

UNITED STATES DEPARTMENT OF THE INTERIOR

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

**DECISIONS
OF THE
DEPARTMENT OF THE INTERIOR**

Edited by
MARIE J. TURINSKY



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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1955, to December 31, 1955. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Douglas McKay served as Secretary of the Interior during the period covered by this volume; Mr. Clarence A. Davis served as Under Secretary; Messrs. Fred G. Aandahl, Orme Lewis, Felix E. Wormser and Wesley A. D'Ewart served as Assistant Secretaries of the Interior; Mr. D. Otis Beasley served as Administrative Assistant Secretary of the Interior during this period; and Mr. J. Reuel Armstrong served as Solicitor.

This volume will be cited within the Department of the Interior as "62 I.D."

Douglas McKay

Secretary of the Interior.

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- Harris, James G. (28 L. D. 90); overruled, 39 L. D. 93.
- Harrison, Luther (4 L. D. 179); overruled, 17 L. D. 216.
- Harrison, W. R. (19 L. D. 299); overruled, 33 L. D. 539.
- Hart *v.* Cox (42 L. D. 592); vacated, 260 U. S. 427. (See 49 L. D. 413.)
- Hastings and Dakota Ry. Co. *v.* Christenson et al. (22 L. D. 257); overruled, 28 L. D. 572.
- Hausman, Peter A. C. (37 L. D. 352); modified, 48 L. D. 629.
- Hayden *v.* Jamison (24 L. D. 403); vacated, 26 L. D. 373.
- Haynes *v.* Smith (50 L. D. 208); overruled so far as in conflict, 54 I. D. 150.
- Heilman *v.* Syverson (15 L. D. 184); overruled, 23 L. D. 119.
- Heinzman et al. *v.* Letroadeec's Heirs et al. (28 L. D. 497); overruled, 38 L. D. 253.
- Heirs of Davis (40 L. D. 573); overruled, 46 L. D. 110.
- Heirs of Philip Mulnix (33 L. D. 331); overruled, 43 L. D. 532.
- *Heirs of Stevenson *v.* Cunningham (32 L. D. 650); overruled so far as in conflict, 41 L. D. 119. (See 43 L. D. 196.)
- Heirs of Talkington *v.* Hempfling (2 L. D. 46); overruled, 14 L. D. 200.
- Heirs of Vradenburg et al. *v.* Orr et al. (25 L. D. 323); overruled, 38 L. D. 253.
- Helmer, Inkerman (34 L. D. 341); modified, 42 L. D. 472.
- Helphrey *v.* Coil (49 L. D. 624); overruled, Dennis *v.* Jean (A-20899), July 24, 1937, unreported.
- Henderson, John W. (40 L. D. 518); vacated, 43 L. D. 106. (See 44 L. D. 112, and 49 L. D. 484.)
- Hennig, Nellie J. (38 L. D. 443, 445); recalled and vacated, 39 L. D. 211.
- Herman *v.* Chase et al. (37 L. D. 590); overruled, 43 L. D. 246.
- Herrick, Wallace H. (24 L. D. 23); overruled, 25 L. D. 113.
- Hess, Hoy, Assignee (46 L. D. 421); overruled, 51 L. D. 287.
- Hickey, M. A., et al. (3 L. D. 83); modified, 5 L. D. 256.
- Hildreth, Henry (45 L. D. 464); vacated, 46 L. D. 17.
- Hindman, Ada I. (42 L. D. 327); vacated in part, 43 L. D. 191.
- Hoglund, Svan (42 L. D. 405); vacated, 43 L. D. 538.

- Holden, Thomas A. (16 L. D. 493); overruled, 29 L. D. 166.
- Holland, G. W. (6 L. D. 20); overruled, 6 L. D. 639; 12 L. D. 436.
- Holland, William C. (M. 27696), decided April 26, 1934; overruled in part, 55 I. D. 221.
- Hollensteiner, Walter (38 L. D. 319); overruled, 47 L. D. 260.
- Holman v. Central Montana Mines Co. (34 L. D. 568); overruled so far as in conflict, 47 L. D. 590.
- Hon v. Martinas (41 L. D. 119); modified, 43 L. D. 197.
- Hooper, Henry (6 L. D. 624); modified, 9 L. D. 86, 284.
- Howard, Thomas (3 L. D. 409). (See 39 L. D. 162, 225.)
- Howard v. Northern Pacific R. R. Co. (23 L. D. 6); overruled, 28 L. D. 126.
- Howell, John H. (24 L. D. 35); overruled, 28 L. D. 204.
- Howell, L. C. (39 L. D. 92). (See 39 L. D. 411.)
- Hoy, Assignee of Hess (46 L. D. 421); overruled, 51 L. D. 287.
- Hughes v. Greathead (43 L. D. 497); overruled, 49 L. D. 413. (See 260 U. S. 427.)
- Hull et al. v. Ingle (24 L. D. 214); overruled, 30 L. D. 258.
- Huls, Clara (9 L. D. 401); modified, 21 L. D. 377.
- Hurley, Bertha C. (TA-66 (Ir.)), March 21, 1952, unreported; overruled, 62 I. D. 12.
- Hyde, F. A. (27 L. D. 472); vacated, 28 L. D. 284.
- Hyde, F. A., et al. (40 L. D. 284); overruled, 43 L. D. 381.
- Hyde et al. v. Warren et al. (14 L. D. 576; 15 L. D. 415). (See 19 L. D. 64.)
- Ingram, John D. (37 L. D. 475). (See 43 L. D. 544.)
- Inman v. Northern Pacific R. R. Co. (24 L. D. 318); overruled, 28 L. D. 95.
- Interstate Oil Corp. and Frank O. Chittenden (50 L. D. 262); overruled so far as in conflict, 53 I. D. 228.
- Instructions (32 L. D. 604); overruled so far as in conflict, 50 L. D. 628; 53 I. D. 365; Lillian M. Peterson et al. (A. 20411), August 5, 1937, unreported. (See 59 I. D. 282, 286.)
- Iowa Railroad Land Co. (23 L. D. 79; 24 L. D. 125); vacated 29 L. D. 79.
- Jacks v. Belard et al. (29 L. D. 369); vacated, 30 L. D. 345.
- Jackson Oil Co. v. Southern Pacific Ry. Co. (40 L. D. 528); overruled, 42 L. D. 317.
- Johnson v. South Dakota (17 L. D. 411); overruled so far as in conflict, 41 L. D. 22.
- Jones, James A. (3 L. D. 176); overruled, 8 L. D. 448.
- Jones v. Kennett (6 L. D. 688); overruled, 14 L. D. 429.
- Kackmann, Peter (1 L. D. 86); overruled, 16 L. D. 464.
- Kanawha Oil and Gas Co., Assignee (50 L. D. 639); overruled so far as in conflict, 54 I. D. 371.
- Kemp, Frank A. (47 L. D. 560); overruled so far as in conflict, 60 I. D. 417, 419.
- Kemper v. St. Paul and Pacific R. R. Co. (2 C. L. L. 805); overruled, 18 L. D. 101.
- Kilner, Harold E., et al. (A. 21845); February 1, 1939, unreported; overruled so far as in conflict, 59 I. D. 258, 260.
- King v. Eastern Oregon Land Co. (23 L. D. 579); modified, 30 L. D. 19.
- Kinney, E. C. (44 L. D. 580); overruled so far as in conflict, 53 I. D. 228.
- Kinsinger v. Peck (11 L. D. 202). (See 39 L. D. 162, 225.)
- Kiser v. Keech (7 L. D. 25); overruled, 23 L. D. 119.
- Knight, Albert B., et al. (30 L. D. 227); overruled, 31 L. D. 64.
- Knight v. Heirs of Knight (39 L. D. 362, 491; 40 L. D. 461); overruled, 43 L. D. 242.
- Kniskern v. Hastings and Dakota R. R. Co. (6 C. L. O. 50); overruled, 1 L. D. 362.

- Kolberg, Peter F. (37 L. D. 453); overruled, 43 L. D. 181.
- Krigbaum, James T. (12 L. D. 617); overruled, 26 L. D. 448.
- Krushnic, Emil L. (52 L. D. 282, 295); vacated, 53 L. 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 L. 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 Lodé (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, 43 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.
- McPeck *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, D. (60 I. D. 161); overruled in part, 62 I. D. 210.
- Miller, Edwin J. (35 L. D. 411); overruled, 43 L. D. 181.
- Miller *v.* Sebastian (19 L. D. 288); overruled, 26 L. D. 448.
- Milner and North Side R. R. Co. (36 L. D. 488); overruled, 40 L. D. 187.
- Milton et al. *v.* Lamb (22 L. D. 339); overruled, 25 L. D. 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L. D. 79); overruled, 29 L. D. 112.
- Miner *v.* Marriott 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.
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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.—
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DECISIONS OF THE DEPARTMENT OF THE INTERIOR

JOHN J. FARRELLY ET AL.

A-27068

Decided January 7, 1955

Oil and Gas Leases: Extensions

An application for a 5-year extension of a noncompetitive oil and gas lease must be rejected where the application was not filed within the 90-day period prior to the expiration date of the lease.

Applications and Entries: Generally

Where a statute requires that a document be filed in a certain office by a specified date, the document must be received in that office on or before that date, not merely put in the mails in time to reach the office on time in the normal course of events.

Oil and Gas Leases: Cancellation

The Secretary of the Interior (or his delegate) can revoke the extension of an oil and gas lease granted in contravention of the pertinent statute and regulation at any time he is made aware of the improper action, without regard to the merits of any other offer for the lands covered by the lease.

Rules of Practice: Appeals: Standing to Appeal

A person has no standing to appeal with respect to action taken on an oil and gas lease in which he has no present interest.

Administrative Practice—Oil and Gas Leases: Generally

Although an extension of an oil and gas lease is unauthorized and is subject to cancellation, it serves to segregate the land and prevent other filings until the cancellation is effected and noted on the land office records.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

John J. Farrelly has appealed to the Secretary of the Interior from a decision dated July 2, 1954, by the Acting Director of the Bureau of Land Management which revoked the 5-year extensions granted to several noncompetitive oil and gas leases by the manager of the

Denver land office pursuant to section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226).

These leases (Denver 053930, 053931, 053934, 057169-A, Colorado 01233, 01246) were issued pursuant to section 17 of the Mineral Leasing Act, as amended (*supra*) for a 5-year term effective September 1, 1947, or were created by assignment out of leases effective that date. All of the leases terminated by operation of law on Sunday, August 31, 1952.

The land office which had jurisdiction over the leased lands was closed on Saturday and Sunday, August 30 and 31, 1952, and on Monday (Labor Day), September 1, 1952. At 2:49 p. m. on Tuesday, September 2, 1952, the land office received separate requests for 5-year extensions of all of these leases. The request with respect to Colorado 01233 was dated August 20, 1952, and was signed by P. M. Henderson. The remaining requests were dated August 28, 1952, and were signed by Mr. Farrelly (one being signed by him as president of the Fifty-One Oil Company, record titleholder of Denver 057169-A).

In the meantime, at 9:30 a. m. on September 2, 1954, Margaret J. Spoden filed an offer to lease for oil and gas (Colorado 05331) on lands included in these leases.

The manager, in separate form decisions dated September 9, 1952 (Denver 053930, 053931, 053934), September 11, 1952 (Colorado 01246), January 22, 1953 (Denver 057169-A), and April 29, 1953 (Colorado 01233) held that each request for an extension had been timely filed and extended each lease for 5 years from September 1, 1952.

By a decision dated December 16, 1952, the manager rejected Spoden's application in its entirety on the ground that all the lands covered by it were either in leases for which a 5-year extension had been granted or for which an application for a 5-year extension had been filed and the sixth year's rental paid.

On January 15, 1953, Spoden filed an appeal from the manager's decision with the Director of the Bureau of Land Management. From the Acting Director's decision revoking the extensions of the leases and returning Spoden's application for adjudication, Farrelly has taken this appeal to the Secretary.

The statutory authority for extending noncompetitive oil and gas leases is found in section 17 of the Mineral Leasing Act, as amended (*supra*), which provides in pertinent 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,

January 7, 1955

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 leases in this case expired, provided 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. * * *

The primary term of the leases, issued on September 1, 1947, expired by operation of law on August 31, 1952. The pertinent statute and regulation required that an application for an extension of these leases had to be filed within the 90-day period prior to this date. Applications for extension filed thereafter can afford no basis for granting an extension of these leases. *H. L. Cribbs*, A-26864 (July 16, 1954); *cf. Mabel E. Hale, Grace E. Van Hook*, 61 I. D. 55 (1952);¹ see *Great Lakes Carbon Corporation et al.*, 61 I. D. 228 (1953).

The appellant seeks to avoid the force of this principle by contending that the requests for extension were mailed prior to the expiration of the leases and ought to have been received in the normal course of events prior to the expiration of the leases at midnight August 31, 1952.

However, it is well settled that the requirement that a document be filed by a certain date means that it must be actually received by that date in the office where it is to be filed and not merely put in the mails addressed to the proper office in time to reach the proper office in the ordinary course of events. *H. P. Saunders, Jr.*, 59 I. D. 41 (1945); *Willis H. Morris*, A-26783 (November 10, 1953).

¹In *Mabel E. Hale, Grace E. Van Hook*, it was held that where an oil and gas lease expires on a nonbusiness day, which is preceded and followed by a nonbusiness day, an application for a preference-right oil and gas lease under section 1 of the act of July 29, 1942, which required such applications to be filed within a 90-day period prior to the date of expiration of the original lease, was not timely filed on the first business day after the expiration date of base lease. This conclusion is entirely applicable to requests for extension of oil and gas leases made pursuant to section 17 of the Mineral Leasing Act, as amended (*supra*).

The appellant also contends that the act of the manager in granting the extensions of these leases and the fact that several annual rental payments have been accepted for the extended terms require that the leases, as extended, remain in effect. This argument overlooks the fact that the authority of the Secretary (or his delegate) to issue or extend oil and gas leases is derived solely from the provisions of the Mineral Leasing Act. Any lease or extension issued in violation of the pertinent statutory provisions is void or voidable and is subject to cancellation. *Transco Gas & Oil Corporation, Joan Ford*, 61 I. D. 85 (1952). Accordingly, in view of the fact that there is no statutory authority to extend noncompetitive oil and gas leases after the original term has expired, extensions granted under such conditions are unauthorized and are subject to cancellation. See *H. A. Jacobson, E. B. Todhunter*, 61 I. D. 116 (1953).

The appellant also alleges that he was not properly notified of Spoden's appeal from the manager's decision rejecting her application. Regardless of whether a person appealing from a manager's decision must notify an adverse party of his appeal (compare *William R. Brewer et al.*, 60 I. D. 454 (1951), and *Delfino Cordova et al.*, 47 I. D. 608, 611 (1920)), the Department must take proper corrective action when facts are brought to its attention indicating that a lease has been issued or extended in contravention of the pertinent statute. In other words, the validity of Spoden's application or of her appeal cannot overcome the inherent deficiency in the extended leases or inhibit the Department from taking the proper corrective action.

It is deplorable that more than a year elapsed between the granting of the extensions and the revocation of the extensions. However, the Department has no other alternative than to abide by the requirements of the law. It must be concluded, therefore, that the decision of the Acting Director in revoking the extension of oil and gas leases Denver 053930, 053931, 053934, 057169-A, and Colorado 01233 was proper.

It may be worthwhile to note that the appeal as it relates to oil and gas lease Colorado 01233 is also subject to dismissal on other grounds. This lease was originally created out of oil and gas lease Denver 053930 by assignment from Farrelly to Broderick, which became effective June 1, 1948, the first day of the lease month following the date of filing. 30 U. S. C., 1952 ed., sec. 187a. On August 20, 1952, there was filed an assignment of this lease from Broderick to P. M. Henderson. Although the assignment was approved on April 29, 1953, its effective date was September 1, 1952. *Id.*

Thus Farrelly's interest in this lease ended with the assignment which created it. Thereafter he had no connection of record with this

January 7, 1955

lease and no interest in it which would sustain an appeal by him from any adverse action relating to it. In other words, he is not a person aggrieved by the decision of July 2, 1954, and therefore has no standing to appeal with respect to that lease. 43 CFR, 1953 Supp., sec. 221.75 (a).

Furthermore the request for a 5-year extension of this lease was filed by P. M. Henderson in a letter dated August 20, 1952, and received on September 2, 1952. Section 17 of the Mineral Leasing Act (*supra*) requires that the application for an extension of an oil and gas lease must be filed by the "record titleholder."

The assignment to Henderson, having been filed in August 1952, could not take effect until September 1, 1952. Since the primary term of the lease expired on August 31, 1952, Henderson never became the record titleholder of the lease during its primary term, and, hence he never had any standing to submit an application for an extension of the lease. *E. P. Miremont et al.*, A-26253 (June 8, 1952); *cf. Glen E. Petters*, A-26265 (May 27, 1952).

With respect to the remaining lease involved in this appeal (Colorado 01246), the record of that lease contains a letter from John J. Farrelly received in the land office on July 10, 1952, in which he stated that he desired a 5-year extension on this lease and asked that an overpayment he had submitted in connection with a prior request for extension of oil and gas lease Colorado 053947 be applied to the sixth year's rental on Colorado 01246. By a letter dated July 10, 1952, the manager acknowledged Farrelly's request for extension, informed him that the overpayment on lease Colorado 053947 was not sufficient to pay the rental on Colorado 01246, and requested a full remittance on the latter. By a letter dated August 28, 1952, and received on September 2, 1952, Farrelly submitted the proper sixth year's rental and stated that he desired a 5-year extension of the lease. Although this second request was received late, the original request of July 10, 1952, was timely and entitled Farrelly to an extension of the base lease.² Therefore lease Colorado 01246 was properly extended for a term of 5 years and the decision of the Acting Director revoking it was in error.

As a final matter, it may be well to make some reference to the future leasing of the lands involved in this appeal. Although the extension of five of these leases was unauthorized, the extensions were not a nullity. Having been granted by an official of the Department authorized to grant 5-year extensions of oil and gas leases, they segregated the land they cover from the public domain and while they remain uncanceled and of record, no application may properly be filed

² The rental was paid on the first business day following the commencement of the sixth lease year and was timely. *Great Lakes Carbon Corporation et al.*, 61 I. D. 228 (1953).

for such land. *H. A. Jacobson, E. B. Todhunter, supra.* Therefore these lands are not to be opened to leasing until the cancellation of the covering leases has been noted on the tract books. 43 CFR, 1953 Supp., 192.43.

This rule, however, does not apply to Spoden's offer. At the time her offer was filed, five of the base leases had expired without a request for extension having been filed. The lands included within these leases were then open to filing. The later improper extension of these leases and the rejection of her offer (Spoden having filed a proper appeal) cannot deprive her of her preference right to a lease. *Transco Gas & Oil Corporation, supra.*

However, if Spoden's application is subject to rejection, there being no indication in the record that any other offers were filed prior to the extension of the base leases, then the rule stated above will apply.

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 revoking the extensions of the oil and gas leases listed above is affirmed, except as to lease Colorado 01246, as to which it is reversed, and Spoden's offer for a noncompetitive oil and gas lease is returned for adjudication under the applicable laws and regulations.

J. REUEL ARMSTRONG,
Acting Solicitor.

APPEAL OF CAMPBELL CONSTRUCTION & EQUIPMENT CO.

IBCA-2

Decided January 11, 1955

Contracts: Appeals—Contracts: Notices—Contracts: Delays of Contractor

The appeal of a contractor from the decision of a contracting officer assessing liquidated damages against the contractor by reason of the late completion of the work under the contract must be dismissed when the contractor failed to give the contracting officer timely notice of the causes of the delay as required by article 9 of the contract. The consideration of the causes of delay by the contracting officer on the merits does not amount to a waiver of the requirement of notice, since the contracting officer could extend the time for giving notice only with the approval of the head of the Department.

Contracts: Damages: Remission of Liquidated Damages

The partial use of the facility constructed by the contractor is not a sufficient reason for remitting liquidated damages, when such use in no way interfered with the work of the contractor.

BOARD OF CONTRACT APPEALS

The Campbell Construction & Equipment Co., of San Francisco, California, filed an appeal on April 23, 1953, from the findings of

January 11, 1955

fact of the contracting officer, dated March 26, 1953, under Contract No. I75r-4125, denying in part the contractor's requests for extensions of time to complete the contract.

The contract, which is on the standard form for Government construction contracts (Form No. 23, Revised April 3, 1942), was entered into with the Bureau of Reclamation on January 17, 1952. It required the contractor, in accordance with the specifications (No. 200C-182), to furnish the materials and perform the work necessary to construct and remodel a warehouse and a temporary electrical laboratory near the Tracy Pumping Plant, Tracy, California, a part of the Central Valley Project, California.

Notice to proceed was received by the contractor on February 12, 1952, and since under paragraph 21 of the specifications the work was required to be completed within 90 calendar days of the date of receipt of notice, the date for the completion of the work under the contract became May 12, 1952. That date was extended 15 days by Order for Changes No. 1, dated April 3, 1952, so that the date for the completion of the work became May 27, 1952. The contractor began work on February 25, 1952, but the work was not satisfactorily completed and accepted until October 16, 1952, which was 142 calendar days after the expiration of the contract time.

In accordance with the provisions of article 9 of the contract and paragraph 22 of the specifications, the contractor was assessed liquidated damages at the rate of \$25 per day for each of the 142 days of the delay.

However, on March 31, 1952, the carpenters in the area of the contractor's operations had struck for a pay increase, and the contractor's carpenters had become involved in the strike. It appears from a letter dated May 21, 1952, from the contractor to the Construction Engineer that the contractor had written to the latter on April 11, 1952, "relative to strike conditions," and had received in reply a letter dated April 14, 1952, stating that the contractor's notification would be given consideration. Other delays in the performance of the contract occurred but the record does not show that the existence of these delays was brought to the attention of the contracting officer within 10 days of their occurrence. However, on November 19, 1952, when the contractor wrote to the Construction Engineer requesting final payment for all completed items under the contract and a release of the funds held as "possible liquidated damages," it requested various extensions of time for the completion of the contract which included not only 63 days to cover the period of the carpenters' strike but also 14 days to cover the period of a longshoremen's strike that had prevented the delivery of 2/0 TW wire to its subcontractor; 10 days for the time required to connect 6" pipe to the bottom of a 100,000-gallon tank (under Purchase Order No. 205-T-2140); 40 days for the time re-

quired to paint wireway brackets under Purchase Order No. 205-T-2342, and, finally, 25 days to cover the period of delay caused by the loss in transit of parts of a shipment of Holophane fixture glass ordered from the General Electric Supply Company by its subcontractor.¹

In his findings of fact of March 26, 1953, the contracting officer granted an extension of time of 63 calendar days, to and including July 29, 1952, to cover the period of delay caused by the carpenters' strike, but denied all the other requests of the contractor for extensions of time. While the Board does not concur in all the grounds advanced by the contracting officer for his conclusions, there appears to be no good reason for disturbing his decision.

The pertinent part of article 9 of the contract provides:

* * * the right of the contractor to proceed shall not be terminated or the contractor 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 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 ten 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, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, * * *.

As the contractor does not appear to have notified the contracting officer, except in the case of the carpenters' strike, of the existence of any delays within 10 days of their occurrence, the contracting officer would have been justified in denying extensions of time on this ground alone. Moreover, it has been held that the contracting officer may not waive this requirement of notice, and consider the causes of the delays on their merits (as he did in this case), because he can extend the time for giving notice only with the approval of the head of the Department,² and the latter can act only during the life of the contract.³

¹ Since the requested extensions of time total 152 calendar days, it is apparent that the contractor regarded some of them as concurrent.

² See 16 Comp. Gen. 374, 376 (1936); *Langevin v. United States*, 100 Ct. Cl. 15, 33 (1943); *E. C. Huffman Constr. Co. v. United States*, 100 Ct. Cl. 80, 117 (1943); *United States v. Cunningham*, 125 F. 2d 28 (App. D. C., 1941); *Associated Piping and Engineering Co., Inc.*, 61 I. D. 60 (1952); *Hamilton Carhart Overall Company*, 1 CCF 65 (BCA, March 6, 1943); *Morris Klein, Trustee*, 1 CCF 77 (BCA, March 18, 1943); *Branford Construction Co.*, 1 CCF 149 (BCA, May 19, 1943); *Boston Duck Co.*, 1 CCF 189 (BCA, June 17, 1943); *Happ Bros. Co.*, 1 CCF 324 (BCA, August 23, 1943).

³ 20 Comp. Gen. 299 (1940).

January 27, 1955

Although the notice requirement of article 9 is procedural, it has been declared that it serves an extremely important purpose. The investigation of the causes of delay, in order to determine whether the contractor acted with due diligence, often requires the consideration of a considerable number of complex factors. These factors must, moreover, be investigated promptly. At a later date the evidence may not be available, or may become subject to various interpretations. The Government is put at a definite disadvantage, therefore, when the justifications for delays must be explored long after the event.

In addition to requesting extensions for the various delays, the contractor contends that no liquidated damages at all should be assessed against it because the Government had partial use of the facility which was the subject of the contract prior to its completion. It appears, however, that this particular use consisted only of making use of the office portion of the building for the purpose of supervising and inspecting the job, and that this use in no way interfered with the work of the contractor, or delayed it in the completion of the job. It has been held that liquidated damages should not be waived by reason of such use.⁴

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the decision of the contracting officer is affirmed, and the appeal of the contractor is dismissed.

THEODORE H. HAAS, *Chairman.*

THOMAS C. BATCHELOR, *Member.*

WILLIAM SEAGLE, *Member.*

EARL J. BOEHME ET AL.

A-26811

Decided January 27, 1955

Oil and Gas Leases: Lands Subject to Leasing

Applications for noncompetitive oil and gas leases on a narrow strip of land along the United States-Canadian border which has been reserved to aid in the better enforcement of the customs and immigration laws are properly rejected where the proposed use of the land would not be compatible with the purpose for which the reservation was created and the land is not well adapted to exploration or exploitation on a sound basis.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Earl J. Boehme and Edwin J. Keyser have appealed to the Secretary of the Interior from a decision dated April 4, 1953, by the

⁴ See *Kohlman v. United States*, 63 Ct. Cl. 604, 613 (1927); 11 Comp. Gen. 73 (1931).

Assistant Director of the Bureau of Land Management which affirmed the decision of the Manager of the Billings land office rejecting their respective applications¹ for noncompetitive oil and gas leases on certain lands in Montana.

The lands applied for are within the public reservation along the boundary line between the United States and Canada created by a Presidential Proclamation, dated May 3, 1912. The proclamation states:

Whereas, the custom and immigration laws of the United States can be better enforced and the public welfare thereby advanced by the retention in the Federal Government of complete control of the use and occupation of lands abutting on international boundary lines;

Now, therefore, * * * there are hereby reserved from entry, settlement, or other form of appropriation or disposition under the public-land laws, and set apart as a public reservation, all public lands lying within sixty feet of the boundary line between the United States and the Dominion of Canada. [37 Stat. 1741.]

The lands applied for constitute a strip 60 feet wide and 36 miles long.

It is clear that the lands applied for have been permanently withdrawn by the proclamation. *Mabel Sletten*, 43 L. D. 552 (1915). Nevertheless the appellants contend that the lands are subject to leasing pursuant to the Mineral Leasing Act of February 25, 1920, as amended (30 U. S. C., 1952 ed., sec. 181 *et seq.*).

However, even though the lands may be subject to lease under the provisions of the Mineral Leasing Act despite the withdrawal, such leasing is discretionary with the Department.² If the leasing of land for oil and gas purposes would interfere with the use of the land for the purpose for which it is reserved, it is proper to reject applications for such leases. *George E. Kohler, Sr., et al.*, A-26412 (January 9, 1953); *Gerald W. Anderson*, A-26297 (February 13, 1952); *Vilas P. Sheldon*, A-25927 (January 16, 1951).

In accordance with the usual practice, this Department requested the Departments of Justice and the Treasury, the agencies of the Government in whose interest the withdrawal was made, to state their views as to whether drilling for oil and gas would be inconsistent and materially interfere with the use of the land by such agencies for

¹ The serial numbers of the applications are as follows:

Earl J. Boehme, Montana	09159
Earl J. Boehme, Montana	09160
Earl J. Boehme, Montana	09161
Edwin J. Keyser, Montana	09164
Edwin J. Keyser, Montana	09165
Edwin J. Keyser, Montana	09166

² *United States ex rel. Roughton v. Ickes*, 101 F. 2d 248 (App. D. C., 1938); *Dunn v. Ickes*, 115 F. 2d 36 (App. D. C., 1940), *cert. denied*, 311 U. S. 698; *United States ex rel. Jordan v. Ickes*, 143 F. 2d 152 (App. D. C., 1944), *cert. denied*, 323 U. S. 759.

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the purpose for which the land was withdrawn. The Department of Justice replied that the issuance of an oil and gas lease would not interfere with its administration of the immigration laws if the lease contained a stipulation that immigration officers shall, for the purposes of enforcing the immigration laws, be entitled at all times to free access to all lands and buildings or enclosures not actually used for dwellings (8 U. S. C., 1952 ed., sec. 1357 (a) (3)). The Treasury Department stated that, in its view, no obstruction or structure should be placed within the reserved strip that is not essential to the enforcement of Federal laws and that any leases issued should contain a stipulation that no structure or obstruction will be erected either permanently or temporarily within the boundaries of the reserved area.

Upon inquiry, the International Boundary Commission has informed the Department that its only concern is the marking and maintaining of the international boundary line and that it is concerned that its markers not be disturbed and that such land as is necessary for keeping the boundary clearly visible not be interfered with.

Since there is no indication in the record that the appellants would be able to utilize the land applied for without erecting structures on the land, it must be concluded that the proposed use of the narrow reservation along the international boundary would not be compatible with the purpose for which the reservation was created.

Furthermore, it is apparent that the lands applied for, being a narrow strip only 60 feet wide running between privately owned land on one side and the international boundary on the other, are not well adapted to exploration or exploitation on a sound basis.

A lease 60 feet wide should not be drilled either by directional drilling or otherwise if normal and economic well-spacing programs are to be maintained. This Department would be severely criticized if it adopted a policy of permitting unrestricted drilling where operators in North Dakota and Montana followed a normal spacing pattern of one well to 40 acres or even a program of one well to 10 acres, which latter spacing is unusual in present-day development of oil fields in the Rocky Mountain area except in North Central Montana. This Department has been a leader in orderly well spacing. If a Federal lessee were permitted to drill on such a narrow strip the lessors on either side could demand offsets; thus wells would be only 60 feet apart. The known oil reservoirs in the area adjacent to the boundary do not contain sufficient reserves per acre to warrant unorthodox locations. Legal subdivisions adjacent to the reserved area, for the most part, are irregular and contain less than 40 acres, already further complicating a regular spacing program.

Where the United States owns the minerals adjacent to the 60-foot strip, no useful purpose can be served as drainage would be compensated by royalty from the Federal lease. These cases are rare since most of the land has passed to private interests.

There is the possibility that leases could be issued subject to the condition that no structures be located on the 60-foot strip and that the applicant show that he owns, is a lessee of, or has operating rights on the adjoining acreage. However, such conditions would lead to endless administrative difficulties in the field and in Washington.

Furthermore, it is unlikely that an adjoining owner would grant surface rights to a Federal lessee to drill directionally beneath the 60-foot strip from adjoining land with full knowledge that wells on his land will drain the oil and gas from the public reservation. Consequently, the Federal lessee of proven acreage would be certain to request permission to drill on the reservation and to obtain an exception from the regular well-spacing program for the field.

It is admitted that where the United States owns a strip 60 feet wide through an oil field a minor loss will occur if the strip is not leased. However, in the absence of unitization or State laws requiring compulsory communitization, it appears wholly impractical to issue leases extending along the 60-foot strip and then become involved in proposals for deviation from proper well-spacing patterns.

Accordingly, it is not in the public interest to allow the appellants' applications.

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

ORME LEWIS,
Assistant Secretary.

**CLAIMS OF MR. AND MRS. ARNOLD STREIT AND BERTHA C.
HURLEY**

T-476 (Ir.) (Supp.) *Decided January 31, 1955*

Irrigation Claims: Flooding and Overflow—Contracts: Interpretation

Article 6 of the form of land-purchase contract used by the Bureau of Reclamation for several years prior to its revision in 1952 which provides in pertinent part that the amount paid by the United States for the purchased land should constitute "full payment for all damages for entry upon the said property and the construction, operation, and maintenance of reclamation works thereon * * *" has been interpreted by several rulings of the Solicitor beginning in 1948 to release the Government from liability for damage to remaining lands which are appurtenant to the land purchased from the claimant. Such rulings are hereby reversed and claims denied on that basis will be reconsidered on their merits.

Arnold Streit, T-476 (Ir.) (August 26, 1952); Bertha C. Hurley, TA-66 (Ir.) (March 21, 1952), overruled.

January 31, 1955

SUPPLEMENTAL ADMINISTRATIVE DETERMINATION

This supplemental determination reconsiders the claims of Mr. and Mrs. Arnold Streit, Bostwick, Nebraska, and Bertha C. Hurley, of Hardy, Nebraska, which were denied in administrative determinations dated August 26, 1952 (T-476 (Ir.)), and March 21, 1952 (TA-66 (Ir.)), respectively, because of an interpretation of article 6 of two standard Bureau of Reclamation land-purchase contracts executed by each of the claimants conveying certain rights in their lands to the United States.¹ This provision does not appear in the revised form adopted on August 1, 1952.²

I

LAND-PURCHASE CONTRACT PROVISION

Article 6 provides as follows:

The United States shall purchase said property on the terms herein expressed, and upon execution and delivery of the deed provided in Article 3 and the signing of the usual Government vouchers therefor, and their further approval by the proper Government officials, it shall 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 under said act [June 17, 1902 (32 Stat. 388, as amended and supplemented)], the sum of * * *.

The claims were denied on the ground that, in the light of this contractual provision, the purchase price paid to the respective vendors constituted compensation to them for any future damage that might be caused to lands adjoining the land sold, by the construction, operation, or maintenance of reclamation works on the land purchased.³

¹ Form 7-276, December 1948, was used in the case of Mr. and Mrs. Streit and Form 7-276, June 12, 1933 (June 1946), in the case of Mrs. Hurley.

² Form 7-276 was redrafted among other reasons to overcome the effect of the administrative determination of October 4, 1948, *Lonnie M. Abernathy*, (T-96 (Ir.)), and subsequent determinations including those of *Streit* and *Hurley*. The equivalent provision (now designated article 4) provides that "The United States shall purchase said property on the terms herein expressed, and on execution and delivery of the deed required by article 3, the signing of the usual vouchers, and their further approval by the proper officials of the United States, it shall cause to be paid to the Vendor as full purchase price the sum of * * *." For contemporaneous comment regarding the interpretation of new article 4, see memorandum dated November 17, 1952, from the Acting Assistant Commissioner (Golze) to the Regional Director, Denver, Colorado.

³ The rationale of the rule which was applied in the initial determinations of these claims is stated in *Dillard B. Hicks*, TA-33 (Ir.) (January 23, 1951), as follows: "Since the Government was to become the owner of the land covered by the purchase contract, and Mr. Hicks would no longer have any proprietary interest in that land, there was no occasion to refer in Article 6 of the contract to the possibility of future 'damages' to such land arising from the 'construction, operation, and maintenance of reclamation works' on it after its acquisition by the Government. Consequently, the reference in Article 6 to possible 'damages' was necessarily used with respect to other property retained by Mr. Hicks."

A careful review of the records in the case of each claim now under consideration discloses that the possibility of future damage to adjoining lands because of seepage or from any other cause was not within the contemplation of either claimant or of the Government when the purchase price was fixed for the lands acquired from these landowners. This conclusion is reinforced by the fact that there is no indication that the appraisals of the lands purchased were increased because of the inclusion in the contract of article 6 of the land-purchase contracts.

Bureau of Reclamation data, including preliminary drafts, extensive comment thereon by field officials of the Bureau engaged in the negotiation and execution of land-purchase contracts, and the analyses, contain nothing that suggests an intention on the part of the Bureau draftsmen that the words "full payment for all damages for entry upon said property and the construction, operation, and maintenance of reclamation works thereon," should or would release the United States from liability for future injuries resulting from irrigation activities to the adjoining or adjacent lands of vendors, as was concluded by the former Solicitor.⁴

For the purpose of attaining uniformity of action with respect to policies and procedures in land acquisition and related matters, and to effect to that end adequate delegations of authority to field officials, the Commissioner of Reclamation in 1945 issued a series of numbered circular letters. A review of the pertinent circular letters discloses nothing in the form of a policy statement or instruction prescribing procedures which can be construed as authorizing the execution by Bureau of Reclamation personnel of land-purchase contracts which would have the effect of precluding vendors of lands or rights in lands to the United States from seeking the payment of damages for injuries to their adjacent or adjoining property resulting from irrigation activities of the Bureau of Reclamation.⁵

Moreover, even assuming that the language was intended to produce the result reached in the original decision, it is ambiguous. Therefore, the provision should be construed against the Government, which drafted the contract form.

I therefore conclude that the interpretation heretofore made of article 6 of the standard land-purchase contract form of the Bureau

⁴The sense of the data appears to be crystallized in a memorandum dated March 26, 1947, from E. C. Davis, an attorney, Office of the Chief Counsel, Bureau of Reclamation, commenting upon the recommendations of the various Regional Directors concerning the revision of the land-purchase contract (Form 7-276, Dec. 1948).

⁵See, *e. g.*, Bureau of Reclamation Circular Letters Nos. 3281 and 3282, both dated January 11, 1945. The substance of these circular letters was later incorporated into the Bureau of Reclamation Manual.

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of Reclamation was in error, and it is hereby reversed. All claims that have been denied upon the ground that article 6 precluded the consideration and payment of damages to vendors of lands or rights in lands to the United States for reclamation and irrigation purposes should be reexamined and reconsidered on the merits under the Interior Department Appropriation Act, 1955, 68 Stat. 361. Payment of a claim is authorized under this law upon the basis of a factual finding that the damage complained of was the direct result of some nonnegligent action on the part of personnel of the Bureau of Reclamation, directed by competent authority.

II

SUMMARY OF CLAIMS

Both claims presently before me for reconsideration are for compensation because of damage to land and property adjoining the Superior Canal. The damage is allegedly resulting from the construction of the canal, which is part of the Bostwick Division, Kansas River District, Missouri River Basin Project. The claim of Mr. and Mrs. Arnold Streit is in the amount of \$8,000 for compensation because of alleged damage to a portion of their land adjoining the Superior Canal from water seepage from the Superior Canal which damaged the basement of their house and crops on their land.

III

PHYSIOGRAPHIC FEATURES

This Missouri River Basin Project comprises development of the water resources in 10 States, including Nebraska. It envisages the integrated development and utilization of the waters of all streams of the Missouri River Basin.

In addition to two canals heading at Harlan County Dam, three diversion dams and four pumping plants provide diversions into canals, each serving a portion of the project lands. The Harlan County Reservoir, located on the Republican River near Alma, Nebraska, releases storage water into the Franklin Canal. This canal runs roughly parallel to the course of the Republican River through Franklin County to the Superior-Courtland Diversion Dam in Webster County. Water is released at the latter dam into the Superior Canal. This canal connects with other canals, all of which flow in a southeasterly direction, parallel to the Republican River, through Nuckolls, Republic, Jewell and Cloud Counties.

The character of the soil in this area is described as sandy loam, silt loam, and clay loams, and the altitude of the irrigable area is 1,610 feet.

The Republican River is a nonnavigable stream. It flows into the navigable Kansas River. The drainage basin contributing to stream discharges in the area of the river includes large areas of sand hills. The greater portion of the watershed contributes both ground water and surface runoff to stream discharges.⁶

Data of record disclose that experienced hydraulic engineers of the Bureau of Reclamation and other Government personnel responsible for the planning of Harlan County Dam and irrigation works were well informed regarding the physiographic phenomena of the area to be included in the Bostwick Division and the facts that the ancestral channel, underlying the present course of the Republican River and the canals of the irrigation works, is filled largely with alluvial deposits which are very pervious, thereby rendering excavated canals susceptible to leakage and seepage. Moreover, it is well known that ground water underlies the valley flat at shallow depths.

Seepage through and under the banks of newly constructed canals is recognized as a usual and necessary incident of a new ditch constructed by excavation in the usual manner in the generally prevailing soil of the country.⁷

Accordingly, I find no basis in the record before me to conclude that the seepage which damaged the property of the claimant was due to negligence on the part of Reclamation personnel in the construction of the Superior Canal.

IV

BASIS FOR CLAIMS

Form 95 filed by Mr. and Mrs. Arnold Streit on December 31, 1951, stated the Streit claim in the amount of \$8,000. This amount repre-

⁶ The discussion of the physiographic features of the Missouri River Basin Project appearing in the administrative determination of the seepage claim of *Mrs. Bertha Theobald*, T-569 (Ir.) (June 30, 1954) is generally applicable in the consideration of the present claims. Mrs. Theobald's property was located in the Frenchman-Cambridge Division, Kansas River District, Missouri River Basin Project. A description of the Bostwick Division appears in "Reclamation Project Data," Bureau of Reclamation report dated December 8, 1948, pp. 225-227, and "Survey Report on the Republican River Basin," released by the Bureau in 1943. The latter report contains the results of a detailed investigation of the Bostwick Division, Kansas River District, Missouri River Basin Project.

⁷ *Howell v. Big Horn Basin Co.*, 81 Pac. 785 (Wyo., 1905); *Mrs. Bertha Theobald*, T-569 (Ir.) (June 30, 1954); *Northern Pacific Railway Co. et al.*, T-560 (Ir.) (May 10, 1954), p. 8.

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sented alleged seepage damage to the basement of their house in the amount of \$2,000, and to 100 acres of crop corn land in the amount of \$6,000.

In a memorandum dated June 20, 1952, the District Manager, Kansas River District, McCook, Nebraska, reported to the Regional Director, at Denver, findings of fact concerning the claim of Mr. and Mrs. Arnold Streit for seepage damage as follows:

The bottom grade of the first seven miles of the Superior Canal, to within $\frac{1}{4}$ mile of the Streit property, is from 1 to 4 feet below the natural groundwater surface, hence this reach of the canal functions as a drain when no headgate diversions are being made. The first 9.5 miles of the Superior Canal were essentially complete in September 1950, at which time the canal began to carry a small amount of groundwater flow (3-4 c. f. s.) through the Streit property. According to Mr. Streit, water appeared in the basement of his house sometime during October 1950. The house is located approximately 120 feet south of the centerline of the canal. The floor of the basement of the house is approximately 6 feet below the bottom grade of the canal. According to all available information, the basement was never wet from the time the house was built in 1903 to October 1950.

In a memorandum dated November 10, 1954, the Projects Manager, Kansas River Projects, transmitted to the Regional Director at Denver special appraisal reports reflecting the Streit property as it would be without the seepage condition and the property as it now exists. The difference between these two appraisals is \$3,995.80, and the Projects Manager recommends that the claim be allowed in this amount. The appraisal of the Projects Manager appears to be reasonable.

Form 95 executed by Mrs. Hurley on or about August 9, 1951, describes the injury to her property as "continuing," the claim as "based only on damages to date of August 9, 1951," and the nature of the injury as a drainage problem which resulted when, during the construction of the Superior Canal, a ridge of dirt was thrown up which "acted to turn the natural flow of water from the land just to the north, back to the south along the canal, down to the buildings located on the said eighty acres, and upon the buildings, lots and yards there, so that any considerable rainfall resulted in the flooding of the building area and the patches of farm ground to the west and east of the said building area." She alleges that the flooding cut the road between the buildings, making it necessary to rebuild it; went through under the garage, and backed up in and around other outbuildings. She stated also that the water "cut a gutter on either side of the dwelling house which must be filled in each time it rains and made farming of ground around the building area impossible." Originally, Mrs.

Hurley claimed \$100 for the damage allegedly done to her property. Although she later increased the amount to \$200, there is no evidence to substantiate the increase. The amount of \$100 was not questioned by the Bureau of Reclamation and appears to be reasonable and should be allowed in full satisfaction of all damage to her property to the present time arising out of activities of the Bureau of Reclamation.

V

CONCLUSION

A preponderance of the engineering and other data of record establishes that the engineers of the Bureau of Reclamation were aware of the physiographic features of the Bostwick Division, Kansas River District, Missouri River Basin Project; that they employed accepted engineering skills and techniques in their planning and construction operations; that it was expected that some seepage damage would occur in the early, or "testing" period of the works; and that, as previously indicated, when seepage did occur, they considered it to be in the best interests of all of the water users, to operate the works and defer repair of the relatively minor seepage damage until the end of the irrigating season.

It is clear from the record that the damage sustained by the claimants was caused by seepage which was directly the result of the construction of the Superior Canal.

I conclude, therefore, that the claims arose "out of activities of the Bureau of Reclamation" and therefore are cognizable under and may be paid from funds made available to the Bureau of Reclamation by the Interior Department Appropriation Act, 1955, 68 Stat. 361.

VI

DETERMINATION AND AWARD

Therefore, in accordance with the provisions of the Interior Department Appropriation Act, 1955, and the authority delegated to me by the Secretary of the Interior:

1. I determine that—

- (a) the damage to the properties of Mr. and Mrs. Arnold Streit and Bertha C. Hurley arose out of the activities of the Bureau of Reclamation;
- (b) the total amount of damage allowable in the case of Mr. and Mrs. Arnold Streit is \$3,995.80, and in the case of Bertha C. Hurley is \$100; and

February 7, 1955

(c) the claims of Mr. and Mrs. Arnold Streit and Bertha C. Hurley should be allowed in the respective amounts identified in each case as the amount allowable.

2. Accordingly, I award to Mr. and Mrs. Arnold Streit the sum of \$3,995.80 and to Bertha C. Hurley the sum of \$100, and I direct that these respective amounts be paid to them, subject to the availability of funds for such purpose. These awards cover all damage to the claimants' property to the present date.

J. REUEL ARMSTRONG,
Acting Solicitor.

ELWYN C. HALE

A-27028

Decided February 7, 1955

Oil and Gas Leases: Preference Right Leases

The provision added to section 17 of the Mineral Leasing Act by the act of August 8, 1946, which states that no withdrawal from oil and gas leasing shall be effective until 90 days after notice thereof shall be mailed, registered mail, to each lessee to be affected, has no application to a lessee asserting a preference right to a new lease under the act of July 29, 1942.

Oil and Gas Leases: Preference Right Leases

The act of July 29, 1942, confers upon the holder of an expiring lease only a right to be preferred over other applicants if a new lease is awarded; it gives no right against the Government to insist on a lease, if the Department of the Interior determines to withhold the land from leasing entirely.

Oil and Gas Leases: Preference Right Leases

An application for a preference right oil and gas lease under the act of July 29, 1942, directed to land not subject to leasing at the time it was filed, is invalid and is not validated by the restoration of the land to leasing even though the restoration occurs prior to the adjudication of the application.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Oil and gas exchange lease Las Cruces 029144 was issued to Elwyn C. Hale for a 5-year term commencing January 1, 1940. The lease covered all of secs. 14, 22, 23, and 24, T. 20 S., R. 30 E., N. M. P. M. Subsequently, Mr. Hale made a partial assignment of the lease as to the NE $\frac{1}{4}$ sec. 14, and the assigned portion of the lease was given serial number Las Cruces 060441. Later the lease as to the NE $\frac{1}{4}$ sec. 14 was reassigned to Mr. Hale.

On December 30, 1942, Mr. Hale entered military service. He was discharged on October 17, 1945. While he was in service, there were

filed on his behalf on December 30, 1944, two informal applications for preference right leases under section 1 of the act of July 29, 1942 (56 Stat. 726). Application 063610 was based on lease Las Cruces 029144 and application 063611 was based on lease Las Cruces 060441. Formal applications were filed by Mr. Hale on January 31, 1945.

Prior to the issuance of the original lease to Mr. Hale, an order had been issued by the Acting Secretary of the Interior on February 6, 1939 (4 F. R. 1012), withholding certain lands in New Mexico, including portions of sections 14, 22, 23, and 24, from oil and gas leasing.¹ On October 16, 1951, this order was revoked by an order of the Secretary of the Interior (16 F. R. 10669) which opened the lands to oil and gas leasing in accordance with a prescribed procedure. Numerous applications were filed. With respect to the land in question, the following were designated as the successful applicants for leases: Holm O. Bursum, Jr., for the NW $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$, S $\frac{1}{2}$ sec. 14, under application New Mexico 06783; M. H. Kibbe, for the N $\frac{1}{2}$ sec. 22, under application New Mexico 06784; Harold L. Sims, for the N $\frac{1}{2}$ sec. 23, under application New Mexico 06785; and Frances Q. Lippett, for the NW $\frac{1}{4}$ sec. 24, under application 06786.

On June 5, 1952, Mr. Hale filed two protests against the issuance of leases to these applicants, claiming that he was entitled to preference right leases to the land involved under his preference right applications. Mr. Hale's protests were forwarded to the Washington office of the Bureau of Land Management without action by the local office and were dismissed by the Assistant Director on March 31, 1954. Mr. Hale has appealed to the Secretary of the Interior.

The records in this case show that a series of complicated actions were taken with respect to Mr. Hale's original lease and his preference right applications. The complexities arose by reason of Mr. Hale's entry into military service and his claim of benefits under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U. S. C. App., 1952 ed., secs. 501-585). However, it appears to be unnecessary to unravel all of these actions to determine whether Mr. Hale is now entitled to preference right leases on the tracts of land in question. The appeal can be disposed of on a relatively simple ground.

In his order of February 6, 1939, the Acting Secretary of the Interior directed that no oil and gas leases be issued, no application for oil

¹ Mr. Hale's original lease Las Cruces 029144 was issued to him in exchange for an oil and gas permit as required by section 13 of the Mineral Leasing Act, as amended by the act of August 21, 1935 (49 Stat. 674). The issuance of the lease was therefore unaffected by the order of February 6, 1939.

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and gas leases be accepted, and no rights be acquired by filing an application for such a lease, on any part of a 42,685.18-acre area in New Mexico, which included all the subdivisions involved in the present case. Mr. Hale does not dispute the legality of this order,² but contends that it was ineffectual against him because he was not personally notified of it before he filed his preference right applications. He relies on the following language in section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226) :

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. A withdrawal, however, shall not affect the right to an extension if actual drilling operations on such lands were commenced prior thereto and were being diligently prosecuted on such expiration date. *No withdrawal shall be effective within the meaning of this section until ninety days after notice thereof shall be mailed, registered mail, to each lessee to be affected by such withdrawal.* * * * [Italics added.]

The quoted language, however, was added to section 17 by the act of August 8, 1946 (60 Stat. 951), which provided, in section 15 :

No repeal or amendment made by this Act shall affect any right acquired under the law as it existed prior to such repeal or amendment, and such right shall be governed by the law in effect at the time of its acquisition; but any person holding a lease on the effective date of this Act may, by filing a statement to that effect, elect to have his lease governed by the applicable provisions of this Act instead of by the law in effect prior thereto. [60 Stat. 958.]

Mr. Hale has not filed a statement of election to have his base leases governed by the 1946 act; indeed, by asking for preference right leases under the act of July 29, 1942, *supra*, which relates solely to leases issued under the 1935 amendments to the Mineral Leasing Act (49 Stat. 674), he is taking a position incompatible with such an election. Prior to the act of August 8, 1946, *supra*, there was no requirement that a lessee be notified of a withdrawal of the land in his lease. On the contrary, it has been repeatedly held that the act of July 29, 1942, confers upon the holder of an expiring lease only a right to be preferred over other applicants if a new lease is awarded; it gives no right against the Government to insist on a lease, if the Department of the Interior determines to withhold the land from leasing entirely. *The International Trust Co.*, 60 I. D. 208 (1948), and cases therein cited.

² A similar order was upheld by the Supreme Court of the United States in *United States ex rel. McLennan v. Wilbur*, 283 U. S. 414 (1931).

Therefore, Mr. Hale was not entitled to any notice of the order of February 6, 1939, in order for it to affect his preference right applications.

The established rule of the Department is that an application for an oil and gas lease on land not subject to leasing at the time it was filed is invalid and that it is not validated by the restoration of the land to leasing even though the restoration occurs prior to the adjudication of the application. *D. Miller*, 60 I. D. 161 (1948); *Noel Teuscher*, A-25194 (May 3, 1948); *N. G. Morgan, Sr.*, A-25519 (May 19, 1949); *P. T. Farnsworth, Jr.*, A-25629 (May 31, 1949); *cf. Richard R. Crandall*, A-24444 (November 12, 1946); *Hunt v. State of Utah*, 59 I. D. 44 (1945). The restoration order of October 16, 1951, did not validate previously filed applications, but only authorized future filings. *Mabel E. Hale, Alfred J. O'Eth*, A-26860 (June 23, 1954). Hence Mr. Hale's preference right applications entitle him to no rights.

Mr. Hale also makes a general claim of rights under the Soldiers' and Sailors' Civil Relief Act of 1940, *supra*. What these rights may be in the present situation he fails to spell out.

The protestant has failed to adduce any reasons why oil and gas leases New Mexico 06783, 06784, 06785 and 06786 should not be issued.

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.

SCHOOL SECTIONS RESERVED BY THE ACT OF MARCH 4, 1915 (38 STAT. 1214, 48 U. S. C. SEC. 353), FOR THE TERRITORY OF ALASKA

Alaska: School Lands

Subject to the Territory's consent, the Bureau of Land Management may issue permits under the act of July 31, 1947 (43 U. S. C. sec. 1185), to the Alaska Road Commission authorizing it to remove roadbuilding material from school sections reserved for the Territory by the act of March 4, 1915 (48 U. S. C. sec. 353). The consent may be conditioned upon reasonable payment to the Territory. The Territory has no authority under the act of 1915 to lease the reserved school sections to the Federal Government. Land reserved by the act of 1915 may be withdrawn by public land order for the use of the Department of the Army. Applicability of the act of June 14, 1926 (44 Stat. 741), as amended (43 U. S. C. sec. 869), to school sections reserved by the act of 1915 considered.

Materials Act

The Bureau of Land Management may issue permits to the Alaska Road Commission under the Materials Act authorizing the Commission to remove

February 8, 1955

roadbuilding material from sections reserved for the Territory of Alaska by the act of March 4, 1915 (48 U. S. C. sec. 353), providing consent of the Territory is first obtained.

Accounts: Payments

Proceeds from leases for school sections reserved by the act of March 4, 1915 (48 U. S. C. sec. 353), issued under the act of June 14, 1926, as amended (48 U. S. C. sec. 869), should be deposited in the United States Treasury for payment annually to the Territory of Alaska.

M-36243

FEBRUARY 8, 1955.

TO THE DIRECTOR, OFFICE OF TERRITORIES.

Reference is made to your memorandum of September 23 and attached correspondence raising the following questions:

1. May the Territory charge the Alaska Road Commission, a Federal agency under the jurisdiction of this Department, for roadbuilding material removed by that Commission from school sections reserved for the Territory by the act of March 4, 1915 (38 Stat. 1214, 48 U. S. C. sec. 353), the material to be used for the construction and maintenance of roads outside of those sections? The record shows that such material is being removed by that Commission under permits issued by the Bureau of Land Management, authorized by the act of July 31, 1947 (61 Stat. 681, 43 U. S. C. sec. 1185).

2. May the Territory, under authority of section 1 of the act of March 4, 1915, *supra*, lease lands in reserved school sections to the Federal Government for buildings and structures used for defense purposes and collect rental for such use? It appears that the Territory has leased such lands to an agency of the Department of the Army for those purposes.

I

With respect to question 1:

With certain exceptions not pertinent here, section 1 of the act of March 4, 1915, *supra*, provides that when public lands in the Territory are surveyed, sections 16 and 36 of every township shall be reserved from sale or settlement, for the support of common schools of the Territory and sections 33 in every township within a certain area shall be reserved for the support of the Territorial agricultural college and school of mines. The reservation made by the act does not attach to a school section until it has been surveyed and the plat of survey approved or accepted by the Bureau of Land Management.¹ The

¹ Section 1 of the act of March 4, 1915 (38 Stat. 1214, 48 U. S. C. sec. 353). See *John J. Corey*, A-25892 (August 11, 1950); departmental decision of April 14, 1920 (D-38804) ("N" 796175-GLO); Cf. *United States v. Morrison*, 240 U. S. 192 (1916); *State of New Mexico*, 52 L. D. 679 (1929); *State of Colorado*, 49 L. D. 341 (1922); *State of Montana*, 38 L. D. 247, 250 (1909); *F. A. Hyde & Co.*, 37 L. D. 164, 165 (1898); and *Solicitor's Opinion M-36143* (July 22, 1952).

reservations made by the act are not grants and title to the reserved sections remains in the United States, subject to the full control and disposition of Congress until the contemplated grant is effected.² Hence, the Territory cannot charge for the material by virtue of any ownership of such a section or of the material therein. However, section 1 of the act of July 31, 1947, *supra*, after authorizing the Secretary of the Interior to permit any Federal, State, or Territorial agency, unit or subdivision, including municipalities, without charge, to remove material from public lands, provides in part:

When the lands have been withdrawn in aid of a function of a Federal department or agency other than the Department of the Interior or of a State, Territory, county, municipality, water district, or other local governmental subdivision or agency, the Secretary of the Interior may make disposals under said sections only with the consent of such Federal department or agency or of such State, Territory, or local governmental units.

The act clearly applies to Alaska, as section 3 thereof provides for the disposal of proceeds from the reserved school sections in Alaska.

One of the functions of the Territorial government is the establishment and maintenance of public schools in the Territory³ and as the proceeds from the reserved school sections obviously would aid in the performance of that function, it is clear that the Territory comes within the scope of the above-quoted provision of section 1 of the act of 1947. Consequently, roadbuilding or other materials in the reserved school sections may not be removed and disposed of under the act of 1947 without first obtaining the consent of the proper agency of the Territory. As the Territory may refuse or give consent, it follows that it may attach reasonable conditions to the consent, if given.⁴ In view of the purpose for which the surveyed school sections have been reserved, its consent may be conditioned upon the Federal agency entering into a separate agreement with the Territory which requires a reasonable payment to the Territory. However, in our opinion after the Territory has once given its consent to the issuance of a permit and the permit has been issued, the Territory may not attach other conditions so long as the permit remains in effect.

² See departmental ruling of July 16, 1946 (59 I. D. 280, 283) and footnotes 5 and 6; *New Mexico v. Altman*, 54 I. D. 8 (1932); *Byers v. State of Arizona*, 52 I. D. 488 (1928).

³ Act of January 27, 1905 (33 Stat. 616), as amended (48 U. S. C. secs. 41, 161, 169).

⁴ See Solicitor's Opinion M-36071 of May 16, 1951 (60 I. D. 477); *Of. Solicitor's Opinion* of July 8, 1939 (57 I. D. 31, 33), wherein he held that power to grant or refuse a right-of-way permit, implied the authority to condition the permit upon payment of rental.

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II

With respect to question 2:

A provision of the act of March 4, 1915, *supra*, reads as follows:

Provided further, that the Territory may, by general law, provide for leasing said land in area not to exceed one section to any one person, association, or corporation, for not longer than ten years at any one time.

We find nothing in the act or in its legislative history to justify the conclusion that by the words "person, association, or corporation" Congress intended to include the Federal Government. It is hardly conceivable that by those words Congress intended that lands to which the United States still holds legal title may be leased by the Territory to the United States and that the Federal Government be restricted to leasing not to exceed one section. Therefore, we conclude that the Territory has no authority under the provision quoted to lease to the Federal Government. It may be that under the language the Territory could issue a lease to a governmental corporation. That specific question will be considered when and if it arises.

III

We have also been asked whether the Secretary by the issuance of a public land order may withdraw such legal subdivisions of a section reserved to the Territory by the act of March 4, 1915, *supra*, as might be needed by the Department of the Army. In our opinion, he may do so. As above stated, the reservation made by the act of 1915 is not a grant but is merely a reservation in contemplation of a future grant and the legal title to the reserved school section remains in the United States. Hence the reservation is no legal obstacle to such a withdrawal⁵ particularly as the reservation is only "from sale or settlement."⁶

IV

In closing, attention is called to the act of June 14, 1926 (44 Stat. 741), as amended by the act of June 4, 1954 (43 U. S. C. sec. 869), which authorizes the Secretary of the Interior to sell or lease public lands for public purposes to Federal instrumentalities. The judicial inter-

⁵ See *Byers v. State of Arizona*, 52 L. D. 488 (1928); departmental ruling of July 16, 1946 (59 L. D. 280, 283); Assistant Attorney General's Opinion of October 19, 1905 (34 L. D. 186), which concerned lands withdrawn March 9, 1903, under the reclamation laws. The Federal Government still retains control and dominion over the reserved sections—see *United States v. Elliott*, 41 Pac. 720 (1895); *Barkley v. United States*, 19 Pac. 36 (Wash., 1888); *United States v. Bisel*, 19 Pac. 251 (Mont., 1888).

⁶ Section 1 of the act of March 4, 1915 (48 U. S. C. sec. 353).

pretation of the term "public lands" as used in other acts has varied with the context and purpose of the statute in which it occurs and although those words ordinarily are used to designate such lands as are subject to sale or disposal under the general land laws, they are sometimes used in a larger and different sense.⁷ We think that might be true here, since the section 1(c) of the act specifically excepts from the applicability of the act, lands covered by certain enumerated kinds of withdrawals and provides for the disposal of other lands withdrawn in aid of a function of a Federal or Territorial agency with the consent of that agency.

The pertinent portion of the section 1(c) provides that:

Where the lands have been withdrawn in aid of a function of a Federal department or agency other than the Department of the Interior, or of a State, Territory, county, municipality, water district, or other local governmental subdivision or agency, the Secretary of the Interior may make disposals under this Act only with the consent of such Federal department or agency, or of such State, Territory, or local governmental unit.

In view of the consent requirement, before a lease may be issued for a reserved school section, it would be necessary that the consent of the proper agency of the Territory to the issuance be obtained. As the Territory may refuse or grant its consent, the consent, if given, may be conditioned upon the Territory being assured of receiving the amount of the rental.⁸ The section 2(b) of the act authorizes the Secretary to charge a "reasonable annual rental" and the regulations (43 CFR 254.8d) provide for such rental. The rental received by the Secretary under such a lease would be deposited in the United States Treasury for payment annually to the Territory pursuant to section 1 of the act of March 4, 1915 (48 U. S. C. sec. 353). When any specific questions arise over the applicability and effect of the act of June 4, 1954, we shall be glad to consider them.

Of course, a permit, lease, or withdrawal order cannot be issued for a reserved school section to the detriment of a lease issued by the Territory under the second provision of section 1 of the act of March 4, 1915, *supra*.

J. REUEL ARMSTRONG,
Acting Solicitor.

⁷ See *Kindred v. Union Pac. Ry. Co.*, 225 U. S. 582 (1912); *Newhall v. Sanger*, 92 U. S. 761 (1875); *Union Pac. Ry. Co. v. Karges*, 169 Fed. 459 (1909); *United States v. Blendauer*, 128 Fed. 910 (1904); *State of Utah*, 53 I. D. 365, 368 (1931).

⁸ See footnote No. 4.

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GARTH L. WILHELM ET AL.

A-27018

*Decided February 9, 1955***Rules of Practice: Appeals: Service on Adverse Party**

An appeal to the Secretary of the Interior will be dismissed where the appellant did not file, within the time prescribed by the Department's Rules of Practice, a certificate showing service of notice of appeal upon a party having an adverse interest and no service in fact was made upon the adverse party.

Rules of Practice: Appeals: Failure to Appeal—Homesteads (Ordinary): Final Proof

Where an entryman fails to appeal from the rejection of his final proof based upon his failure to comply with a condition improperly imposed upon him more than 2 years after the date of the register's receipt, he loses whatever rights he had under his final proof.

Homesteads (Ordinary): Mineral Reservation—Reclamation Homesteads: Generally

Where land within a reclamation homestead entry is reported to be prospectively valuable for oil and gas at and subsequent to the time when the entryman filed satisfactory reclamation final proof, it is proper to require the entryman to file a consent to a reservation in the United States of the oil and gas in the land covered by the entry.

Homesteads (Ordinary): Mineral Reservation

Where an entryman fails to appeal from the rejection of his final proof under which he would have been entitled to an unrestricted patent and the land is later reported to be valuable for oil and gas at and subsequent to the time when he later files another final proof, it is proper to require the entryman to file a consent to a reservation of the oil and gas to the United States in the land covered by the entry.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Garth L. Wilhelm has appealed to the Secretary of the Interior from a decision dated January 13, 1954, by the Assistant Director of the Bureau of Land Management which held that the lands in the reclamation homestead entry (Cheyenne 043849) of Frank L. Wilhelm, deceased, were valuable for oil and gas and therefore subject to the provisions of the act of July 17, 1914 (30 U. S. C., 1952 ed., secs. 121-123).

On April 29, 1918, Frank L. Wilhelm's homestead entry (Lander 010095, now Cheyenne 043849) was allowed for farm unit "B" or the NE $\frac{1}{4}$ NW $\frac{1}{4}$ and lot 1, sec. 18, T. 57 N., R. 97 W., 6th P. M., Wyoming, subject to the provisions of the Reclamation Act of June 17, 1902, as amended 43 U. S. C., 1952 ed., sec. 371 *et seq.*). Final proof of compliance with the provisions of the ordinary homestead law was accepted on March 20, 1923.

On April 19, 1927, the Bureau of Reclamation, at the request of the entryman, amended the farm unit plat of the township by the cancellation of farm unit "B" and establishment in lieu thereof of farm unit "N" (lot 1 and the NE $\frac{1}{4}$ NW $\frac{1}{4}$, sec. 18, and lots 3 and 4, sec. 7). The entry was conformed to farm unit "N" on July 6, 1927. On February 20, 1928, the proof of compliance with the homestead laws which had been accepted on March 20, 1923, was accepted as applying to the entry as conformed to farm unit "N".

Wilhelm filed final reclamation proof on January 17, 1929. After some intermediate proceedings, which are discussed later in this decision, the Commissioner of the General Land Office¹ on February 13, 1940, notified the register that, the entryman having failed to comply with a certain requirement imposed upon him by previous decisions, "the final affidavit of reclamation proof heretofore submitted is finally rejected, and the case closed, the homestead entry remaining intact of record, subject to future compliance with the law."

On February 8, 1941, Wilhelm again filed final reclamation proof. A final certificate dated February 7, 1941, was issued. On June 10, 1941, the Commissioner held the final reclamation proof and final certificate for cancellation subject to the submission of evidence that the entryman had paid all reclamation charges due on the date of the certificate. The entryman was notified by registered mail and made no response. Thereafter, on April 23, 1942, the Commissioner rejected final reclamation proof and canceled the final certificate.

It appears that Frank L. Wilhelm died intestate on or about November 14, 1944, leaving as his heirs his wife, Retta, and three children, Garth L., Homer S., and Lucille E. (Mrs. Lucille E. Goodman). Mrs. Retta Wilhelm died intestate on October 29, 1951, leaving as heirs the three children.

Pursuant to an application filed under the Mineral Leasing Act by Dorothy Fox Atfield on February 1, 1943, an oil and gas lease Cheyenne 067759, was issued effective January 1, 1946, for 1866.60 acres of land, including all of Wilhelm's entry. This lease is now in its extended term because of a discovery made on June 9, 1948, in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 6. The Sunray Oil Corporation and the Standard Oil Company are the present holders of this lease through assignment.

The land at issue is within the known geologic structure, undefined, of the Sage Creek field and also within the participating area of the Sage Creek unit agreement approved November 21, 1947. It appears that at least eight producing wells have been drilled within the unit area, two of which are on land in the Wilhelm entry, one in lot 4,

¹ Now the Bureau of Land Management.

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sec. 7, and the other in lot 1, sec. 18. Lots 3 and 4, sec. 7, were included within Petroleum Reserve No. 41, Wyoming 16, by Executive Order approved December 6, 1915.

By a decision dated January 13, 1954, the Assistant Director of the Bureau of Land Management held that—

the owner of the reclamation homestead entry is allowed 30 days from date of service of this decision within which to (1) consent to the reservation of oil and gas to the United States under the act of July 17, 1914 on the attached form, or (2) to apply for reclassification of the land as non-mineral, submitting a showing therewith and to apply for a hearing in the event that reclassification is denied, or (3) to appeal.

* * * * *

If an appeal is filed it must conform to the requirements of 43 CFR 221.75 and 221.76. The Sunray Oil Corporation constitutes an adverse party within the purview of the above regulations.

A copy of this decision was served upon Garth Wilhelm, as administrator of the estate of Frank L. Wilhelm, deceased, on February 2, 1954. Garth Wilhelm filed an appeal which was received by the Director of the Bureau of Land Management on March 1, 1954. But Wilhelm did not serve a copy of his appeal upon Sunray Oil Corporation as required by the Department's Rules of Practice (43 CFR, 1953 Supp., 221.75 (c)). Consequently, in accordance with the consistent rulings of the Department, Wilhelm's appeal must be dismissed. *John David Paine et al.*, A-26972 (July 26, 1954); *Charles D. Edmonson et al.*, 61 I. D. 355 (1954).

Even if the regulation as to appeals had been complied with, the appeal would not warrant any change in the Assistant Director's decision.

Upon the record as it now stands, the owner of the reclamation homestead has complied with the requirements of the ordinary homestead laws. However, before a patent can be issued for a reclamation homestead, the entryman must show compliance with the requirements of the reclamation act. *Floyd H. Wells*, A-26924 (August 17, 1954); *L. S. Strahan*, A-26716 (August 21, 1953); *Jean W. Richards*, A-26718 (June 30, 1953); 43 U. S. C., 1952 ed., secs. 439, 440; 43 CFR 230.46-230.48; 19 F. R. 9070.

Section 3 of the act of July 17, 1914 (30 U. S. C., 1952 ed., sec. 123), provides that where lands entered under the nonmineral land laws are subsequently reported to be valuable for oil and gas, the entryman may receive a patent, upon satisfactory proof of compliance with the laws under which the lands are claimed, but that the patent must contain a reservation to the United States of the oil and gas deposits.

The lands covered by the entry are not only within the limits of a producing oil and gas lease but two producing wells are located within the entry itself. These facts effectively dispose of the appellant's

contention that there is no evidence that the land is not prospectively valuable for oil and gas.

In these circumstances it is proper to require the appellant to file a consent to the reservation of the oil and gas to the United States.

There are, however, several other questions involved in the appeal which warrant discussion.

In a memorandum accompanying the record on appeal to the Secretary, the Director of the Bureau of Land Management expressed the view that upon review of the matter he was of the opinion that the heirs of Frank L. Wilhelm are entitled to an unrestricted patent. This view is based on the fact that on February 25, 1933, the Commissioner of the General Land Office held that Wilhelm should be issued an unrestricted patent. Since Wilhelm had been issued a register's receipt on January 17, 1929, he was entitled to a patent 2 years thereafter unless there was a contest or protest pending against the validity of the entry. 43 U. S. C., 1952 ed., sec. 1165. A contest was brought within the period allowed on the ground that land in the entry was known to be valuable for oil and gas at the time of final proof. This contest was finally terminated in the entryman's favor by the Commissioner's decision of February 25, 1933.

Thereafter, the Commissioner, first on August 18, 1933, and several times later, imposed another condition, the payment of \$5.93 in final commissions, upon the entryman, which had to be met prior to the issuance of a patent. More than 2 years having elapsed since the date of the register's receipt, the attempt to impose a condition not raised in a contest or protest within the 2-year period, was improper. *Milroy v. Jones*, 36 L. D. 438 (1908).

Nevertheless, the entryman did not appeal from any of the several demands made upon him to comply with this condition or to suffer the rejection of his final reclamation proof. Finally, as stated earlier, on February 13, 1940, the Commissioner rejected Wilhelm's final proof and closed the case.

Again Wilhelm failed to appeal. Instead on February 8, 1941, he filed a new final reclamation proof. A final certificate was issued to him dated February 7, 1941, which was later canceled on April 23, 1942, for failure of the entryman to file evidence that he had paid all reclamation charges on the date of the certificate. Wilhelm did not appeal from this decision.

Later oil and gas lease Cheyenne 067759 was issued to Mrs. Fox, covering this and other land.

These facts raise the question as to what consequences flow from Wilhelm's failure to appeal from an erroneous decision of the Commissioner. It is my opinion that Wilhelm's failure to appeal from either rejection of his final reclamation proofs deprives him of the

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right to an unrestricted patent now that the land has been proven to be valuable for oil and gas and an adverse interest has intervened.

In the recent case of *Charles D. Edmonson et al.*, 61 I. D. 355 (1954), it was held that:

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. This is so even though the right lost by the applicant was a preference right to enter land. [P. 362.]

In *Joseph Crowther*, 43 L. D. 262 (1914), it was held that the Department would not reopen any case under section 7 of the act of March 3, 1891 (43 U. S. C., 1952 ed., sec. 1165), which had been closed and the entry canceled and where the parties had not continuously thereafter prosecuted their claims, although the entries were erroneously canceled upon proceedings begun more than 2 years after the issuance of the register's receipt. See also *State of New Mexico et al. v. Robert S. Shelton et al.*, 54 I. D. 113, 117-121 (1932); *Louis M. Pozar*, 55 I. D. 485 (1936); *Charles Perkins* (On Rehearing), 50 L. D. 173 (1923).

These decisions furnish ample support and justification for holding that Wilhelm has lost whatever right he had to an unrestricted patent by his failure to appeal from the Commissioner's decision of February 13, 1940.

Another point which merits discussion is whether the entryman has a preference right to an oil and gas lease on the lands covered by his entry pursuant to section 20 of the Mineral Leasing Act (30 U. S. C., 1952 ed., sec. 229). It is clear that he has none as to lots 3 and 4, sec. 7, for the reason that this part of the entry was in Petroleum Reserve No. 41, approved December 6, 1915, prior to the date of the original entry. *Bourdieu v. Pacific Oil Company*, 299 U. S. 65 (1936); rehearing denied, 299 U. S. 622 (1936); *Schneider v. Forster*, 49 L. D. 610 (1923). Furthermore lots 3 and 4 were added to the entry in April 1927, after the enactment of the Mineral Leasing Act and thus too late to entitle the entryman to a section 20 preference right. 43 CFR 192.70, 19 F. R. 9016; *Charles R. Haupt*, 47 L. D. 588 (1920); 48 L. D. 355 (1921); *Thomas Roselle v. Harry R. Harn et al.*, 60 I. D. 167 (1948).

The situation is not clear as to the original entry, lot 1 and the NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 18. As yet there is no conclusive evidence that the entryman waived his preference right. However, in the present state of the record, it is not necessary to determine this point. The entry is now held by Edna F. McMillan under a certificate of purchase for

delinquent taxes. Until Garth Wilhelm exercises his right to redemption and files a mineral waiver, he will not, in any event, be entitled to a preference right. Therefore until Wilhelm is in a position to claim a preference right, if he has one, a decision on that point would be premature.

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. This leaves in effect the Assistant Director's decision of January 13, 1954, requiring Wilhelm to file an oil and gas waiver.

J. RUEEL ARMSTRONG,
Acting Solicitor.

February 11, 1955

HENRY PETZ

MARY B. WILSON, ADMINISTRATRIX OF THE ESTATE OF FRANK H.
WILSON

A-27017

Decided February 11, 1955

Grazing Leases: Cancellation—Public Sales: Generally

The existence of a grazing lease will not bar the disposal, in accordance with the general authority of section 7 of the Taylor Grazing Act, of the leased land through public sale as an isolated tract; and the grazing lease may be canceled in order to effect such disposal.

Grazing Leases: Cancellation

A determination by the manager of the amount of compensation to be paid to a grazing lessee for his improvements upon the cancellation of his lease will not be disturbed where it is accurate and reasonable; however, an award of compensation for the loss of grazing use should be reexamined where in fact the lease has been allowed to run for its full term and the lessee has not apparently suffered any loss of grazing use.

Administrative Practice—Notice

A statement by the Acting Director, Bureau of Land Management, in a decision approving an application for public sale of an isolated tract, that the grazing lessee on that tract would be given personal notice of the time and place of the sale (apart from the usual general notice by publication and posting) was properly construed as the extension of a courtesy and not as the conferring of a right, there being no law or regulation requiring such personal notice.

Words and Phrases

Adjoining lands. The term "contiguous land" used in the first proviso of section 2455 of the Revised Statutes, as amended, does not include "cornering" lands, since in the administration of the public land laws the terms "contiguous" or "adjoining" lands have been consistently defined and construed to exclude "cornering" lands.

Words and Phrases

Contiguous lands. The term "contiguous land" used in the first proviso of section 2455 of the Revised Statutes, as amended, does not include "cornering" lands, since in the administration of the public land laws the terms "contiguous" or "adjoining" lands have been consistently defined and construed to exclude "cornering" lands.

Public Sales: Preference Rights

One who owns land merely touching the corner of an isolated tract is not entitled to the preference granted by the first proviso of section 2455 of the Revised Statutes, as amended, to the owners of land contiguous to the isolated tract offered.

Public Sales: Preference Rights

A person has no preference right in connection with a public sale of an isolated tract merely because he holds a grazing lease on the tract to be sold.

Public Sales: Applications

A defect in an application for the public sale of an isolated tract does not affect the validity of the sale thereafter held since the filing of an application is not a prerequisite to the holding of the sale.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On November 26, 1946, an 80-acre tract described as the W $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 7, T. 33 N., R. 63 W., 6th P. M., Wyoming, was offered at public sale as an isolated tract pursuant to section 2455 of the Revised Statutes, as amended (43 U. S. C., 1952 ed., sec. 1171). Frank H. Wilson, who had filed application for this sale on December 4, 1944, was the only bidder and bid the appraised price of \$320. At the time of the sale, Henry Petz held a 10-year grazing lease (Cheyenne 069840) covering the land involved. This lease was issued as of September 25, 1944, pursuant to section 15 of the Taylor Grazing Act, as amended (43 U. S. C., 1952 ed., sec. 315m), and the then applicable regulations (43 CFR, 1940 ed., Part 160; 43 CFR, Cum. Supp., Part 160). It was renewed for an additional 10 years on September 25, 1954.

The fact that the land involved was and is under lease to Mr. Petz did not and does not impose any legal bar to the final disposal of the land pursuant to public sale.¹

Because final certificate and patent could issue to Mr. Wilson only after his reimbursement of Mr. Petz for the reasonable value of the latter's grazing improvements on the land and, during the term of the original lease, for the reasonable value of any injury caused by the loss of the leasehold due to the sale of the land,² the manager of the land office at Cheyenne, in a letter to Messrs. Petz and Wilson dated November 29, 1948, urged the two men to agree on an amount of compensation which should be paid to Mr. Petz. Such an agreement was not forthcoming; consequently, by a decision dated September 17, 1953, the manager, on the basis of a field examination of the land, fixed the value of the compensation to be paid Mr. Petz at \$488.46 and also set the time allowed for payment or an appeal by either party.³

Mr. Petz refused tender by Mrs. Mary Wilson, administratrix of the estate of Frank Wilson, and appealed to the Director, Bureau of

¹ Section 2 (d) of Mr. Petz' original grazing lease and section 2 (e) of the renewed lease reserve to the United States the right to dispose of the leased land in accordance with section 7 of the Taylor Grazing Act (43 U. S. C., 1952 ed., sec. 315f), and the lease may be canceled in order to dispose of the leased land through public sale. *Ira L. Partin*, A-26839 (March 26, 1954); *Clara Dickson et al.*, A-26744 (October 5, 1953); *A. T. Hobson, Woodrow Carey*, A-26140 (June 28, 1951). See 43 CFR, 1940 ed., 160.22 and 43 CFR 160.12.

² Provision for this occurs in 43 CFR, 1940 ed., 160.22 and in section 2 (d) of the original grazing lease. 43 CFR 160.12 (19 F. R. 8953), applicable at the time of the renewal of Mr. Petz' grazing lease, however, limits the extent of compensation to grazing improvements on the land.

³ 43 CFR, 1940 ed., 160.22; 43 CFR 160.12 (19 F. R. 8953).

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Land Management. In that appeal, Mr. Petz contested not only the adequacy of the amount of \$488.46, the sole matter with which the manager's decision was concerned, but also, on various grounds, the validity of the public sale.

In a decision dated March 1, 1954, the Acting Assistant Director, Bureau of Land Management, affirmed the decision of the manager as to the adequacy of the compensation to be paid Mr. Petz. At the same time, he answered and rejected the several arguments put forward by Mr. Petz against the validity of the public sale.

Mr. Petz now brings this appeal to the Secretary of the Interior and contends generally that the public sale should be set aside as illegal. In any event, he avers, the amount of compensation allowed should have been \$1,087.50, instead of \$488.46.

With respect to the fixing of the amount of compensation payable to the appellant as a grazing lessee, the regulations cited in footnote 2 clearly provide that the amount of compensation to be paid to the appellant shall be determined by the Department when, as has happened here, the private parties involved have not been able to settle the amount by agreement. The manager's fixing of the amount at \$488.46 in his decision of September 17, 1953, in accordance with a field examination report of the land, was in full conformity with the regulations just referred to. There is no evidence that the fixing of the particular amount was arbitrary or capricious. On the contrary, the report of field examination, dated September 12, 1951, which recommended the amount subsequently allowed, appears thorough, accurate, and reasonable.

However, one item of the settlement list drawn up in the field examination report is questionable. That item runs as follows:

Loss of grazing use from September 25, 1944 to September 25, 1948, 80 acres at \$.03 per acre per annum for 4 years - - - \$9.60.

Any loss of grazing use should be evaluated on the basis of the actual time, if any, during which the appellant might have been deprived of the use of the land within his leasehold. From the fact that the appellant has continued as the lessee for the full term of 10 years it is not clear why the appellant should have suffered any loss of grazing use during the original term of the lease.⁴ Except as the Bureau of Land Management may revise the foregoing item upon further study, the amount of compensation to the appellant which was fixed by the manager is approved.

As in his appeal to the Director, the appellant again asserts that he had a right to direct, personal notice of the time and place of the impending public sale of the land embraced by his grazing lease. He

⁴ See footnote 2, *supra*.

is not disputing the fact that publication and posting of notice were duly made as required by 43 CFR, 1940 ed., 250.8, 250.9. This notice contained the following paragraph:

Any persons claiming adversely the above-described land are advised to file their claims, or objections, on or before the time designated for sale.

Mr. Petz is referring, rather, to a decision, dated September 16, 1946, by the Acting Director, Bureau of Land Management, in which Mr. Wilson's application for public sale was allowed, and to the following statement taken from that decision: "The grazing lessee will be notified of the time and place of sale."

In the appellant's view the Director had authority to order such direct notification of the grazing lessee; and, accordingly, this order became a condition precedent to a valid sale. It follows, the appellant argues, that failure to give such direct notification would be prejudicial and would nullify the sale. The appellant says that he did not receive any such direct notice, and there is nothing in the record to contravene this.

There is, of course, no specific statutory requirement that such direct notice of a proposed public sale be given to anyone. The applicable statute authorizes the Secretary to order the sale of isolated tracts "after at least thirty days' notice by the land office of the district in which such land may be situated:" (43 U. S. C., 1952 ed., sec. 1171). There can be no question that the "thirty days' notice" referred to means notice by publication and posting. This has been the long-standing and unvarying interpretation which the Department has given that language in its regulations,⁵ and no broader authoritative interpretation of this language has been found. There is no requirement in the Department's regulations that, in addition to notice by publication and posting, direct, personal notice must be given to potentially interested parties.

Whatever potential significance it might otherwise have had, the statement made in the decision of September 16, 1946, has been construed as to its import and effect by the Bureau of Land Management in the Acting Assistant Director's decision of March 1, 1954. Here it is expressly denied that the statement was intended to have the import and effect which the appellant claims it has. Rather, the decision describes the statement as being "in the nature of a courtesy and not required by applicable law and regulations." The Department con-

⁵ Cf. Circulars: April 11, 1895, 20 L. D. 305, 306; July 3, 1905, 34 L. D. 14; July 18, 1906, 35 L. D. 44; May 16, 1907, 35 L. D. 581, 582; December 27, 1907, 36 L. D. 216, 218; June 6, 1910, 39 L. D. 10, 12; December 18, 1912, 41 L. D. 443, 446, 447; July 17, 1913, 42 L. D. 236, 239; January 11, 1915, 43 L. D. 485, 488; No. 684, April 16, 1920, 47 L. D. 382, 385, 386; Rev. of No. 684, February 25, 1926, 51 L. D. 357, 359, 360; Rev. of No. 684, April 7, 1928, 52 L. D. 340, 344; Rev. of No. 684, November 23, 1934, 55 I. D. 76, 79; 43 CFR, 1940 ed., 250.8, 250.9. Cf. also 69 Cong. Rec. 2090.

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curs in that interpretation, for it appears both reasonable and permissible.⁶ As such an administrative interpretation, it becomes controlling.⁷ Accordingly it is held that the alleged failure to give direct, personal notice of the sale to the appellant does not infringe any legal right of the appellant or violate any law and, consequently, that it does not cast any doubt on the validity of the sale.

The appellant next contends that his letter of December 20, 1946, to the Acting Manager of the land office at Cheyenne, Wyoming, was an assertion, within a period of 30 days from the date of sale, of a preference right under the public sale law. He undoubtedly refers to the preference granted to the owners of land contiguous to the isolated tract offered for sale to purchase the land at the highest bid or at three times the appraised price, whichever is lower, such preference right to be asserted before 30 days from the date of receipt of the highest bid (43 U. S. C., 1952 ed., sec. 1171; 43 CFR, 1944 Supp., 250.17, 250.20 and 43 CFR, 1940 ed., 250.18, 250.19).

Even if the appellant's letter of December 20, 1946, could be construed as an assertion of a preference right, the appellant is not entitled to such a right. Since the preference right is extended only to owners of "contiguous" land, the appellant, whose land merely corners on the tract offered at sale, does not enjoy a preference right. It is well established that "cornering" land is not "contiguous" or "adjoining" land.⁸

The appellant may be contending that because he has a grazing lease on the tract sold, he is entitled to a preference right from that

⁶ The practice, one not required by law or regulation, of sending expiration notices to holders of oil and gas leases has been held to be "merely * * * a matter of courtesy and advice" and not a matter of right or entitlement. *Clifford M. Irvin, A-25663* (November 10, 1949); *Hugh B. E. Brown, A-24077* (November 13, 1945).

⁷ The administrative construction of a regulation has controlling weight unless plainly erroneous or inconsistent with the regulation itself. *Bowles, Price Administrator v. Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945). See also *Chapman v. Sheridan-Wyoming Coal Co., Inc.*, 338 U. S. 621, 631 (1950), wherein it was held that a particular interpretation by the Secretary of one of his own regulations was "permissible, even if not inevitable" and that therefore the courts could not interfere. In respect of the function and effect of departmental interpretation, there seems no reason to treat an official statement of proposed agency action as being different from an administrative regulation.

⁸ The current regulation which deals with the preference right of owners of contiguous land under section 2455 of the Revised Statutes, as amended, expressly declares that the preference right is not extended to the owners of cornering lands (43 CFR 250.11 (b) (19 F. R. 9117)). This declaration appeared first in the regulations as revised November 19, 1947 (43 CFR, 1947 Supp., 250.11 (b)), a year after the date of the public sale in this case. Nevertheless, in view of the great number of instances in which the word "contiguous," as used in the public land laws, has been authoritatively defined or construed in contradistinction to "cornering," it is quite obvious that, even without the specific declaration in the amended regulations of 1947, the term "contiguous land" as used in the first proviso of section 2455 of the Revised Statutes, as amended, was never intended to include cornering land. *William I. Moore et al.*, 60 I. D. 227 (1948). See *Ruth Cynthia Kress, A-25349* (August 6, 1948); *H. Glendon Culverwell, A-24076* (March 7, 1946); *George H. Snodgrass, A-24038* (October 3, 1945); *Hugh Miller*, 5 L. D. 633 (1887). See also *The Swan Company v. Alfred and Harold Banzhaf*, 59 I. D. 262, 267 (1946); 43 CFR 160.3 (footnote 1) (19 F. R. 8952); 43 CFR 167.12 (19 F. R. 8977); 43 CFR 250.6 (b) and 250.7 (b) (19 F. R. 9116); 43 CFR 250.11 (b) (19 F. R. 9117).

fact alone. However, there is nothing in the statute authorizing the sale of isolated tracts which gives a grazing lessee preference, merely because of his lease, to purchase such a tract offered at public sale. *Henry Petz*, A-26787 (October 22, 1953).

A further point on which the appellant has appealed is that Mr. Wilson's original application for public sale of the tract in question (filed December 4, 1944) contained an erroneous description of the land, and also that his application contained a false statement. The short answer to this contention is that the public sale law does not require the filing of an application as a prerequisite to the offering of land at public sale. The Secretary has authority to offer land for sale on his own motion (43 U. S. C., 1952 ed., sec. 1171). Consequently, a defect in an application for sale does not afflict a sale with invalidity.⁹

The appellant has also questioned whether Mary B. Wilson (now Mary B. Wilson Shepard), administratrix of the estate of Frank H. Wilson, is the latter's lawful successor in interest with respect to his rights under the public sale. But this is not a question which has any relevance to the existence of the property right acquired through that sale, or to the ultimate disposition of that right through the probate of Mr. Wilson's estate.

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), except as the Bureau of Land Management may, in accordance with this decision, revise the amount of compensation properly due the appellant for any loss of grazing use during the term of his original lease, the decision of the Acting Assistant Director, Bureau of Land Management, is affirmed.

J. REUEL ARMSTRONG,
Acting Solicitor.

HERMA WERNER IRVINE

A-27031

Decided February 15, 1955

Public Sales: Preference Rights

Where preference right claims are asserted for two tracts of land offered at public sale by a father on behalf of his daughter, who was the applicant for the sale and who asserted in her application that she owned land contiguous to one of the tracts, the preference right claims are properly disallowed where it appears that such contiguous land is owned by a family

⁹ It might be noted, incidentally, that the typographical error in Mr. Wilson's original application for public sale was duly corrected and also that there is evidence in the record to indicate that the statement in Mr. Wilson's application which the appellant has questioned was substantially true or at least that on December 1, 1944, the applicant Wilson had good reason to believe the statement to be true.

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corporation and that the only land contiguous to the other tract is owned by the father in his own name.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Herma A. Werner (now Mrs. Herma Werner Irvine) filed an application requesting that two isolated tracts of land be offered at public sale pursuant to section 2455 of the Revised Statutes, as amended (43 U. S. C., 1952 ed., sec. 1171). One tract consisted of sec. 14 and the other tract of the N $\frac{1}{2}$ and the N $\frac{1}{2}$ S $\frac{1}{2}$ of sec. 2, T. 35 N., R. 75 W., 6th P. M. The applicant stated that she was the owner of adjoining land, describing such land. In fact, the adjoining land described is contiguous only to sec. 14 and not to any part of the land applied for in sec. 2.

On the day of the sale, October 21, 1952, Herman Werner appeared for the applicant and bid on both tracts. Stanley J. Hoskovec also appeared and matched Mr. Werner's bids. Mrs. Irvine and Mr. Hoskovec were declared to be the high bidders in a decision of the same date, and 30 days were allowed for the assertion of preference right claims to purchase the land. Within the 30-day period, Mr. Hoskovec filed a statement that he had bid on behalf of his two sons, James J. and William B. Hoskovec, the bid on the tract in sec. 2 being for James and the bid on sec. 14 being for William. There were also filed within the 30-day period proof of the ownership by James and William, respectively, of land adjoining secs. 2 and 14, respectively. Also within the 30-day period, William J. Smith asserted his preference right to the tract in sec. 2 and matched the bids for that tract. Mr. Smith submitted proof of his ownership of contiguous land.

The parties having failed to agree on a division of the tracts among themselves, the case was submitted to the Regional Administrator for a determination pursuant to the regulation in force at the time (43 CFR 250.11 (b) (3)). The Regional Administrator noticed that there was no evidence showing that Mrs. Irvine owned any land contiguous to the tract in sec. 2. Thereupon, the manager of the Cheyenne land and survey office on May 5, 1953, allowed Mrs. Irvine 15 days to submit such evidence. Mrs. Irvine received the request but failed to respond.

On August 20, 1953, the Acting Regional Administrator made his determination, dividing the tract in sec. 2 between Mr. Smith and James J. Hoskovec and sec. 14 between Mrs. Irvine and William B. Hoskovec.¹ The manager issued a decision on August 26, 1953, effecting this determination.

¹ Mr. Smith received the NE $\frac{1}{4}$ (lots 1 and 2, S $\frac{1}{2}$ NE $\frac{1}{4}$) and the N $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 2; James Hoskovec received the NW $\frac{1}{4}$ (lots 3 and 4, S $\frac{1}{2}$ NW $\frac{1}{4}$) and the N $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 2.

Mrs. Irvine was awarded the E $\frac{1}{2}$ and William Hoskovec the W $\frac{1}{2}$ of sec. 14.

Mrs. Irvine appealed from the manager's decision with respect to the award of the tract in sec. 2. She submitted with her appeal an affidavit by the county assessor showing that sec. 35, T. 36 N., R. 75 W., which adjoins sec. 2, is owned in fee by her father, Herman Werner, that several sections of land adjoining sec. 14 on three sides are owned by Werner, Inc., a Wyoming corporation, and that Werner, Inc., is a family corporation the stock of which is owned by Herman Werner, Herma Werner Irvine, and Grace A. Werner.

On March 29, 1954, the Acting Assistant Director of the Bureau of Land Management not only affirmed the manager's award as to the land in sec. 2 but revoked the award to her of the E $\frac{1}{2}$ sec. 14. Mrs. Irvine thereupon appealed to the Secretary.

The Acting Assistant Director's decision was based on the fact that Mrs. Irvine did not own any land contiguous to sec. 14 or to the tract in sec. 2, the land contiguous to sec. 14 being owned by Werner, Inc., and the land contiguous to sec. 2 being owned by her father. In her appeal, Mrs. Irvine states that the Werner family has been engaged in the livestock business for more than 40 years; that in all the ranching operations all the land owned by the family has been utilized for the common good of the family and considered as a single unit, regardless of legal ownership; that at the time the application for public sale was made, the title to some of the lands of the Werner family was in the name of Herman Werner, Herma Werner, and the Slaughter-Patzold Sheep Co., but all the lands were utilized as though they were owned by a single ownership; that, as a matter of convenience in handling the operations of the family unit, all the lands in the vicinity were conveyed to Werner, Inc., a family corporation whose only stockholders and officers were the members of the Werner family, and all questions of management were left to Herman Werner and his daughter, who own all the stock equally in the company except for a qualifying share given to Grace A. Werner, the mother of the appellant and wife of Herman Werner; and that the Werner family, since the application for public sale, purchased sec. 35, the land adjoining the tract in sec. 2. The appellant also asserts that the tract in sec. 2 connects lands to the north and south owned by the family and that to deprive the family of any part of the tract in sec. 2 will break the connection between the family holdings to the north and south.

Section 2455 of the Revised Statutes, as amended (*supra*), provides:

* * * That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants,

* * *

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The regulations of the Department in effect at the time of the sale provided that:

The owners of contiguous lands have a preference right, for a period of 30 days after the highest bid has been received, to purchase the land offered for sale * * *. Such preference right may also be asserted at any time prior to the commencement of such period. * * * [43 CFR 250.11 (b).]

The statute clearly provides that only the owner of contiguous land has a preference right to purchase the land; and both the statute and the regulations contemplate that, within the period allowed for asserting preference right claims, a claim must be asserted on behalf of any owner of contiguous land who desires to assert a claim. A claim asserted after the period expires cannot be considered as a preference right claim. *Charles H. Hunter*, 60 I. D. 395 (1950).

Disregarding the claims of the Hoskovecs and William J. Smith, what claims were asserted in this case? In her application, Mrs. Irvine asserted a preference right claim only in her own name and only with respect to sec. 14. She stated that she was the owner of land contiguous to sec. 14. At that time, according to her appeal, sec. 35, the land contiguous to the tract in sec. 2, had not yet been acquired. The next claim that was asserted was on the day of the sale. According to the memorandum of the sale prepared by the manager on October 21, 1952:

At the time set for the sale, Mr. Herman Werner, Ross Wyoming appeared for the applicant and offered a bid of the appraised price of \$8.00 an acre for the tract in sec. 2.

* * * * *

Mr. Werner then offered a bid of \$8.25 an acre, for the applicant, for the land in sec. 14.

* * * * *

Each of the above, Werner (for the applicant), and Hoskovec claim ownership of lands adjoining each of the above tracts.

No other claim with respect to the appellant was asserted within the 30-day period, and, as stated above, she subsequently failed to respond to the manager's request of May 5, 1953, for evidence concerning her ownership of land contiguous to the tract in sec. 2.

It is now established that Mrs. Irvine was not the owner of land contiguous to sec. 14 or to the tract in sec. 2 and that only Werner, Inc., and Herman Werner were the owners of such contiguous land. Neither the corporation nor Mr. Werner asserted a preference right claim in its or his own name and no such claim was asserted on behalf of either within the time required. It would seem clear therefore that neither Mrs. Irvine, Mr. Werner, nor Werner, Inc., has any preference right claim to either of the two tracts offered for sale.

The only factor that might cast doubt on this conclusion is the assertions as to the family nature of the Werner ranch operations

and of Werner, Inc. In other circumstances, the Department has been liberal in recognizing preference right claims. Thus, in *Fred A. Van Horn et al.*, A-26316 (May 2, 1952), where an applicant for public sale who had claimed to be the owner of adjoining land turned out to hold the land only as a tenant in common with his wife, the Department allowed his preference right claim upon a showing that he had acted on behalf of his wife. In *Hans Ewoldt et al.*, A-26171 (December 27, 1951), where the adjoining land was owned by the public sale applicant's father but the applicant and his father were in partnership, the Department held that the partnership should be considered as having applied for the sale and that it was a qualified preference right claimant. And, in *Allen E. Weathers et al.*, A-25128 (May 27, 1949), where a bidder at the sale did not own land adjoining the tract awarded to him but his son owned adjoining land which was operated as a family ranch and which the son was willing to convey to the father, the Department held that it would be appropriate to allow the father, following such conveyance, to assert a preference right claim to the land awarded to him. See also *Tollef N. Iverson et al.*, 59 I. D. 108 (1945), and *Louis Olson et al.*, A-24143 (1946).

On the other hand, in *William I. Moore et al.*, 60 I. D. 227 (1948), the Department took a more stringent view. William I. Moore applied for the public sale of two tracts of land, stating that he owned adjoining land and that he was acting on his own behalf. On the day of the sale, he bid on the land. However, on the same day "Moore Sheep Co. By Wm. I. Moore Ass't Sec." filed a nonmineral affidavit in which the entity was described as the applicant for the sale. Later, within the preference right period, Leroy Moore, on behalf of Moore Sheep Company, asserted a preference right claim, stating that William Moore had acted on behalf of the company. In another matter, involving grazing lease applications, William I. Moore had denied that he had any connection with the Moore Sheep Company. Because of the inconsistencies in the two matters with respect to William Moore's relationship with the company, further information was requested by the Department. A response was made that William Moore was a shareholder in, and assistant secretary of, the company, which was a family corporation. It was also stated that William Moore had applied for the sale on his own behalf, expecting to buy the land at a nominal amount, but that, when he learned there would be competitive bidding at the sale, he took the matter up with his father (Leroy Moore) who instructed him that, if the bidding got too high, he should bid on behalf of the company; and that, therefore, up to a certain point in the bidding he was acting for himself, thereafter for the company. The Department said with respect to this explanation—

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The explanation is inadequate. The original application and affidavit of William I. Moore referred to lands which he claimed to own and which are contiguous to the lands that he requested the Department to place on sale. The record is now clear that the lands which William I. Moore claimed to own were actually owned by the Company. This, coupled with the representation as to the various capacities in which William I. Moore bid on the lands at public sale, casts doubt upon the degree of his interest and of the corporation's interest in both the grazing lease and the public-sale cases. Where their interests separate and where they coalesce, where William I. Moore acts on his own behalf, and where he assumes the role of agent for the Company, are questions for which this Department is not obligated to discover true answers. It is enough that neither the United States nor other applicants for the public lands shall be prejudiced by the conduct of William I. Moore and the Company in causing confusion as to the relationship between them. [*William I. Moore et al., supra*, p. 230.]

The Department held that, as to one tract of land on which another preference right claimant had bid, William I. Moore would be deemed to have asserted a preference right personally and that, as he personally did not own any contiguous land, the tract would be awarded to the other preference right claimant. The second tract was awarded to the company as it was the only preference right claimant for that land.

The facts in the decisions just discussed are not identical with those in the immediate proceeding. The cases therefore are not controlling. However, although it might be argued that the reasoning in the cases first discussed should be extended to the case under consideration so as to support a recognition of a preference right on the part of Werner, Inc., Herman Werner, or the appellant, it is my opinion that the view expressed in the *Moore* decision should be extended to this case. In other words, I see no reason why the Department should be obligated to pierce into the relationships of Werner, Inc., Herman Werner, and the applicant in order to develop a rationale for converting the defective preference right claims which were asserted by Mr. Werner and the appellant into a proper preference right claim from which the appellant can benefit. It would have been the easiest thing for Mr. Werner to assert a preference right claim in his own name for the tract in sec. 2 and, as an officer of Werner, Inc., to assert a claim on behalf of the corporation to the land in sec. 14. Because, for reasons which are not disclosed, he asserted a claim to both tracts only in the name of the appellant, who is not the legal owner of any contiguous land, it is difficult to perceive any sound basis for the Department's attempting to develop a theory which would justify a recognition of a preference right on the part of the appellant.

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 Assistant Director of the Bureau of Land Management is affirmed.

J. REUEL ARMSTRONG,
Acting Solicitor.

FORMER STATE LEASES BISECTED BY THE PRESENT STATE LINE DIVIDING THE SUBMERGED LANDS FROM THE OUTER CONTI- NENTAL SHELF

Outer Continental Shelf Lands Act: Boundaries—Outer Continental Shelf Lands Act: Oil and Gas Leases

A former State lease which was divided into two parts by operation of the Submerged Lands and Outer Continental Shelf Lands Acts does not continue as a single lease subject to its original terms. Instead the portion of the former lease situated on the outer Continental Shelf bears a later effective date, is subject to different terms as to royalties and its primary term will expire at a later date than the portion situated within the State boundaries. It is, therefore, a separate and distinct lease to which the terms of the former State lease, to the extent that they apply, apply separately.

Outer Continental Shelf Lands Act: Oil and Gas Leases

Former State leases which qualify as to part of the acreage under the Outer Continental Shelf Lands Act are subject to rental payments to the United States only for the acreage which is qualified. Where such rentals are on a lump-sum basis they should be prorated. Royalties in such case are due the United States only on account of production from the outer Continental Shelf lease. The payment of royalty to a State from production elsewhere does not affect the lessee's obligation to the United States.

M-36259

FEBRUARY 18, 1955.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

You have asked me to define as a matter of law the obligations to the United States of the owners of leases lying partly on State submerged land and partly on the outer Continental Shelf with respect to royalty, rental, and other payments under the lease.

You state that out of a total of 404 State leases off Texas and Louisiana filed with requests for determination by the Secretary under section 6 of the Outer Continental Shelf Lands Act, a substantial number lie partly on the outer Continental Shelf and partly within the State boundary. Thus, out of 300 such leases off Louisiana, approximately 50 appear to lie partly within the submerged lands area and partly upon the outer Continental Shelf. Of these, 35 are non-producing, rental paying leases, 7 are producing within the State area, 6 are producing from the outer Continental Shelf and 2 are producing

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from an area which may develop to be either State or outer Continental Shelf lands. There are other leases off the coast of Texas which are similarly situated but none of which is producing.

The primary question is whether each of these leases (and other leases off the coast of Texas or other States) constitutes a single lease by two landowners, each owning a separate parcel or two separate and distinct leases, one for each separately owned parcel. Upon the answer to this question may depend the nature and extent of the obligations of the lessees to the two lessors and to whom and in what manner payments of royalties and rentals are to be made. Although the answer to your question will apply generally, the leases off the State of Louisiana are the only leases which include in their number both producing and nonproducing leases. Therefore, in order to cover all points that may be raised, the discussion will center upon those leases. They were originally issued by that State at various dates prior to June 5, 1950, and were, on that date, "in force and effect in accordance with its [their] terms and provisions and the law of the State issuing it [them]."¹ If each portion is equally subject to the terms of the original lease and if each relates back to the date of issuance of that lease and will continue for the same term of years or by reason of production from any part of either as contemplated by the terms of that lease, then the rule as to the payment of rentals, etc., may differ from the rule that would apply if each is a separate lease.

In considering the primary question we begin with the premise that the issuance of these leases by the State was wholly without authority and the leases were void *ab initio* because the State did not own the land. (*United States v. Louisiana*, 340 U. S. 899.) Hence, there was no valid lease in any of these cases until they were made so either by the Submerged Lands Act of May 22, 1953 (67 Stat. 29; 43 U. S. C. 1952 ed., Supp. I, sec. 1301), or by the Outer Continental Shelf Lands Act of August 7, 1953 (67 Stat. 462; 43 U. S. C., 1952 ed., Supp. I, sec. 1331).

Under the rule of estoppel the Submerged Lands Act by granting the lands to the State would have operated to validate the State's portion of the lease pursuant to the rule that one who conveys an interest in land which he does not own, if he should thereafter acquire the title, may not question his own prior conveyance. Tiffany, *Landlord and Tenant* (1912), page 422, section 76. This is the rule in *Louisiana v. Allison*, 196 La. 838, 850, 851, 200 So. 273 (1941); and as to leases; *Angichiodo v. Cerami*, 35 F. Supp. 359, 370 (W. D. La., 1940), *aff'd* 127 F. 2d 848, 852 (5th Cir. 1942). However, there is no need to rely upon

¹ Quoted from section 6 of the Outer Continental Shelf Lands Act.

the doctrine of estoppel, for the Submerged Lands Act in terms makes the grant of the submerged lands to the State subject to the lease in all cases where the lessee makes all payments due within 90 days after the date of the act in the manner and to the extent specified therein. Thus, by the specific terms of that act that portion of the lease became a valid lease as of the date of the act if the terms of that act were complied with.

Section 6 of the Outer Continental Shelf Lands Act similarly made the part of the lease on the outer Continental Shelf valid at least from the date of that act subject to a similar provision for the payment of all sums then due and to a determination by the Secretary that certain other requirements specified in that section were satisfactorily met by the lessee within the time specified therein. The rule of estoppel would not apply to the United States here and no general provision of law would validate the Federal portion of the lease. Possibly section 6 could be construed as an adoption of the State lease but if so it would not relate back. See C. J. S. 1071 (Agency section 34). Again the United States might have ratified the outer Continental Shelf portion,² but even if the decisions holding that the real owner may ratify a lease

² Some cases held that a landowner can ratify a lease on his land, given by a stranger in the latter's own name as lessor. *United Realty & Mortgage Co. v. Stoothoff*, 133 App. Div. 245, 117 N. Y. Supp. 483 (1909); *Anderson v. Connor*, 43 Misc. 384, 87 N. Y. Supp. 449 (1904); *Texas Co. v. Aycock*, 190 Tenn. 16, 227 S. W. 2d 41 (1950). Several cases involving oil and gas leases are to the same effect, *Parten v. Webb*, 197 La. 197, 203-211, 1 So. 2d 76 (1941) (sublease by lessee whose lease had expired, ratified by owner of part of mineral interest); *Liles v. Barnhart*, 152 La. 419, 426-427, 93 So. 490 (1922) (owner of undivided one-fifth mineral interest elected to sue in tort); *Liles v. Teasas Co.*, 166 La. 294, 296, 117 So. 229 (1928) (same facts; election in previous case prevented recovery here of royalties received in period as to which tort recovery was barred by limitations). Similarly, as to a part owner, *Turner v. Hunt*, 131 Tex. 492, 495, 116 S. W. 2d 688 (1938). Such ratification does not create a new, separate lease as to the ratifying owner, but rather ratifies the original lease as an entirety, so that it comes within the general rule as to joint leases by adjoining owners, that development on the land of one will maintain the lease as to all, *Herring v. United Gas Public Service Co.*, 153 So. 710 (La. App., 1934); *Magnolia Petroleum Co. v. Storm*, 239 S. W. 2d 437 (Tex. Civ. App., 1951), writ refused, no reversible error, 149 Tex. 690. Cases involving distribution of royalties have similarly spoken of this as ratification, though with varying results. *Hamilton v. McCall Drilling Co.*, 131 W. Va. 750, 50 S. E. 2d 482 (1948) (royalties apportioned, following the general rule for joint leases by adjoining owners); *Harris v. Wood County Cotton Oil Co.*, 222 S. W. 2d 331 (Tex. Civ. App., 1949), writ refused, no reversible error, 148 Tex. 637 (general rule of apportionment distinguished, since here original lessor, thinking he owned all the land, never intended to share royalties on land he did own); *Seal v. Banes*, 183 Okla. 203, 80 P. 2d 657 (1938) (general rule of apportionment similarly distinguished; court also relied on fact act of ratification did not show intent to apportion royalties, and on subsequent conduct of parties); *Herring v. United Gas Public Service Co.*, 153 So. 710 (La. App., 1934) (apportionment refused, following what was said to be the Louisiana rule for joint leases by adjoining owners, even though the act of ratification specified royalties should be apportioned); *Louisiana Canal Co. v. Heyd*, 189 La. 903, 181 So. 439 (1938) (royalties apportioned, where facts made drilling unlikely on land of ratifying owner, so court inferred he would not have joined in lease originally on any other basis). In none of the foregoing cases is there any discussion of the general rule that no one can ratify an act which did not purport to be done in his name.

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given by a stranger to the title were in the majority, the Outer Continental Shelf Lands Act shows no intent to do so. Ratification must be of the whole transaction in all of its aspects³ which renders the decisions inapplicable to the facts here, since as will be shown the former State leases were not ratified according to all of their terms.

It is believed that under the separate terms of the two acts each of the original leases which is bisected by the line forming the south boundary of Louisiana as fixed by the Submerged Lands Act may not under the rule last stated be considered to be ratified by the Outer Continental Shelf Lands Act but they must be held to be two separate and distinct leases; the portion on State lands being one lease, that on the outer Continental Shelf, another.

1. The two bear different effective dates. The Submerged Lands Act in Title II, section 3, made the grant to the State subject to each lease executed by the State and "to the rights herein now granted to any person holding any such lease to continue to maintain such lease * * * for the full term thereof * * *." This means that the State portion of the original lease became in law a valid lease as of a date not later than May 23, 1953, the date of the Granting Act. At that time the remainder of the original lease was wholly invalid and without effect and it remained so until August 7, 1953, when the provisions of section 6 of the Outer Continental Shelf Lands Act afforded the means for making it a lease. Thus, the rights under the two leases run from different dates. As will be shown, the Federal lease, at least, was not validated retroactively.

2. In addition to the fact that the present lease rights of the two portions of the original lease run from distinctly different dates, there are several other differences in the two. The State side portion continues under the terms of the original lease as specifically provided in the Submerged Lands Act except for the primary term which is extended in certain circumstances. But the provisions of section 6 of the Outer Continental Shelf Lands Act include the following additional differences from the original lease terms:

(1) In subsection (a) (8) a royalty of not less than 12½ per cent even if the original lease provided for a lower royalty.

(2) In subsection (a) (9) an additional royalty equivalent to the unpaid severance, etc., tax imposed by the State, on the total production less the State's royalty between June 5, 1950, and the date of the act and an equivalent royalty thereafter.

³ *Gaines v. Miller*, 111 U. S. 395, 398 (1884); *Bradburn v. McIntosh*, 159 F. 2d 935, 938 (10th Cir. 1947); *King v. Continental Casualty Co.*, 110 F. 2d 950, 951 (4th Cir. 1940); *Republic of China v. Merchants' Fire Assur. Corp. of N. Y.*, 49 F. 2d 862, 865 (9th Cir. 1931); I *Restatement of Agency*, sec. 96.

(3) Under subsection (a) (10) the primary term of the lease as extended must terminate within 5 years from August 7, 1953. Thus, the terms of the outer Continental Shelf land leases differ from the former State leases as well as from the leases created by the Submerged Lands Act in that they have different primary terms and different rates of royalty than either the former State leases or the Submerged Lands Act leases.

3. In addition to the fact that these differences necessarily separate each of the tracts into two distinct leases Congress has specifically provided in section 6 (e) that the provisions referred to and all others in section 6 be applied *only* to the lands on the outer Continental Shelf. This appears to mean that from and after the date of the act the lease term shall be computed and the lessee shall pay to the United States all "rentals, royalties and other payments" including royalty in lieu of severance taxes due on the "area" (on the outer Continental Shelf) without regard to the status of the area situated on State land. Such a construction accords with the facts as they existed. The obligation to pay the State for the submerged lands in his lease had already accrued and the jurisdiction of Congress over that land had ended on May 25, 1953. It could only legislate as to the outer Continental Shelf part of the lease. As to that part, it could, of course, have provided that payments to the State on the portion now under State jurisdiction would apply in satisfaction of obligations to the United States.⁴ It did not do so. Instead, in section 6 (a) it proceeded to amend the former State lease so as to make it a different lease as to royalty, date, and term than the State lease and in section 6 (e) specified not only as to these changes but also as to operations and payments to be made under the lease that all provisions of the section should apply only to the land situated on the outer Continental Shelf.

I conclude that where any former State lease is situated partly on submerged lands of a State and partly on the outer Continental Shelf, the two portions constitute two separate and distinct leases. It follows that the terms and provisions of each lease are to be separately construed and applied, consistent with the general rule. I Tiffany, *Landlord and Tenant* (1912) page 7165, section 182 (e) (2) (b). The situation here is similar to one where part of the lease title fails leaving only a part of the land subject to the terms of the lease. In such case the consideration and rentals are customarily reduced proportion-

⁴It did in fact provide that payments made to the State prior to the date of the act would be accepted as of equal effect as payments to agencies of the United States but only as to prior obligations settled before August 7, 1953. This, however, had nothing to do with the character of the right granted. It merely stated the conditions that must be met as a basis for allowing the holder of the State lease to hold and operate a lease under the act.

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ately.⁵ This means that delay rentals must be paid on the Federal lease in the proportion that the acreage of that lease bears to the acreage of the former State lease and that such rentals are due and payable until such payment is no longer necessary by reason of production from the Federal lands even though production has previously been obtained elsewhere on the State lease. When production is obtained from the Federal lands, the full royalty from that production including royalty due in lieu of former payments of severance or other tax to the State must be made to the United States.

J. REUEL ARMSTRONG,
Acting Solicitor.

VALIDITY OF DESERT LAND APPLICATIONS AND ENTRIES IN ARIZONA DEPENDENT ON PERCOLATING WATER FOR RECLAMATION

Desert Land Entry: Water Right

When Congress provided in the Desert Land Act that the right to use of water by the entryman "shall depend upon bona fide prior appropriation," Congress used the words "prior appropriation" as words of art having reference to the well-established doctrine of prior appropriation then obtaining in the Western States and Territories.

Desert Land Entry: Water Right

Whether water is subject to prior appropriation as required in the Desert Land Act is a matter governed by State law.

Waters and Water Rights: State Laws

Under the second opinion of the Arizona Supreme Court in the case of *Bristor v. Cheatham*, percolating waters are not subject to the doctrine of prior appropriation but only to the doctrine of reasonable use.

Desert Land Entry: Water Right

Applications for desert land entries in Arizona cannot be allowed, and allowed desert land entries in that State cannot be patented, where the entries are dependent upon percolating waters for reclamation.

M-36263

FEBRUARY 23, 1955.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

You have requested my opinion as to whether, in view of the decision by the Supreme Court of Arizona in the case of *Bristor v. Cheat-*

⁵In Louisiana, if a part of the title to leased property fails, the consideration for the lease must be proportionately reduced. La. Civ. Code, sec. 2701; *B. D. Wood & Sons v. Fabrigas*, 105 La. 1, 29 So. 367 (1900). This law would appear to apply to oil and gas leases; see *Lawrence v. Sun Oil Co.*, 166 F. 2d 466, 470 (5th Cir. 1948); *Lockwood Oil Co. v. Atkins*, 158 La. 610, 104 So. 386 (1925); *Carroll v. Boosahda*, 51 So. 2d 836 (La. App. 1951). In West Virginia, loss of part of the leased land in *Hope Natural Gas Co. v. Jarvis*, 88 W. Va. 396, 106 S. E. 889 (1921), resulted in a partial reduction in the rental.

ham, 75 Ariz. 227, 255 P. 2d 173 (1953), applications for desert land entries in that State can be allowed or allowed desert land entries in that State can be patented where reclamation of the entry depends upon percolating water.

As the term "percolating water" is used in your request and this opinion, it means underground water which does not comprise or is not part of an underground stream which has a well-defined channel and banks and a current.

Section 1 of the Desert Land Act of March 3, 1877 (43 U. S. C., 1952 ed., sec. 321), provides in part as follows:

* * * it shall be lawful for any citizen of the United States * * * to file a declaration * * * that he intends to reclaim a tract of desert land * * * by conducting water upon the same * * * *Provided however* that the right to the use of water by the person so conducting the same * * * shall depend upon bona fide prior appropriation: * * * and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. [19 Stat. 377.]

The answer to your question depends upon the interpretation to be given to the specific portion of the quotation from the act which requires that "the right to the use of water by the person so conducting the same * * * shall depend upon bona fide prior appropriation."

In *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142 (1935), the United States Supreme Court held that a homestead patent issued in 1885 for land bordering on a stream did not carry with it the common law riparian right to have the stream flow by the land in its accustomed channel without substantial diminution. This holding was based on the Court's interpretation of the provision of section 1 of the Desert Land Act following the clause just quoted and beginning with "and all surplus water," etc. Although the Court was not directly concerned with the clause under consideration here, it discussed at length the background of the Desert Land Act and made a number of statements which are very illuminating with respect to the point at issue. The more significant statements follow:

For many years prior to the passage of the Act of July 26, 1866 * * * the right to the use of waters for mining and other beneficial purposes in California and the arid region generally was fixed and regulated by local rules and customs. The *first appropriator* of water for a beneficial use was uniformly recognized as having the *better right* to the extent of his actual use. The common law with respect to riparian rights was not considered applicable, or, if so, only to a limited degree. * * * The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by

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prior appropriation for a beneficial use was entitled to protection * * *. [P. 154; italics added.]

* * * That body [the Congress] thoroughly understood that an enforcement of the common-law rule, by greatly retarding if not forbidding the diversion of waters from their accustomed channels, would disastrously affect the policy of dividing the public domain into small holdings and effecting their distribution among innumerable settlers. In respect of the area embraced by the desert-land states, with the exception of a comparatively narrow strip along the Pacific seaboard, it had become evident to Congress, as it had to the inhabitants, that the future growth and well-being of the entire region depended upon a *complete adherence* to the rule of appropriation for a beneficial use as the *exclusive criterion* of the right to the use of water. [P. 157; italics added.]

In the light of the foregoing considerations, the Desert Land Act was passed, and in their light it must now be construed. [P. 158.]

These extracts from the *Power Co.* case leave little doubt that the rule of prior appropriation was a well-established doctrine of water law in the Western States and Territories at the time the Desert Land Act was passed and that, when Congress provided in the act that the right to use of water by a desert land entryman "shall depend upon bona fide prior appropriation," Congress used the words "prior appropriation" as words of art having a clear and precise meaning.

The question then presents itself whether the right to appropriate water for the reclaiming of a desert land entry is a matter governed by State law or Federal law. The *Power Co.* case provides the answer. The Court stated in that case:

As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. * * * The fair construction of the provision now under review¹ is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public *under the laws of the States and territories named*. [P. 162; italics added.]

Nothing we have said is meant to suggest that the [Desert Land] act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, *subject to the plenary control of the designated states*, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. * * * The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation. [Pp. 163-164; italics added, except to *publici juris*.]

¹ The clause in section 1 of the act commencing with "and all surplus water," etc.

It is clear then that whether a desert land entry in Arizona can be based upon percolating water depends upon whether, under the law of Arizona, percolating water is subject to the doctrine of prior appropriation.

This question was settled only relatively recently in the case of *Bristor v. Cheatham, supra*. To appreciate the full significance of that case, a brief consideration of the history of the Arizona law on percolating water is necessary. The first pronouncement by the Arizona Supreme Court on the subject of percolating water apparently was in the case of *Howard v. Perrin*, 76 Pac. 460 (1904), aff'd 200 U. S. 71 (1906). In that case, the Court stated that percolating water, as distinguished from water in an underground stream, belonged to the owner of the soil and was not subject to appropriation by another.

In *Maricopa County Municipal Water Conservation Dist. No. 1 et al. v. Southwest Cotton Co. et al.*, 4 P. 2d 369 (1931), the Arizona court decided to treat the subject of underground water as a matter of first impression. In a lengthy opinion, the court concluded that "our holding in *Howard v. Perrin, supra*, that percolating subterranean waters were not subject to appropriation, was and still is the law of Arizona" (4 P. 2d, at p. 376).

Then came the case of *Bristor v. Cheatham*. This was an action by the plaintiffs to restrain the defendants from diverting water which the plaintiffs were pumping from domestic wells on their property. The plaintiffs alleged as a first count that the defendants had sunk a number of large wells on defendants' property to a common source of underground water underlying the lands of both and were pumping and conveying the water three miles distant to reclaim other land owned by the defendants, and that this withdrawal of water was drying plaintiffs' wells. In a second count, the plaintiffs alleged that the waters from which their wells were supplied were taken from an underground stream. The action was dismissed on both counts by the lower court.

When the case came before the Supreme Court of Arizona, the court first held on January 12, 1952, that its ruling in *Howard v. Perrin* was dictum and contrary to the Desert Land Act; it overruled that case and held that percolating waters are subject to the doctrine of prior appropriation. *Bristor v. Cheatham*, 240 P. 2d 185 (1952). A rehearing was granted, following which the court reversed itself on March 14, 1953 (255 P. 2d 173). The court said:

The state of Arizona through its legislature has adopted its policy and local doctrine to the effect that ground waters are not subject to appropriation. It seems the only answer, therefore, is that a prior right to the use of ground

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waters cannot now be acquired and never could have been acquired under the law of *prior appropriation*. We hold, therefore, that such waters are not subject to *any law of appropriation*. [255 P. 2d, at p. 177; italics added.]

The court went on to hold that the owner of land overlying percolating water has a right to use the water subject to the doctrine of reasonable use, as distinguished from the doctrine of correlative rights. Under the latter doctrine, a landowner would be limited to his proportionate share of the percolating water underlying his land and the lands of his neighbors. Under the doctrine of reasonable use, a landowner may use, without any liability to an adjoining user, as much of the percolating water as he can reasonably put to a beneficial use on his land even though it exceeds his proportionate share of the water. See 55 A. L. R. 1385 and 109 A. L. R. 395.

