose of that act was to render public lands of the United States within a State irrigation district, whether lands subject to entry or entered, but to which title has not been perfected, subject to bearing a proportionate share, along with privately owned lands in the district, of the cost of construction and operation and maintenance of the district's irrigation system. Application of the act to unentered public lands is specifically limited to lands "when subject to entry." Under the act, a State irrigation district may submit a map to the Secretary together with the irrigation plan for the lands within the district, including the lands of the United States which are either unentered but subject to entry or entered but unpatented (sec. 3; 43 U. S. C., 1952 ed., sec. 623). On approval of the map and plan by the Secretary, the aforesaid lands of the United States become subject to State irrigation-district laws in the same manner as privately owned lands in the district and to the bearing of an equitable share of district expenses (secs. 1 and 2; 43 U. S. C., 1952 ed., secs. 621 and 622). Section 2 of the act (43 U. S. C., 1952 ed., sec. 622) further provides that all charges legally assessed against such lands of the United States "shall be a lien on unentered lands and on lands covered by unpatented entries included in said irrigation district"; and this lien may be enforced upon lands in unpatented entries by sale (43 U. S. C., 1952 ed., sec. 626). But no public lands within the district which are unentered at the time any tax assessment is levied against them by the district can be sold for taxation. Such charges, nevertheless, "shall be and continue a lien"; and as a condition precedent to entry of such lands under the homestead or desert-land laws, the applicant must present a certificate from the district showing that no unpaid district charges are due and delinquent against the land (sec. 5; 43 U. S. C., 1952 ed., sec. 627). Upon the expiration of 10 years from the date of the Secretary's approval of the map of the district designating the lands of the United States which are to be subject to the act, he may release from lien any unentered lands or entered lands upon which no final certificate has issued, if the irrigation works serving such lands have not been constructed and water has not been made available (sec. 3; 43 U. S. C., 1952 ed., sec. 625).

The designation of the lands within the Imperial Irrigation District to be subject to the Smith Act was effected through the approval by the Department of a map of the district which bears the following endorsement under date of February 26, 1921:

Approved, subject to the limitations and provisions of the Act of August 11, 1916 (39 Stat. 506) as to all public lands involved, subject to entry, and entered lands for which no final certificates have been issued.

(Signed) ALEXANDER T. VOGELSANG,
First Assistant Secretary.

It must be noted that there is no record of a release by the Secretary of any lien with respect to the land involved in this case.

This, then, was the status of the land in question on June 4, 1930, when it was included among the lands described in the first-form reclamation withdrawal order. The question now arises: Did the land involved in this case, then unentered public land subject to entry, remain unaffected by the withdrawal of 1930 because of its designation in 1921 as subject to the Smith Act?

In the case of *Harley R. Black*, 55 I. D. 445 (1936), it was held that unentered public lands in an irrigation district, of which a map designating those lands as subject to the Smith Act had been approved by the Department, were not withdrawn by the general withdrawal of public lands accomplished by Executive Order No. 6910, dated November 26, 1934.[2] Under this order, certain vacant, unreserved, and unappropriated public land in specified States was—

* * * temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, and for conservation and development of natural resources.

The withdrawal hereby effected is subject to existing valid rights.

The *Black* case concludes at pages 447–448:

It seems clear that a withdrawal of the lands from entry in the district results in a reduction in the quantity of land from which such prospective revenue may be anticipated for the payment of bonds and other expenses of the district and also diminishes the security behind the bonds.

It renders unavailable possible sources of revenue, contemplated by the law, reliance upon which was placed when the enterprise was undertaken. It seems, therefore, that the irrigation district had valid existing rights in the land at the date of the withdrawal of November 26, 1934, one of such rights being that the land remain free for the initiation and acquisition of title under the public-land laws in order that it would become burdened with its proportionate share of the obligations and liabilities of the district and contribute to their discharge.

It follows that the land is unaffected by the withdrawal of November 26, 1934, and is subject to entry by Black upon proper application therefor, provided he shows that all taxes and assessments properly levied by the irrigation district have been paid. * * *[3]

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[2] 54 I. D. 539; 43 CFR 297.11.

[3] It should be noted that the *Black* case was decided on January 30, 1936, before the passage of the act of June 26, 1936 (49 Stat. 1976), which revised section 7 of the Taylor Grazing Act to its present form (43 U. S. C., 1952 ed., sec. 315f). Prior to June 26, 1936, Executive Order 6910 was an absolute bar to settlement, location, or entry on the lands

Even prior to the *Black* case the Department had indicated its awareness of the implications which would be raised where a State district should assert rights to the satisfaction of its liens against Smith Act lands. In a letter to Congressman George Burnham, relating to an effort to obtain land within the Imperial Irrigation District for a Boy-Scout camp, the Acting Secretary of the Interior, on April 8, 1935, stated:

> In this situation, therefore, while the Government did not covenant in giving the district permission to tax its lands to withhold them from such disposition as should be in the public interest, it would seem that the district has an interest in the land which could not, if asserted, be disregarded in favor of a proposition to dispose of this land in the manner proposed by you.[4]

What, then, can be said as to the effect of the asserted first-form withdrawal of the lands entered by the appellant upon the rights accruing to the Imperial Irrigation District under the Smith Act?

There can be no doubt that lands under first-form reclamation withdrawal are not subject to entry. Paragraphs 13 and 16 of Circular No. 759, as revised June 18, 1921, 48 L. D. 153, which was in effect at the time of the withdrawal of 1930, provided, in part:

> 13. After lands have been withdrawn under the first form they can not be entered, selected or located in any manner so long as they remain so withdrawn, and all applications for such entries, selections, or locations presented after the date of such withdrawal should be rejected and denied. * * *[5]
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> * * * * * * *
>
> 16. Lands withdrawn under the second form and becoming subject to entry in the manner provided by section 10 of the act of August 13, 1914, can be entered only under the homestead laws and subject to the provisions limitations, charges, terms and conditions of the reclamation law, and all applications to make selections, locations, or entries of any other kind on such lands should be rejected * * *.[6]

Circular No. 592, as revised June 3, 1927, 52 L. D. 155, contained

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affected by that order. On and after that date, however, these lands were made available for entry and other disposition subject only to prior classification by the Secretary of the Interior. The application of the rationale of the *Black* case to the present proceeding is not, therefore, to be construed as extending the actual holding in that case to mean that lands designated under the Smith Act remained unaffected by Executive Order 6910 after June 26, 1936.

The principle of the *Black* case was reaffirmed in a Solicitor's opinion of October 30, 1942, 58 I. D. 170, dealing with the rights of a drainage district in the State of Arkansas under the Caraway Act (act of January 17, 1920, 43 U. S. C., 1952 ed., secs. 1041–1048) to impose and subsequently realize liens on unentered and unpatented lands of the United States within the district. In summarizing its holdings, the opinion states, at page 179:

> "3. That the valid rights to Caraway cash entry which the act creates in the drainage districts concerned and in those qualified persons claiming under them will upon assertion prevent withdrawal of lien-burdened lands from such entry, and, being statutory, cannot be defeated by an Executive order of withdrawal which omits to declare that its operation is subject to existing valid rights."