It is plain from the two opinions in the *Bristor* case that the doctrine of prior appropriation is diametrically opposed to the doctrine of reasonable use. Under the first doctrine, a prior appropriator acquires a legal right to a definite quantity of water which cannot be diverted by any subsequent appropriator even though the latter could put the water to a beneficial use. Under the second doctrine, a prior user of water acquires no right to the quantity of water used. Any subsequent user of water, by drilling a larger well or installing a more powerful pump, can, without liability, drain him dry so long as the water is put to a beneficial use by the subsequent user.

I find it impossible therefore to interpret the clause in the Desert Land Act which requires that "the right to the use of water * * * shall depend upon bona fide prior appropriation" as encompassing the doctrine of reasonable use as set forth in the second *Bristor* opinion.

The Department's regulations do not sanction the allowance or patenting of a desert land entry which depends upon percolating water which is subject only to the doctrine of reasonable use. The pertinent regulation currently in effect (43 CFR 232.13; 19 F. R. 9084), which has been unchanged since its adoption on May 18, 1916 (Circ. 474, 45 L. D. 345, 351), provides in part as follows:

Sec. 232.13 *Evidence of water rights required with application.* No desert-land application will be allowed unless accompanied by evidence satisfactorily showing either that the intending entryman has already acquired by appropriation, purchase, or contract a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right. * * * All applications not accompanied by the evidence above indicated will be rejected.

The requirement in the regulation is clear that an applicant must acquire, or take steps to acquire, a legal right to the permanent use of

sufficient water to reclaim his entry. The same requirement is stated in the regulation dealing with the submission of final proof. (43 CFR 232.32; 19 F. R. 9086.)

As we have seen, a landowner has no legal assurance of a permanent supply of water under the doctrine of reasonable use. His "right" to use percolating water, unlike the right of a prior appropriator, is always subject to diminution or abrogation by a subsequent user of the water.

It is my opinion, therefore, upon the basis of the Desert Land Act and the second opinion of the Supreme Court of Arizona in *Bristor v. Cheatham*, that an application for a desert land entry on land in Arizona cannot be allowed, and that a patent cannot be issued for such an entry which has been allowed, where the entry is dependent upon percolating water for reclamation.

J. RUEEL ARMSTRONG,
Acting Solicitor.

APPEAL OF ART PUGSLEY, D/B/A ART PUGSLEY CONSTRUCTION CO.

IBCA-5

Decided February 25, 1955

Contracts: Substantial Evidence

Where contractor on appeal has submitted affidavits tending to establish that he was not responsible for the incorrect installation of a sewer, and the Government offers no counter proof of a substantial nature, the contention of the contractor must be accepted.

Contracts: Performance

A Project Engineer assigned to supervise the construction of a sewer does not transcend his proper function when he assists the contractor in making the necessary preparations and computations in the laying out of the sewer after it has been discovered that the original plans for the sewer were erroneous.

Contracts: Additional Compensation—Contracts: Changes

Where, in the construction of a sewer, the original plans were discovered by the Project Engineer, who was the active supervisor of the work, to be erroneous, and he was allowed to revise the plans without any corrective action on the part of the contracting officer who was remote from the job, and as Chief Administrative Officer of the Bureau of Indian Affairs had other numerous and important duties to perform, and the Project Engineer thereafter made an error in laying out the sewer, the contractor is entitled to additional compensation for relaying part of the sewer in order to correct the error, and a proper change order should be entered.

February 25, 1955

BOARD OF CONTRACT APPEALS

Arthur M. Pugsley, doing business as the Art Pugsley Construction Co., of Huron, South Dakota, filed an appeal, dated July 11, 1953, from the findings of fact and decision of the contracting officer dated June 16, 1953, which denied the claim of the contractor for additional compensation in the amount of \$2,104.77 as a result of being required to re-lay 621 feet of sewer pipe in the construction of a sewer at the White Horse School, Cheyenne River Agency, South Dakota.

The contract for the construction of the school was on U. S. Standard Form No. 23 (revised April 3, 1942), and was dated May 29, 1952. It was made with the Bureau of Indian Affairs, and required the construction of a school building and outside utilities at White Horse, South Dakota, in accordance with Specifications No. 6-52, at a price for the whole work of \$55,812.

The contract required the work to be commenced within 20 calendar days of notice to proceed, and to be completed within 300 calendar days thereof. The contractor was given notice to proceed on June 20, 1952. The work was finally accepted as completed on March 5, 1953.

After the construction of the sewer had commenced, it was discovered by the contractor and George Eastman, the Project Engineer, that the plans for the sewer system were in error. The contour lines on the drawings were such that if the septic tanks and the disposal lagoons had been located as shown, the septic tank and Manhole No. 6 would have been wholly above ground. On July 25, 1952, the Project Engineer visited the Area Office of the Bureau of Indian Affairs at Aberdeen, South Dakota, and reported the errors in the plans to M. G. Hunt, the Area Maintenance Engineer. On August 14, 1952, the contractor conferred with Eastman and Hunt with reference to changing the plans for the sewer. Changes in distances between the manholes were agreed on, and the contractor and Project Engineer were instructed by Hunt to make also the necessary changes in the invert elevations at the manholes, so as to maintain the necessary grade of the sewer.

Under the drawings and specifications the grade of the sewer lines was to be 0.6 percent. As actually installed, however, the grades varied considerably, being 0.25 percent between Manholes Nos. 2 and 5, 1.93 percent between Manholes Nos. 5 and 6, and 0.7 percent between Manhole No. 6 and the septic tank. Thus the velocity of the sewage flow would be inadequate and sewage stoppages would be inevitable.

After it had been discovered that a portion of the sewer had been incorrectly laid, the Project Engineer was requested to make a written statement concerning the installation of the sewer. His statement,

which appears to have been made on April 29, 1953, shows that he was responsible for the laying out of the sewer after the errors in the plans had been discovered. He did so with the assistance of the contractor, but it was the Project Engineer who made the calculations of the elevations from the offset stakes. However, the Project Engineer destroyed the notes containing his computations, and the stakes themselves have either been lost or destroyed. The Project Engineer also admitted that during the laying of the sewer line "I did not check to determine whether or not the sewer was laid the distance below the top of the manhole offset stakes." It was not until he had received letters from Hunt dated August 27 and September 23, 1952, asking for data on the sewer elevations, that he requested a Mr. Thorberg of the Branch of Roads, Bureau of Indian Affairs, to check the distances and elevations of the sewer line, and it was then discovered that the grade of the sewer between Manholes Nos. 2 and 5 was too flat. The Project Engineer reached the following conclusion in his statement:

In conclusion I would like to say that it is possible that I made an error in my computations and that this could have been the cause of the mistake in the laying of the sewer. There is, however, no way in which this can be checked since the computations have been destroyed. I believe however that the unworkmanlike manner in which the sewer was laid could also have been the cause of this error.

The chronology of events in this case is recorded principally in a memorandum dated November 20, 1952, from Hunt to the Area Director from which it appears not only that Hunt was the agency official supervising the Project Engineer and the construction of the sewer, but also that the errors in the original plans for the laying out of the sewer were reported to the contracting officer in the central office of the Bureau of Indian Affairs at Washington, D. C., in the monthly construction report for July 1952, which is dated August 14, 1952, but which was not actually received until August 21, 1952.¹ However, one of the anomalous features of this case is that although the changes necessary to correct the errors in the original plans were ordered, this was done by Hunt rather than directly by the contracting officer, and no formal change order was ever entered. To be sure, the contractor wrote on September 22, 1952, requesting a change order,

¹ Thus it is stated in a footnote to the report: "Excavation completed for septic tank and oxidation pond, ready to pour concrete on septic tank. Lines laid out for sewer system. Contours at treatment works found in error, distance between MH2 and MH5 shortened 30 ft, MH5 and MH6 shortened 40 ft and from MH6 to septic tank shortened 30 ft to meet existing conditions and avoid projecting septic tank wholly above ground contractor requested submit proposal for change order request."

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but the details he supplied in his letter were apparently deemed unsatisfactory, and his letter was returned to him for correction. But, although no formal change order was entered, the parties all proceeded as if the changes had been properly ordered by the contracting officer. In a letter dated September 18, 1952, from the Assistant Area Director to the Commissioner of Indian Affairs, the changes in the construction of the sewer were reported, and the "concurrence" of the central office was requested. That office responded by reprimanding the area office for not requesting a formal change order but no objection was made to the making of the changes.

On October 27, 1952, however, after the errors in the laying out of the sewer had been discovered, the contracting officer did write to the contractor stating that the installation of part of the sewer line "does not meet the requirements set forth in the contract drawings and specifications," and directing the contractor to rectify the condition. He was informed at the same time that a payment to him of a balance of \$1,190.50 would be withheld, pending the reconstruction of the sewer. In a letter dated October 30, 1952, to the contracting officer, the contractor protested that the sewer had been constructed "under the constant direction and supervision of the Aberdeen Area Office and its staff," and that if any error had been committed it was the fault of the Project Engineer, since it was he who had computed the invert elevations. In a telegram dated November 6, 1952, the contracting officer reaffirmed his direction to the contractor to proceed to re-lay the sewer but promised to institute an investigation to determine the responsibility for its incorrect installation.

In his factual findings and decision the contracting officer undertook to assess the blame for the incorrect installation of the sewer between the contractor and the Project Engineer. He reached the general conclusion that the contractor had been at fault in allowing the Project Engineer to usurp his responsibility for the performance of the work, and in not reporting to the contracting officer that "the sewer could not be constructed in accordance with the drawings." As for the laying of the sewer in particular, he held that, although the Project Engineer had computed the invert elevations at which the sewers were to be laid, there was no evidence to prove that his computations were in error; that the Project Engineer had reported that, as the sewer line was being constructed no batter boards had been erected by the contractor, as they should have been; and that the contractor had not followed the method indicated on the drawings for laying the sewer. On the other hand, the contracting officer held also that the Project Engineer had been at fault "in not stopping work

when it was obvious that the batter boards and other requirements of the specifications were not being enforced," and "in not checking the grade of the sewer from the stakes as it was being laid." However, the contracting officer concluded that it could not be determined from the record whether the error in laying the sewer was made by the Project Engineer rather than the contractor, and, therefore, he rejected the contractor's claim.

In his appeal the contractor complains that his contentions "were not given proper credit while statements made by the Project Engineer were accepted as truth although not substantiated by any tangible evidence," and reiterates that the faulty construction of the sewer was the result of the Project Engineer's miscalculations, for which he had assumed full responsibility. The contractor now also alleges, moreover, that the Project Engineer checked the entire sewer system at least twice and then ordered it to be backfilled. Why, asks the contractor did he order the sewer to be backfilled if it was incorrectly laid? This question is certainly highly pertinent, since the Project Engineer would hardly direct the sewer to be backfilled, unless he assumed it to be correctly laid, for the sewer would have to be uncovered again to be relaid, which would, of course, entail additional labor.

In support of his appeal the contractor has filed two affidavits with the Board. One of the affidavits is by Loren J. Brunken, whose company, J. F. Brunken & Son, was the subcontractor on the sewer project. The affiant corroborates the contractor's assertion that the Project Engineer inspected the sewer after it was laid, and ordered it to be backfilled. He also adds: "It was my understanding at the time that according to what Mr. Eastman said either Mr. Eastman had erred or that Mr. Hunt had misinstructed Mr. Eastman in laying out the sewer." The other affidavit is by Richard B. Plate, a shovel operator for the subcontractor, who operated the power shovel for the excavation of all the sewer ditches on this project. This affiant not only deposes that the Project Engineer ordered the sewer to be backfilled after it was laid but that he gave the instructions for the laying out of the sewer and placed the grade stakes himself.

In a memorandum addressed to the Board the contracting officer states that George Eastman, the Project Engineer, is now deceased, and that he himself has no information concerning the matters covered by the affidavits, but that in the interest of disposing of the appeal, he is willing to stipulate that the Project Engineer "ordered the backfilling of the original sewer installation." The Board, therefore, accepts this as a fact. Moreover, in view of the support given to the

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allegations of the contractor by other statements in the affidavits and the absence of any counterproof in behalf of the Government, the Board must also find as a fact that the errors in the original installation of the sewer were made by the Project Engineer. The Board does not deem it necessary to decide in the circumstances of the present case whether the burden of proof was on the contractor to establish that he was not responsible for the incorrect installation of the sewer. The contractor having offered some sworn testimony of a substantial nature, the burden of proof—if it was on the contractor—shifted to the Government, and it has offered no satisfactory counterproof. There is, to be sure, the failure to erect batter boards. That is stressed by the contracting officer but the grade of the sewer would nevertheless have been wrong if the computations of the Project Engineer were erroneous, and he himself has admitted this possibility.

There is a case decided by the War Department Board of Contract Appeals that is markedly similar to the present case: *Spencer B. Lane Company*, 3 CCF 269 (Jan. 8, 1945). In this case the question was whether the appellant contractor was entitled to additional compensation for rerouting a water supply pipeline around a pond. The contracting officer held that the appellant had rerouted the pipeline for its own convenience, and denied relief. A Mr. Cunningham, superintendent of the appellant, appeared before the Board and testified that he had not requested the change to be made, and that the pipeline had been rerouted at the request of a Mr. Rhodes, a field representative of the contracting officer. In reversing the decision of the contracting officer, the Board declared:

* * * In view of the fact that Mr. Cunningham, one of the parties who was directly connected with the relocation of the water line, appeared before this Board and under oath denied that any request was made by him for a relocation of the line and stated that it was done solely at the request of the Government, the Board is of the opinion that the appellant has sufficiently proved this of the claim, and without further evidence to the contrary from the Government the Board is constrained to find as a matter of fact that the relocation of the line around the pond between stations 72+00 and 83+00 was ordered by Mr. Rhodes, a field representative of the contracting officer, and, therefore, the appellant is entitled to a change order to pay it for any reasonable costs which it incurred by such relocation over and above that which it would have cost it to have placed the line directly across the pond as originally contemplated by the drawing.

The original specifications having been in error, and the attempt to revise these specifications without entering a change order prescribing exactly how they were to be corrected having led to further error, the situation should now finally be corrected by entering an appropriate change order and by compensating the contractor for the execution of this work unless, indeed, it can be said that the Project Engineer's ac-

tions were wholly unauthorized, and the contractor was at fault in following his directions. Such was the conclusion of the contracting officer but the Board finds itself unable to accept the premises on which they rest.

Undoubtedly the Project Engineer played a more active role in the construction of the sewer than is customary. But it cannot be said that the supervision of a job necessarily excludes any participation in the actual operations. The Project Engineer would certainly not be expected to dig the ditch, or lay the pipe, but the making of the necessary preparations and computations did not go beyond what may, perhaps, be described as an active form of supervision. Moreover, in view of the discovery that the plans for the sewer were erroneous, it cannot be said that there was no justification for this form of supervision.

As for the authority of the Project Engineer to act for the contracting officer in the revision of the plans, and the execution of the work, perhaps he went *ab initio* somewhat beyond the scope of his authority. Paragraph 34 of the specifications provided quite a hierarchy of officers for the execution of the contract: the contracting officer, who was the Executive Officer of the Bureau of Indian Affairs, or his authorized representative; the Chief, Branch of Buildings and Utilities, in the Bureau of Indian Affairs, or his authorized representative; Area Chief, Branch of Buildings and Utilities, or his authorized representative; and finally the Project Engineer, described as "the official assigned to the project to supervise the work under the contract." Moreover, the specifications themselves were so highly articulated that various and diverse functions were specifically assigned to each of these officers in various paragraphs of the specifications.² Whether or not this scheme was strictly followed in every precise detail, it is apparent that the Project Engineer was expected to be the active supervisor of the work, and that his authority only fell short of entering formal change orders.³ As the contracting of-

² It is, however, significant that the Project Engineer is assigned specific duties as frequently as the Area Chief, and that the Project Engineer alone is mentioned in connection with the installation of plumbing and outside utilities. Thus, under "Plumbing," paragraph 5, deviations in piping may be made with the approval of the Project Engineer; under paragraph 8, the lines and grades of pipe trench excavations are to be tested and approved by the Project Engineer, who may then order them to be backfilled. And under "Outside Utilities," paragraph 2c, unauthorized excavations are to be filled in a manner approved by the Project Engineer.

³ The Indian Office Manual, Vol. IV, Pt. V, Ch. 3, section 308.13, thus states the extent of the Project Engineer's responsibility: "The Project Engineer is the Bureau's representative on the work and it is his responsibility through his day by day inspection of the work and contacts with the Contractor or his representative to insure construction of the project in accordance with the drawings and specifications." Among the "major responsibilities" of the Project Engineer are listed the inspection of work and the correction of errors.

February 25, 1955

ficer was removed some 2,000 miles from the site of the job, and as the Executive Officer of the Bureau of Indian Affairs had other numerous and important administrative duties to perform, the general supervision of the White Horse School Project which was in an isolated area necessarily devolved upon the Area Office and the Area Office, in turn, although exercising some supervision over the Project Engineer, left the conduct of operations largely to him. In effect, the Area Office, through Hunt, allowed the Project Engineer to reform the specifications, and the contracting officer by failing to take effective corrective action, would appear to have agreed to what had been done. When, under these circumstances, the Project Engineer erred in laying out the sewer, the Government became bound to pay the necessary costs of correction.⁴

In order to clear the record, the case is returned to the contracting officer so that he may enter a formal change order. Such an order having been entered, the contractor should be allowed compensation for the extra costs in relaying the sewer pipe. The contractor has submitted a statement of costs but it is not verified, and such costs should be paid only upon proper verification. If the parties fail to agree upon the amount, the matter may again be referred to the Board.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the findings of fact and decision of the contracting officer denying the claim are reversed with directions to proceed as outlined above.

THEODORE H. HAAS, *Chairman.*

THOMAS C. BATCHELOR, *Member.*

WILLIAM SEAGLE, *Member.*

⁴In *General Casualty Company of America v. United States*, decided by the Court of Claims (No. 47331, Jan. 11, 1955), which involved the question of the authority of a resident engineer to act on behalf of a contracting officer, the court observed: "It would be inane indeed to suppose that the resident engineer was at the site for no purpose. We believe * * * that the resident engineer was the authorized representative of the contracting officer." See also *Dayton Airplane Co. v. United States*, 21 F. 2d 673, 681 (6th Cir. 1927), stressing factors of remoteness and emergency in authorizing action by an assistant to the contracting officer; *Ross Engineering Company v. Pace*, 153 F. 2d 35, 48-49 (4th Cir. 1946), holding that waiver results from constant disregard of contract provisions; and *Modern Engineering Co.*, 3 CCF 360 (B. C. A., Jan. 29, 1945), holding that contracting officer by permitting interferences and actions by other than contracting officer ratifies their acts.

GEORGE AND JOHN ARKOOSH, VIVIAN BAHR

A-26988

*Decided February 25, 1955.***Public Sales: Preference Rights**

A person who owns land adjoining a single subdivision of a tract consisting of two or more contiguous subdivisions is an owner of land contiguous to the entire tract within the meaning of section 2455, Revised Statutes, granting owners of contiguous land a preference right to purchase isolated tracts offered for public sale, notwithstanding that his land does not adjoin any of the other subdivisions within the tract.

Public Sales: Award of Lands

In a division among conflicting preference-right claimants of lands offered at public sale, the land awarded need not be contiguous to the claimant's privately owned land, if the award is otherwise equitable.

Public Sales: Award of Lands

Where a tract of land has been awarded to a bidder at a public sale solely for the purpose of giving the bidder a needed outlet to a county road, and it is impossible on the basis of the evidence to determine whether an outlet in fact is needed and whether the award made will give the desired outlet, the case will be remanded for a determination of the facts.

Allen E. Weathers, Frank N. Hartley, A-25128 (May 27, 1949), overruled in part.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

George and John Arkoosh have appealed to the Secretary of the Interior from the decision of the Director, Bureau of Land Management, dated January 26, 1954, which affirmed the decision of the manager of the land and survey office at Boise, Idaho, awarding the S $\frac{1}{2}$ S $\frac{1}{2}$ sec. 24, T. 1 S., R. 15 E., and lots 1, 2, and 3, sec. 30, T. 1 S., R. 16 E., B. M., Idaho, to Vivian Bahr.

These and other lands were offered at a public sale held April 13, 1953, pursuant to the application filed by Mrs. Bahr on March 31, 1950, under the terms of section 2455 of the Revised Statutes, as amended (43 U. S. C., 1952 ed., sec. 1171). At the sale no other bidders appeared and Mrs. Bahr was declared the highest bidder. During the 30-day period following the date of the sale, two additional bids were received from other adjoining owners, equaling the highest bid. The parties were unable to reach an agreement among themselves as to a division of the lands involved after having an opportunity to do so as provided by the regulations (43 CFR 250.11 (b) (3); 19 F. R. 9117). On July 10, 1953, the manager made a division of the lands applied for. In addition to the award to Mrs. Bahr, he awarded the N $\frac{1}{2}$ NE $\frac{1}{4}$

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sec. 25, T. 1 S., R. 15 E., to Mrs. Lola Schmidt and the balance of the offered land—the NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 24, T. 1 S., R. 15 E., the N $\frac{1}{2}$ NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 30, T. 1 S., R. 16 E.—to the appellants.

The appellants state, and the record shows, that Mrs. Bahr is not the owner of land contiguous to the S $\frac{1}{2}$ S $\frac{1}{2}$ sec. 24, T. 1 S., R. 15 E., and that this land merely corners on and is not contiguous to the other land awarded to her. That land is, however, contiguous to land owned by Mrs. Bahr. They argue, in effect, that when a division of lands offered for public sale is made among conflicting preference right claimants the claimants may be awarded only land contiguous to their private holdings or, at least, contiguous to other lands awarded to them which are, in turn, contiguous to their privately owned lands.

The public sale law under which the present sale was held provides in pertinent part that for a period of not less than 30 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 has been held that under the public sale law one who owns land contiguous to a single subdivision of a tract consisting of two or more contiguous subdivisions of land offered for public sale is the owner of land contiguous to the entire tract for the purpose of asserting a preference right to purchase the tract. *Steve Black, James Barkley, A-24186* (Apr. 9, 1946).

Where a party has shown that he is the owner of land contiguous to one subdivision of the tract, he has established his preference right to the entire tract, and thereafter his claim to an equitable division of the land among conflicting preference-right owners may be satisfied by the award of any part of the tract if the award made is equitable. It is not required, if the award is otherwise equitable, that the land awarded to him be contiguous to his privately owned land or to other land assigned to him in the award. To the extent that *Allen E. Weathers, Frank N. Hartley, A-25128* (May 27, 1949), holds to the contrary, it is *overruled*.

Therefore, the award made in this case is permissible if it is supported by equitable considerations.

The basis of the award of the S $\frac{1}{2}$ S $\frac{1}{2}$ sec. 24 to Mrs. Bahr is stated to be her need for an outlet to the west from her privately owned land. Mrs. Bahr's need for this outlet is not shown by the present record. Furthermore, it is doubtful that the award will meet that need, if it, in fact, exists.

It should be noted that the only statement in the record concerning Mrs. Bahr's need for an outlet to the west is contained in an affidavit dated August 21, 1953, by John H. Bahr, the husband of Vivian Bahr, that "it is necessary for her to be awarded said lands in order that she may have an outlet for her stock on the west from her above said owned land; that a public county road comes to the southwest corner of the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 24, Twp. 1 S., Rge. 15 E. B. M." There is nothing in the record to substantiate this statement respecting Mrs. Bahr's needs. Mrs. Bahr's privately owned lands lie to the south and to the east of the land in sec. 24. There is nothing in the record to show what outlet Mrs. Bahr now uses for those lands.

Furthermore, there is conflicting evidence in the record as to where the county road ends. It is impossible to determine from the conflicting evidence presented on appeal whether the road ends at the corner of the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 24 or at a point somewhere west of that corner. If the latter is true, the award to Mrs. Bahr will not afford her the outlet she seeks. Also, there is no showing in the present record that Mrs. Bahr can use the S $\frac{1}{2}$ S $\frac{1}{2}$ sec. 24 in conjunction with her privately owned land and the other land awarded to her without committing trespass in view of the fact that the S $\frac{1}{2}$ S $\frac{1}{2}$ sec. 24 only corners on the other land awarded to her.

There is not sufficient evidence in the record to support the award made. A further investigation of the facts should be undertaken to determine, first, whether Mrs. Bahr has a substantial need for an outlet to the west and, second, whether the award to Mrs. Bahr of the land in sec. 24 will give her access to the county road.

Unless a determination can be made that Mrs. Bahr has a definite need for this particular land and that she can use it in conjunction with her other land, the award of the S $\frac{1}{2}$ S $\frac{1}{2}$ sec. 24 to her does not appear to be in accord with desirable land use. Furthermore, Mrs. Bahr appears to have received a disproportionate share of the tract. See 43 CFR 250.11 (b) (3); 19 F. R. 9117.

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 to ascertain the facts with respect to Mrs. Bahr's need for the S $\frac{1}{2}$ S $\frac{1}{2}$ sec. 24, T. 1 S., R. 15 E., and with respect to the location of the county road and for such further action with respect to the award made as may be indicated after the facts have been ascertained.

J. RUEEL ARMSTRONG,
Acting Solicitor.

January 20, 1955

ASSISTANT DIRECTORS, FISH AND WILDLIFE SERVICE*

Reorganization Plans

Reorganization Plan No. 3 of 1950 removed any limitations which the provisions of section 3 of Reorganization Plan No. III, of 1940 may have imposed with respect to the organization through which functions relating to fish or wildlife are to be performed.

Secretary of the Interior

There is authority in the Secretary, under Reorganization Plan No. 3 of 1950 and his general authority to establish an organization to perform functions vested in him, to establish the position of "Associate" or "Deputy" Director of the Fish and Wildlife Service and to provide that this officer perform such functions relating to fish or wildlife as may be deemed desirable.

M-36258

JANUARY 20, 1955.**

TO THE ADMINISTRATIVE ASSISTANT SECRETARY.

Your memorandum of August 26 advises that the survey team appointed by the Secretary to study the responsibilities and organization of the Fish and Wildlife Service recommended the establishment of a third position of Assistant Director but that in the process of carrying out that recommendation it was discovered "that the law provides that there shall not be more than two Assistant Directors." You then ask "whether or not the provision of law pertaining to the appointment of the Director and Assistant Directors prevents the creation of the position of 'Associate Director' or 'Deputy Director' in the case of the Fish and Wildlife Service * * *" by the Secretary.

Apparently the provision of law pertaining to appointment of the Director and Assistant Directors of the Fish and Wildlife Service to which your memorandum refers is section 3 of Reorganization Plan No. III, of 1940 (5 F. R. 2107). The pertinent substance of that plan and its forerunner, Reorganization Plan No. II, of 1939 (4 F. R. 2731), are as follows:

Reorganization Plan No. II, section 4, subsections (e) and (f), effective July 1, 1939, transferred the Bureau of Fisheries in the Department of Commerce and its functions, and the Bureau of Biological Survey in the Department of Agriculture and its functions to the Department of the Interior, to be administered under the direction and supervision of the Secretary of the Interior.

*For an opinion on the same subject see the Decision of the Comptroller General, dated March 1, 1955 (B-122827).

**Not released for publication in time for inclusion chronologically.

Reorganization Plan No. III, section 3, effective June 30, 1940, consolidated the Bureau of Fisheries and the Bureau of Biological Survey into one agency to be known as the Fish and Wildlife Service in this Department. This section also provided that, "The functions of the consolidated agency *shall be administered* under the direction and supervision of the Secretary of the Interior *by a Director and not more than two Assistant Directors*, who shall be appointed by the Secretary and perform such duties as he shall prescribe." (Italics supplied.) The plan then abolished the offices of Commissioner and Deputy Commissioner of Fisheries and the offices of Chief and Associate Chief of the Bureau of Biological Survey and transferred their functions to the Fish and Wildlife Service.

It appears that one of the purposes of section 3 of Reorganization Plan No. III, of 1940, was to provide for the administration of the Fish and Wildlife Service by a Director and two Assistant Directors and that, under that plan, it would not have been proper to create a position of another principal officer, such as a "Deputy" or an "Associate" Director. However, it is my opinion that, because of the authority conferred upon the Secretary by Reorganization Plan No. 3 of 1950, section 3 of Reorganization Plan No. III, of 1940, no longer constitutes a limitation upon his power to provide for the performance of any function relating to fish and wildlife.¹

Reorganization Plan No. 3 of 1950 (15 F. R. 3174) provides in part as follows:

Section 1. *Transfer of functions to the Secretary.* (a) Except as otherwise provided in subsection (b) of this section, there are hereby transferred to the Secretary of the Interior all functions of all other officers of the Department of the Interior and all functions of all agencies and employees of such Department.

* * * * *

Sec. 2. *Performance of functions of Secretary.* The Secretary of the Interior may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of the Interior of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan.

* * * * *

Sec. 5. *Incidental transfers.* The Secretary of the Interior may from time to time effect such transfers within the Department of the Interior of any of the records, property, personnel, and unexpended balances (available or to be made

¹ The Secretary's power under Reorganization Plan No. 3 of 1950 with respect to any authority vested by statute in a subordinate after May 24, 1950, the effective date of Reorganization Plan No. 3 of 1950, is not under consideration here. See Solicitor's Opinion, 60 I. D. 448 (1950).

January 20, 1955

available) of appropriations, allocations, and other funds of such Department as he may deem necessary in order to carry out the provisions of this reorganization plan.

The only functions excepted from the operation of section 1 of Reorganization Plan No. 3 of 1950 were those of hearing examiners under the Administrative Procedure Act and those of the Virgin Islands Corporation and its Board of Directors and officers. It is plain, therefore, that these provisions transferred to the Secretary all of the functions of the Fish and Wildlife Service and of its officers and employees and empowered the Secretary either to perform any of these functions himself or to provide that any of them should be performed by an agency of the Department other than the Fish and Wildlife Service or by an officer or employee of the Department who is not in that Service.

The authority thus conferred upon the Secretary by Reorganization Plan No. 3 of 1950 is patently incompatible with the requirement of section 3 of Reorganization Plan No. III, of 1940, that the functions of the former Bureau of Biological Survey and of the Bureau of Fisheries be performed through the Fish and Wildlife Service under the administration of a Director and two Assistant Directors. Therefore, in my judgment, the later reorganization plan has removed any limitations that the earlier one may have imposed with respect to the organization through which functions relating to fish or wildlife are to be performed.

Reorganization Plan No. 3 of 1950 was one of six similar plans which were submitted to the Congress at the same time and which related to the Departments of the Treasury, Justice, Interior, Agriculture, Commerce, and Labor, respectively.² The conclusion to

² The President submitted a message to the Congress covering 21 reorganization plans, including Reorganization Plans Nos. 1 through 6 (H. Doc. 503, 81st Cong.). He also submitted a special message on Reorganization Plans Nos. 1 to 13 of 1950 in which he dealt with Plans Nos. 1 to 6, inclusive (H. Doc. 504, 81st Cong.). No resolution to disapprove Reorganization Plan No. 3 (Interior) was introduced in either House of Congress, but the Senate Committee on Expenditures in the Executive Departments reported favorably on the plan (S. Rept. 1545, 81st Cong.). The situation with respect to Plan No. 2 (Justice) was similar—see S. Rept. 1683. Resolutions to disapprove four of the plans were introduced in the 81st Congress. Citations to resolutions upon which action was taken, the reports of committees, and the debates on the resolutions follow:

Reorganization Plan No. 1 (Treasury)—S. Res. 246, S. Rept. 1518, 96 Cong. Rec. 6891-6893.

Reorganization Plan No. 4 (Agriculture)—S. Res. 263, S. Rept. 1566, 96 Cong. Rec. 7225-7235.

Reorganization Plan No. 5 (Commerce)—S. Res. 259, S. Rept. 1561, 96 Cong. Rec. 6769-6770, 7383-7396, 7475-7480; H. Res. 546, H. Rept. 1976, 96 Cong. Rec. 7266-7274.

Reorganization Plan No. 6 (Labor)—H. Res. 522, H. Rept. 1907, 96 Cong. Rec. 7241-7266; no S. Res., S. Rept. 1684.

which I have come is, I believe, consonant with the views expressed in connection with the congressional consideration of these plans. Both the supporters and the opponents of particular plans appear to have agreed that one of their purposes was to vest in the heads of the respective departments a considerable power to make changes in organization. Thus, the unfavorable action taken on Reorganization Plan No. 1 rested on the conviction that the Secretary of the Treasury would be authorized to control the Comptroller of the Currency and to transfer any functions of his bureau. The report and debates on the resolution disapproving Reorganization Plan No. 4 indicate that this plan was defeated because it was thought to confer too broad a power to reorganize the Department of Agriculture. Those who opposed Reorganization Plans Nos. 5 and 6 did not contend that the plans would not give the heads of the respective departments broad authority with respect to the Patent Office and the Wage and Hour Administrator; they sought disapproval of the plans because they believed that the authority contained in the plans ought not to be extended to the Patent Office or to the Administrator.

Accordingly, I am of the opinion that, pursuant to Reorganization Plan No. 3 of 1950, and in the exercise of his general authority to provide an organization to perform functions vested in him (Solicitor's Opinion, 60 I. D. 111 (1948)), the Secretary may follow the recommendation of the survey team, establish the position of "Associate" or "Deputy" Director of the Fish and Wildlife Service, and provide that this officer perform such functions relating to fish or wildlife as may be deemed desirable.

J. RUEEL ARMSTRONG,
Acting Solicitor.

HENRY S. MORGAN

A-26997

Decided March 4, 1955

Oil and Gas Leases: Lands Subject to Leasing

Where an application for an oil and gas lease on acquired lands is rejected as to part of the land on the basis that such land is privately owned and, on appeal, the applicant submits evidence that one tract applied for is owned by the United States, the case will be remanded for consideration of the evidence that the tract is available for leasing.

March 4, 1955

Oil and Gas Leases: Applications

An application for a present interest oil and gas lease on acquired lands is properly rejected where at the time when the application was filed the United States owned only a future interest in the oil and gas deposits.

Oil and Gas Leases: Applications

A defective application for a future interest oil and gas lease on acquired lands which are subject only to future interest leasing when the application is filed cannot support the issuance of a present interest lease following the vesting of the present mineral rights in the United States.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Henry S. Morgan has taken an appeal 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, which rejected Mr. Morgan's application for a noncompetitive oil and gas lease on acquired lands. Mr. Morgan has appealed from the decision of February 10 insofar as it rejected his application for the following lands: NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 4; SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 13; SE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 28; E $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 29; W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 31, T. 1 S., R. 12 W., St. Stephens meridian, Mississippi.

The application was rejected by the Bureau's decision as to the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of sec. 4 (8.5 acres more or less) on the ground that the land was privately owned and not subject to leasing under the acquired lands leasing law. Mr. Morgan appealed from the rejection of his application for this tract and submitted a photostatic copy of a deed of September 16, 1936, between Batson & Hatten Lumber Company and the United States Government by which this tract, among other lands, was apparently conveyed to the United States. There is nothing in the record which contradicts the evidence submitted by the appellant indicating that this tract has been subject to present interest leasing since before the time when the appellant filed his lease application, and the case will therefore be remanded to the Bureau of Land Management for reconsideration of the decision rejecting the application as to this tract.

The remaining lands involved in this appeal are a part of the DeSoto National Forest and are subject to leasing in accordance with the provisions of the Mineral Leasing Act for Acquired Lands (30 U. S. C., 1952 ed., secs. 352-359). These lands were conveyed to the United States by a deed dated December 29, 1941, from the Bond Lumber Com-

pany. The conveyance was subject to outstanding designated mineral deeds and leases, and the deed reserved to the grantor, its successors and assigns, the oil and gas in the lands for a primary period ending on July 1, 1952 (the termination being subject to a qualification not here relevant). The interest of the United States in the lands prior to July 2, 1952, was subject only to future leasing, as ownership of the oil and gas did not become possessory until after the expiration of the reservation in the deed.

When Mr. Morgan filed his application on April 8, 1952, the lands here under consideration were subject only to future interest leasing. At the time when his application was acted upon by the Bureau, the future interest had become a present possessory interest and the Department could issue only a present interest lease on the lands.

The Bureau's decision rejected Mr. Morgan's application for all the lands applied for (except the tract in sec. 4) because, on April 8, 1952, when the application was filed, the United States had no present leaseable interest in the lands. The decision treated the application as being one for other than a future interest, i. e., as a present interest lease application, and stated—

In accordance with long-established rules and regulations of this office, an oil and gas lease application, other than for a future interest, cannot be favorably considered for any lands in which the United States does not have a vested interest in the minerals at the time of the filing of the application, and no priority of filing can be accorded such application, notwithstanding the fact that the title to the minerals may have become vested prior to the acceptance of the offer to lease.

Mr. Morgan's application did not indicate whether it was an application for a future interest lease or a present interest lease. If it was intended to be an application for a present interest lease, as the Bureau assumed, it was properly rejected because, at the time when it was filed, the United States did not have a present mineral interest to lease. It has long been the practice of the Department to reject applications for oil and gas leases where the lands applied for were not available for leasing at the time the applications were filed, whether because the lands were withdrawn or otherwise closed to leasing. *Kenneth A. Araas*, A-26672 (April 28, 1953); *George B. Friden*, A-26402 (October 8, 1952); *D. Miller*, 60 I. D. 161 (1948). The Department has refused to suspend such applications pending the restoration of such lands to leasing. *James Des Autels*, 60 I. D. 513, 515 (1951); *D. Miller, supra*.

March 4, 1955

If Mr. Morgan's application was intended to be an application for a future interest lease,¹ it did not comply with the requirements for applications for future interest leases. The pertinent regulation (43 CFR, 1953 Supp., 200.7) provided:

(b) *Applications for leases for future mineral interests, including future fractional interests.* 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. If the application is made by one claiming ownership of the present mineral interest, it shall also be accompanied by a certified abstract of title, going back to the title of the predecessor in interest of the United States who created such mineral interest, showing such ownership. If made by some one who holds the leasehold or the operating rights under a lease to the present mineral interest, it shall, in addition to the abstract of title, also be accompanied by three certified copies of the lease, or other contract under which such rights were acquired from the owner of the present mineral interest. In lieu of an abstract a certificate of title may be furnished.

Mr. Morgan made no showing of any kind that he either owned or controlled all or substantially all of the present operating rights with respect to the oil and gas deposits in the lands covered by his application. Consequently, his application was defective if considered as an application for a future interest lease at the time when it was filed.

In this respect, the present case is distinguishable from the cases of *S. J. Hooper et al.*, A-26861 (March 12, 1954), and *S. J. Hooper*, 61 I. D. 346 (1954). In those cases, Hooper also filed applications for acquired lands oil and gas leases at a time when the United States had only a future interest in the oil and gas deposits. Like the Morgan application, the Hooper applications did not indicate whether they were for present interest leases or future interest leases. The applications were not acted upon until after the interest of the United States became a present interest. Thereafter, present interest leases were issued to Hooper. Subsequently, they were canceled by the Bureau of Land Management for the reason that, at the time when Hooper filed his applications, he was not qualified to hold a future interest lease because he did not own or control the present operating rights in the oil and gas deposits. The Bureau's decisions were reversed by the De-

¹ The regulations of the Department in effect at the time did not require that an application be designated as a future interest lease application or a present interest lease application (43 CFR, 1953 Supp., 200.7; 43 CFR 200.5).

partment for the reason that the provisions of 43 CFR, 1953 Supp., 200.7(b), quoted above, had not yet been adopted at the time when the Hooper applications were filed and that his applications were in full compliance with the regulations at the time they were filed.

The question then arises as to whether Mr. Morgan's application, although defective as a future interest application, lost its infirmity on July 2, 1952, when the mineral rights vested in the United States, and thereafter formed a valid basis for the issuance of a present interest lease. The answer to this lies in the departmental decisions previously cited which hold that applications for lands not then available for leasing will not be suspended to await the restoration of the lands to leasing, at which time such applications, if they were then filed, would be valid applications. See also *L. N. Hagood*, 60 I. D. 462 (1951).² To hold that a defective future interest application, which should have been rejected, becomes sufficient to give the applicant a priority to a present interest lease once the present interest vests in the United States would be to give the applicant an unwarranted advantage over other applicants for a present interest lease who properly wait until the present interest vests before filing their applications.

For these reasons, it is concluded that Mr. Morgan's application was properly rejected.

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 for further consideration of the application as to the NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 4, T. 1 S., R. 12 W., and the decision of the Chief, Branch of Leasing, Division of Minerals, Bureau of Land Management, is affirmed with respect to the rest of the land involved in this appeal.

J. RUEEL ARMSTRONG,
Acting Solicitor.

² In the *Hagood* case, a junior application for a lease was not rejected after a lease was issued pursuant to a senior application. Subsequently, the lease was relinquished and the lands were reopened to leasing. A lease was then issued on the basis of the suspended junior application. The Department held that there were no grounds for canceling the lease. *The Department stated, however, that in accordance with established administrative practice, the junior application should have been rejected once the first lease was issued.* In the present case, of course, a lease has not yet been issued to Mr. Morgan. It is to be noted, too, that in the *Hagood* case, the junior application was not a defective application at the time it was filed.

March 7, 1955

FLOYD CHILDRESS

A-27038

Decided March 7, 1955

Oil and Gas Leases: Extensions

An application for a 5-year extension of a noncompetitive oil and gas lease must be rejected where the application was not filed in the land office within a period of 90 days prior to the expiration date of the lease.

Oil and Gas Leases: Extensions—Applications and Entries: Generally

Where an application for a 5-year extension of an oil and gas lease is addressed to the home address of the manager of the land office and received by him after business hours on Friday, the application will not be considered filed until such time as it is received by the land office on the following Monday, the first business day in which the application can be filed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Floyd Childress has appealed from the decision of the Acting Director, Bureau of Land Management, dated April 28, 1954, which affirmed the decision of the manager of the Santa Fe land and survey office dated March 4, 1954, rejecting his application for a single extension of his noncompetitive oil and gas lease Las Cruces 063921 for the reason that the application was not timely filed.

The record shows that Mr. Childress was issued the lease on March 1, 1949, for a period of 5 years, and therefore the primary term expired on Sunday, February 28, 1954. On Friday, February 26, 1954, an application for a 5-year extension was mailed to the manager of the Santa Fe land and survey office at his residence address. The postal marks on the letter indicate that it was received in Santa Fe at 5:30 p. m., Friday, February 26, 1954. The land and survey office closes at 5 p. m. The letter was delivered to the manager either on Friday evening or during Saturday morning, February 27. He apparently kept the application in his possession until Monday, March 1, 1954, and then stamped it "received" at 8:29 a. m., on Monday, March 1, 1954. On Monday, March 1, 1954, 26 offers for leases were filed simultaneously in the Santa Fe land and survey office for the lands covered by the Childress lease.

Section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226), under which the lease was issued to the appellant, read in part as follows on the expiration date of the Childress lease:

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. * * * 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. * * *¹

It is the contention of the appellant that since the application was actually received by the manager at his home prior to midnight February 28, 1954, the application should be considered filed on time. This presents the question whether an application can be considered to be filed when it is received by the manager not at his office and outside of office hours.

Many years ago it apparently was a common practice for the registers and receivers (now managers) of the district land offices to accept applications outside of office hours and away from the office. This practice was early frowned on. Thus, in instructions issued on September 4, 1884, the Commissioner of the General Land Office stated:

The duties of local officers are to be discharged in their respective offices, and during the hours devoted to public business. * * *

* * * * *

Registers and receivers have no authority to administer oaths and affirmations generally, nor are they authorized to do public business privately or in chambers. Their place of business is the land office, and their business with the public must be conducted openly, publicly, and regularly, and not privately or in secret or otherwise irregularly. [3 L. D. 108.]

See also *Clewell and Marsh*, 2 L. D. 320 (1884); *Jefferson v. Winter*, 5 L. D. 694 (1887); and *Sears v. Almy*, 6 L. D. 1 (1887), in which applications handed to the local officer on the street and at his home and accepted by him were held to be valid applications. These actions occurred prior to the issuance of the September 4, 1884, instructions.

After the issuance of the instructions, the rulings of the Department with respect to applications received outside of office hours were not

¹The departmental regulation (43 CFR 192.120; 19 F. R. 9018) issued pursuant to this statutory provision provides in part:

"The record title holder of any noncompetitive lease * * * may, by filing his application therefor within the period of 90 days prior to the expiration date of the lease, obtain a single extension of the primary term of the lease for an additional five years * * *"

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consistent. See *John W. Nicholson*, 9 L. D. 54 (1889); *Kelso v. Jane-way et al.*, 22 L. D. 242 (1896); *McDonald et al. v. Hartman et al.*, 19 L. D. 547, 554 (1894); and *Giroux v. Scheurman*, 23 L. D. 546 (1896). In the last case cited, an adverse claim against an application for a mining patent was filed in the land office at 8:30 p. m. on the last day permitted for filing such claims. It was rejected by the register as being filed out of time. The Department held that while he could have refused to accept and file the claim, he did not do so and the claim would therefore be regarded as timely filed.

On October 25, 1922, when the same question was presented again, i. e., whether a land office could accept an adverse claim after the closing hour of 4:30 p. m. but before midnight of the last day for filing, First Assistant Secretary Finney directed that such a claim should not be received or accepted. 49 L. D. 326. He referred to a circular issued on January 25, 1904, which provided:

Applications to make entry can not be received by the register or receiver out of office hours, nor elsewhere than at their office, nor can affidavits or proofs be taken by either of them except in the regular and public discharge of their ordinary duties.

He also referred to the instructions issued on September 4, 1884, and the statement in *Giroux v. Scheurman*, *supra*, that local officers can refuse to accept adverse claims tendered outside of office hours, and said:

From the foregoing it is apparent that all local land office business should be transacted at the land office and during office hours only. If applications or adverse claims, or other papers, are received or accepted by the local officers outside of the office or after office hours, an opportunity is presented for the exercise of favoritism and partiality which might lead to much mischief and afford grounds for questioning the integrity of the service. [49 L. D. 327.]

The regulation of January 25, 1904, has remained in effect without any change (except to substitute "manager" for "register and receiver") up to the present time (43 CFR 210.2; 19 F. R. 9048).

There is little doubt, therefore, that a manager cannot accept applications in an official capacity outside of regular office hours and that applications delivered to him at such times are not to be considered filed upon such delivery. At the most, the manager can be deemed only to be the agent of the applicant for the purpose of seeing to it that the application is delivered to the land office for proper filing during official hours of business. There is, of course, no obligation on the manager to perform this task.

It is obvious that any other conclusion would lead to the evils long ago referred to in the early departmental decisions and rulings cited above. Particularly in the case of applications for noncompetitive oil and gas leases under section 17 of the Mineral Leasing Act, where a preference right to a lease is obtained by the first qualified applicant, managers would be besieged at all hours of the day and night by applicants seeking to file first.

It may be said that this case does not involve such applications but only applications for 5-year extensions and that in any one case there can be only one application for an extension. It may also be argued that section 17 grants a period of 90 days prior to the expiration date of a lease for the filing of an application for a 5-year extension and that the lessee is therefore entitled to file up to midnight of the last day of his lease term. However, there is nothing in the language of section 17 or in its legislative history to show that Congress, in providing for the 90-day period, intended that it would override the normal business practices of keeping certain specified office hours on work days and closing on Saturdays, Sundays, and holidays. Ninety days constitute a generous allowance of time for filing and any lessee who is reasonably diligent will have no trouble in filing his application within the time allowed. Moreover, in basic principle, there appears to be no reasonable basis for distinguishing between applications that can be and those that cannot be filed with a manager outside of his office and outside of office hours.

The Department has previously expressed the same view. In *Mabel E. Hale, Grace E. Van Hook*, 61 I. D. 55 (1952), the Department held that where the base oil and gas lease expired on a nonbusiness day, an application for a new preference-right lease filed on the first day thereafter that the land office was open could not be regarded as timely filed. The Department stated in that decision:

* * * 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). [Italics added, except as to citations.]

For the reasons stated above, there is no valid basis for modifying the Acting Director's decision that Mr. Childress' application for extension was not timely filed.

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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 affirmed.

J. REUEL ARMSTRONG,
Acting Solicitor.

C. T. HEGWER ET AL.

A-27002

Decided March 11, 1955

Rules of Practice: Appeals: Failure to Appeal—Oil and Gas Leases: Cancellation

One whose oil and gas lease is erroneously canceled and who fails to appeal from the decision canceling the lease loses his rights in his lease.

Oil and Gas Leases: Reinstatement

One whose oil and gas lease is erroneously canceled and who fails to appeal from the cancellation is entitled to reinstatement of his lease only in the absence of intervening rights.

Oil and Gas Leases: Lands Subject to Leasing

When an oil and gas lease is canceled and that cancellation is noted on the tract books of the land office, the lands formerly embraced in the lease immediately become available for leasing by others unless they are on a known geologic structure of a producing oil or gas field or are withdrawn from further leasing.

Oil and Gas Leases: Applications

The first qualified applicant for land available for oil and gas leasing has a statutory preference right to a lease, if a lease is to be issued for the land, which must be honored.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior by C. T. Hegwer and J. E. Bedingfield¹ from a decision by the Acting Director of the Bureau of Land Management, which held that two noncompetitive oil and gas leases issued to C. T. Hegwer had been properly canceled, which revoked the reinstatement and extension of the leases, and

¹ C. T. Hegwer, J. E. Bedingfield, John D. Meredith, and Margaret A. Andrews.

which held that two oil and gas lease applications for the lands covered by the Hegwer leases remain intact.

Noncompetitive oil and gas leases Las Cruces 063944 and 064017,² both of which were dated September 1, 1946, were issued to C. T. Hegwer for an initial term of 5 years under the provisions of section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226). By June 12, 1950, Mr. Hegwer had assigned portions of each lease and there remained in Las Cruces 063944 280 acres of land in sec. 13, T. 24 S., R. 30 E., N. M. P. M., New Mexico, and in Las Cruces 064017 245.34 acres of land in sec. 7, T. 24 S., R. 32 E., N. M. P. M., New Mexico. On that date, the manager of the land and survey office at Santa Fe, in identical notices, informed Mr. Hegwer by registered mail that the rental under his leases had not been paid "as required by the terms of the lease." Mr. Hegwer was informed that he had 30 days from the receipt of the notice within which to pay the amount due and that if no action were taken within the time allowed the leases would be canceled without further notice. Mr. Hegwer received these notices on June 29, 1950. Mr. Hegwer did not pay the rent on either lease, did not appeal from the manager's decisions, or take any other action with respect to the leases within the time allowed. Thereafter, by identical decisions dated October 5, 1950, the manager informed Mr. Hegwer that his leases were canceled, effective as of July 31, 1950, for nonpayment of rent after formal demand therefor and that the cancellation of the leases had been noted upon the records of the land and survey office.

Mr. Hegwer made no response to those decisions. However, on February 27, 1951, he executed a partial assignment of each lease to J. E. Bedingfield. These assignments, accompanied by Mr. Bedingfield's checks covering the rentals due on the leases and the filing fees for the assignments, were submitted to the land and survey office shortly thereafter. They were returned, on March 28, 1951, to Neil B. Watson, apparently Mr. Bedingfield's attorney, with the statement that the leases had been canceled effective July 31, 1950, for nonpayment of the rent.

Nothing further was heard from Mr. Hegwer until August 31, 1951, when he, by his attorney, applied for the reinstatement of both leases. On that date, Mr. Thomas F. McKenna as Mr. Hegwer's attorney in fact filed an application for an extension of both leases, as provided for in section 17 of the Mineral Leasing Act. This application was joined in by J. E. Bedingfield. With these documents, there were filed

² Las Cruces 063944 and 064017, New Mexico 03812, 04168, 07186, and 07187.

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a partial assignment of Las Cruces 063944 and a complete assignment of Las Cruces 064017 to Mr. Bedingfield. The rentals for the fifth and sixth years of the leases were paid at that time.

In the meantime, however, on October 11, 1950, John D. Meredith applied (New Mexico 03812) for a noncompetitive oil and gas lease on the 280 acres of land in Mr. Hegwer's canceled lease Las Cruces 063944 and, on November 7, 1950, Margaret A. Andrews applied (New Mexico 04168) for a noncompetitive oil and gas lease on the 245.34 acres of land in Mr. Hegwer's canceled lease Las Cruces 064017.

On January 18, 1952, the manager reinstated Las Cruces 064017 in its entirety and extended it, reinstated and extended Las Cruces 063944 only as to that portion of the lease assigned to Mr. Bedingfield, and rejected the Meredith application in part and the Andrews application in its entirety.

On January 28, 1952, after the manager had rendered his decision but apparently before Mr. Bedingfield had received a copy thereof, Mr. Bedingfield filed two applications (New Mexico 07186 and 07187) covering the lands embraced in the Hegwer leases.

The appellants assert that the Hegwer leases were improperly canceled, that the leases were placed in good standing on the final day of the initial 5-year term and that they are thus entitled to the extension provided for by statute, and that the lands were not available for leasing when the Meredith and Andrews applications were filed. They ask, in the alternative, that, if the Hegwer leases are not reinstated and extended, Mr. Bedingfield's applications be allowed.

In the circumstances presented by this case, the primary question for consideration is whether the leases can be reinstated and extended, in whole or in part, in view of the intervening Meredith and Andrews applications.

As noted above, Mr. Hegwer took no appeal from the manager's decisions of June 12, 1950, informing him that his leases were in default and that they would be canceled if he did not pay the rent. Nor did he take an appeal from the decisions of October 5, 1950, informing him that his leases had been canceled and that the cancellations had been noted on the records of the local office. He stood idly by while others filed applications for the lands. Mr. Hegwer did nothing to question the correctness of the manager's action in canceling the leases until the very last day of the initial term of his leases, which was 14 months after he was notified of the manager's decision of June 12, 1950. By that time, the lands had been made available for leasing by others.

The fact that the manager may have erroneously canceled the leases³ is no excuse for a failure on Mr. Hegwer's part to pursue the remedy of appeal. *McKernan v. Baily*, 17 L. D. 494 (1893). He must be presumed to have acquiesced in the action taken and to have abandoned his leases. *Cf. State of New Mexico, Robert M. Wilson, Lessee v. Robert S. Shelton and John T. Williams*, 54 I. D. 112 (1932). Mr. Hegwer lost any rights which he may have had in his leases by his failure to appeal from the cancellation of his leases. This principle was recently affirmed in *Charles D. Edmonson et al.*, 61 I. D. 355 (1954). Such rights can be restored only in the absence of intervening rights.

When the leases were canceled and their cancellation noted on the tract books, the lands, unless they were on a known geologic structure of a producing oil or gas field or withdrawn from further leasing (which the lands involved in this appeal apparently were not), immediately became available for leasing by others. (43 CFR 192.43; 19 F. R. 9015.)

Section 17 of the Mineral Leasing Act provides, in pertinent part:

* * * When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding.

Thus when the Meredith and Andrews applications were filed, the lands were available for leasing and those applicants, if they were the first applicants for the lands after the cancellation of the Hegwer leases and if they are otherwise qualified to hold leases, had each acquired a statutory preference right to a lease, if a lease were to be issued, which must be honored. *Russell Hunter Reay v. Gertrude H. Lackie*, 60 I. D. 29 (1947).

Thus regardless of whether the action of the manager in canceling Mr. Hegwer's leases was proper, Mr. Hegwer's right to the reinstatement of his leases must depend upon whether the rights of others have

³The manager canceled the leases for the reason that the appellant did not pay the fourth year's rental 90 days in advance. His action was apparently based upon the provision in section 2 (a) of the leases that the lessee must file a \$1,000 bond not less than 90 days before the due date of the next unpaid annual rental but that this requirement may be successively dispensed with by making payment of each successive annual rental not less than 90 days prior to its due date. This provision obviously cannot be construed as advancing the due date of rental payments but only as a requirement for filing a bond. Since the appellant did not file the bonds or relieve himself of that obligation by paying his rental 90 days in advance, his leases could have been canceled for failure to file the bonds, but not for failure to prepay his rentals. After the rentals became due, the leases could have been canceled for the appellant's failure to pay the rentals. However, the manager never purported to cancel the leases for this reason.

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intervened. If they have, Mr. Hegwer's leases cannot be reinstated. If no other rights have intervened, Mr. Hegwer's application for the reinstatement of his leases may be considered.

Whether there are intervening rights in the lands covered by Mr. Hegwer's canceled leases has not yet been determined. The decision of the Bureau merely held that the Meredith and Andrews applications remain intact. Consideration must be given to the Meredith and Andrews applications and any other applications which may have been filed for the lands after they became available for leasing and before Mr. Hegwer filed his application for the reinstatement of his leases, in their order of filing to determine if the applicants are qualified to hold leases and their applications are proper. If there are proper applications by qualified applicants for the lands in the Hegwer leases, the latter cannot be reinstated.

If there are no qualified applicants for the lands, whose applications were filed after the notation on the tract books of the cancellation of the Hegwer leases and before Mr. Hegwer's application for the reinstatement of his leases, the Hegwer leases may be reinstated and extended, if it be determined that the leases are entitled to extension.

For the reasons stated above, any consideration at this time of the two applications filed by Mr. Bedingfield on January 28, 1952, would be premature.

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 for further action consistent with this decision.

J. REUEL ARMSTRONG,
Acting Solicitor.

H. K. RIDDLE

A-27079

Decided March 15, 1955

Oil and Gas Leases: Extensions

Under section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946, where there has been no production during the primary term of a lease from the leased land, part of which is, and part of which is not, within the known geological structure of a producing oil or gas field at the

expiration of the primary term, such a lease is not extended as to that portion of the land not within the structure of a producing field by the prosecution of diligent drilling operations on the portion of land which is within the structure of a producing field.

Oil and Gas Leases: Extensions

An oil and gas lease is not extended beyond its primary term by a mere discovery on the lease without actual production of oil or gas in paying quantities at the expiration of the primary term.

Oil and Gas Leases: Extensions

In order to obtain a 5-year extension of his lease, a lessee must file an application for such extension; diligent drilling operations do not have the effect of an application.

Oil and Gas Leases: Suspension of Operations and Production—Oil and Gas Leases: Discovery

A suspension of production under an oil and gas lease cannot be granted where the lease contains neither a producing well nor a well capable of production, even though such a discovery had been made on the lease as would support a determination that part of the leased land is situated on the known geological structure of a producing oil or gas field.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Noncompetitive oil and gas lease, Santa Fe 078629, covering 2,561.60 acres of land in New Mexico, issued to Miss Marguerite Riddle on April 1, 1948, pursuant to section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946 (30 U. S. C., 1952 ed., sec. 226). She assigned the lease to H. K. Riddle, effective as of August 1, 1951. The primary term of the lease expired on March 31, 1953.

On April 1, 1953, C. J. Warren, among others, filed an oil and gas lease application for all of the lands included in Mr. Riddle's lease. A public drawing was held on May 27, 1953, to determine the priority of the simultaneously filed lease applications for this land. In a decision of May 27, 1953, the manager of the Santa Fe Land and Survey Office announced that, as a result of the drawing, lease application New Mexico 011639 filed by Mr. Warren was accorded priority No. 1.

On September 25, 1953, Mr. Riddle filed a protest against the issuance of any lease on any of the lands covered by Santa Fe 078629. In a decision dated December 8, 1953, the Chief, Branch of Leasing, Division of Minerals, Bureau of Land Management, held that on March 31, 1953, lease Santa Fe 078629 terminated by operation of

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law as to all of the lands included therein except the N $\frac{1}{2}$ sec. 4, T. 25 N., R. 7 W., N. M. P. M., and that the lease was extended as to the N $\frac{1}{2}$ sec. 4 until March 31, 1955. The decision also dismissed Mr. Riddle's protest as to all of the lands except the N $\frac{1}{2}$ sec. 4. Mr. Riddle filed a motion for reconsideration but on July 7, 1954, the Chief, Branch of Leasing, affirmed his earlier decision. Mr. Riddle has taken an appeal to the Secretary of the Interior from the decision of July 7, 1954.

By a report dated July 23, 1953, the Geological Survey stated that the N $\frac{1}{2}$ sec. 4, T. 25 N., R. 7 W., within the appellant's lease was included, as of March 31, 1953, within the known geologic structure of a producing gas field, undefined. The lands covered by the appellant's lease, other than the N $\frac{1}{2}$ sec. 4, are not within the known geologic structure of a producing oil or gas field.

The decision of July 7, 1954, held that the appellant's lease was extended only as to the N $\frac{1}{2}$ sec. 4 until March 31, 1955. This determination was made in accordance with the third paragraph of section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946, *supra*, which provides in part as follows:

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 * * *. 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. Any noncompetitive lease which is not subject to such extension in whole or in part because the lands covered thereby are within the known geologic structure of a producing oil or gas field at the date of expiration of the primary term of the lease, and upon which drilling operations are being diligently prosecuted on such expiration date, shall continue in effect for a period of two years and so long thereafter as oil or gas is produced in paying quantities.

As the decision authorizing the extension of the lease as to the N $\frac{1}{2}$ sec. 4 was based upon a determination that drilling operations were being diligently conducted by the lessee on the NW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 4, within the known geologic structure of a producing field, on the date of the expiration of the primary term of the lease, it was in accordance with the last sentence of the third paragraph of section 17, quoted above. *Cf.* Solicitor's opinion M-36159, Part III (December 30, 1952).

The appellant asserts that his lease should be extended as to all of the lands covered thereby for 2 years and so long thereafter as oil or gas is produced because he believed that the drilling operations on the NW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 4 would extend the entire lease. However, in the absence of any production from this leasehold before the expiration of the lease on March 31, 1953, diligent drilling operations would not have extended the term of this lease as to lands which were not on that date within the known geological structure of a producing oil or gas field.¹ The record in this case indicates that there has been no production from this leasehold.

The appellant asserts that prior to the expiration of the primary term of his lease, he made a discovery of a commercial gas deposit and that, although no production was obtained from the lease, the discovery was sufficient to extend the lease beyond its primary term. Even if the appellant had made such a discovery, his contention would lack merit. The Department had held several years previous to the asserted discovery that a lease is extended beyond its primary term only if it is actually producing in paying quantities and not if it contains merely a well which is capable of producing in paying quantities but not actually producing. *Joseph L. Dumigan*, A-26148 (August 15, 1951); Solicitor's opinion M-35048 (December 20, 1948).

The appellant maintains that the departmental decision in the case of *Jesse W. White et al.*, A-25904 (December 12, 1950), supports his contention that his lease should be extended in its entirety. However, the *White* case holds that the provision in the third paragraph of section 17 for the 2-year extension of a lease as to lands within the known structure of a producing field on which drilling operations are being diligently prosecuted on the expiration date of the lease means that the drilling operations referred to must be on lands within the producing structure in order to result in the extension of the lease on such lands beyond its primary term. The decision does not imply that such drilling activities would extend a lease as to lands not within the known structure of a producing field.

As the lands within the appellant's lease other than the N $\frac{1}{2}$ sec. 4

¹ The appellant does not cite any provision of the Mineral Leasing Act to support his contention. The only applicable provision is the second paragraph of section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946, which provides that:

"Any lease issued under this Act upon which there is production during or after the primary term shall not terminate when such production ceases if diligent drilling operations are in progress on the land under lease during such period of nonproduction."

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were not within the known geological structure of a producing oil or gas field on the expiration of the primary term and were not withdrawn from leasing, they were subject to a single 5-year extension under the third paragraph of section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946, quoted above.

However, the appellant did not file an application for the extension of his lease, as expressly required by the statute; consequently the lease expired by operation of law as to the lands which were not within the known geologic structure of a producing field. Cf. *John J. Farrelly et al.*, 62 I. D. 1 (1955); *H. L. Cribbs*, A-26864 (July 6, 1954). The appellant's assertion that his action in drilling a well on land within the known geologic structure was tantamount to filing the application for a 5-year extension of the lease as to land not within the known geologic structure is not meritorious in view of the statutory mandate that no extension of a lease on such lands shall be granted unless an application therefor is filed by the record titleholder of the lease within the 90-day period before the expiration of the primary term.

The third paragraph of section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946, clearly stated the conditions under which the term of a lease would be extended as to lands which are outside of a known geologic structure on the expiration of the primary term of a lease. These conditions were separate and distinct from the conditions under which the lease term would be extended as to lands which are within the known structure of a producing field on the expiration of the primary term of a lease. The appellant's contentions would result in a complete disregard of the fact that, where there was no actual production at the expiration of the primary term of a lease and where part of the land is, and part of the land is not, within a known geologic structure of a producing field when the primary term expires, the applicable statutory provisions plainly required the lessee's compliance with two separate kinds of conditions in order to extend such a lease in its entirety beyond its primary term.²

In the circumstances and in accordance with the statutory provisions here under consideration, the only way Mr. Riddle's lease on lands not within a known producing structure could have been extended would have been by the filing of an application therefor as required by statute and applicable departmental regulation (43 CFR

² The third paragraph of section 17 has been amended by the act of July 29, 1954 (68 Stat. 583), to change these conditions. The changes, of course, do not retroactively apply to benefit the appellant.

192.120). As Mr. Riddle failed to do this, the decision that his lease terminated on March 31, 1953, except for the N $\frac{1}{2}$ sec. 4 was correct.

On May 1, 1953, the appellant filed with the regional oil and gas supervisor at Roswell an application for suspension of operations and production under section 39 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 209). The suspension was granted by the oil and gas supervisor from May 1, 1953, through April 30, 1954. On June 28, 1954, the appellant filed a request under section 39 that the Secretary suspend production and waive acreage rental or minimum royalty as to all of the lands covered by his lease. The appellant requested that the suspension be granted retroactively from March 31, 1953, to May 1, 1953, in order to extend the life of the whole lease.

Section 39 of the Mineral Leasing Act, as amended, provides in pertinent part that:

* * * In the event the Secretary of the Interior, in the interest of conservation, shall direct or shall assent to the suspension of operations and production under any lease granted under the terms of this Act, any payment of acreage rental or of minimum royalty prescribed by such lease likewise shall be suspended during such period of suspension of operations and production; and the term of such lease shall be extended by adding any such suspension period thereto.

Section 39 refers in terms only to a suspension of operations *and* production. As it is undisputed that the well on the appellant's lease was not completed until some time in April 1953, it is clear that a suspension of both operations *and* production could not be assented to for that month. The appellant seemingly recognizes this since he has asked only for an assent to a suspension of production. Although the August 8, 1946, amendments to the Mineral Leasing Act eliminated the provisions formerly in section 17 of the act which recognized the authority of the Secretary to assent to a suspension of operations *or* production, with an extension of the lease for so long as the suspension remained in effect, the Department ruled on August 26, 1953, that the Secretary still had authority to assent to a suspension of production only, with the consequence that the lease would not expire during the period of suspension.³ This ruling has been incorporated in the oil and gas regulations, which provide

(d) No lease will be deemed to expire by reason of a suspension of production only pursuant to any direction or assent of the Secretary. [43 CFR 191.26; 19 F. R. 9010.]

³Memorandum dated May 28, 1953, from Director of Geological Survey to Secretary with respect to oil and gas lease Cheyenne 069946, approved by Assistant Secretary Lewis on August 26, 1953.

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The appellant's request raises the question as to whether the Secretary can give a retroactive assent to a suspension of production. This is a question which has not yet been decided by the Department. See *U. S. Oil and Development Corporation*, A-26269 (October 30, 1951); *Eagle Consolidated Oil Company*, A-26259 (January 3, 1952). It also appears that the question need not be decided here, for an indispensable element to granting the suspension is absent in this case, namely, the existence of production prior to the expiration of the term of the appellant's lease which could be suspended. On March 4, 1955, the Director of the Geological Survey reported as follows:

The Survey, in its memorandum of January 27, 1954, stated, in substance, that there was sufficient evidence of a discovery of gas on the subject lease on March 31, 1953, to warrant the inclusion of the N $\frac{1}{2}$ section 4 within a known geologic structure of a producing field. This determination, however, was not intended and should not be interpreted to mean that a well had been completed to production, or was in condition to produce, or was capable of production on that date, that is, March 31, 1953. In fact, the condition of the well on that date was such that gas could not have been produced therefrom, and the well would not have been regarded as entitling the operator to a suspension of production. An application for suspension would not have been regarded as approvable within the intent and spirit of the regulation, 43 CFR 191.26 (b).

Basically, the reported discovery has no relation to well potential, ability to produce in paying quantities, or, in fact, any bearing on final completion. Instead, such initial reports are for classification of lands as believed to be productive for inclusion in or establishment of a known geologic structure.

It is plain from this report that, immediately prior to the expiration of the primary term of the appellant's lease, there was on the lease neither a producing well nor a well capable of production. Consequently it would be impossible to assent to any suspension of production prior to the expiration of the lease. Accordingly the request for assent to suspension must be denied.

The fact that the request for suspension of production on the entire leasehold as of April 1, 1953, cannot be granted does not affect the suspension of operations and production heretofore granted as to the N $\frac{1}{2}$ sec. 4.

In the circumstances, there is no basis for modifying the decision that Mr. Riddle's lease was extended to March 31, 1955, only as to the N $\frac{1}{2}$ sec. 4 and that it terminated by operation of law as to the remainder of the leased lands on March 31, 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 Chief, Branch of Leasing, Division of Minerals, Bureau of Land Management, is affirmed.

J. REUEL ARMSTRONG,
Acting Solicitor.

H. LESLIE PARKER, M. N. WHEELER

A-27066

Decided March 18, 1955

Oil and Gas Leases: Twenty-year Leases—Oil and Gas Leases: Extensions

The last sentence of the fourth paragraph of section 17(b) of the Mineral Leasing Act, as amended, relating to the extension of unitized oil and gas leases upon their elimination from a unit agreement or the termination of the unit agreement applies to 20-year oil and gas leases.

Oil and Gas Leases: Generally

The last sentence of the fourth paragraph of section 17(b) of the Mineral Leasing Act, as amended, relating to the extension of unitized oil and gas leases upon their elimination from a unit agreement or the termination of the unit agreement applies to all such leases without the necessity of the lessee filing the notice of election provided for by section 15 of the act of August 8, 1946.

Statutory Construction: Generally

The words of a statute will be given their plain meaning where to do so does not lead to an absurd or unjust result.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

H. Leslie Parker and M. N. Wheeler have appealed to the Secretary of the Interior from a decision by the Chief, Branch of Leasing, Division of Minerals, Bureau of Land Management, dated April 22, 1954, which granted them a renewal of oil and gas lease Cheyenne 048864 (a) upon certain conditions.

The lease, covering the NE $\frac{1}{4}$ sec. 23 and the S $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 14, T. 35 N., R. 79 W., 6th P. M., Wyoming, was originally issued to the appellants as of January 26, 1931, as a reward for discovery of valuable deposits of oil and gas, pursuant to sections 13 and 14 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437). The lease was for a term of 20 years, with a preferential right of renewal, upon certain conditions, for successive periods of 10 years, and required the lessees to pay a royalty of 5 percent on all oil and gas produced from the leased land.

On December 29, 1939, the Acting Secretary of the Interior ap-

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proved a unit agreement for the Midway Dome Area, I-Sec. No. 325, which included, among other leases and permits, the Parker-Wheeler lease. The Midway Oil Corporation (S. H. Keoughan, or Midway Oil Syndicate, its contractor) was named as the unit operator.

On December 29, 1945, the Assistant Secretary approved a unit agreement, I-Sec. No. 431, for the Midway Dome Area, in which the Phillips Petroleum Co. was named as operator and which superseded the prior unit agreement. After operations under this agreement had proved unsuccessful, the agreement (I-Sec. No. 431) was terminated effective February 18, 1947.

Thereafter, Midway Oil Corporation entered into an agreement with M. M. Travis, under which further development of the Parker-Wheeler lease took place. The agreement was dated September 24, 1948, and was supplemented on January 3, 1949.

It appears that a well on the lease was restored to production sometime in 1949. Production continued until August 24, 1953, when it was shut down as a consequence of the refusal of The Ohio Oil Company to continue to purchase the crude oil until title difficulties to the lease were settled. On August 14, 1953, the Geological Survey had written a letter to the Amcera Oil Company, which has apparently conducted operations on the lease under Travis' agreement with Midway, pointing out that the 20-year term of the lease had expired and that no application for renewal had been filed and that operations after January 25, 1951, might be in trespass.

On November 30, 1953, the appellants filed an application for a renewal of the lease, in which they also contended that for several reasons the lease was still in effect. By a decision dated April 22, 1954, the Chief, Branch of Leasing, Division of Minerals, Bureau of Land Management, held that the lease had expired, but that a renewal would be granted at an increased royalty, provided the lease account was placed in good standing. From this decision, the lessees have taken an appeal to the Secretary.¹

The appellants indicate a willingness to accept a renewal of the lease on the terms offered if their appeal is denied. However, they urge that for several reasons their lease is still in full force and effect according to its original terms and that consequently the lease is not ripe for renewal.

¹ On August 6, 1954, the Department granted permission to M. M. Travis to resume production pending a decision on the appeal in order to avoid damage to the shutdown wells on the lease.

One of their contentions is that the lease has been extended beyond its regular termination date by the provisions of section 17 (b) of the Mineral Leasing Act which was added by the act of August 8, 1946 (30 U. S. C., 1952 ed., sec. 226e). The fourth paragraph of section 17 (b), as originally enacted, read as follows:

Any lease issued for a term of twenty years, or any renewal thereof, or any portion of such lease that has become the subject of a cooperative or unit plan of development or operation of a pool, field, or like area, which plan has the approval of the Secretary of the Interior, shall continue in force until the termination of such plan. Any other lease issued under any section of this Act which is committed to any such plan that contains a general provision for allocation of oil or gas shall continue in force and effect as to the land committed so long as the lease remains subject to the plan, provided oil or gas is discovered under the plan prior to the expiration date of the primary term of such lease. The minimum royalty or discovery rental under any lease that has become subject to any cooperative or unit plan of development or operation, or other plan that contains a general provision for allocation of oil or gas, shall be payable only with respect to the lands subject to such lease to which oil or gas shall be allocated under such plan. Any lease which shall be eliminated from any such approved or prescribed plan, or from any communitization or drilling agreement authorized by this section, and any lease which shall be in effect at the termination of any such approved or prescribed plan, or at the termination of any such communitization or drilling agreement, unless relinquished, shall continue in effect for the original term thereof, but for not less than two years, and so long thereafter as oil or gas is produced in paying quantities.²

The pertinent regulations in effect on the expiration date of the 20-year term of the appellants' lease provided:

Sec. 192.122 *Extension for term of cooperative or unit plan.* (a) Any lease issued for a term of 20 years, or any renewal thereof, committed to a cooperative or unit plan approved by the Secretary of the Interior, or any portion of such lease so committed, shall continue in force so long as committed to the plan, beyond the expiration date of its primary term. This provision does not apply to that portion of any such lease which is not included in the cooperative or unit plan unless the lease was so committed prior to August 8, 1946.

(b) Any other lease issued under any section of the act committed to any such plan that contains a general provision for the allocation of oil or gas shall continue in effect as to the land committed so long as the lease remains subject to the plan, provided oil or gas is discovered under the plan prior to the expiration date of the primary term of such lease. [43 CFR 192.122.]

Sec. 192.123 *Extension of lease eliminated from cooperative or unit plan or communitization or drilling agreement and of lease in effect at termination of such plan or agreement.* Any lease or portion thereof eliminated from any approved or prescribed cooperative or unit plan or from any communitization or

²The second sentence of this paragraph has been amended and a new third sentence added by the act of July 29, 1954 (68 Stat. 583). The changes throw no particular light on the question at issue here.

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drilling agreement authorized by the act, and any lease in effect at the termination of such plan or agreement, unless relinquished, shall continue in effect for the original term of the lease, or for two years after its elimination from the plan or agreement or the termination thereof, whichever is the longer, and so long thereafter as oil or gas is produced in paying quantities. [43 CFR 192.123; 19 F. R. 9018.]

Taking the words of the statute and the regulations at their plain meaning, it would seem that the appellants' lease is a lease which having been in effect when a unit agreement was terminated and upon which oil and gas was being produced on its expiration date is to continue in effect so long as oil or gas is produced in paying quantities.

The only objection to this interpretation is that the last sentence of the fourth paragraph of section 17 (b) was not intended to apply to 20-year leases because such leases are given by law a preference right to renewal for successive 10-year periods and consequently do not need the protection which is afforded by this sentence to other types of leases which are dependent upon production for continuation beyond their primary term and which might otherwise expire after elimination from a unit agreement before the lessee could conduct drilling operations on his own.

While the rationale for distinguishing between 20-year leases and all others in this situation may be sound, it runs contrary to the plain meaning of the words "any lease." Further there is no support in the legislative history of the 1946 act or the Department's decisions for the distinction.

As originally introduced, S. 1236, 79th Congress, which became the act of August 8, 1946, amended, among others, sections 17 and 27 of the Mineral Leasing Act, as amended. Section 2 of S. 1236 amended section 17 to provide in part as follows:

Leases issued for a term of twenty years pursuant to this Act shall continue in force and effect in accordance with the terms of such leases and the laws under which issued: *Provided*, That any such lease that has become the subject of a cooperative or unit plan of development or operation, or other plan for the conservation of the oil and gas of a single area, field, or pool, which plan has the approval of the Secretary of the department or departments having jurisdiction over the Government lands included in said plan as necessary or convenient in the public interest, shall continue in force beyond said period of twenty years until the termination of such plan * * *. [Page 6, lines 14-25.]

The proviso in substantially the same form, had first been added to the Mineral Leasing Act by the act of July 3, 1930 (46 Stat. 1007), and had been maintained without any alteration material here in the

acts of March 4, 1931 (46 Stat. 1523), and August 21, 1935 (49 Stat. 676).

Section 2 of S. 1236 also provided for the amendment of section 27 of the Mineral Leasing Act by adding after the proviso authorizing unit agreements the following proviso:

* * * *Provided further*, That any lease which shall be eliminated from any such approved agreement or plan shall continue in effect for the original term thereof but for not less than two years, and so long thereafter as oil or gas is produced in paying quantities: * * *. [Page 12, lines 19-23.]

In his report on S. 1236 the Secretary of the Interior enclosed a substitute draft of the bill which combined the provisions relating to unitization into section 17 (b) (see letter from Secretary to Chairman of Committee, March 15, 1946, Committee Print, Reports Submitted to the Committee on Public Lands and Surveys, United States Senate, 79th Congress).

In discussing the purposes of S. 1236, the Secretary stated:

(7) The bill would extend nonproducing oil and gas leases—

* * * * *

(c) For not less than 2 years after elimination from a unit area; page 12, lines 19 to 23, inclusive; * * *. [*id.*, page 9.]

The Secretary approved of this proposal saying,

The proposed extensions of the initial term of a lease not subject to renewal upon which drilling is in progress and of a lease eliminated from a unit plan are desirable. The former would protect diligent lessees who have been unable to complete their prospecting operation during the 5-year term of the lease. The latter gives the lessee who surrenders his exclusive right to drill in the interest of conserving the oil and gas deposit an opportunity to drill his lease before it expires where, for any reason, it is excluded from the unit area. * * * [*id.*, page 13.]

The fourth paragraph of section 17 (b) was enacted in the form suggested by the Secretary with the addition of the underlined words as follows and the substitution of "primary" for "fixed" as indicated:

Any lease issued for a term of twenty years, or any renewal thereof, or any portion of such lease that has become the subject of a cooperative or unit plan of development or operation of a pool, field, or like area, which plan has the approval of the Secretary of the Interior, shall continue in force until the termination of such plan. Any other lease issued under any section of this Act which is committed to any such plan that contains a general provision for allocation of oil or gas shall continue in force and effect as to the land committed so long as the lease remains subject to the plan, provided oil or gas is discovered under the plan prior to the expiration date of the primary [fixed] term of such lease. *The minimum royalty or discovery rental under any lease that has become sub*

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ject to any cooperative or unit plan of development or operation, or other plan that contains a general provision for allocation of oil or gas, shall be payable only with respect to the lands subject to such lease to which oil or gas shall be allocated under such plan. Any lease which shall be eliminated from any such approved or prescribed plan, or from any communitization or drilling agreement authorized by this section, and any lease which shall be in effect at the termination of any such approved or prescribed plan, or at the termination of any such communitization or drilling agreement, unless relinquished, shall continue in effect for the original term thereof, but for not less than two years, and so long thereafter as oil or gas is produced in paying quantities.

There does not appear to have been any further discussion of the last sentence of the fourth paragraph of section 17 (b) in the course of the bill through the Congress to its enactment.

An examination of the fourth paragraph of 17 (b) as enacted indicates that the words "any lease" without qualification also occur in the third sentence, relating to payments of minimum royalty or discovery rental. This sentence applies to 20-year leases. *General Petroleum Corporation et al.*, 59 I. D. 383 (1947).

The term "any lease" is also used in other portions of the 1946 act. It appears in the third paragraph of section 17 (b), relating to pooling of separate tracts under certain circumstances and is plainly applicable to 20-year leases. It also appears in the final paragraph of section 17 (b) dealing with subsurface storage of oil and gas in leased lands, where it undoubtedly includes 20-year leases and, in applicable circumstances, that paragraph would extend a 20-year lease "so long as oil or gas is being produced in paying quantities" as well as any other type of lease. It is also used in sections 27, 30 (a), 30 (b), 31 and 39 and each time is applicable to 20-year leases.

In view of the many times that the term is used in the Mineral Leasing Act, as amended by the 1946 act, most of which times the term clearly applies without differentiation to 20-year, as well as to other, oil and gas leases, I must conclude that the possibility that the use at issue here may bestow an unintended benefit upon 20-year leases is not sufficient to justify a finding that Congress intended to make a distinction in this one instance.

Even where the legislative history of a statute has indicated that the congressional purpose in enacting the statute was less broad than the language used, the Department has held that there was no basis for departing from the plain language of the statute inasmuch as giving effect to the plain language did not produce an absurd or

patently unjust result. Solicitor's opinion M-35048, 60 I. D. 260 (1948); Solicitor's opinion M-36159 (December 30, 1952). Here there is no indication that Congress' intention was less broad than the plain language of the statute imports and consequently the plain language should be given effect.

This holding leads to a consideration of whether section 15 of the act of August 8, 1946, affects the appellants' right to benefit by it. Section 15 provides:

No repeal or amendment made by this Act shall affect any right acquired under the law as it existed prior to such repeal or amendment, and such right shall be governed by the law in effect at the time of its acquisition; but any person holding a lease on the effective date of this Act may, by filing a statement to that effect, elect to have his lease governed by the applicable provisions of this Act instead of by the law in effect prior thereto.

The pertinent regulation states:

Applicability of amendatory act to existing leases. Prior to the filing of the notice of election hereinafter referred to, the act of August 8, 1946 (60 Stat. 950; 30 U. S. C. 181) applies to leases issued prior to the date of that act only where the amendatory act so provides. The owner of any lease issued prior to August 8, 1946, may elect pursuant to section 15 to come entirely under the provisions of that act by filing a notice of election to have his lease governed by the amendatory act, accompanied by the consent of the surety if there is a bond covering the lease. A notice of election so filed shall constitute an amendment of all provisions of the lease to conform with the provisions of the amendatory act and the regulations issued hereunder. [43 CFR 192.1; 19 F. R. 9011.]

As the regulation indicates, some of the provisions of the 1946 act apply to all leases in effect on the date of that act whether an election is made or not and some apply only if an election is made. There is no indication in the record that the appellants have ever filed an election which would bring them entirely under the 1946 act. Thus the appellants can avail themselves of the extension granted by the last sentence of the fourth paragraph of section 17 (b) to leases in effect when a unit agreement is terminated only if this provision applies to leases issued prior to August 8, 1946, without the necessity of filing a notice of election.

The fourth paragraph of section 17 (b) confers benefits upon lessees without imposing an alternative burden upon them. The second and third sentences of this paragraph plainly apply to leases issued prior to August 8, 1946, as well as to those issued thereafter, and do not require any election from the lessee in order to entitle him to the benefits they provide. The last sentence appears to be of the same nature.

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In a case in which a notice of election was filed, the Department has interpreted the second clause of section 15 of the 1946 act as follows:

* * * This clause appears to provide that, to the extent that the 1946 amendments to the Mineral Leasing Act provide for rights or obligations which differ from those contained in leases issued prior to August 8, 1946, or in the prior law applicable to such leases, the holder of such a lease may elect to have his lease governed by the inconsistent provisions of the 1946 act, regardless of whether they confer additional rights or impose additional burdens. Provisions of the lease, or of the prior law applicable to the lease, which are not inconsistent with the 1946 amendments to the Mineral Leasing Act would be unaffected by the election. [Solicitor's opinion M-36048, July 31, 1950.]

If the filing of a notice of election only changes conditions of a lease or of the prior law applicable to the lease, which are inconsistent with the amendments effected by the 1946 act, it must follow that no election is necessary where there is no inconsistency between the prior law and the act of August 8, 1946.

Therefore, we must determine whether the last sentence of the fourth paragraph of section 17 (b) with which we are concerned affects any rights which the lessee had prior to the enactment of the act of August 8, 1946.

The prior law contained no provisions relating to the extension of leases which are in effect when a unit plan terminates. The rights the appellants had under the law prior to its amendment in 1946 were to have their lease run to the end of its 20-year term and then by a proper application to have it renewed for a 10-year term. Section 17 (b) added the right to have the lease run for no less than 2 years from the termination of the unit agreement and so long thereafter as oil or gas is produced in paying quantities. Plainly section 17 (b) did not affect the right of the appellants to have their original lease run for its term of 20 years. Nor did it alter in any way the appellants' right to renew their lease. Its effect is simply that if the appellants took no action under their right of renewal, this provision of section 17 (b) extended their lease so long as oil and gas is produced in paying quantities.

The difficulty in applying the provision of section 17 (b) with which we are concerned to the appellants is that in doing so their lease changes from one which has a right to successive renewals of 10 years each, regardless of production, to one which is dependent on production for its existence. Drastic a change as this may be, as the application of this provision of section 17 (b) to the appellants does not

affect any right acquired by them under the law prior to enactment of the provision, there is no necessity for them to invoke the provisions of section 15 of the 1946 act and to file an election.

Shortly after the passage of the 1946 act, the Department completely revised the oil and gas regulations in light of that act. 43 CFR, 1946 Supp., Part 192. Although section 192.123, which dealt with the extension of leases in effect when a unit agreement is terminated, made no reference to the necessity of an election under section 15 of the 1946 act, other sections of the regulations did. For example, section 192.81 required an election if a lessee desired to take advantage of the provision of section 17, as amended, for the payment of a minimum royalty in lieu of discovery rental. Similarly, section 192.120 required an election if a lessee under a lease issued prior to August 8, 1946, wished to obtain an extension of his lease under section 17, as amended, in lieu of a new lease under the former provisions of the law.

In contrast, other sections of Part 192 which were concerned with other changes in the Mineral Leasing Act made by the 1946 act did not require an election to make them applicable. In this category are sections dealing with assignments (192.140-192.145), relinquishments (192.160), royalty on production (192.82), and subsurface storage (192.25).

The absence of a requirement that a lessee in the situation of the appellants file a notice of election is some indication that such action was not deemed to be necessary.

Additional support for this point of view is found in the action taken by the Bureau of Land Management in *Amerada Petroleum Company*, Salt Lake City 064580, and seven other leases. These eight leases were 5-year noncompetitive leases, issued from May to October 1945, which had been committed to the unit agreement for the Green River Unit area, Utah, I-Sec. 563. The unit agreement was terminated on October 31, 1949. By a decision dated November 14, 1949, the Chief, Branch of Minerals, Division of Adjudication, Bureau of Land Management, citing 43 CFR 192.123, extended the eight leases to October 31, 1951, and so long thereafter as oil or gas is produced in paying quantities. There is no indication in the records that the lessee had filed a notice of election under section 15.

Amerada's situation was in several respects identical with the appellants'. At the termination of the unit agreement, which was before the expiration of the 5-year terms of its leases, Amerada was entitled to await the expiration of its leases and then file preference right applications for new leases, under the act of July 29, 1942 (56

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Stat. 726), or, if the provisions of section 17 (b) applied, to have the leases continue in effect for 2 years and so long thereafter as oil and gas is produced in paying quantities.

These same alternatives were open to the appellants—either a 10-year renewal or the continuation in effect of the old lease for the remainder of the original term and so long thereafter as oil and gas is produced in paying quantities.

While the Bureau of Land Management decision of November 14, 1949, did not discuss the question of whether an election was necessary, its prompt and unrequested action in extending the leases is indicative of its assumption that no election was required.

In other situations the Department has allowed the extension of other pre-1946 leases without the necessity of filing an election. It held that a pre-1946 5-year noncompetitive lease is extended for the period during which compensatory royalty is paid after the expiration of its primary term. (Solicitor's opinion M-35046, December 24, 1948.) Although the provision for such an extension was added to section 17 of the Mineral Leasing Act by section 3 of the 1946 act, the opinion made no reference to the necessity for an election as a prerequisite to its applicability. The Department has also held that the portion of a 10-year exchange lease effective January 1, 1940, which had been committed to a unit agreement which terminated on December 31, 1949, was automatically extended for 2 years. (*L. E. McLaughlin et al.*, A-25957 (January 23, 1951).) This case differs from the one on appeal in that there was no alternative available to McLaughlin. If the provisions of section 17 (b) did not apply, there was no other way to continue the lease. However, it is significant that provisions of section 17 (b) were applied to a pre-1946 lease without requiring the lessee to file a notice of election under section 15 of the 1946 act. In *H. H. Howell*, A-25852 (December 29, 1950), it was held that a lease created by assignment out of a pre-1946 lease is extended for 2 years after the date of discovery of oil and gas in paying quantities upon any segregated portion of the lands originally subject to the basic lease under the provisions of section 30 (a), as added to the Mineral Leasing Act by section 7 of the act of August 8, 1946. There again the Department made no reference to the filing of an election.

The only difference between the situation in these cases and the one on appeal is that the appellants here had the opportunity of applying for a renewal of their lease up until its expiration date. There was, however, no obligation on their part to indicate at any time whether

they intended to avail themselves of this opportunity. Not having exercised it, they have placed their lease, on its expiration date, in exactly the same situation as the leases in the *McLaughlin* and *Howell* cases, *supra*. Thus, the extension provisions of the 1946 act, without the necessity of an election, are as applicable to the appellants' lease as to the latter leases.

In view of the ambiguity of section 15 and of the lack of a clear requirement in the regulation that a notice of election be filed, when coupled with the apparent assumption in the Bureau of Land Management that no election was necessary in an analogous situation and the Department's application of the provisions of the act of August 8, 1946, to somewhat similar situations without the filing of a notice of election, I am of the opinion that the last sentence of the fourth paragraph of section 17 (b) is applicable to the appellants' lease without their having filed a notice of election.

Therefore, the appellants' lease has been in effect since the termination of the unit agreement, first, for the rest of its original term, and thereafter it was continued in effect by the production of oil and gas in paying quantities. It will remain in effect so long as oil or gas is produced in paying quantities. The lessees are authorized to continue their operation of the lease subject to its terms and to the applicable rules and regulations.

This conclusion necessarily disposes of the appellants' alternative contention that unit agreement I-Sec. No. 431 was not validly terminated on February 18, 1947. Whether the termination was proper or not, it was in fact accomplished and the appellants acquiesced in the action. This is evidenced by the agreement entered into with M. M. Travis on September 24, 1948, which provided for operations on the appellants' lease, an action wholly incompatible and inconsistent with the idea of the continued existence of the unit agreement under which such operations would have been conducted by the unit operator.

It is unnecessary to consider the other contentions urged by the appellants.

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, Branch of Leasing, Division of Minerals, Bureau of Land Management, is set aside and the case is remanded for further proceedings consistent with this decision.

J. REUEL ARMSTRONG,
Acting Solicitor.

March 21, 1955

CLAUDE E. CRUMB

A-26930

Decided March 21, 1955

Desert Land Entry: Cancellation—Administrative Practice

The report of a field examination, although a proper basis for charges, notice, and a hearing, is not evidence on which the final action of cancellation of a desert land entry may be taken.

Desert Land Entry: Cancellation—Administrative Practice

A desert land entry is not to be canceled for defects not appearing on the face of the record without giving the entryman an opportunity to be heard.

Desert Land Entry: Proof—Desert Land Entry: Reclamation

The desert land law requires that in order to make satisfactory final proof of entry, an entryman must, in addition to the reclamation of the irrigable land in his entry, actually irrigate and cultivate one-eighth of this land.

Desert Land Entry: Proof

The actual production of an agricultural crop is not required in order to make satisfactory final proof of the reclamation, irrigation, and cultivation of the one-eighth portion of the land in a desert land entry, but, except where grass crops only can be grown or where tillage would be detrimental to the soil, the cultivation of a desert land entry must at least include tillage.

Desert Land Entry: Proof

Satisfactory final proof of the reclamation, irrigation, and cultivation of land in a desert land entry must show that the entryman has made a bona fide effort to produce an agricultural crop. The adequacy of such good faith is to be measured by the extent of the entryman's efforts to produce a productive and profitable crop, provided always that such efforts include performance of the acts of reclamation, irrigation, and cultivation within the defined scope of those terms.

Words and Phrases

Reclamation. As used in the desert land law, reclamation of land is interpreted to mean conducting water in adequate supply to the land so as to render it available for distribution when needed.

Words and Phrases

Cultivation. As used in the desert land law, cultivation of land means tillage, which is "the operation, practice, or act of tilling or preparing land for seed, and keeping the ground in a state favorable for the growth of crops." Because the cultivation of desert land without irrigation would be a useless proceeding, the irrigation of such land is required as an attendant act.

Words and Phrases

Irrigation. As used in the desert land law, irrigation means the application of water to land.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Claude E. Crumb has appealed to the Secretary of the Interior from a decision dated September 29, 1953, by the Assistant Director, Bureau of Land Management, affirming the action of the manager of the land office at Los Angeles, California, by which the appellant's final proof in support of his desert land entry (43 U. S. C., 1952 ed., sec. 321 *et seq.*) was rejected and his entry held for cancellation. This entry, described as the SW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 22, NE $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 27, T. 4 N., R. 6 E., S. B. M., California, was allowed on October 22, 1947. The appellant's sworn testimony of final proof was received in the land office at Los Angeles on December 3, 1951.¹

Although the Assistant Director affirmed the manager's rejection of the final proof, he reached this result via a different approach. He specifically rejected the basis of the manager's decision because it was derived from a report by a field examiner of the Bureau of Land Management, dated June 20, 1952. In his decision, the manager noted that the appellant's final proof of entry had been made some 6 months before the date of the field examination report; he then stated:

From the report * * * it is shown that while the entryman has spent more than the required amount in his attempt to reclaim this land, and has actually applied water to more than the required one-eighth of the land, he has not produced an agricultural crop; he has not constructed the necessary ditches or conduits to carry water to all of the irrigable land within the entry; has not developed a supply of water within his entry and has not secured a right to the land on which he drilled a well to obtain a water supply. The volume of water developed is adequate to irrigate not more than 120 acres. The quality of the water is saline and not considered suitable for the irrigation of agricultural crops.

The Assistant Director rightly held that a report of field examination, although a proper basis for charges, notice, and a hearing, is not evidence on which the final action of cancellation may be taken. *John C. Miller*, 28 L. D. 45, 46, 47 (1899). *Cf. Richard P. Ireland*, 40 L. D.

¹ In his appeal, the appellant reveals that he was compelled to surrender possession of the land within his entry by virtue of a court order for possession entered on July 30, 1952. This order resulted from an action brought by the United States in the United States District Court, Southern District of California, Central Division, docketed as No. 14334-PH Civil and entitled *United States of America v. 558,829.28 acres of Land, more or less, in the County of San Bernardino, State of California, Southern Pacific Land Company, a corporation, et al.* Information supplied by the office of the Assistant Attorney General, Lands Division, United States Department of Justice, indicates that the lands within the appellant's entry are referred to in the aforementioned action as Parcel No. 26, and have been taken simply for temporary use by the Department of the Navy in connection with the so-called "Twenty-nine Palms Project." The estate so taken was for an initial term extending through June 30, 1953, with a right to extend, at the election of the Government, for yearly periods through June 30, 1958. At present the term has been extended through June 30, 1955. These facts concerning the court action, though not material to present issues, are placed in the record here because they might, conceivably, become material at a later stage in the disposition of this case.

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484, 485 (1912); *George F. Goodwin*, 43 L. D. 193, 195 (1914); *Henry Chamberlain*, 48 L. D. 411, 414 (1922); *John Robert Clavis, Richard H. Yoder*, 60 I. D. 457, 459 (1951). An entry is not to be canceled for defects not appearing on the face of the record without giving the entryman an opportunity to be heard. *Johnnie E. Whitted, Bill Smith*, 61 I. D. 172 (1953).

The Assistant Director, however, noted what he considered to be a sufficient ground for rejection of the appellant's final proof in the fact that the appellant had not produced an agricultural crop on his entry. Such failure, the Assistant Director concluded, was a fatal deficiency in the appellant's final proof, the evidence of such failure in the form of the appellant's sworn testimony of final proof being enough to establish the fact.² Nevertheless, the Assistant Director's holding that the proof of cultivation must include proof of the actual production of an agricultural crop is an overstatement of the law.

The desert land law, as implemented by regulation, provides that patent may only issue for an entry on satisfactory proof of reclamation of the land and on the further proof of the irrigation and cultivation of at least one-eighth of the land in a manner calculated to produce profitable results (43 U. S. C., 1952 ed., secs. 328 and 329; 43 CFR 232.25 and 232.30 (19 F. R. 9086)).

The desert land act of March 3, 1877 (19 Stat. 377), before being amended and supplemented by the act of March 3, 1891 (26 Stat. 1095, 1096-1097), had merely called for satisfactory proof of *reclamation* of the entered land, such reclamation to be accomplished "by conducting water on the same," within 3 years after the date of the entry. According to departmental interpretations of the act of 1877, these requirements could be satisfied by conducting water in adequate supply to the land so as to render it available for distribution when needed.³

The act of 1891, however, allowed the entryman up to 4 years from the date of entry to comply with the requirements as to reclamation of the land and to submit final proof, but provided "that proof be further required of the cultivation of one-eighth of the land." (43

² Where an entryman's final proof, on its face, shows noncompliance with the requirements of the law, it is proper to hold the proof for rejection and the entry for cancellation on the basis of such insufficient final proof. *Paris Gibson et al.*, 47 L. D. 185, 186 (1919); *United States v. Robert L. Pope, Jr.*, 58 I. D. 574, 576 (1943); *United States v. Evan R. Jensen*, A-26486 (December 2, 1952).

³ *Instructions of the Secretary*, 3 L. D. 385, 386 (1885); *Dickinson v. Auerbach*, 18 L. D. 16, 19 (1894) ("Supply *in posse*, rather than *in esse*, meets the requirements of the law, and satisfies the demands of equity"); *Brandon v. Costley*, 34 L. D. 488, 500 and *passim* (1906). Cf. *United States v. Mackintosh et al.*, 85 Fed. 333, 337 (8th Cir. 1898); *Connor v. United States*, 214 Fed. 522, 535-536 (9th Cir. 1914).

U. S. C., 1952 ed., secs. 328 and 329.) Of the purpose of this added provision, the decision of *Brandon v. Costley, supra*, footnote 3, declared, at page 498:

* * * The primary object of the act of 1877 was the change of lands from a desert to an agricultural state, "to secure the actual and permanent reclamation of land which in a natural state is unproductive," and that title might not pass upon a mere constructive compliance with the law, the additional requirement of cultivation was put in the amendatory act of 1891. * * *

The word "cultivation" used in connection with the desert land law, the homestead laws, and the former preemption law has been frequently discussed and defined in decisions and opinions of this Department.⁴ The most comprehensive treatment of the term is to be found in the aforementioned decision of *Brandon v. Costley*, a case in which a desert land entry was contested for alleged failure of the entrywoman to make legally sufficient final proof of entry. Regarding the meaning of "cultivation," the decision, at page 498, states:

* * * There is nothing from which it can be inferred that the word "cultivation" was employed in the act in any different sense from what is ordinarily understood by that term, namely, tillage, which, as defined by Webster, is "the operation, practice, or act of tilling or preparing land for seed, and keeping the ground in a state favorable for the growth of crops."

But the actions involved in reclamation and cultivation of the one-eighth portion of the land do not constitute the entire process. There must also be irrigation of this land. The decision of *Alonzo B. Cole*, 38 L. D. 420 (1910), holds, at page 422:

Cultivation of desert lands without actual irrigation would be a useless proceeding, and inasmuch as the cultivation of the amount stated is required, it is also necessary that this area must have been actually irrigated by placing water upon it prior to final proof. * * *

The desert land law itself provides that a prospective patentee must have expended a certain minimum amount of money "in the necessary irrigation, reclamation, and cultivation" of the land (43 U. S. C., 1952 ed., sec. 328). As a direct result of the *Cole* decision, the departmental regulations have incorporated the following as a part of 43 CFR 232.30 (19 F. R. 9086):

While it is not required that all of the land shall have been actually irrigated at the time final proof is made, it is necessary that the one-eighth portion which is required to be cultivated shall *also* have been irrigated in a manner calculated to produce profitable results, considering the character of the land, the

⁴ Cf. *Andrew Clayburg*, 20 L. D. 111, 114 (1895) (desert land entry); *Nancy M. Hough*, 47 L. D. 621, 624 (1921) (desert land entry); 43 CFR 166.23 (19 F. R. 8969) (homestead entry). See the numerous cases cited in *Brandon v. Costley, supra*, pp. 499-500.

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climate, and the kind of crops being grown. (Alonzo B. Cole, 38 L. D. 420.) * * * [Italics supplied.]

As for the word "irrigation" as used in the desert land law and the implementing regulations, it can have only one meaning: the application of water to the land.

Thus, the desert land entryman, in order to make final proof of entry, must (in addition to fulfilling other requirements not pertinent at this point) make proof of the reclamation, irrigation, and cultivation of one-eighth of the land in his entry. Yet, contrary to the rule which the Assistant Director advanced in support of his holding, there is nothing in the desert land law or the departmental regulations and decisions which either expresses or implies that production of an agricultural crop is indispensable to the sufficiency of proof of reclamation, irrigation, and cultivation.

The words "reclamation," "irrigation," and "cultivation" have, with respect to the desert land law, well established meanings, as set forth above. None of these definitions can be stretched to include production of a crop as one of its necessary incidents. To be sure, crop production is the most satisfactory method of showing the sufficiency of the irrigation and water supply, which are essential to reclamation. Some of the language in Questions 11 and 12 of the final proof testimony form reflects this.⁵ But whatever these questions may suggest as possible administrative interpretation, they do not in this case bespeak the rule.

In support of his view that the term "cultivation" properly encompasses production of a crop, the Assistant Director has referred to "The method and scope of cultivation required under the Desert Land Law [which] are described in 43 CFR 232.32 and 232.33."⁶ In addition, he has cited as direct authority *Charles Edmund Bemis*, 48 L. D. 605 (1922), and as collateral authority *Clark C. Johnson*, A-25923 (May 14, 1951).

With respect to that portion of 43 CFR 232.30 (19 F. R. 9086) which is quoted above, it is evident that, insofar as a farming activity such as the appellant's is concerned, there is nothing in that provision to equate cultivation with the actual production of an agricultural crop. On the contrary, it implies that at the time of final proof the one-eighth portion to be cultivated need only have been irrigated "in a manner *calculated* to produce profitable results, * * *." [Italics

⁵ Cf. footnote 8 *infra*.

⁶ The same sections are now designated as 43 CFR 232.30 and 232.31 (19 F. R. 9086).

supplied.] This language plainly does not envision that the "profitable results" must have been produced at the time of making final proof.

The text of 43 CFR 232.31 (19 F. R. 9086) is as follows:

As a rule, actual tillage of one-eighth of the land must be shown. It is not sufficient to show only that there has been a marked increase in the growth of grass or that grass sufficient to support stock has been produced on the land as a result of irrigation. If, however, on account of some peculiar climatic or soil conditions, no crops except grass can be successfully produced, or if actual tillage will destroy or injure the productive quality of the soil, the actual production of a crop of hay of merchantable value will be accepted as sufficient compliance with the requirements as to cultivation. (32 L. D. 456.) In such cases, however, the facts must be stated and the extent and value of the crop of hay must be shown, and, as before stated, that same was produced as a result of actual irrigation.⁷

This contains no reference to any requirement of the actual production of an agricultural crop, except where grass crops only can be grown or where tillage will prove detrimental to the soil. The inference is readily drawn that where tillage is required, actual production of a crop is not essential to satisfactory final proof.

The very decision on which the Assistant Director places chief reliance disproves his contention.⁸ This decision, *Charles Edmund Bemis, supra*, contains the following declaration at page 607:

* * * While, as stated in the case of Nancy M. Hough, *supra*, it is not always necessary to show that the crop was remunerative, yet it is incumbent upon the entryman to show that some sort of a crop was raised by irrigation or that a *bona fide* effort was made with that end in view. * * * [Italics supplied except as to *bona fide*.]

While it is true that this case *relates* the test of final proof of entry to the raising of a crop by irrigation, it obviously does not make the raising of a crop an indispensable requirement. Reference to the raising of a crop seems rather a recognition that this is the easiest, most satisfactory method, of showing that the performance of the activities involved in the reclamation, irrigation, and cultivation of

⁷ See *Mary Munro*, 35 L. D. 15, 17 (1906). With respect to the citation 32 L. D. 456, see footnote 11, *infra*.

⁸ The other decision mentioned by the Assistant Director, *Clark C. Johnson*, A-25923 (May 14, 1951), contains statements which might indicate that the statutory requirement of cultivation includes the actual production of a crop. However, these statements follow discussion of certain questions in the final proof blank which were designed to elicit information pertinent to the matter of final proof. These questions impliedly recognize that the ordinary method of proving reclamation and cultivation is by the production of a crop. The language of these questions should not, however, be taken as an administrative construction of the law to the effect that actual crop production is an indispensable element of final proof.

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the land either has been accomplished or is proceeding duly in the direction of the ultimate objective of the desert land law; that is, "the change of lands from a desert to an agricultural state."

It is clear, however, that the *Bemis* case has given definite affirmation to the standard of bona fides in judging the satisfactoriness of proof of reclamation, irrigation and cultivation.⁹ There, an entryman, without disclosing any reason, had made proof of attempted cultivation before the crop he had planted had germinated. He had submitted final proof even though he had nearly two full cropping seasons before the expiration of the time for doing so. Employing the reasoning that a bona fide effort to produce an agricultural crop would necessarily include the utilization of so much of the time still available to the entryman as would be needed to bring his crop to maturity, the decision ruled that the proof offered by the entryman was insufficient and that supplemental proof could properly be demanded of him within the period of time left for his making final proof.

In explanation of this standard of good faith, the *Bemis* case matches good faith to concrete effort, declaring that "the degree of good faith displayed by a claimant must necessarily be measured by the extent to which he tried to produce a productive and profitable crop." (48 L. D. 608.)

Actually, the *Bemis* case holds merely that with respect to the one-eighth portion of the land in a desert land entry which must be cultivated, the proof of reclamation, irrigation, and cultivation may be satisfied by a bona fide effort to produce a crop.¹⁰ Read literally, however, this holding must be regarded as too abridged a statement of the rule, since, even where some degree of good faith is evident, it will necessarily be insufficient unless it is manifested by efforts which include the acts of reclamation, irrigation, and cultivation, as defined above, performed in a manner calculated to produce profitable results.¹¹

⁹ Cf. *John Cunningham*, 32 L. D. 207, 208 (1903); *Nancy M. Hough*, footnote 4 *supra*, p. 624.

¹⁰ The paragraph of the *Bemis* case from which the quotation appearing above is taken concludes with the following sentence: "The mere planting of a crop does not fulfill the requirement." When this sentence is read in context with the entire decision, it becomes clear that it is not to be regarded as a general holding that in all cases something more than planting is required to prove cultivation. The import of this sentence is, rather, that where good faith is not evident, the planting of a crop will not satisfy the requirement of proof of cultivation.

¹¹ Cf. *John Cunningham*, *supra*, footnote 9, in which it was held that efforts to produce a crop must be such as can demonstrate the reclamation of the land from its desert condi-

From the provisions of the desert land law itself, certain inferences may be drawn. As stated previously, under this law an entryman has initially 4 years from the date of his entry within which to submit final proof of compliance with the requirements of the law as to reclamation and cultivation (43 U. S. C., 1952 ed., sec. 329). It is reasonable to assume that the law does not contemplate that the end of the 4-year period must always coincide with the time when an agricultural crop has matured, quite obviously because growing seasons, types of crops, weather, geography, and other variables and contingencies bear no necessary relationship to the anniversary of the date of entry. Moreover, it would be a harsh interpretation of the law indeed if an entryman's final proof were rejected because, although he had done everything necessary to produce a crop, that crop had failed to mature on account of such unforeseen factors as plant disease or flood or insect damage.¹²

In the present case, actual tillage of the soil, planting of a crop, and irrigation of the land had occurred before the appellant's submission of his final proof on December 3, 1951. He has stated, in his appeal to the Director, Bureau of Land Management, that 40 acres planted in ranger alfalfa and 35 acres planted in oats were in excellent condition at the time he was forced by the court order temporarily to quit the land. In his appeal to the Secretary the appellant avows that he "has done everything humanly possible to reclaim and put to productive use the land involved" and asserts that he has spent approximately \$18,000 in connection with his entry.

From the foregoing, it is apparent that the adequacy of the appellant's final proof must be tested by criteria other than the production of an agricultural crop.

Despite the fact that the Assistant Director's decision cannot be sustained with respect to the particular issue on which it was based, the record here, including the final proof testimony, shows a number of omissions which, unless clarified, may nonetheless require rejection of the appellant's final proof and the cancellation of his entry.

For example, Question 6 of the final proof testimony form instructs the claimant to state the source and volume of his water supply, how it was acquired, how it was maintained, and at what cost (43 CFR

tion. (The validity of this rationale undoubtedly remained unaffected by the modification of the *Cunningham* decision by the *Instructions* of the Secretary, 32 L. D. 456 (1904), which merely specified that actual tillage of the land was required.) Cf. also *Brandon v. Costley*, *supra*, p. 501, and the quotation, *supra*, from 43 CFR 232.30 (19 F. R. 9086). See *Forest R. Mildren and Grace Ganey Mildren*, A-23660 (July 21, 1943).

¹² Cf. *Instructions* of the Secretary, 3 L. D. 385 (1885).

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232.29 (19 F. R. 9086)); also called for is record evidence of the entryman's right to the use of such water or other satisfactory evidence in accordance with local laws (43 CFR 232.32 (19 F. R. 9086)). The appellant's reply, in full, to Question 6 is: "16" well pumping better than 100 miners inches, pumped into main ditches." There is no showing whatever in the record either as to evidence of the appellant's right to the use of the water of which he speaks or as to the sufficiency of his water supply for the irrigation of all the irrigable land embraced in his entry (43 CFR 232.32 (19 F. R. 9086)).

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 to the Bureau of Land Management for further action in accordance with this decision.

J. REUEL ARMSTRONG,
Acting Solicitor.

MARY E. BROWN

A-27072

Decided March 23, 1955

Oil and Gas Leases: Lands Subject to Leasing

Applications for oil and gas leases filed after the revocation of a withdrawal of the land covered by the applications but before the date specified in the revocation order for the receipt of applications for the land must be rejected.

Withdrawals and Reservations: Revocation

Where an order revoking a withdrawal of land specifies that the revocation shall not be effective to change the status of a part of the land affected by the revocation until a future date, that part of the land is not available for oil and gas leasing until that future date.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior by Mary E. Brown from a decision of the Associate Director of the Bureau of Land Management dated May 22, 1952, which affirmed the action of the acting manager of the land office at Salt Lake City, Utah, in rejecting, on August 30, 1948, Miss Brown's application for a noncompetitive oil and gas lease under section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226), insofar as it covered the following described land in T. 15 S., R. 21 E., S. L. M., Utah:

Sec. 6: Lots 2, 3, 4, 5, 6, 7, SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$,
W $\frac{1}{2}$ SE $\frac{1}{4}$

Sec. 7: Lots 1, 2, 3, 4, E $\frac{1}{2}$ W $\frac{1}{2}$, W $\frac{1}{2}$ E $\frac{1}{2}$

Sec. 18: Lots 1, 2, 3, 4, E $\frac{1}{2}$ W $\frac{1}{2}$, W $\frac{1}{2}$ NE $\frac{1}{4}$

The Associate Director held that this land was not available for oil and gas leasing on August 23, 1948, when Miss Brown's application was filed.

It is contended on appeal that this land was made available for oil and gas leasing on July 16, 1948, when an order of this Department, dated July 1, 1948, revoking a withdrawal of this land, was filed with the Division of the Federal Register and that it was error to reject Miss Brown's application filed on August 23, 1948.

Sections 6, 7, and 18, T. 15 S., R. 21 E., S. L. M., Utah, were, with other lands not involved in this appeal, temporarily withdrawn from all forms of disposition under the public land laws by the First Assistant Secretary of the Interior on September 26, 1933, in aid of proposed legislation, under the authority of section 4 of the act of March 3, 1927 (25 U. S. C., 1952 ed., sec. 398d). On August 24, 1945, the Secretary of the Interior modified the withdrawal of September 26, 1933, to permit the issuance of oil and gas leases under the provisions of the Mineral Leasing Act on some of the lands covered by the 1933 withdrawal (10 F. R. 11257).

By the act of March 11, 1948 (62 Stat. 72), Congress extended the exterior boundaries of the Uintah and Ouray Indian Reservation in Utah to include some but not all of the lands withdrawn by the order of September 26, 1933. Under that act, the reservation for the benefit of the Indians included surface rights only in those lands added to the reservation which had, previous to the withdrawal of September 26, 1933, been withdrawn by Executive Order No. 5327 of April 15, 1930 (43 CFR 297.8; 19 F. R. 9163).¹ Section 2 of the act directed the Secretary of the Interior to revoke the withdrawal of September 26, 1933. Pursuant to that congressional mandate, the 1933 withdrawal was revoked by the Department on July 1, 1948. The order of revocation was filed with the Division of the Federal Register on July 16, 1948, and appeared in the daily issue of the Federal Register for July 17, 1948 (13 F. R. 4105).

¹ That Executive order had, on February 6, 1933, and May 13, 1935, been modified to authorize the Secretary of the Interior to issue oil and gas leases and sodium permits and leases under the Mineral Leasing Act on the withdrawn lands (Executive Order No. 6016, 43 CFR 297.10 (19 F. R. 9163); Executive Order No. 7038, 43 CFR 297.13 (19 F. R. 9163)).

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The order of July 1, 1948, described the lands withdrawn by the order of September 26, 1933, in the same manner in which they were described in the 1933 order, i. e., by the exterior boundaries of the withdrawal. It revoked the 1933 order and the 1945 modifying order and provided:

* * * Effective upon the signing of this order, the remaining lands, described as follows, shall be administered for grazing purposes under applicable laws:

After describing the "remaining lands" by legal subdivisions, where possible, and specifically including among the "remaining lands" all of T. 15 S., R. 21 E., the order provided:

The revocation of the modifying order of August 24, 1945, *supra*, which permitted the issuance of oil and gas leases on certain lands, shall not be effective until 10:00 a. m. on September 2, 1948 as to such of the remaining lands as were affected by said order.

This order shall not otherwise become effective to change the status of such remaining lands until 10:00 a. m. on September 2, 1948. At that time the lands shall, subject to valid existing rights and the provisions of existing withdrawals, become subject to application, petition, location or selection as follows: * * *

The order then provided for a 90-day period, commencing on September 2, 1948, within which certain veterans might apply for the "remaining lands" under certain of the nonmineral land laws and in which others having claims to such lands might assert their preference rights and it permitted such persons to present their applications during a 20-day advance period beginning on August 13, 1948, all of such applications, together with those presented on September 2, 1948, to be treated as simultaneously filed. It further provided that commencing on December 3, 1948, any of the lands remaining unappropriated would become subject to such application, petition, location or selection by the public generally as might be authorized by the public-land laws and it provided that applications by the general public might be presented during the 20-day period from November 13, 1948 to December 2, 1948, inclusive, and that all such applications together with those presented on December 3, 1948, were to be treated as simultaneously filed. The order informed veterans to submit with their applications evidence of their military or naval service and those claiming other preference rights to submit evidence in support thereof. It contained information as to where applications for the lands were to be filed, how the applications would be processed, and general information as to the character of the land.

The order contained no specific statement as to when the mineral deposits, either in the lands to which the Indians received only the

surface rights under the act of March 11, 1948, or in the "remaining lands," would become subject to leasing under the Mineral Leasing Act.

The Department has held that in so far as the availability of the lands affected by the order of July 1, 1948, for leasing under the Mineral Leasing Act is concerned, the order dealt with two classes of land: (1) those lands withdrawn by the order of September 26, 1933, to which the Indians received only the surface title under the act of March 11, 1948, and (2) those lands withdrawn by the same order to which the Indians received no title under the act of March 11, 1948. It held that in dealing with the latter class, i. e., the "remaining lands" the order specified a future date upon which the lands would become subject to application. The Department held further that the revocation of the order of July 1, 1948, became effective as to the mineral deposits in lands falling within class (1) when the order was filed with the Division of the Federal Register on July 16, 1948. *D. K. Edwards et al. v. Albert G. Brockbank et al.*, A-25960 (April 3, 1951).

The land involved in this appeal was not added to the Indian reservation by the act of March 11, 1948. It is included among those lands withdrawn by the order of September 26, 1933, to which the Indians received no title under the act of March 11, 1948. It is therefore a part of the "remaining lands" dealt with in the order of July 1, 1948.

The subdivisions involved in this appeal were not affected by the modification of August 24, 1945. They were not, therefore, subject to oil and gas leasing under that modification, the revocation of which, under the order of July 1, 1948, was not to be effective until September 2, 1948.²

As the land involved in this appeal is among the "remaining lands" dealt with in the order of July 1, 1948, for which a future date was specified upon which the land would be subject to application, it is clear that it did not become available for oil and gas leasing on July 16, 1948, when the order was filed with the Division of the Federal Register, as contended by the appellant.

The order provided that it would not become effective to change the status of the "remaining lands" until 10 a. m. on September 2, 1948. Therefore, on August 23, 1948, when Miss Brown's application was

² Other subdivisions in sections 6, 7, and 18 were affected by the modifying order of August 24, 1945. The Associate Director held that those subdivisions, for which Miss Brown also applied, were available for oil and gas leasing on August 23, 1948, when Miss Brown filed her application. The record shows that these lands were leased to applicants prior in time to Miss Brown.

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filed, the land was still not available for oil and gas leasing³ despite the revocation. *Cf. D. Miller*, 60 I. D. 161 (1948). It was accordingly correct to reject Miss Brown's application for an oil and gas lease insofar as it covered those portions of sections 6, 7 and 18, T. 15 S., R. 21 E., S. L. M., Utah, described at the beginning of this decision.

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.

ROBERT E. MEAD
GRIFFITH MOORE

A-27071

Decided March 23, 1955

Oil and Gas Leases: Suspension of Operations and Production

Where there are no intervening rights, the Secretary of the Interior has authority to give his assent after the expiration of the primary term of an oil and gas lease to a suspension of operations and production in effect prior to the expiration of the lease, with a consequent revival of the lease term. Whether such authority will be exercised depends upon whether the lessee has exercised due diligence in requesting the suspension and upon other pertinent factors.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Noncompetitive oil and gas lease Santa Fe 078641 covering approximately 2560.20 acres was issued as of May 1, 1948, to Walter Berger for a term of 5 years.¹ On August 15, 1951, the manager of the land and survey office, Santa Fe, New Mexico, approved a partial assignment of the lease to Robert E. Mead insofar as it covered approximately 960.20 acres, subject to an overriding royalty of 5 percent reserved by Mr. Berger. The partial assignment, which was approved as of September 1, 1951, created a separate and distinct lease with respect to the acreage assigned to Mr. Mead and was assigned serial number Santa Fe 078641-A. On September 10, 1952, Mr. Mead filed

³ The 20-day advance period, commencing on August 13, 1948, provided for in the order for the filing of certain preference applications obviously has no application to persons seeking mineral leases.

¹ The lease was issued under section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226).

a designation of operator, naming Griffith Moore as the operator of the lessee.

The record shows that lots 1, 2, 3, 4, S $1\frac{1}{2}$ N $1\frac{1}{2}$ sec. 3, T. 26 N., R. 11 W., N. M. P. M. (being a portion of the lands contained in Santa Fe 078641-A), were classified by the Geological Survey as being within the known geological structure of the San Juan field effective as of January 1, 1953. The record also shows that the manager of the land and survey office, Santa Fe, reported to the Director of the Bureau of Land Management on March 17, 1952 [1953], that the Geological Survey had reported that lease Santa Fe 078641-A had a producing status and that the date of discovery was December 23, 1952.

On March 16, 1953, Mr. Mead filed for approval an assignment executed January 31, 1953, from Robert E. Mead *et ux.* to Griffith Moore of an undivided 90 percent interest in lease 078641-A.

On April 30, 1953, the primary term of the lease expired.

It appears that on May 20, 1953, the appellants filed with the regional oil and gas supervisor a request for a 2-year suspension of operations and production retroactive to May 1, 1953, and that by a letter of July 21, 1953, the supervisor denied the application for the reason that it was not filed prior to the expiration of the primary term.

On August 5, 1953, Messrs. Mead and Moore filed an appeal from the supervisor's decision which was transmitted to the Director of the Bureau of Land Management because it involved other considerations pertaining to the lease. On June 3, 1954, the Acting Assistant Director of the Bureau of Land Management held that the lease was not extended beyond the expiration of its primary term and consequently denied approval of the assignment from Mr. Mead to Mr. Moore. With respect to the request for suspension of operations and production, the Acting Assistant Director said that relief could be granted only by the Secretary on equitable principles. The appellants have appealed from that decision to the Secretary.

The appellants' principal contention on appeal is that the suspension of operations and production requested by them should be granted. They assert that appellant Moore entered active military service on April 17, 1953, and was assigned to the Naval Control Shipping Officer at Norfolk, Virginia; that such service lasted until May 5, 1953; that until his return from military service he thought that the lease was in good standing and he was unaware of the need of applying for a suspension; that on May 6, 1953, his attorney called the regional oil and gas supervisor at Roswell, New Mexico, and orally requested a suspension of operations and production; that on May 11, 1953, the attorney wrote the supervisor that an application for sus-

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pension would be sent to him as soon as possible; and that on May 20, 1953, the application was filed with the supervisor.

The appellants have also submitted an affidavit dated July 27, 1953, by appellant Moore in which, after reciting the facts of his military service, he stated that he elected to have his 90 percent undivided ownership in lease Santa Fe 078641, and the lease, suspended for the period of time equivalent to his military service and 6 months thereafter; and that the purpose of the affidavit was to give notice of military service in connection with the public land claim.

The appellants also allege that on May 11, 1953, appellant Moore filed an offer to lease, NM 012062, with the land office at Santa Fe, New Mexico, covering the 960.20 acres involved. They state that this offer was made for the purpose of preventing the entrance of any stranger who might attempt to secure some rights to the land by filing an offer therefor. They also state that with the filing it was requested that the land office take no action on the offer to lease until a decision had been reached on their application for suspension of operations and production.

The appellants state they have expended in excess of \$18,000 in drilling two wells on the lease, with a valuable discovery being made in the well located on lot 1, sec. 3, T. 26 N., R. 11 W., and that this well was shut in after its completion sometime in December 1952, because of lack of pipeline facilities to market the gas. Thus, it would appear that the lease could be extended in its entirety only by a grant of the suspension of operations and production requested by the appellants.

The appellants contend that because of the equitable considerations in this case the Secretary should assent to their application for a retroactive suspension of operations and production under the provisions of section 39 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 209), which states in pertinent part as follows:

* * * In the event the Secretary of the Interior, in the interest of conservation, shall direct or shall assent to the suspension of operations and production under any lease granted under the terms of this Act, any payment of acreage rental or of minimum royalty prescribed by such lease likewise shall be suspended during such period of suspension of operations and production; and the term of such lease shall be extended by adding any such suspension period thereto.

The first question raised by the appellants' request is whether the Secretary is authorized under section 39 to give his assent retroactively to a suspension of operations and production where the effect of the action would be to revive a lease which would otherwise have

expired. This question was raised but left undecided in the cases of *U. S. Oil and Development Corporation*, A-26269 (October 30, 1951), and *Eagle Consolidated Oil Company*, A-26259 (January 3, 1952). In the first case cited, operations and production ceased on a lease shortly before the expiration of its primary term but no request for suspension was filed until over 19 months later. In the second case cited, over 29 months elapsed between the expiration date of the lease and the request for suspension. The Department held in both cases that, assuming that a retroactive assent to suspension could be given so as to revive the leases, such relief would not be granted in those cases because the lessees had not exercised due diligence in seeking a suspension.

In the immediate case, since the well located on lot 1, sec. 3, was shut in on its completion date of December 23, 1952, for lack of pipeline facilities to market the gas, an interval of 4 months and 27 days elapsed until the application for suspension of operations and production was filed on May 20, 1953. At any time within the period from December 23, 1952, until April 30, 1953, which was within the primary term of the lease, the appellants could have filed for a suspension and in all likelihood it would have been granted. The record does not contain any information relative to any further drilling operations after December 23, 1952, nor do the appellants assert there were any, which might explain why no application for suspension of operations and production was filed. The only explanation given is that appellant Moore did not apply for a suspension or make inquiry concerning such a suspension since he was unaware of the necessity for it or the procedure to obtain the same, and because he was out of contact with his business interests while serving with the Navy from April 17 until May 5, 1953. However, this does not explain why Mr. Mead, who remained the record titleholder of the lease, did not request the suspension.

On the other hand, a lessee is not obligated to request a suspension of operations and production even though he may be entitled to it. If he chooses to continue to pay rental and to allow his lease term to run during a period of actual suspension, this Department could not validly object to his failure to request a suspension. In other words, if the appellants had not requested a suspension until April 30, 1953, the Department could not complain that they had not exercised due diligence in requesting the suspension. On that basis, it appears that in determining whether due diligence has been exercised in this case, the only period of delay that should be considered is the delay from

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April 30, 1953, to May 20, 1953, when the application for suspension was filed. This was a delay of 20 days. When it is coupled with the fact that on May 6 the appellants orally requested a suspension and confirmed the request by their attorney's letter of May 11, 1953, to the supervisor, it would appear that the appellants had exercised due diligence in applying for a suspension.

In the absence of a lack of due diligence in applying for a suspension and in view of the substantial expenditures made by the appellants which resulted in a well capable of production, and further in view of the fact that a suspension of operations and production would clearly appear to be in the interest of conservation, it appears that the relief requested should be granted if legal authority exists for such action.

Section 39 does not in terms bar the giving of a retroactive assent. On the contrary, the provision that the Secretary may "assent" to a suspension seems to connote the idea of giving recognition to something which already exists. Such an interpretation seems to be necessary in order that section 39 may achieve its full purpose. It is not uncommon that a well capable of production may be completed on a lease only on the last day or two of the primary term. If, for example, this should occur after the close of business in the supervisor's office on a Friday and the lease term should expire on Saturday or Sunday, there would be no way in which an application for a suspension could be filed prior to the expiration of the lease. In such a case, it would obviously be impossible to assent to a suspension of operations and production and have it inure to the benefit of the lessee without giving the assent retroactive effect. Consequently, it is concluded that the Secretary has authority to give assent to a suspension even though the assent is not given until after the expiration of the primary term and even though it has the effect of reviving the lease term. Whether such relief is to be granted in any particular case is, of course, a matter of discretion to be exercised in consideration of all pertinent factors, such as those mentioned in this decision.

It is to be noted that so far as the record shows, no application for a lease on the land included in the appellants' lease was filed after April 30, 1953, and before Mr. Moore filed his application on May 11, 1953.² No opinion is expressed as to whether the Secretary would have authority to give a retroactive assent to the suspension of operations and

² No application for a noncompetitive lease could, of course, have been filed for any portion of the leased land which was situated on the known geologic structure of a producing field.

production as to the entire lease and thus extend the entire lease if a qualified application had been filed prior to Mr. Moore's application for such portions of the leased land as were not situated on the known geologic structure of a producing field.

The decision of the Acting Assistant Director of the Bureau of Land Management is reversed; assent is given to a suspension of operations and production on lease Santa Fe 078641-A from April 30, 1953, to May 31, 1955 (in view of the lapse of time attending the final disposition of this case); and the case is remanded for further consideration in accordance with the views expressed in this decision.

ORME LEWIS,
Assistant Secretary.

JOHN W. ROUNDY ET AL.

A-27127

Decided March 28, 1955

Public Sales: Preference Rights—Accounts: Payments

Where the owner of contiguous land submits a timely preference-right claim for lands offered at public sale on the last day of the preference-right period and tenders his personal check which is later dishonored, the preference-right claim should be rejected.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On the application of M. L. Oldroyd, Salt Lake 071727, for the public sale of certain lands pursuant to section 2455 of the Revised Statutes, as amended (43 U. S. C., 1952 ed., sec. 1171), a public sale was held by the manager of the land and survey office at Salt Lake City, Utah, on September 17, 1952. The applicant, Mr. Oldroyd, was the high bidder for one of the tracts offered (tract No. 2, containing 1,139.11 acres) with a bid of \$2,790.82. On September 25, 1952, within the 30-day period provided for by the statute for the exercise by contiguous owners of a preference right to purchase the offered land, Merle and Zelda K. McPherson submitted a bid of \$2,790.82. On October 17, 1952, the last day of the 30-day preference-right period, John W. Roundy asserted a preference right and submitted a bid of \$2,790.82 for the tract. He offered in payment his personal check drawn on the Commercial Bank of Utah. Mr. Roundy's check was returned unpaid and marked "Refer to Maker." By a decision dated November 3, 1952, the manager rejected Mr. Roundy's bid.

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In his appeal from the manager's decision to the Director, Mr. Roundy enclosed a cashier's check on the Commercial Bank of Utah in the amount of \$2,790.82 and an affidavit by A. U. Miner, attorney for the Commercial Bank of Utah, stating that Mr. Roundy had made an arrangement with John G. Steele to borrow the purchase price of the land involved; and that John G. Steele had in turn arranged with the bank that he would execute and deliver his promissory note to the bank with the understanding that the bank was to allow Mr. Roundy to draw a check against the note for the amount of the bid. The affidavit states that Mr. Roundy's check reached the bank prior to the time that John Steele had executed and delivered the note and that the employees of the bank were not fully acquainted with the arrangements made by Mr. Roundy and John Steele. Thus, the check was returned marked "Refer to Maker." By a decision dated April 23, 1954, the decision of the manager was affirmed by the Acting Assistant Director. Mr. Roundy has appealed to the Secretary of the Interior.

Section 250.11 (b) of the regulations under the public sale law (43 CFR, Part 250; 19 F. R. 9116) provides:

(b) The owners of contiguous lands have a preference right, for a period of 30 days after the highest bid has been received, to purchase the land offered for sale at the highest bid price * * *.

(1) (i) A preference right to purchase must be * * * accompanied by the purchase price of the land.

It is obvious that the tender made by the appellant on October 17, 1952, cannot be regarded as compliance with the above quoted regulation. Payment made by a worthless check does not constitute a payment in support of the purchase. It confers no right on the bidder. *Cf. John F. Settje*, 21 L. D. 137 (1895) and *J. Martin Davis et al.*, A-26564 (January 12, 1953).

The appellant contends, however, that immediately after his check was returned unpaid he tendered a cashier's check which was accepted and cashed and that therefore he became the bona fide purchaser of the land offered for sale. The record shows that the second check was received from the appellant on November 10, 1952. However, since the preference-right period expired on October 17, 1952, his tender on November 10, 1952, can avail him nothing. There is no authority for extending the 30-day preference-right period to permit a claimant to submit the purchase price of the land. *Cf. Newell Richins, Randle B. Carson*, A-26323 (May 12, 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 Acting Assistant Director's decision is affirmed.

J. REUEL ARMSTRONG,
Acting Solicitor.

APPEAL OF RYALL ENGINEERING COMPANY

IBCA-1

Decided March 30, 1955

Contracts: Additional Compensation—Contracts: Changes

A contract for aerial photography and topographic mapping of a reservoir and project lands provided for the mapping of all lands within a designated boundary up to a limiting contour, and for aerial photography only of the lands within the designated boundary north of a certain parallel of latitude. The parties, nevertheless, treated the designated boundary as only approximate, and the contractor was paid for mapping a considerable number of areas outside the designated boundary but within the limiting contour. In these circumstances, the contractor is entitled to additional compensation for aerial photography necessary to map an area on the northern edge of the project where the limiting contour ran considerably beyond the designated boundary. The fact that the additional work was not supported by a written change order, does not bar the allowance of the claim since the disputed area was mapped with the knowledge and consent of representatives of the contracting officer, payment was made for the maps which were retained by the Government, and the mapping could not be required without also consenting to the photography.

Contracts: Damages: Remission of Liquidated Damages

Where a contract was modified by an understanding between the parties which was, strictly speaking, inconsistent with its literal terms, and so constituted a change "within the general scope" thereof, as provided in Article 2 thereof, and where as a result of the change the contractor was required to perform extra work, he is entitled not only to payment for the extra work accomplished but also to an extension of time for the completion of the work by way of an equitable adjustment, and liquidated damages which have been assessed against him should be remitted.

BOARD OF CONTRACT APPEALS

On February 24, 1953, the Ryall Engineering Company, a partnership, formerly of Little Rock, Arkansas, but now of Denver, Colorado, appealed the decision of the contracting officer, dated January 23, 1953, under Contract No. I-103r-1700, denying its claim for an extension of time and additional compensation in the amount of \$350. The contract, which was a standard Government supply

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contract (Form No. 32, November 1949 revision), was entered into on March 21, 1952, with the Bureau of Reclamation.

The contract provided that the contractor would "perform aerial photography and produce aerial photographs and enlargements, and perform topographic mapping and furnish topographic maps and other map items" of the reservoir and project lands, Glen Elder Unit, Solomon Division, Missouri River Basin Project. All work was to be done in accordance with the specifications, which were numbered 701S-234.

In accordance with the terms of the contract and paragraph 17 of the specifications, the contractor was to begin work within 21 calendar days after date of receipt of notice to proceed and was to complete all work, "including delivery of the map sheets and tracings," within 120 days from the date of receipt of such notice.¹ Notice to proceed was received on March 28, 1952, thus fixing July 26, 1952, as the date of final completion of all work under the contract. That date was extended 25 calendar days by Order for Changes No. 1, and 58 calendar days, or to October 17, 1952, by findings of fact dated September 30, 1952, to the effect that the contractor had been delayed in the prosecution of the work by outside interference. All work under the contract was not actually completed, however, until November 6, 1952.

In the "Bidding Schedule" provision was made for the photography of 55,700 acres at a lump sum price of \$2,600 (item 1), and the mapping of 94,100 acres at 74¢ per acre, which equals \$69,634 (item 2). The basic requirement concerning the work to be done was set forth in paragraph 11 of the specifications, as follows:

It is required that aerial photographs be furnished of that portion of the area outlined on Drawing No. 495-701-9, which lies north of parallel 39° 30' N. and that topographic maps with either a five foot or one foot contour interval, as described in these requirements, be furnished of *all areas below and including elevation 1500 lying within the designated boundary both north and south of parallel 39° 30' N.* The boundary lines of the area within which work is to be performed, as shown on Drawing No. 495-701-9, *is drawn along legal land subdivision lines, to a minimum of one-quarter section.* [Italics supplied.]

It appears from Paragraph 12 (a) of the specifications that no provision was made for photographing areas south of parallel 39° 30' N. because the contracting officer was to furnish mapping photographs.² Paragraph 12 (b) (3), of the specifications governing map

¹ The contract stipulated that the work was to be completed within 90 calendar days but allowed the contractor to indicate a longer period of time, provided it did not exceed 120 calendar days.

² These apparently were obtainable from the United States Geological Survey.

detail, provided that the maps were to be prepared with contour intervals of 5 feet, except for one small area where the interval was to be 1 foot. The last sentence of this subparagraph provided: "The remaining area within the boundary indicated on Drawing No. 495-701-9, lying *above* elevation 1500, outside the project lands, shall be covered by aerial photography only." [Italics supplied.] This sentence, which is inconsistent with Paragraph 11, in effect established an exception to the provision of that paragraph, so that aerial photography only was required at elevations above 1500, irrespective of whether the area lay north or south of parallel 39° 30' N.

Change Order No. 1 provided for mapping at 5-foot contour intervals of additional lands at elevations above 1500 indicated on Drawing 495-701-13 attached thereto, and some of these lands are outside the boundary designated on Drawing 495-701-9. In addition, the order provided for mapping at 1-foot contour intervals of two small areas within this original boundary which lie at elevations both above and below 1500. As Change Order No. 1 did not otherwise modify Paragraph 11 and the last sentence of Paragraph 12 (b) (3) of the specifications, and was, therefore, inconsistent therewith, it constituted another exception. Change Order No. 2 in effect provided that if the contractor could not gain access to any lands required to be mapped at 1-foot contour intervals, such lands were to be mapped with a contour interval of 5 feet. Change Order No. 2 was again in the form of a revision of the language of Paragraph 12 (b) (3) of the specifications, but in making the revision the entire insertion made by Change Order No. 1 was eliminated. Since the work required by Change Order No. 1 had already been done, it is apparent that this elimination was unintentional.

The dispute between the contractor and the contracting officer in this appeal³ is whether the contractor is entitled to additional compensation and to an extension of time for photographing an area on the northern edge of the project where the 1500-foot contour ran considerably beyond the boundary marked on Drawing No. 495-701-9. This area which will hereinafter be referred to as "the disputed area"

³ The contracting officer was H. E. Robinson, the Manager of the Kansas River District of the Bureau of Reclamation. However, paragraph 1 (b) of the "General Provisions" of the contract defined the term "contracting officer" as including "the authorized representative of a Contracting Officer acting within the limits of his authority." Charles H. Gardner was appointed a representative of the contracting officer prior to the opening of bids. J. B. Budd was substituted for Gardner as a representative of the contracting officer when Gardner subsequently retired from the service. In addition, R. P. Laughlin, who was in charge of the office of the Bureau of Reclamation at Beloit, Kansas, acted in the capacity of an inspector for the contract. It was his duty to check the field work of the contractor and to inspect the contractor's work and methods in the absence of Gardner.

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lies in Secs. 8, 9, 16, 17, 18, 20 and 21, T. 5 S., R. 9 W., and comprises 1184 acres. The photography work and the mapping based thereon appear to have been done without any written change order after the contractor had completed all other work under the contract. The aerial photography was done early in September, and the maps were delivered to the office of the Bureau of Reclamation at Beloit, Kansas, about September 15, 1952. The sheets were checked, accepted and returned to the contractor by R. P. Laughlin. The Bureau of Reclamation has made use of the map sheets of the disputed area, and intends to retain them.⁴

On October 16, 1952, which was one day before the scheduled completion of all the work under the contract, the contractor wrote to the contracting officer, formally requesting a 15-day extension of time for the completion of other work under the contract, which had had to be postponed to map the disputed area, and the payment of an additional \$350 to cover the cost of the additional photography which had been necessary to map the disputed area. In a supplementary letter of November 13, 1952, the contractor amended its request for an extension of time to 22 days, and also explained how and why the photography had been done, as follows:

To accomplish this photography, it was necessary to move the plane and crew from Grand Junction, Colorado, to Beloit, Kansas, and return to Grand Junction. The move was made when weather reports indicated a period of clear weather could be expected in the Beloit area * * *.

The amount of \$350 for the additional photography represented the actual cost to this company in performing the work in that we considered it to be an additional area to the mapping required under the specifications which had not been included due to the inaccuracy of the existing U. S. Geological Survey Quadrangle Maps covering the area. This assumption was based on the fact that the 1500 foot contour delineated on Drawing No. 495-701-13 indicated that the USGS maps were used as the source material. The project boundary shown on Drawing No. 495-701-9 would under ordinary conditions adequately contain the mapping to the 1500 foot contour. However, in planning the aerial photography of this area the flight lines were placed to cover the area within the boundary and in addition provide a safe overedge coverage of about one mile. This need for additional photography was discussed with Mr. Mervin Greer of the Regional Office in Denver as he was immediately available and had participated in the preparing of the specifications. Mr. Greer indicated that the area had not been intentionally omitted in planning the project.

In a letter dated December 22, 1952, the contractor requested a change order "as suggested by Mr. Holland of the Legal Branch,

⁴ See memorandum dated May 1, 1953, from Stuart G. Browne, Acting Manager of the Kansas River District, to the Commissioner of Reclamation.

Denver Regional Office, confirming the verbal instructions given by Mr. Budd for the completion of the mapping in the area beyond the project boundaries." With the letter the contractor forwarded a notarized statement of W. E. Spontz, a supervisor in charge of ground survey parties for the contractor, supporting its contention that it had received verbal instructions to map the disputed area. Spontz deposed that he had received such instructions from Charles H. Gardner at a meeting which he had with him and R. P. Laughlin, and also from J. B. Budd in another meeting towards the end of the month. Spontz also deposed that Budd stated to him that "this work would be covered by the original specifications and that the map delineating the project boundary was only approximate," and that he also advised Budd that "additional aerial photography would be required to map this area."

In denying in his findings the contractor's claim and request for an extension of time, the contracting officer took the position, however, that "the boundary of the work covered under this contract is well defined and distinctly marked." He went on to state:

Ryall Engineering Company was not instructed by the Contracting Officer or his Authorized Representative at any time to do any work outside of the designated boundaries. The Contracting Officer or his Authorized Representative were not consulted by Ryall Engineering Company prior to the mapping of the area in question. Furthermore, Ryall Engineering Company did not ask for an interpretation of the specifications as to whether the 1500' contour or the designated boundary * * * was the determining factor.

As a result of this decision, the contractor not only failed to obtain payment for the additional photography but was assessed \$2,000 in liquidated damages. In prosecuting the present appeal, the contractor contends that it could have avoided the assessment of liquidated damages if it had received any indication that the mapping of the disputed area would not be required, and it stresses that it acted as it did because it seemed that "the project boundary was possibly in error," since it was "the usual practice in mapping to the limiting contour." Indeed, it asserts that it actually mapped some other areas "falling beyond the project boundary," and that it was paid for this work at the unit price stipulated in the contract.

Subsequent to the submission of the appeal, in response to a series of interrogatories propounded by the Department to the Regional Office of the Bureau of Reclamation, the Bureau forwarded a statement dated October 30, 1953, and made by M. J. Greer,⁵ as well as affidavits

⁵ He was Regional Staff Officer on surveying matters, and acted in an advisory capacity for the region.

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made by J. B. Budd on November 17, 1953, by Charles H. Gardner on November 12, 1953, and by R. P. Laughlin on November 7, 1953. Greer declares in his statement that about the middle of August 1952 he had a conversation with H. E. Blevins, representing the contractor in which he said to the latter that "we definitely want this area (namely, the disputed area) mapped, but that I was not the contracting officer and that he would have to receive his instructions from the contracting officer." Greer also records in his statement the purport of another conversation between himself and Blevins on October 28, 1952. Greer then knew that the mapping of the additional area had been completed but had not then yet read the specifications under the contract. "Knowing that the work was completed," he states, and "*completed with the contracting officer's knowledge*, I said that it could be paid for under the specifications." [Italics supplied.] Budd, Gardner and Laughlin deny in their affidavits, however, not only that they ever instructed the contractor to map the disputed area but any area outside of the boundary shown on Drawing No. 495-701-9. Thus Budd deposes: "At no time did I recommend or suggest to any representative of the Ryall Engineering Company that they should do mapping outside the contract boundaries"; Gardner deposes: "I did not instruct the Ryall Engineering Company to map any area outside of the boundary as shown on the map (No. 495-701-9)"; and Laughlin deposes: "At no time during this meeting did I tell Mr. Spooztz to do or not to do any additional mapping beyond the project area to reach the 1500-foot contour."

In view of the direct and wholly irreconcilable conflict between the contentions of the contractor and the statements of the Bureau of Reclamation personnel, the Board, when it came to consider the case, requested additional information from the Bureau. In response to the inquiry, the Board was informed that the contractor had been paid under item 2 of the schedule at 74¢ per acre for mapping no less than 5,902 acres outside the boundary shown on Drawing No. 495-701-9 and under the 1500-foot contour. This acreage included the 1184 acres in the disputed area. Only 462 of the 5,902 acres were covered by a change order—Change Order No. 1, which would amount to 5,440 acres not so covered. Deducting the 1184 acres in the disputed area from the 5,440 acres not covered by change order, there were 4,256 acres which were photographed and mapped, in addition to the acreage in the disputed area.

In another statement made by M. J. Greer and attached to a memorandum on this subject dated March 7, 1955, from the Regional Di-

rector of the Bureau of Reclamation to the Commissioner of Reclamation, it is explained:

* * * The remaining 4256 acres are scattered over the entire mapped area and were photographed and mapped simultaneously with the areas adjacent inside the boundary line. The entire 5440 acres of mapping were paid for, since it was determined that it could be classed as a normal overrun in mapping quantities. No payment was made for photography, on the 5440 acres. Photography for the small areas comprising the 4256 acres was obtained automatically on the initial flights paid for under Item 1, Schedule 761-S-234. The contractor makes no claim for photographing this area, but does claim in his appeal payment for photography on the 1184 acres for which a special flight had to be made. This overrun was occurring throughout the entire time the contractor was on the job, but he never objected to the overrun until the end of his contract time.

* * * * *

Our field office has paid the contractor for mapping at the price per acre established by the contract for all areas for which topography was furnished including 5,902 acres overrun lying outside the boundary shown on Drawing Number 495-701-9. This interpretation of the boundary limitations in paragraph 11 may be too liberal an interpretation of the paragraph as it is written, but is in keeping with the original intention of the paragraph and with our needs. All but 1,184 acres of the 5,902 acres were covered by the contractor's first flights for aerial photography. In order to map this 1,184 acres the contractor had to bring a plane back to the area for aerial photography. Because of the extra flying the contractor wanted more money. Because of this and the added acres outside the boundary upon which he had established his bid, the contractor wanted more time. Admittedly this request for more time should have been made much earlier.

Had the wording of paragraph 11 of the invitation been as follows: "It is required, etc. . . . all areas below and including elevation 1500 in the reservoir area and to boundaries shown on the project lands both north and south of parallel 39°30' N. The boundaries shown for the reservoir area are approximate to aid the contractor in bidding and the Government makes no guarantee that the 1500 foot contour is confined within this boundary. The boundary line of the area, etc. . . ." "The burden of determining both the extent of the survey and time required for the survey would have been with the contractor. Consideration of the above alternate wording may be of assistance in understanding the reasons back of the appeal.

On the basis of this statement, the Board finds it difficult to credit the earlier denials of the representatives of the contracting officer that they did not order any mapping to be done outside the map boundaries, and the Board finds as a fact that the disputed area was at least mapped with their knowledge and consent, if not with the knowledge and consent of the contracting officer himself. It may be that the representatives of the contracting officer did not in so many words direct that the disputed area be mapped when the desirability of performing this work was called to their attention, and this may explain the denials in their affidavits, but there can be no doubt that they gave tacit approval to

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the contractor's suggestion, and this tacit approval would have to be regarded as sufficient, in view of the many additional areas within the limiting contour but outside of the map boundaries that had already been mapped and paid for without any objection. Similarly, the Board must credit the statement of the contractor's representative that he advised the contracting officer's representative that additional aerial photography would be required in connection with the mapping of the disputed area, and assume that his failure to object—if failure there was—was tantamount to consent. It is clear that the additional aerial flight in connection with the mapping of the disputed area was necessary, and if so, the mapping could not be required without also consenting to the photography. Furthermore, the checking, acceptance and retention of the maps of the disputed area constituted in themselves approval of both the mapping and the necessary photography.

It is true that the disputed area was mapped without any change order in writing, although Article 3 of the contract and Paragraph 3 of the specifications required any order for extras to be in writing, and it has been held that a contractor may not recover for extra work not ordered by the contracting officer in the manner specified in the contract, even though such work benefited the Government. The leading case on this point is *Plumley v. United States*, 226 U. S. 545 (1913), and the rule of the *Plumley* case has been reapplied in *United States v. McShain, Inc.*, 308 U. S. 512 (1939). The Court of Claims, as well as other courts, have shown a marked tendency in recent years, however, to allow recovery for extra work in cases in which it was undertaken upon the basis of oral assurances or promises by the contracting officer, or by his representatives when their oral assurances have been ratified by him.⁶ This result appears to have been reached on the basis of waiver and estoppel. However, even if a written order is to be regarded as essential, the checking and acceptance of the maps of the disputed area may be regarded as a sufficient compliance with the requirement that extras be ordered in writing.⁷

It is apparent also from the record that the contract was modified by an understanding between the parties which was, strictly speaking, inconsistent with its literal terms, and so constituted a change "within the general scope" thereof, as provided in Article 2 of the contract.

⁶ See *W. H. Armstrong & Co. v. United States*, 98 Ct. Cl. 520 (1943), in which the Court of Claims expressly declined to follow the *Plumley* case because it regarded it as against the trend of decision; *Lewis Joseph Stiers et al. v. United States*, 121 Ct. Cl. 158 (1951); *Whitman et al. v. United States*, 124 Ct. Cl. 464 (1953); *Lord Const. Co. v. United States*, 28 F. 2d 340 (3d Cir. 1928); *Ross Engineering Co. v. Pace*, 153 F. 2d 35 (4th Cir. 1946).

⁷ See *James McHugh Sons, Inc. v. United States*, 99 Ct. Cl. 414 (1943).

The schedule under the contract and Paragraph 11 of the specifications provided for the photographing and mapping of a precise number of acres within a designated boundary but the parties treated the provisions as flexible, and acted as if the contract contained an "approximate quantities" clause. How this interpretation came to be adopted does not precisely appear but it may, perhaps, be surmised from the language of Paragraph 11 of the specifications, which, although not ambiguous when read in the light of the items in the schedule, nevertheless, harbored an element of ambiguity. Although the first sentence of the paragraph, which required the photographing and mapping of all areas covered by its provisions up to the 1500-foot contour but only when such areas lay "within the designated boundary," was perfectly clear and definite, yet the second sentence of the paragraph, which explained that the boundary lines had been drawn "along legal land subdivision lines," seemed to qualify the first sentence, and to suggest that the boundary lines of the map were, perhaps, intended to be approximate rather than exact.

In view of the actual changes made in the specifications and the many additional areas, including the disputed area, which had to be mapped as a consequence of the change, considerations of equity should obviously have dictated not only the payment for the extra work accomplished but also the extension of the time for the completion of the work as requested by the contractor. Such an "equitable adjustment" was required by Article 2 of the contract, relating to changes.³

The Board cannot agree as suggested in the Greer memorandum that the requests of the contract were not timely. The contractor requested payment for the additional photography prior to the expiration of the contract time, and the record does not show that the request for an extension of time, which was justified not only by the mapping of the disputed area but of other areas as well, was not made as soon as it became manifest that the work could not otherwise be completed on time. The contracting officer, moreover, has not raised any question of timeliness.

In order to clear the record, the case is returned to the contracting officer for the entry of an appropriate change order in which provision will be made for the payment of \$350 for the additional photography, and an extension of time of 20 days will be granted. After the change order has been entered, the liquidated damages assessed in the amount of \$2,000 should be remitted. Accordingly, payment should be made to the contractor in the amount of \$2,350.

³ See *United States v. Rice*, 317 U. S. 61 (1942).

March 30, 1955

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the findings of fact of the contracting officer pursuant to which the claims of the contractor were denied are reversed with directions to proceed as outlined above.

THEODORE H. HAAS, *Chairman.*

THOMAS C. BATCHELOR, *Member.*

WILLIAM SEAGLE, *Member.*

EDWARD CHRISTMAN ET AL.

A-27052

Decided April 1, 1955

Enlarged Homesteads: Mineral Reservation

Where a patent issued containing a reservation to the United States under the act of July 17, 1914, of all oil and gas in an enlarged homestead entry in accordance with the notation of the reservation in the final certificate, and where that notation is identical with the amendment of the final certificate to which the entryman was required to, and did, consent before the final certificate was approved, the fact that only a part of the land in the entry was included within a petroleum withdrawal when the entryman filed his consent to the reservation does not warrant a conclusion that the reservation as to the land not within the withdrawal was erroneous.

Patents of Public Lands: Amendments—Res Adjudicata

Where a patent on an enlarged homestead entry with a reservation to the United States of oil and gas was issued more than 36 years ago and the entryman later filed a petition requesting issuance of an unrestricted patent on the entry, which petition was denied more than 33 years ago, and the entryman did not appeal from the denial, the matter is res adjudicata and will not be reopened upon an application for an unrestricted patent by a subsequent owner of a portion of the land who does not conclusively establish that the mineral reservation was unauthorized and who has no equities entitling him to an unrestricted patent.

Rules of Practice: Appeals: Failure to Appeal

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

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

On January 29, 1919, patent No. 662889 issued on enlarged homestead entry, Miles City 024317, to Azariah Doggett on 318.6 acres of land described as lots 1, 2, 3, 4, S $\frac{1}{2}$ NE $\frac{1}{4}$, and S $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 4, T. 9 N., R. 58 E., M. P. M., Fallon County, Montana (43 U. S. C., 1952 ed., sec. 218). This land comprises the N $\frac{1}{2}$ of sec. 4. The patent reserved to the United States all the oil and gas in the lands included in the entry in accordance with the act of July 17, 1914 (30 U. S. C., 1952 ed., sec. 121 *et seq.*).

On January 29, 1952, Florence Zaerr filed an oil and gas lease offer, Montana 06607, for lot 4 and the SW $\frac{1}{4}$ NW $\frac{1}{4}$, which tracts contain 79.72 acres of land and make up the W $\frac{1}{2}$ NW $\frac{1}{4}$ of sec. 4, within the Doggett homestead entry (30 U. S. C., 1952 ed., sec. 226).

On January 27, 1953, Edward Christman, present owner of the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 4, filed an application for a corrected patent on the entry which would eliminate the oil and gas reservation to the United States under the act of July 17, 1914, insofar as it affects the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 4.

On April 24, 1953, counsel for Gladys Y. Williams filed an application for reinstatement of oil and gas lease offer M-02907, which included the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 4. This offer, filed on July 23, 1951, was rejected as to the land here involved in a decision of November 7, 1951, by the manager of the Billings land office. The case was closed on December 18, 1951, because Mrs. Williams did not appeal from the manager's decision.

In a decision of May 5, 1954, the Acting Assistant Director of the Bureau of Land Management, in effect, allowed Mr. Christman's application by authorizing the issuance of a patent supplemental to patent No. 662889 which would convey the oil and gas in the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 4 to the original patentee. In the same decision, the Acting Assistant Director rejected Mrs. Zaerr's oil and gas lease offer for the land, rejected the application for reinstatement of Mrs. Williams' oil and gas lease offer, and rejected protests filed by the oil and gas lease applicants against the allowance of Mr. Christman's application. Mrs. Zaerr and Mrs. Williams have taken separate appeals to the Secretary of the Interior from the Acting Assistant Director's decision. The Shell Oil Company, holder of an option agreement covering Mrs. Zaerr's application, joined in Mrs. Zaerr's appeal.

On January 22, 1915, Mr. Doggett made enlarged homestead entry on the N $\frac{1}{2}$ sec. 4. By Executive order of January 11, 1916, all of the land covered by the entry except the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 4 was withdrawn

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and included within Petroleum Reserve No. 43, Montana No. 3. The Executive order, subject to the provisions of the act of July 17, 1914,¹ withdrew the lands included therein from settlement, location, sale, or entry, and reserved them for classification and in aid of legislation. The withdrawal was *prima facie* evidence of the mineral character of the lands included therein, and the land so withdrawn, unless proved to be nonmineral, was not subject to patenting under the homestead laws without a mineral reservation to the United States as provided for by the act of July 17, 1914. *Cleveland Johnson (On Rehearing)*, 48 L. D. 18 (1921).

The Acting Assistant Director's decision authorizing the issuance of a supplemental patent to convey the oil and gas in the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 4 is based upon the conclusion that the reservation to the United States of the oil and gas in that tract was erroneous because that land was not included in a petroleum withdrawal when equitable title to the entry was earned and the land was not considered to be valuable for oil or gas. The decision referred to a report of June 3, 1953, by the Geological Survey which states that the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 4 was not considered to be prospectively valuable for oil and gas when the entryman earned equitable title.

This conclusion in the Acting Assistant Director's decision requires an examination of the proceedings which resulted in the issuance of a final certificate, approved November 21, 1918, on this entry and patent No. 662889, dated January 29, 1919, both of which reserved to the United States all oil and gas in the entire entry in accordance with the act of July 17, 1914.

The record of Mr. Doggett's entry contains a letter of September 24, 1918, from the Assistant Commissioner of the General Land Office to the register and receiver, Miles City, in which it was stated that the NE $\frac{1}{4}$ and the E $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 4 in Mr. Doggett's entry were withdrawn by Executive order and included within Petroleum Reserve No. 43; that the claimant should be notified in accordance with departmental instructions (44 L. D. 32 (1915)) under the act of July 17,

¹ Section 3 of the act of July 17, 1914 (30 U. S. C., 1952 ed., sec. 123) provides in part that:

* * * any person who shall hereafter locate, select, enter, or purchase, 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.

1914, that he would be allowed 30 days from notice within which to file an application for classification of the land as nonmineral or to file his *consent to the amendment of the final certificate* to contain the following:

Patent to contain provisions, reservations, conditions, and limitations of the Act of July 17, 1914 (38 Stat., 509).

Said consent must be witnessed by two persons, and if furnished, the final certificate will be amended by placing thereon above notation. [Italics added.]

The Assistant Commissioner also stated in the same letter that the entryman should be notified that:

* * * unless he complies with the above or appeals herefrom within thirty days from notice, the entry and final certificate hereby held for cancellation will be canceled without further notice from this office.

The entryman did not apply for classification of the land as non-mineral.

On October 14, 1918, Mr. Doggett filed a consent to the amendment of his *application* as to lots 1, 2, 3, S $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 4, T. 9 N., R. 58 E. (all of the land in the entry except the W $\frac{1}{2}$ NW $\frac{1}{4}$), by the insertion therein of the following:

Application made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914 (38 Stat. 509).

This consent was signed by the entryman and witnessed by *one* person. This consent to the amendment of the application was not literally a consent to the amendment of the final certificate, as required by the Assistant Commissioner's letter of September 24, 1918.

On October 15, 1918, the following instrument which did comply with the requirements of the Assistant Commissioner's letter was filed in the Miles City, Montana, land office. The instrument stated:

Baker Montana October 7th., 1918.
Miles City Montana No. 024317

Consent to amendment of Homestead application.

I hereby consent to the amendment of my Homestead Application and *subsequent instruments issued in connection therewith* so that they may contain the Provisions, reservations conditions and limitations of the act of July 17th., 1914. [Italics added.]

(Sgd.) Azariah Doggett

Witness

L. C. Burns (Sgd.)

J. F. Williams (Sgd.)

It is apparent that this instrument was a consent to the amendment of the final certificate and was witnessed by two persons, as required by the Assistant Commissioner's letter of September 24, 1918.

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The two consents were transmitted to the Commissioner by the register in a letter dated October 30, 1918, and in which he said: "we enclose acceptance of the Act of July 17, 1914, as to Lots 1, 2, 3, S $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 4, T. 9 N., R. 58 E."

The following statement is stamped on the final certificate issued on Mr. Doggett's entry:

Patent to contain provisions, reservations, conditions and limitations of the Act of July 17, 1914 (38 Stat. 509).

A marginal ink notation indicates that the statement refers to oil and gas. The above-quoted statement, which is stamped on the final certificate, is identical with the statement in the Assistant Commissioner's letter of September 24, 1918, of the amendment to be contained in the final certificate, to which amendment the entryman was required to file his consent. Thus, the Assistant Commissioner required, and the entryman consented to the requirement, that the final certificate be amended to show that the patent was to contain a reservation under the act of July 17, 1914. The required amendment was not limited to a reservation on only part of the land covered by the entry.

In view of these facts, the flat statement in the Acting Assistant Director's decision that the final certificate was erroneously amended by a notation thereon of the oil and gas reservation as to all of the lands in the entry is not sustained by the record. Although the reference in the Assistant Commissioner's letter of September 24, 1918, to the land contained in the petroleum reserve, Mr. Doggett's consent of October 14, 1918, and the register's letter of October 30, 1918, is some evidence that it was intended that Mr. Doggett was to be required to consent to a mineral reservation only as to the NE $\frac{1}{4}$ and E $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 4, the consent specifically called for by the Assistant Commissioner and the consent filed by Mr. Doggett on October 15, 1918, was not so limited. The amendment of the final certificate was exactly what was required by the Assistant Commissioner's letter of September 24, 1918.

Moreover, in a petition dated August 7, 1920, after the land was patented, Mr. Doggett requested that the reservation to the United States of the oil and gas in his entire entry be canceled and that an unrestricted patent issue to him on all of the land because he believed there was no oil in the land. In this petition the entryman referred to the Department's requirement that he waive the oil and gas rights in the entry, and he did not contend that the reservation as to the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 4 was less warranted than the reservation on the remainder of the entry. Before a decision on this petition was rendered, the Director of the Geological Survey made the following

report, dated July 8, 1921, to the Commissioner of the General Land Office:

In reply to your letter of April 30, 1921 (Miles City 024317 "N" JAW), requesting information relative to the oil and gas value of the following lands in Montana, M. M., included in a homestead petition filed by Azariah Doggett:

T. 9 N., R. 58 E., Sec. 4, lots 1, 2, 3, 4, S $\frac{1}{2}$ of N $\frac{1}{2}$.

The land is situated on the southwestern flank of the Glendive-Baker anticline, which is a long, narrow fold, trending northwest-southeast from Yellowstone River in T. 15 N., R. 55 E., across the Montana State boundary in T. 5 N., R. 61 E., across the southwest corner of North Dakota and into South Dakota. As a result of a geologic study of the region the lands embraced in this anticline were withdrawn as prospectively valuable for oil and gas by Executive Order of January 11, 1916. At that date gas had been discovered at two localities on the structure, one in Sec. 20, T. 14 N., R. 55 E., and the other in Sec. 1, T. 7 N., R. 59 E. Subsequent to the date of withdrawal, numerous wells have been drilled in the vicinity of the two borings mentioned above and considerable gas production obtained. Gas is supplied for domestic use to the towns of Glendive and Baker as well as to a carbon black plant at Baker. Furthermore, a well drilled approximately three miles northeast of the land under discussion is reported to have secured an initial gas production of 8,000,000 cubic feet.

Because the land is structurally favorably located for the accumulation of oil and gas, and drilling has discovered gas at three separate localities on the structure, one of these being but three miles from the land in question, *this homestead* should be regarded as prospectively valuable for oil and gas until further drilling proves otherwise. [Italics added.]

In a decision of December 23, 1921, Mr. Doggett's petition for the issuance to him of an unrestricted patent on the entry was rejected. The record does not contain a copy of this decision, but the rejection is noted on the backing sheet of the record. The entryman did not appeal from the rejection of his petition and the matter remained closed until Mr. Christman's application was filed.

On January 11, 1933, the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 4 was offered for competitive leasing as part of Unit No. 3 of the Cabin Creek field and a lease thereon (Billings 034164) was issued as of July 1, 1935, for a primary term of 20 years. On June 23, 1939, the lease was relinquished as to the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 4.

The Department has held that where a restricted patent was issued upon a homestead entry under the act of July 17, 1914, reserving oil and gas in accordance with departmental practice then prevailing but later held to be erroneous, and the action is long acquiesced in by the patentee, the matter is *res adjudicata*, and a petition to reopen the case will not be entertained. *Lillie M. Kelly*, 49 L. D. 659 (1923). In a situation where a waiver to oil and gas rights was filed by a homestead entryman and final certificate and patent issued containing a reservation of oil and gas under the act of July 17, 1914, but where, between

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the date of approval of the entry for patenting and the date of issuance of patent, the land was released from a petroleum reserve and restored to unrestricted entry, the Department refused to exchange the patent, outstanding for 14 years, for a patent without an oil and gas reservation. *Karl A. P. Loyning*, 53 I. D. 479 (1931). The reasons given in support of this decision were that the patent which issued conformed exactly with the record upon which it was based and that the Department was without further jurisdiction in the matter; moreover, the entryman had accepted the patent and raised no objection until nearly 14 years after its issuance.

In the instant case even if it is assumed that Mr. Doggett was erroneously required in 1918 to consent to a mineral reservation as to all of the entry or that the consents filed by him should be construed as not applying to the $W\frac{1}{2}NW\frac{1}{4}$ sec. 4, the patent that was issued to him in fact reserved the oil and gas in the entire entry, the patent was accepted by him, he did not appeal from the decision of December 23, 1921, denying his request for an unrestricted patent as to all the land, and he and his successors in interest acquiesced in the decision for over 31 years. The cited departmental decisions, principles of orderly administration, and the doctrine of the finality of administrative action require the conclusion that the question here under consideration is *res adjudicata* and should have been so regarded by the Bureau of Land Management. Cf. *Rose M. Anderson et al.*, A-20557 (May 2, 1952); *H. W. Rowley*, 58 I. D. 550 (1943).

It may be mentioned also that no equitable considerations justify the allowance of Mr. Christman's application, which amounts to a request that the United States convey oil and gas rights in land on which an agricultural entry was finally approved more than 36 years ago. Counsel for Mrs. Zaerr asserts that on February 24, 1953, the Acting Director of the Geological Survey approved a unit agreement for the Cabin Creek Unit formed by the Shell Oil Company; that the $W\frac{1}{2}NW\frac{1}{4}$ sec. 4 was committed to the agreement by Mrs. Zaerr as applicant under Montana 06607; that a valuable oil well was discovered in March 1953 as a result of drilling which was begun on January 12, 1953, about one-half mile north of the $W\frac{1}{2}NW\frac{1}{4}$ sec. 4; that as a result of this and other discoveries, Cabin Creek Unit was enlarged on May 7, 1954, and includes lands within one-eighth of a mile of the land here in dispute. Although the $W\frac{1}{2}NW\frac{1}{4}$ sec. 4 had been leased competitively in the past, it was not until after the Shell Oil Company began drilling its Cabin Creek well, resulting in a valuable discovery of oil, that Mr. Christman's application was filed.

There are no equities in support of Mr. Christman's application in these circumstances. In *State of California, Robinson, Transferee*, 48 L. D. 384 (1921), and in the same case, on rehearing (48 L. D. 387 (1921)), the Department held that a proceeding relating to the reformation of title papers is governed by principles of equity and that one who had done everything necessary to acquire title and who afterwards filed a waiver of oil and gas deposits under the act of July 17, 1914, and accepted a restricted patent, would not be granted an unrestricted patent even where it had been judicially determined that the ruling under which the requirement of filing the waiver was made was erroneous. *A fortiori*, the facts in this case require the rejection of Mr. Christman's application for issuance of an unrestricted patent.

In view of these departmental decisions, and because there is no legal or equitable ground upon which Mr. Christman's application can be granted, nor any reason for reopening the decision of December 23, 1921, rejecting Mr. Doggett's petition for an unrestricted patent, the Acting Assistant Director's decision was erroneous and must be reversed insofar as it allowed the issuance of a patent supplemental to patent No. 662889 for the purpose of conveying title to oil and gas in the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 4 to the entryman, and authorized a notation in the margin of patent record 662889 to that effect.

The Acting Assistant Director's decision rejected Mrs. Williams' request for reinstatement of oil and gas lease offer Billings 02907 because of the allowance of Mr. Christman's application for issuance of supplemental patent. The rejection of Mrs. Williams' petition must be affirmed, but for a different reason from that given in the Acting Assistant Director's decision. Mrs. Williams' application was rejected in a decision of November 7, 1951, by the manager of the Billings land office. The manager's decision rejecting the application stated erroneously that the land had been patented without a reservation of oil and gas to the United States. The decision became final and the case was closed on December 18, 1951, as Mrs. Williams did not appeal from the rejection of her application. That application will not be reinstated on the basis of a petition filed more than 2 years after the case was closed where the right of an intervening applicant would be prejudiced thereby. *Charles D. Edmonson et al.*, 61 I. D. 355 (1954); *cf. Jeanette L. Luse, Mildred M. Hornung*, 61 I. D. 103 (1953); *C. A. Rose*, A-26354 (May 13, 1952).

Mrs. Zaerr's oil and gas lease offer, Montana 06607, was rejected by the Acting Assistant Director because of the decision to issue, in the name of Mr. Doggett, a supplemental patent which would convey the oil and gas in the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 4. As the decision was erroneous to

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this extent and as the oil and gas deposits are apparently available for leasing under the Mineral Leasing Act (30 U. S. C., 1952 ed., sec. 181 *et seq.*), the rejection of Mrs. Zaerr's offer was incorrect. Accordingly, the Acting Assistant Director's decision must be reversed as to the rejection of oil and gas lease offer, Montana 06607, all else being regular.

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 Assistant Director of the Bureau of Land Management is reversed except with respect to the rejection of Mrs. Williams' petition for reinstatement of oil and gas lease offer Montana 02907, and the case is remanded for action consistent with this decision.

J. RUEEL ARMSTRONG,
Acting Solicitor.

JOHN E. MILES

A-27075

Decided April 11, 1955

A-27144

Oil and Gas Leases: Noncompetitive Leases

Where oil and gas leases were signed and completed on behalf of the United States in January 1948, they were properly dated as of the first of the following month and will not be redated after the expiration of their primary terms so as to continue them in force beyond their original expiration dates.

Federal Employees and Officers: Members of Congress—Oil and Gas Leases: Generally

The provisions of 18 U. S. C., sec. 431, and of section 9 of noncompetitive oil and gas leases make unlawful the holding of an oil and gas lease by a Member of Congress even though the lease was issued at a time when the lessee was not a Member of Congress.

Oil and Gas Leases: Termination

An oil and gas lease which was valid when issued terminates by operation of law when the lessee thereunder takes office as, and assumes the duties of, a Member of Congress.

Oil and Gas Leases: Assignments or Transfers

The attempted assignment of an oil and gas lease after the record titleholder thereof has served as Member of Congress for more than a year or after his term as Congressman has ended is ineffective even though such assignments are purportedly approved by employees of the Bureau of Land Management.

Oil and Gas Leases: Extensions

Where, during the primary term of a lease on land not within the known geologic structure of a producing field, the lessee becomes disqualified to hold the lease, and it terminates by operation of law, the lease is not subject to the single extension provided for by section 17 of the Mineral Leasing Act.

Oil and Gas Leases: Applications

An oil and gas lease application which is filed for lands included in prior applications should be suspended rather than rejected pending determination of whether any of the prior applicants are entitled to a lease.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

John E. Miles has appealed to the Secretary of the Interior from a decision of July 1, 1954, by the Acting Director of the Bureau of Land Management which held that Mr. Miles' oil and gas lease, Santa Fe 078963, covering lands in New Mexico expired by operation of law at the end of its primary term and that Mr. Miles had not filed a timely application for extension of the lease (30 U. S. C., 1952 ed., sec. 226). The decision also rejected Mr. Miles' application, New Mexico 011924, for an oil and gas lease on part of the lands included in Santa Fe 078963.

Mr. Miles filed a separate appeal to the Secretary from a decision of December 21, 1954, by the Associate Director of the Bureau of Land Management which held that oil and gas lease Santa Fe 079989 had expired by operation of law at the end of its primary term and that a timely application for extension of the lease had not been filed. This decision also rejected application New Mexico 011925 which included all of the lands formerly covered by Santa Fe 079989. As the questions involved in the two appeals are identical, the appeals are being decided together.

Noncompetitive leases Santa Fe 078963 and 079989 were entered into as of February 1, 1948, for a primary term of 5 years and ordinarily would have expired on January 31, 1953.¹ On April 29, 1953, Mr. Miles filed application New Mexico 011924 for a lease on part of the lands covered by Santa Fe 078963, and application New Mexico 011925 for a lease on all of the land covered by Santa Fe 079989. The applications were filed on the standard offer to lease and lease form No. 4-1158, and on each of the applications Mr. Miles inserted the

¹ The leases were issued pursuant to a decision of January 6, 1948, by the Director of the Bureau of Land Management authorizing the issuance of two leases pursuant to Mr. Miles' application Santa Fe 078963, as the one application covered scattered tracts which could not be included in a single lease.

April 11, 1955

notation: "This confirms the application for preferential right to a new lease requested March 2, 1953, which was erroneously refused."

On February 2, 1953, 20 applications which conflicted in whole or in part were filed simultaneously for the lands included in Mr. Miles' leases. A public drawing was held on April 22, 1953, to determine the priority of the simultaneously filed applications. In a decision of April 22, 1953, the manager of the Santa Fe Land and Survey Office announced that, as a result of the drawing, lease application New Mexico 010812, filed by Buck Russell, was accorded priority No. 1. Mr. Russell's application covered all of the lands included in the appellant's application New Mexico 011924. The lands covered by appellant's application New Mexico 011925 were included in New Mexico 010591, filed on February 2, 1953, by Evelyn W. Fritts, which application was accorded priority No. 2 as a result of the drawing on April 22, 1953.

The appellant contends that leases Santa Fe 078963 and 079989 were improperly dated; that the leases had not terminated by operation of law when, on February 2, 1953, conflicting offers for the lands included in his new applications were filed; and, consequently, that his are the first valid applications for the lands, or, in the alternative, that his applications should be regarded as preference right applications for single extensions of his leases. However, the serial record of Santa Fe 078963 indicates, with respect to the leases here under consideration, that the lessee executed the lease forms and paid the required rental before the end of January 1948, and that the lease forms were signed and completed on behalf of the United States by the acting manager of the Santa Fe Land and Survey Office during January 1948. In accordance with the applicable regulation (43 CFR 192.40a; 19 F. R. 9013), the leases were dated on the first day of the month following the date the leases were signed on behalf of the United States. Accordingly, the decisions holding that the leases were properly dated and that the conflicting applications for the lands, filed on February 2, 1953, were filed when the lands were open to oil and gas leasing were correct.

The appellant asserts that the serial record is not accurate and that other notations in the case files and the practice of the Bureau of Land Management in issuing leases demonstrate that the leases were not issued until some time in March 1948 or later. However, the receipt of the leases in Washington on February 26, 1948, after their execution in the field by an official of the Department on behalf of the United States, and the notation of issuance of the leases on the

backing sheet of the Washington records in March 1948 do not alter the fact that the leases were properly dated February 1, 1948, in compliance with the applicable regulation. *Cf. Ross L. Malone, Jr. et al.*, A-26502 (November 25, 1952).

Moreover, the appellant having accepted the leases with the date February 1, 1948, it is too late for him to come in after the expiration of their primary terms and seek to have the leases redated so as to continue them in force beyond their original expiration dates. *Ross L. Malone, Jr., et al., supra; Mrs. Grace L. Levers and Mrs. Frances Dale*, A-26462 (August 20, 1952).

In any event, it appears that Mr. Miles' leases terminated by operation of law before the expiration of their primary terms, and that the lands included therein were available for leasing on February 2, 1953. The appellant states that he was a Member of Congress in 1949 and 1950. On November 2, 1948, he was elected for a term as Representative at Large from New Mexico to the Eighty-first Congress of the United States. His service as Congressman began on January 3, 1949, and continued through December 31, 1950. The provisions of 18 U. S. C., 1952 ed., sec. 431, and of section 9 of the leases here involved make the holding of an oil and gas lease by a Member of Congress unlawful.

18 U. S. C., 1952 ed., sec. 431, provides in pertinent part that:

Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account, undertakes, 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, shall be fined not more than \$3,000.

All contracts or agreements made in violation of this section shall be void * * *.

Section 9 of the lease provides:

Unlawful interest.—It is also further agreed that no Member of, or Delegate to, Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior, shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom; and the provisions of section 3741 of the Revised Statutes of the United States, and sections 114, 115, and 116 of the Codification of the Penal Laws of the United States approved March 4, 1909 (35 Stat. 1109), relating to contracts, enter into and form a part of this lease so far as the same may be applicable.²

² Section 3741 of the Revised Statutes, as amended (41 U. S. C. 1952 ed., sec. 22) requires that the above-quoted provisions as to Members of or Delegates to Congress and Resident Commissioners be inserted as an express condition of the lease.

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In the case of *John L. McMillan*, 61 I. D. 16 (1952), the Department held that 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; that an oil and gas lease issued to a Member of Congress under the Mineral Leasing Act is not within the scope of the statutory exemptions from the provisions of 18 U. S. C., sec. 431, granted by Congress in 18 U. S. C., sec. 433, and is void; and that, even in the absence of 18 U. S. C., sec. 431, the holding of an oil and gas lease by a Member of Congress is a violation of section 9 of the lease which would subject the lease to cancellation under section 31 of the Mineral Leasing Act (30 U. S. C., 1952 ed., sec. 188).

As the appellant was not a Member of Congress when these leases were entered into, the leases were not void by reason of the provision in 18 U. S. C., sec. 431, that all contracts or agreements made in violation of the statute shall be void. It is contended for the appellant that, because the leases here involved were valid when they were issued, the provisions of 18 U. S. C., sec. 431, are not applicable in this case. If this contention were to be sustained, it would be necessary to disregard the words of the statute which make subject to the penalty imposed, a Member of Congress who "* * * 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 * * *."

In *United States v. Dietrich*, 126 Fed. 671 (C. C. D. Nebr., 1904), the meaning of substantially the same statutory provision as that here involved was construed. The *Dietrich* case held that where one who entered into a valid contract with the United States to lease realty to the Government later, during the life of the contract, became a Member of the United States Senate, the contract then terminated by operation of law insofar as it remained executory. In this connection, the Court stated (at p. 675) :

* * * The moment, therefore, that the defendant became a member of the Senate, this contract was dissolved—his obligation to further perform it and his right to further hold and enjoy it were terminated—by operation of law. He then assumed an official relation to the government which rendered it unlawful, and therefore incompatible, for him to longer have or sustain contractual relations of this character. * * *

In accordance with this decision, it is concluded that the appellant's leases terminated by operation of law when the appellant became a Member of Congress.

The appellant seeks to evade the force of the *Dietrich* case (*supra*) by asserting that his leases were fully executed before he became a Member of Congress. A glance at his leases dispels this contention. For

example, under section 1 of the leases, the appellant had the right, during the term of the leases, to remove and dispose of oil and gas deposits, other than helium, in or under the leased lands, and section 2 (c) of the leases obligated him at any time during the lease term to drill wells necessary to protect the leases from drainage and to drill any other wells required by the Secretary to insure diligence in the development and operation of the property. These provisions were clearly not fully executed before the appellant became a Member of Congress.

The record indicates that Mr. Miles attempted to assign the leases as to the lands involved in these appeals by an instrument filed on December 7, 1950. The assignment fees were paid on February 1, 1951, and the assignments were purportedly approved in decisions of February 2, 1951, by the manager of the Santa Fe Land and Survey Office, after Mr. Miles' term as Congressman ended. The appellant's lease, Santa Fe 078963, as to a part of the lands which are not involved in this appeal, was also purportedly assigned, effective February 1, 1950. This earlier assignment was not filed until after the appellant had been serving as a Member of Congress for more than a year.

The attempted assignments of these leases after their termination by operation of law were ineffective as the leases did not exist when the appellant tried to assign them. The fact that employees of the Bureau of Land Management purportedly approved the assignments cannot operate to reinstate leases which had previously terminated by operation of law because the lessee thereunder was not qualified to continue holding the lease.

In the circumstances, as the leases here involved terminated by operation of law when the appellant became a Member of Congress, the decisions holding that the appellant did not file timely applications for an extension of the leases will not be disturbed. However, the conclusion that the appellant's applications, New Mexico 011924 and 011925, are not preference right applications for extensions of Santa Fe 078963 and 079989 should have been based upon the fact that since the leases terminated before the expiration of their primary terms because the lessee became disqualified by law to hold them, the leases are obviously not subject to extension under section 17 of the Mineral Leasing Act which provides, under certain circumstances, for a single extension of a lease at the expiration of the primary term when the lease has been maintained in accordance with applicable statutory requirements and regulations.

Although the appellant's applications here involved are clearly not preference right applications for extensions of his leases, the fact that a

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number of applications were filed ahead of the appellant's applications is not a proper basis for rejecting his applications. Inasmuch as the appellant's applications were filed on form 4-1158, the form on which regular oil and gas lease applications are required to be filed, and the appellant now seems to be qualified to hold a lease, the applications are not subject to rejection merely because the land is included in prior applications. As leases apparently have not yet been issued on the land covered by the appellant's applications, his applications should be suspended, rather than rejected, pending determination of whether any of the prior applicants are entitled to a lease of the lands. *Cf. William H. Phipps, A-25720 (August 19, 1949)*. Accordingly, the decisions by the Acting Director and the Associate Director are modified insofar as they held the appellant's applications for rejection rather than for suspension pending issuance of leases on these lands.

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 decisions of the Acting Director and the Associate Director of the Bureau of Land Management are modified, and the cases are remanded for action in accordance with this decision.

J. REUEL ARMSTRONG,
Solicitor.

**STATE OF UTAH
KEARNS CORPORATION**

A-27091

Decided April 13, 1955

Rules of Practice: Appeals: Timely Filing

An appeal to the Secretary of the Interior will be dismissed where it was not filed with the Director of the Bureau of Land Management within the time prescribed by the Department's Rules of Practice.

School Lands: Mineral Lands—Withdrawals and Reservations: Authority to Make

The Secretary of the Interior may withdraw after January 25, 1927, a mineral school section unsurveyed at the time of the enactment of the act of January 25, 1927, and title to the section will not pass to the State upon the acceptance of the plat of survey thereafter so long as the withdrawal is unrevoked.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The State of Utah has appealed to the Secretary of the Interior from a decision dated July 28, 1954, by the Acting Director of the

Bureau of Land Management which held valid an oil and gas lease issued to Kearns Corporation pursuant to section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226), on, among other lands, section 32, T. 7 S., R. 32 E., S. L. M., Utah.

A copy of this decision was received by the appellant on August 2, 1954. The notice of appeal was filed with the Director of the Bureau of Land Management on September 7, 1954. The pertinent regulation provides:

(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. [43 CFR 221.75; 19 F. R. 9061.]

Consequently the notice of appeal filed by the appellant was late. The Department has consistently dismissed late appeals. *Robert Dale Scarrow*, A-27023 (January 11, 1955). Therefore the appeal in this case must be dismissed.

Even if the appeal had been timely filed there would be no basis for reversing the Acting Director's decision.

On August 24, 1918, section 32 was reported by the United States Geological Survey as mineral in character, valuable as a source of petroleum and nitrogen. Under Executive Order 5327, dated April 15, 1930, it, among other land, was withdrawn for the purpose of investigation, examination, and classification relative to oil shale deposits. This order was modified February 6, 1933, to allow the issuance of oil and gas permits and leases under the Mineral Leasing Act of February 25, 1920, as amended, and further modified on May 13, 1935, to authorize the granting of sodium permits and leases.¹

The plat of survey for T. 7 S., R. 23 E., was accepted February 13, 1945. Section 32, among other lands, was leased to the Kearns Corporation on November 1, 1950.

The appellant contends that title to section 32 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, 28 Stat. 107),

¹The section was also withdrawn by departmental order of September 26, 1933, as a grazing reserve. This withdrawal was revoked on July 1, 1948, and the lands opened to disposition subject, however, to the provisions of existing withdrawals. (13 F. R. 4105.)

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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).²

The act of July 16, 1894, granted to the State of Utah upon its admission to the Union on January 4, 1896, nonmineral unappropriated sections numbered 2, 16, 32, and 36 which were surveyed on that date and such numbered sections as were thereafter surveyed upon the date of the acceptance of the plat of survey. *Wyoming v. United States*, 255 U. S. 489, 500-501 (1921); *United States v. Sweet*, 245 U. S. 563 (1918); 43 CFR 270.24, 19 F. R. 9139. Section 1 of the act of January 25, 1927, 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:

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.

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 added.] The two underscored 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 ninety days after the date of 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.

The appellant contends that the retroactive effect of subsection 2 of the 1932 act made only reservations effective on or prior to January 25, 1927, a bar to title passing to the State.

In a recent case, *Sun Oil Company, A. J. Preston*, 61 I. D. 391 (A-27015, September 2, 1954), the Department discussed at length the effect to be given to subsection (c), *supra*, as amended by the 1932

² The act has been further amended by the act of April 22, 1954 (68 Stat. 57).

act. It held that title to a surveyed mineral school section which was within a reservation on the date of the enactment of the act of January 25, 1927, and which was thereafter placed within an oil shale withdrawal by Executive Order 5327, dated April 15, 1930, does not pass to the State upon the termination of the first reservation so long as the second reservation remains in effect. The decision was based upon the conclusion that the act of May 2, 1932, gave mineral school sections the same status as nonmineral school sections. In view of the fact that the United States may impose a second valid reservation upon a nonmineral school section already in a prior reservation which will survive the termination of the prior reservation (*State of Utah*, 53 I. D. 365 (1931)), the decision held that the same rule applied to a mineral school section.

The application of this rule to the facts in the case on appeal makes it clear that the title to section 32 has not yet vested in the State.

It is well established that until title to a nonmineral school section vests in a State, the United States may impose a reservation upon it (*United States v. Morrison*, 240 U. S. 192, 210 (1916); *State of Utah*, 53 I. D. 365, 368 (1931); see *United States v. Wyoming*, 331 U. S. 440, 444, 445 (1947)), the State being entitled to take an indemnity selection for it or to await the extinguishment of the reservation.

Thus, if title to section 32 had not vested in the State at the time of the withdrawal of April 15, 1930, the United States had full authority to dispose of the land as it saw fit. In view of the fact that the plat of survey was not accepted until February 13, 1945, it is clear that the title to this section was in the United States at the time of the withdrawal.

Since the Government may withdraw a nonmineral school section prior to survey, and since the grant of mineral school sections is of the same effect as the grant of nonmineral school sections, it may withdraw a mineral school section prior to survey.

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 section 32 has never vested in the State, that the land is subject to leasing under the Mineral Leasing Act, and that the lease issued to Kearns Corporation is valid.

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.

J. RUELL ARMSTRONG,
Solicitor.

APPEAL OF S. J. GROVES & SONS COMPANY

IBCA-8

Decided April 12, 1955

Contracts: Performance—Contracts: Appeals

A contractor who bids on a Government contract is charged with the obligation of having available whatever machinery and labor may be necessary to execute the contract, and the burden of proving that delays were excusable rests upon the contractor who has taken an appeal.

Contracts: Performance—Contracts: Unforeseeable Causes

When bids on a contract were opened on June 26, 1950, a day after the commencement of the Korean conflict, and the contract was awarded on June 29, 1950, 4 days later, even though the contractor was already bound by its bid when the conflict commenced, and the proportions and probable duration of the conflict were not then entirely manifest, the contractor was at least put on notice at the very beginning of the performance of the contract that difficulties in procuring labor equipment might be expected, and that early and determined efforts would be necessary if shortages were to be avoided.

Contracts: Release—Contracts: Damages: Liquidated Damages

It is well settled that the failure to except an item from settlement has the effect of barring any claim based on such item, and, therefore, a contractor who, in executing a release on the contract, requested an extension of time of a certain number of days for the completion of the work under the contract, cannot subsequently increase its request to a greater number of days, in order to avoid the assessment of liquidated damages.

Contracts: Delays of Contractor

A request for an extension of time to take care of delays in the performance of a contract that led to the assessment of liquidated damages against a contractor must be denied, notwithstanding the claim that the delays were attributable to the Korean conflict, when the contractor sold machinery in good condition that was usable in the performance of the contract, and subsequently entered into another contract which required the simultaneous use of the available machinery in the performance of both contracts. Moreover, since the contractor was allowed an extension of time for the performance of the contract because of the shortage of parts due to the Korean conflict, the contractor must demonstrate that delays attributed to the unavailability of new machinery were not concurrent with the delays due to the shortage of parts.

Contracts: Delays of Contractor—Contracts: Unforeseeable Causes

A request for an extension of time to take care of delays in the performance of a contract that led to the assessment of liquidated damages must be denied when the contractor has failed to meet the burden of proving that an alleged labor shortage was of calculable duration and was attributable to the Korean conflict rather than to its own lack of forethought and diligence. The record indicates that an adequate supply of labor could have been obtained if adequate advance notice had been given to the State employment agency, and adequate housing facilities had been supplied at or near the job site as required by the specifications, and hence the situation cannot be said to have been "beyond the control and without the fault or negligence of the contractor" within the meaning of Article 9 of the standard

form of Government construction contract. The Board cannot find that the provisions of the specifications requiring the contractor to furnish adequate housing facilities for workers at the job site were waived by the Government in the absence of positive evidence of such a waiver. The contracting officer has entered no change order eliminating the provisions of the specifications in question, and the Board cannot indulge any presumption that he did so informally in view of the obvious need for the housing facilities. As the housing problem at or near the job site was, moreover, necessarily known to the contractor at the time it bid for the contract, it could have had no connection with the Korean conflict and cannot constitute an "unforeseeable" cause within the meaning of Article 9 of the standard form of Government construction contract.

Contracts: Appeals—Contracts: Notices—Contracts: Contracting Officer—Delegation of Authority: Redelegations—Bureau of Reclamation: Authorization

The appeal of a contractor from the decision of a contracting officer assessing liquidated damages against the contractor by reason of the late completion of the work cannot be considered on the merits when the contractor failed to give the contracting officer notice of the causes of the delay as required by Article 9 of the standard form of Government construction contract. The consideration of the causes of delay by the contracting officer on the merits does not amount to a waiver of the requirement of notice, since the contracting officer could extend the time for giving notice only with the approval of the head of the Department. Although the head of the Department had delegated to the heads of bureaus the authority to extend the time for giving notice, and had authorized them to redelegate the authority to their subordinates by order published in the Federal Register, no effective redelegation was accomplished in this case, since the Commissioner of Reclamation authorized his contracting officers to extend the time for giving notice by means of an unpublished instruction in the Bureau of Reclamation manual.

Contracts: Damages: Remission of Liquidated Damages

The Interior Board of Contract Appeals is not authorized to make recommendations to the Comptroller General with respect to the remission of liquidated damages pursuant to section 10 (a) of the act of September 5, 1950 (64 Stat. 578, 591; 41 U. S. C., 1952 ed., sec. 256a). This function is vested in the Solicitor of the Department by section 27 of Order No. 2509, Amendment No. 16.

BOARD OF CONTRACT APPEALS

S. J. Groves & Sons Company, 500 Wesley Temple Building, Minneapolis, Minnesota, filed an appeal from a decision of the contracting officer dated September 29, 1953, insofar as he denied request for extensions of time under Contract No. I2r-19050, entered into on June 29, 1950, with the Bureau of Reclamation.

The contract, which is on the standard form for Government construction contracts (Form No. 23, Revised April 3, 1942), provided that the contractor would perform the work for construction and completion of Big Sandy Dam and dike for the contract amount of \$1,011,772.60, under the schedule of Specifications No. 3072, Eden Project, Wyoming.

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Paragraph 24 of the specifications required the contractor to commence the work within 30 calendar days after the date of receipt of notice to proceed and to complete all work within 500 calendar days thereafter. Notice to proceed was received by the contractor on July 17, 1950, thereby establishing November 29, 1951, as the final date for completion of the work. However, by Order for Changes No. 2, dated December 21, 1951, findings of fact dated April 1, 1952, and May 23, 1952, the completion date was extended 27 days, 105 days and 22 days, respectively, or to and including May 1, 1952. All work under the contract was completed October 10, 1952, which amounted to a delay of 162 days.

Paragraph 25 of the specifications provided for the assessment of liquidated damages in the amount of \$250 for each calendar day of unexcusable delay beyond the specified completion date.

In connection with the submission of the final payment voucher, the contractor executed a Release on Contract, dated December 20, 1952, and attached thereto a letter dated January 7, 1953, which listed exceptions to the release including claims for additional compensation totaling \$12,663.02 and a request for an extension of time amounting to 162 days. The contracting officer in his findings of fact and decision dated September 29, 1953, dismissed the claims for additional compensation without a consideration of the merits on the ground that they had previously been considered by him in a findings of fact and decision dated April 30, 1953. However, an extension of time of 14 days was allowed because of delay due to the lack of suitable riprap material in a Government designated riprap source. A further extension of time of 63 days was granted because of delay in 1951 due to a scarcity of materials and parts resulting from the establishment of the national priorities system following the outbreak of the Korean conflict on June 25, 1950. Accordingly, the time for performance was extended an additional 77 days or only to July 17, 1952, and liquidated damages in the amount of \$21,250 have been assessed.

The appeal, which is dated December 2, 1953, is restricted to the decision made by the contracting officer with respect to two items of the contractor's claim.¹ The first concerns the item of the claim designated 4 (b) involving a request for an extension of time of 72 days because of alleged unavailability of new machinery following the outbreak of the Korean conflict. The second concerns item 4 (c) under which the contractor requested a time extension of 45 to 60 days caused

¹ It should be noted that none of the work under the contract was performed by the contractor, S. J. Groves & Sons Company. All of the work, with the exception of the concrete work which was subcontracted by the contractor to another firm, was subcontracted to Forgey Construction Co. of Wyoming, which company, in turn, subcontracted the riprap work to the Wyoming Construction Co.

by an alleged labor shortage following the outbreak of the Korean conflict.

The contracting officer denied the request of the contractor for an extension of time because of its alleged inability to obtain new machinery for use in connection with the earth work on the ground that the contractor, during the construction period under the contract, advertised for sale construction equipment of a type which was suitable for use on the project. A further ground for denying the request was based upon the contracting officer's finding that Forgey Construction Co. was the successful bidder on a contract with the Wyoming State Highway Department in January 1951, and that equipment employed on that road project was of a type suitable for use on the construction work under the contract with the Bureau of Reclamation.

As for the extension of time by reason of the labor shortage attributed to the Korean conflict, the contracting officer found on the basis of a letter dated May 4, 1951, from the Manager of the Rock Springs office of the Wyoming Employment Security Commission to the Rock Springs office of the Bureau of Reclamation that no assistance in the recruitment of labor had been requested prior to May 18, 1951; that assistance had then been requested only in the months of May and September 1951; and that labor could have been obtained despite the stringency of the labor market if "advance requests for assistance had been made." He concluded, therefore, that the labor shortage was not due to causes which were unforeseeable and beyond the control of the contractor within the meaning of Article 9 of the contract.

The contractor appealed from the decision of the contracting officer by letter dated December 1, 1953, with which it forwarded a number of affidavits in support of its contentions. No formal hearing has been held in this case but counsel for the contractor has had two conferences with representatives of the Department at Washington, D. C. The first conference, which was held on January 29, 1954, was with the then Acting Deputy Solicitor and other members of the Solicitor's office. Following this conference, counsel for the contractor, by letter dated February 26, 1954, supplied further arguments and comments in support of its appeal. The second conference, which was held on February 23, 1955, was with members of the Board of Contract Appeals to which the case had been transferred. The Bureau of Reclamation was represented at this conference by counsel. At this conference counsel for the contractor filed with the Board and opposing counsel a letter dated February 18, 1955, commenting on the availability of housing facilities for employees at the site of the job. Counsel for the respective parties also entered into a stipulation at the conference by which in effect they agreed that the Board should decide the case on the existing record. Subsequent to the conference, department counsel filed a brief of three pages, discussing a procedural point in the case.

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In its letter of appeal, dated December 1, 1953, the contractor attacks the findings of the contracting officer with respect to the alleged shortage of new machinery by arguing that the equipment advertised for sale by the contractor was "old, used and secondhand," and required replacement parts, which were not available, before it could be used; that a "majority of this equipment" was specialized, and unsuitable for use on the Eden Project; and that this equipment was located too far away in New Jersey and Pennsylvania. The contractor also pointed out that one of the tractors which was purchased by the Forgey Construction Company from the prime contractor broke down after 3 weeks of operation but could not be repaired because of a lack of parts, and that the same factor impeded the repair of the trucks, which were always breaking down because of snow, other conditions of the terrain, and the high elevation of the area of the job site.

As for the findings of the contracting officer with respect to the alleged labor shortage, these were attacked by the contractor on the ground that they were based exclusively on information received from the Rock Springs office of the Wyoming Employment Security Commission. The contractor asserts that only 5 percent of its labor was obtained through the Rock Springs office of the commission, and that appeals for labor were made over various radio stations, and to labor unions in Casper, Lander, Cheyenne, Rock Springs, and Salt Lake City.

In considering the contractor's contentions, it must be realized that a contractor who bids on a Government contract is charged with the obligation of having available whatever machinery and labor may be necessary to execute the contract,² and that the burden of proving that delays were excusable rests upon the contractor.³ Here, however, the contractor's case is compromised at the very outset. The Korean conflict commenced on June 25, 1950, and the contractor's bid was opened on June 26, 1950, a day later, and the contract itself was not awarded and executed until June 29, 1950, 4 days later.⁴ While the contractor was already bound by its bid when the conflict commenced and its proportions and probable duration were not then entirely manifest, the contractor was at least put on notice at the very beginning of the performance of the contract that difficulties in procuring labor and equipment might be expected, and that early and determined efforts would be necessary if shortages were to be avoided.

² See *Krauss v. Greenberg*, 137 F. 2d 569, 573 (3d Cir. 1943), cert. denied, 320 U. S. 791 (1943). rehearing denied, 320 U. S. 815 (1943); *Sussex Hats, Inc.*, 1 CCF 105 (BCA, April 17, 1943); *Penker Associates, Inc.* (BCA, December 9, 1944).

³ See *American Construction Co.*, 3 CCF 341 (BCA, January 23, 1945).

⁴ In his letter of February 26, 1954, counsel for the contractor states on page 4 of the letter: "The Korean War was not anticipated when the contract was bid, or even when the job was let." The italicized portion of this statement is in error.

Instead the record shows no awareness of the seriousness of the situation with respect to the procurement of equipment and labor until more than a year after the issuance of the notice to proceed, and the requests for extensions of time by reason of shortages seem to be afterthoughts. A labor shortage due to the Korean conflict is first mentioned in a letter dated September 24, 1951, from the Forgey Construction Company to the prime contractor, which forwarded the letter to the contracting officer with a covering letter of its own dated October 2, 1951. The lack of new equipment due to the Korean conflict is first advanced as a cause of delay in a letter dated December 21, 1951, from the contractor to the Rock Springs office of the Bureau of Reclamation in which an extension of time of 180 days was requested by reason of the lack of new equipment and repair parts, as well as for other reasons. In connection with the lack of repair parts, the contractor stated: "I believe that we are being conservative when we say we believe that the inability to obtain repair parts reduced our production some 20%. *Had we had the additional 20% production, there would have been no question as to our completion on schedule* (emphasis supplied)." Again, in the affidavit of Charles Chapin, Secretary-Treasurer of the Forgey Construction Company, in which it is admitted that the company made a contract dated January 5, 1951, with the Wyoming State Highway Department, to do a road job, the excuse for making this contract that there was then still no shortage of new equipment is offered. Thus the affiant states: "At the time the contract was bid it was not generally anticipated in the trade that there would be a shortage of new equipment nor the difficulties later encountered in obtaining parts and supplies to maintain and recondition presently owned equipment."

It is not surprising, therefore, that when the contractor wrote its letter of January 7, 1953, to accompany the execution of its release on the contract, it did not mention either the lack of new equipment or of labor as specific reasons justifying an extension of time, although no less than five other specific reasons were mentioned. In requesting a further extension of time of 141 days, the contractor merely stated that this would be justified by the fact that the Government had never intended to impound water during the year 1952, and added:

We also feel the Government should take into consideration the fact that when this job was bid in the Spring of 1950,⁵ conditions were at that time fairly stable and we anticipated no extreme change; however, conditions did change drastically (Korea), and our costs went up accordingly causing us to assume a large loss that was, in our opinion, due to circumstances beyond our control, but for which there is no apparent remedy.

These unanticipated costs, added to the heavy penalties assessed by the Government, have worked an extreme hardship on us which we respectfully request

⁵ Actually the contractor's bid was made in the summer of 1950, being postmarked June 23, 1950.

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in all equity be alleviated by the forgiveness of all penalties, particularly, since the Government has suffered no corresponding loss.

At most, it seems to be asserted in this statement that penalties should be remitted, not because of delays assignable to any specific reason but because conditions brought about by the Korean conflict had rendered performance generally more expensive for the contractor.

Apparently the contractor's exceptions were considered so obscure that it was requested to clarify them, and this clarification it supplied in a letter dated March 20, 1953. In this letter, the contractor now increased its request for extensions of time by reason of delays due to the Korean conflict from 141 days to a maximum of 200.9 days, of which 68.9 days was attributed to the lack of necessary material and parts, 72 days to the lack of new equipment, and 45 to 60 days to the prevalence of a labor shortage. The delay of 72 days attributed to the lack of new equipment was explained by stating: "New Equipment bona fide ordered at the outset of the job, included four tractors and on 6 2½ yard power shovel. These items represented 20% of the machine units which should have been on the job, and if they had been available, 20% of 360 days, or 72 days would have been saved. Net delay, this cause: 72 days." It is not demonstrated, however, how the 20% employed in this formula was arrived at, nor why 360 days should have been postulated as a working year. The delay of 45 to 60 days attributed to the labor shortage is even vaguer and more indefinite. The contractor merely stated: "An extremely conservative estimate of delay to this war-caused labor shortage is 45 to 60 days."

In any event, there is a serious question whether these claims could even be considered in view of the failure to identify them more specifically in the letter of January 7, 1953, accompanying the release on the contract. It is well settled that the failure to except an item from settlement has the effect of barring any claim based on such item.⁷ However, even giving the contractor the benefit of the doubt on this score, it is patent that it must be limited to the claim of 141 days of delay stated in the letter of January 7, 1953, for to increase this time to 200.9 days would have the effect of enlarging the claim. Since the contracting officer allowed the contractor an extension of time of 63 days to take care of a scarcity of material and parts because of the Korean conflict, the contractor could not now be allowed an extension of time of more than 78 days to cover the alleged shortage of both new equipment and labor, although liquidated damages for a period of 85 days were assessed.

⁶ So in original. Apparently it was intended to refer to "one 2½ yard power shovel."

⁷ See *P. J. Carlin Construction Co. v. United States*, 92 Ct. Cl. 280, 303, 305 (1940); *Eastern Contracting Co. 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); *S & S Engineering Corp.*, 61 I. D. 427 (1954).

The Board is not persuaded that the contractor is entitled to any additional extension of time by reason of the lack of new machinery. It is apparent that the lack of new machinery could not have been too grievous when the contractor was advertising machinery for sale, and the main subcontractor was undertaking another contract which might require the use of the same machinery. While the contractor contends, to be sure, that the machinery was second-hand, and unsuitable for use without repairs, this contention is refuted by the fact that in the advertisements themselves virtually all the items of machinery offered for sale were described as "in good condition." While not all the equipment offered for sale may have been suitable for work on the Eden Project, it is established by the affidavit of James R. Ritchey, the Executive Vice-President of the contractor, that at least several D-8 tractors (only one of which was sold to Forgey), three C-11 Tournapulls, compressors and wagon drills were suitable for such work. Although this equipment was located at a considerable distance from the Eden Project—in either New Jersey or Pennsylvania—it could have been transported to the project site, and the expense of such transportation does not excuse the contractor from undertaking it. After all, the transportation of new machinery would also be expensive.

Moreover, the affidavit of the Secretary-Treasurer of the Forgey Construction Company establishes that a very considerable number of items of equipment used on the road job, which this company undertook in January 1951, could be used in work on the Eden Project, and, indeed, were used on the project by being shifted back and forth between the road job and the project.⁸ This dual use of the machinery must necessarily have slowed operations on the project, which had previously been undertaken.

The attempt of the contractor to justify its disposition of used equipment (which, of course, increased its need for new equipment), by the scarcity of parts to recondition such used equipment, only points to the basic weakness of its case. Whether or not the shortage of new equipment was primarily in earth-moving equipment, as the contracting officer contends, or in heavy duty trucks, as the contractor contends, either type of equipment, which was available, could have been kept operating if parts had not been difficult to obtain. As the contractor was allowed an extension of time of 63 days because of the shortage of parts due to the Korean conflict, it is obliged to demonstrate that the delay attributed to the unavailability of new equipment was not concurrent with the delays due to the shortage of parts. As stated in a recent contract appeal decided by the Department: "When a contractor is prevented from working on a given day by two different

⁸ The machinery consisted of 4 DW-10 tractors with 12 C. Y. scrapers; 2 D-8 tractors; 1 pneumatic tired roller; 1 set of scale and scale house; 1 TD-18 International tractor with dozer-blades; and 4 of 7 dump trucks.

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causes, either of which makes delay on the contractor's part excusable, there is nevertheless only 1 day of excusable delay."⁹

In a memorandum to the Solicitor dated January 26, 1954, a copy of which was sent to the contractor, the Chief Engineer of the Bureau of Reclamation points out that the shortage of new equipment could have affected only the completion of the dam embankment, which was completed on June 1, 1952, and that "The work in progress from June 1 until October 10, 1952, consisted, for the most part, of the quarrying, hauling, and placing of riprap," which, however, could have been accomplished contemporaneously with the construction of the dam embankment, so that a substantial amount of delay in the completion of the work could have been avoided. The Chief Engineer concluded:

* * * that if there was a delay in completing the dam embankment attributable to shortage of equipment, such delay would be concurrent with other delays allowed by the contracting officer. The time for completion as established by the contract and notice to proceed was November 29, 1951. Extensions of time totalling 231 days have been allowed based upon other causes of delay, bringing the final required completion date up to July 17, 1952. Since the dam embankment, for which the equipment was required, was completed on June 1, 1952, some 47 days earlier, it appears that the contractor has been amply provided with extensions of time for excusable causes and that the granting of any further extension of time because of shortage of this equipment would actually amount to an allowance of a double extension of time.

The contractor has clearly failed to show that any delay due to the shortage of new equipment was not concurrent with delays due to shortage of parts, or other causes of delay.

The Board is also not persuaded that the contractor has met the burden of proving that the alleged labor shortage was of calculable duration¹⁰ and was attributable to the Korean conflict rather than to its own lack of forethought and diligence. In the letter of May 4, 1953, from the manager of the Rock Springs office of the Wyoming Employment Security Commission on which the contracting officer relied in making his findings with respect to the claim of labor shortage, it is stated:

In the year 1950 there was a surplus of labor, and any number of construction workers could have been provided for the three companies concerned with little difficulty. The following two years, however, qualified help was at a minimum and the lack of adequate living accommodations in the Farson area discouraged the workers who we were able to obtain, from going to work there. Between May and November there were shortages of construction workers in the local office

⁹ *McDaniel Construction Co.*, CA-164 (October 9, 1952). See also *J. F. White Engineering Corp.*, 61 I. D. 201 (1953).

¹⁰ Since the contractor has requested an extension of 45 to 60 days on account of the alleged labor shortage, it is apparent that the Board, if it were to allow an extension of time, would be compelled to fix the number of days arbitrarily. The contractor has requested, moreover, that a decision be rendered on the existing record.

area, but if advance notice had been given, it would have been possible to recruit an adequate supply of construction workers *from other areas*. Between November and May there is and always has been a large surplus of construction workers because of seasonal layoffs due to weather conditions.

In at least [sic] one instance the *Forgey Construction Company* utilized the radio to appeal for workers just prior to, or at about the same time that an order was placed with the local office. The orders from Forgey Construction Company received on September 28, 1951 was mailed into the office, the remainder of all orders were submitted in person by representatives of the various companies.

In the case of the Wyoming Construction Company, some trouble was encountered when the Company was unable to pay wages earned, and when the information was circulated among workers in the construction line, many good qualified workers refused referrals. [Italics supplied.]

The argument of the contractor that the findings of the contracting officer were based exclusively on the information contained in this letter seems superficially plausible. Actually it is based upon the fallacy that information received from *a single source*, namely the Rock Springs office of the Wyoming Employment Security Commission, must necessarily reflect the labor situation in *a single place*. There is no reason for assuming, however, that the manager of a State labor agency, would be so parochial in the performance of his duties, that he would be wholly ignorant of the labor situation in contiguous areas which were part of the labor market. And, if such an assumption were theoretically possible, the possibility is eliminated by the comment in the letter itself that "if advance notice had been given, it would have been possible to recruit an adequate supply of construction workers from other areas." Such a statement makes it manifest that the manager's knowledge of the labor market was not confined to the local office area. Moreover, the statement must also be regarded as the opinion of an expert that an adequate supply of labor could have been obtained "if advance notice had been given." This opinion is strengthened by the fact that the manager's letter shows that he was aware that one of the subcontractors was utilizing other means of recruiting labor, such as the radio, which the contractor emphasizes so much in attacking the contracting officer's findings.¹¹ As there appears to be no reason for rejecting the expert opinion of the manager, it must be concluded that the situation was not "beyond the control and without the fault or negligence of the contractor" within the meaning of Article 9 of the contract. Furthermore, the manager's letter suggests two other reasons for the difficulties of the contractor in obtaining labor, namely the lack of adequate housing facilities for workers in the Farson area, which was 12 miles from the site of the

¹¹ Charles Chapin, who was not only an officer of the Forgey Construction Company but a member of the Wyoming Employment Security Commission, in his affidavit charges the contracting officer with reaching the conclusion that the Rock Springs office of the Commission was "our principal source of labor for the job." Actually no such statement is to be found in the contracting officer's findings, nor is it fairly inferable therefrom.

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job, and the failure of one of the subcontractors to meet wage payments.

The contractor has made the lack of adequate housing facilities a prominent issue in the case. In the affidavit of Charles Chapin transmitted with the contractor's letter of appeal of December 1, 1953, the affiant deposed that " * * * The Big Sandy project was approximately 75 miles from Rock Springs, Wyoming and there was no public transportation from Rock Springs to the dam; that the referred employees in many instances made no attempt to contact the affiant's company; there were no housing facilities on or near the job." In its letter of February 26, 1954, the contractor also stated that:

* * * The Secretary should consider the fact that this damsite was up in the mountains, seventy-five miles from the Rock Springs office, with no public transportation provided, and also no facilities at the damsite for the housing or feeding of laborers, so that a man had to have his own transportation and commute back and forth to the job, or have a trailer house or tent so that he could reside at the job. Most laborers were not so equipped, and very, very few of those referred to the job ever actually appeared and applied.

Paragraphs 34 to 44, inclusive of the specifications in this case provided that the contractor was to supply housing accommodations and meals for workers on the job, and regulated the supply in great detail. Consequently, the Board found it difficult to understand why the lack of housing at or near the site of the job, should have been a factor in the inability of the contractor to secure labor, as it contended. In response to an inquiry which the Board instituted through the Bureau of Reclamation, it received a teletype message dated February 3, 1955, from the Rock Springs, Wyoming, office of the Bureau, stating as follows:

Contractor or subcontractors did not provide any housing or housing accommodations for use by their employees. All contractor's employees furnished their own trailer houses, secured local housing, or commuted from Rock Springs, 54 miles from the job site. Trailer houses were parked at the job site and at a commercial trailer park in Farson, 12 miles from the job site. Very limited hotel accommodations and a few low grade apartments were available at Farson. Some local residents of the Eden Project area were used by the contractor in his labor force.

Local housing in general was very inadequate. A Government camp was constructed to accommodate Bureau employees. Commuting roads from Rock Springs and Farson to damsite are asphalt paved, with exception of 3 miles gravel, all were in good condition. Adequate commercial housing was available at Rock Springs.

A copy of the teletype having been sent by the Board to counsel for the contractor, he filed with the Board and opposing counsel the letter dated February 18, 1955, commenting on the provisions of the specifications requiring the contractor to furnish housing facilities for its employees at the site of the job. It was stated in this letter that "due to

the size of this job and the comparatively small number of men involved, there was no housing project or specific housing facilities supplied for the workers," but that the provisions of the specifications requiring housing to be furnished had been waived by the Government as unnecessary. It was further explained that there were adequate housing facilities available at or near the project site, as follows:

When the project started the various employees specifically stated that they preferred to live in their own trailers at trailer camps established at the project. There were motels and housing facilities in small communities immediately in the vicinity of the project. Many of the employees were furnished board and room by farmers in the area who were glad of the opportunity to get this additional income.

There were adequate housing facilities at Farson, Wyoming twelve miles from the job site, nine of said miles being over asphalt paved highways. All of the numerous local residents of the Eden Project area were used by the contractor in housing his labor forces, and the employees would not have used housing facilities if they had been erected, as all of them stayed in their own homes. Very adequate commercial housing was available in Rock Springs, a distance of fifty-four miles from the site, of which distance fifty-one miles are over asphalt paved highways.

The statements in the letters of February 26, 1954, and February 18, 1955, on the subject of the availability of housing at or near the site of the job are irreconcilable. In these circumstances, the Board is constrained to accept the statement made by the manager of the Rock Springs office of the Wyoming Employment Security Commission in his letter of May 4, 1953, that there was a "lack of adequate living accommodations in the Farson area," and the sworn statement of Charles Chapin on behalf of the contractor that there were no housing facilities on or near the job, and the Board must conclude that the failure to provide housing facilities for employees was a major factor in the inability of the contractor and subcontractors to obtain labor.

As for the contention that the provisions of the specifications requiring the contractor to furnish adequate housing facilities was waived by the Government, the Board cannot find that they were waived in the absence of positive evidence of such a waiver. The contracting officer has entered no change order eliminating the provisions of the specifications in question, and the Board cannot indulge any presumption that he did so informally in view of the obvious need for the housing facilities. As the housing problem at or near the job site was, moreover, necessarily known to the contractor at the time it bid for the contract, it could have had no connection with the Korean conflict, and cannot constitute an "unforeseeable" cause within the meaning of Article 9 of the contract which can be accepted as an excuse for the delay of the contractor in the completion of the work.

Quite apart from the merits, there is, moreover, a procedural bar to the consideration of both claims of the contractor. The contracting officer was not notified in writing, as required by Article 9 of the con-

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tract, of the causes of delay at the time of their occurrence or within ten days thereafter. Although this rule is procedural, it serves the extremely important purpose of facilitating the contemporaneous investigation of causes of delay, so that the Government will not be at a disadvantage in exploring the justifications for them, and also of affording the Government an opportunity of helping the contractor when possible, to remove or to mitigate the causes of delay. The contracting officer in this case did, to be sure, consider the causes of delay on their merits, but the requirement of written notice was not waived thereby, since he could extend the time for giving notice only with the approval of the head of the Department,¹² and the latter could act only during the life of the contract.¹³

Department counsel in this case takes the position, to be sure, that the contracting officer had authority to extend the time for filing a notice of delay without the approval of the head of the Department, and that presumably, therefore, the contracting officer waived the requirement of notice by considering the claims on the merits. Article 21 (a) of U. S. Standard Form No. 23, revised April 3, 1942, defines the term "head of department" so as to include "his duly authorized representative," which in turn is defined as "any person authorized to act for him other than the contracting officer." The words "other than the contracting officer" in Article 21 were stricken from the contract in the present case. This was done apparently pursuant to a memorandum from the Interdepartmental Board of Contracts and Adjustments, dated November 27, 1927, which gave authority to the Bureau of Reclamation to deviate from the standard contract form then in use by striking from Article 18 (a) thereof the words "other than the contracting officer." It is contended that this permission to deviate was expressly saved in Section 50 of Departmental Order No. 2509, which authorizes the heads of bureaus to extend the time for filing notices of delay, and to redelegate the same authority to their subordinates, and that this re delegation was actually accomplished by Chapter 6.1.30 of Volume X of the Bureau of Reclamation manual. However, subdivision (d) of Section 50 of Order No. 2509 which authorized the re delegation to subordinates expressly provides: "Each such re delegation shall be published in the Federal Register." Quite apart from the question whether the permission to deviate from the standard form survived the adoption of another standard form, it is plain that the re delegation could not be accomplished by virtue of

¹² See 16 Comp. Gen. 374, 376 (1936); *Langevin v. United States*, 100 Ct. Cl. 15, 33 (1943); *R. C. Huffman Construction Co. v. United States*, 100 Ct. Cl. 80, 117 (1943); *United States v. Cunningham*, 125 F. 2d 28 (App. D. C., 1941); *Associated Piping and Engineering Co., Inc.*, 61 I. D. 60 (1952); *Hamilton Carhartt Overall Co.*, 1 CCF 65 (B. C. A., March 6, 1943); *Morris Klein, Trustee*, 1 CCF 77 (B. C. A., March 18, 1943); *Branford Construction Co.*, 1 CCF 149 (B. C. A., May 19, 1943); *Boston Duck Co.*, 1 CCF 189 (B. C. A., June 17, 1943).

¹³ 20 Comp. Gen. 299.

an instruction in the Bureau of Reclamation manual which is an unprinted intrabureau manual of instructions which has never received the approval of the Secretary of the Interior. The Board must conclude that the contracting officer was not authorized to extend the time for filing a notice of delay, and that, therefore, his consideration of the causes of delay on the merits did not serve to waive the requirement of notice.¹⁴

The contractor requests that if its delay in performance of the contract is found to be inexcusable under Article 9 thereof, the liquidated damages of \$21,250 assessed against it be waived in accordance with the provision of section 10 (a) of the act of September 5, 1950 (64 Stat. 578, 591; 41 U. S. C., 1952 ed., sec. 256a), which authorizes the Comptroller General, on the recommendation of an agency head to remit liquidated damages in whole or in part "as in his discretion may be just and equitable."¹⁵ The Board is, however, not authorized to make such recommendations to the Comptroller General. This function is vested in the Solicitor of the Department by section 27 of Order No. 2509, Amendment No. 16.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the decision of the contracting officer denying the contractor's requests for additional extensions of time is affirmed, and the contractor's request that a recommendation be made to the Comptroller General that the liquidated damages be remitted is referred to the Solicitor for his consideration.

THEODORE H. HAAS, *Chairman.*

THOMAS C. BATCHELOR, *Member.*

WILLIAM SEAGLE, *Member.*

LIMITATION OF ACCESS TO THROUGH-HIGHWAYS CROSSING PUBLIC LANDS

Rights-of-way: Revised Statutes sec. 2477

A throughway or limited-access type of highway may be established across the public lands, under Rev. Stat., sec. 2477 and the regulations (43 CFR 244.57-

¹⁴ It should be noted that this question cannot arise under Paragraph 5 (c) of Standard Form 23A (March 1953), which permits the contracting officer to extend the times for filing notices of delay without the concurrence of the head of the Department. The Board has considered the question, although not essential to its decision, because its decision on the same question in *Campbell Construction & Equipment Co.*, IBCA-2 (January 11, 1955) (62 I. D. 6), has been attacked as incorrect, and the same question may arise in another appeal.

¹⁵ 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); *McCann Construction Co.*, 61 I. D. 342 (1954).

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244.59). The United States as grantor does not have any special right of access to such highways, other or different from that accorded other abutting owners under State law. Persons subsequently acquiring the abutting lands from the United States likewise do not have any special right of access which the State need consider for the purpose of eliminating by purchase or otherwise.

Rights-of-way: Act of November 9, 1921

A throughway or limited-access highway may be established on public lands under sec. 17 of the Federal Aid Highway Act, and the regulations (43 CFR 244.54-244.56). The Secretary of the Interior probably could reserve a special right of access to such highway if necessary to his administration of the public lands as a condition of his certification of the land for disposition to the State for highway purposes. In the absence of a special reservation, the United States as owner of the abutting lands, is subject to the same limitations on access to the highways as other adjoining owners under State law; and persons subsequently deriving title from the United States are subject to the same limitations. The Secretary of the Interior may surrender to the State a reserved right of access prior to disposing of the abutting lands.

M-36274

APRIL 15, 1955.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

You have informally referred to me the correspondence from Mr. E. H. Brunner, Right-of-Way Engineer of the Idaho Highway Department, together with your proposed reply thereto and a proposed memorandum for the information of Bureau officials on the above subject.

Mr. Brunner writes that the State of Idaho in acquiring rights-of-way for the Interstate Highway System, so far as it crosses Federal lands in Idaho, would also like to acquire rights from the abutting Government land in order to provide for a safer highway. For this purpose Mr. Brunner asked the Manager of the Land and Survey Office at Boise to add the following clause to a certification of right-of-way withdrawal of Government land:

In the event Federal statutes are amended, giving the right to grant access rights along with rights-of-way, this withdrawal shall be considered as also granting all access rights, present and future, across the above listed subdivisions.

The manager properly indicated his lack of authority to sign the certification as requested and the matter has been referred to you. By "withdrawal" Mr. Brunner obviously means an appropriation and transfer of Federal land under section 17 of the Federal Aid Highway Act (see 43 CFR 244.54 (a) (2)).

The questions and problems posed by Mr. Brunner's letter and enclosures are common to the highway departments of other Western States where highways must cross large stretches of public land. The problem is that in constructing a limited-access highway whether

as part of the interstate highway system or otherwise, the highway departments desire to acquire from the Government the right-of-way for such highway over and across the public lands; and to acquire also the right of access to such highway from the abutting Government land while it is in Government ownership so as to preclude the unrestricted exercise of such rights when title to the abutting lands has passed into private ownership thus avoiding the necessity of the States' purchasing such rights from the Government's successors in interest. Mr. Brunner's suggested access clause is intended as a stop-gap measure pending the enactment of legislation authorizing the grant of access rights. The questions involved may be simply stated as follows:

1. May a freeway or limited-access type of highway be constructed over the public lands?
2. Does the United States (and its successors in interest) as owner of lands abutting such highway have special rights of access thereto?
3. If it does, is legislation necessary to authorize the Government to surrender to the States its access rights to such highway?

This memorandum will touch only briefly upon the Government's right of access to the ordinary, conventional or "land service" highway running across public lands. I will not discuss the situation where a conventional highway is converted under State authority into a limited access highway, but my answer will be restricted to new freeways constructed on public lands administered by the Bureau of Land Management where no highway previously existed. My answers follow:

1. A limited-access highway may be constructed over public lands either under Rev. Stat., sec. 2477, or under section 17 of the Federal Aid Highway Act of 1921, *infra*.
2. Except as hereinafter indicated with respect to Federal Aid Highways, the United States does not have any special right of access to such freeways other or different from that accorded to other abutting owners under State Law.
3. As to such limited access highways no special legislation is necessary to authorize the surrender to the States of the Government's right of access, if any. Nor is the special access clause suggested by Mr. Brunner necessary pending enactment of such legislation.

An easement of access is defined as the right which an abutting owner has of ingress and egress to and from his premises other than the public easement in the street or roadway. *Chicago & N. W. Ry. Co. v. Milwaukee, R. & K. Electric Ry. Co.*, 70 N. W. 678 (Wis., 1897).

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Thus owners of land abutting upon a highway have the right to use and enjoy the highway in common with other members of the public; and in addition they have an easement of access to their lands abutting upon the highway arising from ownership of such land contiguous to the highway which "easement of access" does not belong to the public generally. *State Highway Board v. Baxter*, 144 S. E. 796 (Ga. 1928). These rights usually arise in connection with the ordinary, conventional or "land service" highway as distinguished from the "traffic service" or limited-access highway.

The limited-access highway has been developed in recent years by highway authorities to provide rapid transit for through traffic, uninterrupted and unendangered by vehicles or pedestrians from private roads and intersecting streets and highways, thereby providing a maximum of economy, efficiency and safety. Limited access highways, also designated as freeways, throughways, expressways, controlled access highways, etc., are so constructed or regulated that an abutting owner cannot directly enter the highway from his property or enter his property from the highway. Users of such highways gain access thereto at specified controlled access points which they may reach by a circuitous route or by a service road paralleling the main highway.

There are two statutes of concern to us in the administration of the public lands under which highway rights-of-way may be acquired. They are Rev. Stat., sec. 2477 (43 U. S. C. sec. 932; 43 CFR 244.57-244.59), and section 17 of the Federal Aid Highway Act of 1921 (23 U. S. C. sec. 18; 43 CFR 244.54-244.56).

Section 2477 is an unequivocal grant of the right-of-way for highways over the public lands without any limitation as to the manner of their establishment. *Smith v. Mitchell*, 58 Pac. 667 (Wash., 1899). The grant becomes fixed when a public highway is definitely established in one of the ways authorized by the laws of the State where the land is located. *State v. Nolan*, 191 Pac. 150 (Mont., 1920); *Moulton v. Irish*, 218 Pac. 1053 (Mont., 1923). The act did not specify nor define the extent of the grant contemplated over the public lands, the width of the right-of-way nor the nature and extent of the right thus conferred, both as against the Government and subsequent patentees (21 L. D. 354 (1895)). Whatever may be construed as a highway under State law is a highway under Rev. Stat., sec. 2477, and the rights thereunder are interpreted by the courts in accordance with the State law. The lands over which the right-of-way is located may be patented to others subject to the easements and to whatever rights may flow to the State and to the public therefrom. *Eugene McCarthy*, 14 L. D. 105 (1892).

Clearly, a limited access highway as established under State law, is within the purview of Rev. Stat., sec. 2477. It is probable also that upon the establishment of such limited access highway, the United States as an abutting land owner would have no right of access to the highway different or greater than would any other land owner; and any successor in interest of the United States would likewise have no special right of access which it would be necessary for the State to acquire by purchase or otherwise.

Similarly the Federal Aid Highway Act does not define nor limit the nature or the extent of the right-of-way of public lands which may be appropriated under section 17 (except as to the provision in section 9 of that act (23 U. S. C. sec. 10) relating to the width of the right-of-way and adequacy of the wearing surface). A limited-access highway is therefore within the purview of section 17. The Department has held that the right-of-way granted under this act is merely an easement; and consequently a subsequent patent would be subject to the highway easement.

Since freeways or limited-access highways are of fairly recent origin, there has been little court-made law on the subject. It is generally recognized, however, that statutes providing for limited access to highways arise as an exercise of the State's police power for the promotion of public safety and of the general welfare. (3 Stanford Law Review, 1951, p. 303.) Such statutes are in existence in several of the Western States including Colorado, California, Oregon, and Utah. It has been stated that where an ordinary or conventional road is built there may be an intent to serve abutting owners, but when a freeway is established the intent is just the opposite, and a resolution creating a freeway gives adequate notice that no new rights of access will arise unless they are specifically granted. (3 Stanford Law Review, 1951, pp. 298, 300, 308.)

A freeway has been defined as a highway in respect of which the owners of abutting lands have no right or easement of access to or from their abutting lands or in respect of which such owners have only restricted or limited right or easement of access. Thus a highway commission's condemnation resolution for a limited access freeway did not create in the abutting owner's property a new right of access to a freeway to be constructed where no highway, conventional or otherwise, had existed before. *People v. Thomas et al.*, 239 P. 2d 914 (Calif., 1952). The easement of access applies to rights in existence prior to the establishment of the freeway and to claimed rights which had no previous existence, but which come into being, if at all, only by virtue of the new construction. The California courts have held that where a statute authorizing freeways provides for creation of a freeway on lands where a public way had not previously existed,

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it does not create rights of direct access in favor of abutting property which prior to the new construction had no such right of access. *Schnider et ux. v. State*, 241 P. 2d 1 (Calif., 1952).

The precise question of the nature and extent of the Government's right of access to a new limited-access highway on public lands has not previously been raised before this Department, nor has it been considered by the Courts so far as I know. As already stated, neither Rev. Stat., sec. 2477 nor the Federal Aid Highway Act contains any qualification as to the nature of the grant and of the rights thereunder. In the absence of express reservation in the right-of-way grant (or in the conditional certification of a section 17 highway), it would appear that the United States would retain no right of access unless such right was granted by State law since its position would be that of a land owner only. Such right after conveyance by the United States would be governed by the rule in *Packer v. Bird*, 137 U. S. 661, 669 (1891), that whatever incidents or rights attach to property conveyed by the Government will be determined by the laws of the States in which situated, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee. It was held in the cited case that where a State law denies riparian rights to private land owners a grantee of the United States would acquire none with the grant. The right of access here involved would seem to be in like case.

In the circumstances therefore the State courts would undoubtedly consider the United States as a landowner in the same position as any other adjoining landowner, and the same rules of construction would be applied to it. It would follow that if under State law a private landowner has no right of access to a limited-access highway except as specifically provided, the United States likewise has no such easement from its lands. If the United States has no right of access, clearly persons subsequently deriving or claiming from or through the United States would have no such property rights in the highway which the State need consider or pay compensation for its elimination. The latter question, however, is one for the State courts when and if presented in a proper case. Suffice it to say that, in my view, the Government has no special rights of access to limited-access highways newly established under either of the two cited statutes on public lands under the administration of the Bureau of Land Management.

A complication could arise, however, in the situation where the Secretary of Commerce determines that public lands are necessary for a limited-access highway and the Secretary of the Interior as a condition to his certification of such lands wishes to reserve the right of access to or across the highway. If the Secretary of the Interior as a necessary incident to the management of the adjacent public

lands found it necessary to retain the Government's right of access to or across the proposed highway it may be that he could make it a condition for his certification of the land for appropriation and transfer. The complication could arise when the abutting land is disposed of, if the Secretary did not voluntarily surrender such right of access to the State, prior to the patenting of the land or the establishment of valid rights to the land. In the absence of such conditions, the Government and its successors would have no right of access to the highway except at the control points or as otherwise provided by State law.

Another problem in public land administration will undoubtedly arise from the practical effect which a limited-access highway has of cutting a legal subdivision upon which it is located into two separate parcels because of the restriction upon the settler's or applicant's right to enter and cross the highway without difficulty to reach and utilize a parcel on the other side of the road.

I do not think it necessary to comment on the proposed legislation prepared by a special commission of State highway officials particularly section 6 relating to granting of access rights which Mr. Brunner submitted merely for your information. Further, in view of the conclusion I have reached on the basic questions, I do not believe it is necessary to discuss the discretionary authority of the Secretary under section 7 of the Taylor Grazing Act and other laws to insert access limiting stipulations in patents or other disposals whose allowance is discretionary, as indicated in your proposed reply. Your reply should be drafted consistent with the views herein expressed.

C. R. BRADSHAW,
*Acting Assistant Solicitor,
Branch of Land Management.*

Approved:

JAMES D. PARRIOTT, Jr.,
*Associate Solicitor,
Division of Public Lands.*

APPEAL OF A. G. MCKINNON, D/B/A MCKINNON CONSTRUCTION CO.

IBCA-4

Decided April 25, 1955

Contracts: Additional Compensation—Contracts: Specifications

Where a contract provided for the excavation of a particular section of a channel in accordance with specifications and drawings, and the requirements of the work were reasonably ascertainable from the drawings relating to that section of the canal and a related drawing, which showed that there was much more material on one side of the centerline of the channel than on the other side, and that the embankments were designed to be approximately equal and to contain a waterflow of 4,000 c. f. s., which would require the embankments to be a minimum height of 18 feet above the bottom grade of

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the channel if allowance was also to be made for a freeboard, the contractor is not entitled to additional compensation for equalizing the embankments to the necessary minimum height, notwithstanding the omission of the 18-foot dimension on one of the drawings, and its revision by the contracting officer to show the omitted dimension, at a time when the contractor had virtually completed the excavation work on that section of the canal.

Contracts: Contracting Officer

The findings of a contracting officer will be presumed to be correct in the absence of contrary proof by the contractor.

Contracts: Additional Compensation—Contracts: Specifications

A contractor who was required to lengthen and reconstruct a bridge in accordance with unit prices stipulated in a schedule for erecting salvaged timber in structures, removing timber in existing structures, and salvaging timber, was not entitled to additional compensation for removing the center span of the existing bridge prior to the construction of the center pile bent for the lengthened bridge, and replacing the center span in its original position, when the removal of the center span was a necessary operation in reconstructing the bridge, and no provision for payment for this work was contemplated by the contract.

BOARD OF CONTRACT APPEALS

A. G. McKinnon, d/b/a McKinnon Construction Company, Sandy, Oregon, appealed on May 25, 1953, from the findings of fact and decision of the contracting officer denying two separate claims arising out of construction work under Contract No. I2r-19806 with the Bureau of Reclamation. The contract is identified as "Earthwork and Structures, Lost River Channel Improvements, West Canal Enlargement, W-1 Lateral, Langell Valley, Specifications No. DC 3682, Modoc Unit, Tule Lake Division, Klamath Project, Oregon-California."

The two claims, which will be considered separately in this decision, are for (1) \$12,145 alleged to be due for extra work in depositing excavated material in embankment construction between Stations 370+ and 325+, and (2) \$1,330 for the removal and replacement of the center span of a bridge structure.

Following the issuance of the contracting officer's findings of fact and decision on April 9, 1953, the contractor in his notice of appeal requested a hearing before the Solicitor of the Department of the Interior. The Solicitor designated a hearing examiner, and a hearing was held in Portland, Oregon, on June 21 and 22, 1954. Subsequent to the hearing the examiner filed a recommendation that the claim of the contractor be denied. This recommendation, the transcript of the hearing which runs to 160 pages, as well as extensive briefs by both the Government and the contractor, have been studied by the Board.

CLAIM No. 1

This claim arises from the excavation work done by the contractor on the "Lost River Channel Improvements," and varied along different stretches of the canal. The stretch of the canal particularly involved in the present dispute is between 370± and 325±, and this operation was governed by Drawing No. 12-D-821.

The contractor commenced work on May 2, 1952, at Station 375. As shown on the typical section of Drawing No. 12-D-821, between Stations 375± and 274±, the centerline of the new "Lost River Channel" was to be 10 feet to the right or east of the centerline of the then existing Langell Valley Main Drain. This tended to unbalance the material to be excavated, so that there was more material to be removed from the section of the channel prism to the right or east of the centerline of the Lost River Channel than from the section on the left or west side of the channel. When work was first started by the contractor, he had a dragline on each side of the channel but, since there was more material on the right bank, the machine on the left bank made more rapid progress than the machine on the right bank, tending to outstrip the latter. The contractor, therefore, moved the machine from the left bank over to the right bank to help handle the bulk of the material. With both of the machines on the right bank, most of the material was side cast on the right or east bank. (Tr., pp. 37-38.)

On May 6, 1952, a representative of the contracting officer, who was supervising the contractor's operations, orally informed him that approximately equal embankments which would be sufficient to contain a flow of 4,000 c. f. s. would be required on each side of the channel. However, he was not required to equalize the embankments between Stations 375± and 370± which had already been excavated by him. The instructions seemed "assinine" to the contractor (Tr., p. 40), and he tried to persuade the representative of the contracting officer to change the centerline "back to the center line of the old original drain," as a method of balancing the material to be excavated. (Tr., pp. 41-42.) He pointed out that downstream from Station 375, in an area which had been excavated under a previous contract, the bulk of the material had been side cast on the right or east side (Tr., p. 39), and that if he had to equalize the embankments upstream from this point, it would be necessary for him to "go past the center line on the east side and drag the material through the water that was running through the canal, which is never dry at any time of the year and most especially in the spring." (Tr., pp. 39-40.) However, the representative of the contracting officer insisted that his instructions be carried out, and the contractor complied, although he warned him that he would expect additional compensation for the work which he regarded as extra.

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With a letter dated May 23, 1952, the representative of the contracting officer transmitted to the contractor revisions of various drawings which are not relevant here except for Drawing No. 12-D-821. It was explained in the letter that this drawing "has been revised to show minimum height of embankments to be constructed along the channel from Station 325+ to Station 375+00 * * *." The minimum height of the embankments indicated on the revision of the drawing was 18 feet above the bottom grade of the channel.

By letter dated May 26, 1952, the contractor formally protested the work which had been demanded of him between these stations as "outside the requirements of the contract." He contended that it had "more than doubled our cost of operation" and necessitated "a lot of extra bulldozer work building retaining dikes on the left side to contain and confine this wet material within the right of way, after it was pulled through the water in the canal * * *." Subsequently, the contractor reserved in his release on the contract his claim for extra compensation for this work, as well as for the work which is the subject of Claim No. 2. It should be noted that neither in his letter of May 26, nor in his release on the contract, did the contractor specifically protest against the revision of the drawing. He referred rather to the increased difficulties of the excavation, or the additional excavation. It is significant, moreover, that he referred to the work in the past tense, indicating thus that it had already been accomplished by the time he received the letter of May 23.

In his findings of fact and decision of April 9, 1953, the contracting officer rejected the contractor's claim on the ground that the contractor had been merely directed to do what was required by the typical section of Drawing No. 12-D-821, which showed that equal embankments were required on each side of the channel, and that these could be constructed only by moving material from the right or east side of the centerline bank across the centerline on to the left or west bank. As for the revision of Drawing No. 12-D-821, the contracting officer held that this did "not affect in any way the work required to be done, since this vertical distance when scaled on the original drawing is also approximately 18 feet. Furthermore, the profile on the drawing shows the water surface for a flow of 4,000 cubic feet per second is approximately 16 feet above the bottom grade of the channel. Allowing for a 2-foot freeboard, this would indicate that a minimum height of embankment of 18 feet above the bottom of the channel was required."

In that part of the hearing concerned with this claim counsel for the Government offered no affirmative evidence at the close of the presentation of the contractor's case, and explained his decision not to do so by stating that it was based upon the understanding that "the contracting officer's findings will be presumed to be correct in

the absence of contrary proof by the appellant." (Tr., p. 150.) Counsel for the contractor objected to this statement but his objection was overruled by the hearing examiner. This ruling was not erroneous. Indeed, in his brief counsel for the contractor concedes that a presumption of validity attaches to the factual findings of the contracting officer but contends that the question in the case is "the interpretation of a term of the contract which is strictly a matter of law." However, there is nothing in the statement of counsel for the Government which demonstrates that he was not referring merely to the factual findings of the contracting officer, and, moreover, it has been held that in a dispute over the proper interpretation of drawings and specifications, the decision of the contracting officer should not be disturbed unless the court was convinced it was erroneous.¹ This is only another way of saying that the burden of proof is on the contractor to establish his claim. It is the conclusion of the Board on the whole record that the contracting officer's findings and decision are amply supported by the contractor's own admissions at the hearing, and by what may be gathered from the relevant drawings.

The issue between the parties in this case is whether the oral instructions and the revision of Drawing No. 12-D-821 amounted to a change in the contract involving extra work by the contractor. The Government contends that the 18-foot dimension was "inadvertently" omitted from the original drawing but insists that the failure to indicate the dimension was not material. However, whether or not the omission of the dimension from the drawing was inadvertent, the Government would be liable if it was of such a nature that it was calculated to mislead the contractor. The real questions are whether the requirements were reasonably ascertainable from the relevant drawings, and whether the defect in Drawing No. 12-D-821 involved substantially extra work for the contractor. On the basis of the contractor's own testimony the Board must answer both questions in the negative.

The contractor admits the two most important of the contracting officer's findings, namely that he could tell from Drawing No. 12-D-821 that the embankments were required to be approximately equal, and that there was much more material on the right or east side of the centerline than on the left or west side. Thus, the contractor's testimony concerning the equality of the embankments was as follows:

¹ See *Penker Construction Company v. United States*, 96 Ct. Cl. 1, 50 (1942). See also *Imparato Stevedoring Corporation*, ASECA No. 2266, decided October 25, 1954, in which the Armed Services Board of Contract Appeals said: "There is a certain presumption of validity attaching to a contracting officer's decision, not patently erroneous, which requires the appellant to come forward with evidence showing it to be fallacious, if such is the case."

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Q. Is it not equally clear from your examination of these drawings, Mr. McKinnon, that the typical banks shown on these drawings are of approximately equal size on both the right and left banks?

A. According to the appearance of the cross section they appear relatively close, or about the same.

Q. Well, I am not asking you to say more than that, because without perimentering the sections you couldn't tell.

A. Yes, you could not tell.

Q. But they appear to be approximately equal.

A. That is right.

The only witness offered by the contractor as an expert, A. H. Harding, Manager of the Associated General Contractors of America, also testified that the embankments on the typical section of the drawing were "substantially" equal. Indeed, this is quite apparent from the drawing itself. As for the distribution of the material, the contractor testified that "it was very evident that the bulk of the material was on the east side or on the right hand side, so we started with a machine on either side" (Tr., p. 37). Moreover, the contractor admitted that there was insufficient material on the left or west side of the channel to construct an embankment on that side (Tr., p. 108), and that merely side casting the material to each side of the channel would not produce substantially equal embankments in height and width (Tr., p. 109). If the contractor knew this, his complaint that he was caused a great deal of trouble and expense by being compelled to drag the material through the water in the canal, and to build retaining dikes on the left side of the channel to confine the wet material becomes unjustified. Obviously, then, he was required to perform these precise operations by the terms of the contract.

An examination of the drawings in the light of the contractor's testimony also makes it reasonably manifest that the contractor knew or should have known not only that the embankments were required to be approximately equal but also that they were required to be a minimum height of 18 feet above the bottom grade of the channel. Drawing No. 12-D-821 does not stand alone. It is plainly marked as sheet 3 of 4 drawings and as a continuation of Drawing 12-201-168, which is sheet 2 of the set of 4 drawings. The contractor conceded that the profiles of both drawings indicated that the approximate difference in elevation between the bottom grade of the Lost River Channel Improvement and the water surface of 4,000 c. f. s. was approximately 15 feet, and that the two drawings also indicated an intention to construct a continuous channel. (Tr., p. 69.) He also conceded that there were no substantial differences in topography in this area (Tr., p. 73). Looking only at Drawing No. 12-D-821, he admitted that some freeboard must be allowed above the maximum water surface

elevation of 4,000 c. f. s. (Tr., p. 65), but denied that it was the duty of the contractor to make allowance for a freeboard, since it could be assumed that it was taken care of in the drawing by indication of the water surface elevation. But his maintenance of this assumption broke down completely when he was asked to read Drawing No. 12-D-821 in the light of Drawing No. 12-201-168. It so happens that the profile on Drawing No. 12-D-821 includes Stations 260± to 274±, which are also included in the typical section of Drawing No. 12-201-168, and there is thus an overlap of 1,400 feet between the two drawings, as the contractor conceded (Tr., p. 76). Now, a minimum embankment of 18 feet is plainly indicated on Drawing No. 12-201-168, and the contractor admitted that a freeboard of approximately 3 feet was contemplated in the typical section of this drawing (Tr., p. 139). It seems to us that the contractor could not reasonably conclude that the indication of the water surface elevation at 4,000 c. f. s. in one part of the same drawing would include the freeboard while in the other part, it would exclude the freeboard. The only reasonable conclusion is that the contractor knew or should have known that a freeboard of approximately 3 feet should be added to the 15 feet of the depth of the channel at maximum water surface elevation, which would be a minimum height of approximately 18 feet. The revision of Drawing No. 12-D-821 added nothing, therefore, to the contractor's knowledge of the requirement of the job. He was charged with the duty of construing the drawings together, and the contract as a whole.² Moreover, counsel for the contractor states in his brief: "At the time contractor received said revised drawing he had virtually completed excavation as directed, between Stations 370+ and 324+."³ If this is so, it is difficult to perceive how the contractor's work could have been materially affected by the revision of the drawing.

The contractor makes many other arguments in support of his claim but they are not persuasive. Thus he claims that he was misled by the failure of the representative of the contracting officer to halt his procedure of side casting the bulk of the material to the right or east bank sooner than he did. There is, however, nothing to show that the necessary action was not taken as soon as it was thought necessary. Moreover, there may have been valid topographical reasons for not insisting on 18 feet embankments between Stations 375± and 370±, and the Government suggests that there were such reasons. Whether or not these reasons were valid, the contractor certainly cannot complain that he was not compelled to do over the work between these sta-

² As the Comptroller General said in 30 Comp. Gen. 275, 277 (1951): "It is a rule of contract construction that the intent and meaning of a contract are not to be determined by the consideration of an isolated section or provisions thereof, but that the contract is to be considered in its entirety and each provision is to be construed in its relation to other provisions and in the light of the general purposes intended to be accomplished by the contracting parties."

³ See the third full paragraph on page 3 of the contractor's brief.

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tions, since this would hardly have been to his advantage. Nor can the contractor complain that a change was made at Station 325±, where there was a curve in the stream, so that excavation was conducted from this point to the old centerline of the Langell Valley Main Drain. This tended to balance the material, and to facilitate the operations of the contractor.

The Board also cannot look with favor upon other arguments of the contractor which attack the practicality of the specifications, or the necessity for some of their provisions. The Government was entitled to get what it had contracted for, and it was not bound to accept any suggestions of the contractor, or to accede to his opinions. Thus, it is quite immaterial whether the problem of balancing the excavations between Stations 370± and 325± could have been solved by excavating to the old centerline; or whether a water flow of 4,000 c. f. s. was actually to be anticipated, in view of certain bridge and drain construction, and the hydrographic history of the stream; or whether there was a custom in channel excavation of side casting material to each side of the channel unless such custom was consistent with the actual specifications; or whether such a method of operation had been followed under a previous contract.

The Board must conclude, therefore, that the contractor is not entitled to extra compensation on Claim No. 1.

CLAIM NO. 2

The work involved in this claim comprised the lengthening and reconstruction of a bridge, which was the county road bridge at Langell Valley, Station 335+28.8. This work was to be undertaken in accordance with paragraph 57 of the specifications and Drawing No. 12-201-177, and to be paid for in accordance with the unit prices under items 22, 25 and 26 of the schedule.