[4] File—Imperial Irrigation District, L. A. 039762.
[5] *Cf.* 43 CFR 230.13.
[6] *Cf.* 43 CFR 230.15.

regulations pertaining to the Smith Act, as amended. Paragraph 19 of this circular provided:

> 19. Lands within an approved district withdrawn under the act of June 17, 1902 (32 Stat. 388), shall during the continuance of such withdrawal be subject to entry only in the manner provided by said act, and amendments thereto and the regulations thereunder.[7]

From the foregoing, it is clear that the land purportedly withdrawn on June 4, 1930, if properly under first-form reclamation withdrawal, could not be subject to entry and, not being subject to entry, could not be assessed and placed under lien pursuant to the Smith Act. Yet the lands involved in the case were, in fact, properly designated under the Smith Act and thereupon became subject to assessment for district charges and the imposition of a lien for the payment of such charges. Therefore, in line with the *Black* case, it must be held that no withdrawal could be made which would have the effect of excluding Smith Act lands from assessability under that act and from the concomitantly and cumulatively accruing liens in favor of the district.

It is true that under present practice the Bureau of Reclamation no longer withdraws public lands under the second form of withdrawal, that is, for the purpose of possible project irrigation. Instead, all lands are now customarily withdrawn under a first-form withdrawal. This practice is explained in the Bureau of Reclamation Manual, vol. XVII, ch. 1.5.2:

> * * * Reclamation withdrawals shall embrace all lands required for the construction, operation and maintenance, and protection of main irrigation works and minor structures, * * *. All public land apparently susceptible of irrigation from a project or probable of being required in connection with the development of the project shall be included in the withdrawal. Until June 25, 1910, lands withdrawn under the second form were open to entry under the Reclamation law. Since that date, they have not been subject to entry until water is available and notice is given (Act of June 25, 1910, 36 Stat. 835; Act of February 18, 1911, 36 Stat. 917; Sec. 10, Act of August 13, 1914; 38 Stat. 686). For this reason settlement lands as well as other lands are withdrawn under the first form, and second form withdrawals are no longer made.

Whether the particular lands involved in this case were actually intended for possible irrigation rather than for use in connection with irrigation construction and operation could in no way have altered the legal effect of a first-form withdrawal, which would have been to withdraw those lands from public entry. Until section 3 of the Reclamation Act of 1902, *supra* at footnote 1, is amended, this must of necessity be the result of withdrawals under the first form.

Accordingly, the lands for which the appellant has made desert-land entry were not affected by the withdrawal of June 4, 1930, but re-

[7] *Cf.* 43 CFR 231.18.

mained public lands within the Imperial Irrigation District which were subject to entry under the homestead and desert-land laws. The original allowance of the appellant's entry was correct and the subsequent cancellation of that entry improper.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Chief, Division of Lands, Bureau of Land Management, is reversed, and the case remanded for disposition in accordance with this decision.

J. REUEL ARMSTRONG,
Acting Solicitor.

C. W. PARCELL ET AL.

A-26970 *Decided November 12, 1954*

Uranium Leases—Acquired Land—Unsurveyed Land—Protraction.

The Mineral Leasing Act for Acquired Lands and regulations of the Department of the Interior issued in its implementation are not applicable to the leasing of uranium on acquired lands of the United States.

The regulations of the Department of the Interior governing applications for uranium leases on acquired land of the United States do not require any particular method of land description.

Where an application for an acquired-land uranium lease on unsurveyed land describes the land by protraction of the public-land survey, the application is not ineffective because of inadequate land description, where the northwest and southwest corners of a surveyed section of public land less than a mile and a half to the east were monumented in the field only 25 years previously; and a lease issued pursuant to such an application will not be canceled in order to issue a lease to a subsequent applicant who described a conflicting area by metes and bounds.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On November 17, 1952, C. W. Parcell, Gertrude L. Parcell, Frank R. Parcell, and Adeline S. Parcell jointly applied for a lease entitling them to mine uranium on a 62.72-acre tract within the Ojo del Espiritu Santo grant in New Mexico, which is acquired land of the United States. They described this tract by metes and bounds with reference to tangent station 483+42 on the north boundary of the right-of-way of State Highway No. 44.

In a decision dated September 17, 1953, the Assistant Chief of the Division of Minerals of the Bureau of Land Management required the Parcells to furnish a new metes and bounds description of the area on which they desired a lease, "tied by course and distance to a recognized

corner of the public survey or an established monument, failing in which the application will be finally rejected and the case closed."

On October 8, 1953, the applicants furnished the required new metes and bounds description, which showed the area to be in what would be sec. 25, T. 17 N., R. 1 W., N. M. P. M., if the public-land surveys had been extended into the Ojo del Espiritu Santo grant.[1]

On December 7, 1953, the Assistant Chief of the Division of Minerals rejected the Parcell application because the area was already included in uranium lease BLM–A 032609, issued to Cass Goodner and W. E. Burk, Jr., for a 10-year term commencing June 1, 1953, on the basis of an application filed October 8, 1952.

The Parcells have appealed to the Secretary of the Interior. They write:

The decision of December 7, 1953 indicates that the lease granted to Goodner and Burk, Jr., BLM–A 032609, was for "Section 25, T. 17 N., R. 1 W." Additional information which the appellants believe is correct, substantiates this conclusion that the lease was issued so described and based on an application so described, and that the tract leased was not described in the application or the lease by metes and bounds, tied by course and distance to a recognized corner or to an established monument. * * *

Section 10 of the Mineral Leasing Act for Acquired Lands, August 7, 1947 (61 Stat. 913; 30 U. S. C. 351–359) states that the Secretary of Department of the Interior is authorized to prescribe such rules and regulations as are necessary, "which rules and regulations shall be the same as those prescribed under the mineral leasing laws to the extent that they are applicable."

Section 200.4 of 43 C. F. R. states, so far as is pertinent here, that "except as otherwise specifically provided in §§ 200.1 to 200.36, inclusive, the regulations prescribed under the mineral leasing laws and contained in Parts 70, 71 and 191 to 198, inclusive, of this chapter, shall govern the disposal and development of minerals under the act to the extent that they are not inconsistent with the provisions of the act." 43 C. F. R. 192.42 (d), pertaining to oil and gas, states that each offer for unsurveyed lands must describe the lands applied for by a metes and bounds description connected with a corner of the public land surveys by course and distance. 43 C. F. R. 192.42 (g) states in part that an offer will be rejected and returned to the offeror, and it will confer no *priority* if it is not completed in accordance with the regulations in Parts 191 and 192. The Decision of September 17, 1953 in this case, previously mentioned, indicates the necessity of a proper description for unsurveyed lands, the penalty for such failure being final rejection. * * *

[1] This Spanish land grant, consisting of some 113,141 acres, was confirmed to the heirs of Luis Maria Cabeza de Baca by act of Congress of March 3, 1869 (15 Stat. 454). Only the exterior boundaries have been surveyed by the United States. See volume 5 of General Land Office Plats of Private Land Claims in New Mexico, pp. 12, 13 (in the National Archives),—also plat of T. 17 N., R. 1 E., N. M. P. M., correcting a portion of the eastern boundary (on file in the Bureau of Land Management in Washington). The grant was conveyed to the Government on December 27, 1934, by its contemporaneous owner; and title was approved by the Attorney General on February 11, 1935. This land at all times involved in the present appeal has been administered by the Department of Agriculture under title III of the Bankhead-Jones Farm Tenant Act (7 U. S. C., 1952 ed., secs. 1010–1012).