The contractor removed and reinstalled the short left-end span of the existing structure in one piece by using a dragline and reinstalled it in the extended bridge structure in one piece. Prior to the construction of the center pile bent for the lengthened bridge the contractor elected to remove the center span of the existing bridge in one piece. After the construction of the center pile bent, the contractor replaced the center span of the existing bridge in its original position. It is for the removal and replacement of the center span that the additional compensation is claimed.

A stipulation relative to the bridge construction was entered into at the hearing and the contractor rested his case on this stipulation offering no evidence. A pertinent part of the stipulation (Tr., p. 136) reads as follows:

It is further stipulated that in order to meet the requirements of the Government for driving piling for a new bent on the right end of the center span it was necessary for the appellant either to remove the center span, as he did, and re-install it upon completion of the new bent, or to dismantle the center span and reassemble and re-install it upon completion of the new bent.

An inspection of that drawing by a qualified man shows the necessity of removing and replacing the center section or dismantling and salvaging and replacing said center section as a prerequisite to the completion of certain other work required by this drawing.

The Government proceeded, at the hearing, to introduce evidence on the question of costs on this part of the project and at one point counsel for the contractor, in offering an objection, stated:

I will state that the claim filed by appellant is for work at unit prices and unit prices only. No claim has been made for an equitable adjustment in any form. (Tr., p. 156.)

Counsel for the Government then asked the following question:

Counsel, do I understand that you are making no claim whatsoever under either Article III, IV or V of the Standard Form of Contract No. 23 * * *?

Upon receiving an answer to the effect that contractor was not claiming under any of these Articles, the Government immediately rested its case.

Drawing No. 12-201-177 itself does not designate the center span for removal or replacement. It indicated simply that the right half of the new or remodelled bridge was to be comprised of the center and right-hand spans of the existing structure. In removing the existing piles supporting the left-end of the center span of the existing bridge and in driving new piles, some provision had to be made, to be sure, to handle the center span of the existing bridge. The method of doing this was not, however, specified and was left entirely to the contractor. But, whatever method he chose, no provision was made in the contract for the payment of this work, the items for which payment could be made being limited under items 22, 25 and 26 of the schedule to erecting salvaged timber in structures, removing timber in existing structures, and salvaging timber.

The contractor was paid at the unit prices for these operations, and the payments closely approximated the estimated quantities for these items. This alone would indicate that the materials of the center span of the existing bridge were not included. The contractor having been paid at the unit prices for the work required to be performed is not entitled to additional compensation. Even if the work could be regarded as extra work for which an equitable adjustment might be due, the contractor has expressly waived any such claim. Claim No. 2 is, therefore, also rejected.

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CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the findings of fact and decision of the contracting officer, dated April 9, 1953, are affirmed.

THEODORE H. HAAS, *Chairman.*

WILLIAM SEAGLE, *Member.*

MR. BATCHELOR, dissenting in part.

I am in accord with the majority opinion as to Claim No. 2 and with its factual statement of the record, but I cannot join in the decision which has been reached in connection with Claim No. 1. A third matter which the Board has been asked to determine in this appeal is the correctness of the ruling of the hearing examiner upholding a Government motion to have the findings of fact and decision of the contracting officer declared presumptively correct. I am inclined to agree with the majority view that this ruling was not erroneous, but I wish to discuss the question in detail in a subsequent portion of this opinion.

In considering Claim No. 1, it should be recognized that the Government supplied the contractor with a drawing which "inadvertently omitted" the dimension as to the required height of the canal embankments. The contractor stated that he was misled by this drawing and that as a result he performed extra work and incurred increased costs. A considerable portion of the record is devoted to an effort on the part of the Government counsel to support the position that the contractor should not have been misled by the drawing. It is urged that had he studied other drawings, which were a part of the contract, or analyzed and correctly interpreted certain markings and symbols on the drawing in question he would not have been misled. Regardless of whether the contractor was required to do this, or, if having done so, the difficulty might or might not have been avoided, the contractor maintained to the end that he had been misled and I do not believe that the Government has sufficiently proved otherwise.

If, as it is asserted, there was no reason why the contractor should have been misled, what sound reasons can be advanced to explain why he proceeded as he did? Was he incompetent, or careless, or was he simply endeavoring to take advantage of the Government error? There is nothing in the record or in the contractor's actions to suggest that he was motivated by selfish considerations and as to his competency, that is attested to by Government counsel as follows:

* * * Mr. McKinnon is a highly intelligent and skilled contractor as appeared both from his testimony and his demeanor on the stand. He was not naive and

appreciated the significance of what he read and saw on the drawings. [Government brief, p. 8.]

Again, near the conclusion of the hearing, Government counsel made this statement:

At this point I desire to express my appreciation to the witness for his very direct answers and lack of equivocation.

Many references from the transcript are included in the majority opinion and these, for the most part, tend to show the contractor in some seeming contradictions. It is possible, however, to extract other portions of the testimony which are favorable to the contractor. The record discloses, for example, that the contractor testified that he did not consider himself as having been put on notice by other drawings that 18-foot embankments were required and that the Government contemplated a 3-foot freeboard (Tr., p. 42). Also, that it was logical for him "to assume that a minimum bank height might not be required at one point in the job but might be imposed at some future point in the work progress." (Tr., p. 145.)

It is the contractor's position that he at all times constructed embankments of sufficient height to contain a flow of 4,000 cubic feet per second and thereby met what he considered to be his contractual obligation (Tr., p. 130, brief, p. 6). A canal of this capacity was certainly the main objective of the contract. If there were to be other requirements, such as minimum height or freeboard of a particular dimension, it was the duty of the Government to make these requirements clear.

There are numerous decisions as to the effect of faulty specifications and drawings but due to different factual situations, these decisions cannot be reconciled with any great degree of clarity. This Department, however, has, upon occasion, given relief to a contractor where it appeared that he had been misled. See appeals of *Anderson Construction Company*, CA-230 (October 6, 1954), and *The Tuller Construction Company*, CA-52 (Supp.) (May 8, 1951).

As to the amount of extra compensation to which the contractor is entitled, I do not believe the contractor has proved with exactitude the amount of \$12,145, as claimed. At neither the hearing (Tr., pp. 56, 109, 110, 111) nor in his brief (p. 9) did the contractor present figures with particularity. The sum of \$12,145 appears to be, at best, only an estimate and it is admitted that the contractor kept no accurate computable time data. This figure appears to have been submitted primarily upon the basis that it was considered "reasonable."

The Government, on the other hand, has made a much more convincing analysis as to the amount of any extra costs that may be involved. This will appear from the letter dated July 30, 1954, from Robert B. Starke, to the hearing examiner, which is a part of the record, and from the Government brief at pages 18, 19, and 20. On the basis of a

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preponderance of the evidence presented, I have no alternative other than to accept the Government estimate and I would find, accordingly, that the contractor is entitled to recover the sum of \$4,189.19 on Claim No. 1.

As phrased in its final form the Government motion as to the presumption in favor of the contracting officer's findings of fact presented no serious question. A certain validity attaches to the findings and in the absence of contrary proof, it is only proper to presume that they are correct. However, before the final motion was offered, other statements were made and a foundation was laid which extended far beyond the motion itself. This foundation, as stated by Government counsel, was as follows:

Before the Government proceeds with this case Mr. Examiner, I wish to raise a point which, if my understanding is correct, would make it unnecessary in my judgment for the Government to call any witnesses.

That understanding is as follows: That the findings of the contracting officer established a prima facie case in favor of the Government and that it is necessary for the appellant to controvert those findings of fact with affirmative evidence in order to overturn them. In other words, that the appellant carries the burden of proof.

Upon this understanding, if correct, I propose that no witnesses be called on behalf of the Government and that the Government at this point also rests its case on this particular phase.

I request a ruling from the Examiner as to whether the understanding which I have previously outlined is in accordance with his opinion; or I may ask opposing counsel if there is any controversy concerning this matter.

The position of contractor's counsel, however, was as follows:

My position is this: that the appellant contractor has a burden of affirmative proof. As to whether or not the Findings of Fact are presumptively correct on their face in the absence of other evidence, I do not know. I assume that that presumption would have to be established by statute or by valid action of an administrative authority under authorization delegated by Congress. If such statute or action under delegated authority exists, the findings, I will admit, are presumptively correct. In the absence of this I will not agree for my client or on his behalf that they are presumptively correct.

Several pages of the record and an off-the-record discussion were devoted to a consideration of the proposition before the motion was phrased in its final form and the objection renewed. Therefore, it appears that it was the intention of Government counsel to establish a precedent to the effect that a findings of fact and decision of a contracting officer constitute a prima facie case for the Government and no affirmative evidence is required in the absence of contrary proof on the part of an appellant or when appellant's proof is considered inadequate. If so, I am not in accord with the establishment of such a precedent.

The decision of the Armed Services Board of Contract Appeals in the *Imparato Stevedoring Corporation* case, cited in the majority opinion, is not persuasive for the reason that no motion such as we are here concerned with was made; moreover, affirmative evidence actually was offered by the Government. At least one member of the Armed Services Board of Contract Appeals has expressed himself clearly on the point here at issue. In discussing the effect of Public Law 356, 83d Congress [68 Stat. 81], Gilbert A. Cuneo said:

This new standard will not shift the burden of proof in the appeal before the head of the department or his representative or board. The Government, however, will have to come forward with substantial evidence to support its case. *It will not be able to rest without presenting any evidence merely because its counsel believes that the contractor did not prove his case on his presentation.* [Italics supplied.]¹

As stated in *Settergren*, 1 CCF 871 (BCA):

The Government has failed to show in any manner wherein the appellant's claim is wrong. The contracting officer's ruling and findings of fact, in which he set up *his idea* of the items allowable, cannot be considered as evidence to refute the claims. They are the subject matter of the appeal and are considered by this Board in the light of pleadings—not evidence. [Italics supplied.]

In *Kirk t/a Kirk Building Company*, 1 CCF 168 (BCA) the following almost identical statement is made:

The foregoing Findings of Facts are not evidence in refutation of the appellant's claim, *and testimony relating thereto*. They are the subject matter of review in this appeal. [Italics supplied.]

The Corps of Engineers Claims and Appeals Board takes an even stronger position on the question. In *Derby Construction Co., Inc.* and *Perkins Construction Co.* (Engineers C & A Decision No. 543), the Board said:

An appeal opens up the entire record, the contracting officer's decision is vacated, and this Board has authority to review and redetermine all matters previously decided by the contracting officer irrespective whether such determinations were in favor or adverse to the applicant.

I am of the opinion, therefore, that an appeal opens up the entire record and that the contractor's findings of fact, despite a tentative presumption of correctness or validity, are, for all practical purposes, vacated.

THOMAS C. BATCHELOR, *Member.*

¹ PLS Cir. 8 (Department of the Army, 29 June 1954) 10, 12.

May 10, 1955

WHETHER SOLICITOR'S OPINION M-36254 (DECEMBER 28, 1954) EFFECTS A WITHDRAWAL FROM OIL AND GAS LEASING OF LANDS DISPOSED OF UNDER A PATENT WHICH (a) EXCEPTS OIL AND GAS DEPOSITS PREVIOUSLY LEASED BUT (b) PROVIDES THAT TITLE TO SUCH DEPOSITS SHALL VEST IN THE PATENTEE UPON TERMINATION OF THE LEASE

Withdrawals and Reservations: Generally

Solicitor's Opinion M-36254,* which held that a patent may be issued to a homestead entryman, which patent excepts oil and gas deposits previously leased but provides that title to such deposits shall vest in the patentee upon termination of the lease, does not constitute a withdrawal of the lands within the meaning of section 17 of the Mineral Leasing Act (30 U. S. C. sec. 226).

Oil and Gas Leases: Extensions—Oil and Gas Leases: Patented or Entered Lands—Oil and Gas Leases: Termination

The issuance of a patent excepting and reserving to the United States the oil and gas deposits but providing that title to the same shall vest in the patentee upon termination of an outstanding oil and gas lease, does not preclude the extension of the oil and gas lease authorized in section 17 of the Mineral Leasing Act as amended August 8, 1946 (60 Stat. 951; 30 U. S. C. sec. 226).

M-36254 (Supp.)

MAY 10, 1955.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

My opinion of December 28, 1954 (M-36254), involved a case wherein (a) land in a homestead entry was reported by the Geological Survey to be prospectively valuable for oil and gas, (b) the entryman consented to accept a patent which reserved to the United States the title to the oil and gas deposits, and (c) thereafter, but prior to issuance of patent, the Geological Survey reported that the land has no prospective value for oil and gas. In such circumstances, a patent without reservation of the oil and gas deposits would ordinarily be issued to the entryman. However, in the case discussed in the opinion, after the land had been first reported as prospectively valuable for oil and gas, a noncompetitive oil and gas lease had been issued pursuant to section 17 of the Mineral Leasing Act of 1920, as amended (30 U. S. C. sec. 226). In my opinion of December 28, 1954, I ruled as follows:

- (a) Notwithstanding the provisions of the act of July 17, 1914 (38 Stat. 509; 30 U. S. C. sec. 122), the oil and gas lease may not be canceled for the purpose of issuing an unrestricted

*61 I. D. 459.

62 I. D., No. 5.

patent to the entryman, solely on the ground that the classification of the land has subsequently been changed.

(b) The patent may not under existing law be issued for both the surface of the land and the mineral deposits subject to the lease.

(c) A patent may issue which excepts and reserves to the United States the oil and gas deposits previously leased but provides that the title to such deposits shall vest in the patentee upon termination of the lease.

Your memorandum of March 16 points out that section 17 of the Mineral Leasing Act grants a single 5-year extension of the lease to a lessee complying with the law and regulations, unless during the term of the lease the lands are withdrawn from oil and gas leasing and the lessee receives [is sent] by registered mail notice of the withdrawal at least 90 days prior to the termination of the lease. You therefore ask whether my opinion of December 28, 1954 "should be considered as a withdrawal of the lands from oil and gas leasing, and whether section 17 of the Mineral Leasing Act should be complied with by notifying in proper cases the recordholders of oil and gas leases of such withdrawal, and that unless oil or gas is discovered in paying quantities prior to the termination of the 5-year period for which the lease was issued, the lease will terminate by operation of law and will not be subject to further extension."

I

An opinion of the Solicitor on a general question of law cannot operate as a "withdrawal" of particular lands. I shall therefore consider the first part of your question as if it read, not that the opinion should be considered as a withdrawal, but that the issuance of a patent reserving to the United States the oil and gas deposits but providing that title thereto shall vest in the patentee upon termination of the lease should be considered as a withdrawal.

II

Section 17 of the Mineral Leasing Act 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. A withdrawal, however, shall not affect the right to an extension if actual drilling operations on such lands were commenced prior thereto and were being diligently prosecuted on such expiration date. No withdrawal shall be effective within

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the meaning of this section until ninety days after notice thereof shall be mailed, registered mail, to each lessee to be affected by such withdrawal. 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 title holder within a period of ninety days prior to such expiration date. Any noncompetitive lease which is not subject to such extension in whole or in part because the lands covered thereby are within the known geologic structure of a producing oil or gas field at the date of expiration of the primary term of the lease, and upon which drilling operations are being diligently prosecuted on such expiration date, shall continue in effect for a period of two years and so long thereafter as oil or gas is produced in paying quantities.

It is apparent from the mandatory nature of the statutory language quoted above that in the circumstances prescribed by the statute, the holder of a noncompetitive lease is entitled, in addition to his lease rights during the primary 5-year term, to a single extension of the term of his lease, which extension "shall be for a period of five years and so long thereafter as oil or gas is produced in paying quantities." Thus, he is entitled to such an extension:

(a) If he complies with applicable requirements and regulations, if the law then does not provide otherwise, if the lands are not then without a known geological structure of a producing oil or gas field, and if the lands are not then withdrawn from leasing;

(b) even though the lands have been withdrawn, if actual drilling operations are being diligently prosecuted;

(c) even though the lands have been withdrawn, if registered mail notice has not been sent to the lessee at least 90 days prior to the expiration of the primary term of the lease.

In addition, even though the lands are within the known geologic structure of a producing oil or gas field at the expiration of the lease, he is entitled, if drilling operations are then being diligently prosecuted, to an extension for 2 years and so long thereafter as oil or gas is being produced in paying quantities.

The lessee's right to obtain an extension, in each of the four circumstances mentioned above, is a part of his lease rights. Indeed, his right to an extension under the above-quoted provisions of section 17 is incorporated in the regulations (43 CFR 192.120) and in section 1 of the lease. This right to an extension is similar to the right which a lessee would have under a lease provision granting an express option to renew the lease in the same circumstances, and subject to the same conditions, as set forth in section 17. Such contract rights are protected by the fifth amendment to the Constitution and may not be

taken from the lessee without proper cause unless he receives just compensation. *Lynch v. United States*, 292 U. S. 571, 579 (1934). And the Secretary of the Interior clearly has jurisdiction to grant the extension prescribed by section 17 since title to the oil and gas deposits would remain in the government, and would not pass to the patentee, until the lease and all rights thereunder, including the right to the extension, have terminated. *West v. Standard Oil Co.*, 278 U. S. 200, 210 (1929).

As I stated in Opinion M-36254 of December 28, 1954, the Secretary of the Interior may not cancel the lease solely on the ground of a subsequent change of classification of the land, nor on any other ground not specifically authorized by law. The authority to deprive a lessee of one of the rights under that lease, namely, the right to an extension as prescribed by section 17 of the Mineral Leasing Act, is equally subject to the same restriction.

My opinion of December 28, 1954, in suggesting that the patent leave the title to the oil and gas deposits in the United States "for the duration of the lease" and that the patent provide for vesting that title in the patentee "upon the termination of the lease," did not qualify those phrases, either expressly or impliedly, to refer only to the termination of the lease at the end of the primary term. They also included the concept of termination of the lease after such extension thereof as the law might authorize.

Section 17 does permit nullification of the right to an extension by a withdrawal of which notice is sent by registered mail to the lessee at least 90 days prior to the date of expiration of the primary term of the lease. But the phrase "withdrawn from leasing under this section" and the word "withdrawal," as used in section 17, clearly contemplated an order, such as those customarily issued by the President, or by the Secretary of the Interior, or other proper officer, which provides for continued public ownership of the lands by withholding disposition thereof in order to effect a public purpose or to provide for some future action by the Government with respect thereto. See *Allen H. Cow*, 31 L. D. 193, 195 (1902); *Hans Oleson*, 28 L. D. 25, 31 (1899); *Union Pacific R. R. Co.*, 28 L. D. 32 (1899). I know of no usage of such words to refer to the issuance of a patent which terminates the public ownership of the land. There is nothing in the language of section 17, or in its legislative history, which suggests such meaning. To infuse such a meaning into these words, in derogation of their accepted understanding and for the purpose of cutting down the lessee's rights to the full enjoyment of his contract, should require much more specific indication of Congressional intent to

May 19, 1955

achieve such purpose than can be derived from the bare words themselves.

Accordingly, your question is answered "No."

J. REUEL ARMSTRONG,
Solicitor.

TRANSFER OF FUNDS TO OFFICE OF THE SOLICITOR

Bureau of Reclamation: Reimbursability

The concept of reimbursability is concerned not with appropriated funds *per se*, but with costs of individual projects, and with respect to such costs, they are reimbursable or not depending upon the purpose to which allocated.

Reorganization Plans—Secretary of the Interior

The reorganization of legal activities of the Department represents an exercise by the Secretary of continuing authority under Reorganization Plan No. 3 of 1950 to transfer and reassign functions.

Bureau of Reclamation: Generally—Solicitor, Department of the Interior

Transfer of legal function relative to the reclamation program from the Bureau of Reclamation to the Office of the Solicitor did not affect the nature of the function which remains one required in and by reason of the exercise of responsibilities under the Federal reclamation laws.

Bureau of Reclamation: Accounting—Bureau of Reclamation: Reimbursability—Solicitor, Department of the Interior

The cost of legal services performed in the field by the Office of the Solicitor that represents services in connection with the reclamation program that were, prior to the transfer of the legal function from the Bureau of Reclamation to the Office of the Solicitor, charged as an item of cost to specific projects continues to be so chargeable and their reimbursability or nonreimbursability is determined by the application of the allocation and accounting procedures applicable to the particular project concerned.

M-36233

MAY 19, 1955.

TO THE COMMISSIONER, BUREAU OF RECLAMATION.

By memorandum of July 20, 1954, Assistant Commissioner Crosthwait has inquired whether certain funds transferred to the Office of the Solicitor from appropriations made to the Bureau of Reclamation, as provided in the Interior Department Appropriation Act, 1955, "retain their reimbursable character and whether it is incumbent on the Bureau to record these costs by proration or otherwise in its accounts, subject to recovery through repayment procedures." Mr. Crosthwait's memorandum observes that with the exception of the

\$384,120 derived from the General Administrative Expense Appropriation, the funds transferred¹ are derived from "appropriations ordinarily described as reimbursable, that is, the expenditures are subject to recovery from the beneficiaries under certain conditions provided by reclamation law."

The question is answered in the affirmative.

Before considering the specific question whether and to what extent costs of legal services incident to the reclamation program are reimbursable, it is desirable to comment concerning the requirements of the Federal reclamation laws² which, in general, govern reimbursability.

Except as provided otherwise in the case of specific projects, questions of reimbursability are controlled by section 9 of the Reclamation Project Act of 1939,³ section 2 of the act of August 14, 1946,⁴ and subsection 0 of the Fact Finders' Act, as amended.⁵

By virtue of section 9 of the 1939 act, costs of projects allocated to flood control or navigation are nonreimbursable, as are likewise, by virtue of section 14 of the act of August 14, 1946, costs allocated to the "preservation and propagation of fish and wildlife." On the other hand, the provision of the 1939 act referred to requires that there be returned to the Government the costs of projects allocated to irrigation, power and municipal water supply or other miscellaneous purposes. The important consideration here is that the concept of reimbursability is concerned not with appropriated funds *per se*, but with costs of individual projects, and with respect to costs of individual projects, they are reimbursable or not depending upon the purpose to which allocated.⁶

¹ The Department's Appropriation Act for Fiscal Year 1955 (Public Law 465, 83d Cong., 2d sess.; 68 Stat. 361, 362), provides that certain funds for the Office of the Solicitor are to be derived by transfer from other appropriations made in the Act in the sums and in the manner set forth in Senate Report No. 1506, 83d Cong. The funds to be transferred from appropriations of the Bureau of Reclamation are identified, at page 6 of that report, as follows:

Bureau of Reclamation:	
General investigations.....	\$ 23, 690
Construction and rehabilitation.....	348, 134
Operation and maintenance.....	75, 625
General administrative expens.....	384, 121
Total, Bureau of Reclamation.....	\$831, 570

² Act of June 17, 1902 (32 Stat. 388), and all acts amendatory thereof or supplementary thereto.

³ 53 Stat. 1187, 1193; 43 U. S. C. sec. 485h.

⁴ 60 Stat. 1080; 16 U. S. C. sec. 662.

⁵ Sec. 4, act of December 5, 1924 (43 Stat. 701, 704), as amended by the act of April 19, 1945 (59 Stat. 54; 43 U. S. C. sec. 377).

⁶ It is not necessary to refer at length to earlier provisions of the Federal reclamation laws, relative to reimbursement, of general applicability, e. g., sec. 4, act of June 17, 1902 (32 Stat. 389; 43 U. S. C. sec. 461), secs. 2 and 5, act of August 13, 1914 (38 Stat. 687; 43 U. S. C. secs. 475, 492), subsec. F, sec. 4, act of December 5, 1924 (43 Stat. 702; 43 U. S. C. secs. 473, 474), sec. 46, act of May 25, 1926 (44 Stat. 649, 650; 43 U. S. C. sec.

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With the important exception of amended subsection 0, to be discussed shortly, reclamation law is silent as to the principles which determine elements of the items of costs charged to individual projects. As to electric power, other statutory law⁷ does provide some guidance. All Federal power agencies are enjoined to observe, "so far as may be practicable," the uniform system of accounts and rates of depreciation prescribed by the Federal Power Commission. Other than the requirements of amended subsection 0 and the admonition of the Federal Power Act, the determination of what costs should be charged into the project accounts rests upon the application of sound principles of accounting.⁸

Subsection 0 of the Fact Finders' Act, as amended, has the effect of defining explicitly certain categories of cost and expense of the reclamation program, all or parts of which are not to be charged against specific projects. The categories are the costs and expenses of the Office of the Commissioner in Washington, D. C., of general investigations, and of nonproject offices outside the District of Columbia. The costs and expenses which are not to be charged against the specific projects are (a) those of the Commissioner's Office and (b) those both of general investigations and nonproject offices outside Washington, D. C., *that are not incurred on behalf of specific projects*. As to these costs and expenses, subsection 0, as amended, specifically provides that, "they * * * shall not be charged as a part of the reimbursable construction or operation and maintenance costs." Note again, the reference is to "costs."

The provision appearing currently and for some years past in the Bureau of Reclamation portion of the Department's annual appropriation act to the effect that sums therein appropriated which are "expended in the performance of reimbursable functions of the Bureau of Reclamation shall be returnable to the extent and in the manner provided by law," is entirely in harmony with the principles above discussed and constitutes an express recital of what the law would, in any event, require.

The captions under which funds are appropriated in the Bureau of Reclamation portion of the annual appropriation acts are, so far as here material, "General Administrative Expenses" ("GAE"),

423e). Under these provisions the requirement of reimbursability is likewise related to the cost of construction and operation and maintenance. *Swigart v. Baker*, 229 U. S. 187 (1913). Thus, save for the absence of the allocation feature (all project costs were reimbursable by the water users), the same consideration controls.

⁷ Sec. 213, act of August 26, 1935 (49 Stat. 854; 16 U. S. C. sec. 825 (c)), adding sec. 301 to the Federal Power Act.

⁸ The Comptroller General prescribes standards, cooperates in the development of, approves, and reviews agency accounting systems. Title I, pt. II, sec. 112, act of September 12, 1950 (64 Stat. 835; 31 U. S. C. sec. 66).

"General Investigations" ("GI"), "Construction and Rehabilitation" ("C & R"), and "Operation and Maintenance" ("O & M").⁹ GAE funds, being limited to financing of the Commissioner's Washington and field offices and of the regional offices, are not chargeable to specific projects and are, by the express provisions of subsection O, nonreimbursable. As a matter of fact, the appropriation acts so describe them and cite the amendment of subsection O as the reason therefor.¹⁰ It is the others, that is, GI, C & R, and O & M, which the memorandum of July 20, 1954, refers to as being "appropriations ordinarily described as reimbursable" and as having a "reimbursable character." Actually, as heretofore pointed out, the incidence of reimbursability does not automatically attend these funds at the time of appropriation. They are, in effect, eligible for determination as being reimbursable or nonreimbursable when reflected in project costs depending upon their allocation, as project costs, to particular purposes and subject, of course, to the overriding requirements of specific provisions of law, if any, applicable to a particular project.¹¹

Against the background of the foregoing, I turn now to a consideration of the status of expenses for legal services incident to the reclamation program.

Prior to the recent reorganization of the legal activities of the Department, the reimbursability or nonreimbursability of funds expended for legal services was determined, as was the case with respect to funds expended for all other activities, by application of the foregoing principles. The expense of the Chief Counsel's offices in Washington was nonreimbursable by virtue of the provisions of amended subsection O. The expense of legal services in the field was likewise, by virtue of subsection O, nonreimbursable except as it pertained to

⁹ Funds are also provided under the caption "Emergency Fund." While consideration of these funds is not germane to this opinion, opinion M-36210 (February 15, 1954) held, consistently with the views herein expressed, that (quoting from the syllabus): "The purpose for which the expenditures are made will govern with respect to reimbursability, and, if expenditures are made from the emergency fund for a purpose for which, under the law and contractual arrangements, expenditures made from regular funds must be reimbursed, then the expenditures from the emergency fund will likewise be reimbursable."

¹⁰ E. g., the Interior Department Appropriation Act, 1955, provides under the caption "General Administrative Expenses," "For necessary expenses of general administration and related functions in the offices of the Commissioner of Reclamation and in the regional offices of the Bureau of Reclamation, \$4,000,000, to be derived from the reclamation fund and to be nonreimbursable pursuant to the Act of April 19, 1945 (43 U. S. C. 377): *Provided*, That no part of any other appropriation in this Act shall be available for activities or functions budgeted for the current fiscal year as general administrative expenses."

¹¹ An example of such requirement is the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057; 43 U. S. C. sec. 617), as amended by the Boulder Canyon Project Adjustment Act of July 19, 1940 (54 Stat. 774; 43 U. S. C. sec. 618), which requires reimbursement for all expenses of construction, operation and maintenance of Hoover Dam, powerplant and appurtenant works over a 50-year period with the exception of the first \$25,000,000 advanced from appropriated funds for construction, repayment of which is to be made after June 1, 1987, upon such terms as the Congress shall determine.

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services in connection with specific projects. Field legal expense pertaining to specific projects, either in connection with general investigations or other services relating to a particular project, found their way into the project costs. Their reimbursability or nonreimbursability then followed, as a matter of course, by virtue of the purpose to which they related.¹²

The reorganization of legal activities of the Department represents an exercise by the Secretary of continuing authority he possesses under Reorganization Plan No. 3 of 1950¹³ to transfer and reassign functions. So far as it relates to the reclamation program it amounts, in effect, to a transfer of a function from the Bureau of Reclamation to the Office of the Solicitor. But the nature of the function is not affected thereby and it remains a function required in and by reason of the exercise of responsibilities under the Federal reclamation laws.

It follows that the cost of those legal services now performed by the Office of the Solicitor which represents services previously performed by the Commissioner's offices in Washington and in nonproject offices in the field other than those performed on behalf of specific projects continue as before not to be chargeable to individual projects and they remain nonreimbursable. It follows also that the cost of legal services now performed in the field by the Office of the Solicitor that represents services previously charged as an item of cost to specific projects (including general investigations charged to specific projects) continues to be so chargeable and their reimbursability or nonreimbursability is determined by the application of the allocation¹⁴ and accounting procedures that apply to the particular project concerned.¹⁵

In reaching my conclusions, I have not found it necessary to rely on the technical ground that the appropriation of funds for fiscal year 1955 is carried in the Bureau of Reclamation portion of the act so that, in any event, these funds are attended by the same consequences that attend any funds carried under the heading "Bureau of Reclamation." I have preferred to address myself to the more basic considerations involved because these are not limited to the current fiscal year. In future years, and assuming that funds to finance reclamation legal services are budgeted under the Office of the Solicitor, the budgeting, apportioning and accounting process as to funds for and costs of legal services for reclamation will not differ materially. In connection

¹² Again, it must be borne in mind that specific provisions of law applicable to particular projects will control as to such projects. See footnote 11, *supra*. As to the older projects, see footnote 6, *supra*.

¹³ 15 F. R. 3174; 64 Stat. 1262; 5 U. S. C., 1952 ed., following 133z-15, page 160.

¹⁴ As to older projects governed by the provisions there cited, reference is again made to footnote 6, *supra*.

¹⁵ It is, perhaps, unnecessary to add that the costs under discussion are in the category of actual costs, not so-called "imputed" costs.

with preparation of future fiscal year budgets, assuming budgeting for all legal services under the single item of Office of the Solicitor, the amount and breakdown as between project and nonproject functions will continue to be arrived at as in the past. It need only be added that I see no necessity in such case for deriving the funds from sources other than the General Fund (such, for example, as the Reclamation Fund), except as to those instances where appropriations must, as a matter of law, be derived from a particular fund in order for the expenditure for the service to be charged to the beneficiaries. I have in mind such cases, for example, as the Boulder Canyon Project, for which the law¹⁶ restricts the obligation for reimbursement of certain expenses to sums expended from the Colorado River Dam Fund. These cases can, however, be given particular consideration at an appropriate time.

J. REUEL ARMSTRONG,
Solicitor.

KLAMATH TERMINAL LEGISLATION

Indian Tribes: Terminal Legislation—Words and Phrases

Since Section 2(e) of the act of August 13, 1954 (68 Stat. 718), defines an "adult" for the purposes of that act as "a member of the tribe who has attained the age of twenty-one years," married women or emancipated minors under the age of twenty-one may not be considered adults for the purposes of that act even though they may be "adults" under State law.

Indian Tribes: Terminal Legislation

The question of whether a member of the Klamath Tribe may alienate his interest in tribal property after the transfer of such property pursuant to section 6(a) of the act of August 13, 1954 (68 Stat. 718) and prior to the date of the proclamation to be issued pursuant to section 18 of said act, is a question to which no definite answer can be given at this time, as such answer will depend upon the terms of the plan pursuant to which title to such property is transferred.

Indian Tribes: Terminal Legislation—Indian Lands: Leases and Permits: Grazing

The right of members of the Klamath Tribe to free-use grazing on tribal land will not terminate upon publication, under the act of August 13, 1954 (68 Stat. 718), of the final membership roll. The right to so use tribal land will continue until tribal title is extinguished by sale, or by transfer pursuant to section 6(a) of that act, in which latter event the use of the range will be governed by the terms of the plan pursuant to which such transfer is made.

¹⁶ Secs. 1 and 2, Boulder Canyon Project Adjustment Act of July 19, 1940 (54 Stat. 774; 43 U. S. C. secs. 618, 618a).

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Indian Tribes: Terminal Legislation—Indians: Domestic Relations—Indian Tribes: Membership

Under the provisions of section 5(a)(2) of the act of August 13, 1954 (68 Stat. 718), which allows "each adult member of the [Klamath] tribe * * * an opportunity to elect for himself, and, in the case of a head of a family, for the members of the family who are minors" to withdraw from or remain in the tribe: (1) when the parents of a child are separated and the child is living with one of the parents, the latter parent may make the decision for the child to withdraw; (2) when the parents of a child are separated and the child is living with some third person, the question of who is the head of the minor's family is one of fact which must be considered in each case; (3) where the child has a judicially appointed guardian of his person and his property, the guardian may not elect for the child unless the guardian is otherwise qualified as an adult member and head of the family of the minor; (4) if the child is an orphan who is living in an institution where he cannot be considered as a member of the family of an adult Klamath Indian, no one may make the decision for him to withdraw; (5) an adult member of the tribe who has judicially been deprived of control over his child may not make an election for his child to withdraw; (6) a parent who is judicially declared to be *non compos mentis* may not elect for himself or his child to withdraw; and (7) an adult member who is the head of a family may make the decision to withdraw for his wife if she is under, but not if she is over, twenty-one years of age.

Indian Tribes: Terminal Legislation—Indian Tribes: Membership

An adult member of the Klamath Tribe, if incompetent, insane or *non compos mentis* may not, under section 5(a)(2) of the act of August 13, 1954 (68 Stat. 718), make an election to withdraw from the tribe.

Indian Tribes: Terminal Legislation—Indian Tribes: Membership

A judicially appointed guardian for an adult member of the Klamath Tribe who is insane, incompetent or *non compos mentis* may not, under the provisions of section 5(a)(2) of the act of August 13, 1954 (68 Stat. 718), make an election for him to withdraw from the tribe.

Indian Tribes: Terminal Legislation—Indians: Hunting and Fishing

The right of members of the Klamath Tribe to hunt and fish on tribal lands does not, for purposes of the appraisal to be made under section 5(a)(1) of the act of August 13, 1954 (68 Stat. 718), have an appraisable value, as this right comes to an end when membership ceases, and is not subject to transfer.

Indian Tribes: Terminal Legislation—Indian Lands: Tribal Lands: Alienation

Since Section 6(b) of the act of August 13, 1954 (68 Stat. 718), provides that "all of the actions required by sections 5 and 6 of this Act shall be completed at the earliest practicable time and in no event later than four years from the date of this Act," sales of land pursuant to section 5 of the act may not be made subsequent to August 13, 1958.

Indian Tribes: Terminal Legislation—Indian Lands: Individual Rights in Tribal Property: Annuity and Per Capita Payments

When pursuant to section 5(a) (3) of the act of August 13, 1954 (68 Stat. 718), the selection is made of all that property of the Klamath Tribe which is to be sold to pay off withdrawing members, a partition of the tribal property results. Thereafter withdrawing members will be entitled to receive all the income from the property so selected, but will not receive per capita payments from the remaining tribal property.

Indian Tribes: Terminal Legislation—Indian Tribes: Tribal Government—Indian Tribes: Membership

Should a member of the Klamath Tribe, who has elected to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), inherit an interest of a member who has elected to remain in the tribe, the withdrawing member would not acquire by such inheritance the decedent's right to vote as a member of the tribe.

Indian Tribes; Terminal Legislation—Indian Tribes: Tribal Government—Indian Tribes: Membership

Members of the Klamath Tribe who elect to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), remain tribal members and may participate in tribal affairs to the same extent as any member until they have been paid in full the money value of their interests in tribal property.

Indian Tribes: Terminal Legislation—Indian Lands: Patents

It will be advisable for a member of the Klamath Tribe, who elects to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), at the time of his election and as a part of that election, to petition the Secretary of the Interior to issue to him, pursuant to section 8 of the act, a patent in fee for any trust lands, or to remove restrictions covering any restricted lands he might now or hereafter hold.

Indian Tribes: Terminal Legislation—Indian Lands: Minerals—Indian Lands: Sales and Exchange

The requirement in section 8(b) of the act of August 13, 1954 (68 Stat. 718), that the Secretary of the Interior transfer the subsurface rights in trust or restricted land owned by members of the Klamath Tribe to one or more trustees becomes applicable at and after the date of the proclamation to be issued pursuant to section 18(a) of that act and does not apply to situations prior thereto.

Indian Tribes: Terminal Legislation—Indian Lands: Water Rights—Words and Phrases

The term "subsurface rights" as used in section 8(b) of the act of August 13, 1954 (68 Stat. 718), does not include water rights.

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Indian Tribes: Terminal Legislation—Indian Lands: Descent and Distribution: Intestate Succession—Indian Lands: Descent and Distribution: Wills—Indian Lands: Sales and Exchange—United States

Under section 9 of the act of August 13, 1954 (68 Stat. 718), (1) all trust and restricted property of members of the Klamath Tribe who die 6 months or more after the date of the act is subject to the probate jurisdiction of State courts; (2) if the State court orders a sale of such property in order to pay claims and probate expenses, the purchaser whether Indian or non-Indian, takes a fee simple title to the property sold; (3) if the court distributes such property to an Indian heir, such heir acquires the property in a trust or restricted status unless such status has been removed by operation of said act; but if the distributee or devisee is a non-Indian, the trust and restricted status is removed; (4) if the court decides it would be advantageous to cause a trust or restricted allotment to be leased during the period of probate, it must be leased in accordance with Federal rules and regulations; (5) the court, in probating such property, may appoint guardians ad litem to protect the interests of minors, incompetents or persons *non compos mentis*; (6) where the court orders a sale of such trust or restricted property, the United States is a necessary party to the proceedings therefor, and must be served with the petition for sale and accorded an opportunity to be heard. Service should be made upon the United States Attorney and upon the Attorney General of the United States; (7) heirs or devisees of Klamath Indians need not be qualified by the 1/16th degree Indian blood of the Klamath Tribe as formerly required; (8) trust and restricted estates of Klamath Indians who died prior to February 13, 1955, will be probated by the Federal Examiner of Inheritance and not by a State court.

Indian Tribes: Terminal Legislation—Indian Tribes: Tribal Personality: Acquisition

Loans transferred to the Klamath Tribe pursuant to section 12 of the act of August 13, 1954 (68 Stat. 718) are assets of the tribe and subject to management by the trustee, corporation or other legal entity selected pursuant to section 5 (a) (5) of the act.

Indian Tribes: Terminal Legislation—Indian Lands: Water Rights

Section 14 (a) of the act of August 13, 1954 (68 Stat. 718) defers the application of the laws of Oregon with respect to the abandonment of water rights by the Klamath Tribe or its members for a period of 15 years after the date of the proclamation issued pursuant to section 18 of that act. Except for such deferment, section 14 (a) is merely a saving clause which operates to preserve whatever water rights the tribe and its members may have under the law in force on the date of the act.

Indian Tribes: Terminal Legislation—Indians: Hunting and Fishing

The fishing rights secured to the Klamath Indians by the Treaty of 1864 and reserved under section 14 (b) of the act of August 13, 1954 (68 Stat. 718) are: (1) neither alienable nor descendible; (2) may be exercised by a withdrawing member of the tribe until fully paid his share in the tribal assets; (3) may be exercised by an heir of a member only if the heir is also a member; (4) may not be exercised with respect to tribal land which is sold and con-

veyed in fee simple; and (5) may continue to be exercised by members who elect to remain in the tribe.

Indian Tribes: Terminal Legislation—Indians: Domestic Relations

Under section 15 of the act of August 13, 1954 (68 Stat. 718) (1) the Secretary of the Interior may, where there is an existing guardianship over a Klamath Indian, recognize the guardian and deliver the property of the ward to him; (2) approval of the appointment of such a guardian by the Secretary is not necessary as a matter of law; (3) no impropriety is seen in the appearance of an authorized representative of the Secretary in a guardianship proceeding for the purpose of assisting the court in making a proper appointment; (4) there is nothing in the Oregon statutes that would preclude an authorized representative of the Secretary from filing a guardianship petition or to prevent an Oregon court from appointing a guardian pursuant to such a petition; (5) the Secretary in the absence of a guardianship, may transfer trust and restricted personal property to a minor himself, if the Secretary believes the minor competent to handle the property; or the Secretary may transfer such property to a State or county welfare agency, to a parent as natural guardian, or to a private trustee.

Indian Tribes: Terminal Legislation—Indian Lands: Individual Rights in Tribal Property: Annuity and Per Capita Payments—Indian Tribes: Fiscal Matters

Under section 16 of the act of August 13, 1954 (68 Stat. 718) per capita payments may be made from the capital reserve fund of the Klamath Tribe established by 50 Stat. 872.

Indian Tribes: Terminal Legislation

The Klamath Tribe will continue to exist subsequent to the date of the proclamation issued under section 18 of the act of August 13, 1954 (68 Stat. 718), and will continue as such for the purpose of exercising such rights and privileges as are reserved to it by that act.

M-36284

MAY 20, 1955.

TO THE COMMISSIONER, BUREAU OF INDIAN AFFAIRS.

This replies to your memorandum of April 21, 1955, and numerous questions concerning interpretation of various provisions of Public Law 587 [act of August 13, 1954, 68 Stat. 718] which have been raised by the following communications:

- (a) Letter of March 3, 1955, from the Area Director to the Regional Solicitor.
- (b) Letter of March 11, 1955, from Assistant Area Director Holm to Regional Solicitor.
- (c) Letter of March 18, 1955, from the Area Director to the Commissioner of Indian Affairs, which was referred to this office for answers to the legal questions therein contained.

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These questions are answered so far as is now possible in the discussion which follows. Prior opinions have been incorporated where applicable.

SECTION 2 (e)

Section 2 (e) defines an adult as a member of the tribe who has attained the age of 21 years. The question asked is whether or not any exception can be implied for either married women or emancipated minors, which under Oregon laws are considered adults prior to attaining the age of 21.

ANSWER: This is a Federal matter and the Federal act governs. A person to be an adult under the act must be 21 years of age, with no exceptions which would otherwise be permitted by State law. For the purpose of Public Law 587, a person under the age of 21, whether emancipated under State law or not, must be considered a minor.

SECTION 4

1. It has been asked whether or not a member could alienate or transfer his interest in the tribal property after the transfer of the tribal property to a trustee, corporation, or other legal entity and before the date of the proclamation issued pursuant to section 18.

ANSWER: No definite answer to this question can be given at this time, inasmuch as the answer will depend upon the terms and conditions contained in the plan pursuant to which the title to tribal property is conveyed to a trustee, corporation, or other legal entity, as provided in section 6 (a) of the act.

2. Tribal members who raise livestock have and enjoy free-use grazing on tribal land for approximately 100 head of livestock pursuant to regulations contained in Title 25, Code of Federal Regulations. The question has been asked whether or not the Indian members of the tribe with cattle are still, under the act, entitled to free grazing privileges after publication of the final roll as provided by section 4, and if so, for what period?

ANSWER: This question erroneously assumes that the tribal property becomes personal property after publication of the final roll, as provided for in section 4. This is not so. The tribal property remains tribal property and only the interest of the individual member therein becomes personalty. Therefore, the grazing regulations which relate to the use and management of the tribal range will continue to apply until such time as the tribal title is extinguished by sale, as provided in section 5 (a) (3) or the tribal property is conveyed to a trustee, corporation, or other legal entity in accordance with the plan prepared by the Management Specialists. In the latter event, the use of the tribal range will be governed by the terms and condi-

tions of the plan pursuant to which transfer of the property is made to a trustee, corporation, or other legal entity.

SECTION 5 (a) (2)

1. Under date of November 4, 1954, in a memorandum to the Commissioner of Indian Affairs, the Solicitor of the Department of the Interior answered a number of questions regarding the right, or absence of a right, of minors to withdraw from the tribe. The opinion is hereby reproduced in full:

“ * * * Section 5 (a) provides that the Secretary shall enter into a contract with qualified management specialists who shall:

‘(2) give each adult member of the tribe, immediately after the appraisal of the tribal property, an opportunity to elect for himself, and, in the case of a head of a family, for the members of the family who are minors, to withdraw from the tribe and have his interest in tribal property converted into money and paid to him, or to remain in the tribe and participate in the tribal management plan to be prepared pursuant to paragraph (5) of this subsection;’

“The specific questions raised and our answers thereto are stated below.

“1. When the parents of a child are separated and the child is living with one of the parents, may that parent make the decision for the child to withdraw from the tribe?

“The answer is Yes. The concept of a head of a family is not a rigid one and may be applied by the Secretary in a reasonable manner.

“2. When the parents of a child are separated, and the child is living with some third person, who may make the decision for the child to withdraw?

“The above quoted language sets out qualifications for any person who may make an election for a minor to withdraw. No question of law is involved. Who is the head of a minor's family and of what particular family a minor is a member are questions of fact which need to be considered in each case. Parenthood of a minor is not necessarily a requirement for the head of a family.

“3. Where a child has had a judicially appointed guardian of his person and his property, may the guardian elect for the child to withdraw?

“Unless the guardian is otherwise qualified as an adult member and head of the family of the minor, he is in no position to elect for the child to withdraw. It should be noted that section 15 of the Act requires the Secretary to protect the rights of members of the tribe who are minors by causing the appointment of guardians for such members in courts of competent jurisdiction or by

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such other means as he may deem adequate. The insertion of this section in the Act is to better provide for protection of the rights of members of the tribe who are minors, *non compos mentis*, or in the opinion of the Secretary in need of assistance in conducting their affairs; it does not create a right in any guardian now or hereafter appointed to elect for a minor member to withdraw from the tribe.

"4. If a child is an orphan who is living in an institution, or who is living in any other place where he cannot be considered as a member of a family of an adult Klamath Indian, may anyone make the decision for him to withdraw?

"The answer is No, for the reason that the person who elects for a minor must be a member of the tribe.

"5. May an adult member of the tribe who has judicially been deprived of control over his child make an election for his child to withdraw?

"The answer is No. Such a person can no longer be considered to be the head of the family.

"6. If a parent is judicially declared to be *non compos mentis*, may he elect for himself and his child to withdraw?

"The answer is No.

"7. May a member of the tribe who is under 21 years of age but who is self-supporting and emancipated from family controls, be considered as an adult for the purpose of making the decision to withdraw?

"Section 2 (e) of the statute defines an adult member of the tribe as one who has attained the age of 21 years. Therefore a member under 21, whether emancipated or not, must be considered a minor for the purpose of this Act. Most likely, if an emancipated, self-supporting minor desires to be withdrawn from the tribe, the fact of his self-support and emancipation would be withheld from notice if he could persuade the titular head of the family to elect for his withdrawal. On the other hand, if such a minor is opposed to withdrawal but the titular head of the family appears to be insisting on the withdrawal, the minor will bring to light the fact of his emancipation and self-support in order to defeat his being considered a member of that family. The intentions of the minor and the head of his family largely determine the facts subject, of course, to the control imposed by the common understanding of family relationships.

"8. May an adult member of the tribe who is the head of a family make the decision to withdraw not only for himself and the children but also for his wife?

"Since each adult has the right to elect for himself, the head of the family has no right to withdraw for an adult wife. If the wife is a member of the tribe under 21 years of age, however, the husband may so elect."

2. A question was asked whether or not an adult member of the tribe, even though incompetent, insane, or *non compos mentis*, could make an election to withdraw from the tribe.

ANSWER: The answer is No, irrespective of whether the insanity or incompetency of the member has been judicially declared or not. If, however, an adult member, whose competency is in question, applies for withdrawal, the application should be suspended pending judicial inquiry which may be had pursuant to guardianship proceedings instituted under the laws of the State of Oregon.

3. It has been asked whether or not a judicially appointed guardian for an adult member who is insane, incompetent, or *non compos mentis*, can make an election for him.

ANSWER: A guardian cannot make an election for an adult member. The act does not so provide.

SECTION 5 (a) (3)

1. It has been asked if fishing and hunting rights have an appraisable value which should be included in the sum to be paid to withdrawing members.

ANSWER: No decision of which we are aware has held that the right to hunt and fish on the tribal lands is a property right which is vested in the individual member of the tribe. It is a right which the member may exercise in common with other members of the tribe. The right is inseparably connected with membership and when membership ceases, the right comes to an end. The right is not subject to transfer and is incapable of transmission by descent or devise. Accordingly, it has no appraisable value which can properly be included in the sum to be paid to withdrawing members.

SECTION 6 (b)

Question: What will be the situation if it is not possible to sell all the land to be disposed of by the deadline date of August 13, 1958?

ANSWER: Section 6(b) states that it is the intention of Congress that *all* of the actions required by sections 5 and 6 of the act shall be completed at the earliest practicable time and *in no event later than four years from the date of the act*. It is considered that the act makes it mandatory that the lands to be sold are sold within the 4-year period and there is no authority in the act for sales thereafter.

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SECTION 6 (c)

1. This section provides that members of a tribe who receive the money value of their respective interest in tribal property shall thereupon cease to be members of the tribe. The question was asked if members electing to withdraw could receive per capita payments as members before being paid off and receiving the full value of their interest in tribal property.

ANSWER: After the appraisal is made, each specified member of the tribe shall be given an opportunity to elect to withdraw from the tribe or to remain therein. When that election closes, it becomes the duty of the Management Specialists by section 5 (a) (3) to "determine and select the portion of the tribal property which if sold at the appraised value would provide sufficient funds to pay the members who elect to have their interests converted into money." In other words, it becomes the duty of the Management Specialists to set aside for sale that portion of assets which at appraised value equals the sum of all the withdrawing members' appraised interests in tribal assets. When the selection of such assets is made a partition results. Therefore, the withdrawing members will be entitled to receive all of the income from that property, including timber, until such property has actually been sold by the Management Specialists for the purpose of paying off the withdrawing members. They will not receive per capita payments from the remaining tribal property after the selection of assets to be sold.

2. Question: How will the income of timber sales be handled subsequently to the time elections have been made by the members withdrawing? Since the timber sale contract obligation now in effect may be in either the portion which is to be sold or to remain in group ownership, must it be shared equally by all members? Should not the resources of such an area be appraised as cutover land so that the income can be equally distributed among all members?

ANSWER: Since the withdrawing members are in legal effect the sole beneficiaries of the property selected and designated for sale by the Management Specialists pursuant to section 5(3), the withdrawing members will be entitled to receive all of the income from that property, including timber, until such property has actually been sold by the Management Specialists for the purpose of paying off the withdrawing members.

3. The question has been asked what happens when a member who has elected to withdraw inherits an interest of a member who has elected to remain in the tribal group or entity. Can the withdraw-

ing member be a member of the tribal group and vote therein because of the inheritance from the remaining member?

ANSWER: The answer to this question is No, because tribal membership is not inheritable. The withdrawing member may vote only in his own right as a member of the tribe and this right will continue until he receives the money value of his interest in the tribal property, at which time he ceases to be a member of the tribe. The extent to which non-members of the tribe who acquire interests in the tribal property by inheritance or otherwise may participate in the management of the tribal property by voting or otherwise after the tribal property has been transferred to a trustee, corporation, or other legal entity pursuant to section 5(a) (5) should, and no doubt will, be covered by the plan prepared pursuant to that section.

4. Question: Are the members who elect to withdraw eligible to participate in tribal affairs until they cease to be members of the tribe, particularly in affairs that concern the group that remains?

ANSWER: Yes, the members who elect to withdraw remain tribal members and may participate in tribal affairs to the same extent as any member of the tribe until said withdrawing member has been paid in full the money value of his interest, at which time and only at that time does he cease to be a member of the tribe.

5. Question: Should a withdrawing member petition for a patent in fee for any trust lands or removal of restrictions covering restricted lands he might own?

ANSWER: At a conference between the Office of the Solicitor and personnel of the Office of the Commissioner of Indian Affairs, in Washington, D. C., March 16, 1955, it was considered advisable for the withdrawing member, at the time of the election to withdraw, and as a part of said election, to petition the Secretary of the Interior to forthwith, pursuant to the provisions of section 8 of Public Law 587, issue to said withdrawing member a patent in fee for any Indian trust lands or remove restrictions covering restricted lands he might now or hereafter hold.

SECTION 8 (b)

1. This section provides that the trust or restricted status of property is not removed four years after the date of the act with respect to subsurface rights. The Secretary is instructed to transfer said subsurface rights to one or more trustees designated by him for management for a period not less than 10 years. The Area Office asks whether or not this applies to current land sales.

ANSWER: The section applies only to situations that exist at and after the date of the proclamation four years hence, and does not apply to situations prior thereto. A fee patent could issue from the

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Secretary on a present land sale. Each case must be separately handled and separately submitted to the Secretary.

2. Question: Do the subsurface rights referred to in section 8 (b) include underground water?

ANSWER: The term "subsurface rights" does not mean water rights. The term "water rights" is used elsewhere in the statute, and, therefore, when Congress uses the expression "subsurface rights" and does not mention or include "water rights," the term "subsurface rights" will be considered to be applicable only to minerals, oil and gas, and those matters commonly considered to be "subsurface rights."

SECTION 9 (b)

This section provides:

The laws of the several States, Territories, possessions, and the District of Columbia with respect to the probate of wills, the determination of heirs, and the administration of decedents' estates shall apply to the individual property of members of the tribe who die six months or more after the date of this Act.

1. Question: Will the State probate court have jurisdiction to order the sale of realty now held in trust in connection with the administration of an estate?

2. Question: Must the Superintendent release all personalty (payments in lieu of allotment, etc.) to the jurisdiction of the local probate court?

ANSWER: Section 9 (b) above makes *no exception* with reference to trust or restricted property or any classification of such trust or restricted property, and it is considered mandatory that all property of all kinds should, without exception, be administered by the State court under State law. Some of the State statutes and laws applicable to this matter are as follows:

OREGON REVISED STATUTES—

Sec. 115.430. Bond of Executor or Administrator. * * * sum not less than double the probable value of the personal property of the estate, plus double the probable value of the annual rents and profits of and from the real property of the estate.

Sec. 116.105. Possession and control of property. The executor or administrator is entitled to the possession and control of the property of the deceased, both real and personal, and to receive the rents and profits thereof until the administration is completed or the same is surrendered to the heirs or devisees by order of the court or judge thereof; but where any such property is in the possession of a third person by virtue of a valid subsisting lease or bailment, the possession and control of the executor or administrator is sub-

ordinate to the right of the lessee or bailee. During the time the property is in the possession or control of the executor or administrator, it is his duty to keep the same in repair and preserve it from loss or decay as far as possible.

Sec. 116.305. Proceedings in case of refusal to disclose property. Whenever it appears probable from an affidavit of an executor, administrator, heir or other person interested in the estate, that any person has concealed or in any way secreted or disposed of any property of the estate or any writing relating or pertaining thereto, or that any person has knowledge of any such property or writing being so concealed, secreted or disposed of, and refuses to disclose the same to the executor or administrator, the court or judge thereof, upon the application of the executor or administrator, may cite such person to appear and answer under oath concerning the matter charged.

Sec. 116.405. Inventory of estate; when and how made. An executor or administrator shall, within one month from the date of his appointment, or, if necessary, such further time as the court or judge thereof may allow, make and file with the clerk an inventory, verified by his own oath, of all the real and personal property of the deceased which shall come to his possession or knowledge.

Sec. 116.410. Money of deceased and debts due deceased. The inventory shall contain an account of all money belonging to the deceased, or a statement that none has come to the possession or knowledge of the executor or administrator; also a statement of all debts due the deceased, the written evidence thereof, the security therefor, if any exists, specifying the name of each debtor, the date of each written evidence of debt, and security therefor, the sum originally payable, the indorsements thereon, if any, and their dates, and the sum appearing then to be due thereon.

Sec. 116.705. Application for order for sale; citation to heirs. No sale of the property of an estate is valid unless made by order of the court or judge thereof or as provided in ORS 116.825 and 116.830. The application for an order of sale shall be by the petition of the executor or administrator, and in case of real property, a citation to the heirs and others interested in such property.

Sec. 116.710. Application to sell personalty; terms of sale. Upon the filing of the inventory, or at the next term of the court, the executor or administrator may make an application to sell the personal property of the estate for the purpose of paying the funeral charges, expenses of administration, the claims, if any, against the estate and for the purposes of distribution; and the court or judge shall grant such order, if in his judgment it is for the best interest of

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the estate, and shall direct and prescribe the terms of sale upon which the property shall be sold, whether for cash or on credit.

Sec. 116.755. Order to sell; undertaking of executor or administrator. (1) If, upon the hearing, the court finds that it is necessary that the real property, or any portion thereof, be sold, it shall make the order accordingly, and prescribe the terms thereof, whether of cash or credit, or both. If the court finds that such property cannot be divided without probable injury and loss to the estate it may order that it, or any specific lot or portion thereof, be sold wholly, whether otherwise necessary or not.

The executor or administrator has a right to possession of the deceased's property for the purposes of administration (*Humphreys v. Taylor*, 5 Ore. 260). The real estate is chargeable with the payment of debts, funeral charges and the expenses of administration, the personal estate being primarily chargeable (*Worley v. Taylor*, 21 Ore. 589). It makes no difference whether decedent made a will or not or what the will contains (*ibid.*) *No one is authorized to make application for the sale of real property or to make sale when ordered except the administrator or executor* (*Levy v. Riley*, 4 Ore. 392).

Under the laws of the State of Oregon, therefore, an executor or administrator is entitled to the possession and control of *all* of the property of the deceased, both real and personal, and to receive the rents and profits thereof until the administration is completed or the same is distributed to the heirs or devisees by order of the court. The property is subject to inventory in full by the executor or administrator, and his bond is set by the court upon the full value of the estate. The property may be sold by the court to pay claims and probate expenses.

It is the opinion of this office that, therefore, where there is trust and restricted property of a deceased member of the Klamath Tribe, such trust and restricted status is not removed from the property but only relaxed for the purpose of administration by the State court under State law. The State court takes possession of all of the property for the purpose of administration thereof, all of the property is inventoried as the estate, and the court can fully administer and control the property to the extent necessary in order to determine the heirs and probate the estate. If the court orders a sale of the property in order to pay claims and probate expenses, the purchaser, whether Indian or non-Indian, takes a fee simple title to the property sold. The purchaser, whether Indian or non-Indian, purchases as a State citizen under State law, and, under State law, the court is authorized

to sell the land and convey a fee title to the property sold. If the court, instead of selling the property, distributes the property to the heirs and thereby such distribution is made to an Indian, the Indian acquires the property with the trust and restricted status thereon, unless the status has been removed by operation of the act four years after date of enactment. If the distributee or devisee is a non-Indian, the trust and restricted status is removed.

It is also the opinion of this office, that if, during probate, there is a trust or restricted allotment of land to be administered by the state court and the court decides that it would be advantageous to cause said allotment to be leased during the period of probate, it must be leased in accordance with federal rules and regulations. The situation is comparable to that where the estate has a private trust thereon at the time of the owner's death, the Federal rules and regulations in the subject matter being comparable to such limitations and terms of a private trust upon an estate being probated by a state court. The court would be limited by the terms of the private trust; in the instant case it is limited by the provisions of the Federal trust and restricted status to compliance with Federal rules and regulations pertaining to such status. The court is not prevented from ordering the property to be leased, but the executor or administrator must proceed to obtain the consent and approval of the Secretary of the Interior or his designated representative.

It is further the opinion of this office, that under Oregon laws and if deemed necessary by the probate court as a part of the probate procedure to protect the interest of a minor, an incompetent, or a person *non compos mentis*, the State court could appoint a guardian ad litem for such person.

Where the probate court orders a sale of the property, the United States is a necessary party to the proceedings therefor where the sale concerns trust and restricted Indian lands. In the case of *United States v. Hellard*, 322 U. S. 363 (1944) the Supreme Court of the United States, dealing with comparable legislation in Oklahoma conferring jurisdiction in State courts, said:

* * * the Act in question purports to be no more than a jurisdictional statute. It fails to say that the United States is not a necessary party * * *. We must read the Act in light of the history of restricted lands. That history shows that the United States has long been considered a necessary party to such proceedings in view of the large governmental interests which are at stake. We will not infer from a mere grant of jurisdiction to a state or federal court to adjudicate claims to restricted lands and to order their sale or other distribution that Congress dispensed with that long-standing requirement. * * *

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The United States must be served with the petition for sale, and accorded an opportunity to be heard to consent or object to the sale. It is the opinion of this office, that such service should be made upon the United States Attorney for the District of Oregon and also upon the Attorney General of the United States.

Section 9 of the act expressly repealed the provisions of 25 U. S. C. 555, and hence the heirs or devisees need not be qualified by at least 1/16th degree Indian blood of the Klamath Tribe as formerly required. By such repeal Indian heirs or devisees can be without any Indian blood of said tribe, can be a member of another tribe, or can be a non-Indian.

Old estates of persons who died prior to February 13, 1955, will be probated and closed by the Federal Examiner of Inheritance and not by state court. The said examiner will not, however, probate the estates of persons who have died after February 13, 1955. The probate proceedings must be initiated by the procedure and by the person or persons prescribed eligible therefor in the Oregon statutes.

SECTION 12

Question: Does the word "Tribe" in the last line of the section refer to the "trustee, corporation, or other legal entity" by which the individual holdings of the members who elect to remain are held?

ANSWER: Although the thought behind this question is none too clear, it may be pointed out that the tribe continues to exist as a tribe even though some of its members elect to withdraw under section 5 (a) (2). The membership of the tribe is merely diminished. The loans transferred to the tribe for collection by section 12 are assets of the tribe. Such assets, along with other tribal property, would be subject to management by the "trustee, corporation, or other legal entity" selected under the plan proposed and adopted pursuant to the provisions of section 5 (a) (5) of the act.

SECTION 14 (a)

Question: Can a non-Indian who desires to purchase potential ir-igible Indian land be given assurance that he will receive a water right with the purchase of such land? Do the Indian's water rights "run with the land" to a non-Indian purchaser?

ANSWER: It is assumed that these questions relate to tribal lands that will be sold by the Management Specialists under authority of section 5 (a) (3) for the purpose of making payment to withdrawing members of the cash value of their interests in tribal property. Section 14 (a) provides that nothing in the act shall abrogate any water rights of the tribe and the individual members, and defers the application of

the laws of Oregon with respect to abandonment of water rights for a period of 15 years after the date of the proclamation issued pursuant to section 18 of the act. Except for deferment of the application of Oregon law with respect to abandonment, section 14 (a) is merely a saving clause which operates to preserve whatever water rights the tribe and individual members may have under the law in force on the date of the enactment of the act.

The Klamath Reservation was established by the treaty of October 14, 1864 (16 Stat. 707). Under the decisions of the United States Supreme Court in *Winters v. United States*, 207 U. S. 564 (1908), *United States v. Powers*, 305 U. S. 527 (1939), and other related cases, the establishment of the reservation carried with it an implied reservation of the right, with a priority corresponding to the date of the establishment of the reservation, to use water from the streams flowing through or bordering on the reservation for the purpose of irrigating the reservation lands. The question of how far and to what extent this tribal water right attaches to and passes with a conveyance of the tribal lands to non-Indians cannot be determined from the present record, which contains no factual statement whatsoever on which such a determination could be made. The specific acreage to be conveyed must be known, together with full information concerning its irrigability and the extent to which it has been developed for irrigation purposes. It would also be desirable to have a complete picture of water development on the reservation, including information as to the acreage which is under irrigation, the acreage which is potentially irrigable, the nonirrigable acreage, and the sources and quantities of available water. Upon presentation of these facts, further consideration will be given to this matter.

SECTION 14 (b)

1. Questions: Will there be a descendency of tribal fishing rights assured by the Treaty of 1864 and reserved under section 14 (b) of the act? Are those rights limited to members living on August 13, 1958? Do heirs continue to enjoy these rights? Do the rights continue for those who elect to withdraw as well as those who elect to or do remain? Do those who elect to withdraw still retain fishing rights on the lands of those remaining in the tribal group?

ANSWERS: The fishing rights secured to the Indians by the Treaty of 1864 and preserved by section 14 (b) of the act are neither alienable nor descendible. Members who elect to withdraw cease to be members when they are paid in full for the value of their tribal interests and their fishing rights terminate with the termination of membership. Until fully paid, the withdrawing member is still a member and en-

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titled to exercise the fishing right in common with other members. As the membership rolls closed as of midnight, August 13, 1954, living members whose names appear on that roll may exercise fishing rights. An heir may exercise the right only if the heir is a member.

2. Do the fishing rights of those who elect to remain continue on the lands which are now in Indian ownership but which will be sold to pay off withdrawing members? Are the fishing rights, exclusive in the area, retained as such pertain to the remaining members?

ANSWER: In the opinion of this office the fishing rights of the members do not continue with respect to the lands which are sold because such sold land is no longer retained tribal land or a part of the Indian reservation. The Klamath Tribe was given only exclusive fishing rights within the reservation. In the opinion of this office, it is considered that it was the intent of Congress that the land which is sold should be conveyed in fee simple and not be impressed with an encumbrance in the nature of fishing rights in favor of remaining tribal members.

Relative to the exclusive nature of the fishing rights of the remaining members, section 14(b) provides that *nothing in the act shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty*. The members of the tribe enjoy exclusive fishing rights under a Federal treaty. Public Law 280, 83rd Congress, 1st session [act of Aug. 15, 1953, 67 Stat. 588] does not apply to the situation, as it expressly excepts from State jurisdiction and control rights acquired by Federal treaty. The remaining group of members is mentioned repeatedly in the act as a "tribe." (See section 12 where remaining group is referred to as a "tribe"; section 5(5) mentions the management of tribal property by the corporation and mentions the interest of "members who remain in the tribe"; section 12 provides that loans are transferred to "the tribe" for collection.) It is the opinion of this office that, pursuant to the above provisions of the act, the remaining members, designated as a "tribe," possess, in the area remaining, exclusive fishing rights pursuant to the provisions of the treaty with the United States.

SECTION 15

Section 15 provides:

Prior to the transfer of title to, or the removal of restrictions from, property in accordance with the provisions of this Act, the Secretary shall protect the rights of members of the tribe who are minors, non compos mentis, or in the opinion of the Secretary in need of assistance in conducting their affairs, by causing the appointment of guardians for such members in courts of competent jurisdiction, or by such other means as he may deem adequate.

The Area Office and members of the Oregon State Bar have asked several questions pertaining to this section, as follows:

1. Whose responsibility is it to cause the appointment of guardians in proper cases?
2. Is the Secretary to be the moving party for the appointment of a guardian?
 - a. If so, by what guide lines or standards does he approve of the guardian and the guardianship proceedings?
3. What is meant by the language of the section "by such other means as he may deem adequate"?

ANSWERS: Section 15 obviously anticipates the date on which Federal supervision and control will be terminated over the property of persons who are under the legal disability of minority or unsoundness of mind or who, in the judgment of the Secretary, are otherwise in need of assistance, by requiring the Secretary to cause the appointment of guardians in courts of competent jurisdiction or by taking such other means as he may deem to be adequate for their protection.

The appointment of the guardian will, of course, be controlled by the laws of the State of Oregon. Since the Secretary may employ other means for protection of the incompetent member, he is not required to seek the appointment of a guardian where none exists. Where there is an existing guardianship, he may, of course, recognize the guardian and deliver the property of the ward to him. As the sole responsibility for the appointment of a guardian resides in the court, approval of the appointment of the guardian by the Secretary would not be necessary as a matter of law. However, no impropriety is seen in the appearance of the Secretary through an authorized representative in a guardianship proceeding for the purpose of assisting the court in making a proper appointment. Although it would be preferable in seeking the appointment of a guardian for the petition to be made by some member of the immediate family of the ward, I find nothing in the Oregon statutes that would preclude the Secretary, acting through an authorized representative, from filing such a petition or that would prevent the court from appointing a guardian pursuant to such a petition. Doubtless appropriate procedures with respect to these matters could be worked out in cooperation and consultation with the court, and that course of action is suggested for immediate consideration by the representatives of the Bureau of Indian Affairs.

"By such other means as he may deem adequate" has been interpreted by the Office of the Solicitor to include a transfer of the trust and restricted personal property without a guardianship to the minor

May 20, 1955

himself if the Secretary believes the minor competent to handle the money, to a state or county welfare agency or institution, delivery to a parent as the natural guardian of the minor if the parent is considered able to look after the child's interest, or the establishment of a private trust and the delivery of the money to the private trustee.

SECTION 16

A question has been asked relative to per capita payments from the capital reserve fund of the Klamath Indians, under section 16 of Public Law 587.

In an opinion rendered by the Office of the Regional Solicitor on February 3, 1955, it was stated:

The capital reserve fund is, by 50 Stat. 872, established from the unobligated tribal funds on deposit in the Treasury of the United States. Section 16 of Public Law 587 (68 Stat. 722) provides:

"Pending the completion of the property dispositions provided for in this Act, the funds now on deposit, or hereafter deposited, in the United States Treasury to the credit of the Tribe shall be available for advance to the Tribe, or for expenditure, for such purposes as may be designated by the governing body of the Tribe and approved by the Secretary."

This Congressional enactment in 68 Stat. 722 does not repeal 50 Stat. 872 relative to the creation of the capital reserve fund, but being a broad authority sufficient to include such fund, it is our opinion that it modifies 50 Stat. 872 in that if the Tribe so desires and the Secretary so approves, the capital reserve fund need not be held in the Treasury of the United States.

We therefore conclude that the Secretary of the Interior has the authority, under Section 16 of Public Law 587, to approve a Tribal Resolution for a per capita payment, and, if such were approved, that such payment can be legally made from the capital reserve fund without any further Congressional enactment.

SECTION 18

Question: Are the Klamaths disbanded as a tribe upon completion of the provisions of the act and publication of the proclamation provided for in this section?

ANSWER: Section 14 (a) of the act provides that the laws of Oregon with respect to the abandonment of water rights by non-use shall not apply to the tribe and its members until 15 years after the date of the proclamation. This language indicates that the tribe will continue in existence beyond the date of the proclamation. The remaining group of members who do not elect to withdraw are repeatedly mentioned in the act as a "tribe." (See section 12 of the act.) Likewise, in section 14 (b) of the act it is provided that nothing in the act shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty. If nothing

in the act can abrogate such fishing rights or privileges of the tribe, then it would appear obvious that the proclamation date would not abrogate such rights or privileges of the tribe, and that the tribe would continue as such for the purpose of exercising such rights and privileges.

J. REUEL ARMSTRONG,
Solicitor.

WILLIS N. FARLOW ET AL.

A-27121

Decided May 27, 1955

Private Exchanges: Protests

Where the notice of publication of a private exchange states that the purpose of the notice is to give persons objecting to the exchange an opportunity to file their objections within 45 days after the first publication of the notice, a protest filed after the end of the 45-day period can be considered by the Department.

Private Exchanges: Public Interest

Where consummation of a private exchange would result in the blocking out of an area of public land and the disposal of an isolated tract of public land, but there is little need for acquiring the offered land and disposal of the selected land would seriously disrupt the grazing operations of two lessees of the selected land, there does not appear to be such a benefit to the public interest as to warrant allowance of the exchange.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On March 29, 1948, Willis N. Farlow filed an application for the exchange of all of sec. 36, T. 17 S., R. 15 E., W. M., in Oregon Grazing District No. 5, for 680 acres of public land located in T. 6 S., R. 13 E., W. M., Wasco County, Oregon, pursuant to section 8 (b) of the Taylor Grazing Act, as amended (43 U. S. C., 1952 ed., sec. 315g (b)). The Acting Regional Administrator made a determination that the exchange was in the public interest and subsequently, beginning October 25, 1951, notice of the proposed exchange was published in the counties wherein the offered and selected lands are located. The publication notice stated that all persons having bona fide objections to the proposed exchange should file their objections with the land office in Portland, Oregon, within 45 days of the date of the first publication of the notice. On December 10, 1951, a protest against the proposed exchange was filed by Lloyd T. and Lorraine Woodside which stated that their objection to the exchange was based on the fact that they were leasing the E $\frac{1}{2}$ NE $\frac{1}{4}$ and

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NE $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 9, T. 6 S., R. 13 E., W. M., which was a part of the land selected by the applicant, under a Taylor Grazing Act lease, and that the leased land adjoined their own private land and was fenced with their private land.

On April 23 and May 2, 1952, letters protesting the exchange were received from Robin D. Day, attorney for George and Lucille Nelson, who were the lessees under Taylor grazing lease Oregon 0227 of all of the selected land except that portion of sec. 9, T. 6 S., R. 13 E., W. M., leased by the Woodsides and another 40-acre tract in sec. 9. The Nelsons' lease expires on April 13, 1961. Mr. Day stated in his letters that Mr. Nelson was willing to purchase the selected land at public sale in order to protect his livestock operations.

On April 22, 1954, the manager dismissed the protests and rejected the public sale application (Oregon 02372) filed by George Nelson on May 14, 1952. Subsequently, both the Woodsides and the Nelsons appealed the manager's decision to the Director of the Bureau of Land Management.

By a decision dated September 13, 1954, the Director, Bureau of Land Management, reversed the manager's decision and rejected the private exchange on the grounds that from the record it did not appear that consummation of the exchange complied with one of the criteria of the statute which authorizes the exchange of public lands for privately owned lands, namely, a positive benefit to the public interest. Mr. Farlow has appealed to the Secretary of the Interior from this decision of the Director.

On appeal the appellant contends that since George and Lucille Nelson did not file their protest within the 45 days prescribed by the notice of publication of the proposed exchange, their protest should not be heard by the Department. Mr. Nelson alleges that the publication notice was not published in a paper which he normally reads and that that is the reason he did not learn of the proposed exchange until several months after the first notice was published.

The notice provided in part as follows:

This notice is for the purpose of allowing all persons having bona fide objections to the proposed exchange an opportunity to file their objections in this office within 45 days from the date of first publication * * *.

This language is not mandatory in the sense that no protest can be filed after the expiration of the 45-day period and that any late protest cannot be considered by the Department. Neither the private exchange statute nor the Department's regulations on exchanges prescribe a mandatory time limitation on the filing of protests (43 U. S. C.,

1952 ed., sec. 315g (d); 43 CFR 146.4 (19 F. R. 8929)). The setting of the time limit in the notice therefore is properly to be construed as setting the time limit beyond which the Department will proceed to act on the exchange. This is not to say that the Department cannot refuse to consider a late protest. The point is that the time limitation in the notice does not *compel* the disregard of late protests.

Furthermore, a ruling that Mr. Nelson's protest could not be heard would obviously be of relative unimportance since by appealing the Director's decision Mr. Farlow has brought the case before the Secretary for a decision on the merits of his application and therefore all of the facts and circumstances of the case must be reviewed in order to reach a determination as to whether his application should be allowed.

The record shows that the lands selected in the appellant's exchange application are public lands which are completely surrounded by privately owned lands. The appellant is not the owner of any lands which adjoin the selected lands. The field reports also show that the selected lands are mountainous and rough and that their only value is for grazing purposes. The record shows that the appellant is not in the livestock business. A report from the district range manager dated June 14, 1954, states in regard to the lands leased by the Wood-sides that—

This lease was granted to Woodside because he had control of the property adjacent, and certainly was short of range lands. The fence in question was constructed by Woodside and is needed for range management purposes. This fence built on a ridge divides the range land between Woodside and the Nelsons. *Woodside certainly needs what Federal range he has.* The area has been properly grazed and has an excellent stand of perennial grasses.

Information contained in the record also makes it obvious that allowance of the exchange would have the effect of seriously disrupting the livestock operations of the Nelsons since it would cause them to lose grazing rights on 520 acres of land that has an estimated carrying capacity of from 9 to 10 acres per A. U. M., and that is almost surrounded on three sides by land owned by the Nelsons.

In regard to the offered land the record shows that this land is surrounded by a large area of public domain in Oregon Grazing District No. 5. From the appraiser's report it would appear that the offered and selected lands are approximately equal in value. A report dated August 5, 1954, from the acting range management officer states that acquisition of title to the offered land by the Government would not improve the land pattern in Oregon Grazing District No. 5 to any significant extent. The district range manager also recommended

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in his report of June 14, 1954, that the exchange be rejected "as not being in the general public interest, due to damage which will be suffered by the protestants in this exchange and the small benefit which would accrue to the Government if the exchange were completed." On the other hand, a report from the State Supervisor, Oregon, dated July 9, 1954, states that:

This particular exchange would convey base lands that are completely surrounded by other public land which are grazing in character and are under active range management in an organized grazing district. The selected land is an isolated tract not in any grazing district and in an area of low Federal ownership. From a standpoint of improvement of the Public land pattern and management, the exchange is in the public interest.

It has long been the policy of the Department, in determining whether to allow a private exchange, to consider not only whether acquisition of the offered land would be in the public interest, but to determine whether disposal of the selected lands would outweigh the advantages which might accrue from such acquisition. Thus, it has been said, "Although a proposed exchange may include some elements of advantage to the public, other elements present in the exchange may strike a balance which is unfavorable to the public interests. The Department must weigh all factors and look to the final balance." *David B. Morgan*, A-24365 (July 23, 1946). Thus, applying this principle in determining whether a proposed private exchange is in the public interest, it was held that although the acquisition of the land offered, without consideration of other aspects of the situation, would clearly be in the public interest, nevertheless the exchange would not be in the public interest where the selected land was more suitable for disposition under the Small Tract Act (43 U. S. C., 1952 ed., sec. 682a), and the exchange application was rejected. *S. Portland Halle, II*, A-24300 (January 23, 1947); *David B. Morgan, supra*. Likewise on several occasions where allowance of a private exchange would seriously disrupt administration of a grazing district or of public grazing lands, the exchange has been rejected. *Ross Babcock*, A-26851 (June 29, 1954); *Ernest C. Feland*, A-25370 (August 13, 1948); *George C. Low*, A-25725 (December 22, 1949); *King Investment Company*, A-24282 (March 25, 1946).

The cases cited are distinguishable from the present case in that those cases involved situations where disposal of the selected land would have adversely affected the interests of a number of persons or the administration of a larger area of land than was directly involved in the exchange. In this case, the selected land is isolated and, so far as the record shows, only the interests of two lessees would be

affected. Nonetheless, since allowance of the proposed exchange would have the undeniable effect of seriously disrupting the established livestock operations of both the appellees and would result in the acquisition by the Government of land for which there is little need, I do not believe that the exchange is of such sufficient benefit to the public interest as to warrant its allowance.

Accordingly, the decision of the Director, Bureau of Land Management, is affirmed.

FRED G. AANDAHL,
Assistant Secretary.

NOEL TEUSCHER ET AL.

A-27099

A-27104

A-27192

Decided May 31, 1955

Oil and Gas Leases: Lands Subject to Leasing—Withdrawals and Reservations: Effect of

In general, unless the Mineral Leasing Act or a withdrawal or reservation specifically provides otherwise, lands withdrawn or reserved for a specific purpose are available for leasing under the Mineral Leasing Act, if the issuance of a lease will not be inconsistent with or materially interfere with the purposes for which the land is withdrawn or reserved.

Oil and Gas Leases: Lands Subject to Leasing—Withdrawals and Reservations: Effect of

Executive Order No. 5214 which withdrew lands in Alaska for the exclusive use and benefit of the Navy Department for naval purposes is properly interpreted as not by itself prohibiting the leasing of the withdrawn lands under the Mineral Leasing Act.

Oil and Gas Leases: Applications

An application for an oil and gas lease must be rejected when at the time it was filed the Mineral Leasing Act excluded the land applied for from leasing, although subsequently the act was amended to permit the leasing of such land.

D. Miller, 60 I. D. 161 (1948), *overruled in part.*

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Noel Teuscher and four other persons¹ have appealed to the Secretary of the Interior from a decision dated August 30, 1954, by the Acting Associate Director of the Bureau of Land Management which

¹ See Appendix A, p. 216.

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affirmed the rejection by the manager of the Anchorage land office of one or more of their respective noncompetitive offers to lease certain lands for oil and gas pursuant to section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226), because the lands applied for were withdrawn by Executive Order No. 5214. D. Miller has also appealed from a decision dated February 25, 1955, by the Associate Director of the Bureau of Land Management, which affirmed the rejection of his application Anchorage 011195 as to certain land for the same reason.

The lands applied for, which lie in the Wide Bay—Cold Bay area of Alaska, were withdrawn along with other lands by Executive Order No. 5214, dated October 30, 1929, which stated:

* * * the * * * herein described areas of land and water in the Territory of Alaska * * * are hereby, withdrawn from settlement, location, sale or entry and held for the exclusive use and benefit of the United States Navy Department for naval purposes until this order is revoked by the President or Congress, subject to any prior valid claim legally initiated and maintained and subject to any other valid existing rights. * * *

By a letter dated February 23, 1951, the Assistant Secretary of the Navy notified the Secretary of the Interior that the Wide Bay area lands and waters withdrawn by Executive Order No. 5214 "are not currently required for military use and are herewith returned to the Department of the Interior."

Executive Order No. 5214 was revoked as to the land covered by the appellants' offers by Public Land Order 945, dated March 18, 1954 (19 F. R. 1583), as amended by Public Land Order No. 956, dated April 20, 1954 (19 F. R. 2353), which opened the land first to settlement by veterans under the homestead laws and the homesite act of May 26, 1934 (48 U. S. C., 1952 ed., sec. 461), and then to settlement and other forms of appropriation by the public generally in accordance with appropriate laws and regulations.

Teuscher's application was filed on December 5, 1945, Miller's applications on November 12, 1946, and the others between April 1 and 14, 1953.

The applications were rejected on the ground that Executive Order No. 5214 removed the land it affected from the operation of the Mineral Leasing Act.

It is clear that the lands applied for were withdrawn from most forms of appropriation by Executive Order No. 5214. It is also clear that the order by its terms left the withdrawn land open to mineral location for metalliferous minerals (see discussion later). The appel-

lants contend that the lands also remained subject to leasing pursuant to the Mineral Leasing Act.

The Mineral Leasing Act is applicable to some classes of withdrawn land and not to others. Section 1 of the act (30 U. S. C., 1952 ed., sec. 181) specifically brings lands within national forests under the provisions of the act and specifically excludes certain other lands devoted to particular governmental purposes or included within certain areas. A naval reservation does not fall within the specific exclusions.

In addition to lands included within national forests, the leasing act has been applied to lands withdrawn under first and second form reclamation withdrawals² and to wildlife refuges.³

In an opinion dated September 30, 1921 (48 L. D. 459), the Solicitor of this Department held that a reservation of lands of the United States “* * * from entry, location or other disposal under the laws of the United States,” pursuant to section 24 of the Federal Water Power Act of June 10, 1920 (16 U. S. C., 1952 ed., sec. 818), did not remove the reserved lands from leasing under the Mineral Leasing Act. The opinion states:

Neither a permit to prospect for oil nor a *lease* to extract oil from lands owned by the United States will secure to the permittee or lessee the right to *finally acquire* title to the lands included in the permit or lease from the Government. Neither can be considered as a *location* or *selection* which will become an *appropriation* of public lands.

* * * * *

A right to prospect for oil or a contract for the possession of oil lands is not for the purpose of acquiring title to the lands and is not included within the terms *entry*, *location* or *selection* unless falling within the phrase “*or other disposal*” under the laws of the United States. [P. 463.]

* * * * *

In consideration of the foregoing views it must be concluded that the granting of a permit to prospect for oil or a lease consequent thereon, not being an act of alienation of property or granting a divestiture of title is not a “disposal” of the land in any proper sense. [P. 465.]

In *Amerman v. Mackenzie*, 48 L. D. 580 (1922), the Department held that “* * * a permit under the leasing act is not an *entry*, or an appropriation of the land with a view to the acquisition of *title* thereto. * * *”

The Supreme Court of the United States has held that a withdrawal of lands “from settlement and entry, or other form of appropriation” was intended to preserve the withdrawn lands from private appropriation. *Mason v. United States*, 260 U. S. 545, 554-555 (1923).

² 43 CFR 191.6; 19 F. R. 9009.

³ 43 CFR 192.9; 19 F. R. 9012.

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An oil and gas lease is not an appropriation of the leased land in the sense that it sets the land apart from any other use. Such land is subject to other disposition both as to the surface and as to other mineral deposits in the land. 30 U. S. C., 1952 ed., sec. 186; 43 CFR 191.7 (19 F. R. 9009); *Joseph E. McClory et al.*, 50 L. D. 623 (1924); see also the act of August 13, 1954 (Public Law 585, 83d Cong.; 68 Stat. 708).

The limited nature of a mineral lease and the fact that the issuance of mineral leases lies in the discretion of the Secretary led the Department to adopt the view soon after the enactment of the Mineral Leasing Act that reserved areas are subject to leasing but that leases will not be issued where the mineral development of the land might seriously impair or destroy the purpose for which the lands have been dedicated. *Martin Wolfe*, 49 L. D. 625 (1923); *J. D. Mell et al.*, 50 L. D. 308, 310 (1924).

The decision appealed from, while recognizing the rule that in general withdrawn or reserved lands are subject to leasing under the Mineral Leasing Act, held that the language of Executive Order No. 5214 withdrawing the land "for the exclusive use and benefit of the United States Navy Department for naval purposes * * *" placed these lands in a different category.

For several reasons the exact meaning of these words is not clear. In the first place, the withdrawal was made under the authority of the act of June 25, 1910, as amended by the act of August 24, 1912 (43 U. S. C., 1952 ed., secs. 141, 142), which left the land open to mineral location under the mining laws for metalliferous minerals, although the President could have withdrawn the lands from all forms of appropriation, including all mineral location, under his inherent authority. *United States v. Midwest Oil Company*, 236 U. S. 459 (1915); 40 Op. Atty. Gen. 73 (1941). Thus the withdrawal itself left the lands open to the use of others than the Navy Department for other than naval purposes. Furthermore, in a letter dated July 11, 1929, from the Secretary of the Navy to the Secretary of the Interior, which transmitted for the latter's consideration a draft of what became Executive Order No. 5214, it was stated:

It also appears that the Department of the Interior has under consideration an application to lease for fur farming under the authority contained in the Act of July 3, 1926 (44 Stat., 821) a portion of Dolgoi Island. No objection is interposed by the Navy Department to the private leasing of Dolgoi Island for the aforesaid purpose, provided the terms of the lease do not prevent actual naval occupation in case of necessity.

This statement contemplating a lease on part of the land proposed for withdrawal, by the agency which drafted the executive order and

for whose benefit it was issued, indicates the words "exclusive use" are not to be interpreted in their most stringent meaning.

Finally, at the time Executive Order No. 5214 was issued, section 1 of the Mineral Leasing Act itself specifically prohibited the leasing of lands included within military and naval reservations. 41 Stat. 437. Section 1, as amended by the act of August 8, 1946 (30 U. S. C., 1952 ed., sec. 181), omitted the exclusion of lands in military and naval reservations from the list of lands excluded from the operation of the Mineral Leasing Act. Thus, at the time Executive Order No. 5214 was issued it was unnecessary to consider whether mineral leasing should or should not be permitted.

However, in view of the fact that the order itself permitted metalliferous mineral locations under the mining laws and that the Navy Department did not consider a fur farm lease to be barred by the terms of the order it had drafted, I am of the opinion that the words "exclusive use" should not be interpreted as preventing mineral leasing if otherwise permissible. Accordingly, it is concluded that Executive Order No. 5214 did not exclude the withdrawn land from the operation of the Mineral Leasing Act after August 8, 1946, and that the appellants' applications are to be judged by the same standards as are applied to other applications for withdrawn lands which are subject to leasing.

Teuscher's application was filed on December 5, 1945. At that time, as has been stated above, lands withdrawn or reserved for naval purposes were barred from leasing under the provisions of the Mineral Leasing Act by section 1 of that act. An application filed for land not available for leasing at the time it is filed must be rejected. *D. Miller*, 60 I. D. 161 (1948); *cf. Mary E. Brown*, 62 I. D. 107 (1955). The fact that land later becomes available for leasing does not validate an application that was filed at a time when the land was not available for leasing. *Id.* Therefore it was proper to reject Teuscher's application.

The remaining applications were filed after the enactment of the act of August 8, 1946, which omitted the exclusion of lands reserved or withdrawn for military or naval purposes from mineral leasing.

However, even though the lands may be subject to lease under the provisions of the Mineral Leasing Act despite the withdrawal, such leasing is discretionary with the Department.⁴ If the leasing of land

⁴ *United States ex rel. Roughton v. Ickes*, 101 F. 2d 248 (App. D. C., 1938); *Dunn v. Ickes*, 115 F. 2d 36 (App. D. C., 1940), *cert. denied*, 311 U. S. 698 (1940); *United States ex rel. Jordan v. Ickes*, 143 F. 2d 152 (App. D. C., 1943), *cert. denied*, 320 U. S. 801 (1944).

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for oil and gas purposes would interfere with the use of the land for the purpose for which it is reserved, it is proper to reject applications for such leases. *George E. Kohler, Sr., et al.*, A-26412 (January 9, 1953); *Gerald W. Anderson*, A-26297 (February 13, 1952); *Vilas P. Sheldon*, A-25927 (January 16, 1951).

Prior to any action having been taken on these applications, the Navy Department by its letter of February 23, 1951 (*supra*), relinquished its interest in the withdrawn lands and returned them to the jurisdiction of the Department. Consequently it would not now be necessary to follow the usual practice of requesting the Navy, in whose interest the withdrawal was made, to state its views as to whether the issuance of the leases would be inconsistent with and materially interfere with its use of the land. *Cf. Emilio J. Lagomarsino*, A-26588 (January 19, 1953).⁵

Thus these applications were filed at a time when the land applied for was available for leasing and it was improper to reject them solely on the basis of the existence of Executive Order No. 5214.

This conclusion is inconsistent with that reached in *D. Miller*, 60 I. D. 161 (1948), where the Department affirmed the rejection of several applications for oil and gas leases covering lands included within Executive Order No. 5214. It is to be noted Miller's applications, in that case, were filed in 1945 and were subject to rejection, in any event, because the lands applied for were not, at the time of filing, open to leasing under the Mineral Leasing Act. Furthermore, the decision did not consider in detail the extent and scope of the withdrawal. However, insofar as that decision stated that the withdrawal made by Executive Order No. 5214 would prevent the leasing of lands it affected as long as the withdrawal remained in effect, it is overruled.

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 decisions of the Acting Associate Director and of the Associate Director are reversed, except as to Teuscher's application Anchorage 010802, and the cases are remanded for further proceedings consistent with this decision. The Acting Associate Director's decision is affirmed as to Teuscher's application. [See Appendix A on following page.]

EDMUND T. FRITZ, *Deputy Solicitor.*

⁵ The fact that Miller's applications were filed prior to the Navy's letter is immaterial because it was the 1946 amendment, not that letter which made the lands available for leasing. After the 1946 amendment, the land was available for leasing subject to the obligation of the Department to ascertain the Navy's views on the issuance of the leases applied for.

APPENDIX A

The names of the appellants, the serial numbers and dates of filing of their applications, and the numbers of their appeals are as follows:

Appeal No.	Applicant	Application	Date of Filing
A-27090	Noel Teuscher	010802	December 5, 1945
"	D. Miller	C11196	November 12, 1946
"	"	011197†	" " "
"	"	011198†	" " "
"	Herbert S. Fink	023732	April 6, 1953
A-27104	George F. Mumford	023677	April 1, 1953
"	"	023678†	" " "
"	L. E. Linck	023788	April 14, 1953
"	"	023789†	" " "
A-27182	D. Miller	011195	November 12, 1946

†These applications were not listed in the Acting Associate Director's decision of August 30, 1954, although they were clearly listed in the respective applicants' appeals to the Director. The omission was apparently due to the fact that the case files on these applications were not transmitted to the Director with the appeals. This decision covers these applications.

PARTIAL ASSIGNMENT OF OIL AND GAS LEASES IN EXTENDED TERM

Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Extensions

A partial assignment of a lease made during the period of the single 5-year extension provided for in section 17 of the act of August 8, 1946 (60 Stat. 955), and prior to the act of July 29, 1954, is valid.

Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Extensions

A separate lease created by an assignment of part of the acreage in a lease pursuant to the provisions of the act of July 29, 1954 (68 Stat. 585; 30 U. S. C., Supp., sec. 187 (a)), where the lease is in its extended term by reason of any provision of the Mineral Leasing Act, as amended, is not limited to the 2-year extension prior to the production of oil and gas in paying quantities resulting from such assignment if, were it not for the assignment, the original lease would have continued longer without such production.

M-36278

MAY 31, 1955.

TO THE SECRETARY OF THE INTERIOR.

The Superior Oil Company has asked the following questions which are pertinent to leases held by it:

(1) Are partial assignments of leases in their extended term, pursuant to an application for a single 5-year extension under the act of August 8, 1946 and which were made prior to the act of July 29, 1954, valid or invalid?

(2) Is a partial assignment of a lease under section 192.144 (b) of 43 CFR valid for a period of only 2 years, or is the term of the lease segregated by such partial assignment coexistent with the term of the base lease, but for not less than two years?

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The first question involves a construction of section 30 (a) added by the act of August 8, 1946 (60 Stat. 955), in its relation to the 5-year lease extension provision of section 17 of the Mineral Leasing Act, as amended by that act.

Section 30 (a) provides that any oil or gas lease may be assigned or subleased, as to all or part of the acreage included therein subject to approval by the Secretary, who may disapprove only for reasons stated in that section. It also provides that any partial assignment shall segregate the assigned and retained portions "and such segregated leases shall continue in full force and effect for the primary term of the original lease, but for not less than two years after the date of discovery of oil or gas in paying quantities upon any other segregated portion of the lands originally subject to such lease."

Special provision is made for the assignment and extension of parts of the leases where the original lease is in its extended term because of production. The 1946 act also amended section 17 of the Mineral Leasing Act to provide, so far as material here, that the holder of a noncompetitive lease shall be entitled to a 5-year extension of his lease if on the expiration of its primary term the land is not withdrawn nor within the known geological structure of a producing oil and gas field.

Without the above-quoted language and the authority specially granted to assign a lease in its extended term because of production, there would be no doubt that a partial assignment of a lease in its 5-year extended term is valid. Section 30 (a) provides that *any* lease may be assigned in whole or *in part*. Section 17 grants as an absolute right under the conditions stated the right to a 5-year extension. The question then is whether the reference to the primary term of a lease in the quoted extract from section 30 (a) and the specific authority to assign a lease extended under another provision of the act, limit the right to assign part of a lease not in its extended term because of production to the period covered by the primary term ("primary term" as used in the act is the initial 5-year term).

It is an established rule of statutory construction that all material parts of a statute must be considered together. It is also permissible to consider the prior legislation that has been amended and the purposes to be served by the amendment in that connection. Section 30 of the original Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U. S. C. sec. 187), provided that no lease should be assigned or sublet without the consent of the Secretary of the Interior. Section 30 (a) as added August 8, 1946, specifically authorized the assignment

of *any* lease and in terms limited the authority of the Secretary to disapprove such an assignment, to certain specified reasons. These reasons did not include the authority to disapprove an assignment because a lease was in its extended term. Therefore, unless there is something to the contrary in the 1946 act, there is no prohibition against assigning a lease in its 5-year statutory extended term. The above-quoted provision has two purposes: (1) to declare the assigned and retained portions of a lease to be separate leases and (2) to provide for a minimum extension of one or more portions (or leases) if a discovery is made on another portion of the original lease, whether the assigned or the retained portion. The first purpose obviously does not affect the right to assign. The second relates only to the period that any of the separate leases may continue in force. It is clear that any such lease may continue for a minimum of 2 years and that it may continue for the remainder of the primary term even if more than 2 years remain in the primary term.

It can hardly be said that continuance of any portion of the lease after discovery "so long as oil or gas is produced in paying quantities" is prevented by the limitation to the "remainder of the primary term but not less than two years." To say that it does prevent such continuance would be to defeat, as to all leases assigned before discovery, the very purpose of the law, which is to encourage the development of oil and gas. Yet if the language "shall continue in full force and effect for the primary term of the original lease, but for not less than two years" etc., is limited to its literal meaning the lease would not be entitled to *any* extension but would become simply a lease for a term of years. If the language does not have that limited effect it is subject to the construction that its purpose is broader than a literal reading would give to it. It is no more unreasonable to say that a strict construction of the restrictive language would prevent an extension of an assigned portion of a lease "for so long as oil or gas is produced" than to say that it would prevent a lease in its 5-year extended term from continuing for the remainder of that term if that remainder is for more than 2 years after the date of the partial assignment.

The 1946 act also expressly provides that assignments under section 30 (a) may be made of parts of leases that are in their extended term because of production and any undeveloped part shall continue for 2 years after assignment "and so long thereafter as oil or gas is produced in paying quantities." It has been suggested that this express authority to assign negatives the right to assign leases which are in their extended term because of other provisions of the act. It

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is true that Congress on July 29, 1954, saw fit to so amend this provision as to clearly make it applicable to assignments of parts of leases which were in their extended term because of any provision of the act. It is not believed that either the authority in the 1946 act to assign parts of leases extended by production or the 1954 amendment is evidence of any intent not to permit the assignment of leases extended for 5 years under the provisions of section 17 of the act, as amended. A consideration of the law as it stood before its amendment in 1946 shows that at that time a lease that was in its extended term because of production could be extended only so long as oil or gas was being produced in paying quantities or for periods equivalent to the suspension of prospecting, drilling, or production or of operations and production. This means that if an undeveloped portion of a lease that was extended because of production were assigned (the producing part being retained), it would automatically terminate unless prospecting or drilling operations were suspended and if they were, it would terminate immediately upon the resumption of such operations. Thus, it was clearly necessary, in order to permit such partial assignments of undeveloped lands to have practical effect to provide for the necessary extension of such leases.

The 1954 amendment to section 30 (a) had a different purpose than to permit the assignment of leases extended by all other extension provisions of the act than where the lease was in its extended term because of production. Although the 1946 act contained several liberal extension provisions in addition to the ones mentioned above, some were found inadequate in practice. The purpose of the 1954 act was to remove any doubt as to the right to an extension where such a doubt existed and to provide additional extensions where equitable considerations warranted them but the existing law did not provide for them.

In sum, the permission in section 30 (a) to assign and the grant in section 17 of a 5-year extension are so all-inclusive that it is not to be presumed that language susceptible of other meanings and which does not, in terms, forbid assignments was used with that purpose or that it has that effect.

The second question deals with the above-mentioned 1954 amendment which reads:

Assignments under this section may also be made of parts of leases which are in their extended term because of any provision of this Act. The segregated lease of any undeveloped lands shall continue in full force and effect for two years and so long thereafter as oil or gas is produced in paying quantities.

and the regulations thereunder, 43 CFR 192.144 (b).

The specific question is:

Is a partial assignment of a lease under section 192.144 (b) of 43 CFR valid for a period of only two years, or is the term of the lease segregated by such partial assignment, co-existent with the term of the base lease, but for not less than two years?

As was pointed out, the 1946 act provided for a minimum extension of 2 years. When it came to leases in their extended term because of production that minimum also became the maximum. Since the 1946 act expressly provided for the assignment of leases in their extended term because of production and did not similarly provide for the extension of leases in their extended term for other reasons, some doubt arose as to whether assignments could be made of the latter types of leases. There were, at that time, other real or apparent defects in the law. As already indicated, the bill which became the 1954 act considered generally was clearly intended to remedy those defects and to liberalize the law in its operation in favor of lessees of the United States. It contains provisions for the relief of lessees in a variety of situations including, but not limited to, (1) a provision in section 17 to prevent certain leases in their extended term because of production from terminating immediately upon the cessation of production, (2) a provision in the same section to insure a lessee who applies for a 5-year extension of the primary term, a 2-year extension as to any portion of the lease which was not entitled to the 5-year extension because the lands were then within the known geologic structure of a producing oil or gas field and (3) giving an additional 1-year extension to a lease that had been previously extended because of payment of compensatory royalty where such payment was discontinued for any reason. The report of this Department on the proposed legislation which was quoted in full in the reports on the bill is to the effect that the whole purpose of the legislation was to grant additional rights to lessees. These were granted either, because under the construction that had been given to the then existing law, leases had been canceled under conditions that were inequitable to the lessees, or because of reasonable doubt as to the meaning of other provisions, other leases might be placed in jeopardy.

In the circumstances, it is my opinion that the legislation should be liberally construed. It should certainly not be so construed as to effect the repeal of any substantial right granted elsewhere in the act which it amended in the absence of any evidence of such an intent on the part of Congress. So considered, the 2-year period would be the minimum in all cases, but in some cases it would also be the maximum period of extension.

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As was stated in discussing the first question considered in this opinion, the grant of a 5-year extension of the primary term of a lease is an absolute grant upon the conditions stated in the law. If I am correct in the conclusion that a lease so extended could be assigned in part before the enactment of the 1954 amendment, the assigned and retained portions of such a lease would have continued for the remainder of the extended term. Without the 1954 amendment, such an assignment, if made today, would not prevent the segregated leases from continuing until the end of the 5-year extended period "and so long thereafter as oil or gas is produced in paying quantities." For, without that amendment the law in this respect is the same now as it was previously. The amendment does not purport to repeal the 5-year extension clause nor the clause permitting the assignment of *any lease* in whole or *in part*. If it repeals either it does so by implication. Repeals by implication are not favored and if any other construction is reasonably possible it should be adopted. This principle is axiomatic. As has been shown the 1954 act was primarily curative. The provision under consideration is a part of that act and there is nothing in the history of the act that indicates that it was intended to be punitive as it would be if literally construed. For example, the Committee reports show that the intent was to permit of assignments of leases in their extended terms under any provisions of the act and the granting of a 2-year extension could well have been merely incidentally to conform it to other provisions of the act that was being amended. The 2-year extension previously granted to leases in their extended terms because of production was largess and the apparent intent was to grant the same additional right in a number of situations without particular thought of its application to the various types of extensions and certainly with no intent to penalize the assignor or assignees.

It might be argued that Congress imposed the 2-year limitation on the extension solely because it was an additional grant but there is no evidence of any such intent and such a construction would be inconsistent with the tenor of all other provisions of the act. Since a lease which had received a 5-year extension of its primary term could have been split into segregated leases by partial assignment without additional extension prior to the 1954 amendment, it did not require the amendment to insure its continuance for the remainder of the 5-year extension. Unless the amendment took away that right by repealing the substantive law to the extent necessary to do so the right still exists and there is the additional right to invoke the amendment

if there still remains less than 2 years of the 5-year extension on the late of the partial assignment.

In this view of the law I conclude that partial assignments of leases made prior to the act of July 29, 1954, when the leases were in their extended terms pursuant to an application for a single 5-year extension are valid, and that a partial assignment of a lease pursuant to 43 CFR 192.144 (b) does not limit the life of the lease as to the undeveloped portion in the absence of production to 2 years if the original lease up to the date of assignment had a longer period of life.

J. REUEL ARMSTRONG,
Solicitor.

WESLEY BEARSKIN

IA-147

Decided June 6, 1955

Indian Lands: Descent and Distribution: Wills

Where the testamentary capacity of the testatrix is attacked, and the evidence concerning her competency is conflicting, and her competency is supported by the testimony of the scrivener and the two witnesses to the will and the fact that the terms of the will were not unnatural, no sufficient basis exists for disapproval by the Secretary of the Interior in the exercise of his administrative discretion under applicable statutes.

APPEAL FROM THE SUPERINTENDENT OF THE OSAGE INDIAN AGENCY

Wesley Bearskin, deceased, Charity Ware Bearskin Quinton, Mildred Bearskin Branson, and Gladys Bearskin Reppell, by their attorney F. W. Files, and Paul A. Comstock, executor named in the last will and testament of the decedent, have appealed to the Commissioner of Indian Affairs from a decision of the Superintendent of the Osage Indian Agency dated August 12, 1954, disapproving the last will and testament of Rose Logan Bearskin, deceased Osage allottee No. 645.

For administrative reasons the Commissioner of Indian Affairs has referred this appeal directly to the Secretary of the Interior for his action.¹

The testatrix died on August 15, 1953, a resident of Pawhuska, Oklahoma, leaving an estate consisting of Osage headright interests, trust funds in the Treasury of the United States, surplus funds in the custody of the Superintendent, and certain real estate in Osage County,

¹ The regulations (25 CFR 83.14) provide for an appeal from the Superintendent's action to the Commissioner of Indian Affairs, and for a further appeal to the Secretary of the Interior.

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Oklahoma. She left surviving as her sole heirs at law, her husband, a brother, sister, and the daughter of a predeceased brother, each entitled, in the absence of her will, to inherit an interest in the estate.

Under the terms of her will the testatrix devised her estate to her husband, Theodore L. Bearskin, with the exception of 10-dollar bequests to her brother, sister, and five nieces and nephews. The will was prepared by Paul A. Comstock, an attorney of Pawhuska, Oklahoma. Mr. Jesse J. Worton, Jr., attorney for Joan Logan Hinkle, decedent's niece, and Messrs. Tillman & Tillman, attorneys for Oscar and Mary D. Logan, brother and sister of the decedent, contested the approval of the will at the hearing held before the Field Solicitor, Pawhuska, Oklahoma, on October 1 and 2, and November 20, 1953, on the grounds that the testatrix lacked testamentary capacity; that the will was not executed in accordance with the laws of the State of Oklahoma; that the will was the result of undue influence exerted by the husband, and that the decedent could not have intended that her Osage property pass to non-Osage Indians, such as may be the case if her will be approved.²

Evidence tending to support the contestants' charges was introduced, and is to the effect that the testatrix since her marriage to Theodore L. Bearskin did not visit her brother, sister, or other members of her family as heretofore; that she was under guardianship from June 18, 1946 to August 4, 1949; that she did not know the extent or value of her property, and that she was of unsound mind. The testimony also indicates that the testatrix was very close to her husband; that they were seldom seen apart and traveled together most of the time. The evidence fails to prove that any actual or attempted influence was exerted on the testatrix with respect to the making of the will or that it was not her free act and deed. Undue influence necessary to invalidate a will must operate to the extent of substituting the will of another for that of the testatrix. *In re Cook's Estate*, 175 Pac. 507 (Okla., 1918). Decedent's husband was present in their home when the will was executed and may have been in a position to exert influence on the testatrix, but convincing proof that he actually did is lacking.

In further support of the lack of testamentary capacity of the testatrix, opinion evidence was offered by the testatrix's brother, sister, niece, and other witnesses, that the testatrix drank and seemed to care only for the company of her husband. The value and weight to be

² The decedent and her husband were murdered on the morning of August 15, 1953, their bodies being found on the Okesa Road about 7 or 8 miles east and north of Pawhuska, Oklahoma. The question as to whether the decedent died first or survived her husband is not an issue in these proceedings.

accorded opinion evidence of a layman is governed by his preceding testimony on which that opinion is based. In this case the antecedent testimony generally covered matters previously referred to which alone would be insufficient to establish testamentary incapacity.

The conclusion of such witnesses that the testatrix lacked mental capacity to execute a will is not convincing. The testimony of the scrivener, and the two witnesses to her will, is clear and positive that the testatrix was of sound mind and disposing memory, and is sufficient to overcome the opinion testimony of the laymen in this case.

All that is required with respect to testamentary capacity in the State of Oklahoma is that the testatrix know the value and the extent of her property, and the nature and objects of her bounty, and that she knows and understands the nature of her acts. *In re Fletcher's Estate*, 269 P. 2d 349 (Okla., 1954). Ample evidence is presented that the testatrix knew the value and extent of her property, and the nature and objects of her bounty.

The Superintendent disapproved the decedent's will on August 12, 1954, for the following reasons:

* * * for the reason that under certain contingencies, if established in probate court, it would result in giving practically the entire estate to heirs of Wesley Bearskin, deceased, who was the father of Theodore Bearskin, the husband of the testatrix, a result which I considered could not have been intended by the testatrix, and I believe this a proper case for the exercise of the discretion of the Secretary of the Interior to prevent a disposition of an Osage estate contrary to all probable intention and desire of the testatrix.

In the light of the whole record it is determined that Rose Logan Bearskin, on June 20, 1951, possessed testamentary capacity to make the will; that its execution complied with the laws of the State of Oklahoma and that she was free from undue influence, fraud, or coercion. The fact alone that the testatrix did not change her will from the time of its execution to her death, clearly indicates that she was satisfied with its provisions. The facts and circumstances surrounding the death of the testatrix and of her husband, and the devolution of the title to her property under the will are not sufficient to warrant disapproval of the will by the Secretary of the Interior in the exercise of his administrative discretion under the applicable statutes.

Accordingly, the action of the Superintendent of the Osage Indian Agency dated August 12, 1954, disapproving the last will and testament of the decedent, dated June 20, 1951, is hereby reversed and the will is approved.

FRED G. AANDAHL,
Acting Secretary of the Interior.

APPEAL OF JACK WILLSON

IBCA-7

*Decided June 14, 1955***Contracts: Specifications**

When, under specifications prescribing in detail the manner in which plaster work was to be performed, and expressly requiring plaster to be three-fourths of an inch thick, the contractor was required to apply plaster exceeding twice the specified thickness in a considerable area, and to do an excessive amount of shimming, the contractor was entitled to an equitable adjustment for the extra work.

Contracts: Protests

A contracting officer waives the requirement of timely protest by considering a claim on the merits.

Contracts: Specifications

When ambiguity of a phrase in the specifications was due to its position in the sentence and such ambiguity was clarified by other provisions in the same paragraph and by information received by the contractor from the contracting officer prior to the submission of the bid, a claim for extra work based on the phrase should be rejected.

BOARD OF CONTRACT APPEALS

Jack Willson, of Downey, California, filed an appeal dated October 16, 1953, from the findings of fact and decision of the contracting officer, dated September 4, 1953, but forwarded to the contractor by registered mail on September 17, 1953. The decision denied three claims totaling \$4,502.63, arising out of construction work under Contract No. 14-06-D-59. Each of these claims will be separately considered.

The contract (U. S. Standard Form No. 23, Revised April 3, 1942) provided for the completion of concrete, architectural finishes, and plumbing for the Davis Dam and Power Plant under Schedule No. 1 of Specifications No. DC-3723, Davis Dam Project, Arizona-Nevada, Bureau of Reclamation.

CLAIM No. 1

This claim is for additional compensation in the amount of \$3,763.28 for extra plaster work including shimming to align plaster casing properly. This amount represents 85% of \$4,427.39, which is what the contractor's subcontractor requested as extra compensation for this work.

The plaster work is covered by Item No. 23 of Schedule No. 1 which calls for applying 1,700 square yards of 3-coat plaster at \$10.22 per square yard. The methods and materials to be employed in

plastering are prescribed in detail in Paragraph 57 of the specifications, and among the provisions in this paragraph are requirements that metal laths shall be installed "so as to provide a space of approximately $\frac{1}{8}$ of an inch between the metal lath and the face of the concrete for a plaster key," and that the finish coat of plaster shall be applied so that the finished surface will be true to line. Paragraph 57 of the specifications also contains a provision, as follows:

Except where otherwise shown on the drawings, the plaster shall be $\frac{3}{4}$ of an inch thick.

The contractor alleges that the work which he was required to perform was not covered by the specifications, and that the specifications themselves were misleading. He points out that, although Drawing 351-D-1785, which includes a typical detail of plaster at expansion joint, shows the metal plaster casing tight against the embedded metal tubing, it was found in doing the work that the embedded metal tubing at the expansion joints varied from one end to the other and on each side of the expansion joint as much as one inch. The result was, he contends, that in order to make a reasonable plane of the finished plaster surface it was necessary to shim out the plaster trim to an excessive extent, and since it could not be attached directly to the tubing, every piece had to be aligned individually and then all the pieces on one wall had to be aligned. In addition to the extra expense of applying the casing and bead, the contractor complains of the additional thickness of plaster necessitated by variations in the concrete, particularly in the governor gallery, where the plaster had to be 2 inches thick to correct a misalignment in the governor gallery walls.

In his decision of September 4, 1953, the contracting officer made the following finding:

Records in the project office show that some of the plaster actually placed was less than $\frac{3}{4}$ of an inch thick, while approximately 100 square yards of the plaster exceeded $\frac{3}{4}$ of an inch in thickness. This amount that exceeded the specified thickness was less than 6 percent of the total area of 1,738 square yards placed. The records also show that in the area where the thickness of plaster was greater than $\frac{3}{4}$ inch, the thickness reached a maximum of $2\frac{1}{2}$ inches in one small area on the downstream wall of the governor gallery at the expansion joint between the "8" and "9" lines. The only other place where the plaster reached 2 inches in thickness was the perimeter of the fire hose and service cabinet on the downstream wall of the governor gallery in Unit 5. Except for these two locations, the maximum thickness of plaster was $1\frac{1}{2}$ inches, feathering out to $\frac{3}{4}$ inch.

Although the contracting officer held that the concrete walls of the governor gallery were not misaligned as claimed by the contractor, he conceded that there were "isolated locations where portions of the

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walls departed from a true line due to displacement of the forms during placement of the concrete walls," and that this was "the reason for the extra thickness of plaster." However, he concluded that the area affected as well as the displacement were "normal for work of this nature." (Findings, par. 6.) Similarly, while the contracting officer conceded that the rough concrete walls were uneven, he pointed out that the walls were fully exposed to view prior to bidding, and concluded that the contractor should have foreseen that "in order to provide a true finished surface, variations from the $\frac{3}{4}$ -inch plaster thickness noted in the specifications were certain to occur," (Findings, par. 7) and that "a certain amount of shimming should have been expected as this is normally required to firmly attach straight and true casings and other trim to the uneven surfaces of formed concrete." (Findings, par. 8.)

It is significant that nowhere in his findings does the contracting officer deny the contention of the contractor that Drawing No. 351-D-1785 shows the metal plaster casings to be placed tight against the embedded metal tubing and the tubing to be evenly aligned. Indeed, it is apparent that the contracting officer's findings support in general the contentions of the contractor but seek to minimize them by declaring the extra work to be not unusual, or unexpected, or by avoiding the use of such damaging adjectives as misaligned. But actually the difference between the work called for by the specifications and the work which the contractor was required to perform is so substantial that the specifications must be regarded as defective and misleading. While even the contractor concedes that a certain amount of shimming is a trade practice, he could not comply with the requirements of the specifications. Under a specification which definitely stated that the plaster was to be three-fourths of an inch thick, rather than *approximately* three-fourths of an inch thick, the contractor could not be required to apply plaster which in considerable areas exceeded twice that thickness. No trade practice could justify such a marked departure from the specifications.

It is apparent that the cost of the plastering, which was no less than \$10.22 a square yard, was not negligible, and that the cost of applying plaster of extra thickness must entail considerable additional expense for the contractor. It is not a valid excuse for the contracting officer to argue that the concrete walls were exposed, and hence that the contractor must have been aware of actual conditions. The contractor was governed by the terms of the specifications, rather than by the condition of the walls. These conditions were as well known, moreover, to the contracting officer as to the contractor, and he should

have prepared specifications which reflected the true requirements of the job.

Although the contracting officer considered the claim of the contractor on the merits, he also attempted to buttress his position by making a finding that the contractor failed to file a timely protest against the extra work as required by Paragraph 12 of the specifications. It has been held, however, that a contracting officer waives the requirement of timely protest by considering a claim on the merits,¹ and the Board must hold that a contracting officer cannot both do this and invoke the procedural requirement. The fact that he has considered the claim on the merits indicates that the information relevant to the adjudication of the claim is available to him, and the justification for the procedural requirement thus fails.

Moreover, the record shows that the contractor did protest to the Acting Construction Engineer on the project, who considered and rejected the claim. The contractor explains that he wrote to the Construction Engineer rather than to the contracting officer because the former chided him with bothering the latter too much with his complaints. It may be that the construction engineer did not intend this monition to extend to such formal requirements as protests but, if so, he did not make his intention clear, and in the circumstances the Board must hold that the protest to the construction engineer was sufficient. In any event, it was the duty of the construction engineer, once he had received the protest, to forward it to the contracting officer rather than to undertake to decide it himself. Under the circumstances presented by this appeal, which include a showing that the contracting officer had filed a protest with the construction engineer, his rights were protected.

The decision of the contracting officer with respect to Claim No. 1 is reversed. However, the evidence before the Board is insufficient to enable it to determine whether the amount claimed by the contractor should be allowed in full. The claim is, therefore, remanded to the contracting officer with the direction to enter an appropriate change order covering the extra work and material for which the contractor is entitled to additional compensation. If the change order is not satisfactory to the contractor, the Board will entertain a further appeal. In such event, a record adequate to permit the making of a determination should be submitted.

¹ *Grier-Lowrance Construction Company, Inc. v. United States*, 98 Ct. Cl. 434, 461-462 (1943); *Callahan Construction Co. v. United States*, 91 Ct. Cl. 538, 610-611 (1940); *Charles Thompson et al. v. United States*, 91 Ct. Cl. 166, 179 (1940). Also see *Branch Banking & Trust Co., et al. v. United States*, 120 Ct. Cl. 72, 87-91 (1951); cf. *McGlone v. United States*, 96 Ct. Cl. 507, 540 (1942).

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CLAIM No. 2

Under Paragraph 25 (a) of the specifications the Government was required to furnish to the contractor various materials, including cement, pozzolan, metal lath, and pipe, which were to become part of the completed construction work. Paragraph 25 (b) of the specifications contained the provision:

The contractor will be charged for any materials lost or damaged beyond repair after delivery, or for any materials not incorporated in the work and not returned, the same amounts that the material cost the Government at the point of delivery to the contractor or amounts equal to replacement costs to the Government at the point of delivery to the contractor, whichever is higher. * * * The above amounts will include a reasonable charge for Government warehousing and handling.

Pursuant to these provisions the contracting officer found that the following materials, totaling in value \$260.51 furnished to the contractor had not been installed but had not been returned to the Government:

Description	Quantity	Unit	Amount
Cement, Portland.....	174¾	Sack.....	\$217.70
Cement, Pozzolan.....	781	Lb.....	13.47
Lath, Metal bldg. 27" x 96".....	13¾	Sheet.....	5.40
Pipe, Blk., 1".....		Ft.....	.26
Subtotal.....			236.83
Plus 10% Warehouse handling charge.....			23.68
Total.....			\$260.51

So far as the cement is concerned, the contractor attacks the count on the ground that the tally board which was used for keeping track of the batches of cement was inefficiently operated by a Mexican laborer who could barely speak English, and that insofar as the count depended on keeping track of the empty cement bags, many of the bags were stuffed into drums with mortar, and mixing water poured on them. The contracting officer now concedes that this happened to some of the empty cement bags but insists that this did not affect the accuracy of the count, since the sack count was checked against the tally board, and the tally board count was further checked against a wheelbarrow count. As for the Mexican laborer, the contracting officer avers that he was born in the United States and educated in American schools, and that the contractor is in error in thinking he could not speak English. The contracting officer also points out that the contractor is under the misapprehension that, since he was charged monthly for washed cement and pozzolan, the Government may not make any further charges. However, the present charges are for materials neither used in the work nor returned to the Government by the contractor.

The contractor contends that the engineers in the office of the Bureau of Reclamation could not possibly have determined what percentage of a sheet of lath was required for laps but the contracting officer points out that the metal lath was measured in place by Government representatives, so that they were able to compute precisely what allowance should be made for waste. The contractor's only objection to the charge for the piece of pipe is that it seemed "a very incidental matter in comparison to the size of this contract," but this is not sufficient as an allegation of error.

It must be concluded that the contractor has not shown that any of the charges were improperly made under Paragraph 25 of the specifications.

CLAIM No. 3

This claim is for additional compensation in the amount of \$478.84 for installing chromium plated pipe which, the contractor contends, he was not required to install under the specifications and drawings. Paragraph 63 of the specifications contained a provision that "chromium-plated pipe, complete with chromium-plated pipe fittings, escutcheons at floors and walls, valves and accessories, shall be installed in all exposed supply and waste lines between the plumbing fixtures and the existing piping where shown on Drawings Nos. 64 (351-D-1786) and 65 (351-D-1787)." This same paragraph also contained provisions for the testing of all pipe lines and plumbing fixtures, and for payment at the unit price for installing chromium-plated pipe.

The contractor contends that there was no distinction made on the drawings between existing pipe and pipe to be installed. He argues, therefore, that he was entitled to assume that all pipe shown on the drawings was existing pipe, or pipe which would be installed by someone else, and to base his estimate on the cost only of installing the fixtures and all piping and accessories between the fixture and the pipe where shown on the drawings.

The contracting officer has found, however, that the contractor was required to install all chromium-plated pipe. He has construed the phrase "where shown on drawings" not as designating existing piping but as designating the locations where chromium-plated piping was to be installed. While this phrase in itself is, perhaps, ambiguous, because of its position in the sentence, it must be read in the light of the other provisions in the same paragraph, and of the drawings themselves. As the contracting officer has pointed out, if, as the contractor contends, all piping shown on the drawings were already in place, there would have been no valves or escutcheons to be installed

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by him, and provision would hardly have been made for the testing of an incomplete plumbing system. Furthermore, the contracting officer has found that the contractor inspected the proposed work prior to submitting his bid at a time when none of the chromium-plated pipe was in place, and that this condition was pointed out to him at the same time that he was advised that he would be expected to install all the chromium-plated pipe.

Under all these circumstances the assumptions made by the contractor appear to have been unreasonable. Indeed, the contractor himself characterizes this claim as "controversial." The contracting officer did not err in rejecting this claim.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the decision of the contracting officer dated September 4, 1953, is affirmed with respect to Claims Nos. 2 and 3, and reversed with respect to Claim No. 1. The case is remanded to the contracting officer, who is directed to proceed in accordance with the instructions contained in this decision.

THEODORE H. HAAS, *Chairman.*

THOMAS C. BATCHELOR, *Member.*

WILLIAM SEAGLE, *Member.*

EUGENE J. BERNARDINI
ALBERT CHESTER TRAVIS

A-27093

Decided June 20, 1955

Oil and Gas Leases: Applications—Administrative Practice

Where three or more oil and gas lease offers wholly or partially covering the same lands are filed simultaneously, necessitating a public drawing to determine the priority of preference, fraud on the part of one or more of the offerors, or collusion on the part of two or more of the offerors, aimed at unfairly enhancing the mathematical probabilities of success in the drawing for those offerors, will result in the total rejection of the offers involved in the fraud or collusion.