Consequently, they contend, the Goodner-Burk lease should be canceled as to the area in conflict with their application and a lease issued to them.

The Mineral Leasing Act for Acquired Lands, however, contains no authority for leasing minerals other than coal, phosphate, oil, oil shale, gas, sodium, potassium, and sulfur. 30 U. S. C., 1952 ed., sec. 352. Consequently, the regulations cited by the appellants are inapplicable to uranium leases. The properly applicable regulations are found in 43 CFR 200.31 to 200.36 (amendments to section 200.31(b) and 200.32 in the 1953 Supplement). *Anaconda Copper Mining Company*, A–26812 (January 27, 1954). These regulations do not require any particular method of land description.

Messrs. Goodner and Burk's application filed October 8, 1952, described the land on which they desired a lease as follows:

> The specific acreage requested under this lease is described by projection.
>
> The NW¼ of section 31, township 17 N, range 1 E and all of section 24, township 17 N, range 1 W and all of section 25, township 17 N, range 1 W, except that portion which we understand has been previously leased for lode mining purposes.
>
> The fee and rental enclosed encompasses 640 acres in section 25, township 17 N, range 1 W, for the reason that we do not know as a matter of fact that a portion of this section has been previously leased, and in the event that it has not, we would like to have the entire section. [None of the section, in fact, had been previously leased.]

The question presented at the outset is whether any land can be identified from the above description.

Fractional township 17 N., R. 1 E., N. M. P. M., was surveyed in the field as recently as 1929 and the intersections of the south and north boundaries of section 29 with the eastern boundary of the Ojo del Espiritu Santo grant were marked on the ground. See Field Notes, New Mexico, Vol. 275, pp. 6, 8. These points are less than a mile and a half from the ideal location of sec. 25, T. 17 N., R. 1 W. Under the circumstances it is concluded that the area Goodner and Burk described by projection can be accurately located by modern surveying methods, and hence is unambiguously identified.

The question for decision, therefore, becomes whether the Goodner-Burk application, admittedly filed earlier than the Parcell application, loses priority merely because it described the area in conflict by projection, rather than by metes and bounds. In *Corbett* v. *Norcross*, 35 N. H. 99 (1857), a deed describing the granted land by reference to a plat made up solely by protraction was held effective to pass title to a 200-acre area within a 60,000-acre unsurveyed tract. In *Daniels* v. *Northern Pacific Ry. Co.*, 43 L. D. 381 (1914), the Department held that a railroad selection of unsurveyed land, described only as what would be, when surveyed, the SE¼ of the NE¼ and the NE¼ of the SE¼, sec. 30, T. 42 N., R. 4 E., B. M., Idaho, was sufficiently certain

to segregate the land as against a settlement claim initiated after the date of selection. In that case, as in the present one, there was a public survey monument within less than 2 miles of the land described by protraction. The Department said (43 L. D. at 387):

> The precise locus of the land selected by the railway company, could, therefore, not only have been found to a reasonable certainty at the date of the selection, but fixed to a mathematical certainty at the date of Daniels's alleged settlement.

In the absence of any applicable regulation or rule of law requiring a more specific description in an application for a uranium lease, I cannot hold that the Goodner-Burk application of October 8, 1952, failed to segregate the land it described, so as to lose priority to the appellants' application of November 17, 1952, merely because the description was by projection rather than by metes and bounds.

There is consequently no ground for partially canceling uranium lease BLM–A 032609 in order to issue a lease to the appellants for the area in conflict.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Assistant Chief, Division of Minerals, Bureau of Land Management, is affirmed.

J. REUEL ARMSTRONG,
Acting Solicitor.

CLAIM OF JOHN W. FORTNER AND PREMIER INSURANCE COMPANY, SUBROGEE

Torts—Government Parking Lot—Licensees—Intervening Cause.

Under the law of Oregon, a Government employee parking his private motor vehicle in a Government parking lot provided for his convenience is generally an invitee. The Government owes a duty to such an invitee of exercising reasonable and ordinary care and providing reasonably safe premises.

An independent intervening cause of damage will relieve the Government from acts which may have originally had elements of negligence.

Where a sudden gust of wind blows paint from a spraying operation performed by Government employees and deposits it on a parked motor vehicle 130 feet away, the Government is not liable to the owner thereof.

T–676 NOVEMBER 26, 1954.

John W. Fortner, 1028 N. 32d Street, Corvallis, Oregon, through the Premier Insurance Company, c/o Huston & Thomas, P. O. Box 866, Corvallis, Oregon, filed a claim in the total amount of $26.50 for compensation for alleged damage to Mr. Fortner's 1953 Ford auto-

mobile as a result of foreign paint deposits being blown onto the vehicle at the U. S. Bureau of Mines, Albany, Oregon.

The question whether the claim should be paid under the Federal Tort Claims Act (28 U. S. C., sec. 2671 *et seq.*) has been submitted to me for determination. That act authorizes the settlement of any claim against the United States on account of damage to property caused by a negligent or wrongful act or omission of an employee of the Government while acting within the scope of his employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage in accordance with the law of the place where the act or omission occurred.

In *United States* v. *Aetna Casualty and Surety Co.*, 338 U. S. 366 (1949), the Supreme Court held that an insurer subrogee may bring suit against the United States under the Federal Tort Claims Act. Therefore, the interest of the Premier Insurance Company may be considered by this Department.

According to the record before me, Mr. Fortner, on June 29, 1954, parked his automobile in an area reserved for Government employees at the Albany plant. A spray painting operation was being conducted on a building approximately 130 feet from the parked vehicle and it is alleged that particles of paint were blown by the wind onto claimant's automobile, causing damage in the amount of $26.50.

It should be noted that many cases have arisen as to the liability of commercial parking lot operators or garage owners since the automobile became a widely used form of transportation.[1] However, as comparatively recent as is this body of law, it has not been extended in any general way to the problem presented when an industrial concern or a governmental agency provides free parking space to its employees as an incident to their employment. This has become a common practice and the status of such employees in relation to the invitee-licensee doctrines should be defined.

It is true that all industrial or Government parking lots are not operated on a uniform basis. A greater degree of care or vigilance may be exercised in some than in others. As a general rule, however, space is specifically set aside; it is sometimes fenced and maintenance to some extent is provided. In some instances guards may be on duty, partly to protect the property of the employee and partly to prevent use of the lot by unauthorized persons. In many cases, identification cards are issued and specific space is assigned, with records being kept in the company office.

The general acceptance of this recent and growing relationship between employer and employee, both in industry and Government,

[1] For an early treatment of this subject, see Laurence M. Jones, "The Parking Lot Cases," 27 Georgetown Law Review 162 (1938).

would seem to imply that generally the employee is on the parking lot by invitation and that there are mutual advantages in the arrangement. Under most circumstances, he would not fit into the classification of a "bare licensee."