Oil and Gas Leases: Applications—Administrative Practice

Where several oil and gas lease offers wholly or partially covering the same lands are filed simultaneously, necessitating a public drawing to determine the priority of preference, a partial duplication of land in two offers

by the same offeror will not result in the total rejection of either offer if there is no evidence that the duplication was the result of a deliberate effort on the part of that offeror to enhance the mathematical probabilities of his success in the drawing.

Oil and Gas Leases: Applications

The departmental regulation establishing a minimum acreage requirement of 640 acres for each oil and gas lease offer has reference to land which is available for oil and gas leasing at the time of the offer; therefore, such an offer, if otherwise valid, may be accepted for an area of less than 640 acres so long as it embraced, at the moment of filing, at least 640 acres of available land.

Oil and Gas Leases: Applications

Quaere: Whether, where there is a partial duplication of land in two oil and gas lease offers filed simultaneously by the same individual, such offers being among several which others had likewise filed simultaneously, it is proper, in the absence of any evidence of fraud or bad faith, to eliminate the duplicated parcel from both of the aforesaid two offers prior to the holding of a public drawing to determine the priority of preference among all the simultaneously filed offers.

Rules of Practice: Appeals: Failure to Appeal—Administrative Practice

Where a decision of a land office manager contains a questionable ruling on a particular legal issue, but the party adversely affected, though apprised of his remedy to appeal, fails to do so, there is no need, in the appeal to the Secretary of a subsequent, collateral case, to decide such legal issue if it is not necessarily involved in a proper disposition of the appeal at hand. Moreover, in such circumstances the importance of administrative finality cannot be disregarded.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Eugene J. Bernardini has appealed to the Secretary of the Interior from a decision dated August 23, 1954, by the Acting Director of the Bureau of Land Management affirming a decision dated December 17, 1953, by the manager of the land office at Santa Fe, New Mexico, which dismissed the appellant's protest against the issuance of oil and gas lease New Mexico 012398 to Albert Chester Travis.

Messrs. Bernardini and Travis, and others not directly concerned with this appeal, filed simultaneous oil and gas lease offers on July 1, 1953. The Bernardini and Travis offers included the following:

Eugene J. Bernardini, 012389 for all sec. 4, T. 24 S., R. 29 E., N. M. P. M., and other lands.

Albert Chester Travis, 012398 for all the aforesaid sec. 4, comprising 638.94 acres.

Albert Chester Travis, 012408 for the S $\frac{1}{2}$ NE $\frac{1}{4}$ and the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of the aforesaid sec. 4 and other lands.

Because the foregoing two offers filed by Mr. Travis were duplicative as to the S $\frac{1}{2}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 4, the manager by a

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decision dated August 28, 1953, which cited as authority the decision of *Edward A. Kelly*, A-22856 (August 26, 1941), eliminated this 120-acre parcel from both of Mr. Travis' offers. In this decision Mr. Travis was informed of his right of appeal. He was advised in addition that in the event of his failure to appeal within the prescribed time, the decision would become final and all of the simultaneously filed offers referred to above (together with Mr. Travis' offers NM 012398 and NM 012408 as to the lands remaining therein) would then be entered in a public drawing to determine the priority of filing in accordance with the applicable regulations. No such appeal having been filed, the public drawing was held on November 10, 1953. Mr. Travis' offer NM 012398 was drawn as number one, and Mr. Bernardini's offer NM 012389 as number two.

Mr. Bernardini's appeal can be reduced to two general propositions. First, he contends that the manager should have rejected all of Mr. Travis' offers in their entirety and not merely eliminated the duplicated parcel from his two simultaneously filed offers embracing that parcel. In effect, the argument is that the manager was required by statute, regulation, or decision to reject all of Mr. Travis' offers because of the duplication. However, in none of these possible sources of authority is such a requirement to be found. The complete rejection of certain simultaneously filed offers in the *Kelly* decision, *supra*, and *Clifton Carpenter*, A-22856 (January 29, 1941), was based on convincing evidence of collusion among the offerors concerned which was aimed at defeating the purpose of the public drawing to determine the priority of preference among all the simultaneously filing offerors. The record of the instant case contains no evidence to show that Mr. Travis' partially duplicative offers were filed in a deliberate effort to enhance the mathematical probabilities of his success in the drawing. Without the presence of the critical element of bad faith on Mr. Travis' part, there can be no basis for the application of the policy of a complete rejection of all offers.¹

¹ This policy is discussed in *Annie L. Hill et al. v. E. A. Culbertson*, A-26150—A-26157 (August 13, 1951), which is related in situation to the *Kelly* and *Carpenter* decisions, *supra*. *Hill v. Culbertson* quotes with approval from the *Carpenter* decision:

" * * * the Department will not give its approval to a practice which even tends to deprive any claimant of the right to fair and impartial treatment in matters over which it has control, and fair minds will agree that the protestant in this case was deprived of his right of equal opportunity to be the successful applicant for lease."

and then adds:

"Thus, it has long been the policy of the Department, reflected in formal rulings, that each applicant should have an equal chance with every other applicant in the case of simultaneous applications for a noncompetitive oil and gas lease.

* * * * *
 "Indeed, if the situation had been called at an appropriate time to the attention of the official in charge of the drawing, and if, under an extension of the doctrine

The appellant's second proposition is that in any event Mr. Travis' winning offer should have been excluded from the drawing, because, as reduced by virtue of the manager's elimination of the duplicated parcel, the area which the offer then embraced was smaller than the 640-acre minimum referred to in 43 CFR 192.42 (d) (19 F. R. 9276), the pertinent part of which provides:

* * * Each offer must be for an area of not more than 2,560 acres except where the rule of approximation applies, and may not be for less than 640 acres except in any one of the following instances: * * *

In considering this argument it will be assumed for the sake of discussion that the manager's action in eliminating the duplicated parcel from Mr. Travis' two simultaneously filed offers was correct. The appellant asserts that the winning offer, after being reduced by the manager to approximately 520 acres, could not meet the requirements of the quoted regulation. In other words, he contends that apart from certain exceptions in the regulation, which are not relevant here, an offer for an oil and gas lease is not eligible for acceptance when, even though at the time of filing it embraced 640 acres or more of land then available for oil and gas lease, some intervening action has rendered so much of the land unavailable for oil and gas lease as to leave a remaining area smaller than 640 acres. If this were not so, the appellant urges, it would be possible for a person to lease an isolated 40-acre tract in circumvention of the regulation by the simple ruse of including the 40 acres as part of a 640-acre tract of which 600 acres were already under lease or were otherwise not available. Such a practice would undeniably contravene the aforementioned regulation, but the appellant's illustration is sound only when it refers to lands covered by an offer to lease which at the time of the filing of the offer were not available for oil and gas leasing. A wholly different situation obtains where, after the filing of such an offer, certain land embraced in the offer becomes unavailable for leasing—because of a withdrawal, for instance—with the result that the land originally included within the offer is reduced to an area smaller than 640 acres.

The regulation referred to above was issued in 1952 to curtail the practice, in which a number of companies had been engaging, of advertising that through their services investors would be able to obtain oil and gas leases for small parcels of land, usually 40 acres in size. The advertisements were particularly appealing because the amount of money involved in connection with a 40-acre parcel as a rule would not

in the *Carpenter* and *Kelly* decisions previously cited, he had rejected the * * * simultaneous filings or had declined to issue a lease to Mr. Culbertson after the drawing, it may be doubted whether such action would have been reversed on administrative or judicial review. * * *

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be extremely large: \$30 for the filing fee and first annual rental, plus, perhaps a \$70 fee to the company.²

That an oil and gas lease offer, apart from the exceptions in the regulation referred to above, and if otherwise valid, may be *accepted* for an area covering less than 640 acres so long as it embraced at least 640 acres of land available for oil and gas lease at the time of its filing is an interpretation both reasonable and fully consistent with the language and purpose of the regulation. To require that an oil and gas lease offer for 640 acres of available land be rejected merely because after its filing a portion of the land involved should be withdrawn or otherwise rendered not subject to lease would be to impute a new and unintended purpose to the regulation.

There is no question that at the time of the filing of Mr. Travis' offers, all the land in sec. 4 was available for oil and gas leasing. The appellant himself concedes this. It follows, then, that when the winning offer was filed, it in fact embraced sufficient land to bring it within the minimum permissible acreage under 43 CFR 192.42 (d), *supra*. As has been indicated above, the point of time in the existence of the offer which the regulation impliedly regards as critical and determinative is the very inception of the offer, in other words, the moment of its filing. Thus, inclusion in the offer at that time of a permissible amount of available acreage satisfies the regulation.

The Acting Director has expressed doubt as to the validity of the principle, assumed for the sake of argument earlier in this decision, that it was proper for the manager to have excluded the duplicated parcel from both of Mr. Travis' offers rather than from merely one of them. (The latter would have been the manager's only alternative, since, as has been shown, it would have been improper to have rejected one or more of Mr. Travis' duplicative offers *in toto*.) However, this issue need not be decided at this time. In the first place, it is not necessarily involved in a proper disposition of the appeal. Its resolution could in no event improve the appellant's situation. For, either Mr. Travis would be permitted to lease the entirety of sec. 4, the land originally encompassed by his winning offer; or he would be permitted to remain *in statu quo*. Furthermore, Mr. Travis, as has been said, failed to exercise his right to appeal on this issue from the manager's decision of 1953. The importance of administrative finality as a fac-

² The background of the regulation is detailed in a memorandum from the Director, Bureau of Land Management, to the Secretary of the Interior, dated June 12, 1952, which transmitted the proposed amendment to the regulation for the Secretary's approval. The memorandum discusses how the amended regulation would discourage operations of the advertising companies.

tor in dealing with circumstances of this nature cannot be disregarded.³

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 affirmed.

J. RUEEL ARMSTRONG,
Solicitor.

JAMES SHELTON

A-27116

Decided June 20, 1955

Oil and Gas Leases: Termination

Where an oil and gas lease was issued for a period of 10 years and so long thereafter as oil or gas is produced in paying quantities and production from the lease was obtained during the primary term but such production ceased prior to the expiration date of the primary term and was later resumed for a 1-month period commencing some time after such expiration date, the lease is deemed to have expired by operation of law at the end of the primary term.

Oil and Gas Leases: Extensions

The 1954 amendment to the Mineral Leasing Act with respect to the extension of leases capable of producing on which production has ceased does not apply to a lease on which production had ceased over 3 years prior to the amendment.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

James Shelton has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated October 19, 1954, which declared oil and gas lease Great Falls 083722 to have terminated by operation of law on July 10, 1951, and directed P. G. Montgomery, his assignee, to pay the sum of \$131.53 as unpaid balance under the lease.¹

The lease was issued on March 11, 1941, "for a period of 10 years, and so long thereafter as oil or gas is produced in paying quantities." The lease originally covered the SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 7, and the E $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 8, T. 35 N., R. 2 W., P. M., containing approximately 180 acres within the Kevin-Sunburst field,

³ Cf. *Charles D. Edmonson, Maner Graham, Virgil Peterson et al.*, 61 I. D. 355 (1954).

¹ P. G. Montgomery has not appealed from the Director's decision of October 19, 1954.

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Montana.² On June 29, 1951, an assignment dated June 13, 1951, of all of the lease, except the E $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 8, from Mr. Shelton to Mr. Montgomery was filed. The assignment was approved by the Bureau of Land Management on January 29, 1952, the assignment being effective as of July 1, 1951.

In a letter dated January 7, 1954, Mr. Shelton stated that Mr. Montgomery had defaulted in certain terms of the assignment and that he had obtained a court decree on December 18, 1953, quieting title to the lease in his name. He inquired as to how he could secure record title to the lease in his name. On January 26, 1954, he was advised to file a copy of the decree or a reassignment. Mr. Shelton filed copies of the decree.

However, before the Bureau of Land Management took further action in the matter, the Bureau received a request from the Geological Survey to determine the status of the lease. The request was based on a report from the Regional Oil and Gas Supervisor dated March 19, 1954, which stated that a "well [on the lease] produced 29 days in June 1951 (87.60 barrels) and has not been produced since. No suspension of operations and production or production alone was requested or granted. Accordingly, the lease may be regarded as having expired on July 10, 1951."

The Director's decision of October 19, 1954, followed. In his appeal the appellant does not deny that production from the well on his lease was 87.60 barrels in June 1951, or that all production ceased after June. He asserts that:

As we construe the law, an oil and gas lease remains in effect after discovery so long as oil and gas can be produced commercially, but it does not say that when production fails it terminates eo instante, or within ten days, or within thirty days, or any prescribed time, nor, in our opinion, does the law or the regulations say that the Bureau of Land Management will act without notice to the lessee (see 43 CFR 192.161—Circular 1840). In any event, it is and should be the practice of the Department of the Interior to give notice and opportunity to answer or appeal in all cases, except where a lease terminates by operation of law, on a fixed date; * * *

Since the appeal was filed, an additional report has been received from the Geological Survey which varies the issue involved in this case. The Survey report, which is dated June 6, 1955, shows that al-

² Oil and gas lease Great Falls 083722-A was created from an assignment of the E $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 8, T. 35 N., R. 2 W., P. M., by Mr. Shelton to the Mills Oil Company dated October 10, 1950, and approved effective as of November 1, 1950. The Mills Company has not filed any appeal from the Director's decision of October 19, 1954. The Director's decision also stated that a field report disclosed that no operations had been conducted on lease 083722-A of the Mills Oil Company and that this lease is considered to have terminated as of March 10, 1951.

though the single well on the lease produced 29 days in June 1951, there had been no production from the lease during the period of February to May 1951, inclusive. The 10-year primary term of the appellant's lease expired on March 10, 1951, during the 4-month period when there was no production from the lease. The Survey report also shows that production was originally obtained from the leasehold in the latter part of 1941 or in 1942 and that intermittent production continued thereafter through January 1951. The one well on the lease was plugged in September-October 1954.

At the time the appellant's lease was issued, section 17 of the Mineral Leasing Act, as amended by the act of August 21, 1935 (49 Stat. 676), provided that leases of the type issued to him should be "for a period of ten years and so long thereafter as oil or gas is produced in paying quantities." This language was incorporated in appellant's lease.

Section 17 was amended by the act of August 8, 1946, to provide that all leases shall be "for a primary term of five years and shall continue so long thereafter as oil or gas is produced in paying quantities" (30 U. S. C., 1952 ed., sec. 226). It will be noted that except for the change in the fixed term of the lease, the amended language is almost identical with the previous language. However, the following paragraph was added to section 17:

Any lease issued under this Act upon which there is production during or after the primary term shall not terminate when such production ceases if diligent drilling operations are in progress on the land under lease during such period of nonproduction.

It is fundamental that where an oil and gas lease is issued for a definite stated period of time, as for instance 10 years in this case, at the end of that period the lease will expire of its own accord unless some provision of the lease provides some condition upon which the lease will be extended. The condition most usually made is that the lease will be extended "for so long thereafter as oil and gas is produced in paying quantities" or words to that effect. Obviously, the "evident and only purposes of the 'thereafter' clause of an oil and gas lease are, first, to prescribe conditions of fact which must exist within or at the end of the exploratory period upon which the lease may be continued beyond the definite term; and, second, to prescribe conditions which must exist after the end of the exploratory period, upon which the lease may continue indefinitely."³ Therefore, unless the conditions in the lease providing a basis upon which the lease can be extended are met, it obviously must expire at the end of the primary term.

³ 2 Summers, Oil and Gas, Perm. Ed., sec. 293.

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On March 10, 1951, when the primary term of the appellant's lease expired, there were two alternative conditions upon which the term of his lease could have been extended: (1) that the lease be producing oil or gas in paying quantities, or (2) that diligent drilling operations be in progress on the leasehold during any period of nonproduction.⁴

The appellant does not claim that the well on his lease was producing oil or gas in paying quantities on the expiration date of the primary term of the lease, or that diligent drilling operations were in progress on that date. Under the circumstances, I cannot find any authority whereby the expired term of this lease may be revived. The fact that on the expiration date of the primary term of the lease there was on the leasehold a well which had produced in the past and which was apparently still capable of producing would not serve to extend the lease. The Department has consistently held that a lease must be actually producing at the end of its primary term if it is to go into its extended term. *H. K. Riddle*, 62 I. D. 81 (1955); Solicitor's opinion, 60 I. D. 260 (1948).

As for the appellant's contention that the Bureau of Land Management should not have acted without notice to him, this contention is based on the fact that his lease had been declared terminated as of July 10, 1951, a date subsequent to the expiration of the primary term of his lease. Although the appellant has failed to show any basis for this contention, the facts as now developed require the conclusion that his lease expired at the end of its primary term. The appellant concedes that no notice is required where a lease terminates by operation of law on a fixed date.

In support of the appellant's contention that the Director erred in not giving him notice of the termination of the lease, he also cites "Public Law 555-83d Congress (68 Stat. 583)." This is the act of July 29, 1954, and the appellant undoubtedly refers to the provision added by it to section 17 of the Mineral Leasing Act which provides that:

No lease issued under the provisions of this Act covering lands on which there is a well capable of producing oil or gas in paying quantities shall expire because the lessee fails to produce the same, unless the lessee is allowed a reasonable time, but not less than sixty days after notice by registered mail, within which to place such well on a producing status. * * *

There is nothing in the 1954 act to indicate that it was intended to apply retroactively to revive a lease which had expired over 3 years earlier, so the appellant cannot avail himself of that act.

⁴ Other extension provisions of the Mineral Leasing Act, as amended, were inapplicable because the circumstances giving rise to such extensions were not present in this case. See, for example, 30 U. S. C., 1952 ed., secs. 226e (4th par.), and 209.

Appellant places much emphasis on the fact that the Bureau of Land Management erred in not informing him of the termination of his lease before October 19, 1954. Although it is regrettable that the Bureau did not discover that the lease had terminated, this fact alone cannot assist the appellant. It is a fundamental fact that a lessee of Federal land is charged with the knowledge of the contents of his lease. Indeed, the appellant was in a much better position than the Bureau to know when production had ceased on his lease. I fail to see how the fact that the Bureau did not act to close its files on this lease has deprived the lessee of any right. Moreover, although it could not serve to give the appellant any rights not authorized by law, there is no showing that the appellant has undergone any substantial expense and work in reliance upon the assumed continued existence of his lease.

In view of the facts now established, it must be held that the appellant's lease expired by operation of law on March 10, 1951. As a consequence the assignment of the lease dated June 13, 1951, to Mr. Montgomery was a nullity and the appellant is liable for any unpaid balance on the lease. The fact that the appellant was erroneously permitted to produce from the lease during June 1951, did not have the effect of reviving the lease and extending its term beyond March 10, 1951.

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 modified accordingly and the case is remanded for further action in the light of this decision.

J. REUEL ARMSTRONG,
Solicitor.

ARNE HOEM
DELIA PLAGGEMEYER

A-27081

Decided June 23, 1955

Public Sales: Award of Lands

An award of land on public sale between two preference right claimants will be reversed where all the land has been included in a grazing lease issued to one claimant and equitable considerations based upon desirable land use, land pattern, fences, and other factors providing for proper utilization of the land require that all of the land be awarded to that claimant.

June 23, 1955

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Pursuant to the application of Arne Hoem, on October 22, 1953, the following lands were offered at public sale under the provisions of section 2455, Revised Statutes, as amended (43 U. S. C., 1952 ed., sec. 1171) :

Unit 1—T. 3 N., R. 14 E., P. M., Montana
 Sec. 10, Lots 1 and 2, $W\frac{1}{2}NE\frac{1}{4}$, $N\frac{1}{2}NW\frac{1}{4}$
 Total area—247.08 acres.

Unit 2—T. 3 N., R. 14 E., P. M., Montana
 Sec. 10, $S\frac{1}{2}SW\frac{1}{4}$
 Total area—80 acres.

Both the units are completely isolated, and are separated by one-quarter mile of privately owned land, and at the sale each unit was sold as a separate entity. The record shows that Mr. Hoem owns land along the east side of Unit 1, but does not own any land adjoining Unit 2.

At the sale Mr. Hoem and Delia Plaggemeyer bid on both tracts. Delia Plaggemeyer was declared the high bidder on Unit 1, but Mr. Hoem met the high bid on the day of the sale. Mr. Hoem was low bidder on Unit 2 and did not meet the high bid of Delia Plaggemeyer for that unit. During the 30-day period prescribed by regulation (43 CFR 250.11 (b) (3); 19 F. R. 9117), the parties were unable to reach an agreement as to a division of the lands in Unit 1, and by a decision dated December 29, 1953, the manager awarded both units to Delia Plaggemeyer. Mr. Hoem appealed from this decision to the Director, Bureau of Land Management. By a decision dated June 2, 1954, the Acting Chief, Division of Lands, Bureau of Land Management, modified the decision of the manager so as to award lots 1 and 2 in Unit 1 to Mr. Hoem. By letter dated June 11, 1954, Mr. Hoem stated that after looking at a contour map of the land awarded to him, he found that lots 1 and 2 consisted mostly of a rocky bluff with hardly any grass. Therefore, he asked that the other 80 acres lying to the west of lots 1 and 2 ($W\frac{1}{2}NE\frac{1}{4}$ sec. 10) be awarded to him also. Delia Plaggemeyer also appealed to the Secretary of the Interior from the Acting Director's decision.

Apparently, the sole basis of Mr. Hoem's appeal to the Secretary is his dissatisfaction with the award to him of only 87.08 acres (lots 1 and 2) in Unit 1, whereas he believes he is entitled to 160 acres. In his letter of June 11, 1954, he stated:

If I could get the other 80 acres laying west also, I would only be getting one half of the land that had been put up for sale.

Please don't take me wrong, I am very much thankful to get this, but was wondering if you could give me the other two fortys' west of these also.

Under the circumstances as stated before I believe it would be no more than fair.

It would be much easier to fence, due to the topography and would help balance my unit and wouldn't hurt the other unit either, taking in consideration the water, and the amount of land they have according to stock, hay, etc.

Mr. Hoem assumes that, since Mrs. Plaggemeyer was awarded the 80 acres in the Unit 2 which, added to the 160 acres awarded to her in Unit 1, gives her a total of 240 acres, he should be awarded two of the forties awarded to her so that each of them would then have been awarded a total of 160 acres. However, the fact that Mrs. Plaggemeyer was awarded all of Unit 2 has no bearing on the division of Unit 1 since each unit must be considered a separate entity in itself. Since Mr. Hoem owns no land adjoining Unit 2, he is not a preference right claimant to that unit and is consequently not entitled to any portion of that unit. He cannot rely on that fact to demand more than his equitable share of Unit 1. *Cf. Henry W. and Beatrice H. Luhmann, Marie Nichelini, A-26946 (December 1, 1954).*

The pertinent regulation in effect at the time the award by the manager was made (43 CFR, 1953 Supp., 250.11 (b) (3)) provided as follows:

* * * In the absence of an agreement an equitable division of the land will be made taking into consideration such factors as (i) the equalizing of the number of acres which each claimant will be permitted to purchase, (ii) desirable land use, based on topography, land pattern, location of water, and similar factors, and (iii) legitimate historical use, including construction and maintenance of authorized improvements. If equitable considerations dictate, all of the subdivisions may be awarded to one of the claimants.

The record shows that all of the land comprising Units 1 and 2 were included in grazing lease Billings 038277 issued to Mrs. Delia Plaggemeyer for a period of 10 years beginning May 7, 1943, and that the lessee has fenced the land in the grazing lease into her privately owned land. Mrs. Plaggemeyer has also pledged the land included in the grazing lease as security for a real estate loan from the Kansas City Life Insurance Company. The manager awarded all of Unit 1 to Mrs. Plaggemeyer on the basis of a determination by the Regional Administrator that considerations of desirable land use, land pattern, fences, and other factors which would provide for the proper utilization of the land require the award of the entire unit to her. In view of these facts, I believe that equitable considerations require the award of all of Unit 1 to Mrs. Plaggemeyer and that the manager's decision therefore was correct.

Mr. Hoem has not offered any substantial evidence of need other than a desire to balance his unit. It seems strange, in view of Mr.

June 23, 1955

Hoem's assertions of need for the additional 80 acres, that it was not until he looked at a contour map that he realized the nature of lots 1 and 2. His apparent lack of actual acquaintance with the land in Unit 1 suggests a lack of real interest in the land.

Therefore, the decision of the Acting Chief, Division of Lands, is reversed and the manager's decision of December 29, 1953, awarding all of Units 1 and 2 to Mrs. Plaggemeyer is affirmed.

ORME LEWIS,
Assistant Secretary.

MATANUSKA VALLEY LINES, INC., ET AL.

A-27197

Decided June 23, 1955

Alaska: Sales—Public Sales: Sales Under Special Statutes

The Alaska Public Sale Act and the departmental regulations and certificates of purchase issued under the act require that proof of use of the land for the purpose for which it was classified for sale be submitted within 3 years after issuance of a certificate of purchase, and the Department has no authority to modify the statutory provision that the required proof be submitted within the 3-year period.

Alaska: Sales—Public Sales: Sales Under Special Statutes

The Department is not authorized to issue patents under the Alaska Public Sale Act to holders of certificates of purchase who do not submit any proof as to use of the land or applications for patent until more than 5 months after the period required by statute.

Alaska: Sales—Accounts: Refunds

The Department has no authority to refund the purchase price paid for land sold under the Alaska Public Sale Act where the purchaser fails to submit proof of the use of the land and an application for patent within the 3-year period prescribed by the statute.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On June 8, 1951, tracts 1, 2, 3, and 4 in block 27, and tracts 6 and 7 in block 34, East Addition, townsite of Anchorage, Alaska, were offered at auction under the Alaska Public Sale Act, which authorizes the sale of certain Alaskan lands, not exceeding 160 acres in the aggregate to any one bidder, when the lands have been classified by the Secretary of the Interior as suitable for industrial or commercial purposes, including the construction of housing. (48 U. S. C., 1952 ed., secs. 364a-364e.) The Matanuska Valley Lines, Inc., of which Russell Swank is president, was the successful bidder at the sale on tracts 1, 2, 3, 4,

and 7. Joe Blackard and Russell Swank, operating a joint adventure as Blackard and Swank, were the successful bidders on tract 6.

In letters of June 12, 1951, from the manager of the Anchorage land office to the corporation and to Blackard and Swank, the successful bidders were required to submit, within 30 days, the unpaid balance of the purchase price for the tracts and to submit plans and descriptions of the proposed use of the tracts and of the improvements to be placed thereon, and a showing of financial ability to complete the proposed project within a period of 3 years.

On July 9, 1951, the applicants completed payment of the \$28,500 purchase price for the land and submitted plans for erecting a trailer park with utility building, storage shed, water and sewer lines, a basement garage, fueling station, warehouses, sheds for road maintenance equipment, and other improvements. All of the tracts were to be graded, landscaped, and fenced. The proposed utilization of the tracts was approved, and on August 20, 1951, certificates of conditional purchase of the five tracts bid for by Matanuska Valley Lines, Inc., were issued to it and a certificate of conditional purchase on the remaining tract was issued to Joe Blackard and Russell Swank.

In decisions of September 7, 1954, the manager of the Anchorage land office held that all rights under the certificates of conditional purchase had terminated as no applications for patents on the tracts had been filed by August 20, 1954, and he allowed the certificate holders 90 days within which to remove any materials, structures, or improvements which had been placed on the tracts. Matanuska Valley Lines, Inc., and Joe Blackard and Russell Swank appealed from these decisions to the Director of the Bureau of Land Management. On January 31, 1955, the corporation and Blackard and Swank filed applications for patents on the tracts under the Alaska Public Sale Act.

In a decision of March 30, 1955, the Associate Director of the Bureau of Land Management affirmed the decisions by the manager holding that all rights under the certificates had terminated and allowed 90 days for the removal of any improvements which the certificate holders had placed on the land. The decision of March 30, 1955, also rejected the applications for patents on the tracts because they were not timely filed. An appeal has been taken to the Secretary of the Interior from the decision of March 30.

Section 3 of the Alaska Public Sale Act (48 U. S. C., 1952 ed., sec. 364c) provides in part that:

There shall be issued to each purchaser of land under this Act a certificate of purchase. Within three years after issuance of such certificate, upon proof supported by affidavits of two disinterested persons that the purchaser has used the land for the purpose for which it was classified for sale for a period of not less than six months, a patent in fee shall be issued. * * *

June 23, 1955

Section 5 of the act (48 U. S. C., 1952 ed., sec. 364e) provides that:

The Secretary of the Interior may make such rules and regulations as may be necessary and proper * * * to provide appropriate notice of and method of conducting sales, to prevent speculation, to promote the orderly development of lands in Alaska, to provide protection and compensation for damages from mining activities to the surface and improvements thereon, and to carry out any of the other purposes of this Act.

Departmental regulations (43 CFR 75.19 *et seq.*; 19 F. R. 8875) issued pursuant to section 5 provide in pertinent part:

75.31 *Certificate of purchase; rights and limitations; survey.* (a) When the authorized officer is satisfied that the successful bidder is qualified, that he has the intention and financial means to develop and use the land in accordance with the act and his proposed utilization program, the authorized officer will authorize the issuance by the manager of a certificate of purchase * * *.

(b) Upon issuance of the certificate which will be valid for a period of three years from the date of issuance, the purchaser shall have the right, during the three-year period, to enter upon, occupy, use, and make improvements upon the land in accordance with the declared utilization program.

* * * * *

75.33 *Termination of certificate; removal of improvements.* (a) At the end of three years from the date of issuance, unless there is then pending an application for the issuance of a patent filed in accordance with § 75.34, the certificate of purchase will be void and of no further effect, all rights thereunder will terminate; and no moneys paid thereon may be returned. No extension of time for compliance with the terms of the certificate of purchase can be granted.

(b) Thereupon the manager will allow the approved holder of the certificate of purchase 90 days from notice within which to remove from the land any materials, improvements, structures, or other property placed thereon. After the 90-day period or any extension thereof granted by the manager because of adverse climatic conditions or other sufficient cause, all such materials, improvements, structures, and property not removed will become the property of the United States.

75.34 *Application for patent; proof of use.* (a) An application for the issuance of a patent for the land, signed by the approved holder thereof, must be filed in triplicate with the manager, at any time after six months and before the expiration of three years from the date of issuance of the certificate of purchase. An application filed after expiration of the three-year period will be rejected. The application must include a showing as to the nature and cost of the improvements and structures placed on the land showing substantial compliance with the declared land utilization program; and the use, dates, and periods of use of the land which must aggregate not less than six months.

(b) There must be furnished with the application the affidavits of two disinterested persons, based upon their own knowledge, that the land has been used for the purpose for which it was sold for an aggregate period of not less than six months. * * *

The substance of these regulatory provisions is incorporated in the terms of the certificates of conditional purchase which were issued

to the appellants. The last paragraph of each certificate is as follows:

Be it known further, in the event full compliance has not been made with the act and regulations thereunder and an application for issuance of patent has not been filed within three years from the date hereof, then this certificate shall be VOID and of no further effect, all rights hereunder shall terminate, and no moneys paid hereunder shall be refunded: *Provided*, That the purchaser, or approved assignee, shall have the right, within 90 days from notice, to remove all materials, structures, improvements, and other property placed on the premises, and any such materials, structures, improvements, or property not so removed shall become the property of the United States.

The decision holding that all rights under the certificates involved in this appeal had terminated and rejecting the applications for patent was based upon the failure of the appellants to submit any proof regarding the required use of the land and their failure to apply for a patent on the tracts until more than 5 months after the expiration of the certificates of conditional purchase.

A memorandum submitted in behalf of the appellants in connection with this appeal asserts that \$83,550.91 was spent in improving the tracts, although the record contains several different statements submitted for the appellants as to the amount so spent. In the applications for patents, the appellants assert that the tracts were developed and used for 6 months, as required by statute. However, the evidence in the records as to whether the tracts have been improved and used as required by regulation and by the certificates in accordance with the approved utilization program which the appellants submitted in 1951 is contradictory.

Material submitted in support of the appeal asserts that the certificates of purchase which were issued to the appellants were destroyed in a bus garage fire in November 1951; that the appellants obtained duplicate certificates of purchase which were sent to the Reconstruction Finance Corporation as partial security for a loan, and that at the expiration of the 3-year period, the appellants did not have the certificates in their possession;¹ that the appellants

¹ Although not required to do so, the Regional Administrator, Region 7, wrote the following letter to one of the appellants on August 18, 1953:

"Dear Mr. Swank:

"Knowing that a year slips by rather rapidly, I thought that you might appreciate my calling attention to the fact that on August 20, 1954, the period of time granted you to construct certain improvements on the land which you bought in the East Addition to the Townsite of Anchorage, will expire. It is likely that you have plans for completing the structures which you outlined on the drawings submitted to the land office, but the requirements of the law under which you purchased the land may not have remained clear in your mind.

"This is a friendly reminder—nothing else.

"Very truly yours,

[Signed]

"Lowell M. Puckett

Regional Administrator."

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had discussed the 6 months' use requirement several times with employees of the Bureau of Land Management but no one had mentioned the results of failure to comply with the time requirement for filing application for patent, and the appellants believed that these requirements were mere administrative details; that enforcement of the regulatory provisions in this case would be unjust, unduly harsh and oppressive as to the appellants, their creditors and employees; that one of the appellants is a public utility and the lands for which it has expended substantial funds are valuable to it and the public because of the nature of its business; and that no one will be injured by the issuance of the patents to appellants.

The requirements in the certificates of purchase and in the departmental regulations that proof be submitted and an application for patent under the Alaska Public Sale Act be filed within 3 years from the date of issuance of a purchase certificate are based upon the portion of section 3 of the act providing that:

Within three years after issuance of such certificate, upon proof * * * that the purchaser has used the land for the purpose for which it was classified for sale for a period of not less than six months, a patent in fee shall be issued.

There is some uncertainty as to whether this language means that a patent shall be issued within 3 years after issuance of the certificate, or rather that if proof is submitted within 3 years after issuance of the certificate, a patent shall be issued, with no particular time specified within which the patent must be issued. The latter meaning was adopted by the Department, as is indicated in the regulatory provisions requiring that proof be submitted and an application for patent filed within the 3-year period. The determination that the 3-year clause limits the time within which the required proof must be submitted rather than the time within which a patent must be issued in effect extends the time for complying with the statutory requirements and so need not be considered further here.

It is clear that under the provision a patent may not be issued, at the earliest, until after 6 months have elapsed following the issuance of a certificate of purchase and then only if proof, in the form required by statute, is submitted that the land has been used as required. The regulations and the provisions of the certificate of purchase interpret the 3-year time clause in the statute to mean that a patent may not be issued if the required proof has not been submitted and the application for patent has not been filed within the 3-year period after the issuance of a certificate of purchase. The reason for this interpretation is that the 3-year clause would be purposeless if it were not regarded as limiting the period within which proof must be

submitted. That is, after the issuance of a purchase certificate, inasmuch as the minimum time which must elapse before a certificate holder may submit the proof required to obtain a patent is definitely 6 months, the only function of the 3-year clause is to set a maximum time within which proof of the required use must be submitted.

There is no question at all as to the meaning placed on the 3-year provision by the regulations and the certificates of purchase. 43 CFR 75.33 plainly states that unless an application for a patent has been filed by the end of the 3-year period "the certificate of purchase will be void and of no further effect, all rights thereunder will terminate * * *." 43 CFR 75.34 equally plainly states that "An application [for a patent] filed after expiration of the three-year period will be rejected." And the certificates of purchase clearly state that, if an application for patent is not filed within the 3-year period, "then this certificate shall be void and of no further effect, all rights hereunder shall terminate * * *."

The question raised by the appeal is whether these provisions of the regulations and of the certificates of purchase are required by the statute or, if not required by the statute, whether they should be waived or declared invalid as being inconsistent with the statute.

As has just been seen, the language of section 3 of the statute seems to require that proof of the use of the land must be filed within the 3-year period. However, because the language employed is not clearly couched in mandatory terms, it is appropriate to resort to the legislative history of the statute to ascertain its proper meaning:

H. R. 2859 (81st Cong., 1st sess.), as amended, became the Alaska Public Sale Act. The basic objective of the bill was to facilitate industrial and commercial development in Alaska and to make more rapidly available lands suitable for commercial and industrial use than was possible under laws then in effect.² The original bill, which was proposed by this Department and passed by the House of Representatives, authorized the private or public sale of certain Alaskan land which the Secretary might classify for such disposition. The bill provided that patent should not issue until after survey, but contemplated the immediate passage of the entire fee in the land to the purchaser after sale, and contained no provisions for the issuance of certificates of purchase, the delay of issuance of patent after sale,

² Senate Rept. 474, 81st Cong. 1st sess.; letter of March 17, 1949, from the Secretary of the Interior on H. R. 2859 to the Chairman, House Committee on Public Lands.

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or the submission of proof by a purchaser that the land was used for the purpose for which it was classified.³

Many of the provisions of the original bill were amended by the Senate Committee on Interior and Insular Affairs, and as so amended, the bill was enacted into law. With respect to the amendments generally, the Committee report stated (*supra*, p. 2) :

While the committee strongly believes that this legislation is essential, it feels that certain safeguards ought to be contained in the act to prevent the acquisition of desirable commercial sites for speculative, nonproductive purposes or for the promotion of monopolies on the public lands.

In explanation of the amendment of the provisions for issuing patent, the report states: (at pages 2 and 3) :

Section 4 was renumbered as section 3, and amended to make certain that the land shall be used only for the commercial, industrial, or housing purpose for which it is sold. The buyer will receive a certificate of purchase at the time of sale, but a patent in fee will not issue to him until he can prove by the affidavits of two disinterested persons that he has in fact used the land for at least 6 months for the purposes for which it was sold. *The buyer must furnish the required proof within 3 years after the issuance of the purchase certificate. If he does not comply with the requirements of this section prior to the end of the 3-year period, he loses his rights in the land.* [Italics added.]⁴

The Department objected to the inclusion in the bill of the provisions for issuance of a certificate of purchase rather than patent and proposed possible alternatives to the provisions, but the Senate amendments prevailed.⁵

³ Sections 3 and 4 of the original bill provided :

"Sec. 3. No sale shall be made for less than the appraised price of the land, or for less than the cost of making any survey to properly describe the land sold, whichever is greater.

"Sec. 4. Any patent issued to a purchaser of lands under this Act shall contain a reservation to the United States of all minerals in the lands patented, together with the right to prospect for, mine, and remove the minerals, and such other reservations as may be necessary and proper."

⁴ Departmental records indicate that the Chief Counsel for the Bureau of Land Management attended a hearing on June 6, 1949, at which the Senate Committee voted to report out H. R. 2859, as amended. In a memorandum of June 9, 1949, referring to this hearing, the Chief Counsel stated in part :

"* * * The bill would authorize the issuance only of a certificate of purchase and the purchaser could obtain a patent only by submitting proof together with the affidavits of two disinterested persons within three years after the issuance of the certificate of purchase, that the lands have been used for six months for the purpose for which they were classified under the sale.

"I conferred with Mr. French, Counsel for the Committee, on June 7 in connection with the preparation of the Committee's report. I suggested that the report make it clear that failure to comply with the above requirements would mean forfeiture of the purchaser's interest. I did not think it advisable to suggest that the Committee spell out that the forfeiture would be by the Secretary by administrative action without Court intervention. * * *"

⁵ Memorandum of August 16, 1949, regarding testimony of an attorney for the Bureau of Land Management at a conference of August 15, 1949, on H. R. 2859 between the House Public Lands Committee and the Senate Interior and Insular Affairs Committee.

The conference report to accompany the bill contained a statement of the managers on the part of the House explaining the changes in the bill resulting from the Senate amendments, and the following explanation of section 3, as amended, was given (House Rept. 1275, 81st Cong., 1st sess.) :

The purchaser shall first receive a certificate of purchase to be followed by a patent in fee *only after the purchaser shall within 3 years file proof* by affidavit of two disinterested witnesses that the land was used for the purpose for which it was sold for not less than 6 months. [Italics added.]

The Department considered that section 3 of the bill, as amended, was undesirable, but because of the need for a better method than then existed for disposing of Alaskan land for industrial and commercial purposes, favored the approval of the legislation.⁶

With respect to the question involved in the instant case, the report by the Senate Committee and the conference report by the managers on the part of the House indicate, without doubt, that the required proof which must be made before patent issues must be filed within 3 years after a certificate of purchase is issued. In the circumstances, it is clear that the time provision cannot be ignored or regarded as casual. That it is an integral part of the provision authorizing issuance of patent under the act is evident from the language of the provision and the statement in the report of the Senate Committee that if a purchaser does not furnish the required proof within 3 years after the issuance of a certificate, he loses his rights in the land. Since one of the requirements upon which Congress conditioned the issuance of a patent was that proof of use of the land be submitted within 3 years after issuance of a certificate of purchase, and as there is nothing in the statute which gives the Department any discretion to modify that requirement, the Department is not authorized to issue patents under the act except in compliance with the requirement.

⁶ A letter of August 25, 1949, from the Under Secretary of the Department to the Director of the Bureau of the Budget commenting upon the enrolled bill stated in part that :

"The provisions of the enrolled bill differ in a number of particulars from those of H. R. 2859, as introduced, due to amendments made by the Senate and accepted in conference. * * * these amendments prohibit the issuance of a patent for the purchased land immediately upon consummation of the sale. In lieu of this feature of the original bill, they establish a procedure under which a patent may be issued only if the purchaser proves, within three years after the sale, that he 'has used the land for the purpose for which it was classified for sale for a period of not less than six months.'

"The foregoing changes have brought into the enrolled bill elements of rigidity and complexity that might well have been omitted in the interest of flexible and speedy administration. Chief among these elements is the deferred patent procedure, which may have the practical effect of restricting land sales under the bill to persons who do not need to obtain mortgage credit in order to develop the land. This is because the bill requires actual use of the land over a period of six months for the purpose for which it has been sold before a patent may be issued, and because until a patent has been issued the purchaser would not have the indefeasible fee simple title ordinarily required as security for a mortgage loan.

* * *

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In the light of these considerations, it is concluded that the provisions in the certificates of purchase and in the departmental regulations that proof be submitted and an application for patent filed within the 3-year period following issuance of the certificate are in accord with the language of section 3 of the act, and are consistent with the intent and the purpose of this statutory provision as shown by its legislative history. Accordingly, the decision holding that because the appellants failed to submit the required proof as to use of the land within 3 years after the issuance of the certificates of purchase here under consideration, all rights under those certificates terminated and that the applications for patent filed more than 5 months after the expiration date of the certificates were filed too late is correct.

The provision in the purchase certificate and the corresponding regulatory provision that no monies paid under the certificate shall be refunded after the certificate becomes void were probably intended to prevent speculation in lands sold under the act. Although circumstances may arise under which it seems unfair that a purchaser is required to pay the entire purchase price for a tract and may afterwards lose all rights in the land without being entitled to a refund of any of the purchase money, no purpose would be served in considering here the question raised by the appellants as to the validity of this regulatory provision because the Department has no authority to refund the purchase price.⁷

In the absence of express statutory authority to the contrary, funds received for the use of the United States are required to be deposited within the Treasury of the United States as miscellaneous receipts (general fund). 30 Comp. Gen. 614 (1950); 31 U. S. C., 1952 ed., sec. 484. The purchase price for the tracts here involved was deposited in an earned monies account and transferred to the Treasury as part of the general fund. Such funds may not be withdrawn except in accordance with subsequent appropriations made by law, and appropriations must be applied solely to the objects for which they are made and no others. 30 Comp. Gen., *supra*; 31 U. S. C., 1952 ed., sec. 628. Although this Department has specific statutory authority to refund money paid under some circumstances, there is no such statute which extends to the facts of the instant case. *Cf.* 43 U. S. C., 1952 ed., secs. 95-98a, 263, 689-690.

⁷ The fact that the provision forbidding the refund of any money paid under the certificate is not a statutory requirement does not alter this conclusion. *Cf.* 32 Comp. Gen. 338 (1953), in which it was held that departmental regulations governing the sale of public lands which require applicants to publish notice of sale at their own expense and which permit the United States to vacate the sale without liability for the money spent for advertising may not be amended retroactively by a provision authorizing reimbursement for the cost of advertising the sale of lands which are later withdrawn from sale by the United States.

It may be that the result in this case is unduly harsh. Nonetheless, this Department has no alternative but to administer the Alaska Public Sale Act in accordance with its terms and the clear-cut legislative intent expressed in those terms. The appellants' only remedy appears to be in obtaining some type of remedial legislation.

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. RUEEL ARMSTRONG,
Solicitor.

SHANNON OIL COMPANY

A-27119

Decided June 27, 1955

Oil and Gas Leases: Unit Agreements

The final paragraph of the South Sand Draw Unit Agreement provides the procedure by which land shall be made subject to the agreement. Unless land is made subject to the agreement in accordance with that procedure, it is not effectively committed to the agreement.

Oil and Gas Leases: Unit Agreements—Secretary of the Interior

The Secretary of the Interior has no authority to reform a unit agreement, approved by him pursuant to the provisions of the Mineral Leasing Act, to include land which, through error, was not committed to the unit agreement.

Oil and Gas Leases: Unit Agreements

Where a tract of land was not committed to a unit agreement through error and the parties to the agreement and the Department have assumed all along that the land was committed, and where there are no intervening rights to the tract which would be adversely affected by such action, the Department will recognize the tract as having been committed at the time of the original agreement upon the submission by all parties in interest of a proper reformation of the agreement.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On July 12, 1954, a petition was filed by Shannon Oil Company, unit operator of the South Sand Draw Unit Agreement, requesting the Secretary of the Interior to determine the status of the SW $\frac{1}{4}$ sec. 26, T. 32 N., R. 95 W., 6th P. M., Wyoming. Specifically, the request was that this land be determined to have been committed to the unit agreement, which agreement was approved by the Assistant Secretary of the Interior on October 8, 1945, and that oil and gas lease Cheyenne 071782, issued to Warwick M. Downing as of May 1, 1945, be held,

June 27, 1955

insofar as it covered the SW $\frac{1}{4}$ sec. 26, to have been extended beyond its primary term by virtue of being committed to the unit agreement.

The petitioner stated that the SW $\frac{1}{4}$ sec. 26 is among the lands covered by the unit agreement which Mr. Downing signed as a party; that by the terms of the unit agreement this land is fully committed to the agreement; that by mistake the land was not listed by Mr. Downing among the lands which he, as an applicant for an oil and gas lease on lands within the boundaries of the unit area, committed to the unit agreement; that Mr. Downing intended to include this quarter section with other lands within the unit area for which he had applied; that Mr. Downing desires to correct his mistake and agrees that the land is to be considered as added to the list of lands made subject to the unit agreement as if the mistake had not occurred; and that ever since the approval of the unit agreement this 160-acre tract has been considered by all persons in interest as definitely committed to the unit agreement. The petitioner submitted an affidavit signed by R. S. Shannon, Jr., and others,¹ stating that each has considered the 160-acre tract to be a part of the South Sand Draw Unit Agreement and a part of lease Cheyenne 071782 and that that lease as to this land is now in full force and effect. In addition, copies of certain decisions and letters of officials of the Bureau of Land Management and of the Geological Survey, indicating the understanding of those officials that the land was committed to the unit agreement, were attached as exhibits.

In a decision dated October 15, 1954, the Acting Director of the Bureau of Land Management, after reviewing the provisions of the unit agreement, held that the actual commitment of the lands to the unit agreement is expressly provided for in the final paragraph of the agreement which provides that:

* * * the parties hereto have caused this agreement to be executed and have set opposite their respective names the date of execution and a list of the lands made subject to this agreement.

He held that lands listed opposite the names of the signatory lessees are the only lands committed and made subject to the agreement and that that listing is controlling over the general designations of the unit area otherwise described in the agreement and the exhibits thereto. He held that, notwithstanding the fact that certain officials of the Department had repeatedly indicated, in decisions and otherwise, that the SW $\frac{1}{4}$ sec. 26 was committed to the South Sand Draw Unit Agreement, the quarter section had not been listed by Mr. Downing opposite his signature and thus was not effectively committed to the agreement.

¹ The affidavit is signed by Mr. Shannon, Richard Downing, G. C. Parker, Paul S. Pustmueller, and Warwick M. Downing.

On the basis of that holding, the Acting Director found that oil and gas lease Cheyenne 071782 was not extended beyond its primary term insofar as it included the SW $\frac{1}{4}$ sec. 26, i. e., that the lease on this land had expired on April 30, 1950.

The petitioner has appealed from that decision to the Secretary of the Interior. Oral argument on the appeal was heard by the Solicitor.

The appellant contends that the Acting Director erred in giving controlling effect to the final paragraph of the unit agreement and that, in any event in the circumstances of this case, the principles of equity and administrative fairness require that the tract be considered to be subject to the unit agreement, particularly in view of the fact that officials of the Department have repeatedly indicated that the land is subject to the unit agreement.

Upon careful consideration of the unit agreement, it is determined that the Acting Director was correct in holding that the final paragraph thereof is controlling in determining the lands made subject to the agreement. Notwithstanding the fact that the tract is included in the area described in section 2 of the agreement as the unit area, is shown on the map attached to the agreement as Exhibit A to be within the boundaries of the unit area, and is shown on Exhibit B of the agreement as being covered by the application of Warwick M. Downing for an oil and gas lease, none of these factors, without more, served to commit the land in question to the agreement. The agreement when read as a whole, and particularly when consideration is given to section 9 thereof,² obviously contemplated the possibility that all lands included within the external limits of the unit area would not be made subject to the agreement. It was only by the definite commitment of the lands by the signatures of the parties and the listing of the lands as provided for in the final paragraph of the agreement that any particular tract of land was made subject to the agreement.³ The agreement was signed by Mr. Downing on July 9, 1944. Opposite his signature are the lands which, by his signature, he agreed should be made subject to the agreement. The tract in question is not listed. It cannot therefore be held, as a matter of interpretation of the agreement, that the tract was committed to the unit agreement.

² Section 9 provides in part that "Any land within the unit area not subject to the terms of this agreement" which is under the control of a party signing the agreement shall be developed so far as possible in accordance with the terms of the agreement.

³ In fact, at the time when the unit agreement was approved by the Assistant Secretary, a 40-acre tract of privately owned land situated in the unit area was not committed to the unit agreement. The Department has frequently approved unit agreements where all the lands situated within the external limits of the unit area have not been committed to the agreement. Paragraph 29 of the standard form of unit agreement expressly recognizes that all lands in a unit area may not be committed to the agreement at the time it is approved (30 CFR, 1953 Supp., p. 52), although such uncommitted land would be described as part of the unit area in paragraph 2 of the standard form of agreement, designated on a map of the unit area (Exhibit A), and listed on Exhibit B. (30 CFR, 1953 Supp., pp. 45 and 54-55).

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It seems obvious, however, that a mistake was made by Mr. Downing and that it was through inadvertence that the SW $\frac{1}{4}$ sec. 26 was not listed opposite Mr. Downing's signature and thus committed to the agreement. The question then is whether the Secretary of the Interior has authority to correct that mistake, whether he can, by the application of the maxims of equity which the appellant cites, reform the agreement to conform to what, the appellant contends, was the true intent of the parties to the agreement.

Although a court of equity undoubtedly has the power, in a proper case, to confer the remedy of reformation of instruments where there has been a mutual mistake⁴ or where it is shown that, through error or inadvertence, the contract does not recite the true intent of the parties⁵ and although a court may require the reformation of contracts to correct erroneous descriptions of land⁶ or reform instruments to include land which the parties intended to include,⁷ there is no reason to believe that the Secretary of the Interior has such power to reform a unit agreement approved by him pursuant to the provisions of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226e).⁸ A unit agreement is essentially a contract between private parties (i. e., lessees or holders of oil and gas rights in Federal, State, and privately owned lands). No reason appears why a unit agreement, as a private contract, is not subject to reformation by a court of equity the same as other private contracts. The fact that the agreement is approved by the Secretary would not appear to have the effect of shifting the power of reformation from the courts to the Secretary. The Secretary would, of course, recognize a proper court decree reforming the agreement.

However, there would appear to be no legal objection to the parties to the contract reforming their contract to state their true intentions in the matter if, in fact, it was their understanding that the tract in question was to be committed to the agreement.⁹

Although the appellant states that all parties to the agreement have at all times since the agreement was executed believed the tract to have been definitely committed to the agreement, evidence of such an understanding by all parties to the agreement has not been sub-

⁴ See *Simmons Creek Coal Company v. Doran*, 142 U. S. 417 (1892).

⁵ See *Ackerlind v. United States*, 240 U. S. 531 (1916).

⁶ See *Adams v. Henderson*, 168 U. S. 573 (1897).

⁷ See *Wasatch Mining Company v. Crescent Mining Company*, 148 U. S. 293 (1893).

⁸ The South Sand Draw unit agreement was entered into pursuant to section 27 of the Mineral Leasing Act, as amended by the act of March 4, 1931 (46 Stat. 1523). Section 27 provided that "permittees and lessees thereof and their representatives may unite with each other or jointly or separately with others in collectively adopting and operating under a cooperative or unit plan * * * whenever determined and certified by the Secretary of the Interior to be necessary or advisable in the public interest * * *."

⁹ See *Hercules Powder Company v. Harry T. Campbell Sons Co.*, 144 Atl. 510 (Md., 1929); 12 Amer. Jur., Contracts, sec. 427.

mitted. The affidavit submitted with the petition is not sufficient. It merely recites that the affiants, some of whom in their individual capacities were parties to the original agreement, understood the agreement to embrace the tract in question. The affidavit recites that certain of the affiants are officers of companies which, according to the records of the Department, have operating rights or other interests in some of the lands committed to the agreement. However, the affidavit is not signed on behalf of those companies but by the affiants as individuals. The affidavit does not indicate that the affiants are authorized to act for the other parties to the unit agreement. Nor does it indicate what proportion of the lands committed to the agreement is represented thereby.

In view of the fact that the records of the Department show that the Assistant Secretary was informed that the tract in question was committed to the unit agreement when he gave his approval to the agreement on October 8, 1945, and in view of the fact that subordinate officials of the Department have apparently at all times considered the tract to be so committed (to the extent, for example, of charging the rental rate applicable to unitized leases), and also in view of the fact that there are no intervening rights to the tract which would be adversely affected by such action, the Department, recognizing its own misunderstanding in this case, will consider the tract to have been so committed, and the lease thereon to have been extended, if all the parties to the unit agreement agree that a mistake has been made and if the parties reform their contract to reflect their understanding of the agreement when executed by them that the SW $\frac{1}{4}$ sec. 26 was to become subject to the unit agreement and bound by its terms and that it was through mistake or inadvertence that the tract was omitted from the list of lands which were made subject to the agreement.

Therefore, while it must be determined on the basis of the present record that the SW $\frac{1}{4}$ sec. 26 is not committed to the South Sand Draw Unit Agreement, this determination will be amended in the event all parties to the unit agreement, or their successors in interest, submit a proper reformation of the unit agreement to correct the error, stating that the SW $\frac{1}{4}$ sec. 26 has been considered as having been at all times since the approval of the agreement subject to the terms of that agreement.

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 for further action consistent with this decision in the event such a reformation of the agreement is submitted.

J. RUEBEL ARMSTRONG,
Solicitor.

*June 29, 1955***APPEAL OF SOUTHWEST WELDING AND MANUFACTURING
COMPANY**

IBCA-33

*Decided June 29, 1955***Contracts: Waiver and Estoppel**

Where a contractor, who is liable to the Government for corrective work performed by another contractor, voluntarily and with full knowledge of the facts constituting the basis for charges for the work enters into a settlement with the other contractor, such settlement constitutes an accord and satisfaction. Such settlement cannot be avoided because the contractor might have entered into the settlement reluctantly, or to avoid the trouble and expense of an administrative determination of fact and a possible appeal therefrom and litigation, or because the Government, an interested third party, urged such a settlement, and withheld the sum of \$5,000 otherwise due the contractor, pending determination of the amount chargeable to the contractor for the corrective work.

Contracts: Damages: Unliquidated Damages

A claim for additional compensation to cover increased costs allegedly incurred by a supply contractor because the Government withheld what was contended to be an excessive amount of money to insure that the contractor paid a back-charge for corrective work, and because the Government failed to give notice to the contractor as required by the contract, is in the nature of a claim for unliquidated damages, which an administrative officer of the Government has no authority to consider or settle.

BOARD OF CONTRACT APPEALS

The Southwest Welding and Manufacturing Company, Alhambra, California, hereinafter referred to as "Southwest," appealed from the findings of fact and decision of the contracting officer, dated March 8, 1955, under Contract No. I2r-19619, denying its claims for compensation in the amount of \$1,812.90 for modification of penstock sections, and in the amount of \$1,818.88 for removing internal bracing from penstock sections.

By brief dated April 26, 1955, in support of the appeal, the contractor accepted the contracting officer's findings of fact and decision with reference to the claim for removal of internal bracing, and limited the appeal to the decision denying the claim for modification of penstock sections.

The contract, which was a standard Government supply contract (Form No. 32, November 1949 revision), was entered into with the Bureau of Reclamation on October 11, 1951. By the terms of the contract, the contractor agreed to deliver fabricated steel penstocks for installation at the Government's Folsom Power Plant, American River Division, Folsom Power Unit, Central Valley Project, Califor-

nia. The penstock sections were to be installed and the joints welded by another Government contractor, Guy F. Atkinson Company, hereinafter referred to as "Atkinson."

Atkinson, the installation contractor, discovered that some of the sections delivered at the job site were out of round beyond specified tolerances, and that corrective work was required, so that the edges of adjoining sections would match and could be welded together.

Upon learning of the defects, the Government by telegram dated February 19, 1954, notified the contractor that certain penstock sections did not comply with the specifications as to roundness, and that immediate corrective work was needed. The telegram also inquired whether the contractor wished to perform the work or preferred to have the work done by the installation contractor and back-charged to Southwest.

Representatives of Southwest visited the site on February 20, 1954, and authorized Atkinson to perform corrective work on two sections of the penstocks, pending the time when Southwest could bring its own crews to the job site to do the balance of the corrective work. When the final payment voucher was issued to Southwest, the Government withheld \$5,000, pending a determination of the cost of the corrective work performed by Atkinson and chargeable to Southwest. Then, the Government encouraged the two contractors to reach a settlement by negotiation between themselves as to the reasonable cost of the corrective work. In this way, it was believed that the contracting officer would be relieved of the necessity of making findings of fact under the two contracts, including a determination of the increased cost under the Atkinson contract because of the corrective work. Moreover, it was thought by the Government that such additional findings of fact might, if the amount of costs of the corrective work determined by the Government was unacceptable to either contractor, lead to an administrative appeal to this Board.

The contractor maintains that it paid an excessive sum to Atkinson in return for Atkinson's withdrawal of its claim against the Government for the corrective work performed; that it was urged by the Government to make a settlement, and that such settlement was the only way by which it could recover the \$5,000 balance due under the contract.

Moreover, the contractor contends that it paid an excessive amount by the settlement because the Government failed to notify the contractor as required by the terms of the contract (clause 5 (b) of the General Provisions), and that Atkinson performed some corrective work on penstock sections before giving notice of the defects to the Government.

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The Government contends that the notice given Southwest by telegram dated February 19, 1954, was in conformity with the provisions of Clause 5 (b) of the General Provisions of the contract, as amended by Paragraph 7 of the Special Conditions relating to "Inspection." The clause, as amended, reads as follows:

(b) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, the Government shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or corrected in place, as requested by the Contracting Officer, by and at the expense of the Contractor promptly after notice, and shall not again be tendered for acceptance unless the former tender and either the rejection or requirement of correction is disclosed. If the Contractor fails promptly to remove such supplies or lots of supplies, when requested by the Contracting Officer, and to proceed promptly with the replacement or correction thereof, the Government either: (i) may by contract or otherwise replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby, or (ii) may terminate this contract for default as provided in the clause of this contract entitled "Default." If the correction of the supplies or equipment is required at the point of installation or delivery because of non-conformity with requirements of this contract, and limitations of time will not permit correction thereof by the contractor, the Government may nevertheless proceed with such necessary correction, after notice to the contractor, and charge to the contractor the cost of correcting the supplies or equipment. Unless the Contractor elects to correct or replace the supplies which the Government has a right to reject and is able to make such correction or replacement within the required delivery schedule, the Contracting Officer may require the delivery of such supplies at a reduction in price which is equitable under the circumstances. Failure to agree to such reduction of price shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

Moreover, section 20 of the special requirement of the contract required the contractor to "replace, free of cost to the Government, any defective material discovered during erection" and to "pay the actual cost to the Government of the correction in the field of any errors for which he is responsible."

We conclude that this appeal is without merit.

Southwest voluntarily and with knowledge of the facts constituting the basis for the charges claimed by Atkinson for the work ordered by the Government and with the acquiescence of the Government entered into a settlement with Atkinson after much discussion and negotiation, which reduced the amount of money originally sought by Atkinson for extra work against the Government.

It is clear that Southwest regarded the settlement as a "mutual agreement," which was the term used by Southwest in a letter dated November 17, 1954, to the Construction Engineer, Bureau of Recla-

mation. This letter enclosed a check in the amount of \$2,266.13 for delivery to Atkinson to "cover the adjusted amount in full." The settlement constituted an accord and satisfaction which cannot be avoided because one of the two parties, the contractor, might have entered into the settlement reluctantly, or to avoid the trouble and expense of an administrative findings of fact and a possible appeal therefrom and litigation, or because the Government, an interested party, urged such a settlement, and withheld the sum of \$5,000 otherwise due Southwest, pending the determination by the Government of the amount chargeable to Southwest under the terms of the contract.¹

Moreover, insofar as the claim rests on alleged increased or excessive costs resulting to Southwest by virtue of an alleged act of the Government in not giving the notice required by Clause 5 (b) of the General Provisions of the contract, as amended, this claim is for an alleged breach of contract,² and hence it is for unliquidated damages.

It is well settled that an administrative officer, including the head of an executive department or his authorized representative, is without authority to consider or settle a claim for unliquidated damages.³

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the findings of fact and decision of the contracting officer, dated March 8, 1955, are affirmed.

THEODORE H. HAAS, *Chairman.*

THOMAS C. BATCHELOR, *Member.*

WILLIAM SEAGLE, *Member.*

DEVEARL W. DIMOND

Decided July 5, 1955

A-27131

Mineral Leasing Act: Lands Subject to—Oil and Gas Leases: Lands Subject to Leasing

Where oil and gas deposits reserved to the United States under stockraising homestead entries or patents were undisposed of on March 1, 1933, when the lands containing such deposits were permanently withdrawn from all

¹ See *Du Puy v. United States*, 67 Ct. Cl. 348, 380-381 (1929); *United States v. Child & Co.*, 79 U. S. 232 (1870); *Brice v. United States et al.*, 32 Ct. Cl. 23 (1896).

² Nonconformity with the contract was the sole ground for this claim in the notice of appeal dated April 11, 1955, and the main basis in the subsequent briefs filed by appellant.

³ *William Cramp & Sons v. United States*, 216 U. S. 494, 500 (1910); *United States v. Rice*, 317 U. S. 61, 67 (1942); *Continental Ill. National Bank & Trust Co. of Chicago v. United States*, 126 Ct. Cl. 631, 640 (1953).

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forms of entry or disposal, those deposits are not subject to leasing under the terms of the Mineral Leasing Act.

Stock-Raising Homesteads

An entry of land under the Stockraising Homestead Act segregates the land entered into two separate estates—the surface and the mineral.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Devearl W. Dimond has appealed to the Secretary of the Interior from a decision by the Director of the Bureau of Land Management dated December 1, 1954, which affirmed the action of the manager of the land and survey office at Salt Lake City, Utah, in rejecting Mr. Dimond's offers to lease lands in Ts. 39 and 40 S., Rs. 25 and 26 E., S. L. M., Utah, for oil and gas purposes under section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226).

The Director held that the lands embraced in the offers are within the area set aside as an addition to the Navajo Indian Reservation by the act of March 1, 1933 (47 Stat. 1418), and that the oil and gas deposits in those lands became subject to the jurisdiction of the Navajo Tribal Council for leasing purposes by the 1933 act, even though some of the lands had been patented under the Stockraising Homestead Act of December 29, 1916 (43 U. S. C., 1952 ed., sec. 291 *et seq.*), with a mineral reservation to the United States and the remainder of the lands were in outstanding entries under that act at the time of the passage of the act of March 1, 1933, although the latter entries were later relinquished or canceled.

Section 1 of the act of March 1, 1933, entitled "An Act to permanently set aside certain lands in Utah as an addition to the Navajo Indian Reservation, and for other purposes," provides:

That all vacant, unreserved, and undisposed of public lands within the areas in the southern part of the State of Utah * * * [described] be, and the same are hereby, permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon: * * *. Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37½ per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: * * *.

The appellant contends that because the lands embraced in his offers were either patented with a reservation of the oil and gas deposits to the United States or in outstanding stockraising homestead entries when the act of March 1, 1933, was enacted, the lands were not "vacant, unreserved, and undisposed of public lands" at that time and thus the deposits of oil and gas therein were not set apart for the Indians.

An entry under the Stockraising Homestead Act is subject to "a reservation to the United States of all the coal and other minerals in

the lands so entered" (43 U. S. C., 1952 ed., sec. 299). The effect of such a reservation at the time of entry is to segregate the land entered into two estates—the surface and the mineral. *Skeen v. Lynch et al.*, 48 F. 2d 1044 (10th Cir. 1931); cf. *Kenney-Coastal Oil Company et al. v. Kieffer et al.*, 277 U. S. 488 (1928). But the fact that one estate—the surface—has been carved out of the public domain by either an entry or a patent under the Stockraising Homestead Act does not make that which is left—the mineral estate—any the less "land." *British-American Oil Producing Co. v. Board of Equalization of Montana et al.*, 299 U. S. 159 (1936); Solicitor's opinion, 59 I. D. 393 (1947).

The act of March 1, 1933, withdraws from all forms of entry or disposal "all vacant, unreserved and undisposed of public lands" in a described area and sets these lands aside for the benefit of the Indians. While it may be admitted that the surface estates in the lands embraced in Mr. Dimond's offers were not vacant, unreserved, or undisposed of when the 1933 act was passed, the mineral estates in those lands meet the test of the act. The record indicates that while some of the lands had previously been covered by oil and gas prospecting permits issued pursuant to the Mineral Leasing Act, all such permits had been canceled prior to March 1, 1933.

As the mineral estates in those lands were vacant, unreserved and undisposed of when the 1933 act was passed, it must be held that those estates are within the scope of the act and that the oil and gas deposits in those lands are not subject to disposition under the terms of the Mineral Leasing Act. Cf. *United States v. Shoshone Tribe of Indians*, 304 U. S. 111 (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 Director of the Bureau of Land Management is, for the reason set forth above, affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

PLYMOUTH OIL COMPANY

IA-453

Decided July 15, 1955

Indian Lands: Leases and Permits: Oil and Gas—Public Sales: Competitive Bidding

Requirement in a notice of public sale for oil and gas mining leases on Indian lands that sealed bids be submitted by a definite time must be observed and where a bid covering eight tracts was submitted after other timely bids on two of the tracts had been opened and the sale closed the late bid

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for the two tracts cannot be considered. Only the timely bids are acceptable under the public sale or steps may be taken in accordance with other provisions of the sale to reject all bids for the two tracts and readvertise those tracts at another public sale. Bids received late for the public sale on six tracts regarding which no competing bids had been received may be regarded as offers to purchase at a private or negotiated sale.

Contracts: Generally

Minor mistake of Western Union in telegram accepting bidder's offer is not fatal where intent to accept offer is otherwise clear.

Indian Lands: Patents—Indian Lands: Removal of Restrictions

The subsequent issuance and delivery of a patent in fee to a tract upon which a bidder's offer to lease had been accepted prevents the Department from granting a mineral lease covering such tract because the land has become unrestricted. Since the Indian owner of the tract has instituted litigation in that respect the deposit made for a lease on the tract will be held pending the outcome of the litigation or subject to further action by the parties interested in the deposit.

APPEAL FROM THE BUREAU OF INDIAN AFFAIRS

On February 16, 1955, the Plymouth Oil Company, which is hereafter referred to as Plymouth, filed further exceptions to action by the Bureau of Indian Affairs accepting Plymouth's bids to purchase certain oil and gas leases on the Fort Berthold Indian Reservation, North Dakota, covering allotted Indian tracts 24, 25, 26, 28, 29, 30, 31, and 32, and directing Plymouth to make the initial 20 percent payment of bonus and rentals on tracts 29 and 32. Plymouth has also asked that the sum of \$19,636, representing an amount already deposited on the other six tracts, be refunded. To support its views in this matter, Plymouth in substance makes three contentions:

1. That the bids submitted by it were late, and were therefore defective as to all tracts bid upon;
2. That there never was a contract with Plymouth as to tracts 29 and 32; and
3. That the acceptance of Plymouth's bids was ineffective.

In order to form a proper background of the present controversy, it is essential that reference be made to the notice of the oil and gas lease sale which was advertised by the Superintendent of the Fort Berthold Agency on March 29, 1954. The notice provided, among other things, that:

Sealed bids for Oil and Gas Mining Leases on restricted Allotted Lands of the Fort Berthold Indian Reservation, North Dakota will be received at the Office of the Superintendent of the said reservation, New Town, North Dakota, until 2:00 P. M., Central Standard Time on April 28, 1954, and will be opened immediately thereafter in the presence of such bidders as may attend.

The notice of the sale likewise contained other provisions which called upon bidders for a deposit of at least 20 percent of the bonus offer, plus 20 percent of the first year's rental, as a guaranty of good faith. Moreover, the notice stipulated that the failure of a successful bidder to comply with the terms of the lease sale, conducted under regulations of the Department,¹ would be grounds for the forfeiture of the bidder's deposit for the use and benefit of the Indian owners. Also, the right was reserved to reject any and all bids, and to disapprove and reject prior to approval any lease made on an accepted bid.

The records disclose that the public lease sale was held as advertised on April 28, 1954. The bids which had been submitted were opened at 2:00 p. m. on that date, and the sale was over at 2:15 p. m. Of the above eight tracts,² only two attracted bids at the public sale. Gulf Oil Corporation bid \$8.05 per acre for tract 29, and Stanolind Oil and Gas Company bid \$12.87 per acre for tract 32. Plymouth's representative did not arrive at the public sale with his bids until 2:20 p. m., which was after the sale had closed. He was informed that he was late, but he requested nevertheless that Plymouth's bids be considered.³ In fact, a clearer understanding of the parties' discussions at this particular phase of the negotiations can best be gained by reference to the local Superintendent's detailed report of October 5, 1954, to the Commissioner of Indian Affairs. The pertinent text of this report reads as follows:

The Plymouth representative, Mr. Joseph W. Cole, Jr., was considerably excited upon arrival. He asked if he was late and was so informed. He then advised that he met a road grader east of New Town and avoided hitting the grader by driving into the ditch. He stated that it took considerable time to get back on the road and this made him late for the sale, and that his company should have their bids considered for that reason. He was advised that we were without authority to make a decision, but that the matter would be referred to our Aberdeen Area Office. An attempt was then immediately made to contact Aberdeen by telephone, but this could not be done because the telephone lines were down. We could not send a telegram for the same reason. Mr. Cole then asked if he could see the abstract of bids received. His request was complied with. After reviewing the bids received he then opened the Plymouth bids. He noted that no bids were received on six tracts and requested

¹ 25 CFR 189.

² Each of the eight tracts contains 320 acres, with the exception of Tract 24, which includes 160 acres.

³ Plymouth's bids per acre on the eight tracts were as follows:

Tract No. 24	\$42.75
“ “ 25	76.25
“ “ 26	36.25
“ “ 28	24.50
“ “ 29	36.25
“ “ 30	42.75
“ “ 31	103.50
“ “ 32	113.75

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that those bids be accepted and his request was granted with the provision that final decision would have to be made at the area or central office. He then called attention to the fact that the Plymouth bids on tracts No. 29 and No. 32 were considerably higher than the bids which were received on time, and he requested that consideration be given these bids also. He was advised that it was our opinion that the bids could not be considered but that we would report the matter to the Aberdeen Office and advise him.

The deposits for tracts No. 29 and No. 32 were returned to Mr. Cole. The deposits for the other six tracts were taken up in Special Deposits and are still so held.

Mr. Cole requested that as soon as word was received from the Aberdeen Office that he be advised. Several days later the Area Office advised that the matter was being transmitted to the Central Office for a decision. Mr. Cole was immediately advised. He again requested that as soon as word was received from Washington that he be advised. This request was complied with immediately by our telegram dated May 20, 1954.

Thus, it would appear that Plymouth, through its representative Mr. Joseph W. Cole, Jr., had repeatedly requested that it be advised promptly when authority was given to the local Bureau officials to accept Plymouth's bids. The authority to accept Plymouth's bids in that respect was sent to the Area Director by a telegram dated May 14, 1954. The local agency officials in turn were advised of this telegram on May 17, 1954, and on May 20, 1954, Plymouth was notified of the award to it of all eight tracts.⁴

It appears that on May 28, 1954, Plymouth's representative, Mr. Cole, visited the Superintendent's office. Since the Superintendent apparently had had no response to his telegram of May 20, 1954, he states in his letter of June 4, 1954, that he took the matter up with Mr. Cole, who then informed the Superintendent that Plymouth desired to be released from the bids which it had made. Mr. Cole was advised to put his request in writing, after which it would be submitted to the Commissioner of Indian Affairs for a decision. A copy of Plymouth's written request for a release in that respect is included in the attached record. While that request, dated May 29, 1953,⁵ is addressed to the Superintendent of the Fort Berthold Reservation, it is not clear from the record when, if ever, that letter was received by the Superintendent. Although it was supposed to have been mailed on May 31, the letter had not been received by the Superintendent on June 2, 1954, when another telegram was sent to Plymouth which referred to the May 20 telegram, and asked for a deposit of all the bonus

⁴ At the same time the Superintendent advised the Gulf Oil Corporation and Stanolind Oil and Gas Company that its bids on tracts 29 and 32 had been rejected, and returned to those companies the deposits which they had made. Both companies have protested this action, and apparently both desire that the respective tracts which they bid on be awarded to them.

⁵ Obviously this is a typographical error, as the date should read May 29, 1954.

and first-year rental for the two tracts in question. Moreover, on June 9, the Superintendent asked Plymouth to indicate what its intentions were in the matter since no word apparently had been received in response to the Superintendent's prior communications.

I

Plymouth contends that the late filing of its bids made them defective as to all of the tracts. There is no question but that its bids failed to comply with the provisions of the public sale held on April 28, 1954. In fact, at the time Plymouth's bids were submitted, one bid covering each of tracts 29 and 32 and which apparently conformed in all respects with the requirements of the public sale, had been received. Since the sale was over before Plymouth's bids were submitted, the two bids which had been received at that time were regarded by the local Bureau officials as the only eligible bids under the public sale. Accordingly, Plymouth's deposit on its bid for tract 32 was returned on the day of the sale, and its deposit on tract 29 was returned on April 30, 1954. Such action by the local officials was proper.

It is fundamental that the specifications set out in invitations for sealed bids on oil and gas leases on Indian lands can be made effective only by giving force to those provisions which serve as the basis for the submission of bids. When responding to such public notices, oil companies and others are justified in expecting compliance with our own requirements. Thus, when properly qualified bidders meet those requirements, and the public sale is closed, no competing bids received after the closing of the sale should be considered. Accordingly, no effort should be made to enforce payment of bonus and rental payments from Plymouth as to tracts 29 and 32, and its bids on those tracts may be regarded as having been rejected. Whether the proposals of the eligible bidders at the public sale should now be accepted is beyond the scope of the present appeal by Plymouth. However, it may be observed in this respect that the notice of the public lease sale reserved the right to reject any and all bids, and to reject, prior to approval, any lease made on an accepted bid. Thus, it will be necessary in a separate proceeding, and upon advice of the United States Geological Survey, for the Bureau of Indian Affairs to make an independent investigation to determine whether the two bids in question should be accepted, or possibly whether tracts 29 and 32 should be readvertised for oil and gas mining purposes.

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II

With respect to the remaining six tracts on which Plymouth submitted bids, we cannot agree that the late filing of bids in that respect prevented the formation of an enforceable agreement. No other bids were made for those tracts. Irrespective of its lack of compliance with the provisions of the public lease sale, Plymouth through its representative, Mr. Cole, nevertheless requested that its bids for those tracts be considered. Accordingly, Plymouth's request in that respect may be regarded as an offer to buy the mineral leasing rights at a private or negotiated sale. Since the lands comprising such tracts are allotted, no statutory bar to a private sale exists.⁶ Accordingly, the local agency officials sought authority to consummate such a sale. This was granted, and Plymouth was so advised through the medium of the Superintendent's telegram of May 20, 1954.

III

It is contended by Plymouth that the terms of the telegram as received by it were indefinite and ambiguous, and did not constitute a valid acceptance. The record discloses that the Superintendent's telegram of May 20, 1954 to Plymouth, when received by the Western Union Telegraph Company of New Town, North Dakota, read as follows:

YOU ARE HEREBY ADVISED THAT YOU HAVE BEEN AWARDED TRACTS 24, 25, 26, 28, 29, 30, 31 AND 32 IN CONNECTION OUR ADVERTISEMENT APRIL 28TH PLEASE DEPOSIT IMMEDIATELY YOUR CHECK COVERING TRACT 29 AMOUNT \$2400.00 TRACT 32 \$7360.00 REPRESENTING 20 PERCENT OF BONUS AND FIRST YEARS RENTAL.

A copy of the telegram which Plymouth alleges it received from the Superintendent through transmission of Western Union reads as follows:

YOU ARE HEREBY ADVISED THAT TRACTS 24-25-26-28-29-30-31 and 32 IN CONNECTION OUR ADVERTISEMENT APRIL 28TH PLEASE DEPOSIT IMMEDIATELY YOUR CHECK COVERING TRACT 29 AMOUNT \$2400.00 TRACT 32 \$7360.00 REPRESENTING 20 PERCENT OF BONUS AND FIRST YEARS RENTAL—RALPH SHANE SUPT. 24-25-26-28-29-30-31-32-28-29 \$2400.00 32 \$7360.00

It is Plymouth's view that the omission through the course of telegraphic transmission of the four words "you have been awarded" led it to construe the telegram as a request to return the checks for the

⁶ Act of March 3, 1909 (35 Stat. 783; 25 U. S. C., 1952 ed., sec. 396).

deposits on tracts 29 and 32 so that the Department could "reconsider" the matter of making an award on all eight tracts.

If, upon receipt of the telegram of May 20, 1954, Plymouth felt that a mistake had been made or had any misgivings concerning the scope of the telegram, it was put on notice, and in view of the negotiations which were pending at the time, Plymouth in all diligence and good faith should have made inquiry to determine the exact language or correctness of the telegram received by it.⁷ Irrespective of any obligation in that respect, it is believed nevertheless that Plymouth understood the telegram of May 20, 1954. Its apparent failure to investigate after receipt of the telegram supports such a view. In any event, that conclusion is not unreasonable based upon the circumstances which prevailed at the time. When the telegram was sent, Plymouth was in fact awaiting word from the Commissioner of Indian Affairs concerning the acceptance of its bids on all of the above tracts. Obviously, the bonus deposits on tracts 29 and 32 would not have been called for unless Plymouth's bids on those tracts were accepted. At that time the parties were aware of the doubtful extension of any acceptance of the bids to tracts 29 and 32. The parties were also aware that if Plymouth's bids on those two tracts could be accepted, no obstacle was foreseeable by the parties to the acceptance of bids on the remaining six tracts which had not been bid upon at the public sale and which were otherwise free to be leased.

Other circumstances also point to the conclusion that Plymouth understood that the telegram of May 20, 1954, constituted an acceptance of all bids. It is shown by its attempted revocation of May 29 1954, that Plymouth was fully aware that the agency officials had been instructed to accept the bids submitted by Plymouth. Moreover, it also appears from the record that the day before the telegram of May 20, 1954 was transmitted, Plymouth had been advised by its own representative that the Commissioner of Indian Affairs would approve Plymouth's bids if it still desired to take the leases.⁸ With such a factual background established, it cannot be said that when the telegram of May 20, 1954 was received, it was ambiguous or meaningless. The telegram merely confirmed what was or should have been understood at that time by Plymouth.

IV

Notwithstanding the above finding that Plymouth's offer to lease the six tracts was accepted by the Superintendent's telegram of May 20,

⁷ Cf. 12 Am. Jur., Contracts, p. 633; *Germain Fruit Company v. Western Union Telegraph Co.*, 137 Calif. 598, 70 Pac. 658 (1902); *Western Union Telegraph Company v. Neill*, 57 Tex. 283 (1882).

⁸ This information was furnished by the local Superintendent after he had received instructions to accept Plymouth's bids.

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1954, we have been advised that a fee patent for one of these tracts (Tract 30) was issued on December 10, 1954, pursuant to an application filed by the Indian owner, George W. Hoffman. The patent has been delivered, and this Department's jurisdiction and supervision over this tract has been lost, since this land is now unrestricted. The Indian owner has indicated an interest in the deposit of \$2,816 which was made for a lease on his land, or that the lease agreement by Plymouth for tract 30 be completed. In this connection we have been advised by a local representative of Plymouth that George W. Hoffman filed suit against Plymouth on April 27, 1955 in the District Court for the Fifth Judicial District of North Dakota, in which he seeks judgment in the amount of \$2,736 representing 20 percent of the amount of Plymouth's bid on Tract 30. Accordingly, no action will be taken looking to the disposition of the deposit which was made on Tract 30, but that fund will be held in a special account by the Superintendent pending the outcome of the litigation between the parties or until such a time as they reach an agreement concerning the disposition of the fund.

To summarize, the action of the Bureau of Indian Affairs requiring Plymouth to make deposits on tracts 29 and 32 is reversed. Plymouth's demand for the return of the deposits on the other six tracts upon which it bid is rejected in its entirety. Pursuant to permission granted Plymouth in the Assistant Secretary of the Interior's letter of November 18, 1954, Plymouth is given 30 days from the date of this decision in which to complete leases on all of the above tracts except Nos. 29, 30, and 32. The deposit made by Plymouth on Tract 30 will be held awaiting the outcome of litigation instituted by the owner of that tract, or pending such further action as the parties interested in the deposit may take.

ORME LEWIS,
Assistant Secretary.

RICHFIELD OIL CORPORATION

A-27083

Decided July 18, 1955

Oil and Gas Leases: Royalties

Where a portion of the land in an oil and gas lease lies within the horizontal limits of an oil or gas deposit which was known to be productive on August 8, 1946, the lessee is not entitled under item (1) of section 12 of the act of August 8, 1946, to a flat royalty rate of 12½ percent on production later obtained from deeper zones underlying the same horizontal limits, which deeper zones were discovered by wells drilled outside the lease boundaries subsequent to August 8, 1946.

Oil and Gas Leases: Generally

Under item (1) of section 12 of the act of August 8, 1946, definitions of the productive limits of oil and gas deposits found to exist on that date cannot later be changed on the basis of information developed after that date.

APPEAL FROM THE GEOLOGICAL SURVEY

The Richfield Oil Corporation has appealed to the Secretary of the Interior from that part of a letter of August 9, 1954, by the Acting Director of the Geological Survey determining that a royalty limitation of 12½ percent does not apply to oil or gas produced under lease Los Angeles 033569 from the E½NW¼ sec. 28, T. 11 N., R. 20 W., S. B. M., California, from the Vedder zone (above Wheeler Ridge thrust fault), the RB-2 zone, and the Eocene zone. The Acting Director's letter responded to a request by the appellant for a determination of the applicability of section 12 of the act of August 8, 1946 (30 U. S. C., 1952 ed., sec. 226c), to production from the appellant's leasehold.

The appellant's lease, known as the Gordon lease, is a renewal¹ of a 20-year lease issued under section 14 of the Mineral Leasing Act (41 Stat. 437, 442). It embraces 160 acres described as the NW¼ sec. 28, T. 11 N., R. 20 W., S. B. M., Kern County, California, and is within the known geologic structure of the Wheeler Ridge Oil Field.²

In the application involved in this proceeding, the appellant asserted that the three zones involved in this appeal (and other zones not so involved) were discovered since August 8, 1946, but not on the Gordon lease, and requested a determination that these zones and the oil and gas deposits therein underlying the Gordon lease were not believed to be within the productive limits of any oil or gas deposit as such limits existed on August 8, 1946. This was, in effect, a request for a royalty limitation of 12½ percent on production under the lease from such zones. The application was denied as to the three zones by the Acting Director's determination which was made pursuant to the departmental regulation (43 CFR 192.6; 19 F. R. 9012) providing for the determination by the Director of the Geological Survey of the

¹ The appellant has apparently filed an application for an exchange lease pursuant to section 17 (a) of the Mineral Leasing Act, which was added by section 4 of the act of August 8, 1946 (30 U. S. C., 1952 ed., sec. 226d). With respect to the issue involved in this appeal, the provisions in section 17 (a) regarding the payment of 12½ percent royalty on the value of production removed or sold from a lease are identical with the provisions in section 12.

² A report of May 13, 1924, by the Acting Director of the Geological Survey stating that the land covered by this lease is within the known geologic structure of the Wheeler Ridge Field indicates that the productivity of the field was established prior to December 18, 1923. The known geologic structure of the field was defined March 25, 1925, and the definition was revised April 14, 1952.

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boundaries of known geologic structures and the productive limits of producing oil or gas deposits.

Section 12 of the act of August 8, 1946, provides as follows:

From and after the effective date of this Act, the royalty obligation to the United States under all leases requiring payment of royalty in excess of 12½ per centum, except leases issued or to be issued upon competitive bidding, is reduced to 12½ per centum in amount or value of production removed or sold from said leases as to (1) such leases, or such part of the lands subject thereto, and the deposits underlying the same, as are not believed to be within the productive limits of any oil or gas deposit, as such productive limits are found by the Secretary to exist on the effective date of this Act, and (2) any production on a lease from an oil or gas deposit which was discovered after May 27, 1941, by a well or wells drilled within the boundaries of the lease, and which is determined by the Secretary to be a new deposit; and (3) any production on or allocated to a lease pursuant to an approved unit or cooperative agreement from an oil or gas deposit which was discovered after May 27, 1941, on land committed to such agreement, and which is determined by the Secretary to be a new deposit, where such lease was included in such agreement at the time of discovery, or was included in a duly executed and filed application for the approval of such agreement at the time of discovery.

Subparagraph (3) of paragraph (a) of the applicable departmental regulation (43 CFR 192.82; 19 F. R. 9017) requires the payment on and after August 8, 1946, of royalty on production of:

12½ percent on all leases theretofore issued, except competitive leases, and on exchange and renewal leases thereafter issued, as to production from

(i) Land determined by the Director, Geological Survey, not to be within the productive limits of any oil or gas deposit on August 8, 1946.

(ii) An oil or gas deposit which was discovered after May 27, 1941, by a well or wells drilled within the boundaries of the lease and which is determined by the Director, Geological Survey, to be a new deposit.

(iii) Or allocated to a lease pursuant to an approved unit or cooperative agreement from an oil or gas deposit which was discovered on unitized land after May 27, 1941, and determined by the Director, Geological Survey, to be a new deposit * * *

With reference to production on the appellant's lease from the zones as to which the 12½ percent royalty rate was denied, the Acting Director's determination stated that:

* * * the E½NW¼ of said section 28 is considered to be within the productive limits of the "Old upper" and "Old lower" zones at depths of 2,000 to 2,500 feet and 3,200 to 4,100 feet, respectively, in the upper Miocene formations of the Wheeler Ridge field. Accordingly, within the intent of section 12 of the Act of August 8, 1946, the parties in interest under oil and gas lease Los Angeles 033569, are entitled to a royalty limitation of 12½ percent of only the oil or gas produced thereunder from any new deposits discovered within the E½NW¼ section 28, subsequent to May 27, 1941 (43 C. F. R., 192.82 (3) (1)). However, a royalty limitation of 12½ percent does not apply to oil or gas produced from the E¼NW¼ section 28 from the * * * Vedder (above Wheeler Ridge thrust fault), RB-2 and Eocene zones as such deposits have been discovered

outside of the boundaries of the subject leasehold. The completion of a well or wells in the E $\frac{1}{2}$ NW $\frac{1}{4}$ section 28 in any of the deposits referred to above cannot be considered within the intent of sec. 12 of the Act of August 8, 1946 (Supra) as being a discovery of a new deposit within the boundaries of the lease.

A report of October 1, 1954, by the Geological Survey concerning the partial rejection of the appellant's request for a flat royalty rate states that the rejection was based on the application of the departmental regulation, 43 CFR 192.82 (a) (3) (ii), quoted above. The report of October 1, 1954, states that:

[This regulation] * * * has been construed to mean that on lands determined to be within the productive limits of any oil or gas deposits on August 8, 1946, a royalty rate of 12 $\frac{1}{2}$ percent would apply only to production from an oil or gas deposit discovered within the boundaries of the lease and which is determined by the Director, Geological Survey, to be that of a new deposit. In the subject case, the reduced royalty rate was denied as to production from the Coal Canyon, FA-2, Olcese OA-2, Vedder (above the Wheeler Ridge thrust fault), RB-2 and Eocene zones in the E $\frac{1}{2}$ NW $\frac{1}{4}$ section 28. This section is predicated on the evidence that production in these zones had been established by prior discoveries on lands outside of the lease Los Angeles 033569. Accordingly, it was determined that the completion of wells in the E $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 28, in any of the zones enumerated above, could not be construed to be that of a discovery of a new deposit. Such completions could only be considered as development wells in deposits which were previously known to be productive.

The appellant agrees that the three zones involved in this appeal were discovered outside the Gordon lease, but asserts that it is entitled to the 12 $\frac{1}{2}$ percent royalty rate under item (1) of section 12 of the act of August 8, 1946. As the discoveries in these zones were not made within the boundaries of the Gordon lease, and as the lease is not committed to an approved unit agreement, the 12 $\frac{1}{2}$ percent royalty rate is not authorized under either item (2) or item (3) of section 12. Accordingly, unless production on the Gordon lease from the zones under consideration comes within the scope of item (1) of section 12, the determination by the Acting Director of the Geological Survey must be affirmed.

In support of its contention that production from the zones here involved is subject to the 12 $\frac{1}{2}$ percent royalty rate under item (1) of section 12, the appellant asserts that although these zones are within the same horizontal limits as are zones which are known to have been productive on August 8, 1946 (the "Old upper" and "Old lower" zones referred to in the Acting Director's determination), the zones here under consideration are situated below the vertical level of the productive limits of the Old upper and Old lower zones and are therefore entitled to the flat 12 $\frac{1}{2}$ percent royalty rate as provided in item (1) of section 12. The appellant contends that the Acting Director's failure to grant the 12 $\frac{1}{2}$ percent royalty rate as to the

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zones involved in this appeal indicates that the statutory phrase "productive limits of any oil or gas deposit" in item (1) of section 12 was construed by the Acting Director of the Geological Survey to mean "horizontal productive limits of any oil or gas deposit." In other words, the appellant asserts that the Acting Director has in effect outlined on the surface of the ground the horizontal limits of the Old upper and Old lower zones and has taken the position that any oil and gas deposit lying within those horizontal limits must be considered to be within the productive limits of the Old upper and Old lower zones even though the deposit is in an entirely separate zone lying either above or below the Old upper and the Old lower zones and not coming within the vertical productive limits of these two zones.

The issue on this appeal therefore is whether the "horizontal limits" interpretation apparently followed by the Geological Survey or the "vertical limits" interpretation contended for by the appellant is correct.

The language of item (1) of section 12 is not too clear. It grants the flat 12½ percent royalty rate to production from

* * * such leases, or such part of the lands subject thereto, and the deposits underlying the same, as are not believed to be within the productive limits of any oil or gas deposit, as such productive limits are found by the Secretary to exist on the effective date of this Act * * *.

Viewed by itself, this language is possibly susceptible of the interpretation advanced by the appellant.

On the other hand, particularly when viewed as against the language employed in items (2) and (3) of the same section, item (1) is more reasonably construed as the Acting Director has construed it. Both items (2) and (3) grant the flat 12½ percent royalty rate to "any production * * * from an oil or gas deposit * * * which is determined by the Secretary to be a new deposit." This language plainly shows that in making a determination under item (2) or (3), the Secretary is to act only upon the basis of "deposits." That is, in acting upon a request under either item (2) or (3) for a determination that the flat 12½ percent royalty rate be granted to production from a certain deposit, the Secretary determines only whether the deposit in question is a new deposit separate and distinct from any other deposit previously discovered. It necessarily follows that if the deposit in question is vertically separated from an existing deposit, it comes within item (2) or (3) regardless of whether it falls within vertical extensions of the horizontal limits of the existing deposit.

The language of item (1) is distinctly different. It does not extend the flat 12½ percent royalty rate to production from a "deposit"; it

extends the flat royalty rate to production from "such *leases*, or such part of the *lands* subject thereto, and the deposits underlying the same, as are not believed to be within the productive limits of any oil or gas deposit" [italics supplied], as such limits existed on August 8, 1946. Moreover, it is to be noted that item (1) says "*such leases*, or *such* part of the lands subject thereto, and *the* deposits underlying the same, *as* are not believed," etc. [Italics supplied.] It does not say "such deposits." The flat 12½ percent royalty is to be extended only to such leased *land* as is not within the productive limits of an existing deposit, and not to such *deposits* as are not within the productive limits of an existing deposit. Accordingly, it seems plain that the Secretary is required to determine only whether the leased *land*, or part of it, lies within the productive limits of a deposit in existence on August 8, 1946. This clearly conveys the idea that the Secretary is only required to determine whether the leased land lies within the horizontal limits of any existing deposit. This interpretation is incorporated in the departmental regulation quoted earlier which was adopted shortly after the enactment of the act of August 8, 1946 (see 43 CFR, 1946 ed., 192.82 (a) (3)). I refer to the provision that the flat 12½ percent royalty rate shall apply to production from "(i) *Land* determined by the Director, Geological Survey, not to be within the productive limits of any oil or gas deposit on August 8, 1946." [Italics supplied.]

The inclusion in item (1) of the phrase "and the deposits underlying it" also bears out this conclusion. That is, item (1) seems to say that only where the leased land *and all the deposits underlying it* are not within the productive limits of a deposit found to exist on August 8, 1946, will the lessee be entitled to the flat royalty rate. This negates the idea that item (1) applies to leased land where one or more of the deposits underlying the land have been found to be in existence on August 8, 1946. If Congress had intended that meaning for item (1), it would seem that Congress would have simply followed the language used in items (2) and (3); that is, item (1) would have been worded as follows:

[The flat royalty rate shall extend to] (1) any production on a lease from an oil or gas deposit which is not believed to be within the productive limits of any oil or gas deposit, as such productive limits are found by the Secretary to exist on the effective date of this Act.

Although the legislative history of section 12 is rather inconclusive, it lends support to the "horizontal limits" interpretation. As introduced, S. 1236 (79th Cong., 1st sess.), which became the act of August 8, 1946, amended section 17 of the Mineral Leasing Act to include the following provision:

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* * * Upon the determination by the Secretary of the Interior that a new oil or gas field or deposit has been discovered after May 27, 1941, (a) by a well drilled within the boundaries of any lease requiring payment of royalty in excess of 12½ per centum, or (b) by a well drilled within two miles of the boundaries of any such lease, the cost of which shall have been contributed to by any lessee of the United States holding any such lease, or would have been contributed to by any such lessee of the United States had the well been non-productive, the royalty obligation to the United States of the lessee who drilled such well, or who contributed or would have contributed to such well, shall be reduced, as to such new oil or gas field or deposit, to 12½ per centum * * *.

It will be noted that this provision extended the flat royalty rate only to production from a new field or deposit discovered by a well on the lease or within 2 miles of the lease. With respect to the situation covered by item (a), the provision was substantially a reenactment on a permanent basis of the act of December 24, 1942 (56 Stat. 1080), which was limited to discoveries of new oil or gas fields or deposits during the period of the national emergency proclaimed on May 27, 1941, and granted the flat royalty only for a period of 10 years following the discovery.

The proposed provision in S. 1236 was flatly opposed by the Department in its report of March 15, 1946, on the bill (S. Rept. 1392, 79th Cong., 2d sess.). The Department stated that the purpose of the 1942 act was to encourage prospecting during a period of extreme need and at a time when labor and materials were scarce but that the need for encouragement in normal times was not apparent.

S. 1236 was amended by the Senate Committee on Public Lands and Surveys and passed by the Senate as amended. In lieu of the provision quoted above, a section 12 was added to the bill which provided for the reduction of royalty under leases on which more than 12½ percent royalty was required, other than competitive leases, to 12½ percent on production removed or sold from said leases as to:

(1) such leases, or such part of the lands subject thereto, and the deposits underlying the same, as are not within the known productive limits of any producing oil or gas deposit, as such productive limits exist on the effective date of this Act, and (2) each oil or gas field or deposit discovered after May 27, 1941, which is entitled to the benefits of the Act of December 24, 1942, or which is included in any approved unit or cooperative agreement.

In explanation of the new provision, the Senate Committee stated:

The bill also provides for a reduction in royalty rate under existing outstanding leases to 12½ percent as to production from new deposits discovered after the effective date of the bill and as to new deposits discovered after May 27, 1941, which are entitled to the benefits of the act of December 24, 1942, or are included in an approved unit or cooperative plan. [S. Rept. 1392, *supra*, pp. 3-4.]

The committee also said with respect to the comparable provision in new section 17(a) to be added to the Mineral Leasing Act (see fn. 1)

that it would fix "with respect to such leases a royalty rate conforming to the rate to be granted under the new leases issued after the effective date of the act." (*Idem*, p. 2.) This had reference to the fact that the bill amended section 17 of the Mineral Leasing Act to provide a flat 12½ percent royalty rate on noncompetitive leases to be issued after enactment of the legislation.

The Department objected to section 12 of the bill as passed by the Senate in the Department's report of June 28, 1946, on S. 1236 to the House Committee on Public Lands. In this report the Department stated:

To appreciate the import of sections 4 and 12 it is important to bear in mind that lands within the exterior boundaries of a *known geological structure* of a producing field are regarded as having a substantially higher relative value for oil or gas and are sold by competitive bidding. Under the terms of these sections the Department would be required to define "the known productive limits of any producing oil or gas deposit." [*Emphasis added.*] In the case of fields or deposits, newly discovered or not fully developed, the known productive limits of the producing oil or gas deposit are almost certain to be smaller than the limits of the known geologic structure. This means that in known geologic structures which are not fully developed on the effective date of the act the Department would have the difficult and impracticable administrative task of breaking down a known geologic structure into a number of smaller subdivisions representing the limits of any producing oil or gas deposit or deposits. * * * (H. Rept. 2446, 79th Cong., 2d sess., p. 6.)

The Department further stated with respect to section 12 that it was

* * * unable to perceive any real basis for conferring so substantial a benefit [reduction of royalty to flat 12½ percent] on those lessees who do little or nothing to promote the search for new reserves of oil or gas. The flat 12½ percent royalty rate, which is the reward offered by the O'Mahoney Act of December 24, 1942 (56 Stat. 1080), to the lessee who discovers a new oil or gas field or deposit, constitutes sufficient incentive to bona fide operators to risk their capital in the search for new petroleum reserves. To extend the same 12½ percent royalty rate to lessees who do nothing to discover a new field or deposit would be to grant them equal rights with lessees who increase the Nation's known oil reserves by discovering a new field or deposit * * *. (*Idem.*)

It will be observed from these two extracts from the Department's report that the Department objected to section 12 because of the administrative difficulties of defining the known productive limits of oil and gas deposits and because the section offered a reward to lessees who did not contribute to making new discoveries.

The House Committee proposed the enactment of a number of amendments including the amendment of item (1) in section 12, in response to the objections by this Department. As a result of the proposed amendments, the language of item (1) in section 12 (and the identical provision in section 4) was changed to the version which was enacted into law, and which reads as follows, the words empha-

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sized being added and the word in brackets being deleted, by the House Committee:

* * * such leases, or such part of the lands subject thereto, and the deposits underlying the same, as are not *believed to be* within the [known] productive limits of any oil or gas deposit, as such productive limits *are found by the Secretary to exist* on the effective date of this Act. [Italics supplied.]

In commenting upon the proposed changes in item (1) the House report (*supra*, pp. 4-5) stated that the amendments were designed "to lessen the administrative tasks of the Department of the Interior in determining the productive limits of existing oil and gas deposits and to allow to the Department very considerable latitude in such determination, to the end that only those lands, the development of which is clearly extremely hazardous, will be granted the exploratory royalty rate of 12½ percent."

From this detailed recital of the legislative history of section 12, it is evident that the intent of Congress in enacting item (1) was not clearly expressed. Nonetheless, two conclusions may be fairly drawn. First, the Department, in complaining to the House Committee of the administrative difficulty of "breaking down a known geologic structure into a number of smaller subdivisions representing the limits of any producing oil or gas deposit or deposits," made it plain that it considered that the smaller subdivisions would be delineated in the same manner as a known geologic structure. That is, the practice of the Department in defining the known geologic structure of a producing field has been to make only one "horizontal" definition for a field regardless of whether there are one, two, or more producing sands or zones in the field. For example, in this case, the Department defined the known geologic structure of the Wheeler Ridge Field on March 25, 1925, and revised that definition on April 14, 1952 (see fn. 2). There is only one definition of the field, not a number of separate "horizontal" definitions of the known geologic structure each based upon each separate producing zone in the field. When the Department spoke of breaking the definition of a structure down into smaller subdivisions, it clearly indicated that it considered that only one "horizontal" definition, as it were, would be made for any given area of land, regardless of whether there were two or more deposits underlying that land.

The House Committee, and later the Congress, gave no indication that it was intended that the Department was to follow a different practice in defining the productive limits of deposits. Instead, the committee sought to lighten the administrative burden of the Secretary by giving him more leeway in making the definitions. If Congress had intended that the Secretary should define the horizontal and

vertical productive limits of each deposit underlying a tract of land, I think that it would have clearly stated so, at least to the extent of employing the same language in item (1) as was used in items (2) and (3).

The interpretation contended for by the appellant would cast a severe administrative burden upon the Department. It would require the Department to define the vertical and horizontal productive limits of every oil and gas deposit in existence on August 8, 1946. Only in this manner could a determination be made as to whether any given deposit falls within the productive limits of any other deposit.

The second conclusion that may be fairly drawn from the legislative history of section 12 is that Congress intended to confer the flat 12½ percent royalty rate only upon a lessee who had undertaken considerable risk in drilling to a deposit. The House Committee said the rate would apply only to land "the development of which is clearly extremely hazardous" (*supra*). Where a lease contains a deposit which is believed to be within the productive limits of another deposit, the element of risk in drilling to a deeper sand is considerably reduced. In the case of the appellant's lease, the lease was known on August 8, 1946, to contain two productive deposits, the Old upper and Old lower. Although the three zones involved in this appeal lie several thousand feet below these two zones, it is obvious that the appellant encountered less risk in drilling on the leased land than it would have in a case where there were no productive deposits at all underlying the lease. It does not appear that Congress intended to grant the flat royalty rate to development, as distinguished from exploratory, wells.

It should also be noted that the Senate Committee said with respect to the identical provisions in section 17 (a) that they would fix with respect to existing leases a royalty rate "conforming to the rate to be granted under the new leases issued after the effective date of the act" (*supra*). If the land involved in this appeal (E½NW¼ sec. 28) had not been leased on August 8, 1946, and was thereafter leased, it would have had to be leased by competitive bidding because of its situation within the known geologic structure of the Wheeler Ridge Field, and the lease would have carried the graduated royalty scale prescribed for competitive leases. The graduated rates would apply not only to production from the Old upper and Old lower zones but also to production from the three zones involved in this appeal. This would be true of any lease issued after August 8, 1946, for land which is believed to be within the horizontal productive limits of an oil or gas deposit as they are found to exist on August 8, 1946. Such

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lease would necessarily have to be issued by competitive bidding as the inclusion of the land within the productive limits of an oil or gas deposit would automatically place the land within the known geologic structure of a producing field (see Department's report of June 28, 1946, to House Committee, *supra*). Thus the interpretation adopted by the Acting Director conforms with the intent expressed by the Senate Committee, whereas the appellant's interpretation would give the holders of leases in existence on August 8, 1946, an advantage over holders of new leases issued after that date for land in the same status.

For these reasons, I believe that the Acting Director's decision correctly interpreted the law.

On June 2, 1955, a supplemental brief was filed for the appellant. In this brief it is contended that because of a lateral fault running diagonally through the E $\frac{1}{2}$ NW $\frac{1}{4}$ of sec. 28, the productive limits of the Old upper and Old lower zones do not include the entire E $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 28 but only a portion of it. That is, the contention is that the fault line marks the westerly limits of the productive limits of the two zones and that the remainder of the E $\frac{1}{2}$ NW $\frac{1}{4}$ lying west of the fault is not within those productive limits and is therefore entitled to the flat royalty rate even under the principle of defining productive limits solely on a horizontal basis.

According to the Geological Survey, the data relied on to support this contention was obtained from wells drilled after August 8, 1946. This information was not available prior to or on August 8, 1946. Item (1) of section 12 of the 1946 act specifically states that the productive limits of a deposit with which item (1) is concerned are "such productive limits [as] are found by the Secretary *to exist on the effective date of this act.*" [Italics supplied.] Obviously information developed after the effective date of the act cannot be used to modify a definition of productive limits based on information available on that date. Otherwise there would be no certainty as to productive limits and consequently no certainty as to royalty rates. The language of item (1) plainly negatives any interpretation which would have that effect.

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 Acting Director's decision is affirmed.

J. REUEL ARMSTRONG,
Solicitor.

APPEAL OF GUTHRIE ELECTRICAL CONSTRUCTION

IBCA-22

*Decided July 22, 1955***Contracts: Extras—Contracts: Changes**

When extra work has been performed by a contractor, pursuant to an order of the contracting officer, a subsequent claim therefor by the contractor is not barred because no written order for extras was entered, as required by Article 5 of the standard form of Government construction contract, and the contracting officer may be directed to enter an appropriate change order. The purpose of Article 5 is to protect the Government against claims for extra compensation for work voluntarily undertaken by a contractor, or ordered by a subordinate of a contracting officer without his approval.

Contracts: Breach—Contracts: Changes

While the issuance by the Government of a stop order which is not justified by the terms of the contract between the Government and the contractor, and which is extraneous to the performance of the contract itself, is a breach of contract, and a claim arising therefrom is one for unliquidated damages, a stop order which constitutes a change in the contract or in the performance of work required by the specifications under the contract entitles a contractor to additional compensation as an equitable adjustment pursuant to the "changes" clause of the standard contract.

BOARD OF CONTRACT APPEALS

Guthrie Electrical Construction, of Shreveport, Louisiana, a partnership, filed an appeal on November 13, 1954, from the findings of fact and decision of the contracting officer dated October 15, 1954, which denied the claim of the contractor in the amount of \$10,000 for compensation to cover costs of extra work allegedly incurred as the result of a stop order which suspended work from April 29, 1953, to June 8, 1953. The amount of \$10,000 was excepted from the release signed by the contractor on August 7, 1954.

The contract, on U. S. Standard Form No. 23 for Government construction contracts (revised April 3, 1942), was entered into with the Southwestern Power Administration and provided for the construction of a 161/69 Kv 30,000 Kva substation, in Henry County, Missouri, under Construction Contract 14-02-001-506. Work order was issued March 18, 1953, and under the terms of the contract work was to start within ten days after notice to proceed.

On April 29, 1953, the contracting officer notified the contractor that, "it will be in the best interest to the Government to suspend construction on the Clinton Substation, Contract 14-02-001-506, for a period of thirty days," and by letter of May 27, 1953, extended the suspension of construction to June 5, 1953. On June 8, 1953, the contractor was notified, by telephone and by letter, that the suspension order was removed and that work could be resumed as of that date.

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After the work was resumed the contracting officer issued an order allowing additional time for the completion of the contract and the work was completed and accepted on July 19, 1954. On July 22, 1954, the contractor, by letter, submitted a release "except \$50,071.95 for construction which is currently due and \$10,000.00 for cost (direct and indirect) involved by reason of your order to suspend construction activities, including delivery of materials, for the period April 29 through June 8, 1953."

When requested, by letter dated August 31, 1954, to give a breakdown on the claim figure of \$10,000, the contractor did so in a letter dated September 10, 1954, in which four claims are outlined, as follows:

It was agreed between representatives of Southwestern Power Administration and Guthrie Electrical Construction at the job site that Item No. 1 of the contract was 25% complete at the time construction was ordered suspended. We were instructed to grade and drain the site to its approximate original contour. When work was resumed we graded the site again. We claim one and one half times the amount paid for work completed as of April 29, 1953 under Item No. 1 or a total of \$4,041.00 for extra work in connection with items listed above.

We had excavated for a portion of the footings and tied a portion of the reinforcing steel for the 69 KV area. We were instructed to backfill and grade that area. We claim \$300.00 as a result of this extra work.

Leaving one employee on the payroll at Clinton for the duration of the suspension period, moving other employees and equipment off the site and back we claim a total of \$1,959.00. The balance, \$3,700.00, we claim as an indirect cost resulting from delayed delivery of material (steel four months) causing a delay in completion of the contract and incurring [sic] additional expense as set forth in our letter dated August 25, 1954.

The contracting officer, in his findings of fact dated October 15, 1954, denied recovery on all of the claims stating that they all were for unliquidated damages which the contracting officer did not have the authority to settle. The claims were then appealed to the Secretary of the Interior and under a delegation of authority from him to this Board. In stating the Government's position with respect to the appeal in a brief received by the Board on May 6, 1955, Department counsel argues that the contractor's claims should be dismissed, not only because they are for unliquidated damages, but also because, in so far as the claims are for extra work, they were not performed pursuant to any written order issued by the contracting officer as required by Article 5 of the contract, which provides:

Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

In Paragraph 3 of its letter of appeal dated November 13, 1954, the contractor states as follows:

During progress of construction we orally requested of representatives of the contracting offices [sic] that payment due to the suspension be included in a change order so payment would be made. We were advised to wait until completion of the project so that the amount of damages could be determined and be included in the final and adjusting change order. This was acceptable to us as on several occasions and on other contracts we performed work on oral authorization and it was included in the final change order. Established procedure for S. P. A. is that the agency prepares all estimates and change orders and then presented to the contractor for signature. Just prior to completion of the project we again requested that it be included in the final change order but we were advised that we had sacrificed our rights to payment in that there was no authorization in writing for the extra work and we had not requested the same in writing. * * *

This statement is not denied in the statement of the Government's position. Indeed, in a document entitled "Additional Statement of Facts" filed in the case by Clarence L. Samuel, Jr., it is averred:

With respect to paragraph No. 3, I have no knowledge of an oral request for the inclusion of extra work and cost as a result of the suspension into a change order. However, the request could have been made to the then representative of the Contracting Officer who is no longer employed by the Government. A request was made by Mr. Guthrie for its inclusion in the final change order. Mr. Guthrie was again advised that it was the type of claim over which the Contracting Officer had no jurisdiction.

It is apparent that the contractor was making a claim for work which had been required by the contracting officer.

In these circumstances, the claims are not barred by reason of the fact that no written order for extras was entered. In the nature of things Article 5 of the contract can apply only to conceded extras. Otherwise the contracting officer could always prevent the taking of an appeal by the expedient of declining to enter a written order. The purpose of Article 5 is simply to protect the Government against claims for extra compensation for work voluntarily undertaken by a contractor, or ordered by a subordinate of a contracting officer without his approval.¹ It does not prevent a reviewing authority, when it is convinced that extra work has been performed by a contractor, as a result of action taken by the contracting officer, from directing the latter to enter an appropriate change order.²

Insofar as the Government's objection to the allowance of the contractor's claims is based upon the absence of a written order for extra work, it must therefore be overruled. The Government's objection

¹ See *Griffiths v. United States*, 77 Ct. Cl. 542, 557 (1933); *Davis v. United States*, 82 Ct. Cl. 334, 347 (1936); *Fleisher Eng. & Const. Co. v. United States*, 98 Ct. Cl. 139, 158 (1942); *Gulf Const. Co., Inc.*, BCA No. 181, Division No. 1, August 10, 1943; 1 CCF 297, 299; *Thomas C. Brown Company, Inc.*, BCA No. 308, Division No. 3, October 9, 1943; 1 CCF 736, 739; *J. M. Montgomery & Co., Inc.*, CA-193 (April 9, 1954).

² See, for instance, *Standard Accident Insurance Co. v. United States*, 102 Ct. Cl. 770, 787 (1945).

to the allowance of the contractor's claims based upon the issuance of the stop order presents, however, a more complex problem.

It is well settled that the issuance by the Government of a stop order which is not justified by the terms of the contract between the Government and the contractor is a breach of contract for which the Government is liable to respond in damages if damages have been sustained by the contractor.³ A stop order represents a breach of contract when it has been issued for a reason wholly extraneous to the performance of the contract itself, such as the exhaustion of an appropriation, doubts concerning the availability of an appropriation, or the institution of an economy program. The stop order in the present case was issued because of doubts concerning the availability of the appropriation. It is clear that the damages in the amounts of \$1,959 and \$3,700 which are alleged in the third quoted paragraph of the contractor's letter of September 10, 1954, were simply the result of this extraneous factor, and represent claims for unliquidated damages which the Board may not consider or allow.⁴

It is not true, however, that all stop orders must necessarily represent claims for unliquidated damages. A stop order may itself constitute a change in a contract rather than a breach thereof, and so entitle a contractor to additional compensation as an equitable adjustment pursuant to the "changes" clause of the contract. For instance, if the progression of the work under a contract were fixed by the specifications, and the purpose of a stop order was to vary the schedule of performance, with the result that the contractor sustained additional costs, the stop order, which would not be extraneous to the performance of the contract, would constitute a change, entitling the contractor to additional compensation.⁵

It may also happen that when a stop order has been entered the contracting officer may direct changes in the work, which are a direct consequence of the entry of the stop order, or which are deemed necessary before operations are resumed. When the contractor claims additional compensation for the extra work or the elimination of work in such cases, he is also entitled to recover, and it has been so held.⁶ The stop order in such cases must be regarded simply as part of a

³ See *Rodgers v. United States*, 48 Ct. Cl. 443, 448-49 (1913); *Schuler & McDonald v. United States*, 85 Ct. Cl. 631, 642-43 (1937); *Herbert M. Baruch Corp. v. United States*, 93 Ct. Cl. 107, 125 (1941); *Brand Investment Co. v. United States*, 102 Ct. Cl. 40, 44 (1944), cert. den. 324 U. S. 850 (1945); *Froemming Bros. v. United States*, 108 Ct. Cl. 193, 214 (1947).

⁴ *Wm. Cramp & Sons v. United States*, 216 U. S. 494, 500 (1910).

⁵ See *Charles H. Schaefer, T/A Schaefer and Company*, ASBCA No. 917, decided January 31, 1952, reconsideration denied May 29, 1952, which is a case of this kind in which recovery was allowed.

⁶ See *Brown Constr. Co.*, BCA No. 1046, Division No. 3, July 21, 1945, 3 CCF 946, where recovery was allowed when an item of work was eliminated after a suspension of work.

sequence of events which has necessitated a change in the performance of the work required by the contract itself.

It is clear that the claims of the contractor in the amounts of \$4,041 and \$300, outlined in the first and second quoted paragraphs of its letter of September 10, 1954, fall in this latter category, and should be allowed. The issuance of the stop order here led to changes in the work performed under the contract, and the contracting officer should have allowed additional compensation for the work which in effect had to be done twice, although the specifications required it to be done only once.

The contracting officer admits in his findings that after the stop order was issued the contractor was instructed to level the site but it is not clear whether he concedes that the contractor is entitled to \$4,041 for this extra work. As for the claim of \$300 for re-excavating the footings, the Government contends that it is excessive. As no evidence in support of the amount of these claims has been submitted to the Board, they are remitted to the contracting officer for his consideration and determination in accordance with the legal conclusions reached in the Board's opinion, subject to a further right of appeal to the Board, if the contractor should be dissatisfied with the contracting officer's determination.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the findings of fact and decision of the contracting officer are affirmed in part and reversed in part, and he is directed to proceed as outlined above.

THEODORE H. HAAS, *Chairman.*

THOMAS C. BATCHELOR, *Member.*

WILLIAM SEAGLE, *Member.*

AUTHORITY TO MANAGE AND DISPOSE OF THE SAN CARLOS POWER SYSTEM

Indian Lands: Power—Power: Development and Sale—Secretary of the Interior

Where the Congress has clothed the Secretary of the Interior with authority to manage and operate an electric power system, that authority may not be transferred to a private utility or independent board without a clear indication on the part of Congress that such action may be taken.

July 25, 1955

Indian Lands: Power—Power: Development and Sale—Secretary of the Interior

Officers and employees of the United States are without authority to sell or lease property belonging to the United States unless specifically authorized by the Congress to do so.

Indian Lands: Power—Power: Development and Sale—Secretary of the Interior

An operating agreement between the Secretary of the Interior and private utilities defining the areas to be served by each may properly be entered into where the relevant statutes contain no prohibition against such an agreement.

M-36296

JULY 25, 1955.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

At the suggestion of Assistant Secretary Lewis you have requested my opinion on certain questions relating to the management and disposition of the San Carlos power system. These questions have arisen, it appears, in connection with certain proposals which have been submitted with respect to the operation and management of the power system. One of these proposals involves an offer by a private utility to acquire the power system by purchase or lease. Under another proposal, a board of equal representation by Indian and non-Indian landowners would be formed to take over the operation and management of the power system. The particular questions raised, upon which my advice is requested, are:

1. Under existing law who is now clothed with the authority to manage and operate the power system, including the regulation of rates?

2. May that authority be transferred to a private utility or to an equal representation board such as that mentioned above?

3. Is there authority under existing law to sell or lease the power system?

4. Is a territorial agreement relating to service areas permissible under existing law, and, if so, who would be required to sign such an agreement and who would be required to approve the agreement?

The San Carlos power system became necessary as the result of the construction of the San Carlos Indian Irrigation Project. The main structure of the San Carlos Indian Irrigation Project, the Coolidge Dam, was authorized by the act of June 7, 1924 (43 Stat. 475, 476). Section 1 of this act authorized the Secretary of

the Interior, through the Indian Service, to construct a dam across the canyon of the Gila River near San Carlos, Arizona, as a part of the San Carlos Irrigation Project for the purpose, first, of providing water for the irrigation of lands allotted to Pima Indians on the Gila River Reservation, Arizona, then 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 said Secretary, can be served with water impounded by the dam without diminishing the supply necessary for the Indian lands.

Pursuant to the authority contained in this act, the San Carlos Indian Irrigation Project was formed. The nucleus of the project was the greater part of the lands of the Florence Casa Grande Project, previously authorized by the act of May 18, 1916 (39 Stat. 123, 130), and such additional land in the Gila River Indian Reservation and public and privately owned lands outside of the reservation to bring the total area of the project to 100,000 acres, one-half of which area is within the Gila River Indian Reservation.

The act of June 7, 1924, did not authorize power development at the Coolidge Dam. The reservoir created by the dam had a capacity of 1,200,000 acre-feet of water. Based on the then available water data extending over approximately 35 years, it was estimated that the reservoir would store sufficient water for the irrigation of 80,000 acres of the project lands. The remaining 20,000 acres of the project was to receive its water from the San Pedro River, return flow and underground pumped water. In order to provide electric power for pumping purposes, and for the sale of excess power, the dam was planned to provide for hydro-electric development. This hydro-electric development was authorized by Congress on March 7, 1928 (45 Stat. 200, 210). This act authorized the Secretary of the Interior, in addition to appropriating the funds for construction purposes pursuant to the act of June 7, 1924, *supra*, to incur obligations and enter into contracts for the development of electric power at the Coolidge Dam as an incident to the use of the Coolidge Reservoir for irrigation, and such action was deemed to be a contractual obligation of the Federal Government for the payment of the cost thereof, with the proviso that no such obligation

* * * shall be incurred or contract entered into until a contract satisfactory to the Secretary of the Interior shall have been executed by the Florence Casa-Grande Water Users' Association¹ providing for repayment of the cost of

¹The use of the term "Florence Casa-Grande Water Users' Association" was in error. This association executed the contract with the Secretary under the act of May 18, 1916. The landowners of that project, in the main filed Landowners' Agreement with the Secretary requesting their land to be incorporated in the San Carlos project. The organization with which the Repayment Contract was executed was the San Carlos Irrigation and Drainage District. It may be said that this reference to the Florence Casa-Grande Water

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construction of said power plant as a part of the cost of the said project and for furnishing power for agency and school purposes and for pumping for irrigation by Indians on the San Carlos Reservation at a cost not exceeding 2 mills per kilowatt-hour delivered at the switchboard at the Coolidge Dam: * * *.

The act authorized the Secretary of the Interior to sell surplus power developed at the Coolidge Dam in such manner and upon such terms and for such prices as he shall think best, with the provision that the net revenues from sales of power at that plant shall be devoted, first, to reimbursing the United States for the cost of developing electric power, such cost to be determined by the Secretary of the Interior; second, to reimburse the United States for the cost of the San Carlos irrigation project; and third, to payment of operation and maintenance charges and the making of repairs and improvements on the project. A further provision of the act required that reimbursement to the United States from the power revenues shall not reduce the annual payments from landowners on account of the principal sum constituting the cost of construction of the power plant or the project works until such sum shall have been paid in full.

The 1928 act also authorized the Secretary of the Interior to effect a merger of the Florence Casa-Grande Project in whole or in part with the San Carlos project and to accept conveyances to the United States for the benefit of the San Carlos project of canals, reservoirs, pumping plants, water rights, lands, and rights-of-way.

The San Carlos Irrigation and Drainage District was formed pursuant to the laws of the State of Arizona for the purpose of embracing the non-Indian lands, brought within the San Carlos Indian Irrigation Project in compliance with the said acts of June 7, 1924, and March 7, 1928. The district executed the repayment contract with the Secretary of the Interior on June 7, 1931. This contract, among other things, obligates the district to repay its share of the total construction cost (including the cost of the power development), and of the operation and maintenance costs assessed against the district lands. The net power revenues accruing in favor of the district lands were to shorten the time during which the construction costs payments shall be made without diminishing the annual payments until the entire debt due the United States has been extinguished.