I

The possible liability of the Government in this and in other tort claims depends in part upon the legal duty, if any, owed by the Government to the claimant, which in turn depends on the status of the claimant under the law of the jurisdiction in which the incident occurred. Thus, if the claimant is a bare licensee generally the only duty of the owner or occupier is to abstain from inflicting intentional, wanton or willful injury or damage. *Firfer* v. *United States*, 288 F. 2d 524 (1953). Thus, the Supreme Court of Oregon has held:

> The law is well settled that a bare licensee, barring wantonness or some form of intentional wrong or active negligence by the owner or occupier, takes the premises as he finds them.

Napier v. *First Congregational Church of Portland*, 70 P. 2d 43, 44 (Oreg., 1937). To an invitee or business visitor, the owner or occupier of premises is required to exercise reasonable and ordinary care and to provide reasonably safe premises.

There have been considerable differences of opinion as to both terminology and definitions regarding the status of claimants injured while on land.

In this connection, the definitions in the restatement should be considered because the *Restatement on Torts* has been frequently cited in judicial decisions of the State of Oregon. (See, for example, *Briggs* v. *John Yeon Co.*, 122 P. 2d 445, 446 (1942); *Short* v. *D. R. B. Logging Co.*, 235 P. 2d 341, 342, 344 (1951).) Section 332 of Volume 2 of the *Restatement on Torts* defines a "business visitor" as "a person who is invited to enter or remain on land in possession of another for a purpose directly or indirectly connected with business dealings between them." (Compare section 336 of the *Restatement* which is representative of the increasing protection afforded the personal safety of trespassers.)

As with all definitions, the supreme test lies in its application. The major conflicts in this field arise in the determination whether certain individuals are included in the various categories, which in turn hinge on the basis of the special obligation which is placed upon the occupier of the land.

The two major theories applying these definitions have been discussed ably by Professor William L. Prosser in his *Handbook of the Law of Torts*, 1951, page 637 *et seq.* The early theory which was once dominant and which still represents the view of many of the courts

is that the duty is arbitrarily imposed upon the occupier of land as the price of the economic benefit which he derives or expects to derive from the presence of the visitor. On this basis the "business" on which the visitor comes must be one of potential pecuniary profit to the possessor of the land. This view is illustrated by Shearman & Redfield on *Negligence*, Vol. IV, pages 793–94 (Rev. ed., 1941). The authors make the most common distinction between an invitee and a bare licensee. They define these terms as follows:

> A business visitor, usually termed an invitee is one who has come upon the premises in connection with business of interest to both parties. One who is on the premises for his own convenience by permission or sufferance, has the status of a bare licensee. One who comes upon another's premises without permission is a trespasser.

Accord *Durbin* v. *Louisville & H. R. Co.*, 219 S. W. 2d 995, 997 (Ky., 1949).

A second theory which has the support of many judicial decisions and which is increasingly followed is that the basis for liability is not an economic benefit to the occupier of land but is a representation to those who are encouraged to enter the land for the landowner's own purpose that the premises are reasonably safe. In many of these cases great stress is often laid upon invitation as well as whether the occupier or owner had knowledge of the presence of the visitor. *Akerson* v. *D. C. Bates and Sons, Inc.*, 174 P. 2d 953, 954 (Oreg., 1946).

This theory is exemplified by the judicial decisions which hold that one who enters a building which is open to the public in order to enjoy public facilities is considered an invitee. For example one who enters a free library to read or to secure some circulating books is considered an invitee in those jurisdictions which follow the second theory. For a discussion of this theory and citation of illustrative cases see Prosser on *Torts*, cited, *supra*, page 638 *et seq.*

The courts of the State of Oregon have apparently adopted this second basis of liability. See *Napier* v. *First Congregational Church of Portland*, 70 P. 2d 43 (1937); *Hise* v. *City of North Bend*, 6 P. 2d 30 (1931).

II

It is obvious from the record that claimant was entitled, as a condition of his employment, to park his automobile on a lot provided for the convenience of employees on Government property. He was not a bare licensee or a trespasser but was entitled to the reasonable and ordinary care owed to invitees or business visitors. It is assumed, however, that as is usual in such employer-provided parking lots he parked the vehicle without the assistance of an attendant and retained the keys in his personal possession. The Government, therefore, did not exercise any control over the vehicle and upon the approach of danger

would have been unable and without authority to move it. It may be argued that this arrangement lessened, to a degree at least, the duty owed by the Government to claimant.

Painting with the use of spray equipment is a common practice and ordinarily is not associated with an element of damage to nearby property. In the present case the painting operation was carried on at a distance of approximately 130 feet from where claimant had parked his automobile. It could not have been reasonably anticipated that particles of paint would be blown such a distance. Only under most erratic wind conditions would such an event be likely to occur and such conditions could have gone unobserved by the person or persons engaged in the painting work.

The weather report for June 29, 1953 for the Albany area shows that winds were variable from 5 to 15 m. p. h. This would not be sufficient to put the painters on notice that a possibility of damage 130 feet distant existed. It is reported, however, that ordinarily the wind in Albany is gusty and not well defined in direction. A possible explanation, therefore, is that a sudden freakish gust of wind swept over the area while the paint sprayers were operating and carried paint to claimant's automobile.

If such was actually the case this would be an independent, intervening cause of the damage inflicted and the Government would be relieved of any negligence which might have originally been present. The rule is stated in *Leavitt* v. *Stamp*, 293 Pac. 414 (Oregon, 1930), as follows:

> In regard to an intervening, efficient, proximate cause, in such cases it may be stated that a prior and remote cause cannot be made the basis of an action for negligence, if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury, even though such injury would not have happened but for such condition or occasion. If no danger existed in the condition, except because of the independent cause, such condition was not the proximate cause. * * *

The record in the present case fails to disclose any negligent act on the part of Government employees. The only possible basis for negligence which could have arisen would have been in the fact that the painting operation was undertaken at a time when strong winds were blowing. The weather report cited above shows that this was not the case.

Determination

Therefore, in accordance with the provisions of the Federal Tort Claims Act and the authority delegated to me by the Secretary of the Interior, I determine that: (*a*) the damage to the property of John

W. Fortner, on which this claim is based, was not caused by a negligent or wrongful act or omission of an employee of the United States Department of the Interior; and (*b*) the claim of John W. Fortner and the Premier Insurance Company must be denied.

J. REUEL ARMSTRONG,
Acting Solicitor.

CHARLES R. KIPPEN

A-26971 *Decided November 26, 1954*

Grazing Privileges—Transfer of License or Permit—Lessee.

A written lease agreement is terminated through surrender by operation of law when, before the expiration of the term of such a lease, the then owner of the leased premises and the lessee enter into and completely perform a new lease agreement containing different provisions from those in the prior lease as to rent, the length of the term, and the conditions under which the premises are leased.

A transfer of a grazing license or permit from base property which is not owned by the transfer applicant is not authorized without the written consent of the owner or owners and any encumbrancers of the property where the transfer applicant is not a lessee of the base property at the time when the application for transfer is filed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Charles R. Kippen has appealed to the Secretary of the Interior from a decision of December 9, 1953, by the Acting Director of the Bureau of Land Management which affirmed the rejection of Mr. Kippen's application for grazing privileges on the Federal range, Utah-Idaho Unit, Nevada Grazing District No. 1. (Sections 2 and 3 of the Taylor Grazing Act, 43 U. S. C., 1952 ed., secs. 315a, 315b.) Mr. Kippen's application was dated December 4, 1951.

In a decision of January 31, 1952, the range manager of Grazing District No. 1 affirmed an earlier decision dated December 17, 1951, rejecting Mr. Kippen's application for the reason that the dependency by use of the Kippen base lands had been transferred to other base lands under section 7(b) of the Federal Range Code (43 CFR 161.7(b)), and therefore the base lands described in Mr. Kippen's application no longer had dependency by use within the district. Mr. Kippen appealed from the rejection of his application and a hearing was held before a hearings examiner on September 29, 1952, at Elko, Nevada. Ten persons, nine of whom were permittees on this range,[1] were recognized as interveners at the hearing.

[1] The nine permittees are: Martin Ithurbide, C. D. Michaelson, Forest Pritchett, Claude Sutton, Carson Brothers, Clarence M. Keller, Porter Brothers, Willard Peterson, L. W. and W. F. Peterson.

The examiner affirmed the range manager's decision in a decision dated December 30, 1952, and, on Mr. Kippen's appeal, the examiner's decision was affirmed by the Acting Director on December 9, 1953.

The base property owned by Mr. Kippen which was denied dependency by use is called the Schmalz Brothers lands. It consists of approximately 10,000 acres of land in Morgan County, Utah. For many years prior to May 1, 1950, this land was owned by the Schmalz Brothers Company, a Utah corporation, and Edwin L. Schmalz and between 1931 and 1949 the land was leased by Schmalz Brothers to Jean P. Etchart, who used the land for grazing livestock. By warranty deeds, executed May 1 and May 4, 1950, and recorded on May 5, 1950, the Schmalz Brothers Company and Edwin L. Schmalz conveyed the base property to Ardeth and Sarah Mortensen. Mr. Kippen purchased the land from the Mortensens by warranty deed of July 27, 1951.

The Schmalz Brothers lands are summer grazing lands which are used from about May 10 until the middle or end of October. Most of the grazing privileges on the Federal range which were allotted to Mr. Etchart on the basis of the dependency by use of the Schmalz Brothers lands authorized winter grazing use (from November 1 to March 31) on the Federal range in the Utah-Idaho unit of Nevada Grazing District No. 1. The dependency by use of the Schmalz Brothers lands resulted from the livestock operations of Mr. Etchart as lessee and amounted to 3,000 animal-unit-months. [2]

On February 17, 1950, Mr. Etchart was allowed grazing privileges for the 1950–1951 grazing season to the extent of 3,000 animal-unit-months less 10 percent, or 300 animal-unit-months, nonuse for conservation purposes. On November 16, 1950, Mr. Etchart filed an amended short form application for a nonuse license for the entire season. This application stated that there had been no change in the "base setup," although the Schmalz Brothers had sold the base land to the Mortensens.

On December 20 and 21, 1950, Mr. Etchart filed nine applications for the transfer of his grazing privileges to use the Federal range (based on the dependency by use of the Schmalz Brothers land) to land controlled by the nine permittees who intervened at the hearing. On October 16, 1951, the Regional Chief, Division of Range Management, approved the transfers of the dependency by use from the Schmalz Brothers lands to land controlled by the nine interveners. The nine interveners, who purportedly acquired the grazing privileges which had previously attached to the Schmalz Brothers lands bought these privileges from Mr. Etchart who sold out his livestock operation.

[2] The hearing examiner's reliance on this figure is followed for purposes of this proceeding although it is not established that part of these grazing privileges was not based on other private land.

The departmental regulation (43 CFR 161.7(b)) pursuant to which the transfer was approved provides:

> Upon application by a licensee or permittee, and after reference to the advisory board for recommendation, the range manager may allow a license or permit based on ownership or control of land to be transferred to other land or a license or permit based on ownership or control of water to be transferred to other water within the same service area: *Provided*, That such transfer will not interfere with the stability of livestock operations or with proper range management and will not affect adversely the established local economy: *Provided further*, That no such transfer will be allowed without the written consent of the owner or owners and any encumbrancers of the base property from which the transfer is to be made, except that when the applicant for such transfer is a lessee without whose established livestock operations such property would not have dependency by use or priority, such consent will not be required. Upon the allowance of a transfer under this paragraph, the base property from which the transfer is made shall lose its dependency by use or priority to the extent of the license or permit transferred.

At the hearing on whether the rejection of Mr. Kippen's application was proper, the principal issues concerned the control of the Schmalz Brothers lands at the time of the filing of the applications to transfer the dependency by use from that property to property controlled by other permittees. The range manager and Bureau officials contended that, as a result of a written lease between Mr. Etchart and Schmalz Brothers, Etchart was lessee of the base lands during the entire year of 1950. It was argued on behalf of Mr. Kippen that an entirely new and different lease was agreed upon and completely performed by Mr. Etchart and Mr. Mortensen after Mr. Mortensen purchased the base lands from Schmalz Brothers; that the new lease terminated when the lands were vacated by Mr. Etchart on or about October 24, 1950; and that as the applications for transfer of the grazing privileges were filed after the expiration of Mr. Etchart's lease with Mr. Mortensen, the applications should have been denied.

In his decision of December 30, 1952, the hearing examiner held that Mr. Etchart had not operated under his lease with Schmalz Brothers but had used the Schmalz-Mortensen lands during the 1950 season under an oral lease with Mr. Mortensen, written evidence of which appeared in Mr. Mortensen's letters of May 5 and October 25, 1950. However, the examiner held that Mr. Etchart had the same control of the Schmalz Brothers lands in 1950 as he had had under his previous year to year leases with Schmalz Brothers; that his grazing license which he wanted to transfer had been based on his 1950 summer's use and did not expire until March 31, 1951; that his control of the Mortensen lands was sufficient to entitle him to a license on the Federal range for the winter grazing season; and, therefore, that his applications to transfer the license were timely filed.

The Acting Director's decision affirmed the examiner's decision

primarily upon the grounds that Mr. Etchart "is a lessee without whose established livestock operations such property would not have dependency by use" within the meaning of the above-quoted regulation and that he was entitled to grazing privileges on the Federal range at the time when he applied for the transfer.

Neither the hearing examiner's nor the Acting Director's decision specifically considered the meaning and effect of the language of the second proviso of 43 CFR 161.7 (b) that no transfer of grazing privileges "will be allowed *without the written consent of the owner* or owners and any encumbrancers of the base property from which the transfer is to be made, except that *when the applicant* for such transfer *is a lessee* without whose established livestock operations such property would not have dependency by use or priority, such consent will not be required." (Italics supplied.)

Mr. Mortensen, who owned the base property when the transfer applications were filed, did not consent to the transfer, but protested against its allowance in a letter received by the range manager on February 2, 1951, and again at a meeting on June 28, 1951, of the advisory board. Mr. Mortensen was notified of the dismissal of his protest in a letter of August 10, 1951, from the range manager. Mr. Kippen, owner of the base property when the transfer was approved, applied for the grazing privileges in dispute for his own use. It is clear therefore that the owners of the property did not give their written consent to the transfer of grazing privileges from the Schmalz Brothers lands.