By supplemental contract between the parties, approved September 17, 1936, as authorized by the act of June 5, 1934 (48 Stat. 881), the interest charge provided for in the act of June 7, 1924, against the district lands was eliminated from the payments to be made by the district on behalf of such construction costs of the San Carlos

Users' Association was an inadvertence. There was no power project authorized under the act of May 18, 1916.

project, including the cost of the power development at the Coolidge Dam and the transmission line or lines, which costs are required to be repaid in 40 equal annual installments, beginning on December 1, 1935. On June 14, 1945 (59 Stat. 469), Congress amended section 3 of the San Carlos Act (43 Stat. 475, 476), as supplemented and amended, so as to provide that the construction charges on account of the non-Indian lands in the San Carlos Irrigation Project shall be repaid in variable annual payments to be determined by the number of acre-feet of water stored in the San Carlos Reservoir on March 1 of each year, beginning on the first day of March 1945, in accordance with the schedule set out in section 1 of the act.

Section 4 of the act authorized and directed the Secretary of the Interior to enter into a supplemental agreement with the San Carlos Irrigation and Drainage District modifying the repayment provisions of the existing repayment contract, as amended, in accordance with the act.

On June 21, 1945 (59 Stat. 487), Congress authorized the Secretary of the Interior to modify the provisions of a contract for the purchase of a power plant from the Christmas Copper Corporation for use in connection with the San Carlos Indian Irrigation Project. This plant consisted of a diesel electric generator unit of the corporation previously acquired under contract with the corporation as a part of the San Carlos power system of the United States.

A further supplemental contract between the Secretary of the Interior and the San Carlos Irrigation and Drainage District was executed on May 29, 1947, to incorporate the requirements of section 4 of the act of June 14, 1945, *supra*, and the provisions of the act of July 3, 1945 (59 Stat. 318, 330). The last cited act authorized the settlement of claims in the sum of \$114,400 of which \$104,400 was paid to the Buckeye Irrigation Company and \$10,000 to the Arlington Canal Company. These payments were conditioned upon the execution of an appropriate repayment contract with the San Carlos Irrigation and Drainage District, obligating the district to repay its proportionate amount properly chargeable to the non-Indian lands in the San Carlos Irrigation and Drainage District. The contract was subject to the approval of the Secretary of the Interior and the obtaining of an appropriate resolution by the Gila River Pima-Maricopa Indian Community Council consenting to the charge of the proportionate amount as construction costs against the Indian lands within the San Carlos Indian Irrigation Project, subject to the provisions of the act of June 1, 1932 (25 U. S. C. sec. 386a).

Because of the lack of funds with which to extend the distribution system to prospective customers from the generating plants and existing power lines and distribution system of the San Carlos Project,

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Congress by the act of June 22, 1936 (49 Stat. 1822, 1823), amended the act of March 7, 1928 (45 Stat. 210), and acts amendatory thereof or supplementary thereto, so as to provide that the net revenues from the sale of surplus power developed at the Coolidge Dam and other generating plants of the San Carlos Project and transmitted over existing transmission lines shall be devoted, first, to reimbursing the United States for the cost of developing such electric power; second, to reimbursing the United States for the cost of the San Carlos Irrigation Project, and, third, to the payment of operation and maintenance charges and the making of repairs and improvements on said project. The 1936 act also provided that all net power revenues derived from the sale of power transmitted over such additional transmission lines as may thereafter be constructed by the San Carlos Irrigation and Drainage District for the benefit of the San Carlos Project shall first be devoted to the repayment of the construction costs of such additional transmission lines. It was further provided that the United States and the San Carlos Irrigation District shall enter into an appropriate repayment contract to be approved by the Secretary of the Interior. The statute required that the contract provide that the additional transmission lines thus constructed by the district shall, upon completion of construction, be conveyed to the United States. After the reimbursement to the district from such net power revenues of the cost of the construction of the additional transmission lines, the net power revenues received from the power transmitted over the additional transmission lines were to be applied in the same manner as the net revenues derived from the sale of power transmitted over the existing transmission lines of the San Carlos Project were to be applied.

Pursuant to the authority of the act of June 22, 1936, the San Carlos Irrigation and Drainage District, under date of March 15, 1937, entered into a construction loan contract with the United States through the Administrator of the Rural Electrification Administration for the construction of such additional transmission lines.

The San Carlos Irrigation and Drainage District, as required by the act of June 22, 1936, *supra*, on April 29, 1937, executed another contract with the United States acting through the First Assistant Secretary of the Interior. Section 10 (b) of this contract provides that immediately upon the completion of the construction of the additional lines, the district will by a good and valid deed convey to the United States for the San Carlos Project such additional lines, together with rights-of-way therefor and all equipment and appurtenances belonging thereto. The district is obligated to accompany such conveyance by evidence of title satisfactory to the Secretary of the

Interior and to be in all respects in accordance with the loan contract, the execution of which was duly authorized by the qualified electors of the San Carlos Irrigation and Drainage District at a special election held on September 21, 1936. The lines were constructed and placed in operation, and payment therefor from the net power revenue derived therefrom, as provided for in the contract, is being made. According to a teletype dated January 20, 1955, by the Acting Commissioner of the Indian Bureau to the Acting Area Director, Phoenix, Arizona, the conveyance of the title to the transmission lines by the district to the United States has not been consummated.

To supplement the generated electric power at the power plants of the United States on the San Carlos Indian Irrigation Project, a contract was entered into between the Commissioners of the Bureau of Reclamation and the Bureau of Indian Affairs and approved by the Under Secretary on April 25, 1952, under which Davis Dam power is made available for the use of the San Carlos Indian Irrigation Project to the extent of 14,000 kilowatts as a preference customer.

The United States has leased certain electric transmission lines of Electric District No. 2, an Arizona corporation, by contract dated July 6, 1949, which was approved by the Acting Assistant Secretary on September 20, 1949. These lines are managed, operated, and maintained by the United States during the period of the contract in accordance with policy and regulations of the Secretary of the Interior for the San Carlos Indian Irrigation Project (25 CFR 133.21) for the sale and delivery of electric power by the project to the landowners served by Electrical District No. 2. The net revenues derived from the operation of the lines leased from Electrical District No. 2 are dealt with the same as all other net revenue derived from operation of the power system.

The several acts of Congress vest the title of the power works and facilities in the United States with the exception of the property of Electrical District No. 2, which is being operated under contract with the United States. In the operation of the project, electric energy is essential for the operation of the pumping apparatus required in order to supply underground water for 20,000 acres of the 100,000-acre project. The net revenues derived from the operation of the electric properties are required by Congress to be used as provided for in the 1928 act, *supra*, as supplemented and amended by the acts heretofore cited. To these requirements of the acts, the original contract and the supplemental contracts between the United States and the San Carlos Irrigation and Drainage District have been entered into between the district and the United States, acting through the Secretary of the Interior.

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Answering question No. 1 specifically, it is quite clear from the foregoing statement that the authority to manage and operate the San Carlos power system, including the authority to sell surplus power in such manner and upon such terms and for such prices as the Secretary of the Interior shall think best, now rests in the Secretary and his authorized representatives.

With respect to question No. 2, it is quite clear also, I think, that the authority of the Secretary to manage and operate the power system may not be transferred to a private utility or to a board composed of an equal number of Indian and non-Indian landowners without enabling legislation by the Congress where, as here, the responsibility for such operation and management has been placed in the Secretary of the Interior by that body. See in this connection the opinion of the Attorney General dated October 4, 1929 (36 Op. Atty. Gen. 98), wherein it was held that where Congress had committed to the Secretary of the Interior supervision and control over Indian properties, the Secretary was without authority to delegate such control and supervision to outside agencies. See also opinion of the Solicitor dated July 30, 1953 (M-36175), in which it was held that while the power of the Secretary of the Interior to delegate his functions to officials and agencies of his own Department was virtually unlimited, the power could not be exercised with respect to the transfer of Indian irrigation projects to State irrigation districts in the absence of a clear indication by the Congress that such a step may be taken.

A similar answer must be given to question No. 3 with respect to the sale or lease of the power system. The title to the physical works, such as power houses, generators and transmission lines, with one minor exception, is in the United States. It is a familiar rule requiring no citation here that no Federal officer or employee is empowered to dispose of the properties of the United States either by sale or lease unless such action has been specifically authorized by the Congress. No such authority is contained in any of the statutes relating to this project.

It is assumed that the territorial agreement referred to in question No. 4 would be an agreement which would define the areas to be served by the project power system and those areas to be served by other power interests. I find nothing in the statutes relating to this project which would prevent the execution of an operating agreement along this line on behalf of the United States by the Secretary of the Interior and the other party or parties concerned defining the areas to be served by each. In this connection, I note from the record that such an agreement was in fact entered into by the Secretary of the Interior in 1937. However, the interests of the San Carlos Irrigation and

Drainage District and the Gila River Pima-Maricopa Indian Community in this matter are such that their consent should be obtained before any such agreement is entered into.

J. REUEL ARMSTRONG,
Solicitor.

**ANNIE DELL WHEATLEY, THE SUPERIOR OIL COMPANY,
INTERVENER**

A-27142

Decided July 27, 1955

Oil and Gas Leases: Applications—Regulations

A regulation which requires that, with certain exceptions, an offer for a non-competitive oil and gas lease under the Mineral Leasing Act must include 640 acres of land is a reasonable exercise of the discretion vested in the Secretary of the Interior by the Mineral Leasing Act, and an offer which includes less than 640 acres and does not come within the exceptions is properly rejected.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mrs. Annie Dell Wheatley has appealed to the Secretary of the Interior from a decision of the Associate Director of the Bureau of Land Management dated December 13, 1954, which affirmed the action of the manager of the land office at Billings, Montana, in rejecting Mrs. Wheatley's offer to lease 240 acres of land in sec. 24, T. 7 S., R. 23 E., P. M., Montana, for oil and gas purposes under section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226). The Superior Oil Company, the holder of an option on Mrs. Wheatley's lease offer, has been permitted to intervene.

Mrs. Wheatley's offer, which was filed on November 6, 1952, was rejected on September 9, 1954, because it did not comply with the requirement embodied in 43 CFR 192.42 (d), as amended on June 17, 1952 (17 F. R. 5615; 19 F. R. 9013), that an offer for a noncompetitive oil and gas lease may not include less than 640 acres except where it is shown that the lands are in an approved unit or cooperative plan of operation or in such a plan approved as to form by the Director of the Geological Survey or where the land applied for is surrounded by lands not available for leasing under the Mineral Leasing Act. The Associate Director found that land adjacent to the land applied for was available for leasing and should have been included in Mrs. Wheatley's offer.

Both the appellant and the intervener contend that the minimum acreage requirement in the regulation finds no support in the Mineral Leasing Act (30 U. S. C., 1952 ed., sec 181 *et seq.*) and that the regulation is therefore illegal.

July 27, 1955

While it is true that the Mineral Leasing Act, although placing a maximum limitation on the acreage which may be held by a lessee or under option (30 U. S. C., 1952 ed., sec. 184, as amended August 2, 1954, 68 Stat. 648), fixes no minimum acreage which may be held under lease or option, the regulation, fixing the minimum acreage which may be applied for in a single lease offer, with certain exceptions, is in no way inconsistent with the act. The act, in fixing the maximum acreage limitation, does not, as the appellant and the intervenor seem to suggest, require that a qualified lessee must be permitted to hold the maximum acreage in all circumstances.¹ It merely prohibits the holding of acreage in excess of the limitation stated in the act.

The act specifically authorizes the Secretary to prescribe necessary and proper rules and regulations and to do any and all things necessary and proper to carry out and accomplish the purposes thereof. (30 U. S. C., 1952 ed., sec. 189.) "The considerations of public policy which must be balanced in determining when and how the public bounty shall be dispensed with respect to public lands and minerals * * * require * * * the exercise of discretion by the Secretary." *United States ex rel. Jordan v. Ickes*, 143 F. 2d 152 (App. D. C., 1944), *cert. denied*, 320 U. S. 801 (1944).

The Secretary has found that the filing of offers for oil and gas leases without a minimum limitation as to acreage often leads to abuses as far as the general public is concerned, to administrative difficulties, and to the hindrance of the proper development of the oil and gas resources of the public domain. It was to protect the public from such abuses, all of which are well known to the oil industry, to lessen the administrative burden, and to remove impediments to the proper development of public lands that the regulation was adopted. As the intervenor recognizes, the regulation was adopted as the result of widespread advertising by promoters that members of the public could secure 40-acre oil and gas leases for sums ranging from \$50 to \$100 or more. The filing fee and first year's rental on a 40-acre lease amounted to only \$30. Oil and gas filings increased as much as 42 to 60 percent in some land offices as a result of the advertising. The result was a slow down in the processing of applications not induced by the advertising, with the prospect of even greater delays as the 40-acre filings mushroomed. Moreover, as the issuance of 40-acre leases increased, so would the difficulties of an operator attempting to assemble acreage for development purposes increase. Instead of contacting one lessee for a section of land an

¹ For example, to be entitled as a matter of right to hold a 40-acre lease where the lessee is 40 acres under the maximum permissible acreage holdings.

operator might have to deal with 16 lessees scattered over the United States. The difficulties of attempting to assemble a large block of acreage under these conditions would be enormous, and would definitely impede the development of the public lands. Furthermore, not only did the 40-acre filings cause a substantial administrative burden in processing the filings but it could be anticipated that in the future, with most of the lessees being pure speculators, there would be defaults in rentals leading to substantial administrative work in attempting to clear up lease accounts and records.

Admittedly the regulation could cause some inconveniences in filings that were not purely speculative. But it was felt that the regulation was the only practicable way of dealing with the grave problem presented, and it has proved successful. The regulation is not in conflict with the express statutory provisions of the act, it is reasonably adapted to the carrying out of the purposes of the act, and, when considered in connection with the abuses it was designed to correct, it is a reasonable exercise of the discretion conferred upon the Secretary of the Interior by the act. Cf. *United States v. Morehead*, 243 U. S. 607 (1917); *Forbes v. United States*, 125 F. 2d 404 (9th Cir. 1942). It does not deprive an offeror of any right to which he may be entitled under the act. Cf. *United States ex rel. McLennan v. Wilbur*, 283 U. S. 414 (1931).

The contention is also made that the regulation places an undue burden upon prospective lessees and their optionees by requiring a prospective lessee to include in a lease offer land which he does not desire to lease. The short answer to this is that the Secretary has prescribed the rules which he believes to be necessary to carry out the purposes of the act. An applicant for the privilege of leasing public lands cannot complain because he is required to meet the requirements imposed upon all other applicants for that land. The Secretary merely requires that one who seeks to take advantage of the provisions of the Mineral Leasing Act shall do so in such a manner that abuses of the privilege shall be minimized and administrative difficulties lessened.

It is contended, further, that the decision of the Associate Director fails to recognize the equities of the appellant, in that the offer was "ignored" for almost 2 years after it was filed, thus preventing the offeror from amending her offer to include other land.

The offer was made on the approved "Offer to Lease and Lease for Oil and Gas" form. Had Mrs. Wheatley taken the precaution to read the instructions on the back of that form, she would have noted, under the ninth paragraph of the General Instructions, that an offer for less than 640 acres which was not within the exceptions stated in 43 CFR 192.42 (d) would be rejected and would afford

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the applicant no priority; and had she read the Special Instructions for filling in Item 2 of the form, "Lands requested," she would have noted that the total area of land requested must not be less than 640 acres except as provided in 43 CFR 192.42 (d). The argument that the appellant has any equities in this case is therefore without merit.

Accordingly, it was correct to reject Mrs. Wheatley's offer.

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 is affirmed.

EDMUND T. FRITZ,
Acting Solicitor.

APPEAL OF SAM BERGESEN

IBCA-11

Decided August 1, 1955

Contracts: Changes—Contracts: Generally

In case of a dispute as to allowances due the contractor under a change order, where the contracting officer requests the contractor to either accept the change order or take an appeal from his decision, which he has declared to be final, such conduct does not amount to duress. The contractor had been merely asked to choose between two perfectly legal alternatives.

Contracts: Changes

Where a contractor voluntarily accepts and signs a change order or similar form of contract modification, which expressly states that it is an adjustment of both of his claims arising from alleged changes, he cannot, in the absence of fraud or duress, successfully assert a claim for additional costs alleged to have resulted from the changes ordered.

Contracts: Appeals

The fact that the contractor excepts his claim of additional compensation in executing his release on the contract merely saves whatever rights he had, and is in no way a concession by the Government that his claim is valid, and such exception does not serve to improve the legal position of the contractor, in the absence of statements by the contracting officer which would lead the contractor to believe that his signing of the change order would be conditional.

Contracts: Waiver and Estoppel

If a contracting officer or any other officer of the Government had intended to waive the defense based on the change order, he would lack authority to do so in the absence of a new and valuable consideration moving to the Government, it being well settled that Government officers may not modify a contract when it is to the disadvantage of the Government to do so.

Contracts: Changes—Contracts: Modification

Where the acceptance of a change order by the contractor represents a unilateral mistake on his part, administrative relief may not be had, since it

is well settled that the reformation of contracts is a judicial rather than an administrative function.

BOARD OF CONTRACT APPEALS

Sam Bergesen has appealed from the findings of fact and decision, dated November 15, 1954, of the contracting officer, denying his claim for additional compensation in the amount of \$4,765 for backfill after the removal of unsuitable material in the performance of Contract No. 14-04-001-07, Project No. Aaa. 50-A-96, Alaska Public Works.

The contract, which is dated July 8, 1952, and executed on U. S. Standard Form No. 23 (revised April 3, 1942), provided for the construction of a grade school at Kodiak, Alaska, for the lump sum of \$566,902. The controversy between the contractor and the Government in the present case relates exclusively to the excavation and backfill work required by the contract.

The work on the Kodiak School was, under the terms of the contract, to be commenced on or before July 2, 1952, and to be completed on or before June 26, 1953. Work actually commenced on July 19, 1952.

In the course of the excavation work, there was encountered a soft, wet clay, which was deemed by the construction engineer to be unsuitable as a foundation, and when its presence was reported to the contracting officer, the latter, by telephone, ordered its removal. The contractor complied with the order but claimed additional compensation in the amount of \$4,765 for the excavation work, which he deemed not to be required by the specifications, and also claimed additional compensation in the same amount for the backfill, which he alleged, had been made necessary by the change in the excavation work.

The construction engineer recommended the entry of a change order, which would have provided additional compensation for both the excavation and the backfill. Although this change order was accepted by the contractor on November 22, 1952, it was not approved by the contracting officer, who at first took the position that both the excavation and backfill in dispute were required by the terms of the specifications and drawings. The contractor requested reconsideration of this decision, and ultimately the contracting officer in a letter dated July 24, 1953, notified the contractor that his claim for additional compensation in connection with the removal of the "sticky clay" was sustained in the total amount of \$4,765 but that nothing additional would be allowed for backfill.

With this letter there were enclosed seven copies of a change order—No. 8—providing for the suggested allowance. This change order was signed by the contractor on September 4, 1953, but before signing it, he altered it by adding to it the following notation:

August 1, 1955

This change order accepted by contractor to cover claim for extra excavation only. This change order does not include or satisfy contractor's claim for extra rock backfilling performed.

The change order, as modified, was not satisfactory to the contracting officer, and after redrafting it by excluding the contractor's exception, he forwarded it to the latter with a letter dated September 10, 1953, which reads as follows:

We have rewritten change order No. 8 to our contract with you (No. 14-04-001-07) on the above Project. This change order is the same as the one previously sent to you, to which you added an additional statement and rendered patently contradictory.

This change order as written is the firm position of this office on the matter. Your additional language to the one previously sent to you returned the disagreement between us to where it was six months ago. In the event you do not wish to sign this change order as written, it would be useless to continue the discussion.

Therefore, please consider this change order as a final decision by the contracting officer as contemplated by Article 15 of the Contract (Form 23). Under that Article you now have 30 days from the date of this letter to file a written appeal to Mr. Dan H. Wheeler, Assistant Director, Office of Territories, Washington 25, D. C.

If you decide to sign it please return it to this office for processing.

The contractor now signed Change Order No. 8 without noting any exception thereto, and the change order was approved by the contracting officer on September 28, 1953. The change order included the statement that it was "*Adjustment in full* in connection with excavation and removal of mucky, sticky, wet clay at building site *and backfilling in order to provide stable base for concrete slab * * **" [Italics supplied.] The change order provided for the payment of \$4,765 to the contractor, and such payment was made to him.

Notwithstanding his acceptance of the change order, the contractor appealed the decision of the contracting officer in a letter dated October 8, 1953, to Dan H. Wheeler, Assistant Director of the Office of Territories, who was not the contracting officer. The latter replied by letter dated October 20, 1953, in which he stated:

I have referred your letter to the District Director who is the contracting officer. I hope that a solution can be found which will be satisfactory to both you and the District Director. If this is not possible, you may appeal to the Secretary of the Interior pursuant to Article 15 of your contract.

Under date of November 17, 1953, the contractor addressed a letter to the Secretary of the Interior stating that inasmuch as he had not received a direct reply to his letter to Mr. Wheeler, he was writing the letter to keep the appeal "open and Active."

There followed a long period of almost a year during which the claim was examined by departmental counsel and various officials, and

the contractor engaged in correspondence with them in an effort to secure a determination of his claim and to elicit the precise basis for the contracting officer's decision rejecting it.

With a memorandum dated February 24, 1954, the contracting officer transmitted to the Director of the Office of Territories a legal opinion by Francis X. Riley, District Counsel, in which the view was expressed that the contractor's claim for backfill should be rejected. The Director of Alaska Public Works at first declined to furnish a copy of this opinion to the contractor, taking the position that the contracting officer's letter of September 10, 1953, was the decision that was the subject of the appeal, and that the legal opinion was for the use of the Department and not a determination of the claim. However, after receiving directions from the Washington office to furnish a copy of the opinion to the contractor, the Director of the Alaska Public Works forwarded the legal opinion to the contractor with a covering letter dated July 22, 1954.

Another legal opinion with respect to the claim was written by the Chief Counsel of the Office of Territories, and it was forwarded to the Director of that office with a covering letter dated April 2, 1954. In this opinion not only the merits of the claim were considered, but also the effect of the acceptance by the contractor of the change order. Thus the Chief Counsel stated:

When Bergesen received the change order, and noted the statement that it was to constitute an adjustment in full for both excavation and backfill, he affixed his signature as evidence of his acceptance of its terms, but wrote across it a statement that he persisted in his claim for additional compensation for backfill and regarded the amount of the change order as compensation for extra excavation only. The contracting officer refused to accept such qualification and prepared a new change order in the same form. Bergesen signed the new change order without qualification. Later, he wrote directly to the Secretary of the Interior, and designated his letter as an appeal from the decision of the contracting officer.

Under date of April 13, 1954, the Director of the Office of Territories addressed a memorandum to the Secretary of the Interior in which he recommended the rejection of the claim. The fifth paragraph of this memorandum is the same, word for word, as the paragraph just quoted from the opinion of the Chief Counsel. The contractor replied to the memorandum of April 13, 1954, in a letter dated May 12, 1954, to the Secretary of the Interior, but he did not offer any explanation in this letter of his acceptance of the change order.¹

¹On page 3 of the contractor's brief, it is stated: "The contractor did not, prior to June 13, 1955, receive from the Department any statement of the government's position. For the first time on that date it was discovered that the government was questioning the validity of the appeal in view of the language of change order No. 8." Since the contractor commented on the Director's memorandum of April 13, 1954, this statement cannot be accepted as entirely true.

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Along about the middle of 1954, the file in the case was reviewed in the office of the Acting Deputy Solicitor—the consideration of contract appeals was then one of the functions of the Solicitor—and it was determined that it would be desirable that the contracting officer should be asked to make formal findings of fact with respect to the claim, since he had not previously done so. The contractor was informed of this determination in a letter dated June 28, 1954, in which the reason for this determination was stated as follows:

A preliminary examination of the record submitted with this appeal indicates that it is incomplete. Accordingly, I have asked the Acting Assistant Solicitor, Territories, to request the contracting officer to make findings of fact in connection with Change Order No. 8 which will refer to all material documents and other evidence which form the basis for the change order.

Under date of November 15, 1954, the contracting officer issued a document entitled "Findings of Fact and Decision of the Contracting Officer." This consisted of 26 numbered paragraphs, and 28 exhibits. The findings consist of a chronological recital of the developments in the case, including a summary of the opinions of the engineers and lawyers who had considered the contractor's claims, and of the correspondence relating to them. However, the file before the Board contains several letters of the contractor not mentioned in the findings. Paragraphs 16 and 17 of the findings, which relate to the preparation and acceptance of Change Order No. 8, and which are, therefore, of particular importance, are quoted in full:

16. In a letter dated July 24, 1953 the Contracting Officer notified the contractor that his claim for compensation in connection with removal of 953 cubic yards of "sticky clay" at his bid price of \$5.00 per cubic yard for extra excavation was sustained in the total amount of \$4,765.00. He was also notified that nothing additional could be allowed for backfill. Copies of the proposed change order were enclosed for his acceptance. A copy of the Contracting Officer's letter dated July 24, 1953 is attached and marked Exhibit 16. The change order was signed by the contractor on September 4, 1953, but before signing, the contractor altered it with the following addition:

"This change order accepted by contractor to cover claim for extra excavation only. This change order does not include or satisfy contractor's claim for extra rock backfilling performed."

On September 10, 1953, the Contracting Officer redrafted Change Order No. 8 excluding the contractor's exceptions and notified the contractor that he should consider this change order as the final decision of the Contracting Officer as contemplated by Article 15 of the Contract (Form 23). The contractor was also notified that he had 30 days in which to file a written appeal from this decision to the Assistant Director, Office of Territories, Washington 25, D. C. A copy of the Contracting Officer's letter dated September 10, 1953, is attached and marked Exhibit 17.

17. The contractor accepted and signed Change Order No. 8 on September 11, 1953. The Change Order was officially approved by the Contracting Officer September 28, 1953. The document as executed states, "Adjustment in full in connection with excavation and removal of mucky, sticky, wet clay at building site and backfilling in order to provide stable base for concrete slab. 953 cubic yards of excavation @ \$5.00 per c/y (unit price for extra excavation)—\$4,765.00. A copy of Change Order No. 8, as executed, is attached and marked Exhibit 18."

The purport of the decision was to reject the contractor's claim for backfill but the contracting officer did not commit himself to any particular theory in making his decision. He simply stated as follows:

After careful consideration of all the facts and circumstances in connection with the contractor's claim for additional compensation for backfill after removal of unsuitable material in the amount of \$4,765.00, it is the conclusion of the contracting officer that there is no proper basis for allowance on the claim, and it is, therefore, denied.

The findings and decision of the contracting officer dated November 15, 1954, were apparently received by the contractor on November 17, 1954, and under date of December 15, 1954, the latter again took an appeal by writing a letter to the Office of the Solicitor in which he requested that "a decision on our appeal be made by the Secretary of the Interior or his representative."

Under date of May 13, 1955, the Board notified the contractor that it would "hold a hearing at 2:00 p. m., June 17, 1955, in the Federal Court Room, Federal Office Building, in Seattle, Washington, for the purpose of affording you an opportunity for oral argument in the case."

Under date of May 19, 1955, Department counsel filed a brief in the case in which the position of the Government with respect to the claim was stated to be as follows:

Following considerable correspondence between the parties, the Contracting Officer submitted to the Contractor a change order which would modify the existing construction contract so as to permit payment of extra compensation for the removal of the "mucky" blue clay. The Contracting Officer reaffirmed his position with respect to the Contractor's claim for extra compensation for backfilling. The change order was written in language which indicated that the extra compensation provided therein was "adjustment in full in connection with excavation and removal of mucky, sticky, wet clay at building site and backfilling in order to provide stable base for concrete slab." The Contractor signed and accepted the extra compensation recited in the change order with full knowledge of the Contracting Officer's denial of his claim for a greater amount which had been claimed for backfilling and excavation; knowing that the change order recited it was in full adjustment for both excavating and backfilling. He, the Contractor, foreclosed any right that may have existed for extra compensation for backfilling.

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By agreement of counsel, the hearing was held a little earlier than scheduled, namely at 2:00 p. m. on June 15, 1955, before Messrs. William Seagle and Thomas C. Batchelor, two members of the Board. The Government was represented at the hearing by N. Baxter Jenkins, Attorney-Advisor, Alaska Public Works, and L. K. Luoma, of the Portland Regional Office, and the contractor was represented by Lyle L. Iversen, of the Seattle law firm of Lycette, Diamond, and Sylvester.

Counsel for the contractor proposed to offer testimony at the hearing to establish that the soft, wet clay which the contracting officer had ordered to be removed would have made a suitable foundation if it had been permitted to dry out. Since the contracting officer had discretion to make changes within the general scope of the contract, subject to equitable adjustment if the change entailed extra work, and the contractor had in fact received additional compensation for the excavation work, the offer of proof did not seem to present any material issue of fact. However, in the course of the discussion of the offer of proof, it appeared that the Government was contending that the contractor had been allowed additional compensation for excavation because he had been required to do more difficult excavation work than had been contemplated but that the amount of the excavation work had not been affected. If the case were to be heard on the merits, this contention would have presented a material issue of fact, since the claim for extra compensation for backfill might be affected by the quantitative factor in the excavation work. However, Department counsel stated that they were not prepared for the trial of factual issues, since they understood that the case had been set down only for oral argument, and they renewed the request made in the Government's brief that the claim for additional compensation for backfill be dismissed on the ground that it had been adjusted by the contractor's voluntary acceptance of Change Order No. 8. Since this ground might be dispositive of the case, counsel for the contractor was requested to argue it first. This he proceeded to do, and also filed at the hearing a brief which summarized his oral argument.

The position of counsel for the contractor is that the contracting officer's letter of September 10, 1953, was itself a form of duress, since it left the contractor with no alternative but to sign the change order; that, in doing so, and in taking an appeal, he was only following the instruction of the contracting officer; that his claim was saved by the exception which he took in executing his release on the contract under the date of May 6, 1955; and, finally, that the contracting officer, as well as other officers of the Department, have indicated that they con-

sidered the contractor's appeal to be properly pending. Thus counsel for the contractor states in his brief:

If the government is to insist upon the technicalities of language used in change order No. 8, then the contractor is equally entitled to insist upon the technicalities contained in the letters of the Assistant Secretary and the contracting officer on subsequent dates indicating that the appeal was properly pending, and that a decision would be made thereon. In the same manner that it might be considered that the contractor surrendered his rights by some technicality of the language used in change order No. 8, we submit that the government has surrendered its rights to insist thereon by assuring the contractor that his appeal would be decided by the Secretary. * * *

Upon conclusion of the oral argument, the two members of the Board who conducted the hearing ruled that the contractor's claim for additional compensation for backfill was barred by his voluntary acceptance of Change Order No. 8, and that the claim had not been revived either by the exception to the release on the contract, or by the action of any of the officers of the Department in connection with the appeal. This ruling is now reaffirmed by the full Board.

There is no suggestion of duress in the contracting officer's letter of September 10, 1953, nor is there any other evidence of duress. In law duress exists only when a party is induced to make a contract or perform an act under circumstances that can be said to deprive him of the exercise of free will. There must be the exertion of such constraint as is sufficient to overcome the mind and will of a person of ordinary firmness. While the constraint may take the form of a threat, it is not a form of threatening conduct to ask a party to choose between two perfectly legal alternatives.² The contracting officer did no more in his letter of September 10, 1953. He put it squarely up to the contractor either to accept the change order, or to take an appeal from his decision, which he declared to be final. The contractor chose to sign the change order which plainly stated that it represented an adjustment of both of his claims. By so doing he waived his right to additional compensation for the backfill.

There was, moreover, no possibility of any misunderstanding of the alternatives. They are not only made plain in the letter of September 10, 1953, but by the previous negotiations between the parties, for these sharply focused the issues in controversy. When the contractor first signed the change order, subject to an exception of his claim for backfill, and then signed the same change order, although the exception had been eliminated therefrom, the effect would have been the surrender of the claim for backfill even if the change order had not

² See 17 American Jurisprudence, Title "Duress," especially sections 2 and 17, and cases there cited.

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explicitly stated that it was to constitute an adjustment of both of his claims. The inclusion of this statement must be taken to have removed any conceivable doubt.

It is well settled that where a contractor voluntarily accepts and signs a change order or similar form of contract modification, he cannot, in the absence of fraud or duress, successfully assert a claim for additional costs alleged to have resulted from changes ordered.³ The acceptance of the change order in effect works a modification of the contract,⁴ or creates a new supplemental contract.⁵ Such a contract is in the nature of an accord and satisfaction, and is not a mere technicality. While the making of such a contract precludes the consideration of the merits of the original controversy, it is, nevertheless an adjustment thereof, and when voluntarily made by the interested parties should be enforced according to its terms, if the principle of the obligation of contracts is to have any meaning.

It is difficult to perceive how any of the procedural steps taken either by the contractor or by representatives of the Government changed in any way the substantive effect of the acceptance of the change order by the contractor. The fact that the contractor excepted his claim of additional compensation for backfill in executing his release on the contract merely saved whatever rights he had, and was in no way a concession by the Government that his claim was valid.⁶ Thus the exception did not serve to improve the legal position of the contractor. Similarly, the Government officers who accepted the appeal, and took various procedural steps in connection therewith, including the perfecting of the findings, were not passing on the merits of the case. There was nothing they could do to prevent the contractor from taking an appeal, and even if they indicated that the appeal was properly pending, this, too, would not be a surrender of any defense which the Government might have. Indeed, there is nothing to show that all the Government officers who wrote letters in connection with the pendency of the appeal were familiar with the details of the case.

³ See *Griffiths v. United States*, 74 Ct. Cl. 245 (1932); *Great Lakes Construction Co. v. United States*, 95 Ct. Cl. 479 (1942); *Frazier-Davis Construction Co. v. United States*, 97 Ct. Cl. 1, (1942); *Coath & Goss, Inc. v. United States*, 101 Ct. Cl. 653 (1944); *Hargrave T/A Hargrave Construction Co.*, BCA No. 804, Division No. 2, June 30, 1945, 3 CCF 1113; *James I. Barnes Construction Co.*, BCA No. 909, March 17, 1945; 3 CCF 474; *Weyerhaeuser Sales Company*, BCA No. 734, Division No. 1, November 22, 1944, 3 CCF 56; *Harco Construction Co. et al.*, BCA No. 414, Division No. 1, October 25, 1944, 2 CCF 1207; *Al Johnson Construction Co. et al.*, BCA No. 607, Division No. 3, October 14, 1944, 2 CCF 1178. To the same effect are many other unreported decisions of the Armed Services Board of Contract Appeals.

⁴ See *Seeds & Derham v. United States*, 92 Ct. Cl. 97 (1940); *cert. denied* 312 U. S. 697 (1941).

⁵ See *F. H. Plack et al. v. United States*, 66 Ct. Cl. 641, 653 (1929).

⁶ See *Ralph Willard Didschuneit*, BCA No. 744, November 3, 1944 (unreported).

As for the contracting officer himself, nothing was said prior to the acceptance of the change order by the contractor which could have led the latter to believe that his signing of the change order would be conditional. Such an inference could be drawn only if the contracting officer had told the contractor that he could both sign the change order and take an appeal. Only if the contracting officer had made such a statement could the acceptance of the change order be regarded as conditional, although absolute in form. In making his formal findings more than a year later, the contracting officer himself gave no indication that he was waiving any substantive defense which the Government might have. On the contrary, he indicated a full awareness of the acceptance of the change order by the contractor, and the contractor himself was aware that this was an issue in the case more than a year prior to the hearing.

A waiver cannot be presumed in the absence of convincing proof of an intention to waive, for it is elementary that "a waiver is the intentional relinquishment of a known right."⁷ Moreover, even if the contracting officer or any other officer of the Government had intended to waive the defense based on the change order, he would have lacked authority to do so in the absence of a new and valuable consideration moving to the Government, for it is well settled that Government officers may not modify a contract when it is to the disadvantage of the Government to do so.⁸ Finally, even if it were to be assumed that the acceptance of the change order by the contractor represented a unilateral mistake on his part, this Board could not reform the contract which had been made thereby, since it is equally well settled that the reformation of contracts is a judicial rather than an administrative function.⁹

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the decision of the contracting officer, rejecting the claim of the appellant, is affirmed.

THEODORE H. HAAS, *Chairman.*

THOMAS C. BATCHELOR, *Member.*

WILLIAM SEAGLE, *Member.*

⁷ See 56 American Jurisprudence, Title "Waiver," section 2, p. 102.

⁸ See 18 Comp. Gen. 114, 116 (1938); and judicial decisions there cited.

⁹ See 15 Comp. Gen. 240 (1935), and judicial decisions there cited. See also *J. R. Hime Electric Company*, BCA No. 250, Division No. 3, August 16, 1943, 1 CCF 306; *John Miles Company, Inc.*, BCA No. 304, Division No. 2, September 28, 1943, 1 CCF 697.

*August 11, 1955***WEYERHAEUSER TIMBER COMPANY****A-27137***Decided August 11, 1955***Withdrawals and Reservations: Power Sites—Withdrawals and Reservations: Revocations**

A power site withdrawal made by the President in 1917 pursuant to the authority contained in section 1 of the act of June 25, 1910, can now be revoked by the President (or the Secretary of the Interior under a delegation of authority from the President) under the authority of that act, despite the intervening passage of the Federal Water Power Act of June 10, 1920.

Withdrawals and Reservations: Power Sites—Public Sales: Applications

Where it appears from the records of the Department that land embraced in a power site withdrawal created by the President under the act of June 25, 1910, may have been erroneously withdrawn or is without value for power site purposes; and an application for the public sale of such land is filed, a field examination of the land will be ordered to determine if such is the case, and, if so, consideration will be given to a revocation of the withdrawal so as to open the lands for disposal at public sale. If the land is determined to be valuable for a power site, the applicant can seek to have the land restored for disposition pursuant to section 24 of the Federal Water Power Act, subject to the conditions therein stated.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Weyerhaeuser Timber Company has appealed to the Secretary of the Interior from a decision of the Lands Officer, Bureau of Land Management, dated October 13, 1954, which affirmed a decision of the manager of the land office at Portland, Oregon, dated March 30, 1954, rejecting the company's application for the public sale of certain land in sec. 19, T. 12 S., R. 4 E., W. M., Oregon, for the reason that the land applied for, except lot 1, is included in Power Site Withdrawal No. 664 and, therefore, is not subject to disposal under the public sale law.

The Lands Officer's decision stated that the records of the Department showed that the land applied for, except lot 1, together with other lands in sections 14, 15, 17, 18, 22, 23, and 24, in the same township, as well as many other tracts in other townships totaling 4,783 acres, were withdrawn by Executive order dated December 12, 1917, creating Power Site Reserve No. 664, Willamette River Basin, Oregon, and promulgated by the General Land Office Order No. 746007 "F" dated December 26, 1917. The decision then stated that the manager's rejection of the application as to the lands in conflict with Power Site Reserve No. 664 was perfectly proper and in accordance with the regulations, 43 CFR 103.2 and 103.3 (19 F. R. 8894).

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The appellant contends that, contrary to the conclusion of the Lands Officer that this case is governed by 43 CFR 103.2 and 103.3, it is apparent from a comparison of the relevant dates set forth in 43 CFR 103.1 (June 10, 1920) and the date of the withdrawal order in question and described in the decision (December 12, 1917), that the instant case is not governed by the cited portions of the Code of Federal Regulations. Appellant urges that the instant case is governed by the act of June 25, 1910, as amended (43 U. S. C., 1952 ed., secs. 141 and 142).

Section 1 of the act of June 25, 1910, provides that the President may temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States and reserve them for water-power sites, irrigation, etc., and that such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress.

Section 24 of the act of June 10, 1920 (pursuant to which 43 CFR 103.1, 103.2, and 103.3 were issued), provided, as enacted, that:

* * * any lands of the United States included in any proposed project under the provisions of this Act shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress.

* * * Whenever the commission shall determine that the value of any lands of the United States so applied for, or *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, 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 Act, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. * * * [Italics supplied.]

Thus, since the specific words "*heretofore or hereafter*" were used in section 24 of the act of June 10, 1920, as of the date of its enactment, it would seem apparent that all withdrawals for power site purposes were on that date brought within the purview of the act regardless of the date upon which they were made. See *E. J. Schneider*, A-24691 (March 30, 1948).

In this connection the Department early issued instructions that applications for lands within a power site reserve must be rejected but that the applicants should be informed that they could apply for a restoration of the lands under section 24 of the 1920 act.¹

¹ See Commissioner's Instructions, Circular No. 729, 47 L. D. 595 (November 20, 1920).

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The appellant, however, contends that where a power site reserve was created under the 1910 act, the land reserved can be restored to entry or other forms of disposal through a revocation of the withdrawal pursuant to the 1910 act. The appellant cites 33 Op. Atty. Gen. 34 (1921) in support of its contention.

The history of this opinion of the Attorney General is as follows: Pursuant to the act of June 9, 1916 (39 Stat. 218), some 2,300,000 acres of land in California and Oregon, which had been granted to the Oregon & California Railroad Company, were revested in the United States. Of this total acreage some 112,000 acres had been classified as power site lands and had been reserved as such by the President under the act of June 25, 1910. On August 4, 1921, the Secretary of the Interior addressed a letter to the Attorney General in which he stated that according to the provisions of the act of June 9, 1916, the sum of \$100,000 had been appropriated for the purposes of classification of the lands; that the Geological Survey undertook to deal with the power sites; that an appropriation of only \$6,000 was made for that purpose, not even sufficient for a "preliminary reconnaissance"; and that "In view, however, of the necessity of conserving the power site possibilities, especially having in mind the proviso in Section 2 [of the 1916 act], 'that any of said lands, after classification, may be reclassified, if, because of a change of conditions or other reasons, such action is required to denote properly the true character and class of such lands,' it was deemed advisable to not await the possibility of appropriation of a sum adequate to the purpose, but to proceed upon such information as was obtainable under the situation then existing." The letter further stated that it was the desire of the Department of the Interior to exchange for lands in private ownership lands formerly embraced within the grant to the Oregon and California Railroad Company in pursuance of the act of May 31, 1918 (40 Stat. 593), which authorized the Secretary of the Interior to make such exchanges, and that inasmuch as the power designations interfered with the proposed exchanges, a reexamination of the lands thus classified was ordered at the expense of the proponents to the end that if such examination disclosed that the chief value of the lands was found to be in the timber thereon, the revocation of the withdrawal of such land would be recommended to the President. This program was completed with the result that a large part of the lands formerly designated for power site purposes was held to be chiefly valuable for the timber thereon and a recommendation for the restoration of such land was sent to the President. No action was taken on the matter by the President, who returned the recommendation to the Secretary of the Interior, who in turn sent it to the Federal Power Commission,

which had come into existence in the meantime under the act of June 10, 1920. As a result of this reference, the Chief Counsel for the Federal Power Commission held, on December 2, 1920, that the provisions of section 24 of the 1920 act, *supra*, "must be regarded as exclusive, and, therefore, as depriving the President of any authority to restore such lands to the public domain for disposition free from the power reservation."

After stating these facts, the Secretary of the Interior requested the view of the Attorney General on three questions: first, whether the Secretary of the Interior had the authority to reclassify as timber or agricultural land under the 1916 act land which had been erroneously classified as power site lands; second, if such authority existed, whether the President had authority to restore to the public domain free from power reservation such reclassified lands if withdrawn as power site reserves by Executive order under the act of June 25, 1910; and, finally, whether the inclusion of lands in a proposed project under the provisions of the Federal Water Power Act, or the reservation or classification of lands as power sites, acted to prevent the patenting of such lands without power reservation, if it was found by the proper administrative officials that the land was without power value and had been mistakenly included in a power project or erroneously reserved or classified as power sites.

In his opinion dated September 2, 1921, the Attorney General stated that the President was expressly granted authority in the act of June 25, 1910, to revoke power site withdrawals made by him under that act, and that he still had that authority unless its retention was inconsistent with the provisions of section 24 of the Federal Water Power Act. He then stated:

* * * The first two sentences of section 24 apparently deal with water-power sites automatically withdrawn from entry and disposal by the mere filing of an application for water-power privileges; and such power sites are to be reserved from disposal under other laws "until otherwise directed by the commission or by Congress." As to all other power-site reservations the only authority given to the commission is to make findings which will result in authorizing the disposal of the lands subject to their future possible use for water-power purposes upon making compensation for improvements, etc.

It is clear, therefore, that the Federal Power Commission is not given authority wholly to abolish waterpower reservations made by the President. It is also clear that in respect to the final disposition of water-power sites withdrawn by the President, and not yet subject to any application for water-power privileges, no provision whatever is made by the Water Power Act. In other words, this Act does not cover the whole subject or provide a complete system of law displacing all others. I am therefore led to the conclusion that there is no legal inconsistency between this Act and the provision of the Act of 1910 which expressly authorizes the President to revoke water-site withdrawals, or with the provision in the Act of 1916 expressly authorizing the Secretary to reclassify the unsold

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lands formerly comprised in the grant to the Oregon & California Railroad Company.

Thus, the Attorney General, in holding that the President had the power to revoke the power site withdrawals made under the 1910 act, determined, in effect, that there were two alternative methods whereby lands in power site withdrawals could be restored to disposition, i. e., either by revocation of the withdrawal under the act of June 25, 1910, or upon a determination by the Federal Power Commission under section 24 of the 1920 act.

The Attorney General's opinion pointed up the fact that in cases where lands have been temporarily withdrawn as power sites, such as the Oregon and California lands after passage of the act of June 9, 1916, with full knowledge of fact that in many of those cases, because of only a preliminary examination, portions of the land reserved would not have value for power site purposes, no useful purpose would be accomplished by retaining such lands in a reserve or disposing of them with the encumbrance of the power site reservation contained in section 24 of the act of June 10, 1920. Obviously, if lands have no value as power sites there is no reason to impose a power site reservation upon them. This was pointed out shortly after the Attorney General's opinion in a letter dated July 13, 1922, from First Assistant Secretary Finney to Representative Sinnott, which stated:

You are further advised that if Mrs. Flynn so desires, she could file an application for restoration of said lands either unconditionally or under Section 24 of the Federal Water Power Act. An unconditional application should set forth such facts as would tend to show that the land is of no value for the purpose of power development. An application under the said Section 24, should set forth such facts as would show that the land would not be injured or destroyed for the purpose of power development if opened to entry or other disposition subject to the terms and conditions of said Sec. 24. * * *

Subsequent to the opinion of the Attorney General, large areas of former Oregon and California grant lands withdrawn by the President in 1917 and 1918 and classified as chiefly valuable for power site purposes, were reclassified by the Secretary as not valuable for those purposes and referred to the President who in turn revoked the withdrawals. The practice of revoking, under the authority of the 1910 act, power site withdrawals made under that act has continued up to the present time. In more recent years, such revocations have been made by the Secretary of the Interior pursuant to general authority delegated to him by the President.²

² Executive Order No. 9146 of April 24, 1942 (7 F. R. 3067), superseded by Executive Order No. 9337 of April 24, 1943 (8 F. R. 5516), which in turn has been superseded by Executive Order No. 10355 of May 26, 1952 (17 F. R. 4831).

In regard to the lands involved in this appeal, viz, NW $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$, and lots 1 and 2 of section 19, T. 12 S., R. 4 E., W. M., and other land, a memorandum from the Director of Geological Survey to the Secretary dated November 12, 1917, stated as follows:

A report by an engineer of the Survey on the waterpower possibilities of Willamette River, Oregon, indicates that Willamette River and certain tributaries possess valuable power possibilities. Owing to insufficient funds, a detailed field examination of the Willamette River Basin has been found impossible and the inclusion of a portion of the public lands in a power-site withdrawal must be considered as temporary until a field examination can be made. The areas of the Oregon-California Railroad grant lands which are believed to be affected by possible power developments have been included in a separate withdrawal.

This memorandum accompanied the proposed withdrawal of lands to form Power Site Reserve No. 664.

Another memorandum dated November 15, 1917, from the Director, Geological Survey, to the Secretary stated:

The attached order of withdrawal includes lands along Santiam River, Oregon, which are believed to possess valuable power possibilities. A report by an engineer of the Survey indicates that the river in this locality flows in a narrow gorge, and that a feasible dam site exists in Sec. 19, T. 12 S., R. 4 E. If feasible storage basins can be found near the headwaters, no doubt the section of the river affected by the lands withdrawn will prove valuable for purposes of power development. The tracts are, therefore, recommended for withdrawal.

The accompanying withdrawal with this memorandum, designated as Power-Site Reserve No. 672, was also signed by the President on December 12, 1917.

Subsequently, on May 23, 1921, lots 3 through 14, of section 19, T. 12 S., R. 4 E., along with other lands located in sections 2—15, and 17—24, inclusive, were patented to the Northern Pacific Railroad Company. The patent does not contain any power site reservation, and, so far as the records of the Department disclose, no application for a proposed power project has ever been filed for lands located in section 19.

In a letter dated October 12, 1929, to the President transmitting proposed Restoration Order No. 434, the Secretary of the Interior stated that certain lands in Oregon had been withdrawn in a number of power site reserves, including No. 664, that some 2,717 acres of land included in the proposed restoration order had passed to patent, and that the balance of the lands in the order had been withdrawn on the basis of information indicating that they were crossed by a transmission line, but that a survey showed they were not so affected. He therefore recommended that the restoration order be approved. The order was approved on the same date. This order restored lots 3 and 4 of section 19 as well as portions of sections 14, 15, 17, 18, 23 and 24.

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From this information it is perhaps possible to conclude that the land involved is valueless for power site purposes, as the appellant company contends, or that the dam site in section 19 mentioned in the Director of the Geological Survey's memorandum of November 15, 1917, has proved to be infeasible. However, the true situation can be determined only by an actual field examination. Accordingly, an examination should be made by the Geological Survey, in cooperation with the Federal Power Commission, to determine if the lands applied for do have any power site possibilities. If it is determined that they do not have power site possibilities, then this Department will give consideration to a revocation of the power site withdrawal so far as the lands applied for are affected.

However, in the event it is determined after a field examination that the lands applied for are chiefly valuable for power site purposes, then the appellant may proceed without prejudice through the Federal Power Commission in accordance with section 24 of the act of June 10, 1920.

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 Lands Officer, Bureau of Land Management, is reversed and the case is remanded to the Bureau for proper action in accordance with this decision.

EDMUND T. FRITZ,
Deputy Solicitor.

APPEAL OF CARSON CONSTRUCTION COMPANY

IBCA-12

Decided August 19, 1955

Contracts: Changes—Contracts: Changed Conditions

The specifications under a contract for the construction of a timber dam at a lump sum price required the contractor to make his own investigation of the site; warned the contractor that subsurface information shown on the plans was not guaranteed; and stipulated that hitches be cut to solid bedrock. Nevertheless, the contractor is entitled to recover on his claim for additional compensation for labor and materials in constructing the dam, when the excavation required to reach bedrock was greater than indicated in a table of test pit results included in the plans, and the dam itself, which was designed on the basis of this information, had to be considerably redesigned. As the contract also included the "changes" and the "changed conditions" articles of the standard form of Government construction contract, the specifications must be read in the light of these provisions, so that the contract will be construed as a whole, and effect given to all of its provisions. As a general proposition, however, it must not be assumed that test pit

results which are not guaranteed constitute in themselves a definite representation of fact on which a contractor may always rely as if they were warranties.

Contracts: Interpretation

Although such varying terms as "solid bedrock," "solid rock," or "bedrock" were employed in the plans and specifications, the contractor was not unreasonable in regarding all these terms as synonymous. The term "solid rock" is only a synonym for "bedrock," and the term "solid bedrock" could be regarded by the contractor as mere tautology.

Contracts: Damages: Unliquidated Damages

To the extent that the Government may have withheld from the contractor information concerning subsurface conditions, such conduct could only form the basis of a claim for unliquidated damages which the Board lacks jurisdiction to consider.

BOARD OF CONTRACT APPEALS

On February 26, 1954, the Carson Construction Company, of Helena, Montana, appealed the decision of the contracting officer in the form of a letter dated January 29, 1954, denying its claim for additional compensation in the amount of \$6,120 for performance of Contract No. 14-04-001-71, Project No. Aaa. 50-A-116, Alaska Public Works, Office of Territories.

The contract, which was dated March 30, 1953, provided for the construction at Cordova, Alaska, of water system improvements consisting of a wood timber dam, separate spillway, supply line, distribution lines and chlorinating and pressure reducing station.

The claim in this proceeding arose in connection with the construction of the timber dam, Item 1 of the contract, for which the unit price bid was \$46,000. The claim, which is set forth in the contractor's letters of October 30, 1953, and January 12, 1954, is for additional 26 cubic yards of hand excavation in very difficult material and location, 6 cubic yards of concrete and forms, 2,900 board feet of 3" x 6" T&G treated decking, 2,232 board feet of 12" x 12" treated timbers, plus an allowance for overhead profit and bond, making the claimed total of \$6,120.

In a memorandum dated April 14, 1954, from the Director of the Office of Territories to the Secretary of the Interior, the nature of the dam is described as follows:

The dam is a wooden structure erected on bedrock in the bed of a stream at an approximate right angle to the banks of the stream, for the purpose of impounding the water of the stream as a municipal supply for the Town of Cordova. The downstream extremity of the dam rises 24 feet above bedrock at right angles to the stream bed. The top of this extremity is referred to as the crest and the bottom where it touches the stream bed, as the heel. The opposite extremity which comes to the level of bedrock, is referred to as the toe of the dam. The

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foundation consists of square concrete pedestals set at 5-foot intervals in pockets of rock of a minimum depth of 12 inches. The pedestals are referred to as footings and the rock pockets into which portions of them extend are referred to as hitches. Imbedded in the center of each concrete footing and extending upward from it is a heavy metal anchor strap. The superstructure begins with square posts 12 inches by 12 inches placed on top of the footings and bolted securely to the anchor straps. These posts are set in straight rows, one behind the other, at intervals of from $4\frac{1}{2}$ to 7 feet from toe to heel, with appropriate braces, each in the form of a Greek cross. Each row is referred to as a bent. Each bent is topped by a 12-inch by 12-inch beam referred to as a cap. The caps are connected by lighter beams referred to as stringers. On the stringers is a sheathing of tongue and groove lumber referred to as the deck. The deck is like a floor, except that it is tilted at an angle of 30 degrees. It is sealed to solid bedrock by mortar referred to as grout. The water is prevented from continuing its uninterrupted flow as it comes in contact with the deck and thus collects in a basin behind the dam until the elevation of the impounded water permits it to spill over the spillway, located approximately 575 feet southeast of the center of the axis of the dam.

In the next paragraph of the same memorandum is described the preparatory work which was done in connection with the construction of the dam, and its notation on the plans as follows:

In preparation for the work of designing the dam, an engineer who had contracted to prepare the Plans and Specifications, dug three rows of 15 test pits each, at intervals of 10 feet along the axis of the dam. The first row, designated on Sheet 1 of the Plans as A, was located approximately 20 feet downstream from the heel of the dam. The second, designated as B, was 20 feet upstream and approximately at the axis and heel of the dam, and the third, designated as C, 10 feet farther upstream in the direction of the toe. Sheet 1 of the Plans bears a sketch showing the location of the test pits in the upper right-hand corner. In the upper left, is a Tabulation of Test Pit Results which shows the elevation in inches below the surface, varying from 0 to 50 inches, at which bedrock was encountered. A note under this table states:

"Overburden consists of 6 inches to 8 inches of moss and tundra, then a layer of humus and weathered rock debris of varying thickness. Measurements given in the table are depth from ground surface to bedrock at test pit."

The General Instruction to bidders attached to the contract contained the usual provision that each bidder was to visit the site of the proposed work and make any necessary tests or investigations to acquaint himself fully "with surface, sub-surface, and all other conditions relating to construction * * *." However, the contract also included the standard "Changes" and "Changed conditions" clauses (articles 3 and 4), providing, respectively, for equitable adjustment of the amount due under the contract in case changes were made by the contracting officer, and for an adjustment in costs should the contractor or the Government discover during the progress of the work "sub-surface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or un-

known 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 specifications also contained a number of provisions which are relevant to a consideration of the claim, or are deemed to be relevant by one or the other of the parties.

Paragraph 4 of the General Stipulations (GS-4) provides:

The subsurface information shown on the plans is for the general information of the bidders and is not guaranteed.

Paragraph 7 of the General Stipulations (GS-7) defines the term "Solid Rock" or "Rock Excavation" as including "all rock in ledge formation that cannot be removed except by drilling and blasting and all boulders containing more than one-half ($\frac{1}{2}$) cubic yard."

Paragraph 2 of the section of the specifications entitled "Dam Structure and Appurtenances" (DS-2) provides:

The necessary rock excavation to provide the required hitches for the dam structure toe wall and toe seal shall be to the limits shown and shall be accomplished preferably by mooling but light plugging and blasting will be permitted as required. No extra payment will be made for excavating hitches beyond the limits shown and the Contractor will be required to fill excavation beyond the limits with Class 2 concrete at no cost to the Government. All hitches shall be cut to solid bedrock with no fractured or shattered material left in the hitches.

Paragraph 7 of the same section (DS-7), entitled "Basis of Payment," provides:

The unit to be paid for under this section shall be the completed installation of the dam structure and all appurtenances, including the outlet pipe to the point where it leaves the insulating box, in accordance with the plans and specifications. The completed unit constructed and accepted shall be paid for at the lump sum price stated in the contract, which price and payment shall constitute full compensation for furnishing all the materials, labor, tools, equipment, and incidentals necessary to complete the installation in accord with the plans and specifications.

The plans for the dam and related structures included six sheets. The relevance of sheet 1, which showed the test pit data, has already been explained in the Director's memorandum of April 14, 1954. Sheet 3 of the plans showed various sketches of the dam at both upstream and downstream elevations, the decking of the dam, and a typical bent section. Sheets 4 and 5 of the plans variously indicated a requirement of a 12-inch minimum excavation in "solid bedrock," or "solid rock," or "bedrock."

On the sketches of the dam at downstream and upstream elevation, the engineer who supervised the construction of the dam plotted fluctuating blue and red lines which show the variations between the planned and "as-built" dam installations. The sketch of the "Down-

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stream Elevation," which is at the bottom of sheet 3 shows variations between the designer's findings of depth to bedrock and the depth to solid bedrock as revealed in the construction of the dam at its heel. The sketch of the upstream elevation, which is at the top of sheet 3, shows the variation between the designer's findings of depth to bedrock and the actual depth to solid bedrock encountered in the construction of the dam at its toe.

These variations, which are considerable, are the basis of the contractor's claim. Additional concrete and form material were required in the main toe wall structure, located at the center and toe of the dam structure in the stream bed from bents 11 to 17. To meet the requirement of 12-inch minimum hitches in solid bedrock, additional depth and width in the excavation were required because of the shale and fractured formation of the rock first encountered, and the replacement of some of the rock with concrete. Moreover, the greater depth at which solid bedrock was encountered at the toe of the dam made it necessary to extend the deck of the dam at the toe to provide an adequate face for sealing the toe with grout. Extra decking was constructed between bents 1 and 11, and additional timber was also needed for caps, and for stringers which served as framing for the deck.

The contractor explained the theory of his claim in his letter of January 12, 1954. The contractor conceded that under paragraph DS-2 of the specifications he could not claim extra compensation for excavation of rock beyond the limits shown for hitches for the dam structure toe wall and toe seal. But, the contractor explained, the claim was based "on conditions other than that contemplated or shown in the plans in that the excavation required *to reach the rock* was more than shown on the plans and over and above what our bid called for." In other words, the contractor was asserting a claim based on article 4 of the contract, which made provision for adjustment in case unknown conditions were encountered at the site.

In rejecting the claim in his decision of January 29, 1954, the contracting officer took the position that since the specifications and plans required the hitches to be cut in solid bedrock, were entirely silent concerning the amount, classification or depth of the overburden, and required all the work for the installation of the dam to be performed at the lump sum price of \$46,000, no additional compensation could be allowed.

The position of the Government was more elaborately stated in the Director's memorandum of April 14, 1954. He conceded that the measurements given in the test pit table of data on sheet 1 of the plans were intended to be "a statement of fact" but he called attention to paragraph GS-4 of the specifications which stated that the sub-

surface information shown on the plans was not guaranteed. He also gave three reasons which, to his mind, made it apparent that the plans were not intended to inform a contractor of the depth to which it would be necessary to excavate for each individual footing, as follows:

First, the footings were not placed in the exact location of the test pits; second, the footings were placed at much more frequent intervals than the test pits were dug and third, the footings were set at least 12 inches in solid bedrock. A careful reading of the table of Test Pit Results indicates variations of as much as 19, 28, and 33 inches to bedrock at 10-foot intervals. This suggests that the rock which underlay the damsite did not extend in a flat sheet or even in a sloping shelf, but that it was full of numerous abrupt pockets of overburden. This broken condition seems to suggest also that the bedrock encountered might be likely to fracture in its upper layers. Since the footings were to be set in 12 inches of solid bedrock, prospective contractors were thus informed that excavation 12 inches below the surface of solid bedrock was required for each footing.

The Director proceeded to call attention also to the provision of the Instructions to Bidders that required each bidder to visit the site and acquaint himself with subsurface conditions, and to paragraph DS-2, describing the nature of the necessary rock excavation to provide the required hitches. "This is a specific indication," he explained, "that the hitches must be excavated in solid bedrock, whereas the test pits previously described were carried only to the beginning of bedrock. No information was given at any time as to the character of the bedrock revealed by the test pits. Indeed no such information could be given since only actual excavation could reveal whether this rock would fracture and thus require removal, or remain solid."

Finally, the Director, like the contracting officer, emphasized paragraph DS-7 of the specifications which provided a lump sum payment for the dam. All these provisions of the specifications ruled out, to his mind, the application of article IV of the contract, dealing with changed conditions. He calculated that an engineer's estimate of the cost of the extra labor and material, to reach the greater depth at which solid bedrock was found would amount to \$3,083.86. But he concluded:

An additional cost of about \$3,100 on a contract item of \$46,000 is less than seven per cent of the contract price. When such cost occurs because of depths to solid bedrock in excess of the depths to bedrock shown on the plans but not described therein as solid bedrock or even guaranteed to constitute bedrock in every instance, it seems necessary to conclude that such difference is not of sufficient substance to constitute a material difference between subsurface conditions of the site as shown in the drawings and as encountered in the progress of the work which will require an increase in the contract price under Article 4 of the contract.

The contractor commented on the Director's memorandum of April 14, 1954, in a letter to the Department dated October 12, 1954, in

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which he pointed out what he regarded as some of the contradictions in his argument, namely: If the test pits "were made for design purposes only, then the test pits were not necessary and should never have been included in the plans for any purpose, as the design could have been made up without the use of the test pits." If the measurements given in the table of test pit results were statements of fact, the provision in the specifications stating that the subsurface information was not guaranteed amounted to saying "here are the facts, but you can't depend on them." If only actual excavation could reveal whether the subsurface rock would fracture and thus require removal, what point was there in the provision requiring bidders to visit the site and acquaint themselves with the nature of the subsurface conditions to be found there? Finally, if the provision for lump sum payment barred any extra compensation, what point was there in including the "changed conditions" article in the contract?

On June 7, 1955, two members of the Board, Messrs. William Seagle and Thomas C. Batchelor, held a hearing in the case at Juneau, Alaska. The contractor was represented at the hearing by Wayne C. Booth, of the law firm of Wright, Booth and Beresford, Seattle, Washington, and the Government by N. Baxter Jenkins, Attorney-Advisor, Alaska Public Works, Juneau, Alaska. The contractor testified in his own behalf at the hearing, and John B. Hudert, Construction Engineer, Alaska Public Works, testified in behalf of the Government. Counsel for the contractor has also filed a post-hearing brief in the case.

At the hearing, as well as in his post-hearing brief, counsel for the contractor advanced in the alternative two legal theories in support of its claim. One theory was that the contractor was entitled to recover because the Government had made a definite representation in the plans concerning the depth to bedrock which was untrue, although there may have been no intention to misrepresent and that the contractor was entitled to rely on this representation. This theory presumably rests on the "changes" clause (article 3 of the contract), although it is not specifically mentioned in this connection. The other theory was that the contractor was entitled to recover because he had encountered changed conditions within the meaning of article 4 of the contract, not anticipated by the designing engineer, which required the footings to be set at an increased depth and at different locations, and led to the redesign of the structure of the dam itself. Counsel for the Government has filed no post-hearing brief but its position is as outlined in the Director's memorandum of April 14, 1954.

The Board does not subscribe in their entirety to the views of either side. The Government's interpretation of most of the specific provisions of the contract, specifications, and plans is believed to be untenable, and some of the positions which it has assumed harbor inherent contradictions, as the contractor contends.

The Government points to the provision requiring bidders to examine the site. But the contractor testified that this was not feasible at the time he made his bid because the snow in the Cordova area was too deep. Moreover, John B. Hudert, the Construction Engineer, testified: "There was no way of knowing just from surface excavation what the nature of your rock would be."

It is true that under the provisions of paragraph GS-4 of the specifications the subsurface information shown on the plans is not guaranteed. On the other hand, there is no express provision in the specifications that expressly requires the contractor to excavate to whatever depth may be required to reach solid rock. The contracting officer apparently found such a provision, in paragraph DS-2 of the specifications, but the contractor is believed to be right in contending that this merely required the hitches to be cut in bedrock without indicating the amount or character of the excavation that would be required to reach bedrock.

The Government also emphasizes the varying uses of the terms "solid bedrock," "solid rock," or "bedrock" in the plans and specifications, but the contractor was not unreasonable in regarding all these terms as synonymous. The dictionary defines bedrock as solid rock underlying superficial formations. The term "solid rock" would be, therefore, only a synonym for bedrock; and the term "solid bedrock" could be regarded as no more than a Shakespearean tautology for bedrock. It is a well-settled rule in the interpretation of Government contracts that, since they are drafted by the Government, they are to be construed against the Government, and any ambiguity is to be resolved in favor of the contractor.¹ It must follow that the table of test pit results on sheet 1 of the plans must be regarded as indicating the depth at which solid rock had been encountered in the test pit diggings.

The Director himself in his memorandum of April 14, 1954, characterized the measurements given in the table of test pit results as "a statement of fact." The Director himself deduced from the table that "the bedrock encountered might be likely to fracture in its upper

¹ See *Ambursen Dam Co. v. United States*, 86 Ct. Cl. 478 (1938); *Callahan Construction Co. v. United States*, 91 Ct. Cl. 538 (1940); *Blair v. United States*, 99 Ct. Cl. 71 (1942); *Peter Kiewit Sons' Co. v. United States*, 109 Ct. Cl. 390 (1947); *George P. Henly Construction Co.*, CA-120 (November 1, 1951); *Durham & Sauer*, CA-124 (December 19, 1951); *S & S Engineering Corporation*, 61 I. D. 427 (1954).

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layers" but no proof has been offered that this conclusion was ineluctable, and that a reasonable man could not have believed that the rock, which was described as bedrock, was solid everywhere. It is doubtless true that the footings were not placed in the exact locations of the test pits but to argue that no reliance should, therefore, be placed on the test pit results is a *reductio ad absurdum* of the whole procedure of test pit digging.

It is even more obvious that paragraph DS-7 of the specifications, which provides a lump sum payment, does not in itself rule out the allowance of extra compensation under any and all circumstances. Articles 3 and 4 of the contract, which contemplate that the contractor shall be paid additional compensation if changes in the work are ordered by the contracting officer, or if changed conditions are encountered, would otherwise be meaningless. It is, moreover, wholly immaterial whether the additional cost of performing the contract was 7 percent of the contract price, or any other percentage. If extra work, not contemplated by the contract, has been performed by the contractor, as required by the contracting officer, he is entitled to be paid therefor even if it represents only 1 percent of the contract price.

It seems to the Board, indeed, that the changes and changed conditions articles of the contract are the keys to a correct and just decision of this case. There is, to be sure, a line of cases in the Court of Claims involving excavation or dredging operations in which the court has held that where test borings have been made or descriptions of materials to be encountered have been given but the specifications state that they are not guaranteed, and require the contractor to make his own investigation of the site, the contractor may not recover for extra work when unexpected conditions have been encountered.² More recently, however, the court has shown a more liberal attitude. Its theory seems to be that since every contract must be read as a whole, the limiting provisions of the specifications must be read in the light of the "changes" and "changed conditions" articles of the standard form of Government construction contract, so that effect will be given to all the provisions of the contract.

Thus, in *Loftis v. United States*, 110 Ct. Cl. 551 (1948), which involved a claim for compensation for additional subsurface excavation work in connection with the construction of the airfield at the Charleston Bomber Command Station, the contractor was allowed to recover when during the progress of the work unstable subsurface

² See, for instance, *W. H. French Dredging & Wrecking Co. v. United States*, 62 Ct. Cl. 97 (1926); *Arundel Corporation v. United States*, 79 Ct. Cl. 343 (1934); *C. W. Blakeslee & Sons, Inc. v. United States*, 89 Ct. Cl. 226 (1939); *Central Dredging Co. v. United States*, 94 Ct. Cl. 1 (1941); *Triest & Earle, Inc. v. United States*, 95 Ct. Cl. 209 (1941).

conditions had been encountered, notwithstanding the inclusion of paragraph 4-01 in the specifications which provided that "Unclassified excavations shall include the removal of all material encountered regardless of type and/or class of material." The defendant argued that by virtue of this provision of the specifications the plaintiff "assumed the risk of encountering unstable subsurface conditions in all embankment construction areas." But the court, nevertheless, said:

* * * This argument of defendant might be justified if we could ignore the fact that the contract, and of necessity the specifications, also contained Article 4. The purpose of specifications and drawings is to supplement the formal contract by delineating the details of the work to be performed thereunder and not to void an express provision written into the contract. Contract provisions, such as Article 4 (finding 21) and paragraph 4-01, above quoted, are to be reasonably interpreted in the light of the known facts and reasonable knowledge possessed by the parties as to conditions and "The intention of the parties is to be gathered, not from the single sentence above quoted, but from the whole instrument read in the light of the circumstances existing at the time of negotiations leading up to its execution." (Page 628.)

The court then continued:

* * * Since the specifications and plans were based on surface conditions, measurements and estimates, without indication or representation as to subsurface conditions, and since the specifications and plans indicated considerable excavation above the finished grade lines for fills, but none beneath the base of the fills, the language of 4-01 cannot, in view of Article 4, be interpreted, as the Government says it should, as a warning or the expression of an opinion that unstable or unusual subsurface conditions existed. If the person who prepared this specification so intended, he succeeded in using language that was so indefinite and misleading as to conceal his intention. * * * We think the language of paragraph 4-01 is not, in the circumstances, susceptible of the interpretation which defendant seeks to place upon it and that plaintiff was justified in interpreting it as he did. But even if there should be a conflict between the language of this paragraph and the provisions of Article 4 of the contract, the latter would prevail.

It is true that in the *Loftis* case no borings were made by the Government engineers who calculated the probable amount of excavation entirely by examination of surface conditions. The court, however, apparently found a substitute factor leading it to apply article 4 in the fact that the specifications and plans indicated no excavation beneath the base of the fills. However, in *Shepherd v. United States*, 125 Ct. Cl. 724 (1953), a case involving a claim for additional compensation for excavating wet material in a channel which, the court was convinced, neither the Government nor the contractor expected to encounter, the court invoked article 4 of the contract and held that the contractor was entitled to recover, although test borings had been made, and the specifications stated that the data were not guaranteed,

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and required the contractor to examine the site. The *Loftis* case was cited as a precedent for this decision.

As a general and abstract proposition, the Board does not subscribe to the contractor's theory that test pit diggings which are not guaranteed constitute in themselves a definite representation of fact on which a contractor may always rely as if they were warranties. The Board goes no further than assuming that in special circumstances the existence of such data does not necessarily rule out recovery by the contractor when unknown conditions have been encountered, or the discovery of the unknown conditions has led to changes in the work. The Board believes that such special circumstances exist in the present case.

The excavation work in the present case was not a separate feature of the contract but was closely related to a design for the superstructure, which was the dam itself. The design of the dam depended on the depth of the excavation, and, when the depth to bedrock was found to be greater than had been supposed, the design had to be considerably altered, as already related. The Board cannot believe that the design for the dam was intended to be wholly tentative or experimental, and certainly there is nothing in the plans which indicates that any of the dimensions were to be altered if the excavation had to be pushed to a greater depth. The Board believes, therefore, that the dam was designed upon the basis of the table of test pit results. In this connection considerable importance is attached to the fact that the Government itself assumed the table of test pit results, and the note thereon, indicating the depth to bedrock, to represent a statement of fact, and, if it was intended as such, the contractor had a right to rely thereon. Under the circumstances, the discovery of the fractured condition of the bedrock was the discovery of a condition at the site "materially differing from those shown on the drawings or indicated in the specifications" within the meaning of article 4 of the contract.

It was established at the hearing, moreover, that the table of test pit results on sheet 1 of the plans was misleading. At nine points where test pit holes are shown, no test pits were dug but the probe method, which is even less reliable, was used. In addition, the engineer who designed the Cordova Water Supply Project, dug a trench along the designed toe of the dam, and recorded the depths which he found at various intervals out from the axis of the dam, upstream. This information, however, was not made available to bidders. It is significant that it was at the toe of the dam that greater depth to bedrock was encountered. To the extent that withholding of infor-

mation by the Government may have been a form of misrepresentation, it could only form the basis of a claim for unliquidated damages which the Board lacks jurisdiction to consider. See *Coffee Construction Co.*, BCA No. 556, May 13, 1944, 2 CCF 745. However, the recording of the probes as test pit results also rendered the specifications somewhat faulty. Since the dam had to be redesigned in part, the contractor's claim may be said to be based also on article 3 of the contract providing for an equitable adjustment in case changes in the performance of the work under the contract are made.

The contractor's claim should, therefore, have been allowed by the contracting officer. However, the evidence before the Board with respect to the amount of additional compensation to which the contractor is entitled is not satisfactory. The contractor did not produce at the hearing the engineer who prepared his estimates on the job. The Government engineer who presented at the hearing a figure indicating the amount which, the Government believed, the contractor would be entitled to receive if his claim were held to be valid, testified that he based this figure on the contractor's periodical estimates. Section 3 of the General Conditions of the contract expressly provides, however, that periodical estimates shall be used only for "determining the basis of partial payments and will not be considered as fixing a basis for additions to or deductions from the contract price." The contracting officer should allow the contractor the cost of the additional labor and material, as well as a percentage for overhead and profit, as authorized by section 12 (b) (3) of the General Conditions of the contract. If the contractor and the contracting officer cannot agree on the amount, the contractor may appeal again to the Board. In such case, however, adequate evidence of the contractor's costs must be presented to the Board.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the decision of the contracting officer is reversed, and he is directed to proceed as outlined above.

THEODORE H. HAAS, *Chairman.*

THOMAS C. BATCHLOR, *Member.*

WILLIAM SEAGLE, *Member.*

August 22, 1955

WHETHER AUTHORITY EXISTS FOR OPERATING A PRIORITIES AND ALLOCATION SYSTEM FOR HELIUM AMONG FEDERAL AGENCIES AND PRIVATE USERS, AND WHAT DELEGATIONS WOULD BE REQUIRED TO ENABLE THE BUREAU OF MINES TO EXERCISE SUCH AUTHORITY**Bureau of Mines—Helium**

Under the Helium Act (50 U. S. C. sec. 161), which requires the Bureau of Mines to dispose of helium to Federal agencies in preference over all other applications for purchase of helium, but permits the Bureau to give preference to any Federal agency over another Federal agency, and to the applications of any non-Federal applicant over another non-Federal applicant, the Bureau of Mines may, in effect, operate a partial priorities and allocations system effective as to direct recipients of helium from the Bureau.

Helium

The Helium Act (50 U. S. C. sec. 161) is less suitable than the Defense Production Act (50 U. S. C., App., sec. 2061 *et seq.*) as a legal basis for operating a priorities and allocations system because the Helium Act lacks, while the Defense Production Act contains, adequate provisions for (a) control of helium use by the purchaser or his transferees, (b) diversion of helium from use by a Federal agency to a non-Federal consumer and vice versa, (c) exemptions from liability for breach of contract incurred in complying with priorities and allocations directives concerning helium, and (d) requiring rendition of information concerning helium stocks and uses.

Secretary of the Interior—Delegation of Authority: Generally

The President's authority under the Defense Production Act with respect to priorities and allocations has, with respect to helium, been delegated to the Secretary of the Interior, subject to certain limitations, and can be redelegated by the Secretary of the Interior to any official or agency of the Federal Government, including the Bureau of Mines.

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TO THE DIRECTOR, BUREAU OF MINES.

This responds to your request for advice as to what authority exists for operating an allocation and priorities system for helium among Federal agencies and private users, and what delegations would be required to enable the Bureau of Mines to exercise such authority.

The Bureau of Mines operates four helium plants owned by the Government, is the sole large-scale producer of helium in the United States, and disposes the helium to Federal and non-Federal users.

I. PRIORITIES AND ALLOCATIONS

There are two sources of authority which may be invoked to authorize the Bureau of Mines to operate some form of an allocation and

priorities system for helium—the Helium Act and the Defense Production Act.

A. THE HELIUM ACT

Section 3 of the Helium Act (act of September 1, 1937, 50 Stat. 885, as amended, 50 U. S. C. secs. 161, 164) authorizes Federal agencies to “requisition”¹ helium from the Bureau of Mines and to pay for such helium “from any applicable appropriations.”² Section 3 (b) provides that “helium not needed for Government use may be produced and sold upon payment in advance in quantities and under regulations approved by the President³ for medical, scientific, and commercial use * * *.” This statutory provision clearly gives to any Federal agency a preference over all non-Federal applicants to obtain helium from the Bureau, no matter what may be the relative needs of the Government agency vis-a-vis the non-Federal user in terms of advancing the interests of national defense.

The Helium Act is implemented by the Helium Regulations (30 CFR, Part 1; 14 F. R. 7760), section 1.12 of which provides as follows:

Sec. 1.12. *Reservations with respect to sales and deliveries.* The Bureau reserves the absolute right and discretion to limit or defer sales and deliveries under contracts to conform to the needs and requirements of the Government, and to give such preferences as between sales for medical, scientific, and commercial use, and requisitions by Government agencies, as it deems proper: *Provided*, That in all cases requirements for Government use shall have first preference. All furnishing of services and supplying of containers and tractors under the regulations in this part shall be at the Bureau's option.

This regulation provides that the Bureau of Mines may exercise “discretion to limit or defer sales and deliveries under contracts” in order to meet the statutory priority of the Federal agencies, but restricts such discretion insofar as it requires “that in all cases requirements for Government use shall have first preference.”

¹Since the “requisition” would be by one Government agency to another, the word requisition is obviously used in the sense of a request for an interagency transfer of material (cf. 31 U. S. C. sec. 686), not in the sense that the requisitioning agency is exercising the power of condemnation by which a Government agency seizes private property. Compare section 1.12 of the Helium Regulations quoted below, with section 201 (a) of the Defense Production Act of 1950 (sec. 201 was terminated on June 30, 1953, by sec. 11 of the Defense Production Act amendments of 1953, 67 Stat. 129, 131, 50 U. S. C., App., Supp. I, sec. 2166).

²The Department of the Interior and Related Agencies Appropriation Act of June 16, 1955 (69 Stat. 141, 146; Public Law 78, 84th Cong.), directs that all funds appropriated to the military departments for acquisition of helium “shall be transferred to the Bureau of Mines and * * * credited to the special helium production fund” established under the Helium Act, 50 U. S. C. sec. 164 (c).

³By section 1 (n) of Executive Order 10250 (16 F. R. 5385, 3 CFR, 1951 Supp., p. 439, 3 U. S. C., note following sec. 301) the President delegated to the Secretary of the Interior the authority to approve, without Presidential ratification, all regulations “governing the production and sale of helium for medical, scientific, and commercial use.”

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In my opinion, there is nothing in the statute or in the Helium Regulation that prescribes the order of preference as between Federal agencies. The Bureau thus could legally provide preference to one Federal agency's requisition over that of another Federal agency.

Secondly, it is my opinion that there is nothing in the statute or in the Helium Regulation that prescribes the order of preference as between private applicants. The Bureau could legally sell helium which is not needed for Government use, to applicants for medical use in preference over applicants for scientific or commercial uses,⁴ to applicants for scientific use in preference over applicants for medical or commercial uses, to applicants for commercial use in preference over applicants for medical or scientific uses, and to any applicant over another applicant within the same group. In any case, the Bureau could, in order to meet the needs of a Federal agency, refuse to sell to, or limit sales to, any non-Federal applicant. In addition, since the terms of section 1.12 of the regulations are incorporated by reference in each of the Bureau's helium sales contracts, the Bureau could, for the purpose of meeting the needs of a Federal agency, defer deliveries under contracts theretofore made with any non-Federal applicant.

On the basis thus outlined, therefore, any Federal agency may obtain helium from the Bureau in preference over all non-Federal applicants. Such preference will ordinarily accord with the necessities of national defense for which an allocation and priorities system is designed. Moreover, insofar as direct sales by the Bureau are concerned, the Bureau probably has sufficient powers to administer a partial allocation and priorities system under the Helium Act. Since section 3 (b) of the Helium Act, by use of the word "may," simply authorizes, but does not direct, the sale of helium to non-Federal applicants, it is dubious whether any non-Federal applicant for the purchase of helium from the Bureau could compel the Bureau to sell helium to it, or to accord it any preference over any other non-Federal applicant. *United States ex rel. McLennan v. Wilbur*, 283 U. S. 414,

⁴ Although the Helium Act does not provide a preference for purchase of helium by applicants for medical use, section 3 of the Helium Act does indicate the special solicitude of Congress that helium be available for medical purposes by providing that "helium shall be sold for medical purposes at prices which will permit its general use therefor." Under section 1.2 of the present Helium Regulations, as amended February 2, 1954 (19 F. R. 788), the Bureau sells helium at a uniform price to all non-Federal purchasers of \$19 per 1,000 cubic feet of helium, with a minimum charge of \$380 per contract, plus certain charges for servicing and use of containers and other equipment. It has apparently been administratively determined that that price is not so high as to impair the "general use" of helium for medical purposes. The charge for helium to Federal agencies is based only on the "expense incident to the administration, operation and maintenance of the Government's helium plants" (50 U. S. C. sec. 164 (a)), and was \$15.50 per 1,000 cubic feet of helium as of June 30, 1955.

420 (1931); *United States v. City and County of San Francisco*, 310 U. S. 16, 30 (1940); *Dunn v. Ickes*, 115 F. 2d 36 (1940), *cert. denied* 311 U. S. 698 (1940); *Perkins v. Lukens Steel Company*, 310 U. S. 113, 129 (1940). Consequently, the Bureau, by its control over sales of helium, and with respect to the direct recipients of helium from the Bureau, could in effect grant priorities and allocate helium to particular categories of purchasers on the basis of their importance to the fulfillment of national defense purposes. Such a priorities and allocations system could be effective, but only insofar as the direct recipients either were the consumers of the helium or, if they were distributors, were willing to conform to the Bureau's requests that certain users or categories of users be preferred in the resale of the helium.

The Helium Act, however, does not provide legal foundation adequate to insure that the use of helium in industrial operations would accord with the pattern of priorities deemed necessary or desirable in the interest of national defense. Among the defects of the Helium Act for this purpose are the following:

(1) The Helium Act provides virtually no controls over the resale or use of helium after the Bureau has disposed of it, except with respect to its exportation and its use in airships.⁵ But these limited areas of control are obviously insufficient upon which to base a system for controlling the use of helium by allocation, limitation orders, or priorities directives, or to prevent private firms that have obtained helium, either from the Bureau or elsewhere, from devoting, or selling, that helium for uses whose importance for national defense needs is much less valuable than that of other potential users. However, under section 103 of the Defense Production Act, which is discussed in part II of this opinion, criminal penalties may be imposed for any violation of sections 101 and 102 of the latter act or of any rule, regulation or order thereunder (50 U. S. C., App., sec. 2073).

(2) Under the Helium Act, any Federal agency has an absolute priority over any non-Federal applicant. So far as the Helium Act is concerned, the control of the uses to which helium is put by any Federal agency would rest with that agency. Each Federal agency could thus devote its helium to a use which, though important and

⁵ Section 4 of the Helium Act imposes criminal penalties for exportation of helium without an export license. The prohibition in section 3 of the act against the sale of helium for use in inflation of any airship (other than airships operating in or between the United States and its territories and possessions, or between any of the aforesaid areas and foreign countries) is not subject to any specific criminal sanction under the Helium Act, although the Bureau may, under section 1.17 of the Helium Regulations, cancel future deliveries, forfeit deposits under existing applications, and demand and collect liquidated damages, and may, in some circumstances, endeavor to have suit instituted against the person violating the restriction against use in airships, either for fraud under the general criminal statutes, or for damages on the contract, or to enjoin the sale or use of helium for such purpose.

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essential, might be less essential in terms of the national defense than a defense-related use of helium by a private firm. The Helium Act does not empower the Bureau of Mines to require that another Federal agency divert its helium, for example, to a Government contractor to weld jet engines, or to a subcontractor who needs it in the production of component parts for aircraft, or to an important defense-related research laboratory, or to save lives in a hospital, instead of using the helium for, to cite an extreme example, inflating ornamental balloons which that agency may have. However, as discussed in part B of this opinion, the Defense Production Act applies to all helium, whether ordered or possessed by a private person or by a Federal agency, and authorizes allocation of helium, and the granting of priorities to obtain helium, to users whose needs are most essential to the national defense, irrespective of whether the user is a Federal or non-Federal agency.

(3) Distributors and other possessors of helium who would be willing voluntarily to allocate or grant priorities to persons seeking to purchase helium, as requested by the Bureau of Mines, might find that compliance with the Government's desire that helium be transferred to essential defense uses would subject them to liability for breach of contract to those with whom prior contractual commitments have been made. There is nothing in the Helium Act which would exempt such distributors or possessors from such liability. Hence, a voluntary allocation system would probably fail to operate in instances where such liability might be incurred. However, section 707 of the Defense Production Act, as amended (50 U. S. C., App., sec. 2157), protects those who comply with regulations and orders issued under that act from liability or penalties because of such compliance, and prohibits any discrimination against orders or contracts to which priority is assigned or for which materials or facilities are allocated, by the charging of higher prices or the imposition of different terms and conditions for such orders and contracts than for other generally comparable orders or contracts, or in any other manner.

(4) The Helium Act does not authorize the Bureau of Mines to compel the rendition of full information concerning stocks and uses of helium by all possessors of helium. However, section 705 of the Defense Production Act (50 U. S. C., App., sec. 2155) confers broad authority upon the President [and his delegates] to obtain information, to require reports and the keeping of records, to inspect records and property, and to take the sworn testimony of any person "as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act and the regulations or orders issued thereunder."

B. THE DEFENSE PRODUCTION ACT

Section 101 of the Defense Production Act of 1950, as amended by the act of June 30, 1953 (67 Stat. 129; 50 U. S. C., App., sec. 2071),⁶ provides as follows:

(a) The President is hereby authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

(b) The powers granted in this section shall not be used to control the general distribution of any material in the civilian market unless the President finds (1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.

Section 101 pertains to priorities for "any * * * contract or order" and authorizes allocations of any "materials and facilities." These words, in ordinary context, would encompass helium. The application of these words to helium is further bolstered by section 702 (b) which defines the word "materials" as including "raw materials, articles, commodities, products, supplies, components, technical information, and processes." 50 U. S. C., App., sec. 2152. The existence of the Helium Act does not exempt helium from the operation of the Defense Production Act. Although the Helium Act deals specifically with the sale of helium, it does not expressly legislate with respect to the granting of priorities and the making of allocations of helium. Such powers, applicable only to direct sales of helium by the Bureau of Mines, are merely implied from the Bureau's authority to prefer one Federal agency over another, or one non-Federal applicant over another non-Federal applicant, in direct sales by the Bureau. Section 101 of the Defense Production Act of 1950, which was enacted after the Helium Act, legislates specifically and expressly with respect to the subject of priorities and allocations. Moreover, by defining "person" as including the United States or its agencies, section 702 (a) makes the United States subject to the powers contained in section 101. In my opinion therefore, it is plain that helium is a "material" within the scope of and subject to the Defense Production Act.

⁶ By section 10 of the act of August 9, 1955 (69 Stat. 580; Public Law 295, 84th Cong.), the life of section 101 was extended to June 30, 1956.

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The authority provided by section 101 (a) is, of course, much broader than the partial priorities and allocations authority implied in the Helium Act. Section 101 (a) could be applied with respect to either governmental or non-governmental possessors and users of helium, and to either direct purchasers or to subpurchasers; and the allocation of helium may be accomplished "in such manner, upon such conditions, and to such extent as he [the President or his delegates] shall deem necessary or appropriate to promote the national defense." The term "national defense" is defined in section 702 (d), as amended (67 Stat. 129, 130; 50 U. S. C., App., sec. 2152), as meaning "programs for military and atomic energy production or construction, military assistance to any foreign nation, stockpiling, and directly related activity." Since helium is used in connection with "programs for military and atomic energy production or construction * * * and directly related activity," there is no question but that a complete and comprehensive allocations and priorities system may be established under section 101 of the Defense Production Act for the control of helium which would supersede any conflicting requirements of the Helium Act.

At this point it is necessary to examine the requirements of subsection (b) of section 101 of the Defense Production Act. It provides that the powers granted under subsection (a) may not be used "to control the general distribution of any material in the civilian market" unless two findings are made. These findings are:

1. That the material whose general distribution is to be controlled "is a scarce and critical material essential to the national defense."
2. That "the requirements of the national defense for such material cannot otherwise be met without creating significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship."

Subsection (b) in its present form was inserted into the Defense Production Act by the Defense Production Act amendments of 1953 (67 Stat. 129). The legislative history of the latter statute shows that one of its purposes was to insure that the use of allocation authority with respect to any material for defense purposes would not automatically require allocation of that material and the imposition of controls thereof for the entire civilian economy. Testimony of Arthur S. Flemming, Acting Director, Office of Defense Mobilization, Hearings before Senate Committee on Banking and Currency, 83d Cong., 1st sess., Part 4, pp. 1280, 1285-1286 *et seq.*; S. Rept. 138, 83d Cong., 1st

sess., p. 15-16. In line with the President's stated purpose that the use of material and product controls be restricted generally "to defense priorities and scarce and critical items essential for our defense" (State of the Union Message of February 2, 1953, H. Doc. 75, 83d Cong., 1st sess., p. 8), sec. 702 (d) defining the term "national defense"⁷ and section 101 relating to priorities and allocations, were revised to read as quoted above. The redefinition of "national defense" encompasses all aspects of national defense work so as clearly to include industrial participation therein, and makes it apparent that the term "civilian market" in section 101 (b) was intended to refer to civilian consumption not related to defense work rather than to all nongovernmental, or nonmilitary, consumption. This is clearly borne out by the discussions at the committee hearings during Mr. Fleming's testimony (*ibid.*, pp. 1280 *et seq.*). See also S. Rept. 138, 83d Cong., 1st sess., p. 15-16. Accordingly, the findings required by subsection 101 (b) would be necessary only where the priorities and allocations powers were to be used "to control the general distribution of any material [in this instance, helium] in" that portion of the civilian economy not devoted to defense work. Those findings would not be a prerequisite to the exercise of the powers of making allocations of, and granting priorities for, helium devoted to defense uses, or as a matter of law, helium to be used by a small segment of the nondefense related civilian market which does not amount to control of the "general distribution" of helium in that market.

Thus, the powers authorized under section 101 (a) could be used, without such findings, to establish a system for allocating helium for defense purposes either to Government or industrial use, or to grant priorities for earlier delivery to an industrial defense use over any other use, including that of a Government agency, or to issue individual priorities directives or allocations orders to facilitate delivery of helium in particular instances to hospitals for emergency medical use, or in other comparable circumstances. The dividing line between such limited control, and control of the general distribution of helium for nondefense related uses, is not readily definable. The point at which limited or partial control achieves the status of general control of a material will depend on the circumstances in which an allocations and priorities system operates. At the present time, almost nine-tenths of helium production is devoted to national defense uses. Moreover, the demand for helium for such uses is steadily rising, and it appears that

⁷ The term "national defense" was defined as follows in the Defense Production Act of 1950: "means the operations and activities of the armed forces, the Atomic Energy Commission, or any other Government department or agency directly or indirectly and substantially concerned with the national defense, or operations or activities in connection with the Mutual Defense Assistance Act of 1949, as amended."

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the capacity of the Bureau of Mines to produce more helium will not increase substantially for a considerable period of time pending the completion of additional helium production facilities. Hence, it would seem that any efforts to control more than a minute fraction of the nondefense civilian use of helium would probably create significant dislocation in the normal distribution of helium in the nondefense civilian market to such a degree as to create appreciable hardships for many persons and concerns. In such circumstances, it would appear to be virtually necessary to control the general distribution of the small proportion of helium devoted to nondefense civilian consumption, in order to assure helium to those nondefense related consumers (e. g., hospitals, industrial users, research laboratories) whose use of helium would be more essential to the general good than use by other consumers of helium (e. g., toy balloons, advertising, etc.). If this assumption is correct, it would follow that the findings in section 101 (b) can properly be made.

In either event, the exercise of the priorities and allocations authority provided under section 101 must be in the light of section 701 (c) of the Defense Production Act as amended (50 U. S. C., App., Supp. I, sec. 2151 (c)). That section was amended by section 4 of the act of August 9, 1955 (69 Stat. 580; Public Law 295, 84th Cong.), to provide as follows:

(c) Whenever the President invokes the powers given him in this Act to allocate any material in the civilian market, he shall do so in such a manner as to make available, so far as practicable, for business and various segments thereof in the normal channel of distribution of such material, a fair share of the available civilian supply based, so far as practicable, on the share received by such business under normal conditions during a representative period preceding any future allocation of materials: *Provided*, That the President shall, in the allocation of materials in the civilian market, give due consideration to the needs of new concerns and newly acquired operations, undue hardships of individual businesses, and the needs of smaller concerns in an industry.

It should be noted that section 701 (c) does not compel the allocation, to any particular segment of the civilian market, of a rigid proportion, or for that matter any proportion, of the available civilian supply. The phrase "so far as practicable" envisages that in some circumstances it may be necessary to allocate a scarce material or commodity (a) in such manner that some uses or types of business will get no allocation whatever, and, thus in case of partial allocation, will have to compete with all consumers for the unallocated share of the total production, or, in case of complete allocation of the total production, will get none of the allocated material, and (b) on a basis different from the share previously received by the use or business affected by such allocation.

In sum, therefore, it can be said that either the Helium Act or the Defense Production Act, or both, can be used to assure that requirements of helium by Federal agencies for national defense would be given priority over other uses. The Helium Act does so by giving to Federal agencies a complete preference to obtain helium from the Bureau of Mines over any non-Federal uses, whatever their nature. The Defense Production Act, however, was fashioned specifically to provide, where needed for national defense, a workable priority and allocation system in an industrial complex irrespective of whether the use is by a Federal or a non-Federal agency. The Helium Act would permit only a partial allocation system, which in general, would operate only with respect to those purchasing helium directly from the Bureau. The Defense Production Act, however, is more comprehensive and would permit the issuance of allocations and priority directives to sub-purchasers and consumers as well as to direct purchasers. Furthermore, the latter act, unlike the Helium Act, contains authority for enforcing orders and rules thereunder by criminal sanctions, for requiring the furnishing of information, and for protecting from liability those persons who would otherwise incur liability because they comply with such orders and rules. Hence, the Defense Production Act provides a better basis for an allocations and priority system to distribute helium to industrial consumers at various stages, and through commercial channels, in the chain of production of items important to national defense.

II. DELEGATION OF AUTHORITY UNDER THE DEFENSE PRODUCTION ACT

The President's functions under section 101 of the Defense Production Act were delegated, by section 201 (a) of Part II of Executive Order 10480 of August 14, 1953 (18 F. R. 4939, 3 CFR, 1953 Supp., p. 98, 50 U. S. C., App., Supp. 1, note following sec. 2153), to the Director of the Office of Defense Mobilization. That same section, in turn, directs the Director of that Office to delegate the performance of those functions (subject to the general authority conferred upon the Director of ODM to coordinate and provide general program direction as provided in Part I of the Executive Order) to "(1) The Secretary of the Interior with respect to petroleum, gas, solid fuels and electric power." Section 201 (b) of the Executive Order provides, however, that findings made under or pursuant to section 101 (b) of the Defense Production Act "shall not be effective until approved by the Director of the Office of Defense Mobilization." The Director effected this delegation to the Secretary of the Interior by Defense Mobilization Order No. 30 (now designated as DMO I-7) of August

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14, 1953 (18 F. R. 5366), as amended (19 F. R. 7348), and restated in DMO I-13 (19 F. R. 7348).⁸

Helium is, of course, a "gas" within the meaning of section 601 (d) of the Executive Order, which defines "gas" as "natural gas and manufactured gas, including pipelines for the movement thereof." Therefore, the authority delegated to the Secretary of the Interior pursuant to Part II of the Executive Order authorizes him, with respect to helium, to exercise the priorities and allocations powers conferred under section 101 of the Defense Production Act, subject to (a) the powers conferred upon the Director of the Office of Defense Mobilization, and (b) the provisions of section 101 (b) of the Defense Production Act which require certain findings if the exercise of such priorities and allocations powers constitutes control of "the general distribution" of helium "in the civilian market."

Within the Department of the Interior, the Secretary has provided, by Secretary's Order 2781 of January 6, 1955 (20 F. R. 316), that all functions and powers delegated to him pursuant to the Defense Production Act, shall "be performed and exercised * * * (d) in so far as these functions and powers relate to petroleum or gas, other than the distribution of petroleum coke, by the Director of the Oil and Gas Division."⁹ Section 3 of the order imposes certain limitations upon the exercise of such authority including a prohibition against the issuance of "orders or directives relating to * * * gas * * *". Accordingly, under this order, if a priorities and allocations system for helium is established pursuant to the authority of the Defense Production Act, the functions and powers thereunder would be exercised by the Director of the Office of Oil and Gas, except that the issuance of orders and directives would require signature by the Secretary or his designee. If the Secretary desires to transfer the performance of those functions and powers, including the signing of orders and directives, to any employee or agency of the Department, including the Director of the Bureau of Mines, or other officials of that Bureau, he could do so simply by amending his order, and having

⁸ To the Secretary of the Interior also has been delegated the authority to present supply and requirements information to the Office of Defense Mobilization for, among other matters, the "distribution of * * * gas." Section 1 (j) of Defense Mobilization Order VII-5 of October 7, 1953 (18 F. R. 6408), as amended November 12, 1954 (19 F. R. 7349).

⁹ The name of the Oil and Gas Division was changed to "Office of Oil and Gas," effective April 6, 1955. Secretary's Press Release, April 15, 1955. Cf. 20 F. R. 3223 (May 12, 1955).

the amendment published in the Federal Register. *Cf. Hotch v. United States*, 212 F. 2d 280 (9th Cir. 1954).¹⁰

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Solicitor.

MATTIE B. KINSEY
MARGARET KINSEY LONG

A-27103

Decided August 22, 1955

Applications and Entries: Generally—Oil and Gas Leases: Extensions

Where an application for a 5-year extension of an oil and gas lease is deposited in the mail slot of the land office on a Saturday, a nonbusiness day, the application will not be considered filed until such time as it is received by the land office on the following Monday, the first business day in which the application can be filed.

Oil and Gas Leases: Extensions

An application for a 5-year extension of a noncompetitive oil and gas lease must be rejected where the application was not filed in the land office prior to the expiration date of the lease.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mattie B. Kinsey and Margaret Kinsey Long have appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated September 23, 1954, which affirmed the decision of the manager of the Los Angeles land office dated January 13, 1954, rejecting their applications for extensions of their noncompetitive oil and gas leases for the reason that the applications were not timely filed.

Noncompetitive oil and gas lease Los Angeles 073578 was issued to Mattie B. Kinsey on November 1, 1948, and on the same date noncompetitive oil and gas lease Los Angeles 073580 was issued to Margaret Kinsey Long. The primary term of the leases expired on Saturday, October 31, 1953. The appellants allege that on October 31, 1953, they deposited in the mail slot of the door of the Los Angeles land office envelopes containing applications for 5-year extensions of their leases. The reason given for depositing the applications in the mail slot is that October 31, 1953, was a Saturday and the land office was therefore

¹⁰ By virtue of section 602 of Executive Order 10480, certain functions under Title VII of the Defense Production Act were not delegated to the Secretary of the Interior, or were delegated to him without power to redelegate. None of these directly affects the particular questions discussed in this memorandum. However, section 602 of Executive Order 10480 and DMO I-7 (19 F. R. 7348) do authorize the Secretary of the Interior to delegate to any Federal agency or employee, including any not in the Department of the Interior, the power to perform the functions delegated to him under the Defense Production Act.

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closed. The applications were stamped as received on Monday, November 2, 1953, by the manager of the land office.

The applications for extension of the leases are governed by section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226), which at that time provided in pertinent part that—

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. * * * 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 legal question thus presented is whether depositing an application for an extension of an oil and gas lease in the land office on a non-business day constitutes "filing" of the application within the meaning of the statute.

The basic rule which has been established by the courts and followed by the Department is that a document is not filed until it is delivered to the proper officer and received. *H. P. Saunders, Jr.*, 59 I. D. 41 (1945), and cases therein cited. The applications in this case were not actually received by any one in the land office until Monday, November 2, 1953, and thus under the general rule could not be considered filed until that date. The specific question then is whether an exception from the rule is justified where the failure to receive is due to the fact that the office of receipt is not open for business during the time otherwise allowed for filing.

The courts have considered in several cases situations where filings were attempted after the close of business hours on the last day permitted for filing. The United States Court of Appeals for the District of Columbia circuit has held that such filings were too late. *Lewis-Hall Iron Works v. Blair*, 23 F. 2d 972 (1928) (envelope containing petition placed by post office employee in mail slot of office of Board of Tax Appeals at 7:10 p. m., office having closed at 4:30 p. m.); *Stebbins' Estate v. Helvering*, 121 F. 2d 892 (1941) (petition deposited in post office box of agency around 5:15 p. m.; office hours ended at 4:30 p. m.). The same rule was followed in *Di Prospero v. Commissioner of Internal Revenue*, 176 F. 2d 76 (9th Cir. 1949); *Casaldue v. Diaz*, 117 F. 2d 915 (1st Cir. 1941).

In a more recent decision, the Court of Appeals for the District of Columbia circuit held that a petition was timely filed where it was slipped under the door one hour after the closing time of 4:45 p. m. *Owens-Illinois Glass Co. v. District of Columbia*, 204 F. 2d 29 (1953).

The court distinguished its earlier rulings by stating that in those cases the agency in question had established by rule office hours for the transaction of business whereas no such hours had been prescribed by the agency involved in the *Owens-Illinois Glass* case. However, in a still more recent decision, another circuit has held that a filing attempted 5 minutes after the close of office hours was too late even though the office hours apparently were not established by any formal rule. The court referred merely to the fact that the office hours had been established and observed for 6 years. *Hilker & Bletsch Co. v. United States*, 210 F. 2d 847 (7th Cir. 1954).

In principle there seems to be no distinction between an attempted filing after office hours on a business day and an attempted filing on a nonbusiness day. The cases cited therefore point to the ruling that must be adopted in this proceeding. At the time the appellants filed their applications for extension, there was, and still is, outstanding a departmental order providing that—

* * * there shall be in the Department of the Interior a 40-hour work-week. The tour of duty shall be 5 days of 8 hours each from Monday through Friday, and *Saturday and Sunday shall be nonwork days.* When it is necessary in the interest of the service to establish a tour of duty other than from Monday through Friday in field operations, the head of an agency, or his designated representative, is authorized to approve such variations. * * * (Order No. 2512, Amendment No. 11, sec. 30 (April 21, 1952).) [Italics added.]

This provision had been in effect for over 6 years at the time of the appellants' filing¹ and, as stated in the Acting Director's decision, no departure from the tour of duty has been authorized for the field offices of the bureau. Therefore, under any of the court decisions cited earlier, the appellants' filing on Saturday was not complete and did not become complete until the following Monday, when it was too late.

This ruling is consistent with the recent ruling of the Department in the case of *Floyd Childress*, 62 I. D. 73 (1955), in which it was held that where an application for a 5-year extension of an oil and gas lease was delivered by mail to the manager at his home after business hours on a Friday, and the lease expired at midnight on Sunday, the application was not considered filed until the following Monday when the land office opened for business, even though it was physically delivered into the hands of the manager before the expiration date of the primary term of the lease. In the *Childress* decision it was stated:

* * * However, there is nothing in the language of section 17 or in its legislative history to show that Congress, in providing for the 90-day period, intended that it would override the normal business practices of keeping certain

¹ Order No. 2362, sec. 9 (September 29, 1947); revoked and superseded by Order No. 2512, sec. 21 (March 17, 1949).

August 25, 1955

specified office hours on work days and closing on Saturdays, Sundays, and holidays. Ninety days constitute a generous allowance of time for filing and any lessee who is reasonably diligent will have no trouble in filing his application within the time allowed.

The following comment by the court in the *Hilker & Bletsch* case is also pertinent:

Plaintiff's insistence that the decision below, if undisturbed, works a great hardship, on its face has some appeal. However, Congress has given the taxpayer ninety days in which to file a claim for drawback, and when the matter of filing is delayed until the last minute of the last hour of the last day, and even beyond that, it would appear that any hardship must be attributed to the taxpayer's failure or negligence rather than the statute which Congress has enacted for its benefit. (210 F. 2d at p. 85L.)

In their appeal to the Secretary, the appellants have stated several grounds upon which they contend that the Director's decision was in error. However, although the appellants asked for and were granted additional time in which to file a brief in support of their appeal, they have never filed any such brief. Consequently, their grounds of appeal constitute mere statements which are unsupported by any legal authorities. Their assertions appear to be without merit.

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 affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

ESTATE OF ABBIE McDONALD KEMBLE LeCLAIR, DECEASED
PONCA ALLOTTEE NO. 491

IA-488

Decided August 25, 1955

Indian Lands: Descent and Distribution—Rules of Practice: Appeals:
Timely Filing

A petition for rehearing filed in the estate of a deceased Indian which seeks to modify the inventory of the estate and exclude property acquired by the decedent by inheritance in probate proceedings completed 17 years earlier is properly treated as a petition to reopen the earlier proceedings, and will be denied when it is not timely filed under the regulations applicable to reopening the earlier proceedings.

APPEAL FROM AN EXAMINER OF INHERITANCE
BUREAU OF INDIAN AFFAIRS

Mr. Willie Kemble and the heirs of McKay Kemble, deceased, through their attorney J. E. Burns, have appealed to the Secretary of

the Interior from the decision of an Examiner of Inheritance dated May 20, 1955, denying their petition for a rehearing in the matter of the estate of Abbie McDonald Kemble LeClair, deceased Ponca Allottee No. 491.

The decedent died intestate on March 4, 1954, at the age of 64 years, a resident of the State of Oklahoma, leaving a restricted estate valued at \$23,979.41. The Examiner, after notice and hearing and by an appropriate order dated August 20, 1954, determined the heirs of the decedent and mailed copies of his decision on the same day to the interested parties.

The appellants were not related to the decedent, and consequently received no notices of the probate proceedings. Thereafter, the appellants filed a petition for rehearing in which they sought to have the inventory of the decedent's estate adjusted to eliminate therefrom certain properties which the decedent had inherited from her prior deceased husband Eliot (Elliott) Kemble, deceased Ponca Allottee No. 330, under an order of the Assistant Secretary of the Interior dated July 20, 1938.¹

The Examiner considered the petition for rehearing to be, in fact, a petition to reopen the proceedings in the matter of the estate of the decedent's prior deceased husband. On that basis, the Examiner denied the petition for rehearing on the ground that it had not been filed within the 10-year period of limitation on petitions for reopening of estates under the applicable Department regulations (25 CFR 81.18, 1940 ed.).

The Examiner was correct in ignoring the form of the petition and looking to its substance. The record shows that the appellants are unable to establish any claim of inheritance from the instant decedent, and that their only claim is that made as heirs of the decedent's prior deceased husband. An examination of the record in the matter of the estate of Eliot (Elliott) Kemble shows that Willie and McKay Kemble received notice of the probate hearing; attended the hearing held on March 14, 1938, at the Ponca Sub-Agency, Ponca City, Oklahoma; testified at the hearing; and that copies of the Assistant Secretary's decision of July 20, 1938, were mailed to each of them on August 6, 1938.

In view of the participation in the hearing by both Willie and McKay Kemble and their receipt of notice of the hearing and decision, the Assistant Secretary's decision of July 20, 1938, became final as to them under the probate regulations² when they failed within 60 days from August 6, 1938, to file a petition for rehearing.

¹ See Indian Office File 33,231-38, Pawnee 350.

² 25 CFR 81.34, 1940 ed.

September 6, 1955

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 25, Order No. 2509, as revised; 17 F. R. 6793), the appeal is dismissed.³

The Area Director, Anadarko, Oklahoma, is directed to distribute the decedent's estate in accordance with the Examiner's order dated August 20, 1954.

EDMUND T. FRITZ,
Acting Solicitor.

ALBERT C. MASSA ET AL.

A-27158

Decided September 6, 1955

Oil and Gas Leases: Acreage Limitations

An offeror for a noncompetitive oil and gas lease has 30 days within which to reduce his acreage holdings to the limitations prescribed by the Mineral Leasing Act without the loss of priority of his offer but in order to qualify to receive a lease on the acreage covered by his offer it must be shown that the offeror has been divested of his excess acreage within the prescribed period.

Oil and Gas Leases: Acreage Limitations—Oil and Gas Leases: Assignments or Transfers

As the first day of the lease month following the filing of an assignment of an oil and gas lease is the earliest date upon which an assignment can take effect, an assignor is not divested of his interest in the assigned acreage at least until that date.

Oil and Gas Leases: Acreage Limitations—Oil and Gas Leases: Assignments or Transfers

Where approval of an assignment of an oil and gas lease is not given until after the first day of the lease month following the filing of the assignment the acreage covered by the assignment remains charged to the acreage account of the assignor until the approval date.

Oil and Gas Leases: Acreage Limitations—Oil and Gas Leases: Assignments or Transfers

Acreage included in pending assignments of oil and gas leases in favor of an offeror must be charged to the acreage account of the offeror in determining the offeror's qualifications to receive a lease.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Albert C. Massa, Edward C. Massa, Franklyn E. Lenz, and Mary A. Lenz have appealed to the Secretary of the Interior from a decision by the Acting Director of the Bureau of Land Management dated December 29, 1954, which affirmed the action of the manager of the

³ The appeal is also subject to dismissal on the ground that it was not filed within 60 days as provided by the regulations, 25 CFR 81.19 (a).

land and survey office at Salt Lake City, Utah, in rejecting, in whole or in part, four offers to lease certain lands in Utah for oil and gas purposes, pursuant to the provisions of section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226). Albert C. Massa had filed three of the offers, Utah 010806 on November 18, 1953, Utah 010844 on November 24, 1953, and Utah 010881 on December 4, 1953. Edward C. Massa, Franklyn E. Lenz and Mary A. Lenz had filed Utah 010886 on December 9, 1953. Three of the offers were rejected in their entirety and the fourth was rejected in part because the lands sought were embraced in three oil and gas leases, Utah 010760, 010762, and 010763, issued to Lewis H. Larsen, based on offers filed by Mr. Larsen on November 12, 1953. Two of the Larsen leases were issued on December 3, 1953, and the third on December 8, 1953. All of the leases were made effective January 1, 1954.

In their appeal to the Director of the Bureau of Land Management the appellants contended that at the time Mr. Larsen filed his offers and on the dates their offers were filed Mr. Larsen held under oil and gas leases and lease offers in the State of Utah in excess of 15,360 acres, despite Mr. Larsen's statements in his offers that his interests, direct and indirect, in oil and gas leases and offers therefor, including the present offers, did not exceed 15,360 chargeable acres. They contended, therefore, that Mr. Larsen was not qualified to receive the leases. The Acting Director found that Mr. Larsen did not hold more than the allowable acreage when the three leases in question were issued to him and that the acreage chargeable to Mr. Larsen had not exceeded the allowable acreage at any time prior thereto. He accordingly held that the leases were properly issued to Mr. Larsen. The Acting Director did not set forth the basis on which he reached his conclusions respecting the acreage chargeable to Mr. Larsen.

In their appeal to the Secretary, the appellants contend that the manager and the Acting Director were in error in computing the acreage chargeable to Mr. Larsen as of the date of the Larsen offers and that they, rather than Mr. Larsen, were the first qualified offerors for the land. Mr. Larsen contends that even assuming that he did hold in leases and lease offers more than the allowable acreage on November 12, 1953, when he made his offers, he had reduced that acreage by assignment prior to the dates when the leases were issued to him, and within the 30 days allowed by the regulation of the Department embodied in 43 CFR 192.3 (c) (19 F. R. 9011). He states that on November 12, 1953, simultaneously with the filing of the offers upon which the leases involved in this appeal are based, he filed assignments of leases which brought his acreage holdings down well within the limitation fixed by the Mineral Leasing Act (30 U. S. C., 1952 ed., sec. 181 *et seq.*).

September 6, 1955

The record in its present state does not contain the necessary information upon which to make a determination as to whether Mr. Larsen was a qualified offeror when he filed the three offers on November 12, 1953, or, if he was not qualified on that date, whether he qualified himself within the time allowed by the departmental regulation. The case must therefore be remanded to the Bureau of Land Management for further consideration. However, the factors which must be taken into consideration in determining whether the leases in question should have been issued to Mr. Larsen will be set forth.

Section 17 of the Mineral Leasing Act, as amended, provides, in pertinent part:

* * * When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding. * * *

Mr. Larsen filed his offers prior to the filing of the Massa offers. If he was qualified to hold the leases, he had a statutory preference right to the leases, if the leases were to be issued, which must be honored. *C. T. Hegwer et al.*, 62 I. D. 77 (1955).

Section 27 of the Mineral Leasing Act limits the number of acres of leasable deposits which may be held by any person, association, or corporation. When the Larsen offers were filed and when the leases here in question were issued, section 27, with exceptions not here material, placed the limitation on acreage in oil and gas leases held by any one person in any one State at any one time at 15,360 acres (30 U. S. C., 1952 ed., sec. 184).¹

In the interest of expediency in the administration of the act and to discourage the filing of offers for leases which the Department is prohibited by section 27 from issuing, the Department has determined that the limitation imposed by statute on acreage must be applied, administratively, to the acreage included in offers for such leases. *W. D. Clack, Walter Butler Slagle*, A-24517 (December 12, 1947); *John H. Trigg et al.*, 60 I. D. 166 (1948).

Mr. Larsen stated in his offers that his chargeable acreage did not exceed 15,360 acres in the State of Utah. He now admits, however, that his holdings may have exceeded that amount when he filed the offers. He states that on or about the time he filed those offers² he was notified by the manager that his offers would probably exceed the limitation imposed by the Mineral Leasing Act and that after being advised by the manager that he had 30 days within which to reduce

¹ The limitation was raised to 46,080 acres by the act of August 2, 1954 (68 Stat. 648).

² The offers were apparently first filed on November 10, 1953. They were rejected on the same date for insufficient description of the lands applied for. They were refiled on November 12, 1953.

his chargeable acreage to the maximum allowed by the regulation, above cited, he reduced his acreage holdings by filing certain assignments with the local land office on November 12, 1953.

The regulation upon which Mr. Larsen relies provides that no lease will be issued until it has been shown that the lessee is entitled to hold the acreage but that any party found to hold or control accountable acreage in excess of the prescribed limitation shall be given 30 days within which to file proof of the reduction of his holdings so as to conform with the prescribed limitation.

The regulation has been construed to apply to lease offers and to grant to the offeror a 30-day period of grace within which to reduce his acreage holdings without the loss of priority of his offer. *John H. Trigg et al.*, A-24483 (April 8, 1949). However, in order to qualify within the 30-day period to receive the acreage covered by the offer, it must be shown that the offeror has been divested of his interests in the excess acreage within the 30-day period.

To determine whether an offeror is divested of acreage by the filing of an assignment, consideration must be given to the provision of the Mineral Leasing Act relating to assignments.

Section 30a of the Mineral Leasing Act, as added by the act of August 8, 1946 (30 U. S. C., 1952 ed., sec. 187a), provides that oil and gas leases may be assigned as to all or part of the acreage therein and as to either a divided or undivided interest therein to any person qualified to own a lease under the act, subject to final approval of the Secretary of the Interior. The section further provides that an assignment shall take effect as of the first day of the lease month following the date of the filing of the assignment in the proper land office but that until such approval the assignor shall continue to be responsible for the performance of any and all obligations as if no assignment had been executed.

As the earliest date upon which an assignment can take effect is the first day of the lease month following the filing of the assignment in the land office, it is obvious that the assignor is not divested of his interest in the lease at least until that date. Furthermore, until an assignment is approved, even though that approval is not given within the month in which the assignment is filed, the assignor continues to hold the acreage under the Mineral Leasing Act. He must therefore continue to be charged with the acreage included in the assignment until the approval of the assignment is given.

Therefore, if the assignments which Mr. Larsen filed on November 12, 1953, were approved during the month of November 1953, he was divested of the acreage included therein as of December 1, 1953. If the assignments were not approved until some time after December 1, 1953, he was not divested of the acreage until the approval dates.

September 6, 1955

As none of the computations of the acreage holdings of Mr. Larsen which have been submitted contains the dates on which the assignments were approved, it is impossible to say whether or not Mr. Larsen, by virtue of the assignments filed on November 12, 1953, qualified himself to receive the leases within the time allowed.³

The record indicates that certain assignments of leases to Mr. Larsen may have been filed during the month of November 1953. Whether or not those assignments were approved and whether or not that acreage was considered in determining that Mr. Larsen was a qualified offeror is not clear in the present record. However, the acreage included in assignments in favor of an offeror must be taken into account in determining the offeror's eligibility to receive additional leases.

The considerations which led the Department to adopt the rule that the acreage included in pending offers must be charged to the acreage account of the offeror apply with equal force to assignments which may have been filed in the land office but upon which action may not have been taken. Unless such a rule were adopted, utter confusion would follow and the Department would not know, at any given date, whether the offeror were qualified to hold additional acreage.

It is realized that under the above holdings two parties, the assignor and the assignee, may be charged with the same acreage for a short period of time. Cf. *Equity Oil Company et al.*, 59 I. D. 326 (1946). However, there would appear to be no other manner in which the Department can avoid the possibility that through the issuance of leases to an offeror while assignments involving the offeror are pending action in the local land office it might inadvertently allow the offeror to hold more acreage under oil and gas lease than the law permits.

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 for a redetermination of the qualifications of Mr. Larsen as an offeror in the light of this decision and to take such further action with respect to the leases now held by Mr. Larsen and the offers of the appellants as the facts disclosed by a further study of the acreage account of Mr. Larsen may warrant.

EDMUND T. FRITZ,
Deputy Solicitor.

³ It should be noted that an offeror may qualify himself under 43 CFR 192.3 (c) in other ways than by the assignment of leases held by him. For instance, an offer may be withdrawn if the withdrawal is received in the land office before a lease has been signed on behalf of the United States (43 CFR 192.42 (h); 19 F. R. 9014) or a lease may be surrendered by the filing of a written relinquishment in the land office. Such a relinquishment takes effect immediately upon the filing of a proper instrument of relinquishment (30 U. S. C., 1952 ed., sec. 187b; 43 CFR 192.160 (19 F. R. 9019)).

FRANK HALLS

A. J. REDD

A-27133

*Decided September 8, 1955***Grazing Permits and Licenses: Cancellation and Reductions**

The cancellation of a grazing permit without first giving the permittee an opportunity to show cause why such cancellation should not be made final is contrary to departmental regulation.

Grazing Permits and Licenses: Cancellation and Reductions—Grazing Permits and Licenses: Federal Range Code

The provision in the Federal Range Code authorizing certain officers, where the orderly administration of the range or other public interest requires, to make immediately effective a decision from which an appeal may be taken, does not apply to decisions canceling grazing licenses or permits.

Administrative Procedure Act: Licensing—Grazing Permits and Licenses: Appeals

The cancellation of a grazing permit without according the permittee an opportunity to demonstrate or achieve compliance with lawful requirements is unlawful under section 9 (b) of the Administrative Procedure Act except in cases of willfulness or those in which the public health, interest or safety requires otherwise; the departmental regulation that a decision canceling a grazing permit will not become effective pending disposition of a timely appeal precludes the possibility of such a decision coming within the scope of the exception clause in section 9 (b) of the Administrative Procedure Act.

Administrative Procedure Act: Hearings—Rules of Practice: Hearings

In a hearing on the propriety of a range manager's notice canceling an outstanding 10-year grazing permit, the Government has the burden of proof.

Grazing Permits and Licenses: Base Property (Land): Dependency By Use

Where a livestock operator sells his ranch, and as a part of the transaction he is entitled to use of the ranch for care of his sheep for an indeterminate time, use of the ranch under such an agreement may give the operator such control of the ranch that use of the land in conjunction with the Federal range will serve to vest the land with the attributes of land dependent by use.

Grazing Permits and Licenses: Base Property (Land): Generally

The cancellation of a 10-year grazing permit on the ground that the base lands lack dependency by use is erroneous where the evidence in the record as a whole does not support such a determination.

Grazing Permits and Licenses: Cancellation and Reductions

Where a grazing permittee has been wrongfully denied use of the range for two grazing seasons under a 10-year grazing permit, the permittee will be granted use of the range for that length of time even though his permit has expired.

September 8, 1955

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

An appeal to the Secretary of the Interior has been filed in behalf of Frank Halls from a decision of November 9, 1954, by the Associate Director of the Bureau of Land Management affirming the cancellation of Mr. Halls' 10-year grazing permit by a Hearing Examiner's decision of January 30, 1953. The examiner's decision affirmed a notice of August 3, 1950, by the range manager of Utah Grazing District No. 6 which canceled Mr. Halls' permit. The ground for cancellation was that Mr. Halls' base property had no priority.

The appellant, who has carried on livestock operations in San Juan County, Utah, since 1919, had continuously used the Federal range in Utah Grazing District No. 6 under sections 2 and 3 of the Taylor Grazing Act (43 U. S. C., 1952 ed., secs. 315a, 315b) from the time the district was organized in 1935¹ until the cancellation of his permit in 1950. The 10-year permit here under consideration was issued on October 20, 1943, effective as of July 1, 1943, and ordinarily would have expired on June 30, 1953. The permit authorized the grazing of 114 cattle from October 16 to May 15 each year, 100 percent Federal range (798 AUM's).

The question as to the priority of the lands owned or controlled by Mr. Halls was first raised at a hearing held on October 10, 1946, regarding the propriety of the range manager's rejection of an application which Mr. Halls filed for summer grazing privileges, in addition to the use authorized by the permit of October 20, 1943, which granted only winter grazing privileges.

The decision by the examiner at the 1946 hearing rejected the appellant's application for summer privileges and expressed the opinion that available information regarding the priority of Mr. Halls' property should be reconsidered to determine whether Mr. Halls' 10-year permit conferred grazing privileges in excess of those allowable under the range code. The record in the 1946 hearing will be considered in the instant proceeding only to the extent that it was relied on by the examiner's decision of January 30, 1953, and by the Associate Director's decision as a basis for canceling the appellant's 1943 permit.