The hearing examiner found that Mr. Etchart's use of the base lands during 1950 was as lessee under an oral agreement with Mr. Mortensen, and that Mr. Etchart vacated the lands under that agreement on or before October 24, 1950. However, the above-quoted regulatory provision permits only the conclusion that if Mr. Etchart was not a lessee of the Schmalz Brothers lands on December 20 and 21 when he filed the applications for transfer, the transfer was not authorized under 43 CFR 161.7 (b) because the owners did not consent to it. Accordingly, consideration must be given to the question whether Mr. Etchart was a lessee of the base property when he filed the applications for the transfer of the grazing privileges from that property.

On October 19, 1950, Mr. Marcellus Palmer, agent for the interveners, submitted to the range manager an undated, unacknowledged instrument purporting to be a lease of the Schmalz Brothers lands to Mr. Etchart for the year 1950.[3]

[3] Tr. p. 5. All page numbers hereafter, unless otherwise noted, refer to the transcript of the hearing on September 29, 1952, in this case at Elko, Nevada.

The instrument, entitled "GRAZING LEASE," recites first that "THIS INDENTURE, [is] made and entered into this First day of January, 1950 * * *," and provides for the leasing by Schmalz Brothers, as lessor, to Jean P. Etchart, as lessee, of approximately 10,000 acres of land in Morgan County, Utah, described by township, range, and section numbers. The term of the lease is from the 1st day of January 1950, to the 31st day of December 1950, for which the lessee agrees to pay the sum of $2,800 of which $1,000 is due and payable on the 1st day of May 1950, and the balance of $1,800 is due and payable on the 1st day of October 1950. The instrument provides that the lessee shall at the expiration of the lease deliver the premises to the lessor in good order and condition; that the lessee shall have the right to sublease; that the lessee shall have first right to purchase the properties if they are offered for sale during the term of the lease; that if the lands should be sold during the term of the lease they "are sold" subject to the lease; and that if the leased lands are unsold at the expiration of the lease term the lessee is granted an option to continue the lease "for another period." The instrument also contains a provision for right of reentry by the lessors without notice to the lessee if the rent remains unpaid 30 days after it is due, and a covenant by the lessee to discharge all costs, attorney's fees and other expenses that may arise from enforcing the covenants of the agreement.

There is some controversy as to whether this lease was actually executed by Schmalz Brothers and there are other factors which would raise a question as to whether the lease was otherwise valid. However, aside from the question as to whether a valid agreement was entered into between Schmalz Brothers and Mr. Etchart, there is uncontroverted evidence that if any lease for 1950 was agreed upon between these parties, such a lease was terminated by operation of law when Mr. Etchart entered into a new lease agreement with Mr. Mortensen. The new lease agreement was evidenced by letters dated May 5 and October 25, 1950, from A. R. Mortensen to Mr. Etchart. It was stipulated at the hearing that these letters were received by Mr. Etchart.

The letters are as follows:

MAY 5, 1950.

MR. JEAN P. ETCHART,
Sunset, Utah.

DEAR JEAN:

It will probably be no surprise to you to hear that I have closed the deal with the Schmalz Brothers Co., and have taken possession of all their holdings in Morgan County. In confirmation of our several conversations you may use this land for grazing purposes during the 1950 season for $3,300.00. 50% due and payable when you enter on the range and the balance when you sort or remove your lambs this fall.

This arrangement, of course, is contingent upon your using the range according to acceptable practices, and your limiting the number and kind of livestock placed thereon so as not to exceed the carrying capacity.

I am making arrangements to continue the road to the top of the ridge between Cottonwood and Dry Creek, and it should be completed in time for you to use it. I may also wish to do some improvement work at waterholes, fences and buildings.

Very truly yours,

A. R. MORTENSEN.

OCTOBER 25, 1950.

Mr. JEAN P. ETCHART,
Sunset, Utah.

DEAR SIR:

This is to confirm our last conversation in which you stated that Tuesday Oct. 24, 1950 would be your last day on my range for the 1950 grazing season. On visiting the range this morning I found that you had vacated according to your promise and a later telephone call from Mrs. Etchart confirmed my findings.

I wish to thank you for your past patronage.

Very truly,

A. R. MORTENSEN.

Evidence at the hearing showed definitely that the agreement as set forth in Mr. Mortensen's letter of May 5, 1950, was accepted by Mr. Etchart; that a canceled check dated May 9, 1950, for $1,650 from Mr. Etchart to Mr. Mortensen was payment for one-half of the rental required by the letter of May 5. Another canceled check dated September 13, 1950, in the same amount drawn in favor of Mr. Mortensen by Mr. Etchart, was payment by Mr. Etchart for the balance due for the season's grazing (p. 21). Sometime after May 5, 1950, Mr. Etchart took possession of the base lands, and he vacated the lands on or before October 24, 1950, in accordance with an oral promise to Mr. Mortensen that he would do so (p. 22).

The period of Mr. Etchart's lease under the agreement with Mr. Mortensen was the 1950 grazing season, which period was commonly understood to extend from about the 10th or 15th of May (p. 28) until the middle of October, or not after November 1st (pp. 26, 27). Mr. Etchart paid rent for the 1950 grazing season only to Mr. Mortensen and had possession of the land only during the term agreed upon with Mr. Mortensen. Mr. Etchart's testimony at the hearing indicates that after the Mortensens purchased the base property, Mr. Etchart did not refer to or rely upon any written agreement with Schmalz Brothers (pp. 34, 35).

In the absence of a specific provision to the contrary, ordinarily a tenant is not deprived of his leasehold estate by a sale of the premises (3 Thompson, *Commentaries on the Modern Law of Real Property*, sec. 1335). Thus, if at the time when the base lands were sold to the Mortensens, a valid lease agreement for use of the base lands for

1950 existed, and if the Mortensens had had actual or constructive notice of the lease,[4] the sale of the land would have been subject to such a lease and the Mortensens would have been lessors under the lease in the absence of a specific agreement to the contrary. However, there cannot be two contradictory leases of the land at the same time, and any lease may be terminated when the parties thereto make a new agreement as lessor and lessee so as to work the surrender of an unexpired lease term by substitution of a new lease for the old (3 Thompson, *supra*, secs. 1207, 1495). A lease is surrendered by operation of law when the tenant accepts from the landlord a new lease, to begin immediately, or at any time during the existence of a previous lease (4 Tiffany, *The Law of Real Property*, sec. 962). It has been held that the execution of a new lease to a tenant before the expiration of an existing lease and performance under the new lease amount to a surrender of the old lease by operation of law and bring about the release of both parties from obligations created under the old lease, the release of one party being the consideration for the release of the other. *Diamanti* v. *Aubert*, 251 Pac. 373 (Utah, 1926).

It is possible, of course, that a later agreement entered into by a lessor and a lessee before the expiration of an existing lease merely modifies rather than terminates a prior lease. However, where a second lease agreement is complete, providing for a different term, at a different rental, and on different conditions from the prior lease, the later agreement supersedes the earlier one, amounting to a surrender by operation of law of the earlier agreement (*Peterson* v. *Betts*, 165 P. 2d 95, 106 (Wash., 1946)). The complete performance of a new agreement is evidence that the parties intended that an inconsistent prior agreement should be terminated. *Cf. Barber* v. *Smythe*, 143 P. 2d 565, 569–570 (Wyo., 1943).

It is clear that the covenants and agreements of the written instrument involved in this case are contradictory to and inconsistent with the provisions of the completely performed agreement between Mr. Etchart and Mr. Mortensen, as the amount of rent, the term of the lease, and the covenants of the parties under the written agreement were different from those under the lease agreement which, in fact, was fully carried out by Mr. Etchart and Mr. Mortensen. When the principles of the above-cited cases are applied to the circumstances of this case, it appears that Mr. Etchart's complete performance of the agreement with Mr. Mortensen effectively terminated, by operation of law, any lease agreement for 1950 which may have existed with Schmalz Brothers.

On the basis of uncontroverted evidence at the hearing that the new

[4] *Williams* v. *Young*, 81 Atl. 1118 (N. J., 1910), and *cf. Garber* v. *Gianella*, 33 Pac. 458 (Calif., 1893).

agreement between Mr. Mortensen and Mr. Etchart regarding use of the base lands during 1950 was completely performed, it is concluded that Mr. Etchart held the lands during the 1950 grazing season under an informal lease with Mr. Mortensen, written evidence regarding which appears in Mr. Mortensen's letters of May 5 and October 25, 1950, to Mr. Etchart, and that Mr. Etchart's lease of the land during 1950 terminated on or before October 24, 1950. It follows that Mr. Etchart was not a lessee of the base lands on December 20 and 21, 1950, when he filed applications for the transfer of the grazing privileges from those lands.

Since Mr. Etchart was not a lessee of the base lands when he filed applications for the transfer of grazing privileges therefrom, and the applicable departmental regulation (43 CFR 161.7(b)) provides that no transfer will be allowed in these circumstances without the written consent of the owner or owners of the base property, the transfer of grazing privileges in this case was not authorized because the owner of the base property did not consent to the transfer. Accordingly, the decision of the Acting Director of the Bureau of Land Management allowing such a transfer was incorrect.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Acting Director of the Bureau of Land Management is reversed, and the case is remanded for action consistent with this decision.

J. REUEL ARMSTRONG,
Acting Solicitor.

AUTHORITY TO ISSUE PATENT WITHOUT RESERVATION OF OIL AND GAS WHERE SUBSEQUENT TO A CONSENT BY THE ENTRYMAN TO SUCH A RESERVATION THE UNITED STATES HAS ISSUED AN OIL AND GAS LEASE AND THEREAFTER HAS CLASSIFIED THE LAND AS NOT PROSPECTIVELY VALUABLE FOR OIL AND GAS

Oil and Gas Reservation in Patent—Entryman's Rights—Oil and Gas Lease, Effect on Rights of Surface Entryman—Homestead Entry—Patent—Authority to Exclude Adverse Interest Established Under Authority of Law—Secretary of the Interior, Authority.

The act of July 17, 1914 (38 Stat. 509, 30 U. S. C. secs. 121, 124), which authorizes the issuance of nonmineral patents with a reservation, *inter alia*, of oil and gas when the land is withdrawn, classified, or known to be valuable for those minerals permits entrymen "at any time before final entry, purchase, or approval of selection or location" to show that the lands are in fact nonmineral in character and thereupon to receive a patent without such a reservation.

Where land in an entry has been classified as valuable for oil and gas and the entry has been impressed with a reservation of those minerals with the entryman's consent, the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, 30 U. S. C. sec. 181, *et seq.*) has invested the Secretary with certain discretionary authority, and with certain obligations with respect to the lessee, the United States and the State as a beneficiary under the lease, which he is powerless to surrender to the entryman absent a specific statute which, either in terms or by clear implication, so requires.

Where an interest has been created under authority of law in possible mineral deposits properly reserved in a homestead entry which is adverse to the claim of the entryman and the land is thereafter classified as nonmineral in character, patent may issue to the homestead entryman only if the adverse interest is excepted from the grant.

The Secretary's authority to finally dispose of public lands is limited to that conferred upon him by law. The interest of the United States in its oil and gas leases is an interest in public realty and is subject to the rule just stated, *Pace* v. *Carstarphen et al.*, 50 L. D. 369, *distinguished.*

M–36254 DECEMBER 28, 1954.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

You have asked my opinion as to whether or not an unrestricted patent may be issued to an entryman who consented to a reservation of the oil and gas in the entered land if after such consent an oil and gas lease was duly issued by the United States and, thereafter, the land was classified as being without prospective value for such minerals.

The facts are as follows:

On October 29, 1927, Frank L. Glebe made reclamation homestead entry, Cheyenne 046000 for Farm Unit "B", the S½S½NE¼, N½SW¼ and the NW¼SE¼ sec. 9, T. 22 N., R. 60 W., 6th P. M. Final homestead proof was filed on April 4, 1952. On February 5, 1952, the Geological Survey reported that the land was prospectively valuable for oil and gas. On March 20, 1952, Mr. Glebe, after being afforded an opportunity to prove the land to be without value for oil and gas, filed his consent to take title to the land subject to a reservation to the United States of the oil and gas as to the N½SW¼ and the NW¼SE¼ sec. 9, having previously assigned out of the entry the S½S½NE¼ sec. 9.

On March 8, 1954, the entryman's attorney inquired whether the lands are now considered to be valuable for oil and gas and, if they are not, whether patent may be issued without a mineral reservation. On March 23, 1954, the Geological Survey reported in response to your request that the land has no prospective value for oil and gas.

I am informed that, pursuant to your general practice, you would issue a patent in this case without a reservation of oil and gas if there was no outstanding oil and gas lease for the land. The question, therefore, is whether such a patent can now issue subject to the oil and gas

lease which would have the effect of subrogating the patentee to the rights of the United States as lessor or whether, assuming as appears to be the case, that a reservation to the United States of the oil and gas deposits cannot now be made, patent should nevertheless except the oil and gas lease including the interest of the United States as lessor.

The first question is whether in view of the privilege granted an entryman to disprove the mineral character of the land at any time before final entry, if after lease issuance the land is classified nonoil and gas land the lease may be canceled.

The language of the 1914 Act, if considered without reference to any other act, is susceptible of the construction that an entryman would be entitled to an unrestricted patent to the land including all interests in the minerals if he proved at any time before final entry that the land was not valuable for oil and gas. In this case the entryman made no such proof before final entry, or at all. Nonetheless it is possible that if the suggested construction were valid, the fact that the determination of nonmineral value was made after final entry and not as the result of entryman's proof to that effect might be immaterial. It appears, however, that the purpose and intent of the 1914 Act must necessarily be held to be modified by the provisions of the 1920 Act authorizing the issuance of oil and gas leases for deposits reserved in entries and patents. Congress cannot be presumed to have authorized the granting of rights which shall be subject from the date of the grant to being defeated at any time by the provisions of a prior act, at least in the absence of a clear intent to do so. On the other hand, the issuance of an oil and gas lease pursuant to a direction of law binds the Secretary to an obligation of contract which cannot be avoided without proper cause. See *United States* v. *Bank of the Metropolis*, 15 Pet. 377, 392 (1841) and *Perry* v. *United States*, 294 U. S. 330, 352 (1935). It is believed that the 1920 leasing act was intended and did modify the 1914 Act to the extent necessary to maintain the obligation of contracts entered into under authority of that leasing act. It follows that a lease properly issued cannot be cancelled merely to permit of the issuance of an unrestricted patent to an entryman because of a subsequent change of classification of the land. *Pace* v. *Carstarphen et al.*, 50 L. D. 369 is not the contrary. There an oil and gas permit was issued for land in an outstanding settlement claim at a time when the land was not withdrawn, classified, or valuable for oil and gas.