Almost 4 years after the 1946 hearing, the range manager sent Mr. Halls a notice dated August 3, 1950, stating that:

Consistent with the Hearings Officer's decision rendered January 17, 1947, a thorough check of your file and testimony rendered at such hearing does not disclose anything that justifies the continued issuance of grazing privileges extended to you under your permit dated October 20, 1943. In view of the fact there is no Class 2 range available, this office finds it necessary to cancel your permit in full. * * *

¹ Utah grazing district was established pursuant to a departmental order of June 22, 1935.

The regulation (43 CFR 161.9 (d)) under which the notice was issued was then quoted, and the notice allowed Mr. Halls to file an appeal therefrom within 15 days. Mr. Halls appealed from the notice of August 3 and a hearing on the appeal was held before a Hearing Examiner at Monticello, Utah, on October 14, 1952.² Before considering the substantive issues raised at the hearing, several procedural questions require determination.

Section 9 of the Taylor Grazing Act (43 U. S. C., 1952 ed., sec. 315h) provides in part:

* * * The Secretary of the Interior shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department.
* * *

The Department has interpreted this statutory provision for hearings as bringing such hearings within the scope of the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1001 *et seq.*), which prescribes certain procedures governing, *inter alia*, agency action in the adjudication of cases (with exceptions not here relevant) required by statute to be determined on the record after opportunity for an agency hearing. Section 5 of the act (5 U. S. C., 1952 ed., sec. 1004) provides in pertinent part:

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, * * *

* * * * *

(b) Procedure—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8. * * *

Section 9 of the act (5 U. S. C., 1952 ed., sec. 1008) provides in applicable part:

In the exercise of any power or authority—

* * * * *

(b) Licenses. * * * Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. * * *

Section 2 of the act (5 U. S. C., 1952 ed., sec. 1001 (e)) defines license as follows:

² Unless otherwise indicated, page references hereafter will refer to the transcript of the hearing held on October 14, 1952.

"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

The notice of August 3 canceling Mr. Halls' permit in full was the revocation of a license within the scope of the Administrative Procedure Act.

The departmental regulation (43 CFR 161.9 (d); 19 F. R. 8959) governing the procedure to be followed in canceling grazing permits and licenses provides in applicable part as follows:

Cancellation of licenses or permits; service of appeal to examiner. Licenses or permits will be subject to cancellation to the extent that they have been improperly issued. In any case in which it shall appear to the Bureau of Land Management that a license or permit confers grazing privileges in excess of those properly allowable under the act and the Federal Range Code for Grazing Districts, the range manager will notify the licensee or permittee that the license or permit is thereby held for cancellation either in whole or in part, as the case may be, and that *the licensee or permittee will be allowed fifteen days from receipt of notice within which to show cause why such cancellation should not be made final.* Such notice will set forth fully the reasons for the proposed cancellation and will be served on the licensee or permittee either personally by the range manager or by such person as may have been designated by him by registered mail sent to the licensee or permittee at his last address of record. In case of failure of the licensee or permittee to show cause within the fifteen days allowed, the license or permit will be canceled to the extent indicated in the notice. The range manager will consider any cause shown and, if satisfied of its sufficiency, he will close the case. If the range manager is not satisfied that sufficient cause has been shown, he will notify the licensee or permittee that the cancellation will be made final unless an appeal to an examiner of the Bureau of Land Management is filed within fifteen days from receipt of notice. * * * So far as practicable, the appeal thereafter will follow the procedure prescribed in the following paragraphs of this section, *except that any decision by the range manager or the examiner on a matter arising under this paragraph will not become effective pending the disposition of a timely appeal to the examiner, the Director or the Secretary of the Interior, as the case may be.* [Italics added.]

The regulatory provisions following 43 CFR 161.9 (d) set forth the procedure governing appeals by a permittee or licensee from a range manager's decision to an examiner, the Director of the Bureau, and the Secretary, respectively. 43 CFR 161.9 (j) (19 F. R. 8960), provides in applicable part:

An appeal shall suspend the effect of the decision appealed from pending the decision on appeal. However (1) the officer making a decision, either initially or on appeal, may, in his discretion when the orderly administration of the range or other public interest requires, provide, in the decision or by order made before an appeal is taken therefrom, that the decision shall be in full force and effect pending the decision on appeal * * *.

When this provision is read with the last sentence of 161.9 (d), it is clear that the provision in 161.9 (d) to the effect that the subsequent paragraphs of 161.9 shall be applicable so far as practicable specifically excepts from such applicability a decision of a range manager or an examiner which cancels a license or a permit. Thus, decisions canceling licenses or permits under 43 CFR 161.9 (d) may not be made effective pending disposition of an appeal. In this respect the departmental regulation is more restrictive than section 9 (b) of the Administrative Procedure Act, as a license may be immediately revoked under that section in cases of willfulness or those in which the public health, interest, or safety requires such action, whereas the applicable departmental regulation provides that if a timely appeal from a decision canceling a grazing permit is taken, the permit remains in effect until the appeal is decided.

On August 4, 1950, the day after the issuance of the cancellation notice to Mr. Halls and long before the period of appeal therefrom had expired, the range manager promulgated a notice, addressed to the appellant and to all licensees and permittees using the range in the west half of unit 1, a part of which was allotted to the Monticello Cowboys and which included use by the appellant under his 1943 permit. The notice listed certain adjustments and changes in allotments and grazing privileges in the area and provided that all permittees using the area were subject to a 35 percent cut in their licensed or permitted numbers. The notice of August 4, 1950, listed as the first change made in the Monticello Cowboy allotment:

1. The use to be made in this area will not include grazing privileges formerly extended Frank Halls.

The notice of August 4, 1950, regarding allotments was made effective immediately pursuant to 43 CFR 161.9 (j), thus summarily terminating Mr. Halls' use of the Federal range.

The situation, then, was that on August 3, 1950, a notice was issued canceling Mr. Halls' permit, subject only to his right of appeal, and that on August 4, 1950, a second notice was issued which had the effect of making the cancellation effective as of that date.

It is at once apparent that the notice of August 3 did not comply with 43 CFR 161.9 (d) in that it did not give the appellant an opportunity to show cause why the cancellation should not be made final. And, when considered in conjunction with the order of August 4, 1950, the notice was additionally in violation of 43 CFR 161.9 (d) in that it was made effective before the time for appeal had elapsed and before the disposition of any appeal that might be timely filed. Mr. Halls did file a timely appeal on August 18, 1950.

The notice of August 4, 1950, stated that immediate action was

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necessary because of the long standing nature of the case and the inability of the operators to reach an amicable settlement themselves. However, the provision in 43 CFR 161.9 (j) giving the range manager discretion, when the orderly administration of the range or other public interest requires, to put into immediate effect a decision from which an appeal may be taken did not authorize the range manager to put into immediate effect the notice of August 3, 1950, canceling Mr. Halls' grazing privileges because 43 CFR 161.9 (d) prohibited such action during the interval within which an appeal might be filed.

It has already been pointed out that section 9 (b) of the Administrative Procedure Act makes unlawful a summary revocation of a license without first according the licensee "an opportunity to demonstrate or achieve compliance with all lawful requirements" except in cases of willfulness or those in which the public health, interest, or safety requires such action.

The statement in the notice of August 4, 1950, that the action making the notice immediately effective was necessary because of the long standing nature of the case and the inability of the operators to reach an amicable settlement themselves may be considered to amount to a determination by the range manager that the public interest required that the notice of the proportionate cut in the use of the range by all operators with livestock grazing in the area be made effective immediately. However, there is nothing in the notice of August 4, 1950, or in the entire record which remotely suggests willfulness on the part of the appellant or that the public health, interest, or safety required that the part of the notice pertaining to Mr. Halls' use of the range be made immediately effective, and if there were any such evidence, the departmental regulatory provision that decisions canceling permits will not become effective pending the disposition of a timely appeal would preclude consideration of it by the range manager as a basis for making the cancellation notice of August 3, 1950, effective immediately.

Since the notice of August 3, 1950, could not, under the Department's regulations, validly be made effective immediately by the order of August 4, 1950, it follows that the action attempted by the two notices was unlawful under section 9 (b) of the Administrative Procedure Act, because Mr. Halls was not allowed an "opportunity to demonstrate or achieve compliance with all lawful requirements" before the permit was canceled.

The examiner's failure to take any action when this procedural defect was called to his attention at the hearing, his decision to proceed with the hearing (pp. 4, 8), and the statement in the Associate Director's decision that the examiner's decision to waive the procedural

defect was proper and reasonable cannot be sustained because the range manager's action in this case was unlawful under section 9 (b) of the Administrative Procedure Act.

A decision on this appeal might be rendered on the procedural matters thus far considered. However, because the term of the appellant's 1943 permit has expired for over 2 years now, a decision merely holding that the cancellation was improper would be incomplete in that it would leave unanswered the question as to whether the appellant is entitled to any relief for the improper cancellation. To answer this question it appears to be necessary to determine whether the record as a whole supports the finding, implicit in the Associate Director's decision, that Mr. Halls' base property lacks priority. To make this determination, however, it is necessary to consider one other procedural matter.

Both the Associate Director and the examiner stated that the appellant had the burden of proving that the Bureau's action failed to reflect properly the rights of the appellant. This statement is incorrect. The range manager issued an order or notice in this case canceling the appellant's outstanding grazing permit. The Government, not the appellant, was the proponent of the cancellation order³ and, as such, had the burden of proof at the hearing in accordance with section 7 of the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1006), which provides in pertinent part that:

In hearings which section 4 or 5 requires to be conducted pursuant to this section—

* * * * *

(c) Evidence.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. * * * and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. * * *

Accordingly, in a situation where, as here, the Government issues an order canceling an outstanding grazing permit, and a hearing is held on the propriety of that order, the Administrative Procedure Act places the burden of proof upon the Government. The attempt to shift to the appellant the burden, in this proceeding, of proving priority of the base lands was improper.

The Bureau of Land Management was represented at the hearing on October 14, 1952, by the Regional Counsel, Region 4, and by the Assistant Chief, Division of Range Management, Region 4. Dale

³ Section 2 of the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1001 (d)) defines "order" as follows:

"'Order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. * * *"

Kinnaman, range manager of Utah Grazing Districts Nos. 6 and 9, testified for the Bureau.

The appellant was represented by counsel, and Judge F. W. Keller, a member of the advisory board for Grazing District No. 6, testified for the appellant.

A. J. Redd, a grazing permittee using the Federal range in the same area as that used by the appellant, was recognized as intervenor. Mr. Redd testified to the effect that his grazing privileges would be adversely affected if Mr. Halls' appeal were sustained but gave no other testimony nor did he submit any evidence at the hearing (pp. 2-3, 56).

The basic issue involved at the hearing on October 14, 1952, on appeal from the range manager's notice of August 3, 1950, canceling Mr. Halls' permit was whether certain lands owned or controlled by the appellant had sufficient "priority" to entitle the appellant to the use of the Federal range in Utah Grazing District No. 6 authorized by the 1943 permit, that is, whether the base lands were dependent by use as required by the Federal Range Code. 43 CFR 161.2 (19 F. R. 8955) contains a detailed definition of land dependent by use, only the first part of which definition needs to be considered on this appeal and which provides:

(g) "Land dependent by use" means forage land which is of such character that the conduct of an economic livestock operation requires the use of the Federal range in connection with it and which, in the 5-year period immediately preceding June 28, 1934 (referred to in this part as the "priority period"), was used as a part of an established, permanent, and continuing livestock operation for any two consecutive years or for any three years in connection with substantially the same part of the public domain, now part of the Federal range * * *.

It was stipulated at the hearing (p. 3) that no question was being raised regarding the commensurability or the control of the base lands, but that the question involved was limited to the priority of the following lands in T. 33 S., R. 24 E., S. L. M., Utah, now owned by Mr. Halls:

- sec. 29, E $\frac{1}{2}$ W $\frac{1}{2}$, W $\frac{1}{2}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$
- sec. 28, SW $\frac{1}{4}$ SE $\frac{1}{4}$
- sec. 27, W $\frac{1}{2}$ SW $\frac{1}{4}$
- sec. 32, NE $\frac{1}{4}$ SE $\frac{1}{4}$
- sec. 33, NW $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NE $\frac{1}{4}$
- sec. 34, NW $\frac{1}{4}$ NW $\frac{1}{4}$

The land in sec. 29 is known as the Arthur S. Wood ranch and the remainder of the above-listed lands is referred to as the Halls ranch. The priority of the land in sec. 29 will be considered first.

The priority period in Utah Grazing District No. 6 began on June

28, 1929. Mr. Halls bought a half interest in the Arthur Wood ranch in 1918 and continued to own that interest until November 1930, when he bought the remaining half interest from Arthur S. Wood. Mr. Halls has owned the entire interest in the property since 1930 (p. 26). The record contains an affidavit dated April 18, 1938, by Arthur S. Wood relating to use of the Wood ranch during part of the priority period. The affidavit states:

A. S. Wood, being first duly sworn under oath states: That his post office address is Monticello, Utah: that for several years he was engaged in the live-stock business in San Juan County, Utah: that during the year 1928 he was the owner of 357 head of sheep, and was the owner of 1016 head of sheep during the year 1929, and 350 head of sheep during the year 1930: that during the winter months of said years the said sheep ranged in Dry Valley in what is now designated as Allotment No. 1, of District No. 6, by the division of grazing, and in Allotment No. 25, and on his farm during the remainder of the year.

That during said years he was the owner of what is commonly known as the Arthur Wood ranch * * * containing 280 acres more or less: that said ranch was used as the base for the operation of his sheep business: That on the 4th day of November, 1930, said A. S. Wood sold the above described land to Frank Halls of Monticello, Utah, and that the said Frank Halls has been the owner of the above mentioned property since the date last above mentioned.

The Government contended at the hearing that Mr. Wood's use of the Wood ranch during the priority period did not qualify the property as land dependent by use under the range code as there was only one season of use, 1929-1930 (pp. 13-14). The decisions of the hearing examiner and the Associate Director upheld this contention.

Mr. Wood's affidavit states that during the summer of 1930, the 350 sheep which he owned used the Wood ranch as base. The winter grazing season in the district begins in the month of October. The statements in the affidavit that during the winter months of the years 1928-1930 the sheep ranged in Dry Valley are evidence that when the Wood ranch was sold to the appellant in November 1930, the 350 sheep which Mr. Wood owned that year were grazing in Dry Valley.

Mr. Halls testified that as part of the agreement for sale of the property, Arthur Wood was to receive 12 tons of hay for 6 years and his sheep were to use the base property until Mr. Wood could dispose of them in a normal manner; that in addition to the hay, Mr. Halls was to let Mr. Wood have pasture and permission to care for his sheep on the ranch; that as Mr. Wood did not have any other property and wanted a place to keep his sheep until he could dispose of them in an orderly manner, he continued to use the ranch for the care of his sheep for one or two years after November 1930 as he had used the land before the sale to Mr. Halls (pp. 30, 31, 36, 40, 41). Mr. Halls also testified that Mr. Wood's sheep used the winter range through the 1930-1931 season; that the sheep used the Wood's ranch as base in the

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spring and summer of 1931; that the sheep came back to the ranch and lambled there in the spring of 1931, and ran on the ranch for more than one season after 1930 (pp. 30, 31, 36, 40).

Judge F. W. Keller testified for the appellant and stated that he had put his own cattle in Dry Valley in the winter of 1931; that he traveled through Dry Valley many times, and, although he could not fix the date, he knew that Arthur Wood ran some sheep there, perhaps six or seven hundred head; that he saw these sheep a number of times over the course of several years; that he thought that 1932 or 1933 would be the years during which he saw these sheep (pp. 42, 43, 48). Judge Keller also testified that he knew that Arthur Wood had wintered his sheep in unit No. 1 (Dry Valley) and continued to do so until he terminated his operations in the sheep business; that if Mr. Wood owned sheep in 1929-1930, the witness could positively testify that Mr. Wood wintered the sheep in Dry Valley (pp. 44, 53, 54).

A certificate by the county recorder was introduced into evidence at the hearing for the appellant showing that A. S. Wood owned and mortgaged 1,373 sheep during the period October 4, 1928-April 7, 1929 (pp. 54, 55, appellant's exhibit A). Appellant's exhibit B which was introduced at the hearing is a chattel mortgage dated August 10, 1933, by which A. S. Wood and Jennie D. Wood of Monticello, as mortgagors, pledged 275 head of sheep as security on a note to the State Bank of San Juan. The mortgage recites that the 275 head of sheep constitute "all property of like character and description owned or possessed by the mortgagors in San Juan County, Utah" (p. 55, appellant's exhibit B).

Although Judge Keller's testimony is inexact about dates, he did testify positively that Arthur Wood continued to winter his sheep in unit No. 1 until he terminated his operations in the sheep business (p. 44). This testimony and the 1933 mortgage are independent evidence tending to corroborate the appellant's testimony that Mr. Wood's sheep used the Wood ranch as base and wintered in unit No. 1 for several years after November 1930. There is no evidence in the entire record which contradicts the appellant's testimony about the use of the Wood ranch as base for Mr. Wood's sheep for several years after November 1930.

The Associate Director's and the Hearing Examiner's decisions held that no priority attached to the Wood ranch after the 1929-1930 season, apparently because Mr. Halls' agreement to supply hay for feeding the sheep was regarded as part of the purchase price of the land. Such a conclusion disregards the undisputed testimony that Mr. Wood's sheep lambled on the ranch during the spring of 1931, used the ranch for pasture in the spring and summer of 1931, wintered

in Dry Valley during the 1930-1931 winter grazing season, used the land as base for more than one season after 1930, and continued to winter in Dry Valley until Mr. Wood terminated his operation in the sheep business, which, there is some evidence to indicate, did not happen until after August 1933.

The Department has held that privately owned forage land which was used during the priority period for the care of bucks and hospital stock of an established operation which required the substantial use of the public range in connection with such private land is properly regarded as land dependent by use. *Del H. Adams, A-25796* (May 1, 1950). *A fortiori*, in the instant case, where undisputed testimony indicates that private land was used for lambing and pasture and for the general care of the sheep in addition to supplying hay for the sheep, and where the sheep grazed on a designated part of the Federal range in winter, the private land should be considered to be land dependent by use for the priority years during which such use occurred.

The appellant's testimony that the Wood ranch was so used by the Wood sheep during the summer of 1931 and that these sheep had grazed during the previous winter in Dry Valley is consistent with a detailed commensurate property report of June 10, 1938, made by an examiner of the grazing district. This report, which was introduced into evidence at the hearing as part of the official record in this case (p. 3), shows, in addition to the dependency by use of the Wood ranch during the priority year 1929-1930 by reason of the use of Dry Valley by 1,016 sheep, that during the priority year, 1930-31, Wood ranch was dependent by use of Dry Valley for grazing 350 sheep.

While the use of the Wood ranch by Mr. Wood's sheep after November 1930 was apparently a part of the purchase price which Mr. Halls paid to acquire entire ownership of the land, this does not change the fact that the use was that which is required to give private land the attribute of dependency by use. The situation with respect to the use of the Wood ranch by Mr. Wood's sheep after November 1930 appears to have been the same as that which would have existed if Mr. Wood had sold the land at a higher price in money than was agreed upon and had then directly leased or rented the land from Mr. Halls after November 1930 and continued to use it under lease for several years until he disposed of the sheep. There is no question but what such use of land by a lessee may invest the land with dependency by use.

There remains some question as to whether, after the sale, Mr. Wood had the necessary control of the property to qualify it as base property under the provisions of the Federal Range Code. Base property means privately owned or controlled land or water used for the support of

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livestock for which a grazing privilege is sought and on the basis of which the extent of a license or permit is computed (43 CFR 161.2 (d) and (e); 19 F. R. 8955). If, after the sale, Mr. Wood had the right to use the property as base for the care of his sheep, it is possible that he had such control of the property as a lessee has, which is sufficient to qualify the land as base property under the Federal Range Code (see, e. g., second proviso, 43 CFR 161.7 (b); 19 F. R. 8958).

Mr. Halls' testimony regarding the agreement with Mr. Wood at the time of the sale of the Wood ranch was that as a part of the sale price, Mr. Halls signed an agreement that Mr. Wood was to have a specified amount of hay over a period of 6 years and that part of the agreement for the sale of the property was that the Wood sheep were to use the property as base for a year or two after the sale (p. 31); that as part of the "deal on the property," Mr. Halls agreed to "let him [Mr. Wood] in there to take care of his sheep * * *" (p. 36); and that Mr. Wood had the right to run the sheep on the Wood ranch until he sold the sheep (pp. 40, 41).

It is not clear from this testimony whether the agreement about Mr. Wood's use of the land after the sale was a part of the agreement which Mr. Halls signed or whether it was an oral and less formal agreement. Although the testimony is not very definite, it appears that in addition to the agreement about hay, and as a part of the transaction by which Mr. Halls bought the land, he agreed to let Mr. Wood use the property as base for the Wood sheep for an indefinite length of time which would be determined by Mr. Wood's disposing of the sheep; that until that time, Mr. Wood had the right to use the Wood ranch as base and that the consideration for Mr. Wood's use of the ranch was reflected in the price for which the property was sold to Mr. Halls.

Regardless of what Mr. Wood's property interest in the ranch after the sale may be called,⁴ the evidence with respect to his control of the property is that he had the right to use the ranch to support and care for his sheep until he disposed of them. There was no evidence that after the sale, Mr. Wood was not entitled to use the land in accordance

⁴ "Where a vendor of land continues in possession, either by an agreement in the contract of sale or collateral thereto, his right usually takes effect as a reservation, and in that case the relation of landlord and tenant does not exist between the parties. However, the parties may, if they wish, deliver the possession of the premises to the grantee and have him lease them back to the grantor and, if that is done, the relation of landlord and tenant would exist between them; and unlawful detainer would lie against the grantor in case he refused to deliver up the possession according to his agreement. * * *" 3 Thompson, *Commentaries on The Modern Law of Real Property*, sec. 1082.

If the agreement between Mr. Wood and Mr. Halls took effect as a reservation from the deed, Mr. Wood may be regarded as having become the owner of a profit a prendre or an easement in gross, and as such, entitled to specific performance of the agreement. 1 Thompson *id.*, secs. 260-271, 372-373, 315-323, 341-347, 356-357.

with the agreement as to which Mr. Halls testified. Thus, although the matter is not free from doubt, as Mr. Wood's interest after the sale of the ranch may have been that of a lessee or that of an owner of a reservation in the land, either of which would meet the requirements of control contemplated in the definition of base property in the Federal Range Code, the record does not support a conclusion that Mr. Wood did not have the control of the property necessary to make it base property.

In view of the foregoing considerations and of all of the evidence that Mr. Wood's sheep used the base land and the Federal range for 2 consecutive years during the priority period (1929-1930 and 1930-1931) in such a way as to qualify the Wood ranch as land dependent by use, the determination, implicit in the Associate Director's decision, that the Wood ranch lacked priority will be set aside.

The rest of the land here under consideration, referred to as Halls ranch, is composed of various tracts which the appellant purchased at different times, but all of which he owned by 1938.

The commensurate property survey report dated June 10, 1938, and an affidavit by the appellant dated August 3, 1938, showing private land and public domain use, are the earliest sources in the Halls' grazing record which purport to show in any detail or with accuracy the complete picture of Mr. Halls' livestock operations during the priority years. With respect to the priority of the Halls ranch lands, the commensurate property survey report of June 10, 1938, which shows base land location and control and summarizes the dependency by use of such lands, indicates that Mr. Halls then owned 1,320 acres of which 752 acres, including the Arthur Wood and Halls ranch, showed dependency by use on the Federal range in units 1 and 25; that Halls ranch had been used as base for livestock operations which required the use of the public range during the priority years as follows:

For the priority year 1929-1930, Halls ranch was base for 50 cattle and 15 horses grazing on the Federal range in Dry Valley, South Point, and Summit Point between September 15 and February 15, and for 120 sheep grazing in the same area between January 1 and November 1.

For the period between June 28, 1930, and June 27, 1931, Halls' and Wood's ranches were base for 50 cattle and 15 horses using the same range during the same season as was shown for 1929-1930.

For the period between June 28, 1931, and June 27, 1932, Halls' and Wood's ranches were listed as base property for 50 cattle and 15 horses using the range in Dry Valley, South Point, and Summit Point between September 15 and February 15.

The use of Halls' and Wood's ranches as base property for the same kind and numbers of livestock using the same range during the same

season as was shown for 1931-1932 is given for the priority years June 28, 1932, to June 27, 1933, and June 28, 1933, to June 27, 1934.

Mr. Halls' affidavit, dated August 3, 1938, of private land and public domain use, which contains a detailed record of the use of the Wood and Halls ranches as base property and of the public range which was used as a part of the livestock operations from that base property during the priority years, is in substantial agreement with the examiner's report of June 10, 1938. The information in the examiner's report, summarized above, authorized the issuance of the 1943 permit which was based in part on the priority of the Halls ranch lands, as the report showed use of the Federal range in connection with Halls ranch which is required to make that land dependent by use. Any 3 years or any 2 consecutive years of the use, outlined in the report of June 10, 1938, during the priority period, are sufficient to give the Halls ranch property priority necessary to support the issuance of the 1943 permit, without reference to the extent of the use authorized thereby.

The statements in the Associate Director's decision that the appellant failed to list Halls ranch properties, in his 1935 or 1936 applications and that the first time the lands comprising Halls ranch were identified or entered into the case file was in the property survey report of June 10, 1938, are not correct. A diagram which apparently was submitted with Mr. Halls' 1935 application shows, by legal subdivisions, lands owned and leased by Mr. Halls in T. 33 S., R. 24 E., S. L. M., Utah, where the Halls ranch lands are situated. With respect to the Halls ranch lands, the diagram shows that the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 28 and the E $\frac{1}{2}$ W $\frac{1}{2}$, W $\frac{1}{2}$ NE $\frac{1}{4}$, and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of sec. 33 were owned by Mr. Halls. It was stated on the 1936 application that the appellant owned 640 acres of land and leased 1,360 acres. A diagram which was apparently submitted with the 1936 application, showing the land owned and leased, is obviously incomplete as only about 1,200 rather than 1,360 acres of leased land are shown on the diagram.

The Halls ranch lands here under consideration which were not identified in the 1935 or 1936 diagrams, consist of an 80-acre tract (NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 32 and SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 33) which, according to a property report filed by the appellant on December 17, 1945, was purchased from San Juan County in 1934, and the 160 acres known as the "Bailey land" (W $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 27, NE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 33, and NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 34) which were purchased by the appellant in 1936 (p. 34).

However, the record contains a letter from Mr. Halls protesting a notice of March 19, 1937, from the Acting Regional Grazier which informed Mr. Halls of the advisory board's recommendation regarding the appellant's application for 1937-1938 grazing privileges. This

letter is undated, but the record indicates that it was filed before April 12, 1937. The letter is clearly a part of Mr. Halls' application for grazing privileges during the 1937-1938 season. Mr. Halls stated in the letter that he owned 1,080 acres of land, most of which he had owned since about 1920. The land is not described in legal subdivisions, but the number of acres of this owned land which was irrigated and planted to alfalfa, the acreage consisting of cultivated dry lands, and that which was irrigated pasture land were designated. Mr. Halls stated that his owned land had been used since about 1920 in connection with the production of livestock. He stated also that he was leasing 680 acres, the greater part of which he had been leasing for 6 or 8 years, but he did not describe the leased land by legal subdivision. Although none of the land referred to in this protest letter is identified by legal subdivision, it seems probable that the total acreage statements in the letter as to owned and leased lands included the "Bailey land" and the above-described 80 acres which the appellant acquired from San Juan County, since both of these tracts are listed as base lands owned by the appellant in the property survey report of June 10, 1938.

At the hearing, Mr. Kinnaman testified for the Bureau that the record showed that the appellant did not own the Halls ranch lands during the priority period (p. 15).

Private property may become dependent by use under the Federal range code if it was used in the required manner with the public domain even though such use was made by a lessee rather than the owner of the property (*cf. Charles R. Kippen*, 61 I. D. 452 (1954)).

In reply to the testimony that the appellant did not own Halls ranch during the priority period, Mr. Halls testified that he bought the property at various times, that he had leased the lands for a number of years before he bought them, that he was leasing Halls ranch when he bought Arthur Wood's interest in 1930, and that he kept the Halls ranch lands under his control and did not lease them to anyone else (pp. 29, 30, 32). He testified further that he leased part of Halls ranch from the wife of a person who homesteaded it; that taxes were delinquent on the property and appellant bought it at a tax sale and later obtained a quitclaim deed from the widow of the man who homesteaded it; and that appellant did not have a written lease on this land (pp. 32, 33). Although Mr. Halls testified at one point that he thought the first year during which he leased the homestead land was 1932 or 1933, he testified three times again, more definitely, in response to direct questions about this statement, that he had the Halls ranch property under lease in 1930 when he bought the Arthur Wood place (pp. 39, 40).

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With respect to that part of Halls ranch called the "Bailey lands," Mr. Halls testified that these lands were leased informally from Ralph Jones until Mr. Jones traded the lands to J. M. Bailey, shortly after which the appellant traded other property which he owned for the Bailey lands (pp. 33, 34). Judge Keller testified that he knew that the appellant had a part of Halls ranch leased from the State for some years before he bought it, and that he had this land leased a number of years before 1937 (pp. 45, 49). No written evidence of the leasing of these lands during the priority period was introduced in support of the appellant's testimony, but to the extent that the land was leased under informal, oral agreements, the lack of letters, canceled checks, or other written evidence of such agreements long after the appellant purchased the land is not significant. There is no evidence in the record that Mr. Halls did not lease the property in accordance with his testimony at the hearing.

In the circumstances, where the official records, including the property survey report of June 10, 1938, show that the Halls ranch lands were under the appellant's control during the priority period; where more than half of the lands involved were included in Mr. Halls' 1935 and 1936 applications, and where there is nothing in the record to support a conclusion that the lands were not controlled from 1930 and after in accordance with the appellant's testimony, the conclusion in the Associate Director's decision that the lands were not so controlled is untenable. Insofar as the propriety of the cancellation notice of August 3, 1950, required a finding that Mr. Halls did not control the Halls ranch lands during the priority period, the Government was required to submit evidence indicating lack of control. However, the Government did not present any evidence whatsoever to refute the appellant's testimony that he leased the lands as to which the question of control during the priority period was raised, and the available record evidence does not conflict with the appellant's testimony on this matter. As there is no substantial evidence in the record that Mr. Halls did not control the Halls ranch lands under lease during the priority period, the conclusion to that effect in the Associate Director's decision must be set aside.

Mr. Kinnaman read at the hearing certain portions of the appellant's 1935 and 1936 grazing applications as evidence that the appellant did not use the Federal range during the priority period (p. 10).

In an application filed on May 1, 1935, Mr. Halls applied for a permit to graze 50 cattle and 10 horses in common with other users of land described by township and range which included Dry Valley. It should be noted that when Mr. Halls filed this application, Utah Grazing District No. 6 had not yet been established and the Depart-

ment had not issued any regulations governing the grazing of livestock in grazing districts under section 3 of the Taylor Grazing Act.⁵ One of the questions asked on the 1935 application was: "Have you previously used the lands covered by this application for grazing permit?" Mr. Halls replied "No" to this question. In reply to other questions on the same application, Mr. Halls stated that he fed his stock 3½ months in winter and leased pasture for the summer.

In an application which Mr. Halls filed on February 15, 1936, he described by section, township, and range the public domain (Dry Valley) normally used by his livestock and added the following statement:

This was used during the winter of 1934-1935, but am not using it during the winter of 1935-36. Stock are being grazed on privately owned and leased land.

In reply to another question on the same application as to the length of time (the season to be specified by months) the applicant used the public domain in his normal livestock operation, Mr. Halls replied:

Oct. to Apr.—50 cattle, (1934-5) Public domain not being used in winter of 1935-36.

The appellant's replies on the 1936 application do not exclude the possibility that he used the range in years prior to 1934. However, the answer "no" in reply to the question on the 1935 application as to whether the applicant had previously used the lands applied for is inconsistent with Mr. Halls' statement on the 1936 application regarding normal use, with his affidavit of August 3, 1938, showing prior use of the range, and with substantially all other evidence in the record on this matter. Counsel for the appellant questioned him about the 1935 application at the hearing and Mr. Halls testified, in effect, that he may have believed that the question as to previous use referred to previous use of the land under the Taylor Grazing Act, and that his answer meant that he had not previously used this public domain under permit (pp. 27, 28). The testimony was not mentioned in the Hearing Examiner's or the Associate Director's decision. However, considering the time when the application was filed, the appellant's explanation that his answer may have meant that he had not previously used the range under permit or regulation is plausible and is consistent with the great preponderance of evidence in the record which indicates that he made some use of the range in Dry Valley during what is now known as the priority period.

⁵ The departmental order of June 22, 1935, establishing Utah Grazing District No. 6 stated in part:

"The restrictions authorized to be imposed by the said Act upon the grazing use of the lands within this grazing district will become effective when governing orders, rules or regulations have been duly issued by the Secretary of the Interior and posted in the United States district land office for the area or areas in which the grazing district is located."

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Mr. Kinnaman also testified regarding a statement, presumably given by Mr. Halls and included in a summary of a commensurate property report dated February 24, 1936 (p. 11). The statement is:

The winter 1934 & 35 is the only time Halls has ever used P. D. [public domain] to winter on. He also summered his stock for the most part on his own holding. However he wants summer range on P. D. to give his pasture a rest.

The same report also states that Mr. Halls had 10 years prior use on the public domain in district No. 6 in T. 30 S., R. 23 E. (Dry Valley). These two statements are so patently inconsistent that the report is of no evidentiary value with respect to the question of the appellant's use of the public domain during the priority years, and the reliance in the hearing examiner's and the Associate Director's decisions on the statement in this report as to use in 1934 and 1935 without considering the 10-years prior use statement was erroneous.

The hearing examiner's decision refers to the testimony at the hearing on October 10, 1946, of two persons who used the range in Dry Valley during the priority period. Mr. Cecil Jones, an intervenor in the 1946 hearing, testified that 1933-1934 was the first year during which he saw Mr. Halls run cattle in Unit 1; that Mr. Halls had about 30 cattle, but the witness didn't know whether Mr. Halls had sheep (transcript of hearing on October 10, 1946, pp. 19, 20). Mr. John Perkins, a witness for the Bureau at the 1946 hearing, testified that he had observed Mr. Halls' operations to some extent, that 1933 was the first year which he remembered Mr. Halls' stock being in Dry Valley; that he couldn't say for sure that Mr. Halls did not use the area before that time; that Mr. Halls had between 40 and 60 head of cattle during that time (transcript of hearing on October 10, 1946, pp. 21-23). In summary, two persons who were in the area during the priority period remember 1933 as the first year in which they saw Mr. Halls' cattle using the range in Dry Valley.

Mr. Halls testified that he started buying cattle in 1927, that he had 50 head of cattle and 5 or 6 horses in Dry Valley in 1930, that his cattle grazed in Dry Valley in 1929 and each year since that time (pp. 28, 38, 40). Judge Keller testified that his best recollection was that Mr. Halls purchased his cattle before the priority years; that he thought in 1932 or 1933, Mr. Halls began running cows in Dry Valley, but did not remember whether Mr. Halls had cattle there during the winter of 1931 (pp. 43, 44). Judge Keller testified also that a State well in the area was drilled before 1934 which corroborated Mr. Halls' testimony and other evidence in the record that the appellant's stock were using the range in Dry Valley before 1934 (pp. 35, 36, 56).

The testimony of Mr. Jones and of Mr. Perkins in the 1946 hearing and that of Judge Keller in the 1952 hearing is independent evidence

in support of the appellant's testimony and of the commensurate property report of June 10, 1938, that the appellant used the range in Dry Valley during the priority year, 1933-1934. The only evidence that the range was not so used during that period is the appellant's statement in his 1935 application concerning previous use.

There is almost no independent evidence (other than the official files) of Mr. Halls' use of the range during the year 1932-1933 since the testimony of the witnesses as to such use is inconclusive. Mr. Jones and Mr. Perkins remembered the 1933-1934 winter grazing season as the first time Mr. Halls' livestock had used Dry Valley. Judge Keller's testimony that he thought Mr. Halls began running cows in Dry Valley in 1932 or 1933, but did not remember about the winter of 1931 casts doubt on the accuracy of the recollection of Mr. Jones and Mr. Perkins on this point. Consequently, any question as to 1932-1933 will have to be resolved by weighing the appellant's testimony and the evidence in the official files, including the commensurate property survey report of June 10, 1938, and the appellant's affidavit of August 3, 1938, showing the same use of the range during the 1932-1933 priority year as was shown for 1933-1934, against the appellant's negative reply to the question in his 1935 application as to whether he had previously used the lands covered by the application.

The Department has held that the cancellation of a grazing permit, issued upon showings accepted as sufficient to satisfy the requirements of the Federal Range Code, and upon which grazing privileges have been granted over a term of years, is not warranted in the absence of clear and convincing evidence that the base property upon which such privileges were predicated was not qualified under the range code and that the action in granting the permit was clearly erroneous. *John D. Assuras et al.*, A-24268 (May 24, 1946). When Mr. Halls' answer on the 1935 application is considered with his testimony as to what he probably meant by the answer; and it is remembered that when the application was filed, the grazing district had not been established, that no departmental regulations were in effect, and that procedures in granting licenses were highly informal,⁶ it seems unreasonable to give very much weight to this answer on the 1935 application. Moreover, since the appellant completely refuted the statement by later affidavit and by testimony to the contrary, and gave a plausible explanation as to what he may have intended by the statement, which explanation is consistent with the preponderance of

⁶ In the departmental decision, *George Carson and Sons*, A-23584 (April 28, 1943), the informal procedure involved in the issuance of grazing licenses during the first few years after the enactment of the Taylor Grazing Act is discussed. There is no reason to suppose that applicants in Utah Grazing District No. 6 were required in 1935 to show a more exact compliance with a Federal Range Code which was not then in existence than were persons filing similar applications in other districts.

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evidence in the record showing some use of the range during the priority years, the statement in the 1935 application loses its probative force. It follows that the conclusion in the hearing examiner's and the Associate Director's decisions to the effect that the appellant did not use the range in connection with Halls ranch during the priority period is not supported by probative or substantial evidence where, as here, the conclusion is based upon the appellant's refuted answer in the 1935 application. The weight of the evidence in this record, consisting of the appellant's testimony, the official grazing files in the case (except the 1935 application), and the independent evidence of witnesses shows use of the range during 2 consecutive years in the priority period (1933-1934 and 1932-1933) necessary to make the Halls ranch lands dependent by use. Accordingly, the determination in the Associate Director's decision to the effect that the Halls ranch lands were not qualified base will be set aside.

In summary, the determinations in the Associate Director's decision that the Wood ranch and the Halls ranch lacked dependency by use and that the cancellation of all of the appellant's grazing privileges was justified were erroneous because a consideration of the evidence in the whole record does not support those determinations. *Cf. Universal Camera Corp. v. Labor Bd.*, 340 U. S. 474, 487-491 (1951). It should be noted, however, that the conclusion in this decision that the Government did not show that the Wood ranch and the Halls ranch were not used during 2 consecutive years of the priority period in such a way as to invest those lands with dependency by use does not amount to a finding that Mr. Halls is entitled to all of the grazing privileges authorized by the 1943 permit. The decision on the substantive issues raised in this proceeding is limited to a determination that the cancellation of Mr. Halls' 1943 permit in its entirety was erroneous on the merits in the instant proceeding in which the Government had the burden of proof. Should the appellant later apply for grazing privileges, further evidence might properly be required of him as an applicant, even though such evidence was not required in this cancellation proceeding in which the appellant had the benefit of the doubt about such matters as Mr. Wood's control of the Wood ranch after the sale of the ranch necessary to show that Mr. Wood used the ranch as base property for the Wood sheep during the year 1930-1931 and evidence of the required use of the Federal range during the priority year 1932-1933 in connection with the Halls ranch.

For the reasons discussed herein, not only was the cancellation of the appellant's grazing permit for lack of priority improper on the merits, but the cancellation was put into effect immediately, contrary to departmental regulation, and the action was unlawful under the

Administrative Procedure Act, thus wrongfully depriving the appellant of the use of the range to which he was entitled under the permit, pending decision on appeal from the notice of cancellation. Although the expired permit will not be re-instated now, the appellant is entitled to the use of the range of which he was unlawfully deprived by the notice of August 4, 1950. In the circumstances, the Department holds that use of the range for 2 winter grazing seasons, in accordance with the erroneously canceled permit, of which use the appellant was wrongfully deprived, should be granted now to the appellant, such use to be subject to any proportionate cut in numbers shared by other users in the area. It is further directed that if the appellant should apply for grazing privileges to begin after the use authorized by this decision, he should in no event be penalized as a result of the fact that he has not filed an application during the period his appeal from the cancellation notice of August 3, 1950, has been pending (*cf.* 43 CFR 161.6 (9), 19 F. R. 8957).

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 and the case is remanded for action consistent with this decision.

EDMUND T. FRITZ,
Deputy Solicitor.

OWNERSHIP OF BIG CREEK FISH HATCHERY AND OTHER FACILITIES

Statutory Construction: Administrative Construction—Statutory Construction: Legislative History—Wildlife Refuges and Projects

Act of May 11, 1938 (52 Stat. 345), as amended, did not contemplate that title to Columbia River fishery facilities constructed on State-owned lands would pass to the States.

M-36294

SEPTEMBER 12, 1955.

TO THE DIRECTOR, FISH AND WILDLIFE SERVICE.

You have requested the views of this office on the ownership of fishery facilities constructed under the provisions of the act of May 11, 1938 (52 Stat. 345), as amended. The question arose originally on the request of the State of Oregon for reimbursement for payments to the "State Restoration Fund." The State Restoration Fund was established to cover the cost of replacing or rebuilding State property that

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had been lost, damaged, or destroyed by fire, smoke, explosion, storm, flood, or earthquake.

The act of May 11, 1938, authorized and directed the Secretary of the Interior to establish one or more salmon cultural stations in the Columbia River Basin in each of the States of Oregon, Washington, and Idaho. It also authorized the Secretary to conduct investigations, engineering and biological surveys, and experiments for the purpose of conserving the fishery resources of the Columbia River and its tributaries and "to construct, install, and maintain devices in the Columbia River Basin for the improvement of feeding and spawning conditions for fish, for the protection of migratory fish from irrigation projects, and for facilitating free migration of fish over obstructions," and lastly, to perform all other activities necessary for the conservation of the fishery resources of the Columbia River Basin. It should be noted that this authorization followed almost immediately the Bonneville Project Act of 1937, for the obvious purpose of relieving, if possible, the damaging effects of the Bonneville Project on the fishery resources of the Columbia River. Subsequently, when additional dams on the Columbia River were proposed, several efforts were made to coordinate the activities of the fishery agencies of the States of Oregon, Washington, and Idaho, and those of the Fish and Wildlife Service to preserve the fishery runs of the Columbia River. It is well known that little progress was made toward developing a coordinated plan primarily because each of the agencies had different views on, first, what ought to be done, and secondly, which agency ought to assume the responsibility for the impending damage to the fisheries. Amendment of the act of May 11, 1938, by the act of August 8, 1946 (60 Stat. 932), had for its sole purpose establishment of a framework on which a coordinated program could be built.

One of the problems encountered in attempting to coordinate the several fishery programs was the inability of the Fish and Wildlife Service to contract directly with the State agencies to carry out certain phases of the program. Thus, section 2 of the 1938 act was amended to provide that the Secretary of the Interior could enter into agreements with the States without regard to those provisions of section 5 of Title 41, United States Code, which require advertising for bids. It was expected, as was developed before the Committee on Appropriations of the House of Representatives for the 80th Congress during its consideration of the Civil Functions Appropriations for the Department of the Army (1948), pages 548-594, that duplication of effort in carrying out the Columbia River fisheries program could be avoided by permitting the Secretary of the Interior to utilize and pay for the services of the several States in developing biological data, in

stream clearance, and in other functions. In other words, the several phases of the program could be parceled out so as to utilize the existing facilities, research as well as construction, of the States of Oregon and Washington. Idaho was not an active participant at this stage of the program. There also was introduced by the 1946 amendment, three other features which were intended to place the States and Federal Government on a cooperative basis. First, the obligation of the Secretary of the Interior to maintain fish hatcheries and similar facilities was deleted. Next, the States were required to provide the necessary title or interest in lands which might be needed in connection with any construction or improvement program by the United States. Lastly, the Secretary of the Interior was authorized to construct facilities on and to improve these State-owned lands.

The question of the relationship of the State to the Federal Government in connection with the construction of these facilities was discussed briefly before the Committee on Appropriations in connection with the 1949 Civil Functions Appropriations Act at page 586. After outlining the then proposed hatchery construction program which included the Sandy River Hatchery owned and operated by the State of Oregon but being rehabilitated under the program, we find the following discussion:

MR. CASE. Item No. 6 is Sandy River Hatchery, Oregon State, \$175,000. Is that a new hatchery?

MR. DAY. Sandy River is an old hatchery being rehabilitated and enlarged.

MR. CASE. It is owned by the State of Oregon?

MR. DAY. That is right.

MR. CASE. Is it proposed there that the \$175,000 is to be expended by the Federal Government or be turned over to the State of Oregon?

MR. DAY. The State of Oregon would serve as constructor for the Federal Government to do the job.

While the 1946 amendment authorizes the construction with Federal funds of facilities on lands not owned or controlled by the United States, it required that title to such lands should be obtained by the States without cost to the United States. Primarily, this authorization was intended to be utilized in that part of the program which called for the improvement of potential spawning streams through the removal of barricades such as logjams, rock ledges, and fall obstructions too high to permit the easy ascent of migrating fish. Such improvement work required only temporary use of the sites. The provision, of course, also was available in connection with the construction of new or improved fish hatchery facilities.

Although the United States did not require, in subsequent agreements covering the construction or reconstruction of fish hatchery facilities that title to lands on which the improvements were to be made

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be conveyed to the United States, it does not follow that the facilities constructed or reconstructed with funds appropriated to the Department of the Interior under provisions of the Civil Functions Appropriation Bills became the property of the States. On the contrary, it is clear from the legislative history cited above as well as from the agreements with the States that the land acquired or owned and made available by the States, was to be held by them in trust for the purposes of the act, at least until such time as the Federal Government subsequently authorized the disposition of facilities constructed with Federal funds. Ownership and administration of the newly constructed or reconstructed facilities then became a joint venture between the States and the United States.

The total program at Big Creek involved the enlargement of the hatchery facilities. The first work was begun under an agreement dated November 24, 1948, which was amended once in 1949 and twice in 1950 to add additional facilities. A further agreement of October 18, 1950, provided for the construction of 12 concrete rearing ponds, alteration of 9 existing rearing ponds, and the construction of headworks and a water supply line. A contract dated April 23, 1952, covered the construction of new buildings, including those for hatchery, refrigeration, utility, 3 residences, the construction of 9 new ponds, and other facilities. In each of these construction contracts it was provided that the Director of the Fish and Wildlife Service would reimburse the State for the value of the work performed as determined by the Director, not necessarily the cost of the work as expended by the State.

Beginning in about the fiscal year 1951, requests were made for Federal funds to cover the cost of maintenance of the enlarged Big Creek and similar facilities, even though the 1946 amendment had deleted from the act of May 11, 1938, the Federal obligation to maintain these facilities. At least until that time there had never been complete agreement between the State and Federal agencies concerning the respective obligations of these agencies either for construction or maintenance. To illustrate, the following is quoted from the "Budget, Fiscal Year 1954, Lower Columbia River Fisheries Development Program, Civil Functions Appropriation, Prepared by Department of the Interior, Fish and Wildlife Service, for Department of the Army, Corps of Engineers:"

The operating costs of the facilities and activities, whether Federal or State, reflect only the additional recurring costs resulting from the construction of new or the enlargement of existing facilities. Operation and maintenance funds for State or Federal facilities and activities in operation prior to the inception of the Lower Columbia River Fisheries Development Program will continue to be provided by the respective agencies.

Operation and maintenance costs are shown only through F. Y. 1965. At that time an appraisal will be made of the success of the program in mitigating upstream losses of salmon, provided that all program facilities have then been in full operation for five years. In 1965, on the basis of the appraisal, it will be determined if the operation and maintenance of the State-operated units will thereafter be the responsibility of the State agencies or will continue to be financed by the Federal government.

The first agreement contemplating Federal maintenance of the enlarged Big Creek facility was executed in 1951 and obligated the Federal Government to pay the sum of \$20,000, apparently the total cost of operating the hatchery in that year. The next one, June 17, 1952, estimated that the total cost of operation would be \$37,414, and that the United States would pay as its share the sum of \$23,644. Again, these maintenance agreements contained a provision that the value of the services to be reimbursed should be determined by the Director. It is true that the Preliminary Project Statement and Plans, Specifications and Estimates for Operation contained a reference to the fact that prior to the enlargement of the Big Creek Hatchery facilities, the cost of operating the hatchery was approximately \$13,770, and it is also true that the estimate has remained unchanged in the 1953 and 1954 maintenance agreements. However, there is no continuing obligation on the part of the United States to pay all or any part of the costs of operation in excess of \$13,770. As a matter of fact, the original statement referred to indicated that this sum was a *minimum* obligation of the State.

Any question regarding the use or availability of Federal funds for maintenance, which may be raised by the repeal in 1946 of the basic maintenance authorization, seems to have been resolved, at least annually, by the appropriation of funds for such purposes. See *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139, 147 (1937), and *Brooks v. Dewar*, 313 U. S. 354, 361 (1941).

In view of the joint interest of the State and the United States in the reconstruction and enlarged Big Creek facilities, there is no objection, of course, to the State carrying whatever insurance it deems advisable to protect whatever interests it has in the properties. However, that is an expenditure that must be borne by the States and the States cannot properly be reimbursed by the United States for any expenditure in connection with such insurance.

J. RUEEL ARMSTRONG,
Solicitor.

September 20, 1955

ZION OIL COMPANY ET AL.

A-27152

Decided September 20, 1955

Oil and Gas Leases: Cancellation

Where a noncompetitive oil and gas lease is committed to a unit agreement, the unit operator is not entitled to notice of default in terms of the lease prior to the cancellation of the lease.

Oil and Gas Leases: Reinstatement

An application by a unit operator for the reinstatement of a canceled noncompetitive oil and gas lease committed to the unit agreement is properly denied where the basis of the application for reinstatement is that the unit operator did not receive notice of default prior to the cancellation of the lease.

Oil and Gas Leases: Lands Subject to Leasing

Where a noncompetitive oil and gas lease is canceled and the cancellation noted on the tract books of the land office, the lands formerly embraced in the lease immediately become available for leasing by others unless they are on a known geologic structure of a producing oil or gas field or are withdrawn from further leasing.

Oil and Gas Leases: Applications

The first qualified applicant for land available for oil and gas leasing has a statutory preference right to a lease; if a lease is to be issued for the land, which must be honored.

Oil and Gas Leases: Applications

An application for a noncompetitive oil and gas lease filed after the cancellation of a former lease on the same lands and the notation of the cancellation of the former lease on the tract books is not prematurely filed even though filed prior to the expiration of the lease year of the canceled lease for which the rent had been paid.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior by the Zion Oil Company, unit operator of the Wyoming Anticline Unit Agreement, from a decision by the Associate Director of the Bureau of Land Management, dated December 21, 1954, which affirmed the action of the manager of the land office at Cheyenne, Wyoming, in denying the application of Zion Oil Company for the reinstatement of canceled oil and gas lease Evanston 026215.

As of June 1, 1950, noncompetitive oil and gas lease Evanston 026215, covering 559.60 acres of land in secs. 1 and 12, T. 25 N., R. 115 W., 6th P. M., Wyoming, was issued to John F. Howard, under section 1 of the act of July 29, 1942 (56 Stat. 726). This act provided that upon the expiration of the 5-year term of any noncompetitive

oil and gas lease issued pursuant to the provisions of the act of August 21, 1935 (49 Stat. 674), amending the Mineral Leasing Act (30 U. S. C., 1952 ed., sec. 181 *et seq.*), the record titleholder of any such lease maintained in accordance with applicable statutory and regulatory requirements should, upon application, be entitled to a preference right over others to a new lease for the same lands, except those lands which, on the expiration date of the lease, were within the known geologic structure of a producing oil or gas field. The lease was executed for Mr. Howard by the Colorado National Bank of Denver, as Conservator of the estate of Mr. Howard, who had been adjudged a mental incompetent. Under the terms of the lease, the lessee was obligated to pay to the United States "in advance on the first day of the month in which the lease issues" a rental for the first lease year at the rate of 50 cents per acre. No rental was due for the second and third lease years. The rental due in advance for the fourth and fifth years was at the rate of 25 cents per acre. Section 2 (a) of the lease provided that:

* * * where a bond is not otherwise required, a \$1,000 bond must be filed for compliance with the lease obligations not less than 90 days before the due date of the next unpaid annual rental, but this requirement may be successively dispensed with by payment of each successive annual rental not less than 90 days prior to its due date.

Section 7 of the lease provided:

If the lessee shall not comply with any of the provisions of the act or the regulations thereunder or make default in the performance or observance of any of the terms, covenants, and stipulations hereof and such default shall continue for a period of 30 days after service of written notice thereof by the lessor, the lease may be canceled by the Secretary of the Interior in accordance with section 31 of the act, as amended, * * *

The second paragraph of section 31 of the Mineral Leasing Act, as amended on August 8, 1946 (30 U. S. C., 1952 ed., sec. 188), provides:

Any lease issued after August 21, 1935, under the provisions of section 17 of this Act 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. Such notice in advance of cancellation shall be sent the lease owner by registered letter directed to the lease owner's record post-office address, and in case such letter shall be returned as undelivered, such notice shall also be posted for a period of thirty days in the United States land office for the district in which the land covered by such lease is situated, or in the

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event that there is no district land office for such district, then in the post office nearest such land.¹

On February 8, 1954, Mr. Howard, through the Conservator of his estate, was billed for the fifth year's rental under his lease, for the period from June 1, 1954, to May 31, 1955. No response having been made to that notice, a default notice was sent by registered letter dated March 12, 1954, to Mr. Howard in care of the Conservator of his estate, informing him that the filing of a \$1,000 bond, or the payment of rental for the fifth year of his lease, beginning June 1, 1954, in the amount of \$140, was due without notice; that the lease was therefore in default in this respect; and that if the default continued for 30 days from the receipt of the notice, the lease would be canceled without further notice. The notice was received by the Conservator on March 19, 1954, as shown by the return receipt card in the case record. No action was taken by the Conservator in response to this notice and on May 24, 1954, the lease was canceled.

Thereafter, on May 25, 1954, Estella P. Steele filed an offer for a noncompetitive oil and gas lease (Wyoming 027684) covering the same land.

On August 6, 1954, the Zion Oil Company, as the unit operator of the lands subject to the Wyoming Anticline Unit Agreement, including the lands covered by the Howard lease, tendered \$140 in payment of the fifth year's rental under the Howard lease and on September 13, 1954, the Zion Oil Company applied for the reinstatement of that lease. It is from the denial of the application of the Zion Oil Company for reinstatement of the lease that this appeal is taken.

The fact that the Howard lease was in default on March 12, 1954, is not disputed. Nor is the fact that notice of default was served on the Conservator of Mr. Howard's estate. The only question in issue is whether the unit operator was entitled to receive the default notice.

The appellant contends that, as unit operator of the Wyoming Anticline Unit Agreement, approved by the Acting Secretary of the Interior on October 26, 1938, it was entitled to receive the notice of the rental due and the default notice; that because it did not receive the default notice, the action taken on May 24, 1954, in canceling the lease was ineffective; and that the land was not available for leasing on

¹ The second paragraph of section 31 was further amended by the act of July 29, 1954, (68 Stat. 585), by the addition of the following sentence:

"Notwithstanding the provisions of this section, however, upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law: *Provided, however,* That when the time for payment falls upon any day in which the proper office for payment is not open, payment may be received the next official working day and shall be considered as timely made."

May 25, 1954, when the Steele application was filed because the rental under the Howard lease had been paid for the fourth year of the lease which did not end until May 31, 1954.

The appellant points to section 13 of the unit agreement which provides:

That Operator, on behalf of the respective permittees and lessees, shall pay all rentals and royalties due the United States on account of lands subject to this agreement and shall distribute the cost thereof to the second parties conformably with their respective rental and royalty obligations. On request of any second party, Operator shall pay other royalties on his behalf in accordance with a schedule furnished by him and charge the cost thereof to his account; provided, that Operator shall incur thereby no responsibility to any royalty owner, but such responsibility shall be and remain an obligation of the second parties. and to the "Approval-Certification-Determination" executed by the Acting Secretary, and attached to the agreement, which states that the Acting Secretary approves the agreement; determines that the plan of development and operation of the Wyoming Anticline contemplated in said agreement is necessary and advisable in the public interest; and certifies

* * * that each and every lease heretofore or hereafter issued for a period of twenty years for lands of the United States subject to said agreement from the effective date thereof, and concurrently therewith, shall be modified to conform with this agreement and shall be continued in force beyond the twenty years specified in the lease, and until the termination of said agreement.

The appellant argues that, inasmuch as section 13 provides that the operator shall pay all rentals due the United States, the terms of the Howard lease were, in effect, modified to make the operator primarily responsible for the payment of the rent on time. The appellant also calls attention to the facts that rental payments in the past have been paid by the appellant and that the application for Mr. Howard's preference right lease was submitted by K. P. M., Inc., the former unit operator, as attorney in fact for John F. Howard.

None of these factors, however, imposed upon the Secretary of the Interior any duty to notify the unit operator when the rent under Mr. Howard's lease was due or to serve upon the unit operator the 30 days' notice required by the statute and the Howard lease to be served upon the lessee prior to cancellation of the lease for default.

Ever since the amendment of the Mineral Leasing Act to authorize the Secretary of the Interior to cancel oil and gas leases on lands not known to contain valuable deposits of oil or gas,² the Department has construed the statute as requiring the 30 days' notice of default to be given only to the record titleholder. In *Bert O. Peterson et al.*, 58 I. D. 661 (1944), the Department had for consideration the appeal

² The provision was first incorporated in section 17 of the Mineral Leasing Act by the amendatory act of August 21, 1935.

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of the Midwest Holding Company, whose application for the reinstatement of the Peterson lease, canceled for nonpayment of rent, had been denied. Appellant in that case, who had entered into an operating agreement with Peterson, approved by the Department, under which the appellant had the right to develop the lands for oil and gas purposes and under which the appellant was bound to pay all costs and expenses of development, including rentals and the costs of all bonds, argued that the term "lease owner" as used in the statute was intended to include anyone interested in the substance of the lease, whether by direct assignment, sublease, operating agreement, or any other similar instrument which had the approval of the Department and that all such persons were entitled to the statutory notice of cancellation. The Department held that the requirement of the statute is met by service of such notice upon the record titleholder of the lease. The Department's position was upheld by the United States Court of Appeals for the District of Columbia in *Peterson et al. v. Ickes*, 151 F. 2d 301 (1945); *cert. denied*, 326 U. S. 795. The court said:

* * * the Department construed the working agreement with Midwest as a sublease and not an assignment and in the opinion affirming the Land Office, the Secretary said: "In the eight years which have elapsed since this statute was enacted [amendment of 1935], several thousand oil and gas leases have been canceled pursuant to the authority granted therein. In all these cases, the Land Office has sent notice of cancellation to only the record title holders." The reasonableness of this ruling is apparent, for if we were to accept appellant's contention that *lease owner* was intended "to include anyone with an interest in the leasehold" acquired with the Department's knowledge and approval, the Department would be required in every instance to examine all interests held in leases to determine to whom notice should be given, a situation which would be burdensome, if not impossible, to comply with in cases of overriding royalty interests where certain rights are transferred and other rights reserved by half a dozen or more different interests in the same lease.

Nothing in the present appeal serves to distinguish this case from the situation presented in the *Peterson* case. While it is true that under section 13 of the unit agreement the operator assumed the responsibility for the payment of the rent, the section itself recognizes that the obligation is that of the respective lessees. That provision does not provide for notice to the unit operator of the bonds or rentals due under the respective leases nor does it change the terms of leases committed to the agreement. The provision quoted above from the "Approval-Certification-Determination" executed by the Acting Secretary does modify the terms of certain leases committed to the agreement but this modification extends, as the provision recites, only to 20-year leases. As the Howard lease is a 5-year lease, its terms were

not affected in any manner by the provision. And, although Zion Oil Company, which company, in 1952, assumed the responsibilities of unit operator under the agreement, undoubtedly paid the rental for the fourth year of Mr. Howard's lease, nothing in the record indicates that this payment was made after notice to the unit operator. The notice of the fourth year's rental payment due under the Howard lease, like the notice of the fifth year's rental due, was sent to the Conservator of Mr. Howard's estate.

The fact that the application for the preference right lease issued to Mr. Howard was submitted by K. P. M., Inc. (the appellant's predecessor as unit operator), as attorney in fact for Mr. Howard, can avail the appellant nothing. The application for the preference right lease was made in the name of John F. Howard, or, if deceased, his successors, heirs and assigns. It recites that K. P. M., Inc., is the approved unit operator of the Wyoming Anticline Unit Agreement; that K. P. M., Inc., is the owner of an oil and gas operating agreement, dated November 16, 1940, from John F. Howard, by assignment from Miller Robert Taylor (the first unit operator), covering the lands applied for; that efforts had been made to contact Mr. Howard but that these efforts had failed and that pursuant to the operating agreement of November 16, 1940, Mr. Howard constituted Miller Robert Taylor and his successors and assigns as his "true and lawful attorney in fact to take all necessary steps before the Department in connection with the leased lands." Although the manager evidently considered the application submitted by K. P. M., Inc., as a timely application filed on behalf of the "record titleholder" under the act of July 29, 1942, he required the lease to be executed by the Conservator of Mr. Howard's estate after he learned that Mr. Howard had been adjudged a mental incompetent.

While the appellant does not state that it has succeeded to the rights of K. P. M., Inc., under the operating agreement and as attorney-in-fact for Mr. Howard, it implies that this is so. Assuming such to be the facts, the situation is not unlike that presented in *Theora A. Gerry, Lexa Oil Corporation*, A-26319 (October 3, 1951). There, a lease had been issued to Miss Gerry, who had, like Mr. Howard, executed an operating agreement which had received the approval of the Department. After cancellation of Miss Gerry's lease for failure to pay the rent, Lexa Oil Corporation, which had succeeded to the interest of the Midwest Holding Company under the operating agreement, applied for the reinstatement of the lease on the ground that under the operating agreement Miss Gerry had appointed Midwest and its assigns her attorney-in-fact "with full power and authority to take any such action before the Department of the Interior as Lessee might be required to take on request of Contractor [Midwest]

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as aforesaid in the name and on behalf of Lessee, for the use and benefit of the parties hereto * * *." It was asserted that Lexa, as attorney-in-fact for Miss Gerry, was entitled to notice of the proposed cancellation of the lease. The Department, relying on the *Peterson* case, *supra*, held that Lexa was not entitled to notice of the proposed cancellation of the Gerry lease.

Therefore I conclude that Zion Oil Company was not entitled to receive notice of default under the Howard lease and that its application for the reinstatement of that lease was properly denied.

One other matter requires consideration. The appellant contends that the Steele application was filed prematurely since it was filed on May 25, 1954, prior to the expiration of the fourth year of the Howard lease on May 31, 1954, for which the rent had been paid. Even though the rent had been paid for the fourth lease year, the lease was in default for the failure to file a bond not less than 90 days before the due date of the next unpaid annual rental. The lease was therefore subject to cancellation, after proper notice, prior to the expiration of the period for which the rent had been paid. When the lease was canceled and its cancellation noted on the tract books of the local office, the lands, unless they were on a known geologic structure of a producing oil or gas field or withdrawn from further leasing (which the lands involved in the appeal apparently were not), immediately became available for leasing to others. 43 CFR 192.43; 19 F. R. 9015. If the Steele application was filed after the cancellation of the Howard lease had been noted on the tract books, it was not prematurely filed. If Miss Steele is the first qualified applicant for the lands, her statutory preference right to a lease, accorded by section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226), must be honored if a lease is to be issued. *C. T. Hegwer et al.*, 62 I. D. 77 (1955). Miss Steele must, of course, satisfy the requirement of the Department that she file evidence that she has entered into an agreement with the unit operator for the development and operation of the lands under and pursuant to the terms and provisions of the unit agreement or a statement giving satisfactory reasons for her failure to enter into such an agreement. 43 CFR 192.41; 19 F. R. 9013.

Finally, it should be noted that no appeal was taken by the Conservator of Mr. Howard's estate from the default notice which was served upon it. Nor did the Conservator apply for the reinstatement of the Howard lease. The Department has recently held that even where a lease may have been improperly canceled a lessee who fails to appeal from the cancellation of his lease loses his rights under his lease and that his lease may be reinstated only in the absence of inter-

vening rights. *C. T. Hegwer et al., supra.* See also *Charles D. Edmonson et al.*, 61 I. D. 355 (1954).

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. RUEEL ARMSTRONG,
Solicitor.

THOMAS F. MCKENNA, FORREST H. LINDSAY

A-27157

Decided September 30, 1955

Oil and Gas Leases: Reinstatement

The reinstatement of an oil and gas lease which has been terminated amounts to a restoration of the lease to the position that it formerly occupied and in effect constitutes a rescission or wiping out of the action which caused the termination of the lease; it does not constitute the issuance of a new lease.

Oil and Gas Leases: Reinstatement

There is no authority in the Secretary of the Interior to reinstate an oil and gas lease which has been relinquished.

Oil and Gas Leases: Relinquishments

One who voluntarily surrenders his oil and gas lease by filing a written relinquishment thereof, in the appropriate land office, cannot withdraw his relinquishment.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior by Thomas F. McKenna from a decision dated January 24, 1955, by the Associate Director of the Bureau of Land Management, which affirmed the action of the manager of the land office at Santa Fe, New Mexico, in rejecting Mr. McKenna's offer for a noncompetitive oil and gas lease on lots 3 and 4, sec. 35, T. 14 S., R. 38 E., N. M. P. M., New Mexico, under the provisions of section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226), and in reinstating and extending noncompetitive oil and gas lease Las Cruces 069118, covering the same land.

Oil and gas lease Las Cruces 069118 was issued to Forrest H. Lindsay as of July 1, 1949, for a primary term of 5 years. Section 5 of the lease provided that the lessee could surrender the lease by filing in the proper land office a written relinquishment, in triplicate, "which shall be effective as of the date of filing." The section required that any such relinquishment be accompanied by a statement that all wages

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and moneys due and payable to the workmen employed on the land relinquished had been paid.

On June 24, 1954, Mr. Lindsay filed a relinquishment of that lease in the Santa Fe land office. The document filed in triplicate by Mr. Lindsay was entitled "Surrender and Relinquishment of Oil and Gas Lease." It stated:

I hereby surrender and relinquish to the United States, all my right, title and interest in and to Oil and Gas Lease, Serial Number Las Cruces 069118, the lands described as follows: * * *

I certify that all rentals and royalties due the United States under said leases have been paid.

That no operations have been conducted on any of the above described lands embraced in the leasehold, no workmen have been employed, therefore, no wages or other moneys due workmen remain unpaid.

On June 29, 1954, the manager received a telegram from Mr. Lindsay requesting him to ignore the relinquishment of the lease and to extend or renew the lease for another 5-year term.

By a decision dated June 30, 1954, sent by registered mail and received by Mr. Lindsay on July 6, 1954, the manager "accepted" the "withdrawal of the relinquishment." He allowed Mr. Lindsay 30 days from the receipt of that decision within which to refile his application for an extension of the lease on the proper form and to pay the sixth year's rental. Mr. Lindsay filed his application and paid the rent on July 9, 1954, and on July 26, 1954, the manager extended the lease.

In the meantime, on July 1, 1954, Mr. McKenna filed his offer. The McKenna offer was rejected by the manager on October 8, 1954, because the lands were covered by Las Cruces 069118.

Mr. McKenna contends that the manager had no authority to reinstate the Lindsay lease and that the reinstatement and extension of that lease was in derogation of Mr. McKenna's preference right to a lease, as the first qualified applicant for a lease on the land formerly embraced in the Lindsay lease.

The question whether a relinquishment of an oil and gas lease may be withdrawn and the lease reinstated appears not to have been considered by the Department since section 30 (b) was added to the Mineral Leasing Act (30 U. S. C., 1952 ed., sec. 181 *et seq.*) by section 8 of the act of August 8, 1946 (30 U. S. C., 1952 ed., sec. 187b). The case is therefore one of first impression.

Section 30 of the Mineral Leasing Act, as originally enacted on February 25, 1920 (41 Stat. 449), provides that the lessee of any deposit leasable under that act, may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquish-

ment of all rights under such lease and that upon acceptance thereof the lessee shall be relieved of all future obligations under the lease.

Section 8 of the amendatory act of August 8, 1946, added a new section to the Mineral Leasing Act, designated as section 30 (b). It provides:

Notwithstanding any provision to the contrary in section 30 hereof, a lessee may at any time make and file in the appropriate land office a written relinquishment of all rights under any oil or gas lease issued under the authority of this Act or of any legal subdivision of the area included within any such lease. *Such relinquishment shall be effective as of the date of its filing*, subject to the continued obligation of the lessee and his surety to make payment of all accrued rentals and royalties and to place all wells on the lands to be relinquished in condition for suspension or abandonment in accordance with the applicable lease terms and regulations; thereupon the lessee shall be released of all obligations thereafter accruing under said lease with respect to the lands relinquished, but no such relinquishment shall release such lessee, or his bond, from any liability for breach of any obligation of the lease, other than an obligation to drill, accrued at the date of the relinquishment. [Italics added.]

Thus, while the Secretary of the Interior still has discretion with respect to the acceptance of relinquishments of leases issued pursuant to the provisions of the Mineral Leasing Act, other than oil and gas leases, he has no discretion to accept or reject a relinquishment of an oil and gas lease. The relinquishment of an oil and gas lease takes effect, not upon the acceptance by the Secretary, as is the case with other relinquishments, but upon the date of its filing in the appropriate land office. No action is required by the Secretary to give effect to the relinquishment. The section confers upon an oil and gas lessee an absolute right to surrender his lease. That right is not dependent upon any action by the Secretary. Nothing in the section suggests that once that right has been exercised it may be ignored by the Secretary.

It has been suggested that because the statute does not specifically preclude the reinstatement of relinquished oil and gas leases, such leases may be reinstated in proper circumstances in the absence of intervening rights. What the "proper circumstances" may be is not indicated. An analogy is drawn between a canceled oil and gas lease and a relinquished lease. The Department has held that the Secretary has implied authority to reinstate a canceled oil and gas lease in the absence of intervening rights (*J. Martin Davis et al.*, A-26564 (January 12, 1953)). In my opinion, the analogy is not sound.

As I conceive it, the reinstatement of an oil and gas lease is the restoration of the lease to the status it occupied prior to its termination. It is not the issuance of a new lease because, if it were, there would seem to be no basis for issuing less than a completely new lease with a new full 5-year term carrying all the rental and other provi-

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sions of a new lease. If reinstatement, then, is the revival of a lease, reinstatement in effect is a rescission or wiping out of the action which had caused the lease to be terminated.

Turning to the situation of a canceled oil and gas lease, under section 31 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 188), an oil and gas lease is subject to cancellation by the Secretary of the Interior after 30 days' notice upon the failure of the lessee to comply with any of the provisions of the lease. The cancellation of an oil and gas lease is in the discretion of the Secretary and action is required by the Secretary to effect the cancellation. In reinstating the canceled lease the Secretary, in effect, rescinds his own action and places the lease in the same status that it would have occupied had no cancellation been made. He reinstates the lease only in the absence of intervening rights after the lands have become available for leasing by others. See *J. Martin Davis et al., supra; cf. C. T. Hegwer et al.*, 62 I. D. 77 (1955).

No action is required by the Secretary in connection with relinquishments. In fact, he is precluded from interfering with the voluntary act of the lessee. Thus, once a relinquishment is filed, there is nothing upon which the Secretary can act. Relinquishment is purely a unilateral act on the part of the lessee. Therefore, to hold that a relinquished lease can be reinstated would be to hold that the lessee has power to rescind his relinquishment. I can see no more reason for holding that section 30 (b) invests the lessee with such authority than that section 15 of the act of August 8, 1946 (60 Stat. 958), gave a lessee the power to rescind an election to come under that act.

In *Seaboard Oil Company of Delaware*, A-26246 (January 18, 1952), an oil and gas lessee filed a statement under section 15 of the act of August 8, 1946 (60 Stat. 958), electing to have its oil and gas leases governed by the provisions of the amendatory act of August 8, 1946, rather than the law in effect prior thereto. The lessee later requested that its election be disregarded. The Department held that, once an election is made, the authority of the section is exhausted and that an election, once made, cannot be revoked. Nothing in section 30 (b) suggests that a relinquishment, once effectively filed, can be revoked by the lessee.

The only other way to hold that a relinquished lease can be reinstated is to hold that the Secretary of the Interior, unlike the lessee, has authority to undo the lessee's act of relinquishment. I am unable to perceive any rational basis upon which such a ruling could be based. I do not see how the Secretary can undo an act over which he had absolutely no control.

Therefore, it must be concluded that when a lessee files his relinquishment of an oil and gas lease in the appropriate land office, he exercises the right granted to him by section 30 (b) of the Mineral Leasing Act; he voluntarily ends his lease relationship with the United States as of the date of the filing of the relinquishment; and he has no right to withdraw a relinquishment once properly filed. Thereafter, such a person stands on the same footing as any other person who desires to acquire an oil and gas lease on the land.

Accordingly, it was error for the manager to reinstate the Lindsay lease. The reinstatement, having been improper, it follows that the extension of the reinstated lease was also improper.

If Mr. McKenna was the first qualified applicant for a lease on the land after it became available for further leasing, his statutory preference right, accorded by section 17 of the Mineral Leasing Act, as amended, must be honored, if the land is to be leased. *C. T. Hegwer et al., supra.*

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, Mr. Lindsay's lease as extended is canceled, and the case is remanded to the Bureau of Land Management for further action consistent with this decision.

EDMUND T. FRITZ,
Deputy Solicitor.

APPLICABILITY OF PUBLIC SALE ACT TO ALASKA

Alaska: Sales—Public Sales: Generally

Section 2455, Revised Statutes, as amended (43 U. S. C. sec. 1171), was extended to the Territory of Alaska by section 3 of the act of August 24, 1912 (37 Stat. 512; 48 U. S. C. sec. 23), and now applies to that Territory.

M-36303

OCTOBER 10, 1955.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

By reference from you I am in receipt of certain correspondence wherein your Area Administrator for the Territory of Alaska has requested a ruling on the question whether the Public Sale Act, as amended (section 2455, Revised Statutes; 43 U. S. C. sec. 1171), sometimes called the Isolated Tract Act, is applicable to Alaska. It appears that the Area Administrator has pending, applications for isolated tracts filed under that act.

October 10, 1955

A thorough search has failed to disclose any departmental ruling on this question.¹ However, that is not surprising as until recent years there had not been such an extension of the public land surveys to lands in Alaska, followed by sufficient increase of population and land disposals, as would create isolated tracts to any extent.

The original Public Sale Act which authorized the sale of isolated or disconnected tracts was that of August 3, 1846 (9 Stat. 51), enacted before the purchase of Alaska.² Section 5 of the act was later coded as section 2455, Revised Statutes³ and as amended is now section 1171, Title 43 of the United States Code. Neither the original act nor the present section 1171 mentions either States or Territories. Each authorized sales in the land office districts in which the isolated or disconnected tracts were situated. However, such districts were established and sales made under the act in the various territories before they were admitted into the Union.⁴ So far as I have been able to find, the applicability of the act through its own force and effect to the various territories before they were admitted into the Union, was never questioned. Of course the act did not apply to areas opened by special acts of Congress only to certain types of disposals "spelled out" in the acts. A general act must give way to a special act, if there is a conflict between them, unless Congress indicates in the special act that the general act is to prevail.⁵ Hence, other acts were necessary in order to make the Isolated Tract Act apply to those areas.⁶

Since the passage of the act of May 17, 1884 (23 Stat. 24), the Territory of Alaska has been an organized Territory.⁷ Section 1

¹ General Land Office letter of February 26, 1930, closed withdrawn isolated tract application Anchorage 07325 and the local office was informed that copies of the regulations and application forms for such applications would not be furnished because "the Isolated Tract Law has not heretofore been held to apply to Alaska, and in the absence of a ruling that it does so apply there is no occasion for you to have circulars or application forms thereunder."

By decision of April 8, 1942, the General Land Office held isolated tract application Fairbanks 04917 for rejection because "The Isolated Tract Law has never been considered as applying to lands in Alaska and there is nothing in Section 14 of the Act of June 28, 1934, which indicates it is intended to apply to Alaska." No appeal was taken.

By letter of October 30, 1953, Senator Cordon was informed by the Bureau of Land Management that section 2455, Revised Statutes, applied to Alaska.

² Alaska was purchased from Russia under the treaty of March 30, 1867 (15 Stat. 539).

³ Revised Statutes of the United States enacted by Congress in 1874.

⁴ See page 173 of *Public Domain* listing land offices from 1800 to 1880. General Land Office serial registers show many isolated tract cases for lands in Arizona and New Mexico, patented before those territories were admitted into the Union.

⁵ Section 5204, Sutherland Statutory Construction, 3d ed.

⁶ See the acts of April 24, 1928 (45 Stat. 457; 43 U. S. C. sec. 1171a), May 23, 1930 (46 Stat. 377; 43 U. S. C. sec. 1171b), May 19, 1926 (44 Stat. 566; 43 U. S. C. sec. 1176), February 4, 1919 (40 Stat. 1055; 43 U. S. C. sec. 1172), May 10, 1920 (41 Stat. 595; 43 U. S. C. sec. 1173), May 25, 1920 (41 Stat. 623; 43 U. S. C. sec. 1174), and August 11, 1921 (42 Stat. 159; 43 U. S. C. sec. 1175).

⁷ *Rasmussen v. United States*, 197 U. S. 516 (1905). *Binns v. United States*, 194 U. S. 486 (1904). *Steamer Coquiltam v. United States*, 163 U. S. 346 (1896).

of the act established the Territory as a civil and judicial district and section 8 declared that district a land office district. Section 8 and section 27 of the act of June 6, 1900 (31 Stat. 329), each contain a provision that "nothing contained in this act shall be construed to put in force in said district the general land laws of the United States."

The act of August 24, 1912 (37 Stat. 512; 48 U. S. C. sec. 21), which established the Territory of Alaska, contains no provision that the act shall not be construed as putting in force in Alaska the general land laws of the United States, as did the acts of 1884 and 1900. On the other hand, section 3 of the act (48 U. S. C. sec. 23), provides that "The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States." Prior to that act, at least eight acts had been passed establishing other territories and each contained substantially the same provision as that contained in the section 3. The provisions in the eight acts were coded as section 1891, Revised Statutes.⁸ Section 1891⁹ provided that "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States."

No decision has been found defining precisely the meaning of "locally inapplicable" as used in section 1891, the eight acts mentioned above or in section 3 of the act of August 24, 1912, *supra*.¹⁰ However, an act of Congress has been held "locally inapplicable" to a territory organized under an act containing a provision similar to that contained in section 3 of the act of August 24, 1912, *supra*, because: the act of Congress applied only to surveyed lands and no public land surveys had been made in the particular territory;¹¹ because the act of Congress, which regulated proceedings of the United States courts, was of special application to those courts;¹² because the act made grants only to States in existence on the date of the granting act and the particular territory was not then a State;¹³ because the act expressly related to a particular territory and by a later act the land involved had been made a part of another territory.¹⁴ On the other hand cer-

⁸ Revised Statutes of the United States enacted by Congress June 22, 1874.

⁹ Section 1891 and certain other sections of the Revised Statutes were repealed by the act of March 3, 1933 (47 Stat. 1429), as being obsolete.

¹⁰ There is a good discussion of the meaning of "locally inapplicable" in the Attorney General's Opinion of June 29, 1915 (30 Op. Atty. Gen. 387).

¹¹ *Stark v. Starrs*, 6 Wall. 402 (U. S. 1867).

¹² *Hornbuckle v. Toombs*, 85 U. S. 648 (1873).

¹³ *Rice v. Sioux City & St. Paul Railroad Co.*, 110 U. S. 695 (1884).

¹⁴ *Northern Pacific Railroad Company*, 27 L. D. 505 (1898); departmental instructions of May 10, 1904 (32 L. D. 604); see Attorney General's Opinion of July 31, 1889 (19 Op. Atty. Gen. 371).

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tain other acts of Congress have been held not "locally inapplicable" within the meaning of a provision similar to that in the section 3, contained in a territorial organization act and that by the provision the act of Congress had been extended to the particular territory.¹⁵

The above-quoted provision of section 3 of the act of August 24, 1912, *supra*, was cited by the United States Supreme Court in support of its decision that a certain section of an Article of the Constitution of the United States had been extended to the Territory of Alaska.¹⁶ The provision has been held to have extended to the Territory of Alaska, the general right-of-way acts of March 3, 1891 (26 Stat. 1095; 43 U. S. C. sec. 946),¹⁷ February 15, 1901 (31 Stat. 790, 43 U. S. C. sec. 959), and March 4, 1911 (36 Stat. 1253; 43 U. S. C. sec. 961).¹⁸ The similarly worded section 1891, Revised Statutes, has been held to have extended to the Territory the general Indian Allotment Act of February 8, 1887 (24 Stat. 390; 25 U. S. C. sec. 331),¹⁹ the Forest Exchange Act of March 20, 1922 (42 Stat. 465; 16 U. S. C. sec. 485),²⁰ and the Highway Right-of-Way Grant made by section 2477, Revised Statutes (43 U. S. C. sec. 932).²¹ However, as late as 1921, the Committee on Public Lands of the House of Representatives of the 67th Congress was of the opinion that the Isolated Tract and certain other acts did not apply to the Territory of Alaska. The committee in its report of October 27, 1921, on H. R. 8842, a bill providing for agricultural entries on oil, gas and coal lands, which after amendments, eventually became the act of March 8, 1922 (42 Stat. 415; 48 U. S. C. sec. 376), stated that the provisions of the act of July 17, 1914 (38 Stat. 509; 30 U. S. C. sec. 121) :

* * * would not fit Alaska, because all of the non-mineral land laws of the United States are not applicable to Alaska, Congress having purposely extended only certain of the laws to that Territory, such as the homestead and homesite laws, but not extending to Alaska the numerous scrip laws which apply to the United States, the timber and stone act, the pre-emption law, the isolated tract law, and various other more or less speculative forms of public land disposition.²²

¹⁵ *Hoffman v. County Commissioners*, 41 Pac. 566, 573 (Okla., 1895); *United States v. McMillan*, 165 U. S. 504, 511 (Utah, 1897).

¹⁶ *Mulloney v. Anderson*, 342 U. S. 415 (1952).

¹⁷ 43 CFR 74.24 (b).

¹⁸ 30 Op. Atty. Gen. 387 (1915).

¹⁹ *Nagle v. United States*, 191 Fed. 141 (1911); see Secretary's opinion of February 24, 1932 (53 I. D. 593).

²⁰ Opinion dated January 18, 1950, by the Solicitor of the Department of Agriculture, followed by the Department of Interior's approval of exchange selection Anchorage 013672 under the act of 1922. The opinion is based partly on section 1891, Revised Statutes, and partly on the wording of the act of 1922.

²¹ *United States v. Rogge*, 10 Alaska Reports 130 (1941).

²² Prior to the act of August 24, 1912 (37 Stat. 512; 48 U. S. C. sec. 21), the homestead laws had been extended to Alaska (act of May 14, 1898, 30 Stat. 409). Certain of the townsite laws had been in effect since the act of March 3, 1891 (sec. 11, 48 U. S. C. sec. 355).

The report further stated in referring to the act of 1914 that the "General Land Office holds that it does not apply to Alaska." The Department's favorable report on H. R. 8842 did not mention the act of July 17, 1914, *supra*. Neither in the committee's nor in the Department's report on H. R. 8842 or in the debate on the bill is there anything indicating that either section 3 of the act of August 24, 1912, *supra*, or section 1891, Revised Statutes, was given any consideration as to whether it had extended to the Territory, the act of 1914.

An examination of the legislative file concerning S. 60, which after amendments, became the said act of July 17, 1914, discloses that the Department recommended that the bill be made applicable to all of the public lands, excepting those in Alaska. In a subsequent report the Department omitted any reference to Alaska. The act of July 17, 1914, is silent as to that Territory. However, the first regulations under the act expressly state that the act does not apply to the Territory,²³ and the current regulations also exclude Alaska.²⁴

Of course the Committee on Public Lands in its consideration of H. R. 8842 found it necessary to determine whether the act of July 17, 1914, *supra*, was applicable to the Territory. If it was, enactment of the bill was necessary only as to coal, as the act of 1914 provides for agricultural entries on lands containing oil, gas and certain minerals other than coal. However, the Isolated Tract Act had no relation to H. R. 8842 and there was no necessity for the committee to determine whether that act was applicable to the Territory. Therefore, I do not think that the committee's statement in its report of October 27, 1921, need be accepted as its considered judgment and as controlling with respect to the question whether the Isolated Tract Act is applicable to the Territory.²⁵ At best, the committee's statement might be considered strongly persuasive if there existed any consistent line of departmental or court decisions holding that during the course of the years Congress has established a policy that in order for an act to be applicable to the Territory of Alaska, the act must expressly so provide. But I find no such holdings.²⁶ On the other hand, the fact that Congress found it necessary to expressly provide in each of the acts of 1884 and 1900 that it should not be construed as putting in force in the Territory, the general land laws of the United States indicates that no such policy was ever established by Congress; otherwise it would have been unnecessary to insert such provisions in those acts.

²³ Regulations of March 20, 1915 (44 L. D. 32).

²⁴ 43 CFR 102.22-102.33.

²⁵ See *Bate Refrigerating Co. v. Sulsberger*, 157 U. S. 1, 42 (1894).

²⁶ This also seems to have been the opinion of the Attorney General (30 Op. Atty. Gen. 387).

October 12, 1955

I find no reason either in the Isolated Tract Act of 1846, its amendments, or elsewhere, for questioning the legality of the disposals of public lands under that act in the various territories before they were admitted into the Union, as soon as the extension of the surveys into the territories and the availability of isolated tracts permitted. Neither do I find any reason for making any distinction between those territories and the Territory of Alaska. Although that Territory was acquired after 1846, a general rule of statutory construction is that an act is prospective in its applicability and that its applicability is not confined to things in existence when the act was passed.²⁷ That rule seems applicable here.

The rectangular system of surveys of the public lands was extended to the Territory of Alaska by the act of March 3, 1899 (30 Stat. 1098; 48 U. S. C. sec. 351). The extension has been followed by sufficient disposals of public lands in such patterns as to create isolated or disconnected tracts to which the Isolated Tract Act would apply. That act contains nothing limiting its scope to public lands in any particular area and it otherwise contains nothing to justify a conclusion that it is "locally inapplicable" within the meaning of those words as used in section 3 of the act of August 24, 1912, *supra*. I think that any doubt should be resolved in favor of the applicability of the act to the Territory. Therefore, in the absence of any convincing reason to the contrary, I must conclude that the act is part of "all laws" of the United States which section 3 provides shall have the same force and effect in the Territory as elsewhere in the United States. Consequently, the Public Sale Act, as amended, is now in full force and effect in Alaska.

J. RUEEL ARMSTRONG,
Solicitor.

APPEAL OF THE PELTON WATER WHEEL COMPANY AND BYRON JACKSON COMPANY

IBCA-16

Decided October 12, 1955

Contracts: Unforeseeable Causes

Article 5 of the standard form of Government supply contract, which prevents the Government from charging the contractor with excess costs when delays are due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, is not strictly applicable in determining whether

²⁷ Section 5102, Sutherland Statutory Construction, 3d ed.

the contractor is entitled to the benefit of escalation clause by reasons of such delays, but the provision of the contract may nevertheless be applied by analogy.

Contracts: Unforeseeable Causes—Contracts: Subcontractors and Suppliers

Insolvency of a subcontractor or supplier is not an unforeseeable and excusable cause of delay entitling a contractor to the benefits of an escalation clause.

Contracts: Delays of Contractor—Contracts: Changes

Delay in the completion of pumps due to additional model tests voluntarily undertaken by contractor in order to discover cause of vibration in the pumps is not an excusable cause of delay entitling the contractor to the benefits of an escalation clause, even though technical problems of unusual difficulty may have been involved in the manufacture of the pumps, nor can adjustments made in the pumps be held to constitute changes which would entitle the contractor to extensions of time by way of an equitable adjustment under Article 2 of the contract when the contractor voluntarily accepted the responsibility for making the changes.

Contracts: Interpretation—Contracts: Performance

When the specifications limited the application of an escalation clause to the period from bidding to shipment, the contractor is not entitled to the benefit of the clause beyond the period when shipment was due, even though after installation of the pumps it was found that adjustments were necessary.

BOARD OF CONTRACT APPEALS

The Pelton Water Wheel Company and Byron Jackson Company, under Contract No. I2r-16882, dated May 28, 1946, with the Bureau of Reclamation, agreed to furnish six pumps for the Grand Coulee pumping plant, Columbia Basin Project.¹ The contract was on U. S. standard form of supply contract No. 32, revised June 18, 1935. The pumps were to be the largest in the world, involving new and intricate features, and Schedule 2 of Specifications No. 1128 provided that a model should be constructed, model tests made, and a report of approved model tests with prototype drawings furnished within 280 calendar days after date of receipt of notice of award of contract. Notice of award was received by the contractor on May 31, 1946, and notice to proceed with manufacture was received on December 16, 1946.

By Change Order No. 1, dated February 26, 1948, the contractor was allowed 274 calendar days' additional time for performance of work under the contract. The dates thus established for final completion, actual final shipping dates, and the number of days' delay for each pump, are shown by the following tabulation in the findings of fact and decision of the contracting officer dated October 5, 1953:

¹The two corporations performed the contract as a joint venture, and, therefore, the term "contractor" will be used to represent the entity.

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	Original contract due date	Due date as extended by OFC No. 1	Final shipping date	Calendar days delay
First pump.....	8-7-48	5-8-49	3-26-51	687
Second pump.....	10-6-48	7-7-49	4-7-51	639
Third pump.....	12-5-48	9-5-49	10-19-51	774
Fourth pump.....	2-3-49	11-4-49	12-6-51	762
Fifth pump.....	4-4-49	1-3-50	4-1-52	819
Sixth pump.....	6-3-49	3-4-50	7-25-52	874

These delays and the question of their excusability arise under Paragraph 24 of the specifications, which provided for escalation with respect to the cost of labor and materials, as follows:

Sixty (60) percent of the original total contract price for any complete unit of apparatus and for the spare parts included in the contract shall be subject to adjustment at the completion of the contract to compensate for changes in the cost of labor and materials during the period of time from and including the month in which bids were opened to and including the month in which shipment of such complete unit of apparatus or of the spare parts included in the contract is completed, exclusive of the time intervening between the month in which bids are opened and the month within which notice to proceed is issued.

The contractor had originally sought to have this provision made applicable up to the date of actual completion of the contract. But the Comptroller General of the United States held in the case of *The Darby Corporation* (B-105694), dated May 4, 1955, that the application of a similar escalation clause was barred by delay in the completion of the contract unless "the delay was caused by the Government or otherwise was excusable under the terms of the contract." The Comptroller General based this decision on the ground that there was "no valid reason, in law or equity, for requiring the Government to assume the burden of price increases occurring after the final date of delivery would have been made but for the contractor's own fault or negligence." After this decision was rendered, the contractor took the position that there were other excusable delays than those allowed by the contracting officer in his findings of fact and decision of the contracting officer dated October 5, 1953, and that it should, therefore, have the benefit of the escalation clause for such additional periods of time.

Prior to the issuance of the findings of fact and decision of the contracting office, the contractor had given proper notice of a number of causes of delay which were alleged to be excusable and beyond the control of the contractor. These causes were set out in a letter from the contractor dated December 15, 1952, and identified by alphabetically designated appendices hereinafter referred to.

The contracting officer considered the causes of delay advanced by the contractor and found some of them to be excusable under the terms of the contract. He, accordingly, granted certain extensions of time which are summarized in the findings of fact and decision as follows:

	Due date as extended by OFC.No. 1	Excusable delay (calendar days)	Revised contract completion date
First pump.....	5-8-49	282	2-14-50
Second pump.....	7-7-49	288	4-21-50
Third pump.....	9-5-49	445	11-24-50
Fourth pump.....	11-4-49	445	1-23-51
Fifth pump.....	1-3-50	445	3-24-51
Sixth pump.....	3-4-50	445	5-23-51

By letter dated November 3, 1953, the contractor filed its notice of appeal from this decision but subsequently requested that a hearing on the appeal be delayed until the Darby case, *supra*, had been acted upon.

Therefore, it was not until June 20, 1955, that a hearing was held on this appeal, and this was in the nature of an informal conference at the Denver Federal Center, Denver, Colorado. All three members of this Board were present at the conference at which the contractor was represented by Evan H. Sweet, Esq., of Los Angeles, California, and the Government by Merlyn E. Modig, Esq., Attorney-Advisor, of the Denver office of the Department of the Interior.

The conference resulted in the simplification of the issues and a reduction in the number of claims. The contractor approved and acquiesced in the findings of fact and decision of the contracting officer, dated October 5, 1953, as to Item 6, Appendix C; Item 7, Appendix D; Item 10, Appendix G; and Item 12, Appendix H (b). The Board, without formal decision, but with no objection on the part of contractor's counsel, eliminated Item 4, Appendix A, and Item 13, Appendix H (c), thus affirming the contracting officer's decision as to these items.

The conference was adjourned with the understanding that the contractor would have the opportunity to furnish additional evidence and supporting legal authorities as to its remaining claims. Pursuant to such understanding, counsel for contractor submitted under date of July 7, 1955, additional evidence of factual material relating to claims identified as Item 5, Appendix B; Item 11, Appendix H (g); and Item 14, Appendix H (d), and filed a supporting brief covering these three items as well as Item 8, Appendix E, and Item 9, Appendix F.

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The material and brief submitted by the contractor was considered by the contracting officer with the result that supplemental findings of fact and decision were issued under date of July 21, 1955. Additional extensions of time were granted therein as to Item 5, Appendix B, and Item 14, Appendix H (d), although not in the amount requested, and any extension as to Item 11, Appendix H (a) was denied.

The contractor, by letter dated August 2, 1955, accepted as satisfactory the supplemental findings of fact and decision in their entirety. This letter read in part as follows:

The Contractors, The Pelton Water Wheel Company and Byron Jackson Co., hereby accept these findings as satisfactory, with the understanding that the acceptance of these findings in regard to the above referred to matters will not in any way affect action of the Appeal Board on the remaining items of claim.

As a result of the Denver conference and the supplemental findings of fact and decision accepted as satisfactory by the contractor, there remain for consideration by the Board only two claims, Item 8, Appendix E, and Item 9, Appendix F.

The Government and the contractor have assumed that the excusability of the contractor's delays should be determined in accordance with the provisions of Article 5 of the contract. In his findings of fact and decision of October 5, 1953, the contracting officer pointed out that this provision only defined "excusable delays as applied to assessment of excess costs in the event of termination of the contractor's right to proceed for failure to deliver within the time specified in Article 1," and that the contractor's right to proceed had not been terminated in this case. The contracting officer considered, nevertheless, that "Article 5 of the contract is the appropriate article from which it may be determined when the contractor is in default for delay."

Under Article 5 delays are excusable when 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, and unusually severe weather, and delays of a subcontractor due to such causes * * *." However, since Article 5 is applicable only to the determination of excess costs, it does not extend in express terms to delays involved in the application of an escalation clause. If delays may be excusable, it is only because the Comptroller General has held in effect that the implied condition which is to be read into the escalation clause is limited in its scope to delays which are not due to the fault or negligence of the contractor. Since this, in its essence, is the purport of Article 5, the Board assumes that it is the intention of the Comp-

troller General that it shall be applied by analogy. Presumably, also, a delay would be excusable if the contracting officer ordered changes to be made in drawings or specifications, for Article 2 of the contract provides for an equitable adjustment when "such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance * * *." In the light of these considerations, the Board will separately examine the two remaining items of claim.

ITEM 8, APPENDIX E

Under this item of the claim the contractor seeks an extension of 120 days in the time fixed for performance of the contract because of the insolvency of its subcontractor, Christison Engineering Company. The contractor alleges that this company "had been in business for a number of years and had been doing a substantial amount of subcontract work for the Pelton Water Wheel Company during this time," and that it was selected because of its close proximity to the Byron Jackson Company plant. It is further alleged that, although at the time the contract was made "there was no question as to the solvency of this company," it ran short of working capital and was forced into involuntary bankruptcy as the result of the action of a disgruntled creditor with the result that its operations were closed down, and its assets liquidated at a sale in which the Pelton Water Wheel Company acquired them. The Christison Engineering Company became insolvent on March 17, 1948, but its assets were not acquired until September 22, 1948.

It is the contention of the contractor that the insolvency of the subcontractor was totally unexpected, and beyond its control, and, therefore, constituted an unforeseeable cause of delay. The Board readily understands that the contractor may have been taken completely by surprise by the sudden and unfortunate development in the subcontractor's financial affairs, but it does not necessarily follow that the delay which resulted therefrom was excusable.

This is the first time that the Board has had advanced before it the proposition that unexpected insolvency of a subcontractor is an excusable cause of delay in the performance of a contract. Both counsel for the contractor and counsel for the Government admit that they have found no cited legal authority on this precise point, and this is impressive in itself, for there undoubtedly have been many instances where financial difficulties affected the performance of a Government contract.

In the absence of a compelling precedent, the Board can find no basis for finding that the rather common occurrence of financial difficulties and insolvency constitute an excusable cause of delay. Such

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a holding would open the door to an entirely new and very considerable field of excusable causes of delay, and would, in effect, tend to weaken substantially the performance of Government contracts.

Although no cases involving bankruptcy of a subcontractor as an excusable cause of delay have been called to the attention of the Board, it has been held that delays occasioned by the financial difficulties of a prime contractor are not excusable.² The reason for this doctrine is that capacity and readiness to perform are the essential obligations of a contractor, and financial difficulties are extraneous to the contract. As the Supreme Court of the United States has said in *Carnegie Steel Company v. United States*, 240 U. S. 156 (1916): "Ability to perform a contract is of its very essence. It would have no sense or incentive, no assurance of fulfillment, otherwise; and a delay resulting from the absence of such ability is not of the same kind enumerated in the contract—is not a cause extraneous to it and independent of the engagements and exertions of the parties."

The contractor apparently contends, however, that the situation should be differently regarded if the financial difficulties are those of a subcontractor. With this the Board cannot agree. It is well settled that the failure of a supplier to perform an obligation is a normal hazard of business which a contractor must face.³ Delays of a subcontractor do not excuse the prime contractor from performing on time unless the subcontractor's difficulty itself results from an excusable cause under the contract.⁴ As the subcontractor had put itself in a position where it could be forced into bankruptcy, it was legally at fault.

The contractor relies upon two recent cases in which delays of subcontractors in performing their obligations appear to have been held to excuse the prime contractor, although the subcontractors may have been at fault. The circumstances in these cases appear to have been highly exceptional, and should be confined to their own facts. The question of the excusability of the delays in these cases arose, moreover, in connection with the assessment of liquidated damages. It has been held that provisions for liquidated damages should be strictly construed.⁵ But the present case involves an escalation clause, the appli-

² See *Buegeleisen T/A Joseph Buegeleisen Company*, BCA No. 45, December 15, 1942; 1 CCF 15; *Kietzman T/A Cinder Supply Co.*, BCA No. 189, Division No. 2, September 29, 1943, 1 CCF 704; *Reliable Barrel Company, Inc.*, BCA No. 1310, Division No. 1, March 28, 1947, 4 CCF 60, 271; *Northern Laboratories Limited*, BCA No. 101, November 22, 1949, 4 CCF 60, 800.

³ *Walsh Brothers v. United States*, 107 Ct. Cl. 627, 645 (1947); *J. F. White Engineering Corp.*, 61 I. D. 201 (1953).

⁴ *Krauss v. Greenberg*, 137 F. 2d 569 (3d Cir. 1943); *Walsh Brothers v. United States*, 107 Ct. Cl. 627, 645 (1947); *Harris v. Covington Hosiery Mills, Inc.*, BCA No. 260, Division No. 2, November 28, 1949, 4 CCF 60, 806.

⁵ See *Tobin v. United States*, 103 Ct. Cl. 480, 492 (1945); *Climatic Rainwear Co. v. United States*, 115 Ct. Cl. 520, 567 (1950).

cation of which will result in increasing the contract price to the Government, and the traditional principles governing delays of subcontractors should not be relaxed in such a case. Some weight should be given also to the circumstance that bankruptcy is not included among the specific causes which are enumerated in the provisions governing the excusability of delays in the standard forms of Government contracts. While it is true that these are not intended to be exclusive, and other causes of delay have been recognized,⁶ the enumerated causes have at least a greater *prima facie* validity. Under all the circumstances of the present case the item of claim based on the bankruptcy of the subcontractor must be rejected.

ITEM 9, APPENDIX F

The contractor seeks an extension of 365 calendar days under this item of claim, asserting that it was delayed to this extent by conducting voluntarily additional model tests and by making certain modifications in the pumps, as directed by the contracting officer. This claim item was denied by the contracting officer primarily upon the ground that the additional model tests and changes caused no delay in the manufacture and shipment of the pumps.

It is undisputed that when the first pump unit was installed at the site vibration difficulties were encountered in the pump discharge line. The contracting officer believed the trouble to be in the pump, while the contractor felt the vibration was caused by improper design and lightness of the penstocks, for which it had no responsibility.

The contractor reassembled the original model at its hydraulic testing facilities in Los Angeles, California, and began a series of tests which were to extend over a period of more than a year in an effort to correct the vibration problem. It is admitted that these tests failed to determine the cause of the vibration. Meanwhile the Bureau of Reclamation took steps to strengthen the penstocks and recommended certain modifications in the pumps at the site, to which the contractor agreed. The result was a satisfactory performance and acceptance of the pumps by the contracting officer, although more than a year had elapsed between the dates of actual shipment and final installation and acceptance thereof. The contractor contends that this delay was caused by acts of the Government and urges that the delay be excused under the provisions of the contract.

The causes of the original vibrations in the pump and discharge line cannot easily be determined from the record. Similarly, which corrective measures were most effective and to whom the credit is due for initiating them is not apparent from the record.

⁶ See, for instance, *H. B. Nelson Construction Company v. United States*, 87 Ct. Cl. 375, 386-89 (1938); *cert. denied*, 306 U. S. 661; *Bury Compressor Company*, CA-189 (October 19, 1953), reported in 61 I. D. 215.

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The contractor points out that these pumps were the largest in the world and of a new and complicated design. Some of the literature in the record states that no pump of comparable size had ever been manufactured anywhere, and describes the problem of developing the proper mechanical design. The inference is that the contractor should be given special consideration for undertaking by its contract the solution of a new problem of great magnitude and intricacy.

The Board feels that the decision of the Supreme Court in the case of *Carnegie Steel Company v. United States, supra*, makes this position untenable. In this case the steel company encountered difficulties in undertaking to produce, for the first time in history, face-hardened armor 18 inches in thickness. Delays in successfully manufacturing the product resulted and liquidated damages were assessed. The Court held that the delays were not excusable and stated:

It will be observed that the point in the case is a short one. It is whether the causes of delay alleged in the petition were unavoidable or were of the character described in the contract, that is, "such as fires, storms, labor strikes, action of the United States, etc." The contention that the alleged causes can be assigned to such category creates some surprise. It would seem that the very essence of the promise of a contract to deliver articles is ability to procure or make them. But claimant says its ignorance was not peculiar, that it was shared by the world and no one knew that the process adequate to produce 14-inch armor plate would not produce 18-inch armor plate. Yet claimant shows that its own experiments demonstrated the inadequacy of the accepted formula. A successful process was therefore foreseeable and discoverable. And it would seem to have been an obvious prudence to have preceded manufacture, if not engagement, by experiment rather than risk failure and delay and their consequent penalties by extending an old formula to a new condition.

Thus any delay which may have been due to the unusual and difficult technical problems involved in the work cannot be the basis for extending the escalation period.

As for the possibility that the adjustments made in the pumps may have constituted changes which would entitle the contractor to extensions of time by way of an equitable adjustment under Article 2 of the contract, the contractor has offered no proof to support such a conclusion. Indeed, by performing the work which was involved in the adjustments without protest, it would seem that the contractor voluntarily accepted the responsibility for undertaking it. The contractor argues, to be sure, that its failure to protest was based upon considerations of business policy, and it may also be true that its acceptance of responsibility for any changes may have been motivated by the assumption that this would not necessarily waive its right to the benefits of the escalation clause, since it had not then been determined that escalation could not be allowed during any period of inexcusable delay. Its motives, however, cannot affect the conclusiveness

of its decision, so far as its legal rights under the contract were concerned.

In any event, it would seem, as, indeed, the contracting officer held in declining to apply the escalation clause to this item of claim, that neither manufacture nor shipment was in fact delayed because of the additional model tests. In making the contract, the parties were, of course, free to provide for escalation of the cost of labor and materials for any period of time, or in connection with any phase of performance. The benefit of the escalation clause did not have to extend to the whole period required for the completion of the contract in all respects. Under paragraph 24 of the specifications the application of the escalation clause was carefully limited to the period from the month of bidding to the month of shipment of each complete unit of apparatus. The specifications also provided for the testing and acceptance of the pumps after they were shipped and installed. But these provisions, far from negating the conclusion that the benefit of the escalation clause was limited to the period when shipment was due under the terms of the contract, confirm it. If it had been intended to provide escalation for the period required for the *completion of the contract* it would have been easy to so provide. Instead, escalation was provided up to the period of the completion of the shipment. The pumps were no less complete within the meaning of paragraph 24 of the specifications because it was found upon installation that adjustments were needed. Moreover, the contractor shipped further pumps after the initial unit was found not to be operating satisfactorily, and it seemed apparent that additional work in the field would be required. This would seem to be some indication that the contractor attached the same importance to the act of shipment as did the contracting officer. The Board must conclude, therefore, that the contractor was not entitled to the benefit of the escalation clause with respect to this item of its claims.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the decision of the contracting officer, rejecting the claims of the appellant, is affirmed.

THEODORE H. HAAS, *Chairman.*

THOMAS C. BATCHELOR, *Member.*

WILLIAM SEAGLE, *Member.*

October 20, 1955.

ETHELYNDAL McMULLIN ET AL.

INTERNATIONAL MINERAL & CHEMICAL CORPORATION

A-27170

Decided October 20, 1955

Mining Claims: Generally

A conflict between a lode claimant and a placer claimant is an adverse claim within the meaning of Rev. Stat. 2325-2326 and may be made the basis of an adverse suit as provided therein.

Mining Claims: Generally

A suit pending between two mining claimants prior to the time when one claimant files an adverse claim against the other claimant under Rev. Stat. 2326 may, under proper circumstances, be considered as an adverse action brought under that section, and where the highest court of a State has specifically held, in a suit involving the same parties and the same mineral deposit, that the suit in the State courts constitutes such an adverse action, the Department will accept the State court's holding.

Mining Claims: Generally

Where an adverse suit brought in a State court pursuant to Rev. Stat. 2326 has terminated in a judgment adverse to the applicant for a mineral patent, he may not proceed further before the Department with his application and his application must be rejected.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Ethelyndal McMullin on her own behalf and on behalf of other claimants has appealed to the Secretary of the Interior from a decision dated December 13, 1954, by the Director of the Bureau of Land Management which held for rejection so much of their application for a placer mineral patent as conflicted with certain lode claims now held by the International Mineral & Chemical Corporation.

On August 2, 1934, McMullin, for herself and her co-claimants, filed mineral application Pueblo 056087 for the Mica Hill Placer No. 1 mining claim, covering the $N\frac{1}{2}SW\frac{1}{4}$, $N\frac{1}{2}SE\frac{1}{4}$ sec. 14, T. 18 S., R. 71 W., 6th P. M., Colorado. Publication was made from September 20 to November 22, 1934.

On October 15, 1934, the Colorado Feldspar Company filed a protest against McMullin's application and on November 14, 1934, it filed an adverse claim, Pueblo 056222, under Rev. Stat. 2326 (30 U. S. C., 1952 ed., sec. 30) against the application for a placer patent. The company claimed that it was the owner of certain lode mining claims covering part of the land included in the placer application and that such lode claims were prior valid claims.

Prior to these events Ralph H. Magnuson and Western Feldspar Milling Company, operators under a lease from the Colorado Feldspar

Company of one of the lode locations, had, on June 26, 1934, filed an action in the District Court for the Eleventh Judicial District of the State of Colorado in which the lode and placer claimants were interpleaded as defendants. The plaintiffs in the court action sought to have determined the proper party to whom they should pay the royalties due under their lease.

By a decision dated February 21, 1936, the District Court found that the lode claimant was entitled to possession of the lode claims and to the royalties. Upon appeal, the Supreme Court of Colorado affirmed in substance the decision of the District Court. *Ethelyndal McMullin et al. v. Ralph Magnuson et al.*, 78 P. 2d 964 (Colo., 1938).

Meanwhile on March 12, 1935, the Commissioner of the General Land Office (now the Director of the Bureau of Land Management), in response to a request for instructions from the register of the land office, directed the register to suspend action on the lode claimant's protest and all other action on the placer application for patent pending final disposition of the adverse claim. Upon appeal, the First Assistant Secretary affirmed the action of the Commissioner. *Colorado Feldspar Company v. Ethelyndal McMullin* (sic), A-18844 (October 2, 1935).

After the decision of the Colorado Supreme Court, it appears that the lode claimant remained in possession of its lode claims and continued to mine them. It did not attempt to have the claims patented to it under the provisions of Rev. Stat. 2326.

McMullin, either personally or through an attorney, informally asked several times in 1939 and 1940 that the Department take some further action in the matter. She was informed that no further action could be taken until a copy of the judgment roll in the adverse suit was filed as required by Rev. Stat. 2326 and the pertinent regulation. In 1948, further informal inquiries were made on McMullin's behalf. Finally on September 13, 1950, McMullin filed with the Bureau of Land Management in Washington a copy of the judgment roll and a document entitled "Petition and Brief of Placer Claimants, Ethelyndal McMullin et al., for Reopening and Completion of Proceedings upon Mineral Application (Pueblo 056087) for the Issuance of Patent upon Mica Hill Placer Mining Claim Number 1." In March 1951, McMullin filed a supplement to the brief.

By a decision dated March 17, 1953, the Assistant Director of the Bureau of Land Management directed the adverse claimant to submit within 30 days "such showing as it may desire with respect to the character of the [mineral] deposit."

Within the time allowed the International Minerals & Chemical Corporation submitted a showing in which it stated that it was the successor in interest of the original lode claimants and raised several

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objections to the decision of March 17, 1953. Thereafter it filed a supplement to its first showing and the placer claimant filed a reply brief.

In his decision of December 13, 1954, the Director held the placer application for rejection subject to the placer claimants' right to show within 30 days that the areas outside the boundaries of the lode claim are mineral in character and subject to location and patent under the placer mining laws.

From this decision the placer claimants have duly taken this appeal.

The brief outline of the lengthy proceedings in this matter has indicated that this appeal involves a conflict between a placer claimant and a prior lode claimant over the right to the same mineral deposit where a local court has held the lode claimant is entitled to the right of possession in a proceeding held by the court to have been brought pursuant to Rev Stat. 2326.

Because the effect of the decision of the Colorado Supreme Court upon their rights is one of the obstacles that the placer claimants must overcome, they have at the outset asserted that a conflict between a lode and placer claimant does not come under the provisions of Rev. Stat. 2326. They base their argument upon an analysis of the legislative history of the mining laws.

There is nothing in the language of the statute to indicate that a lode against placer conflict does not fall within its terms. Furthermore the Department and the courts have consistently and apparently without question treated such conflicts as falling within the terms of Rev. Stat. 2326.¹ Therefore, in view of the plain language of the statute and the practice of the Department and the courts, there can be no question at this date but that a placer-lode conflict is an adverse claim within Rev. Stat. 2326.

The appellants next contend that the proceeding in the Colorado courts was not a statutory adverse suit because the suit was instituted prior to the placer claimants' application for a patent and no proper pleading was filed within the 30-day period after the adverse claim was filed nor was an adequate pleading filed after the expiration of the 30-day period and during the pendency of the suit, amending a pleading filed within the statutory period.

It seems well established that a suit pending between the parties prior to the filing of an adverse claim may, under proper circum-

¹ *Alice Placer Mine*, 4 L. D. 314 (1886); *Apple Blossom Placer v. Cora Lee Lode*, 14 L. D. 641 (1892); *Aurora Lode v. Bulger Hill and Nugget Gulch Placer*, 23 L. D. 95 (1896); *Clipper Mining Co. v. Searl et al.*, 29 L. D. 137 (1899).

Bennett v. Harkrader, 158 U. S. 441 (1895); *Clipper Mining Co. v. Eli Mining and Land Company*, 194 U. S. 220 (1904); *Cole v. Ralph*, 252 U. S. 236 (1920); *Duffield v. San Francisco Chemical Co.*, 205 Fed. 480 (9th Cir. 1913); *San Francisco Chemical Co. v. Duffield*, 201 Fed. 830 (8th Cir. 1912).

stances, be considered as an action brought under Rev. Stat. 2326. *Northwestern Lode and Mill Site Company*, 8 L. D. 437 (1889); *Jones v. Pacific Dredging Co.*, 72 Pac. 956 (Idaho, 1903); *McMullin v. Magnuson*, *supra*; 3 Lindley on Mines (3d ed.) sec. 755; see *Christmann v. Yonkers*, 56 I. D. 34, 37 (1936).

The Supreme Court of Colorado cited this rule upon the appeal of the suit in which the parties here were interpleaded (*McMullin v. Magnuson*, *supra*), and then it specifically held that there was no necessity for the lode claimants to bring a separate adverse suit and that the pleadings were amply sufficient to raise the proper issues in support of the lode claimant's adverse claim.

Where a court of competent jurisdiction has directly ruled on a question relating to the timeliness of a statutory adverse suit, the Department has refused to take any proceedings in the case until the suit has terminated. *Catron et al. v. Lewishon*, 23 L. D. 20 (1896); *Gypsum Placer Claim*, 37 L. D. 484 (1909). In *Richmond Mining Co. v. Rose et al.*, 114 U. S. 576, 582 (1885), the Supreme Court held that what constitutes the commencement of an action in a State court is a matter of State law. After quoting the latter case, the First Assistant Secretary in the *Gypsum Placer Claim* case (*supra*) intimated that the question of the timeliness of the institution of an adverse suit after a State court has ruled upon the question is not an open one.

The same considerations apply to the question of whether proceedings in a State court were sufficient to satisfy the requirements of Rev. Stat. 2326. The placer claimants have not cited, nor have we been able to find, any case in which the Department has held, after a State court has ruled that a suit before it was sufficient to constitute a proceeding under Rev. Stat. 2326, that the Department would consider the suit not to have been of that nature.

Since the Department would necessarily have to rely upon the statutes of a State and the decisions of its courts to determine whether in any case an adverse suit was timely brought and the pleadings therein were sufficient, it would seem that, when the highest court of a State has held in the very suit with which the Department is concerned that the requirements of Rev. Stat. 2326 have been satisfied, the Department ought to abide by the court's determination.

This view is supported by the fact that one of the mining regulations provides:

Where an adverse claim has been filed but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the State court having jurisdiction in the case, and also by the clerk of the district court of the United States for the district in which the claim is situated, will be required. 43 CFR 185.83.

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After a State court has held that an adverse suit was timely commenced, it is difficult to see how a patent applicant who contends that it was not, can obtain the requisite certificate. Without the certificate the Department will not resume consideration of the patent application. Thus it appears that the regulation recognizes that the State court's view as to the timeliness of suit ought to be controlling.

In its decision of August 2, 1935, which in effect affirmed the view of the Commissioner that the lode claimant's protest against the placer patent application ought to be suspended until the adverse suit was terminated, the Department stated:

* * * In fact the Department is not advised that a suit has been timely instituted by the adverse claimant, and it possibly may be shown by the applicant for patent in the manner prescribed in section 88 [now 43 CFR 185.83] of the Mining Regulations that the suit was not timely filed, so that the Department could resume jurisdiction over the controversy, and consequently no occasion would arise for considering the scope and effect of a court's judgment. * * *

The placer claimant did not then avail itself of the provisions of then section 88 nor has it yet filed the certificate required by that regulation. Instead it has attempted to restore the jurisdiction of the Department over its patent application by filing a certified copy of the judgment roll in the very suit it contends was not a statutory adverse suit. I can find no warrant for this procedure. The placer applicant must either rest content with the judgment of the Colorado Supreme Court that a proper adverse suit was instituted and decided or file a certificate in compliance with 43 CFR 185.83 from the proper State court to the effect that no such suit was commenced within the required time.

It is concluded that the litigation in the Colorado courts was an adverse suit within the terms of Rev. Stat. 2326.

In view of this conclusion, there remains for consideration the question of the status before the Department of the placer claimants as the losing party in the adverse suit. This issue was fully discussed in the Department's decision of October 2, 1935, as follows:

- While it is true that the Government may not be bound by the finding of the court as to the placer or lode character of the land, as the case may be, and may refuse a patent to the successful litigant in the adverse proceedings if it is concluded upon due inquiry that title to placer deposits is attempted to be acquired by lode location or vice versa, it is also true that the unsuccessful litigant has no right to protest against the claim of the successful litigant on an issue that the court had jurisdiction to decide and which it did decide in its award of the right of possession. In the case above mentioned of *France and McCarn v. Travertine Products Corporation* [A-10062, January 29, 1927] it is believed that it was there said correctly:

"It does not follow that the Land Department must accept the judgment of the court as to the locatability of the land under the placer mining law, but it does follow that the parties to the suit and their privies as to all matters involved and settled in the suit are bound thereby. *Last Chance Min. Co. v. Tyler Min. Co., supra.* [157 U. S. 683, 694.] In the case last cited the Court said (p. 695),

'After such suit has been commenced and the defendants have been made parties thereto, and the court has proceeded to judgment, will the defendants be heard to say that that judgment amounts to nothing? We are clearly of the opinion this cannot be tolerated, that the judgment was in all respects regular, that it was conclusive as to the particular ground in controversy, and *binding by way of estoppel as to every fact necessarily determined by it * * **' [Italics supplied.]

"The lode claimant cannot therefore be heard to dispute, in an attempt to support its location, the findings against it, and it cannot by way of protest, contrary to rule 53 of the Mining Regulations, 'preserve a surface conflict * * * lost by the judgment of the court in an adverse suit.' As stated in *Lindley on Mines*, section 765, 'so far as the premises thus applied for are involved, the former patent applicant is eliminated from the proceeding, except that he may appear as a protestant and raise such questions as were not properly determinable by the court. Usually the matter rests thereafter between the Government and the adverse claimant.'"

The same rule applies where the adverse claimant is unsuccessful in the suit and seeks by protest to raise issues determined in the adverse proceeding between him and the patent applicant.

The placer claimants are not now before the Department as protestants but as petitioners for the reopening and completion of proceedings upon their application for a mineral patent upon Mica Hill Placer Number 1 mining claim. Having been the losing party in an adverse suit, they cannot proceed any further with their patent application so far as it covers the lode claims and their patent application, to that extent, must be rejected. *Brien v. Moffitt et al.*, 35 L. D. 32 (1906).

In view of the findings set out above, it is not necessary now to determine the effect of the judgment in the adverse suit upon the Department's authority to adjudicate the validity of the lode locations, including the question of whether the mineral deposits in the lode locations are subject to placer or lode location, upon an application by the lode claimant for a patent or in a contest instituted by the Government pursuant to 43 CFR, Part 222.

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 of December 13, 1954, is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

NORTHERN PACIFIC RAILWAY COMPANY, RALPH L. BASSETT

A-27114

*Decided October 20, 1955***Public Lands: Jurisdiction Over—Surveys of Public Lands: Generally**

An island which was stable land in the Yellowstone River when Montana became a State did not pass to the State upon its admission to the Union but remained public land subject to disposition under the public land laws.

Surveys of Public Lands: Generally

When in the course of a survey the banks of a river are meandered, the area within the meander lines is segregated from the survey and an island within the meander lines, otherwise unsurveyed, is not surveyed public land.

Railroad Grant Lands

Although title to an unsurveyed island in a navigable river passed to a railroad under its grant upon the filing of its map of definite location of its line, a patent confirming its right to "all" of the section in which the island is located, did not confirm its right to the unsurveyed island since the patent confirmed the railroad's right only to surveyed public land.

Railroad Grant Lands

A railroad's claim to an unsurveyed island within the primary limits of its grant is one of the types of claims which the railroad has relinquished under a release filed pursuant to the Transportation Act of 1940.

Rules of Practice: Private Contests

It is proper to reject an application for a contest where all the factors upon which the claim to a contest is based are shown by the records of the Bureau of Land Management.

Administrative Procedure Act: Hearings

The provisions of the Administrative Procedure Act relating to hearings are not applicable to proceedings before the Department involving the right of the Department to determine whether an island was omitted from the original survey and to issue an oil and gas lease for such island.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Northern Pacific Railway Company has appealed to the Secretary of the Interior from a decision dated September 28, 1954, of the Acting Director of the Bureau of Land Management, which affirmed the dismissal by the Area Administrator, Area 3, of its protest against the issuance of a noncompetitive oil and gas lease (Montana 011522) to Ralph L. Bassett for an unsurveyed island in the Yellowstone River in sec. 17, T. 14 N., R. 55 E., P. M., Montana.

Section 17 lies within the primary limits of the grant of odd-numbered sections made to the Northern Pacific Railroad Company, the predecessor in interest of the appellant, by the act of July 2, 1864 (13 Stat. 365), and the joint resolution of May 31, 1870 (16 Stat. 378).

The railroad filed its map of definite location of its line opposite section 17 in the General Land Office on June 25, 1881.

Section 17 was surveyed in 1882 and the plat of survey was approved on September 26, 1883. According to the plat, the Yellowstone River runs completely through section 17, entering the section at the southwest corner and leaving it in the eastern half of the northern boundary. The shores of the river are meandered and the section is divided into 7 lots and several regular subdivisions, with a total acreage of 398.68 acres. The plat of survey does not show an island in the present position of the island in question but indicates three sandbars in its place.