The next question is whether a patent may issue subject to the oil and gas lease. Initially it should be stated that, in that event, the patentee would become the lessor invested with all the powers now exercised by the Secretary. All rentals, royalties and other payments

now payable to the United States for distribution as provided in the Mineral Leasing Act would then be payable to the patentee. With respect to the lessor's powers under the lease, many of them are discretionary. Thus, the Secretary may require the lessee to comply with regulations duly issued by the Secretary including operating regulations or to unitize his lease with other leases. Under the law and regulations promulgated by him the Secretary exercises a wide discretion over oil and gas leases in many ways. He has authority to suspend operations or production or both, to waive or reduce rentals and royalties to require the lessee to drill upon demand and to do other things affecting the lessee's rights and interests. Through the years the Secretary has exercised his discretion liberally in favor of the lessee where that could be done without injury to the United States so that lessees may reasonably anticipate the conditions under which they may expect to operate. For example, although he has the authority to specifically require lessees to drill any wells he may deem necessary or proper, he has not imposed any requirement for the initial drilling of a well or wells before any discovery has been made on a lease except in the case of drainage and even then he has given the lessee the alternative of paying compensatory royalty. This general practice results from the fact that although the Secretary has been zealous to act in the best interest of the United States, he acts with different motives than the ordinary land owner, whose first interest is his own profit. The Secretary exercises the powers of a lessor with respect to many thousands of leases. Aside from the fact that he recognizes that a liberal policy with respect to individual leases does not under the actual conditions impede or slow up the development of oil and gas from the total area under Federal lease, he considers the conservation of oil and gas to be of major importance and that in order to effect such conservation it is sometimes necessary to forego a more immediate profit.

If an entryman became the lessor of such a lease and thus invested with the powers of the Secretary, the lessee could no longer anticipate the conditions that might be imposed. For one thing, the interest of the then lessor would probably be to endeavor to obtain production at as early a date as possible and having the right to require that the lessee begin the drilling of a well without regard to the lessee's own wishes or to his ability to comply he might well be expected to do so.

The normal desire to profit as much as possible under the lease would also be an incentive not to suspend operations or production nor to reduce or waive rentals or royalties in cases where the lessee would expect favorable action from the Secretary because of the past practice in such cases.

It cannot be presumed that Congress, when it invested the Secretary with such broad discretion, intended that the power to exercise that discretion should be assignable to anyone. To do so it would first be necessary to conclude that Congress had delegated that power to the Secretary. *Sioux Tribe of Indians* v. *United States*, 316 U. S. 317, 326 (1942). For the Secretary "cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof." *Burfenning* v. *Chicago, St. Paul, etc. Ry.*, 163 U. S. 321, 323 (1896), and cases cited. In addition to the principle that the Secretary cannot surrender jurisdiction that has been regularly vested in him by law, see *West* v. *Standard Oil Co.*, 278 U. S. 200, 220 (1929). If any Secretary saw fit to abuse the discretion so vested in him Congress could afford a remedy, but if the lessor's interest should pass into private control the supervision of Congress over the lessor would be at an end. The statutory power to require conservation of the oil and gas would be lost. Equally important the lessee's rights and duties would no longer be (in effect) fixed by custom but would be subject to the discretion of one whose interests and consequently whose motives and acts would be different. Thus, the assignment of the lessor's interest would have the practical effect of impairing the Secretary's obligations implicit in the lease contract. That contract was entered into under the authority of Congress which has exclusive jurisdiction over the public lands and minerals except to the extent that it delegates it. The lessor's interest in the oil and gas lease is a property interest in the public lands and as such it cannot be disposed of without legislative authority. *Irvine* v. *Marshall*, 20 How. 558 (1857); *Light* v. *United States*, 220 U. S. 523 (1911); 15 Comp. Gen. 96; 14 Comp. Gen. 169; 34 Op. Atty. Gen. 320. Beyond question, Congress can authorize the assignment by the United States of its lessor's interest or by the Secretary of his jurisdiction but lacking such a delegation of authority express or reasonably implied the Secretary can no more assign his jurisdiction over the lease or the lessor's interest to a private person than he can surrender his jurisdiction over the public lands or cancel the lease for a reason not authorized by law.

In addition the Secretary owes a duty not only to the United States but to the State in which the lease is situated not to surrender the lease to an entryman. Section 35 of the 1920 Act, as amended, requires that of all moneys received under the Act, 37½ percent shall be paid to the State within the boundaries of which the leased deposits are situated for the purposes therein stated; the remainder to inure to the United States for reclamation and general purposes. In practical effect then the State holds a three-eighths interest in the lessor's proceeds of such a lease and so long as the lease subsists the Secretary has

the obligation to receive and pay into the Treasury that proportion of the rentals, royalties and other payments under the lease to the credit of the State. Of course, he has an equal obligation to pay the remainder into the Treasury to be credited as provided by law. All such moneys are due or are to become due to the United States by virtue of the lease contract executed pursuant to a law which neither in terms nor by implication contemplates that the contract may be assigned so as to defeat that express requirement. It goes without saying that the Secretary cannot do by indirection what he cannot do directly and since he cannot divert payments actually made to him under the lease he cannot require that payments to become due under the lease in the future be disposed of other than by payment into the Treasury in the prescribed manner.

It is not questioned but that Congress may provide for a transfer of the lessor's interest as it did by clear implication in the act of September 6, 1950 (64 Stat. 769, 7 U. S. C. 1033), when it authorized the sale of certain reserved mineral interests "Notwithstanding any other provision of law * * *."

This leaves for consideration the question whether a patent may issue for the land exclusive of the oil and gas lease, thus leaving the title to the oil and gas in the United States only for the duration of the lease.

There is no doubt but that if it should develop that one of the three 40-acre tracts in the entry is not the property of the United States patent could issue for the remaining tracts still owned by the United States. And it is settled in the Department that where roads, trails, bridges or other improvements have been made on public lands and are being maintained under authority of law and the lands are thereafter disposed of the patent may except the portion of that land that is devoted to such improvements. *Instructions* of January 13, 1916, 44 L. D. 513. Beyond question, the lease here was issued and exists under authority of law. The principle under which it and the deposits which it segregates would be excepted is the same as it is in the exception of land containing improvements constructed under authority of law.

I conclude that a patent may issue in this case only if the oil and gas deposits are excepted from the grant so long as the outstanding oil and gas lease shall continue in force. The patent should also provide that the title to such deposits shall vest in the patentee, his successors and assigns upon the termination of said lease.

J. Reuel Armstrong,
Acting Solicitor.

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