On May 20, 1884, the railroad filed list No. 3 for lands within the primary limits of its grant which included, among a great number of other sections, the "Whole" of section 17 containing 398.68 acres. On May 26, 1896, patent No. 15 was issued for "All of section seventeen containing three hundred and ninety-eight acres and sixty-eight hundredths of an acre." Patent No. 15 included an aggregate area of 654, 226.84 acres.

Under the date February 28, 1941, the railway filed a release pursuant to section 321 (b) of the Transportation Act of 1940 (49 U. S. C., 1952 ed., sec. 65 (b)) in which it relinquished all claims to lands granted to it by any act of Congress except, among others, lands which had been patented or certified to it in aid of the construction of its railroad.

On May 8, 1953, Bassett filed an offer to lease for oil and gas (Montana 011522) pursuant to section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226), for an unsurveyed island comprising 73.50 acres in section 17. The land office manager signed the lease on June 8, 1953, effective July 1, 1953.

On January 12, 1954, the railway filed a protest against the issuance of the lease in which it alleged that title to the island was in it. Thereafter, on January 26, 1954, the railway filed a document in apparent compliance with the pertinent regulation relating to applications to contest (43 CFR 221.2; 19 F. R. 9057). By a decision dated May 7, 1954, the Area Administrator, Area 3, denied the railway's protest. Upon appeal to the Director of the Bureau of Land Management, the decision of the Area Administrator was affirmed and the railway has duly appealed to the Secretary of the Interior.¹

The railway company contends that the island was patented to it

¹ The State of Montana had also filed a protest against the lease after it had been issued, which was dismissed by the manager. The State appealed this action to the Director, who affirmed it. The State has not appealed to the Secretary and thus must be deemed to have acquiesced in the Director's decision.

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along with the rest of section 17 and that the release had no effect upon its title to the island.

A preliminary question is whether title to the island passed to the State of Montana upon its admission into the Union in 1889. The familiar rule is that upon the admission of a State to the Union title to the beds of all navigable rivers within its boundaries passes to it (*Scott v. Lattig*, 227 U. S. 229, 242, 244 (1913)) and that islands arising in a river thereafter are not public land (*State of Oregon*, 60 I. D. 314 (1949)). However, islands in existence at the time when a State is admitted to the Union, whether surveyed or not, remain public land of the United States (*id.*; *Moss v. Ramey*, 239 U. S. 538 (1916)).

Although the 1883 plat of survey indicates the island as sandbars, a chart of the Yellowstone River prepared by the Corps of Engineers, United States Army, and apparently based on data secured as of October 23, 1878, shows an island in the river covering a part of the same position as is occupied by the present island. The chart also shows the north end of the island covered with brush and timber where the present island has the heaviest timber. The railway has also submitted a map prepared by its predecessor in 1881-1882, which shows an island in the same position as the Corps of Engineers' map and indicates brush throughout the length of the island. A field examination conducted in 1954 concluded, on the basis of the Corps of Engineers' chart and the railroad map and the existence of trees of probably more than 60 years of age on the island, that "a part of the island has been in continuous existence above mean high water mark, and supporting brush and timber since prior to the date of the original survey and the date the State of Montana was admitted to the Union in 1889."

It is therefore concluded that the island was in existence when Montana was admitted to the Union and was then public land of the United States subject to disposition under its laws.

This conclusion leads to the consideration of whether the United States has disposed of the island or, having disposed of it, has regained title to it and may now dispose of it again.

The island is within an odd-numbered section of land within the primary limits of the grant made to the railroad by the act of July 2, 1864. The effect of this grant has been summarized in a recent departmental decision, which also was concerned with an unsurveyed island within the primary limits of the grant to the railroad, as follows:

* * * By section 3 of that act, there were granted to the company, *in praesenti*, and within certain limits, the odd-numbered sections of public land, not mineral in character, which were not reserved, sold, granted, or otherwise appropriated, and which were free from preemption or other claims as of the

time when the line of the railroad was definitely located. Section 6 of the act provided that, after the general route of the railroad should be fixed, the odd-numbered sections thereby granted should not be liable to sale, entry, or preemption, except by the company.

The line of the railroad was definitely located in the area of the island in question in the early eighties. * * * There is nothing in the records of the Department to indicate that the land was at that time reserved, sold, granted, or otherwise appropriated, or that it was subject to preemption or other claims or rights. This being so, the island passed to the railroad company, unless it was mineral in character. *Floyd Hamilton*, 60 I. D. 194 (1948).

The decision pointed out, however, that although the unsurveyed island there involved had passed to the railroad, the railroad gave up its claim to the island when, no patent having been issued confirming the railroad's title to the island, the railroad filed a release under the Transportation Act of 1940, *supra*. That act provided for the elimination of preferential traffic rates enjoyed by the United States in connection with certain of its railroad transportation requirements. Section 321 (b) of the act required that before any carrier by railroad which had received a land grant might take advantage of the benefits offered by that act, it must release "any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest. * * *." Section 321 (b) provided for certain exceptions from the release. The only exception material here is that nothing in section 321 (b) should be construed as requiring any carrier to reconvey to the United States lands which had been theretofore patented or certified to it. It should be noted that under section 321 (b), a railroad, by filing a release, gave up its title to any land that had previously been granted to the railroad, if a patent had not been issued to the railroad confirming its title to the granted land.

Thus, unless the island involved in this appeal comes within this exception, the appellant must be deemed to have released its claim to it, for a claim to land, surveyed or unsurveyed, falling within the primary limits of a railroad grant plainly comes within the terms of the statute and the release. *Floyd Hamilton, supra*.

Therefore, we must determine whether the island is included within the patent granting all of section 17 to the railroad.

Since it is well established that a patent can convey or confirm title only as to surveyed land,² it must first be decided whether the island was surveyed at the time when the patent was issued in 1896.

² *Rust-Owen Lumber Company* (On Rehearing), 50 L. D. 678, 683 (1924); *Horne v. Smith*, 159 U. S. 40, 45 (1895).

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The 1883 plat of survey indicates that the surveyor located all the corners of section 17 except the southwest corner, which in its regular position would have been in the Yellowstone River. In lieu of this corner, the surveyor located a meander corner on each bank from each of which he ran meander lines to other meander corners at the points where the northern line of the section crossed the river as it left the section. Thus, although three corners of section 17 were established and the section lines run almost completely, the section was divided into two parts by the meandered banks of a navigable river.

It is well established that a meander line run in the survey of particular portions of the public domain bordering on a stream or other body of water is not run as a boundary of the tract surveyed, but for the purpose of defining the sinuosities of the bank or shore and as a means of ascertaining the quantity of land within the surveyed area. In preparing the official plat of survey, such line is represented as the border line of the water and shows ordinarily to a demonstration that the water course and not the meander line is the boundary. *Railroad Company v. Schurmeir*, 7 Wall. 272 (1868); *Whitaker v. McBride*, 197 U. S. 510 (1905). The rules and the exceptions to them have usually been stated in cases concerned with whether tracts outside the meander line but attached to the mainland pass with a patent of the mainland. Compare *Producers Oil Co. v. Hanzen*, 238 U. S. 325 (1915), and *Jeems Bayou Fishing and Hunting Club v. United States*, 260 U. S. 561 (1923), with *United States v. Lane*, 260 U. S. 662 (1923). Our problem, however, is to determine whether an island within the meanders is to be considered as having been surveyed when the section lines were run.

Besides furnishing a method of computing the upland acreage, a meander line also marks the limits of the Government survey. In other words when a survey stops at the margin of a navigable river, the land, presumably the bed of the river, within the meander lines is segregated from the public lands and is not considered to have been surveyed. *Lee Wilson & Co. v. United States*, 245 U. S. 24, 29 (1917).

Applying this rule to the facts in this case, I must conclude that the 1882 survey and the plat based thereon returned as surveyed land in section 17 only the two tracts, the one terminating on the left bank of the river and the other on the right bank, with the area in between, the bed of the river, having been segregated from the survey and left unsurveyed. This accords with the statement made in *Floyd Hamilton, supra*, where the situation was somewhat similar to the one in this matter:

* * * Although the section lines of section 29 were surveyed, the meander lines of the island were not run, and the island was thus left unsurveyed. * * * (P. 195.)

Islands which lie within the meander lines of navigable or non-navigable rivers and which were omitted from the original survey have in many cases been held to remain public land subject to later survey and disposition by the United States. *Scott v. Lattig, supra*; *Bode v. Rollwitz*, 199 Pac. 688. (Mont., 1921); *Moss v. Ramey, supra*; *State v. Oregon, supra*; *Emma S. Peterson*, 39 L. D. 566 (1911).

The railway urges that cases such as *Scott v. Lattig* are distinguishable because in them only lots abutting on the river on one bank were conveyed, not the entire section as here. It urges that the rule is otherwise where an entire section is conveyed citing *United States v. State Investment Co. et al.*, 264 U. S. 206 (1924), which held that, after a tract of land has been surveyed and patented by the United States, its boundary cannot be affected to the prejudice of the owner by surveys and rulings of the Land Department. This case was concerned with whether a boundary of a private grant should be where the first Government survey placed it on the ground and according to which the patent was issued or whether it should be located according to the calls for distances. It sheds no light upon the problem involved in this matter.

The railway's case is based essentially on the proposition that, although the island has never been surveyed, the island was included in the patent issued to it because, when the railroad applied for the patent, it included the "Whole" of section 17 in its List No. 3 and the patent was issued to it for "All of section seventeen." This contention is effectively refuted by cases involving essentially the same situation.

In *Chapman & Dewey Lumber Co. v. St. Francis Levee District*, 232 U. S. 186 (1914), there was a controversy as to whether 8,000 acres of swamp land had been patented to the State of Arkansas in 1858 pursuant to the Swamp Land Act of 1850 (9 Stat. 519). The 8,000 acres were included in a township the exterior lines of which were surveyed in 1840 and 1841. These lands, however, were excluded from the survey, were meandered as if they were a lake, and were designated on the official plat of survey as a meandered body of water called "Sunk Lands." The plat bore an inscription that the surveyed lands totaled 14,329.97 acres (a regular township contains 23,040 acres). In 1853 the State of Arkansas requested that the township be listed and patented to it as swamp lands, the State describing the township as containing 14,329.97 acres. A patent was issued to the State for "The whole of the Township (except Section sixteen), containing thirteen thousand, eight hundred and fifteen acres and sixty-seven hundredths

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of an acre * * * according to the official plats of survey of said lands * * *.”³ In fact, the Sunk Lands were not a lake but only temporarily overflowed land.

The lower courts held that the words “The whole of the Township (except Section sixteen),” as used in the patent, embraced all that was within the exterior lines of the township, except section 16, whether surveyed or unsurveyed and even although meandered and excluded from the survey. The Supreme Court held to the contrary, stating—

Of course, the words in the patent “The whole of the Township (except Section sixteen)” are comprehensive, but they are only one element in the description and must be read in the light of the others. The explanatory words “according to the official plats of survey of said lands returned to the General Land Office by the Surveyor General” constitute another element, and a very important one, for it is a familiar rule that where lands are patented according to such a plat, the notes, lines, landmarks and other particulars appearing thereon become as much a part of the patent and are as much to be considered in determining what it is intended to include as if they were set forth in the patent. * * * The specification of acreage is still another element, and, while of less influence than either of the others, it is yet an aid in ascertaining what was intended, for a purpose to convey upwards of 22,000 acres is hardly consistent with a specification of 13,815.67 acres. * * * Giving to each of these elements its appropriate influence and bearing in mind that the terms of description are all such as are usually employed in designating surveyed lands, we are of opinion that the purpose was to patent the whole of the lands surveyed, except fractional section 16, and not the areas meandered and returned, as shown upon the plat, as bodies of water. That it is now found * * * that these areas ought not to have been so meandered and returned, but should have been surveyed and returned as land, does not detract from the effect which must be given to the plat in determining what was intended to pass under the patent. (Pp. 196-197.)

In *Lee Wilson & Co. v. United States, supra*, a similar situation was presented. There again a plat of survey of a township showed a lake which was meandered and thus excluded from the survey. The State of Arkansas filed a selection of the township as swamp land, giving the acreage of the township exclusive of the area of the lake as meandered (853.60 acres). A patent was issued in the language of the patent in the *Chapman & Dewey Lumber Co.* case, the patent reciting the acreage of the township exclusive of a school section and the area of the meandered lake. Over 50 years later, the Department investigated the survey, found that there had been no lake, and ordered the area of the fictitious lake surveyed. In the intervening period, the State had assumed that all the land in the township, whether surveyed or unsurveyed, had passed to it.

³ Section 16, a school section, had already passed to the State. Its acreage, 514.30 acres, deducted from the 14,329.97 acres, left the figure of 13,815.67 acres used in the patent.

Holding that the patent did not include the unsurveyed area of the "lake," the Court said:

It thus becomes apparent that the subject of the controversy relates solely to the unsurveyed area resulting from the erroneous assumption as to the existence of a lake and embraces only 853.60 acres. It also is certain that as the result of the concurrent findings of fact by the two courts and the admission made by the parties there is no controversy as to the facts concerning the error committed as to the supposed lake, leaving therefore to be decided only the legal questions which arise from the admitted facts. As a means of putting out of view questions which are not debatable we at once state two legal propositions which are indisputable because conclusively settled by previous decisions.

First. Where in a survey of the public domain a body of water or lake is found to exist and is meandered, the result of such meander is to exclude the area from the survey and to cause it as thus separated to become subject to the riparian rights of the respective owners abutting on the meander line in accordance with the laws of the several States. *Hardin v. Jordan*, 140 U. S. 371; *Kean v. Calumet Canal Co.*, 190 U. S. 452, 459; *Hardin v. Shedd*, 190 U. S. 508, 519.

Second. But where upon the assumption of the existence of a body of water or lake a meander line is through fraud or error mistakenly run because there is no such body of water, riparian rights do not attach because in the nature of things the condition upon which they depend does not exist and upon the discovery of the mistake it is within the power of the Land Department of the United States to deal with the area which was excluded from the survey, to cause it to be surveyed and to lawfully dispose of it. *Niles v. Cedar Point Club*, 175 U. S. 300; *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47; *Security Land & Exploration Co. v. Burns*, 193 U. S. 167; *Chapman & Dewey Lumber Co. v. St. Francis Levee District*, 232 U. S. 186.

* * * * *

*** it is *** insisted that although the patent expressly referred to the plat and survey and purported only to grant the acreage surveyed as reduced by the exclusion from the survey of the body of the lake, that becomes negligible since the right of the State depended upon the grant made by the Swamp Land Act, the selection made under that act and the approval of that selection by the Act of Congress of 1857, all of which must be considered in determining the grant made to the State and give rise when considered to the irresistible implication that all the land embraced in Township 12 passed to the State. Concretely stated the proposition is this: That as the selection made by the State was of Township 12, the exterior bounds of that township became the measure of the State's title irrespective of what was surveyed or unsurveyed within those exterior lines. But it is at once obvious that this proposition rests upon a contradictory assumption, since it treats the designation of Township 12 as the measure of the rights conferred and immediately proceeds to exclude from view the criteria by which alone the existence and significance of the insisted upon designation (Township 12) are to be determined. Aside from this, however, it is further apparent that the contention disregards the very basis upon which the decided cases upholding the doctrine stated in the second proposition rest, which is that the effect of a meander line is to exclude absolutely from the township the area meandered and to cause therefore its nature and character to depend not upon the exterior lines of the

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township but upon the condition existing within those lines made manifest and fixed by the necessary legal consequences resulting from the meander line. This conclusive view is clearly pointed out in *Chapman & Dewey Lumber Co. v. St. Francis Levee District, supra*, pp. 196, 197. And that case also, p. 198, completely answers the argument that although the land was not embraced in the selection, was not included in the township because unsurveyed and did not pass by the patent or the selection independently considered, it yet must be treated as having passed to the State under the Swamp Land Act of 1850 because it was eligible to be selected under that act.

In *Rust-Owen Lumber Company (On Rehearing), supra*, the original plat of survey showed a lake covering a portion of sections 20 and 29. A new survey showed that instead of one lake in the two sections there were two small lakes with a large body of land lying between the two lakes which had not been surveyed in the original survey. The new survey was protested by the Rust-Owen Lumber Company which claimed title to all of section 29 by transfer from the grantee under an act of Congress whereby the entire section was granted to the State of Wisconsin for railroad purposes. The Department held:

* * * The Department is not disputing the equitable title of the railroad company or its transferee to all of Sec. 29 under the grant, but the patent conveyed legal title to the surveyed land only, and it is the duty of the Department * * * to have the omitted area surveyed and patent properly issued.
* * * (50 L. D. 678, 683 (1924).)

The same view has been expressed by a State court. In *Steckel v. Vancil*, 141 Pac. 550 (Kans., 1914), which involved title to an unsurveyed island in a navigable river, the court held:

A part of the land in controversy is situated within the boundaries of a section which was conveyed by the state to the Atchison, Topeka & Santa Fe Railroad Company in 1893. The plaintiff contends that his own prior possession entitled him to a recovery as to this tract, inasmuch as the defendant acquired nothing by his purchase, because the state had already parted with its title. The state in deeding to the railway company "all of" a certain section would not be regarded as parting with its title to everything within the boundary of the section. It could not absolutely divest itself of the title to the bed of a navigable stream. But apart from this incapacity it would not be deemed to intend such a divestiture. Such a conveyance is to be interpreted with reference to the government survey, and the natural inference is that its purpose was to pass title to the tracts there shown, with an implied reservation of the bed of the stream, *including any unsurveyed islands.* This view finds additional support in the fact that the railroad company has deeded away, by specific description, all the land in the section shown by the survey, and has never (so far as shown) made claim to any of the land in dispute. [Italics added.]

The four cases just discussed clearly establish the proposition that the mere fact that a patent in terms recites that it covers "all" of an entire section or township does not alone import an intent to convey all

the land in the section or township, whether the land is surveyed or unsurveyed. These cases and the other cases cited also clearly establish the proposition that the area beyond a meander line or the shore line it represents is excluded from the survey and is unsurveyed. It follows that an island otherwise unsurveyed within the meanders of a river cannot be deemed to have been surveyed when the section lines and the meanders of the river were run. Therefore, as the patent confirmed the railway's title only to surveyed land, it did not confirm its title to the island. Until it should be surveyed and patented the railway had only a claim to this island. By its release filed under the Transportation Act of 1940 the railway has relinquished its claim to the island.

Since the railway has no interest in the island, its protest, based upon its claim of ownership, against the issuance of the oil and gas lease to Bassett was properly dismissed.

The railway also contends that it is entitled to a formal hearing under the rules of practice relating to contests. The pertinent provision of the regulation provides:

(a) 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); 19 F. R. 9057.)

In this matter, all the factors upon which the railway's claim to the island are based, the map of definite location, selection list No. 3, Patent No. 15, and the plat of survey of 1883, are shown by the records of the Bureau of Land Management. Under such circumstances, the regulation does not grant the railway the right to initiate a contest. *The Texas Company et al.*, 61 I. D. 368, 373 (A-27021, August 10, 1954).

The appellant further urges that it is entitled to a hearing pursuant to the provisions of the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1001 *et seq.*). However, the provisions of section 5 of that act are limited to cases of adjudication "required by statute to be determined on the record after an opportunity for an agency hearing * * *." There is no statutory provision for a hearing with respect to the authority of the Secretary to determine whether public land has been omitted from the original survey or to issue oil and gas leases. Consequently, the provisions of the Administrative Procedure Act do not apply to this proceeding. See *Mary Volk et al.*, A-26601 (May 5, 1953).

In its notice of appeal the appellant states that it was error for the Acting Director to issue his decision before it had an opportunity to

submit a brief in support of its contentions. The rules of practice provide for the filing of briefs by a person appealing to the Director. 43 CFR 221.69; 19 F. R. 9061. The railway had ample opportunity to submit a brief.

In any event, in its appeal to the Secretary it has filed a brief and a reply brief in which it has had an opportunity to support its position to the fullest extent. There is no indication that there are matters of fact or law which it has been unable to present for the consideration of the Department. The final authority to allow or dismiss the railway's protest lies with the Secretary, who may exercise his supervisory authority at any stage of the proceeding. The appellant, having had an opportunity to present its case fully at the highest level in the Department, cannot rightly complain of defective consideration below. *The Texas Company et al., supra; Levi A. Hughes et al.*, 61 I. D. 145 (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 Acting Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

HALVOR F. HOLBECK

A-27200

Decided November 14, 1955

Oil and Gas Leases: Applications

Where an application, for an oil and gas lease covers unsurveyed land in the bed of a nonnavigable lake and the United States is only one of several owners of the upland, it is proper to require the applicant to submit an agreement with the owners of the upland adjoining the federally owned uplands as to the boundaries of the land applied for or to demonstrate exactly what portions of the lakebed belong to the United States.

Oil and Gas Leases: Applications—Boundaries

In describing a tract of unsurveyed land in a lakebed by metes and bounds in an oil and gas application, it is sufficient to use the meandered lakeshore as a part of the description without giving bearings and distances.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Halvor F. Holbeck has appealed to the Secretary of the Interior from a decision dated February 14, 1955, of the Associate Director, Bureau of Land Management, which affirmed the action of the manager of the Billings land office holding for rejection, in its entirety, his noncompetitive application (BLM (ND) 033098) to lease for oil and gas certain lands in North Dakota.

Holbeck's application, filed on January 1, 1953, covered seven tracts in secs. 25, 26, 27, T. 164 N., R. 73 W., 5th P. M., North Dakota, which are within the International Boundary Reservation created by the Presidential Proclamation of May 3, 1912 (37 Stat. 1741), lot 2, sec. 29, and an unsurveyed area in a lakebed bounded by lot 2 on the north.

Holbeck's appeal is apparently confined to so much of the Associate Director's decision as rejected his application for the unsurveyed lakebed.¹ This tract is part of the bed of a small meandered nonnavigable lake, surrounded by at least six lots, five of which have been patented without an oil and gas reservation to the United States. The other lot, lot 2, is public domain and has been included in an outstanding oil and gas lease issued to an applicant who filed for it prior to the appellant.

It is well established that the title to the bed of a nonnavigable lake surrounded by public lands remains in the United States until it disposes of the abutting land. *William Erickson*, 50 L. D. 281, 283 (1924). When the United States disposes of the uplands, the effect of its grant to riparian owners is to be determined by the law of the State in which the land lies, unless a contrary intention is shown. *Hardin v. Jordan*, 140 U. S. 371, 384 (1891); *United States v. Oregon*, 295 U. S. 1, 27 (1935); *Oklahoma v. Texas*, 258 U. S. 574, 594 (1922). Under the law of North Dakota, a grant of uplands bordering on a nonnavigable lake conveys the land lying under the bed of the lake to the owner of the uplands.²

In view of the fact that lot 2 is the only upland remaining in the public domain, the United States has title only to that part of the bed of the lake riparian to lot 2. *A. W. Glassford et al.*, 56 I. D. 88, 91 (1937). This portion of the lakebed is unsurveyed. Consequently, applications to lease it for oil and gas must describe the area applied for "by a metes and bounds description connected with a corner of the public land surveys by course and distance * * *." 43 CFR 192.42 (d).

Holbeck's application, as amended, described the land applied for as follows:

Commencing at the northeast corner of surveyed section 29, T. 164N R. 73W 5th PM, thence west 20 chains, thence south 9.6 chains, more or less, to the point of intersection with the meandered north bank of a small lake, which point is the true point of beginning, thence south 12 chains, thence west 20 chains, thence north 12.3 chains, more or less, to the point of intersection with the north bank of said lake, thence eastward along the meandered bank of said small lake a distance of 26.0 chains, more or less, to the true point of beginning.

¹The land within the boundary reservation was properly rejected in accordance with the Department's decision in *Earl J. Boehme et al.*, 62 I. D. 9 (1955). Since lot 2, sec. 29, is included within a lease issued on July 1, 1953, to a prior applicant, the application was properly rejected as to it.

²*State v. Bruce*, 36 N. W. 2d 330 (N. D., 1949); *Ozark-Mahoning Company v. State*, 37 N. W. 2d 488, 492 (N. D., 1949).

The Associate Director held that this description was insufficient and held that—

* * * no consideration will be given to the issuance of a lease for the available lake bed unless the offeror submits an agreement with the riparian owners of the lands adjoining lot 2, section 29, or it is shown to the satisfaction of the Department what specific portions of the lake bed applied for belong to the Federal Government (a metes and bounds description and area) and not to private owners.

The appellant contends that he has to identify only the land he has applied for, not the part of the lakebed owned by the United States; that the acreage can be computed and that he is not required to compute it; that as a private person he cannot reasonably be expected to negotiate with the adjoining land owners; and, finally, that his description is proper.

In other words, the appellant urges that so long as his application describes the area applied for by metes and bounds, it is sufficient and the burden of determining exactly what portion of the land he has applied for is public domain then falls upon the Department, which then can reject his application as to the areas that are not public domain and allow it for the rest.

While this procedure may be sound in the ordinary case, it is by no means clear that it is proper in this situation. The apportionment of the lakebed of an irregularly shaped lake among the several riparian owners is not without difficulty and complications.³ In a recent case, the Supreme Court of North Dakota held that the boundary lines of lands abutting a nonnavigable lake “ * * * are fixed by extending from each end of their respective meander lines, lines converging to a point in the center of the waters. * * * ” *Ozark-Mahoning Co. v. State* (*supra*, fn. 2). If this rule were followed, the portion of the lakebed remaining in the United States would be of a drastically different shape from the rectangular area Holbeck described in his application. While this rule may be suitable for lakes whose length is approximately the same as their width, a different rule is usually followed where a lake is much longer than it is wide.⁴

With these difficulties in mind, the Department has held that an applicant seeking a lease covering public lands in the bed of a non-navigable lake must show what portions of the lakebed belong to the United States (*A. W. Glassford, et al., supra*) or submit an agree-

³ See Clark “Surveying and Boundaries” (1939 ed.), secs. 281, 305, 328; *Hardin v. Jordan, supra*, 397-398.

⁴ *Ibid.*

ment as to the boundaries with the riparian owners of the lands adjoining the vacant lots of public domain (*William Erickson, supra*).

In assaying the fairness of these requirements, it is well to remember that the issuance of oil and gas leases, even when the public land is available for such leasing, is committed to the discretion of the Secretary and that he may refuse to issue a lease when to do so would not be in the public interest. *Earl J. Boehme et al. (supra, fn. 1)*. The appellant here asks the Department to undertake the apportionment of a lakebed to determine the boundaries of the portion to which the United States has title, an area of approximately 20 acres. In view of the fact that there is no indication in the record that there has been any oil or gas discovered which would drain the public land, that the expenses of a survey would exceed the rental, that the United States is to some extent protected by the lease that has been issued on lot 2, and that the area applied for is quite small, the Department might well reject the application on the ground that the issuance of a lease, under such circumstances, would not be in the public interest.

As an alternative, the Associate Director offered the appellant an opportunity to have his application considered if he would either submit an agreement with the riparian owners of the land adjoining lot 2 or show to the satisfaction of the Department what specific portions of the lakebed applied for belong to the United States.

These requirements are in accord with prior departmental practice in similar situations and are proper.

One further point remains. The manager held that Holbeck's description of the lakebed was deficient because "Bearings and distances were not given all the way around the unsurveyed tract." Holbeck had described the northern boundary of the land applied for as follows: "* * * thence eastward along the meandered bank of said small lake a distance of 26.0 chains, more or less, to the true point of beginning." It seems to me that in a metes and bounds description the use of a meandered lake shore as a boundary is entirely adequate.

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 is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

L. N. HAGOOD

STANDARD OIL COMPANY OF CALIFORNIA

A-27211

*Decided November 15, 1955***Oil and Gas Leases: Rentals**

Where the rental due on a noncompetitive oil and gas lease has been paid by the operator under an operating agreement approved by the Department, and no evidence has been submitted that the operating agreement has been terminated in accordance with its terms respecting termination, it is proper to refuse to accept a payment from the lessee for the same rental.

Oil and Gas Leases: Operating Agreements

Where the lessee and the operator are in dispute as to whether their operating agreement has been terminated because of the failure of the operator to comply with its terms, the courts rather than the Department are the proper tribunal to determine the controversy.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

L. N. Hagood has appealed to the Secretary of the Interior from a decision dated April 20, 1955, of the Associate Director of the Bureau of Land Management, affirming the rejection by the acting manager of the Sacramento land office of his payment of the fifth year's rental on noncompetitive oil and gas lease Sacramento 042802.

Hagood's lease, which was effective as of October 1, 1950, is a preference right lease based on lease Sacramento 034851 and issued pursuant to section 1 of the act of July 29, 1942 (56 Stat. 726). During the term of lease Sacramento 034851 the Bureau of Land Management, on October 20, 1947, approved an operating agreement between Hagood and the Standard Oil Company of California under which the latter was designated the operator of the lease. The operating agreement provides in paragraph 24 that it shall apply to Sacramento 034851 and any lease which may be issued pursuant to a preference right of the lessee and, in paragraph 3, that the operator shall pay all rentals on the leased lands payable under the lease to the United States of America.

On September 11, 1953, Hagood paid the fourth year's rental, due on October 1, 1953. Thereafter, Standard submitted a check in payment of the fourth year's rental, which the manager returned on September 28, 1953, with a letter stating that Hagood had already paid the rental.

The next year Standard paid the fifth year's rental on June 28, 1954. Later Hagood submitted a check covering the same rental. This check was returned to Hagood with an explanation that Standard had already paid the rental. Hagood resubmitted this check with a request

that Standard's payment be refunded and his check accepted. The manager again returned Hagood's check in a letter dated July 22, 1954. Thereupon, on July 30, 1954, Hagood filed an appeal with the manager addressed to the Director of the Bureau of Land Management with which he enclosed his check. By a letter dated August 4, 1954, the manager informed Hagood that his appeal was being forwarded and enclosed a duplicate receipt for the fifth year's rental which, the manager said, would be held in the unearned account until the matter was finally settled.

From the Associate Director's decision denying his appeal Hagood has duly taken this appeal.

In his notice of appeal, appellant states that the manager has accepted his rental payment. The only relief he asks is that the operating agreement be ruled void or be held to have expired on September 30, 1955, the expiration date of lease Sacramento 042802. Both Hagood and Standard have filed timely requests for a 5-year extension of that lease.

It is thus apparent that the real issue that Hagood is seeking to litigate is whether the operating agreement is still valid and whether it will affect the extension of his lease, if one is granted. However, there is now no matter before the Department which requires it to express its views concerning these problems. The Department has held that disagreements between a lessee and an operator arising under their operating agreement are primarily a matter of a private contract dispute which should be resolved in the courts. *A. E. Blackner et al.*, A-24440 (February 14, 1947); *cf. David L. Mills*, A-26969 (September 27, 1954). There is as yet no issue before the Department which requires it to decide the validity and existence of the operating agreement unless it is the question of payment of the fifth year's rental.

On this issue it is material to note that the agreement provides in paragraph 18 as follows:

The Lessee shall not declare the rights of the Operator under this agreement forfeited for any cause whatever, unless the Lessee shall notify the Operator, in writing, of the existence and exact nature of the cause of forfeiture and unless the Operator shall thereafter (and within ninety (90) days from the service of such notice) fail to undertake such action as may be necessary to remedy said cause of forfeiture * * *

Hagood has submitted no evidence that he has complied with the requirements of this paragraph or that Standard has failed to cure any cause of forfeiture that he has brought to its attention. He asks the Department to consider the operating agreement terminated on the basis of his simple assertion that he considers it to have been terminated. Standard denies that it has in any way violated the terms of the agreement and insists that it is in full force and effect. Without

attempting to pass on the merits of the dispute between Hagood and Standard, I believe that on the face of the present record the Department has no basis whatsoever for concluding that the agreement has come to an end.

Under these circumstances, the Department has no reasonable grounds for refusing a tender of rental payments by Standard. It follows that since the fifth year's rental was properly paid, the manager correctly refused to accept another payment. The manager accepted Hagood's rental payment only with the statement that it would "* * * be held in the unearned account until the matter is finally settled."

In accordance with the view set out above, the manager is directed to refund Hagood his payment.

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.

EDMUND T. FRITZ,
Deputy Solicitor.

NATALIE Z. SHELL

A-27214

Decided November 17, 1955

Oil and Gas Leases: Applications

The fact that public land is covered by an outstanding application for an oil and gas lease does not render it not available for leasing within the meaning of the regulation requiring that, with certain exceptions, an application for an oil and gas lease include not less than 640 acres.

Oil and Gas Leases: Applications

Where an application for an oil and gas lease covers less than 640 acres and the land applied for adjoins land available for leasing, it will be deemed to be for the equivalent of a section and therefore proper so long as the amount by which it is under 640 acres is less than the amount that the inclusion of the smallest of the adjoining subdivisions available for leasing would put it in excess of 640 acres.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Natalie Z. Shell has appealed to the Secretary of the Interior from a decision dated April 20, 1955, of the Associate Director of the Bureau of Land Management which affirmed the action of the manager of the Sacramento land office partially rejecting her offer to lease for oil and gas, Sacramento 048094, because the land as to which it was

rejected is embraced in oil and gas lease Sacramento 048088 issued to T. W. Soule.

On February 1, 1954, Mrs. Shell filed a noncompetitive offer to lease for oil and gas, Sacramento 048002, which included, among other land, lot 8 of sec. 20, T. 22 S., R. 12 E., M. D. M., California. The manager, on February 25, 1954, allowed her application in part and rejected it for most of the land applied for, including lot 8. In a letter received in the land office on March 1, 1954, Mrs. Shell withdrew her application as to the rejected lands. The withdrawal was noted in the tract book on March 3, 1954.¹

On March 2, 1954, T. W. Soule filed a noncompetitive offer to lease for oil and gas Sacramento 048094, embracing three separate tracts of land totaling 625.32 acres. One of the tracts, with which this appeal is principally concerned, consisted of lots 1, 2, 3, 4, 6, 7, 10, 11, and 12 and the $W\frac{1}{2}NE\frac{1}{4}$ sec. 20, T. 22 S., R. 12 E., M. D. M. The remaining two tracts comprised lands in sec. 28, same township and range. The next day, March 3, 1954, Mrs. Shell filed offer Sacramento 048094 for all of the land in sec. 20 that Soule had applied for and lot 8, sec. 20, in addition. Lot 8 adjoins the other land applied for in sec. 20. On April 20, 1954, the manager issued Soule a lease for all the land listed in his application. On the same day, he issued Mrs. Shell a lease for lot 8, sec. 20, and rejected her application as to the remaining land.

From the Director's affirmance of this action Mrs. Shell has duly taken this appeal.

The appellant contends, in effect, that lot 8 was available for leasing at the time Soule filed his application, that without lot 8 the rest of the land applied for in sec. 20 is not surrounded by land not available for leasing, and that, since Soule's application was for less than 640 acres, his application did not comply with the requirements of the pertinent regulation (43 CFR 192.42 (d)) and, therefore, his lease ought to be canceled as to the land in sec. 20.

The pertinent regulation provides:

* * * Each offer must be for an area of not more than 2,560 acres except where the rule of approximation applies, and may not be for less than 640 acres except in any one of the following instances:

* * * * *

(2) Where the land is surrounded by lands not available for leasing under the act * * *.

The record indicates that the tract in sec. 20, if lot 8 is included, is surrounded by lands covered by outstanding leases. The two

¹The Associate Director's decision states that the withdrawal was noted on the tract book on March 2, 1954. For the reason stated later, the exact date on which the withdrawal was noted in the tract book is not material.

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tracts applied for by Soule in sec. 28 are each surrounded by leased or patented lands.

The first question is whether lot 8 was available for leasing at the time Soule filed his application. If Mrs. Shell's withdrawal of her application as to lot 8 had been noted on the tract book prior to the time Soule filed his application, it is plain that this lot would have been available for leasing at that time. If the withdrawal were not noted until later, the status of lot 8 on the day Soule filed his application was that it was embraced in an outstanding offer to lease for oil and gas.

It has always been the practice of the Department to permit the filing of applications for leases on land already included in prior applications. See *Dorothy Bassie et al.*, 59 I. D. 235, 237 (1946). Such an application is not rejected, but consideration of it is suspended until the prior applications are disposed of. *John E. Miles*, 62 I. D. 135, 140-141 (1955). The Department takes up the applications in the order in which they are filed and awards a lease to the first qualified applicant who has filed a proper application. *C. T. Hegwer*, 62 I. D. 77 (1955).

On the other hand, an application for land not available for leasing because it is already leased or withdrawn from leasing must be rejected for that reason (*Mary E. Brown*, 62 I. D. 107 (1955)), and will not be suspended pending the restoration of the land to leasing. *D. Miller*, 60 I. D. 161 (1948).

Thus it is clear that the Department has always considered lands covered only by an outstanding application to be available for leasing. There is no reason to apply a different interpretation to the 640-acre limitation. In fact, to hold otherwise would undermine the purpose of that provision by bringing many more tracts within the second exception (43 CFR 192.42(d)(2)) to the 640-acre rule.²

Therefore, if the validity of Soule's application for the land in sec. 20 depended upon whether it included lot 8, it would be necessary to hold that it was not a proper application. However, this is not the situation.

The 640-acre provision does not require in every case that an application embrace all of an isolated tract of less than 640 acres. For example, if an 80-acre tract is surrounded by lands not available for leasing, an application, proper in other respects, for 600 acres of other land is required to include only 40 acres of the 80-acre tract. So here if Soule's application were limited to the land in section 20, it

² For example, a person could file one application for quarter-quarter sections in checker-board fashion, totaling 640 acres or more, and then file individual applications for each interspersed quarter-quarter section, claiming that they were all isolated by reason of the first application.

would have had to include lot 8 to be valid. However, since it embraced approximately 195 acres of land in section 28, the question is whether the combined acreage of the land applied for in sections 20 and 28 satisfies the regulation.

While paragraph (d) of 43 CFR 192.42 sets out the acreage requirements, the penalty for failing to comply with it is contained in paragraph (g) of that section. At the time Soule's application was filed, this paragraph provided:

(g) 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 and the instructions printed on the lease form, * * *. When an offer is rejected under this paragraph, the offeror will be given an opportunity to file a new offer within 30 days from the date of service of the rejection, and the fee and rental payments on the old offer will be applied to the new offer if the new offer shows the serial and receipt numbers of the old offer. The corrected offer will retain the same serial number, but the effective date of priority will be as of the date such new offer was received. 43 CFR, 1953 Supp., 192.42 (g).

The instructions on the lease form referred to stated in part:

The offer will be rejected and returned to the offeror and will afford the applicant no priority if: * * * (b) The total acreage exceeds 2,560 acres, except where the rule of approximation applies or is less than 640 acres or the equivalent of a section and is not within the exceptions in 43 CFR 192.42 (d). * * *. Form No. 4-1158, Fourth edition, Paragraph 9, General Instructions.³ * * * That area, except where the rule of approximation applies, must not exceed 2,560 acres or be less than 640 acres or the equivalent of a section * * *. Form No. 4-1158, Fourth Edition, Item 2, Special Instructions.

Since Soule's application was for less than 640 acres, it complied with the terms of the Special and General Instructions only if it was for "the equivalent of a section."

Although the instructions do not define what is meant by "the equivalent of a section," its meaning can be ascertained from the purpose of the 640-acre limitation and from the practice of the Department with respect to applications for oil and gas leases which list acreage in excess of 2,560 acres.

The purpose of the 640-acre limitation is "* * * to curtail the practice, in which a number of companies had been engaging, of advertising that through their services investors would be able to obtain oil and gas leases for small parcels of land, usually 40 acres in size * * *." *Eugene J. Bernardini, Albert Chester Travis*, 62 I. D. 231, 234 (1955).

The fact that the result intended can be as well achieved by allowing an applicant to fall a few acres short of the minimum as by insisting that he apply for exactly 640 acres or a greater amount was recognized

³This provision of the General Instructions is now found in the regulation. 43 CFR 192.42 (g) (1) (ii).

by the addition of the phrase "the equivalent of a section" to the instructions. If the instructions had intended that an application in every case cover 640 acres or a greater amount, there would have been no necessity for the inclusion of that phrase since, in any event, such an application would comply with the regulations. Therefore, it can only mean that in some circumstances an application for less than 640 acres will be deemed proper.

Although the instructions do not set out exactly how much less than 640 acres an application may cover and still be valid, as including the equivalent of a section, the Department has for many years applied, in a similar situation, an administrative rule known as the rule of approximation which offers a valid guide here.

This rule, as it relates to oil and gas leases, has recently been stated as follows:

An offer which lists an acreage in excess of 2,560 acres may be allowed if elimination of the smallest legal subdivision involved would result in a deficiency of area under 2,560 acres greater than the excess over 2,560 acres resulting from inclusion of such subdivision. *J. L. Dougan et al.*, A-26774 (September 1, 1954).

The necessity for this rule, both in relation to oil and gas leases and other grants of interests in the public lands, has been explained as follows:

All the statutes relating to the disposal of nonmineral public lands, except the reclamation homestead act, fix specific areas in multiples of 40-acre tracts as the maximum number of acres that may be entered by any one person; but, it was found that it was not always possible to permit entries for such maximum amounts because the surveying of the public domain necessarily results in the formation of many tracts designated as lots which are irregular in their areas, and do not often, either singly or in combination, aggregate the prescribed maximum enterable areas.

From this it will be seen that a strict enforcement of the statutes would of necessity deprive many applicants of the privilege of securing title to all the lands they were entitled to enter; and it was to meet that contingency, and for the purpose of relieving that class of entrymen of the embarrassment imposed by the statute, as well as to expedite and facilitate the disposal of the public lands, that the rule of approximation on which the company relies in this case was devised as a matter of necessity by departmental action. *Santa Fe Pacific Railroad Company*, 49 L. D. 161, 162-163 (1922).

Since the rule of approximation is concerned with allowing an applicant land in excess of an applicable acreage limitation, it does not cover a situation where the acreage limitation is a minimum, not a maximum. However, the reasoning applies equally well to the latter situation, of which the 640-acre requirement is an example. It is frequently impossible for an applicant to assemble subdivisions whose acreage totals exactly 640 acres. To require an applicant to apply for at least 640 acres would in many instances require him to apply for more.

Thus, applying the guiding principle of the rule of approximation to the 640-acre limitation, it is concluded that where an application for an oil and gas lease covers less than 640 acres and some of the land applied for adjoins lands available for leasing, it will be deemed to be for the equivalent of a section and therefore proper so long as the amount by which it is under 640 acres is less than the amount that the inclusion of the smallest of the adjoining legal subdivisions available for leasing would put it in excess of 640 acres.⁴

Soule's application covered land totaling 625.32 acres. Lot 8 contains 38.56 acres. If Soule had included lot 8 in his application, the acreage would have been 663.88 acres, or 23.88 more than 640. Without lot 8, he was 14.68 acres under the 640-acre minimum. In other words, the exclusion of lot 8 would result in a deficiency less than the excess caused by its inclusion.

It is concluded that Soule's application covered the equivalent of a section and therefore complied with the pertinent regulation. Accordingly, it was proper to reject Mrs. Shell's application insofar as it was in conflict with the former.

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 is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

APPEALS OF CARSON CONSTRUCTION COMPANY

IBCA-21, IBCA-25

IBCA-28, IBCA-34 *Decided November 22, 1955*

Contracts: Changed Conditions

Where a contractor who was excavating for footings for a high school in Ketchikan, Alaska, was required to visit the site, and acquaint himself with actual conditions of the work, and did visit the site which was covered with muskeg and hard rock exposed as the result of preliminary grading by another contractor, the contractor cannot be said to have encountered changed conditions even though continued rainfall subsequently softened the hardpan material underlying the site. The conditions encountered were to be expected in that region of Alaska, and the effects of blasting performed by the preliminary grading contractor should also have been known to the

⁴The Associate Director placed some reliance upon the fact that Soule's application included 16 legal subdivisions, the ordinary number of subdivisions in a section. The regulation is concerned with acreage. Since subdivisions can vary greatly in size, it is apparent that in some situations the acreage of 16 legal subdivisions would fall far short of the 640-acre requirement. Therefore, no significance is to be attached to the number of subdivisions set out in the application.

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contractor, since it was performed prior to the bidding on the construction contract.

Contracts: Additional Compensation—Contracts: Specifications

Where the plans and specifications for the construction of footings for a high school gave the results of subsurface investigations and indicated the depth of the footings, which were to be keyed in solid rock, to be 1 foot 6 inches, but also contained language that indicated uncertainty in the plans, and that the rock lines shown on the plans were "approximate", the depth of the footings cannot be regarded as definite and precise. The contractor is, nevertheless, entitled to additional compensation for constructing footings which exceeded the indicated depth by more than one foot, as held by the original contracting officer.

Contracts: Contracting Officer

Where a contracting officer has granted certain authority to a construction engineer for specific purposes, it does not follow that by such grant the contracting officer has divested himself of his general authority, nor that the construction engineer had authority to authorize changes.

Contracts: Additional Compensation

A contractor is not entitled to additional compensation for work voluntarily undertaken.

Contracts: Additional Compensation—Contracts: Performance

Where the specifications for the construction of a high school required that the building be constructed entirely of various types of steel and aluminum panels manufactured by the Detroit Steel Products Company, except for the foundations and structural steel, and that the manufacturer or his authorized representative erect the panels, the contractor is not entitled to additional compensation for work undertaken to correct leaks which appeared in the building after the installation of the wall and roof panels when the evidence shows that the panels were erected by a subcontractor not authorized by the Detroit Steel Products Company, and the instructions of the manufacturer for the erection of the panels were not followed in a considerable number of respects. The contractor has the burden of proving that the panels could not produce a weather-tight building, even if the instructions of the manufacturer had been followed in their entirety.

Contracts: Additional Compensation—Contracts: Specifications

A contractor is not entitled to additional compensation for providing ventilating outlets in the concrete floor of the auditorium of a high school as part of the ventilating system even though the auditorium floor seating, which was an alternate in the bidding, was temporarily eliminated, and the specifications may not have provided all the details for the outlets, since openings were required by the specifications to be constructed as part of the ventilating system, which had not been eliminated, and the specifications also permitted the contracting officer to supply such detailed drawings as might be necessary.

Contracts: Interpretation

A contractor is not entitled to additional compensation for installing a backing of lath and plaster rather than cheaper gypsum board in certain rooms of a

high school, even though there was a discrepancy in indicating the type of backing between the applicable drawings and a room finish schedule constituting the last sheet of the drawings. The room finish schedule was not part of the specifications and since the discrepancy was only between two sheets of the drawings, it was to be resolved by submission to the contracting officer as required by the specifications.

BOARD OF CONTRACT APPEALS

The Carson Construction Company has appealed from four decisions of the contracting officer denying its claims for additional compensation and extensions of time for performance of Contract No. 14-04-001-86, Project No. Aaa-50-A-5, Alaska Public Works, Office of Territories.

The contract, which was on Standard Form No. 23, Revised April 3, 1942, and was dated August 1, 1953, required the contractor to furnish the materials and perform the work of constructing a high school building with appurtenant facilities at Ketchikan, Alaska, for the consideration of \$2,455,000.

The contract provided for the completion of the work on or before December 13, 1954. By Change Orders Nos. 6, 4, 9 and 14, dated April 14, 19, May 20, and July 28, 1954, the time for performance was extended, respectively, 10, 4, 2 and 3 days, making the final completion date January 1, 1955. Although the high school is now substantially complete as a structure, it is subject to leakage at numerous points, and has never been accepted by the contracting officer.

The four claims involved have been denominated in this proceeding as the footings claim, the wall leakage claim, the auditorium blockouts claim, and the ceramic tile backing claim, and will be considered in the order mentioned rather than in accordance with the numbers which they bear on the Board's docket. The following table gives a summary of the claims and their origin:

Docket No.	Nature of claim	Amount of claim	Date of contracting officer's decision*	Date of appeal**
IBCA-34	Footings	\$30,249.67 and \$72,877.62.	November 8, 1954 and March 11, 1955.	December 2, 1954 and April 19, 1955.
IBCA-25	Wall leakage	\$126,659.00	January 24, 1955	February 15, 1955.
IBCA-21	Auditorium blockouts.	\$915.68	September 22, 1954	October 23, 1954.
IBCA-28	Ceramic tile backing.	Unspecified	November 5, 1954	December 6, 1954.

* The decisions of the contracting officer on the footings and auditorium blockouts claims are in the form of formal findings, while the decisions on the wall leakage and ceramic tile backing claims are in the form of letters. However, the letter on the wall leakage claims was supplemented by formal findings, dated March 11, 1955.

** All the appeals were timely, since some of the contracting officer's decisions took a considerable number of days in transit.

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Hearings were held on the appeals before two members of the Board, Messrs. William Seagle and Thomas C. Batchelor. The hearings on the auditorium blockouts and ceramic tile backing claims were held on June 8, 1955, at Juneau, Alaska. A hearing was held on the footings claim at the same place on June 8 and 9, 1955. By consent of counsel for both the contractor and the Government, the hearing on the wall leakage claim was transferred from Juneau, Alaska, to Seattle, Washington, and held there on June 13, 14, and 15, 1955. Counsel for both the contractor and the Government were afforded also an opportunity to file post-hearing briefs, and the Board has considered such briefs as have been filed.

In connection with the various claims, the contractor requested the contracting officer to grant extensions of time for the completion of the required work, and the contracting officer made various determinations with respect to these requests. On June 8, 1955, counsel for both the contractor and the Government stipulated that none of the contracting officer's determinations with respect to requests for extensions of time were to be considered as final. The Board will, therefore, not consider these determinations.

1. THE FOOTINGS CLAIM

This is a claim for additional compensation, on the basis of a unit price schedule included in the specifications, for extra concrete, excavation, and backfill in extending the footings beyond the depth shown on the drawings. The amount of additional compensation claimed by the contractor prior to the time the contracting officer made his original findings of fact and decision was \$26,118.70.¹ In taking its appeal by letter dated December 2, 1954, however, the contractor increased this amount to \$30,249.67, and claimed an additional amount of \$72,877.62 to cover indirect costs attributed to delays of the Government.²

¹ This amount is made up as follows :

(1) Amount claimed in proposed change order No. 2	\$15, 023. 88
(2) Amount claimed in proposed change order No. 4	5, 027. 28
(3) Amount claimed in proposed change order No. 7	4, 509. 87
(4) Amount claimed in contractor's letter of April 12, 1954	1, 116. 07
(5) Amount claimed in contractor's letter of June 12, 1954	441. 60
Total	\$26, 118. 70

² This amount is broken down by the contractor, as follows :

(1) Additional cost of concrete due to delays of Government	\$9, 002. 00
(2) Wage increases due to delays of Government	13, 875. 62
(3) Increased overhead due to delays of Government & changes	50, 000. 00
Total	\$72, 877. 62

As the jurisdiction of the Board is limited to hearing appeals from decisions and findings of contracting officers, the Board could not review any claim greater than the amount of \$26,118.70 considered by the contracting officer, if it were not for the fact that in his supplemental findings, dated March 11, 1955, the contracting officer considered and rejected the additional amounts claimed by the contractor. They are, therefore, properly before the Board. However, the record does not show on what basis the contractor increased the amount of his direct costs from \$26,118.70 to \$30,249.67. The claim for an additional \$72,877.62 is, moreover, composed of items which the Board lacks jurisdiction to consider because they are clearly in the nature of claims for unliquidated damages.³ The Board will, therefore, limit itself to considering the claim in so far as it covers the direct costs.

The site of the Ketchikan High School, which covers an area of approximately 88,500 square feet, was originally a wooded mountain side. In order to expedite construction, after a contour map of the site, showing the original ground elevations, had been prepared, the Ketchikan Independent School District, for which the building was being constructed, let a separate preliminary grading contract to another contractor, Manson and Osberg. The work done under this separate grading contract consisted mainly in blasting off the rock knoll of the northerly portion of the site and levelling off the site near subgrade. In another site survey made in March of 1953, the new elevations of the then existing ground surface were taken, and a subsurface investigation of the site was conducted by taking soundings on a 24-foot grid system. The engineer who conducted the investigation used a steel rod and drove it to refusal with a sledge hammer, recording the depth in inches at each grid point to what he assumed to be rock. The results of this survey and investigation were recorded on Sheet A-1 of the plans prior to bidding.

As a result of the preliminary work, rock was in evidence at the surface at many locations within the building area. The rock on the site, of which the exposed portion was typical, consisted of tilted greenstone lava flows interstratified with volcanic tuffs and black slate, which were typically of uneven surface and hardness, and contained many lumps and pockets. As was common in this area of Alaska, the uneven rock stratum was covered for the most part with soft mucky soil known as muskeg, which was not suitable for building foundations. There were, to be sure, also areas where soil described as hardpan occurred. However, during the fall of 1953, when the

³ *Wm. Cramp & Sons v. United States*, 216 U. S. 494, 500 (1910); *Continental Ill. Nat. Bank & Trust Co. of Chicago v. United States*, 126 Ct. Cl. 631, 640 (1953).

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footings of the Ketchikan High School were under construction, there was continued rainfall with the result that even the hardpan material softened as it was exposed to the rain and running water.

During excavation there had been some overblasting of the underlying rock by the preliminary grading contractor. There had originally also been a depressed area in the northeast portion of the site to be occupied by the building, and during the preliminary grading this area was filled with waste broken rock from nearby areas where rock had been above building grades. It was apparently the presence of this material that was responsible for the refusal of the driven steel bar at elevations above bedrock.

The plans required the footings to extend to and be keyed in solid rock. In the course of the construction of the foundations, it was discovered, however, that the subsurface soil conditions, for the reasons above stated, were not conforming to the conditions assumed when the plans were prepared. In order to secure the basic information necessary to adjust the design to actual conditions, it was decided to investigate further the subsoil and rock formations for load-bearing data. The contractor was requested, therefore, to perform this work at locations which would be involved in the revision of the plans, and he undertook to do so.⁴

Subsequent to these operations, the plans were adjusted to take into account actual conditions. The designed elevations of the top of the footings and the bottom elevations of the steel columns were adjusted to the actual footing depths required to secure solid bearing, and in most instances this resulted in increasing the depth of the footings, which in the plans were generally given as 1 foot 6 inches. Footings and columns were also changed at certain locations, and in the redesign spread footings were also provided under the pipe trench. It was also decided to extend the use of the spandrel detail to outside walls wherever the depth of the footings exceeded 1 foot 6 inches. In general the foundations were to set on hard pan or broken rock rather than solid rock.

The contractor made the changes required by the revised plans, and some of the changes were even made before revised drawings could be prepared. Moreover, in some instances the contractor constructed spread footings which were not in the revised plans. It took the position that it was entitled to additional compensation for these spread footings, and for the footings at all locations where the depth of the footings had been increased beyond the 1 foot 6 inches shown on the plans.

⁴The contractor was compensated for this additional work pursuant to the terms of Change Order No. 1.

The contracting officer has at all times taken the position that the contractor was entitled to additional compensation whenever the top elevation of the footings had been revised, and for constructing the spread footings under the pipe trench. He has conceded that these changes constituted a redesign of the structure, and has offered to pay the contractor an additional \$3,088.28. He has held, however, that the vertical dimensions of the footings shown on the original plans were minimums rather than maximums, and were, therefore, subject to change without additional compensation. This, indeed, is the basic issue between the contractor and the contracting officer. The contractor has claimed that he had encountered changed conditions, and had been required to perform work not specified in the contract documents, while the contracting officer has contended that the actual changes were few and are not attributable to changed conditions. So far as the spread footings, other than the spread footings under the pipe trench are concerned, the contracting officer has refused to allow additional compensation for constructing them on the ground that this work, which was cheaper for the contractor to perform, although also beneficial to the Government, was voluntarily undertaken.

The position of the contracting officer that the contractor did not encounter changed conditions at the site is believed to be sound. The conditions at the site were generally known, and should have been known to the contractor. The presence of muskeg is certainly no novelty in the region of Alaska where the building was being constructed, nor could the fractured condition of the rock be regarded as unexpected. The effects of the blasting performed by the preliminary grading contractor should have been known to the contractor, since it was performed prior to the bidding on the construction contract. The rainfall which worsened the subsurface conditions was also to be expected in that area of Alaska.

The contractor was, moreover, charged with knowledge of the actual conditions. The General Instructions to Bidders included a paragraph in which it was provided that each bidder was to "visit the site of the proposed work and make any tests or investigations necessary to fully acquaint himself with surface, sub-surface, latent and all other conditions relating to construction * * *." This provision was further emphasized by a paragraph included in Section I, Architectural Specifications, which provided that each bidder "must inform himself fully of the conditions relating to the construction and labor under which the work is now being or will be performed, and will be presumed to have inspected the site and to have read and be thoroughly familiar with the plans and other Contract Documents." Indeed, the president of the contractor has admitted that he had inspected the site, and must, therefore, be assumed to have obtained knowledge of the

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actual conditions. At the time of the inspection some of the rock on the site was exposed.

The contracting officer is also correct in holding that the depth of the footings was not definitely indicated on the plans. Although the depth of the footings was generally indicated as 1 foot 6 inches, this dimension could represent simply an ideal dimension assumed for purposes of design. While the dimensions were not generally indicated as minimums,⁵ the contractor should have assumed at least, from the provisions of the specifications and other notations on the plans, that they were not intended to be precise.

The plans and specifications were, indeed, as full of warning signs and signals as a busy highway in a crowded population center. On the very first page of the specifications, which begin with Section I, Architectural Specifications, is found a warning in the most explicit terms, as follows:

Attention is called to the uncertainty of the quantities of many of the items involved in the Contract. Where borings are indicated on the plans, it is understood that they were made in the usual manner and with reasonable care, and their location, depths, and the character of the material, have been recorded in good faith. There is no express or implied agreement that the depths or the character of the material have been correctly indicated, and bidders should take into account the possibility that conditions affecting the work to be done may differ from those indicated. [Italics supplied.]

Section I, Architectural Specifications, also indicated that the foundations were generally to be set on rock by providing:

Foundations are concrete setting mainly on rock. Some areas have concrete slab on grade over gravel or crushed rock fill.

The same inference was to be drawn from Section 2-8 of the division of the specifications headed "Concrete Work and Cement Finishing," which contained the following paragraphs:

Rock Foundation Placement. Rock surface upon which concrete is to be placed shall be approximately level, clean, and free from oil and other objectionable coatings, standing or running water, mud, debris, drumly rock and loose semi-detached or unsound fragments, and shall be sufficiently rough to assure satisfactory bond with the concrete.

Faults or seams shall be cleaned to firm rock on the sides, and to a depth satisfactory to the Construction Engineer. Immediately before the concrete is placed, all rock surfaces shall be cleaned by the use of high-velocity air-water jets, sandblasting, or other means satisfactory to the Construction Engineer.

If the contractor could have been in any conceivable doubt that the precise depth to rock was not guaranteed, although the footings were to set on rock, the doubt should have been completely dispelled

⁵ An exception was the large size detail shown on Sheet S-2 for Footing X. This certainly would indicate that those who prepared the plans were thinking in terms of minimum dimensions.

by the notations on the plans, which had the same force and effect as the provisions of the specifications themselves.⁶ Sheet A-1, which is the Site Plan, contained a note in the lower left hand corner which read as follows:

In conjunction with the articles of the specified scope of work the contractor must understand he is solely responsible to acquaint himself with site conditions. *No additional costs will be granted for work necessary and not specifically stated or delineated.* The information shown on the plans and specifications was obtained for *design purposes only* and is not guaranteed. [Italics added.]

Another "note" on the other side of the Site Plan, relating to elevation, was "Depth in inches to what is believed to be rock," and the legend of the Site Plan included a symbol which was explained as "Depth to Rock (Assumed)." Sheets A-7, A-8, and A-9, which include the elevation sections of the plans, all contain notations indicating that the rock lines are "approximate."

Finally, Sheet S-1, one of the original structural sheets of the plans, also contains a series of notes which contain the following paragraphs under the heading "Foundations":

All footings have been designed for a maximum soil-bearing pressure of 12,000 lbs.

All footings where shown shall extend to and be keyed in solid rock. Extend exterior footings 24" min. below finished grade. All rock for ftgs shall be cut to a horizontal plane or doweled. *All rock lines are approximate.*

Notwithstanding all these provisions the contractor has argued in his letter of appeal that the precise depth of the footings to bedrock was plainly indicated in the plans and specifications. But the contentions advanced in support of this argument are plainly unconvincing and untenable. The definite assurances and even promises which the contractor found in the contract documents are, indeed, quite incomprehensible. The contractor even found in the notations on the Site Plan which referred to the "assumed" depth to rock or to the depth to what was "believed" to be rock definite representations or promises that rock would be found at the elevations indicated. "The word 'assumed,'" it declares, "when used in this sense can only be interpreted to mean a 'promise.'"

The contractor emphasizes particularly the sentence in Section 1, Architectural Specifications, in which it is stated that where "borings" are indicated in the plans, the results have been recorded in good faith. The contractor regards this provision as a misrepresentation, since no borings—as distinguished from soundings—were made. The contracting officer has explained that the architect probably used

⁶ Article 2 of the contract provided: "Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both."

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the word "borings" in the specifications when he actually meant "soundings."⁷ However, the Site Plan plainly indicated that soundings had been taken on a 24-foot grid, and if there was here an element of confusion, the contractor could easily have secured a clarification of this as well as any other apparent inconsistency, by requesting an interpretation of the plans from the proper officers.⁸ In any event, a statement that "where borings have been made" etc., is not in itself a representation that borings have been made, and whether soundings or borings were the method employed in investigating subsurface conditions, neither could provide absolutely reliable information. In view of all the other provisions of the plans and specifications, the contractor could hardly have been justified in assuming that either borings or soundings were intended to provide definite information, constituting a representation. It is interesting to note that the contractor's chief officer had such a sketchy knowledge of the plans that he testified that he did not know until after the foundations had been completed that soundings had been taken.⁹ Moreover, he has also admitted that the note on the Site Plan which stated that the footings had been designed for a maximum soil bearing pressure of 12,000 lbs. per square foot clearly indicated that "the footings were designed for rock bearing in lieu of other types of material." If he knew that the footings were designed to be set on rock, and that the rock lines shown on the plans were only approximate, it is not possible to see how he could have concluded that the plans indicated a definite depth for the footings. The Board must conclude that the depths of the footings indicated on the plans were not definite.

Such a conclusion is not, however, necessarily dispositive of the claim. The contractor contends that the contracting officer had delegated to William C. Burke, the Construction Engineer who was supervising the job, general authority to approve changes, and that the latter had in fact approved changes which would entitle him to the additional compensation claimed. While the Board cannot go that far, it must hold that the contracting officer did approve a basis for compensating the contractor that went beyond allowing additional compensation only for changes in design, and that this constituted a reasonable interpretation of the requirements of the plans and specifications which is binding upon the Government.

⁷ See paragraph 34 of rebuttal memorandum of the contracting officer. This is dated March 15, 1955.

⁸ The General Instructions to Bidders contains a provision which reads: "If any person contemplates submitting a bid for the proposed contract and is in doubt as to the meaning of any part of the plans, specifications, or other proposed contract documents, he may submit to the consulting engineer or architect a written request for an interpretation thereof."

⁹ See Transcript of Hearing, page 10.

On October 5, 1953, Burke wrote to the Carson Construction Company a letter in which he stated that the contractor was authorized, pending the revision of the plans for the foundations, to proceed with construction in accordance with changes in design communicated to it by the architect's representatives. Payment for this work, Burke assured the contractor, "will be made in accordance with the terms of your contract." As for other work performed prior to October 1, 1953, Burke added, "will be paid for in accordance with the terms of your contract based upon actual quantities involved, measured and computed in accordance with the contract, all of which as authorized in this letter, shall in no event exceed \$13,000.00, and is subject to contract Change Order to be prepared when actual differences in quantities are known and approved by the contracting officer."

In the latter part of the same month Donald R. Wilson, who was then, as head of Alaska Public Works, the contracting officer, addressed an undated memorandum to Burke to confirm a telephone conversation between them on October 22, 1953, on the subject of the "non coordination of plans which were produced by the architect." In the fourth paragraph of this memorandum were discussed the extent of Burke's authority with respect to the review and approval of shop drawings. He was authorized "to review and approve structural and reinforcing steel shop drawings at the site." And, stated the contracting officer: "The review by Mr. Burke will be the final review by this agency (referring to Alaska Public Works), consequently Mr. Burke will be responsible for conformance with the plans, specifications and contract." He added, moreover:

You will recollect the working agreement which exists between you and the Contracting Officer relative immediate decisions by you on additional work and expenditures when decisions must be made immediately at the site to preclude a delay to the contractor. You may proceed accordingly and continue the practice of promptly keeping the Contracting Officer fully informed by either telephone or mail.

It is no doubt true that Burke, as well as E. L. Graves, the inspector on the job at this time, shared the contractor's views of the requirements of the plans and specifications. Indeed, Burke recommended Change Orders Nos. 2 and 4 for approval, although he declined to recommend Change Order No. 7 for approval. Undoubtedly Burke had authority to instruct the contractor when problems of construction arose which were not settled by the plans themselves. If the contractor followed the instructions, he would be protected against charges that he had disregarded the plans and breached the contract, but he would not be entitled to additional compensation unless the work ordered amounted to a change in the requirements of the contract, and there is nothing to establish that the contracting officer

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had divested himself of the authority to approve change orders which in effect would determine these legal questions. The statements of the contracting officer on which the contractor relies were at best ambiguous and enigmatic. "Payment * * * in accordance with the terms of your contract" involved necessarily the interpretation of the contract by the contracting officer, and the necessity of securing a change order left the final decision with him. If the Construction Engineer on the job was specifically authorized to approve structural and reinforcing steel shop drawings at the site, the inference could hardly be that the contracting officer intended to grant him general authority to approve any and all changes. Even if it be assumed that the Construction Engineer at the site of the job was intended to have some sort of emergency authority, its nature and limits are wholly unclear. The mere fact that the Construction Engineer forwarded the change orders to the contracting officer for approval negatives any general delegation of authority. Indeed, the contractor itself was not too sure of its ground, for it finally wrote to the contracting officer under date of April 10, 1954, to ask him to clarify the situation. By this time apparently Donald R. Wilson was no longer District Director of Alaska Public Works, and the contracting officer, and the contractor's letter was answered by John D. Argetsinger, of the Juneau office of Alaska Public Works who was then Acting District Director. Argetsinger stated:

Mr. William Burke, Construction Engineer for this agency in Ketchikan, has such authority as is set forth in the contract documents, including the addendums, and the General Conditions. Mr. Burke has not been extended contract authority. The only exception is that on October 23, 1954, District Director, Donald R. Wilson, authorized Mr. Burke to review and approve structural and reinforcing bar drawings at the site.

Your attention is directed to the General Conditions, Sec. 12, Changes in Work—(a), stating: "Government representatives, including construction engineers, district engineers, inspectors, and custodians, shall have no authority to alter the terms and/or conditions of the contract, specifications, or drawings without authority from the contracting officer."

But, while the Board cannot find that the contracting officer had delegated his authority to approve changes to the Construction Engineer, there is no doubt that Donald R. Wilson, before his retirement from Alaska Public Works, had approved an interpretation of the contract which was more liberal towards the contractor than the one that allowed him additional compensation for work attributable to changes in design. Under date of February 26, 1954, William C. Burke wrote to the contractor as follows:

Attached hereto is a copy of report from our Architectural Section taking exception to the method used to determine the extra concrete, excavation and backfill required to place said footings and foundations on rock-bearing materials. However, it has been *administratively determined* to allow payment for the

above items beginning one (1) foot below the bottom of the footings and foundations as shown on the Plans. As, for an example, footings shown on the Plans with a depth of 1'-6"; to this will be added 1'-0", making a depth of 2'-6" for a basis of computation.

Therefore, it follows that the Change Orders heretofore submitted for these items will necessarily have to be revised to reflect the computations on the above basis.

Upon advice of your approval of the above method, this office will compute and re-write all prior affected Change Orders submitted to date. [Italics supplied.]

There can be no doubt that the construction engineer was authorized to make this offer, for James W. Huston who succeeded Donald R. Wilson as contracting officer on April 19, 1954, has found that it was discussed in the Juneau office of Alaska Public Works, and that Burke was instructed "to discuss with the contractor's representative a revision of quantities based on payment for footings more than 12 inches deeper than the plans * * *." The contractor would not, however, accept additional compensation upon this limited basis, and when Huston succeeded Wilson, the offer was abandoned on the advice of counsel that the contractor was entitled to additional compensation only when explicit changes in design had been made.

The Board must hold that the successor to the original contracting officer erred in rejecting the 12-inch rule suggested by the latter. To say that the plans and specifications were not definite in indicating the depth of the footings does not necessarily lead to the conclusion that they were infinitely indefinite. Such a conclusion would make the plans and specifications perfectly meaningless. The situation would be the same as if no plans or specifications existed at all. The 1 foot 6 inches indicated as the depth of the footings on the plans may have represented an ideal dimension, but even an ideal to have meaning must be something that is at least attainable. The plans indicated that the rock lines were "approximate." To be approximate, however, the lines would have to be close to or near to the elevations indicated on the plans, for it is in these terms that the dictionary defines the term "approximate." Moreover, in a number of cases in which approximate quantities or factors have been involved in construction contracts, the courts have held that the figure stipulated in the contract could not be unreasonably exceeded.¹⁰ Thus, the 1 foot 6 inches indicated

¹⁰ See, for example, *City of Richmond v. I. J. Smith & Co.*, 89 S. E. 123 (Va., 1916), holding that where blueprints for prospective bidders on construction of a municipal bridge showed the depth to bedrock at an approximate number of feet substantial variations could not be justified, and *Dunbar & Sullivan Dredging Co. v. State*, 34 N. Y. S. 2d 848 (N. Y. 1939), holding that where a contract for the excavation of a barge canal provided that the state should reduce the quantity to be excavated by approximately 10,000 cubic yards, the quantity could not be reduced by 17,676.2 cubic yards. See also *Township School District v. MacRae*, 165 N. W. 618 (Mich., 1917); *Midland Steel & Equipment Co. v. Douglas Auto Parts Co.*, 42 N. E. 2d 550 (Ill., 1942); *Mutr Bros. Co. v. Sawyer Constr. Co.*, 104 N. E. 2d 160 (Mass., 1951).

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on the plans as the depths of the footings were neither maximums nor minimums but approximate dimensions.

The contractor alleges that in some instances the depth of the footings indicated on the plans were exceeded by as much as six feet. Of course, reasonable men might well differ in determining what would be a permissible variation from the footing depths indicated on the plans. In the present case, however, this was determined by the original contracting officer, who was in the best position to judge, and the Board accepts the 1-foot rule which he adopted. The contractor is, therefore, entitled to additional compensation on this basis. The record does not show to what extent, if any, changes in the depths of the footings may have resulted in savings to the contractor. If there were such savings the amounts may be deducted from what would otherwise be allowable. However, the contractor is not entitled to additional compensation of any of the spread footings except those under the pipe trench, since the record shows that the contracting officer was correct in holding that they were voluntarily undertaken by the contractor. It is well settled that a contractor is not entitled to additional compensation for work voluntarily undertaken.¹¹

The claim is remanded to the contracting officer for the determination of the amount allowable to the contractor with a further right of appeal to the contractor in case of dispute. If there is such a dispute, a record which would permit the determination thereof should be submitted to the Board. In any event, in view of the disposition by the Board of the wall leakage claim, considered below, which may result in a liability of the contractor for damages, the amount allowable on the footings claim should not be paid but held until the extent of this liability is determined.

2. THE WALL LEAKAGE CLAIM

This claim, which is in the amount of \$126,659, is for additional compensation alleged to have been incurred by the contractor in an effort to eliminate numerous leaks that appeared in the Ketchikan High School Building after the structure had been almost completed.

The Ketchikan High School, which is a striking example of modern architecture, is a low U-shaped building, extending from east to west, with clerestory overhang sections. The south area is a two-story unit, while the north area is a one-story unit. The building, except for its foundations and structural steel, is constructed entirely of various types of steel and aluminum panels manufactured by the Detroit Steel Products Company. The floor and roof areas are constructed of Types

¹¹ See *Kingsbury, Administrator v. United States*, 1 Ct. Cl. 13 (1863); *Murphy v. United States*, 13 Ct. Cl. 372 (1877); *Merchant's Exc. Co. v. United States*, 15 Ct. Cl. 270 (1879).

D and AD panels, while the walls are constructed of Type C panels attached horizontally to the structural steel members. The space between the wall panels is filled with insulating material, and covered with 4" plates attached by steel screws, and mastic is applied in the seams as a sealing compound. The clerestory panels are held together by male and female joints, which were designed to be treated with two coats of paint.

Paragraphs 4-2 and 4-8 of the specifications required the use of panels manufactured by the Detroit Steel Products Company or an approved equal, but panels made by other manufacturers were not found suitable. Paragraph 4-7 of the specifications provided:

All panels shall be laid in strict accordance with the manufacturer's printed instructions and as shown on layout prepared for erector's use. *Erection shall be made by manufacturer or his authorized representative.* [Italics supplied.]

The same requirement is emphasized by Paragraph 4-13 of the specifications which provides:

Erection shall be made by manufacturer or his authorized representative in strict accordance with the manufacturer's standards.

Sheets A-11, A-12, and A-14 of the drawings all contained a "Note," as follows:

All joints or exterior connections shall be caulked with mastic and/or weather-strip, or welded continuous—contractor shall be responsible for a complete weather-tight building—see Specif.

Section 5, subdivision C, of the General Conditions of the contract provided:

The contractor shall not award any work to any subcontractor without prior written approval of the contracting officer, which approval will not be given until the contractor submits to the contracting officer a written statement concerning the proposed award to the subcontractor, which statement shall contain such information as the contracting officer may require.

And Paragraph 4 of Addendum No. 4 to Plans and Specifications provided:

Regardless of the provisions of the plans or specifications or the choice of language used in designating given proprietary articles, the provisions of Section 15 of the General Conditions will govern the construction of this project. Within the meaning of Section 15 of the General Conditions the provisions for this construction do not intend to limit the Contractor to a single item. It is clearly understood that for any item or method of construction "an approved equal is always to be read into the specifications."

Section 15 of the General Conditions to which reference is made in this paragraph provided:

Specific reference in the specifications to any article, device, product, material, fixture, form, or type of construction, etc., by name, make, or catalog number shall be interpreted as establishing a standard of quality and shall not be construed as limiting competition, and the contractor, in such cases, may at his

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option use any article, device, product, or material, fixture, form, or type of construction, which in the judgment of the contracting officer expressed in writing is equal to that named.

Notwithstanding the provisions of the specifications, the panels used in the Ketchikan High School were not erected by the Detroit Steel Products Company, which manufactured them, or by its authorized representative. Before bidding, the contractor had obtained from the Detroit Steel Products Company separate quotations for labor and material. The price quoted by the Detroit Steel Products Company for supplying the panels and other materials as well as for erecting the panels was \$422,967. The price quoted by the company in the event the contractor erected the panels was \$109,889. The contractor apparently felt that the panels could be erected by anyone who had a reasonable amount of experience, and decided to have them erected by a subcontractor of its own choosing, who would not even be supervised by the Detroit Steel Products Company. The subcontractor selected by the contractor for this purpose was American Service, Inc.

The contractor justified the course which it had adopted on the basis of Paragraph 4 of Addendum No. 4, but clearly this justification must be rejected. The purpose of this provision, amending Section 15 of the General Conditions, is to provide for the use of substitute articles which are of equal quality. It is true that the phrases "type of construction" and "method of construction" appear in these provisions, but it is apparent from the context in which they appear that they are only intended to exhaust all the synonyms for "articles." Otherwise, reference would not have been made to the "name, make, or catalogue number" of a type of construction. Even if it be conceded for the sake of argument, however, that the phrases in question do refer to the way certain articles are used in construction, this would still not justify the substitution of one manufacturer for another in the performance of the work required by the contract. Performance by a particular company is neither a "type" nor "method" of construction. Finally, if there is any conflict at all between the provision in the addendum and the provisions of the specifications, they must be construed together, and the repeated provision of the specifications requiring that the panels be erected by the Detroit Steel Products Company, or by its authorized representative, must be given effect.

Indeed, it is plain from the testimony given by the president of the contractor at the hearing that he did not really put any faith in his own theory, for he attempted, both prior to and during the course of the erection of the panels, to secure approval of his subcontractor, American Service, Inc., by the Detroit Steel Products Company. That company not unnaturally declined, however, to give its approval, since it would have meant the assumption of a third party liability

without additional consideration. When asked why, if he construed the specifications not to require the erection of the panels by the Detroit Steel Products Company, he attempted to secure the approval of his subcontractor by that company, the president of the contractor explained the apparent inconsistency by stating that it was because E. L. Graves, who was then the Government's inspector on the job had raised the question whether American Service, Inc., had been approved by the Detroit Steel Products Company. But he admitted that he did not point out to the inspector that under the terms of the specifications, it was not necessary that the subcontractor for the erection of the panels be approved by the Detroit Steel Products Company. Moreover, it is apparent from the testimony of Dwane Henson, the superintendent on the job employed by American Service, Inc., that the subcontractor, too, construed the specifications to require the approval of the subcontractor by the Detroit Steel Products Company, for it even made an independent attempt of its own to secure such approval.

In any event, Paragraph 4 to Addendum No. 4 required the approval of the contracting officer of any equal, and Section 5 (c) of the General Conditions of the contract required the approval of any subcontractor by the contracting officer. Consequently, under date of March 2, 1954, the contractor wrote to Alaska Public Works, requesting that American Service, Inc., be approved as the erector of the roof, floor and wall panels. Paragraph 4 of the letter stated:

Subcontractor is bound to the contractor by the terms of the General Conditions and other contract requirements.

The contracting officer apparently assumed from this statement, as he reasonably might, that the subcontractor was one approved by the Detroit Steel Products Company, and on March 11, 1954, the contracting officer approved American Service, Inc., as the subcontractor for the purposes specified. Certainly fair dealing required that the contractor at least inform the contracting officer that the subcontractor had not been authorized by the Detroit Steel Products Company. There is some evidence that E. L. Graves, the inspector, knew the true situation at this time, and somewhat later informed William C. Burke, the Area Engineer in charge of the project. But the latter failed to inform the contracting officer who thus remained in ignorance of the truth until after the leaks had appeared in the Ketchikan High School. Moreover, it should be noted that the contracting officer could not have waived the requirement that the panels be erected by the Detroit Steel Products Company or by its authorized representative, for it is well settled that Government officers may not modify a Government contract to the disadvantage of the Government.¹²

¹² See 18 Comp. Gen. 114, 116 (1938), and judicial decisions there cited.

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Thus American Service, Inc., proceeded to install the Detroit Steel Products Company panels entirely under its own auspices. The wall panels appear to have been erected in the months from June to October 1954. Gerald B. Banta, who succeeded E. L. Graves as inspector on the job, testified that he first noticed leaks in the building after a storm that occurred on October 8, 1954. The leaks multiplied rapidly thereafter, since the weather continued to be bad. At least 26 major leaks have been located, but they are by no means all that exist. Several witnesses for the contractor testified that the leaks were, in their opinion, mainly in the south and east walls—in the east wall of the auditorium and the south wall of the gymnasium. Various efforts were made by the subcontractor to locate the source of the leaks by testing the walls with fire hoses, and removing some of the panels and cover plates. The contractor also retained the Seattle office of the Pittsburgh Testing Laboratory to test the leakage in the walls, and its personnel inspected the building on December 27, 1954. They then made a test which consisted of subjecting some test panels erected inside the shop area of the building to water from a garden hose. According to the report of the laboratory, dated January 10, 1955, water was visible on the back sides of the panels after the test. Various remedial measures for eliminating the leaks were included in the report, which recommended "removing the cover plates, cleaning both cover plates and panels, and recaulking the last 4" at each end of the panels and placing 1/2" minimum bead of mastic on each side of the cover plate before re-erection," or as an alternative procedure, to eliminate the removal and cleaning operation, applying pressure caulking at all joints on the critical walls.

In the meantime, the contracting officer was himself investigating the cause of the leakage, and insisting in correspondence with the contractor that the building be made weather-tight. On January 4, 1955, a meeting was held at the Ketchikan High School attended by representatives of Alaska Public Works, Detroit Steel Products Company, American Service, Inc., and the designing architect for the purpose of holding an informal discussion of the leakage problem. As a result of this meeting, the contracting officer wrote a letter dated January 18, 1955, to the contractor, in which he took the position that the responsibility for making the building weather-tight was the contractor's, but he suggested various remedial measures which might be taken by the contractor at its own expense to eliminate the leaks. The final paragraph of the letter called the attention of the contractor to its failure to secure the approval of American Service, Inc., by the Detroit Steel Products Company in the following terms:

When we approved American Service, Inc. as a subcontractor, we did so prior to the commencement of the work on the assumption that you were complying

with the terms of your contract and submitting a factory-authorized erector for approval. Our local personnel were assured by your superintendent that American Service, Inc., were factory-authorized erectors, just a few days before we phoned the manufacturer on December 20, 1954 and found that American Service, Inc., were not authorized for such erection work. This transpired after the erection was substantially complete and after the correction of this leaky condition had been called to your attention by the contracting officer on December 8, 1954. Prior to that time our field representatives had repeatedly called this deficiency to the attention of your field representatives.

The remedial measures to eliminate the leaks suggested by the contracting officer in his letter of January 18, 1955, were as follows:

- a. Complete the installation of the porcelain.
- b. Substitute aluminum colored plastic paint for the originally specified two additional coats of paint to be applied on all primed surfaces under the lookouts. As installed, the seams in this metal construction are open, more than factory tolerances, over enough of the area so entire coverage of the under eave area with two coats of this plastic paint is required. These opened seams appear to be the result of improper handling of the metal members, either in transit or on the job site. In some instances these openings approach one-fourth inch and it is obviously impossible to repair this damage by the application of the paint originally specified. This substitution of paint is required because factory tolerances were anticipated in these metal seams and the paint originally specified would have been sufficient to cover them.
- c. Remove vertical cover plates and insulation.
 - (1) Dry the insulation.
- d. Use compressed air to thoroughly blow the water out of all horizontal seams. Note that the presence of moisture interferes with adhesion of the mastic to the metal.
- e. Fill all horizontal seams with the mastic specified by the manufacturer. These seams will have to be completely filled at the face, using small nozzle, pressure operated, caulking equipment. Neatly strike the mastic along the surface of the seams. Clean the rest of the surface of the panels of improperly placed mastic.
- f. Fill the vertical joints with dry insulation as originally specified, using additional insulation as required to completely fill the spaces.
- g. Reinstall, vertical cover plates, completely sealing them with mastic, including pressure application of mastic from the surface in the rib indentations.
- h. Clean surrounding surfaces of improperly placed mastic and neatly strike the mastic.

The letter of January 18, 1955, was followed by another letter, dated January 24, 1955, from the contracting officer in which it was stated that it was the decision of the contracting officer that "correction of the leaky condition and production of the weather-tight structure called for, requires the minimum corrective action suggested in his letter of January 18, 1955." The letter of January 24, 1955, was followed by still another letter dated February 1, 1955, and signed by M. Perry Hobbs, Acting Director of Alaska Public Works, in which it was suggested that the seams in the pans under the lookouts be sealed with a spray application consisting of Minnesota Mining and

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Manufacturing Company's 3M rubberized underseal EC909, and then, in order to provide a satisfactory appearance, that the under-eave areas be covered with a sprayed-on coat of metallic aluminum paint.

In attempting to eliminate the leaks, the contractor fell far short of following the program outlined by the contracting officer. The corrective work consisted principally of pressure caulking the horizontal seams of the building, removing and reinstalling some of the cover plates, and installing some additional flashings. Underseal material was also used in the clerestory sections to seal the side lap male and female joints of the panels. The underseal was, however, applied with a brush rather than with a spray gun, as suggested by the contracting officer.

Although these measures failed to stop the leaks in the building, it is the contention of the contractor that it is entitled to additional compensation for undertaking them. It has attempted to prove that, although it complied in all respects with the plans and specifications, including the instructions of the Detroit Steel Products Company, the building leaks because the design was faulty, and could not possibly result in a weather-tight building, in view of the climatic conditions, which normally prevail in the Ketchikan area. In addition to the high winds and heavy rainfall to which Ketchikan is usually subjected, it points to abnormal weather conditions, including heavy storms and marked variations in temperature which were experienced in Ketchikan after the wall panels were erected. In this connection, the contractor stresses particularly those features of the specifications which called for the horizontal rather than vertical installation of the wall panels, and for the use of cover plates which, it alleges, were not adequately designed to cope with the expansion and contraction of the building as the temperature changed. Its theory is apparently that the horizontal installation of the wall panels and the flatness of the cover plates under the conditions of the Ketchikan climate increased the likelihood that the building would develop leaks. It dismisses the requirement noted on several of the plans that the building be "weather-tight" on the grounds that it was contained in a mere note on the plans and that the word weather-tight cannot be found in any dictionary and is, therefore, quite meaningless.

The burden of proving a claim for additional compensation is always on the contractor. The president of the contractor admitted that in accepting the contract he assumed that by following the plans and specifications, he could construct a building which could withstand the vicissitudes of the Ketchikan weather, and the most cogent and convincing proof that this assumption was wholly mistaken must be required. The weather conditions in the Ketchikan area were no secret. They were as known to the contractor's representatives as to

everyone else. While the weather was somewhat more severe during the period of the construction of the Ketchikan High School, there is no conclusive evidence that this was necessarily responsible for the leaks.

It may be conceded that the plans for the Ketchikan High School left something to be desired. Indeed, the contracting officer himself has not denied that "the plans and specifications are very difficult to interpret and have been the subject of various interpretations."¹³ The architect who testified at the hearing seemed to have only a very hazy notion of the requirements of the plans and specifications. It may be conceded also as a purely abstract proposition that the leakage in a building may be attributable to an experimental design which has not been based upon adequate consideration of climatic or other conditions. If a contractor showed that he had adhered entirely to the requirements of the specifications and the instructions of the manufacturer of the building material, there would be strong reason to infer that the plans were faulty. In the present case, however, the contractor ignored the most crucial requirement of the specifications, and in executing them was guilty to say the least of a grave degree of fault.

It is apparent at least that the contractor did not comply with that requirement of the specifications which obliged it to have the panels installed by the Detroit Steel Products Company or by its authorized representative. The contractor seems to have been determined from the beginning to save the Government money against its will! The contractor behaved, moreover, as if it was saving the Government money when in truth it was saving money for itself, and gaining an obvious advantage over its competitors in the bidding. Having embarked upon this course of conduct, the contractor seems to have treated the requirement that the panels be erected by the Detroit Steel Products Company or its authorized representative as a mere technicality.

In the estimation of the contractor apparently American Service, Inc., was every bit as good as the Detroit Steel Products Company. This overlooked, of course, the consideration that the special skills and knowledge possessed by the manufacturer could not be transferred to others by a booklet of instructions. The subcontractor was put in a position in which it had to adhere slavishly to the instruction book. The Detroit Steel Products Company, on the other hand, had it installed the panels, would have been in a position to modify the general instructions in accordance with the exigencies of the particular job. This is precisely what the Government bargained for in requiring that the panels be installed by the manufacturer or by its authorized rep-

¹³ See paragraph 27 of his rebuttal memorandum of March 15, 1955.

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representative. If any firm, supplied with the Detroit Steel Products Company booklets of instructions could have installed the panels, there would have been no point in imposing this requirement. Over and above this, if the panels had been erected by the Detroit Steel Products Co. or under its supervision, the Government would have been able to hold that company liable for the correct installation of the panels, as well as for their proper manufacture. Indeed, all this was really recognized by the Superintendent of American Service, Inc., when he testified concerning the closure of the D panels at the roof. Speaking of the way the Detroit Steel Products Company might have handled this problem, he stated:

The erection was done properly but had they done the erection they might have made it watertight because its their material and they are obligated to furnish a watertight structure being as how it is their material so naturally I would assume the only possible way they would perform or turn over a watertight building would be to fabricate a different type of closure than the one we have and the one similar to this.

The instructions of the Detroit Steel Products Company were not followed in many respects, moreover, in the installation of the wall panels. Even the contractor's witnesses conceded that the screws on the cover plates were set 8'' rather than 12'' on center, as required by the instructions, and that the mastic was more liberally applied than the instructions called for. In addition, there is very substantial evidence that the panels and the mastic were not stored properly; that some panels were damaged and that these damaged panels were used in the construction; that the panels were not properly cleaned before their installation; that defective mastic or mastic at the wrong temperature was used in caulking or used too sparingly; that the kerosene or gasoline used in cleaning the caulking guns was allowed to get into the mastic and on to the panels; and, finally, that when cover plates were removed and replaced, the same screws rather than new over-sized screws were used in replacing them, despite the protests of the inspector on the job. The subsequent loosening of the screws may well have been attributable to this factor rather than to the contraction and expansion of the cover plates. As for the suitability of paint to seal the interlocking longitudinal side laps or seams of the roof panels, the contractor admits the contracting officer's contention that there was some irregularity to the side laps.

In view of the implications of this evidence, the Board is not disposed to accept the testimony of two engineers retained by the contractor as expert witnesses who, having done no more than examine the plans and specifications for a few hours, ventured the speculative opinion that the horizontal installation of the panels and other factors could not possibly produce a watertight building. The record shows that wall

panels manufactured by the Detroit Steel Products Company have been installed in several places in the United States in a horizontal position, and there is nothing to show that these installations have not proved successful. Similarly, the Board is not disposed to accept as decisive the test conducted by the Pittsburgh Testing Laboratory, especially since the conditions of the test were artificial, and there were departures from the specifications in making it. Moreover, the recommendations made in the report were not entirely adopted by the contractor and they would not have eliminated the leakage even if they had been strictly adhered to. Even less weight, certainly, is to be attached to the certifications made in the course of the job by the contractor's representatives or Government personnel at the site of the job that the work had been performed in accordance with the plans and specifications, since admittedly those who made the certifications did not observe the progress of the work at all times.

As the contractor has failed to show that a weather-tight building could not be produced by following the plans and specifications, and it affirmatively appears that the specifications were not followed in many respects, it is not entitled to additional compensation for such corrective measures as it undertook to eliminate the leaks. Indeed, by accepting plans which made the contractor responsible for "a complete weather-tight building," the contractor expressly warranted that it would be impervious to the weather, which certainly included freedom from leakage. The contractor is mistaken in contending that the word "weather-tight" is not to be found in any dictionary. The word appears among the compounds of "weather" in Webster's New International Dictionary but even if it could be found in no dictionary, the Board would have to assume from the record that the contractor knew what was expected of it. In view of the provisions of Article 2 of the contract, which made anything shown on the drawings of like effect as if mentioned in the specifications,¹⁴ the Board must assume, moreover, that the Note on Sheets A-11, A-12, and A-14 of the drawings was a binding part of the specifications.

The contractor's claim for correcting the "wall leakage," which is something of a misnomer, since it includes also leakage from the eaves of the building, must be rejected. All but a small part of the claim could not be allowed in any event. The president of the contractor testified that of the \$126,659 which the firm was claiming only \$4,750 represented the direct costs of performing the corrective work involved in the attempts to eliminate the leaks. The rest of the amount claimed is only an estimate of damages suffered by the contractor as a result of alleged delays or acts of the Government. This represents a claim for unliquidated damages which the Board would

¹⁴ See footnote 6, *supra*, for the text of this provision.

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have no jurisdiction to allow ¹⁵ even if it were convinced of the meritoriousness of the claim.

3. THE AUDITORIUM BLOCKOUTS CLAIM

This claim in the amount of \$915.68 is for additional compensation for providing ventilating outlets (blockouts) to allow for future installation of ventilator sleeves and dampers in the auditorium floor of the Ketchikan High School.

In the bidding invitation, the auditorium floor seating was an alternate—No. 5—and the Government elected to delete this work from the contract, apparently because the necessary funds were not immediately available. Nevertheless, the installation of a ventilating system was part of the contract, and when the contractor was ready to pour the concrete slab for the auditorium floor, the contracting officer directed the contractor to make provision for the ventilator openings.

The contractor objected to the performance of this work, taking the position that the blockouts were part of the seating contract, which had been eliminated, while the contracting officer took the position that it was part of the ventilating contract, which, of course, had not been deleted.

The basic argument of the contractor is that the blockouts are such an integral part of the seating arrangements, that the location, size, and shape of these openings was entirely dependent on the seating layout. The contractor avers that since it had no way of knowing whether benches, folding chairs, or theatre-type anchored seats would be provided, it was completely at a loss to know what type of openings to make. Therefore, it concludes that it was under no obligation to provide any openings at all. The contractor concedes that it would hardly have been good practice to pour the concrete floor without making provision for ventilator openings, since the slab would have to be punctured later when the seats came to be installed. But it eschews all responsibility for the impracticality of the plan, which it blames upon the Government.

The contractor's position is clearly unreasonable and untenable. As some sort of ventilator openings were a necessary part of the ventilating system, and it would be highly impractical to install them after the floor slab had been laid,¹⁶ an interpretation of the specifica-

¹⁵ See cases cited in footnote 3, *supra*.

¹⁶ Indeed, the contracting officer states that if provision had not been made for the blockouts, it would have been "necessary to go back and break 130 holes through the concrete floor into the plenum chambers beneath. In the operation of breaking the concrete over the plenum chambers it would be impossible to prevent concrete dust and particles from falling into the chambers which, being the main air supply ducts for the auditorium, would diffuse the dust throughout the auditorium." See contracting officer's letter of October 29, 1954, to the Director of the Office of Territories.

tions which produced such a result should hardly be indulged unless absolutely inescapable. This is very far, indeed, from being the case.

Division 4 of the Mechanical Specifications, dealing with ventilation, which was *not* deleted, included as a part of its second paragraph, a provision as follows:

Fan platforms, curbs and *openings* will be provided by the General Contractor. [*Italics supplied.*]

As the appellant was the general contractor, it was clearly obligated to supply openings for the ventilating system.

Moreover, it is conceded that Sheet M-4 of the plans indicated ventilators by small circles, although details were lacking, and that the plan bore a note, as follows:

Clear floor between-the-seat vents, American Seating Company, floor vents, mushroom type, see Specs. under Equipment.

Furthermore, it is also conceded that Sheet EQ-9 indicated in general the location of 130 middle leg ventilators, although again there was no detail as to the openings for the ventilators. The contractor attempts to escape from the fact that the type of ventilator was indicated on the plans by arguing that under paragraph 4 of Addendum No. 4 to the specifications an "approved equal" might have been substituted. But once an equal was approved by the contracting officer, the contractor would again no longer be in the dark. Finally, even if it be conceded that the precise size, shape, and location of the blockouts were not indicated on the plans, this did not necessarily absolve the contractor from any obligation to provide them. Section 9 of the General Conditions of the contract included the provision:

Such additional detailed drawings as the contracting officer may deem necessary will be furnished to the contractor as required by the work.

Paragraph 1-3 of the Mechanical Specifications also provided:

The drawings are partly diagrammatic, and are not intended to show in detail all features of the work.

The necessary details were presumably supplied by the contracting officer, and he properly rejected the contractor's claim.

4. THE CERAMIC TILE BACKING CLAIM

This claim, the amount of which is unspecified, because at the time it was first asserted the work involved had not been entirely completed, arises from discrepancies between the so-called Room Finish Schedule, which is Sheet A-29 of the drawings, and details shown on Sheets A-24 and A-14 of the drawings, with respect to the backing of the ceramic tile to be installed in certain rooms. The Room Finish

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Schedule in the column headed "Walls" listed gypsum board for certain rooms, while Sheets A-24 and A-14 of the drawings, which indicated the details of construction for the various rooms, required the ceramic tile to be backed with lath and plaster.

The contracting officer took the position that the detailed drawings rather than the Room Finish Schedule governed, and that the ceramic tile walls had to be backed with lath and plaster. He reasoned that the Room Finish Schedule was a mere tabulation of materials, and that the drawings for particular rooms had to be consulted, therefore, in order to determine the details of construction. He explained that the error in the room finish schedule had probably resulted from a failure to distinguish in that tabulation between the shower rooms and the toilet rooms. He called attention to the fact that the contractor himself was aware that gypsum wall board was a questionable material upon which to install ceramic tile, and that if used would probably soon result in falling tile. From this he deduced that the contractor should have been put on notice that a discrepancy which required clarification, pursuant to Article 2 of the contract, existed. Article 2 of the contract includes the provision:

In case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense.

Counsel for the contractor, in an effort to escape from the dilemma involved in this provision, has constructed a neat syllogism. His major premise is that the Room Finish Schedule is a part of the specifications, while Sheets A-24 and A-14, showing the actual details of construction, are parts of the drawings. His minor premise is taken from another provision included in Article 2 of the contract which declares: "In case of difference between drawings and specifications the specifications shall govern." His conclusion, of course, is that by virtue of this provision, the Room Finish Schedule, which is part of the specifications, governs.

The trouble with this syllogism is the major premise that the Room Finish Schedule is part of the specifications is wrong. The specifications consist of the series of written statements describing the details of construction that are usually bound with the contract documents. The drawings, *including Sheet A-29, the Room Finish Schedule*, are listed in the specifications but Sheet A-29 is bound with all the other drawings, including Sheets A-24 and A-14. It is quite obviously part of the drawings, and bears the same relation to the other drawings that the index of a book bears to the text of the book itself. It could hardly be reasonably argued that an error in the index of a book is to be preferred to the statement in the text.

Such a view would certainly be highly unrealistic, and it is no less so when applied to a schedule of drawings. As a matter of fact, the argument of the contractor is shown to be fallacious by the specifications themselves which show that the ceramic tile work is governed by the drawings. Division 11 of the Architectural Specifications, headed "Ceramic Wall & Floor Tile," provides in paragraph 2, as follows:

This Division includes all labor, materials and services necessary for and reasonably incidental to the completion of all ceramic wall tile work and all wall preparation required before setting tile *as indicated on the drawing* and specified herein. All wainscots will be heights as shown on the drawings. Tile shall fit snug under sill. [Italics supplied.]

As all the details of the completion of the ceramic tile work are specified only on the drawings, the drawings govern by virtue of this provision of the specifications.

The contracting officer was correct, therefore, in regarding the case as one of discrepancy in the drawings, which should have been handled by the contractor as provided in Article 2 of the contract. The contractor's claim must be rejected. It was stated by the Government at the hearing that the contractor finished several rooms by putting the ceramic tile on gypsum board but that this method of finishing the work would be accepted for these rooms, provided that the Government obtained a proper credit. As the contractor was required to put the tile on lath and plaster in these rooms also, the Government is entitled to a credit, and it is hereby allowed.

Originally, there also appears to have been a dispute between the parties whether steel panel ceilings with furred portions of the ceilings covered with lath and plaster was required, and the dispute appears to have rested on the same discrepancy between the Room Finish Schedule and the detailed drawings. This dispute was not mentioned at the hearing, however, nor is any reference made to it in the briefs of counsel. If this dispute still exists, it is the decision of the Board that the detailed drawings govern.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the findings of fact and decision of the contracting officer are affirmed, as modified, and he is directed to proceed as outlined above.

THEODORE H. HAAS, *Chairman.*

THOMAS C. BATCHELOR, *Member.*

WILLIAM SEAGLE, *Member.*

*November 28, 1955***APPEAL OF JENECKES'****IBCA-44***Decided November 28, 1955***Contracts: Unforeseeable Causes**

A claim for an extension of time for performance of a Government construction contract based on unusually severe weather conditions can be allowed only when the evidence indicates that the severe weather exceeded the average weather conditions reasonably to be expected, since such conditions are "foreseeable" and hence not excusable under the terms of Article 5(c) of the revised standard form of Government construction contract.

Contracts: Unforeseeable Causes—Contracts: Delays of Contractor

Where counsel for the Government contends that the delay in the completion of the contract is attributable to the tardiness of the contractor in commencing and prosecuting the work under the contract rather than to weather conditions, and the record shows that the contractor delayed in commencing work for a greater number of days than the probable number of unforeseeable days of bad weather, there is serious doubt that the contractor is entitled to any extension of time at all.

Contracts: Appeals

While an appeal opens up the entire record, and the Board may, upon urging by counsel for the Government, disallow an extension of time granted by the contracting officer, by reason of unusually severe weather, where the contracting officer's calculations were not entirely correct, and when several factors in the case, including the average number of days of windstorm and rainstorm are obscure, the Board will not disturb the contracting officer's decision.

BOARD OF CONTRACT APPEALS

Jeneckes', of Mountain View, California, filed an appeal from the findings of fact and decision, dated May 26, 1955, of the contracting officer under Contract No. 14-20-450-373, Bureau of Indian Affairs. The contract, which was on Standard Form 23A (March 1953), was for land subjugation and construction of irrigation facilities on the Colorado River Indian Reservation.

The contract was entered into on September 13, 1954. It provided that the work should be started within 20 calendar days after the date of receipt of notice to proceed, and that the work should be completed within 180 days thereafter. Notice to proceed was given by the contracting officer on September 17, 1954. When the contractor delayed acknowledging receipt of the notice to proceed, the contracting officer fixed September 25, 1954, as the date on which the contract time would commence to run. As the contractor did not protest this date, it must be accepted as correct and the date for completion of the work must be considered to be March 23, 1955.

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By letter dated April 15, 1955, confirming and elaborating upon previous correspondence, the contractor requested various extensions of time for performance of the contract. It based its request for an extension of time of $25\frac{1}{2}$ days on bad weather, and another request for an extension of time of $11\frac{1}{2}$ days on a strike. It also reminded the contracting officer that in a letter dated March 22 it had mentioned a loss of time of 10 days due to the repair of the Brisco ditcher furnished by the Government, and another delay of 12 days due to the fact that forms necessary for concrete work were on another Indian agency job.

In his findings, dated May 26, 1955, the contracting officer mentioned the fact that the Superintendent of the Colorado River Indian Agency had complained in a letter dated December 15, 1954, that the work was not progressing in accordance with the schedule of operations which was part of the specifications but was 22% behind schedule. However, the contracting officer did not make any finding of his own with respect to the scheduled progress of the work, or with respect to any of the requested extensions of time except the request based on the prevalence of bad weather. The other requests are, therefore, still open, and the Board's decision will be limited to the factor of weather as an excusable cause of delay.

The tabulation of days of bad weather submitted by the contractor with its letter of April 15 covered the period from September 28, 1954, to April 12, 1955, and had shown 24 windy days and $11\frac{1}{2}$ days of rainy weather. The contracting officer did not investigate or even note the days of rainy weather but by checking the Weather Bureau records for a five-year period from 1950 to 1951, inclusive, for the months from October to March, inclusive, he determined that the average number of windy days during this five-year period had been 14, and that the number of windy days in the 1954-1955 contract period had been 24. He concluded, therefore, that "an allowance of $10/24$ of the days idle due to wind be allowed for the contract period." Actually, he applied this formula beyond the contract period to the $25\frac{1}{2}$ days requested by the contractor as an extension of time by reason of bad weather, as follows:

$10/24 \times 18.5 \text{ days} = 7.71 \text{ extension to end of contract period } 3/23/55$

$10/24 \times 6 \text{ days} = 2.5 \text{ extension from } 3/23/55 \text{ to } 4/12/55$

$10/24 \times 1 \text{ day} = .4 \text{ extension from } 4/12/55 \text{ to } 4/22/55$

Under this formula, the contractor would be allowed an extension of time of 10.61 days but the contracting officer appears to have rounded this figure, and allowed the contractor an extension of time of 11 days by reason of windy weather. He also allowed an additional extension of time of 19 days pursuant to Paragraph 31 of the specifications,

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which provided for an automatic extension of time of 1 day for each 3,000 cubic yards of earth moved in excess of the contract estimate. The excess yardage moved had been 56,361 cubic yards. Thus the time for completion of the contract was extended by the contracting officer from March 23 to April 22, 1955.

Article 5 (c) of the contract provided that the contractor should not be charged with liquidated or actual 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, in neither its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors or suppliers due to such causes * * *.

The contractor contends in its appeal that the contracting officer was in error in construing this provision, so as not to allow an extension of time for the whole 25½ days of windy weather. On the other hand, counsel for the Government contends that the contracting officer erred in allowing any extension of time at all. He argues that a period of five years, the last of which includes the contract period, is not long enough to permit the formulation of an average, and that there is, therefore, no convincing evidence that the number of windy days during the contract period was "unusual" within the meaning of the contract. He argues, also, that the delay in the completion of the contract is attributable to the tardiness of the contractor in commencing and prosecuting the work under the contract rather than to the weather conditions. In this connection, he quotes from a memorandum dated April 22, 1955, in which Acting General Engineer Hall reported to Operations Officer Gilliard that the contractor had not started work until November 1954. In the event that the Board should conclude that it lacks authority to disallow the extension of time granted by the contracting officer, counsel for the Government contends in the alternative that his findings and decision should be affirmed.

The contention of the contractor that all the days of unusually severe weather are excusable seems to be supported by the decision of the Court of Claims in *Albina Marine Iron Works v. United States*, 79 Ct. Cl. 714 (1934), but the force of that case has been considerably weakened by the court's later decision in *Caribbean Engineering Company v. United States*, 97 Ct. Cl. 195 (1942), a case in which bad weather was not specifically listed among the unforeseeable causes of delay. In the later case, the court agreed with the contracting officer that only 32 of 34 days of bad weather were excusable. "To be entitled

to an extension on account of bad weather," said the court, "the bad weather must have been in fact unforeseeable. Any prudent man would have anticipated that he would have been delayed at least two days by bad weather, if not more." In the light of the later decision of the Supreme Court of the United States in *United States v. Brooks-Callaway Co.*, 318 U. S. 120 (1943), which held that none of enumerated causes of delay in the standard form of Government construction contract are unforeseeable per se, the distinction between the two cases would seem to be of no importance, and it is believed that even the Court of Claims would now hold that a contractor is entitled to an extension of time only for such unusually severe weather, as could not reasonably have been foreseen. This has clearly been the rule followed by the Comptroller General, who, for example, declared in 14 Comp. Gen. 431 at 433 (1934) in construing Article 9 of the earlier standard form of Government construction contract:

* * * It is contemplated that a prudent contractor in agreeing to commence work within a certain specified period and to complete same within certain stipulated days thereafter takes into consideration the weather conditions which ordinarily prevail during such season of the year at the site of the work and submits his bid accordingly * * *

"Unusually severe weather," specified in Article 9 of the contract as an excusable cause for delay in performance, does not include any and all weather which prevents work under the contract, but means only weather surpassing in severity the weather usually encountered or reasonably to be expected in the particular locality and during the same time of year involved in the contract. Even though there were some rain and unsettled weather conditions at the site of the work during the contract period, there is no authority to relieve the contractor of the liquidated damages accrued under the terms of the contract on account thereof, inasmuch as there is no evidence that such weather conditions were "unusually severe" within the meaning of Article 9 of the contract.

The contracting officer did not err, therefore, in his basic approach to the contractor's request for an extension of time, except that a period of five years was, perhaps, much too brief to allow an average to be formulated, as counsel for the Government contends, and except that the number of days of excusable delay could have been calculated more simply by deducting the average number of days of unusually severe weather from the number of days of such weather actually experienced on the job.¹ Proceeding in this fashion, the contractor could at most have been allowed an extension of time of 25½, minus 14 days or 11½ days. However, 1½ days of the 25½ days would have to be disallowed because they represented days of rainy weather, and there is nothing to show that such rainy weather should not have been expected. Furthermore, the contractor cannot be allowed to

¹ See 16 Comp. Gen. 936 (1937).

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include days of windy weather which occurred prior to his actual commencement of work on the job.

In its reply brief the contractor admits that it did not commence work until the week of October 5, 1954. Thus, September 28 and 29, 1954, which are listed in the contractor's tabulation as days of windy weather would have to be excluded from consideration. Deducting these 2 days from the 24 days which could otherwise have been claimed by the contractor, the number of windy days that could possibly be claimed by the contractor are reduced to 22. Since the average number of days of windy weather are 14, the contractor would at most be entitled to an extension of time of 8 days by reason of unusually severe weather. As the contractor received notice to proceed on September 25, but did not commence work until October 5, no less than 9 days were lost. Since these are more than the days lost on account of windstorms, and, are, moreover, clearly the fault of the contractor, the Board is in serious doubt that the contractor is entitled to any extension of time at all.

The Board believes that counsel for the Government is correct in maintaining that an appeal opens up the entire record,² and that it may, therefore, disallow an extension of time granted by a contracting officer. However, although the contracting officer's calculations were not entirely correct, several factors in the case, including the average number of days of windstorm and rainstorm, are so obscure, that the Board concludes that the best course to pursue in the present case is simply not to disturb the contracting officer's decision.³

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the decision of the contracting officer is affirmed.

THEODORE H. HAAS, *Chairman.*

THOMAS C. BACHELOR, *Member.*

WILLIAM SEAGLE, *Member.*

² In addition to the case cited by Government counsel, see *Fox Sport Emblem Corp.*, BCA No. 87, March 4, 1943, 1 CCF 57.

³ In its appeal, the contractor apparently requests an additional extension of time by reason of windy weather, which, it alleges, occurred subsequent to April 15. As the contracting officer made no findings with respect to this request, it is not properly before the Board, and cannot be considered.

MELVIN A. BROWN

A-27169

*Decided November 29, 1955***Oil and Gas Leases: Noncompetitive Leases**

Where through error by the local land office land described in an offer for a noncompetitive oil and gas lease is inadvertently omitted from a lease and where the offeror contends that she never received the lease, the offeror will not be held to have abandoned her preferential right to a lease for the land omitted.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Melvin A. Brown has appealed to the Secretary of the Interior from a decision by the Associate Director, Bureau of Land Management, dated January 4, 1955, which affirmed a decision of the manager of the land office at Billings, Montana, dated July 28, 1953, in rejecting Mr. Brown's offer, filed on June 22, 1953, to lease two 40-acre tracts of land—the SW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 14 and the SW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 22—in T. 35 N., R. 12 E., M. P. M., Montana, under the provisions of section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226).

The tracts were included in an offer (Montana 04422) filed by Mrs. Sheila A. Dundas on October 29, 1951, to lease a compact area covering 2,289.97 acres of land in the township. A lease to Mrs. Dundas was executed by the acting manager on December 18, 1952, effective as of January 1, 1953. In describing the lands included in the lease under item 3 of the "Offer to Lease and Lease for Oil and Gas" form, the two 40-acre tracts involved in this appeal were, through clerical error by a land office employee, omitted and the SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 14, which was not included in the offer, was listed. However, the acreage shown to be covered by the lease was stated to be the same as that covered by the offer.

Apparently as the result of the filing of Mr. Brown's offer, the land office discovered that it had made an error in the description of the lands covered by the Dundas lease and, on July 30, 1953, the manager called upon Mrs. Dundas to return her lease for correction. Mrs. Dundas replied that she had never received her copy of the lease and that she was not aware that the lease had been issued until the receipt of the manager's letter. She indicated, however, that she wished the correction of her lease to be made.

Mr. Brown, citing two departmental decisions, contends that since the lease was issued in December 1952, and since Mrs. Dundas did not complain of the omission of the tracts for which she had applied until after his offer had been filed, she must be presumed to have abandoned

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her offer to lease the two tracts and that when he applied for the land, some 6 months later, his offer should have been accepted. He contends that it is a matter of record in the land office that a lease was mailed to Mrs. Dundas on December 19, 1952.

The Department held in the two decisions cited by the appellant that where an erroneous decision of the local land office 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 such right cannot be reestablished by administrative action to the prejudice of third parties whose rights have intervened. *C. A. Rose*, A-26354 (May 13, 1952); *Jeanette L. Luse et al.*, 61 I. D. 103 (1953). However, those decisions are not applicable to the present situation.

In the *Rose* case Rose had applied for two tracts of acquired land, one of which was included in a prior application. After a lease had been issued to the prior applicant for one of the two tracts covered by the *Rose* application, the Bureau of Land Management, in a decision referring to the existence of a lease on one of the two tracts applied for rejected the *Rose* application "in its entirety." No appeal was taken from that decision although the right of appeal was expressly called to *Rose's* attention.

In the *Luse* case, Mrs. Hornung applied for a lease on certain described public lands prior to the change in the regulations governing the issuance of oil and gas leases on public lands substituting the "Offer to Lease and Lease for Oil and Gas" form for the previous method whereby an applicant made application for a lease, describing the land sought, and thereafter the lease was prepared by the local office and then submitted to the applicant for execution. The lease prepared by the local office and submitted to Mrs. Hornung for execution inadvertently omitted certain of the lands described in the application. However, that omission was apparent on the face of the lease which the applicant thereafter executed. The Department held that since the error in omitting certain of the lands described in the application should have been more apparent to the applicant than to anyone else, since the applicant must be deemed to have known what land was included in her application, and since she failed to appeal from the manager's decision sending her the lease forms for execution or from his later action in executing the lease without the inclusion of certain of the lands applied for, the applicant was deemed to have abandoned her preferential right which she initiated by applying for the land and to have acquiesced in the lease as it was issued.

In both of those cases the party affected by the erroneous action had notice of that action. Here, Mrs. Dundas contends that she never received her copy of the lease and there is nothing in the record to indicate that she did receive it. Although Mr. Brown asserts that the records of the local land office show that the lease was mailed to her, the mere fact of mailing a copy of the lease to Mrs. Dundas would not, in my opinion, put her on notice that some of the land for which she had applied had been omitted from her lease.

In the circumstances, there would appear to be no sound basis for depriving Mrs. Dundas of her statutory preferential right to a lease on the lands for which she had applied. *Of Jane E. Brenton et al., A-26759 (July 30, 1953).* Accordingly, it was not error to reject Mr. Brown's 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 is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

APPEAL OF R. P. SHEA COMPANY

IBCA-37

Decided November 30, 1955

Contracts: Additional Compensation—Contracts: Specifications—Contracts: Damages: Unliquidated Damages

When in the performance of a contract for the completion of earthwork and structures to be paid for at unit prices, the units of work were estimated, and the specifications included a provision stating that the estimated quantities were approximations for comparing bids, and no claim should be made against the Government for excess or deficiency therein, claims of the contractor for additional compensation based on large overruns in the estimated quantities, which concededly did not result from changes in the work within the meaning of the "changes" article in the standard form of Government construction contract, are claims for breach of an implied condition of reasonability in the performance of the contract, and, as such, are claims for unliquidated damages which the Board lacks jurisdiction to consider or allow. Even though the Government erroneously estimated one of the units of work, the contract may not be reformed on the ground of mutual mistake of fact, since there was no agreement to perform so much work for a lump sum but only an agreement to perform an approximate quantity of work at so much a unit of work.

Contracts: Protests

Although the Board has held that a contracting officer cannot invoke the requirement of timely protest if he has considered a claim on the merits, the consideration of the merits must involve a question of fact, or at least a

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mixed question of law and fact that is disputed. Since in the present case the contracting officer merely held that the claims could not be allowed in view of the approximate quantities provision of the specifications, which was an expression of an opinion on a question of law, he was not barred from denying the claims merely for failure to make timely protest.

BOARD OF CONTRACT APPEALS

This is an appeal by R. P. Shea Company, a California corporation, from the findings of fact and decision of the contracting officer dated March 15, 1955, under Contract No. I2r-19702, Specifications No. DC-3587, Colorado River Front Work and Levee System Project, Arizona-California-Nevada, Bureau of Reclamation.

The contract was for the construction and completion of earthwork and structures, reservation levees, Lower Colorado River District, and was on U. S. Standard Form No. 23 (revised April 3, 1942). The work site was along the California bank of the Colorado River, near Laguna Dam.

The contractor seeks additional compensation by way of revision of unit prices on six claim items, based on overruns of the estimated quantities. The overruns ranged from 26.3 percent to 1504 percent and the contractor alleges that his contract costs were increased from \$690,784.80 to \$877,944.24. The claims are asserted despite the inclusion in the specifications of paragraph 4, which provided:

Quantities and unit prices. The quantities noted in the schedule are approximations for comparing bids, and no claim shall be made against the Government for excess or deficiency therein, actual or relative. Payment at the prices agreed upon will be in full for the completed work and will cover materials, supplies, labor, tools, machinery, and all other expenditures incident to satisfactory compliance with the contract, unless otherwise specifically provided.

Before discussing the legal problems involved in the various items, each claim, together with the contracting officer's disposition thereof, will be described separately.

CLAIM ITEM 1

The contractor asserted that its actual job and general overhead were increased 12.8 percent as a result of the overruns in the schedule quantities and its claim of \$23,956.41 for this item is arrived at by taking this percentage of \$187,159.44, the difference between the contractor's alleged actual costs and its bid price. The contracting officer held that the contractor's unit prices for the work should have included a component for overhead, but that in any event overhead should be apportioned to particular claims established, and was, therefore, not allowable as a separate item. As this proposition seems

sound and the contractor states in its brief that it has no objection to apportionment of this item over such other items as may be allowed, no separate determination with respect to Claim Item 1 is necessary.

CLAIM ITEMS 2 AND 3

These two items are stated together as virtually all of the overrun involved in each resulted from construction of Levee Culvert, Drain Line No. 8-B. Claim Item 2, which is in the amount of \$20,978.81, is based on an overrun of 1,818 cubic yards of structure excavation (Schedule Item 4), which is 155 percent over the schedule quantity, and Claim Item 3, which is in the amount of \$6,933.75, is based on an overrun of 1,849 cubic yards of compacted backfill (Schedule Item 6), which is 1,000 percent over the schedule quantity.

In this particular phase of the work construction difficulties were encountered because of water conditions, and on May 15, 1952, allegedly at the contractor's request, the authorized representative of the contracting officer established new excavation pay lines and directed the over-excavation and flattening of the slopes. The decision to deepen the excavation was first made by the contracting officer, but after this had been done the contractor requested that the slopes be flattened. The contractor proceeded with the work without protest, and, according to the contracting officer, progress payments and final voucher reflect payment at the bid price for excavation and backfill in accordance with the limits established in a letter to the contractor dated May 15, 1952, which indicates that it had agreed to the establishment of the new excavation pay lines, since this would mean added excavation payable at bid prices rather than the installation of a well-point system which would have been at the contractor's expense.

The contracting officer denied these items of claim on the grounds of failure to make timely protest as provided by the contract, but pointed out that even had there been a timely protest the changes would have been authorized by paragraph 39 of the specifications which provides for revision of excavation slopes and additional excavation to provide satisfactory foundations at the contract price. As to the portions of Claim Items 2 and 3 which involved overruns incident to structures other than the culvert, the contracting officer relied upon the provisions of paragraph 4 of the specifications, hereinbefore quoted.

CLAIM ITEMS 4 AND 5

These two claim items are concerned with Schedule Items 7 and 8, and are, respectively, in the amounts of \$22,042.69 and \$64,021.17. In the first, riprap, quarrying and placing, there was an overrun of 61,918 cubic yards in the schedule quantity of 235,000 cubic yards, or 26 per-

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cent. The other, hauling riprap, saw an overrun of 704,971 cubic yard miles in the schedule quantity of 1,070,000 cubic yards, or 66 percent. Claim Item 4 was considered by the contracting officer to be based on the contention that the increased thickness of the "rock mat" in various areas which changed the method of placement contemplated at the time of bidding resulted in the overrun and Claim Item 5 was considered to be based on the contention that the increased quantities necessitated extra hauling costs. The contracting officer also considered that the contractor had complained that the Government's selection of the quarry site, the interpretation of the specifications regarding suitability of quarry stone, and the refusal of the contractor's request that it be permitted to use a substitute quarry were factors contributing to its increased costs.

The contracting officer pointed out that while the specifications indicated a "minimum" 5-foot blanket of riprap no maximum was set. The drawings also bore the notation in some instances of "riprap as directed." Approximately 12,000 to 14,000 cubic yards of the overrun of schedule quantities resulted from decisions to increase of the riprap blanket thickness from the 5-foot minimum to 10 feet in certain areas and to use additional riprap to obtain a stable condition where water was encountered. Also, approximately 48,000 to 50,000 cubic yards of the overrun was due to a decision to place riprap between levee stations 560+00 and 610+00, which had not been originally contemplated.

The contracting officer's position that this work was required was based on the following provision of paragraph 48 of the specifications which declared that the riprap "shall be placed to the lines, grades and thicknesses shown on the drawings or otherwise established by the contracting officer," as well as upon the notation on the drawings that riprap was to be placed "as directed", which, he held, made the contract "a requirements type of contract." He concluded that the provisions in question were sufficient justification for these overruns and that the Government had been within its rights in ordering the placement of the extra quantities.

The "Laguna Dam Quarry" was designated in the specifications as the source of riprap but when the contractor found that it was encountering considerable waste in this operation it requested that it be permitted to use the nearer "Pilot Knob Quarry." The Government agreed to permit this change but with the reservation that any savings resulting would be passed on to the Government. This reservation was not acceptable to the contractor and it continued to use the designated quarry.

The contracting officer pointed out that the contractor had not protested payment of the Schedule Items 7 and 8 at the bid prices or asked

for additional compensation until his exception on release of contract after all work had been completed. He therefore denied Claim Items 4 and 5, on the ground of lack of timely protest. As in Claims 2 and 3, however, he asserted that even if protest had been made the actions of the Government resulting in increased quantities were within the express provisions of the contract.

Claim Item 6

This claim item, involving Schedule Item 10 (screened crushed-rock road surfacing), is divided into two parts, being in the amount of \$8,256.42 for increased screening and placing costs due to overrun in schedule quantities and in the amount of \$14,462.09 for additional hauling costs based on the difference between the contractor's contemplated average haul at the time bids were submitted and the average haul for the road surfacing as placed. There was an overrun of the scheduled quantity of 16,000 cubic yards by 9,103 cubic yards, or 57 percent.

The contracting officer conceded that the schedule estimate, which was 16,000 cubic yards, was in error but contended that the specifications and drawings were clear with respect to the work required and that the contractor could have correctly estimated the quantities from these. He held that the work as performed was precisely as indicated by the drawings, the length and width of the road and thickness of crushed-rock surfacing being unchanged. According to the contracting officer, the contractor erroneously computed the length of the road to be approximately 10.5 miles when it was shown by the drawings to be actually 17.4 miles.

This item of claim was denied by the contracting officer on the grounds that paragraph 4 of the specifications was applicable and that the work performed was not different from the work as set forth in the specifications. With respect to this item of claim, the contracting officer did not invoke, however, the failure of the contractor to protest.

In support of its appeal, the contractor has filed a brief, dated May 2, 1955, in which a general theory of its claims is set forth, and comments on the particular claims are made. The general theory is stated in two propositions on the first page of the brief, which are, as follows:

1. The contractor concedes the right of the contracting officer to increase or decrease quantities, to vary thicknesses, to change grades, and to otherwise exercise the discretionary powers given him by this contract.

2. The contractor holds, however, that this power is not without limit and that it is the responsibility of the contracting officer to use it judiciously so that

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the work required of the contractor under the contract remains approximately the same as that on which the contractor bid and which he later contracted with the government to perform.

In other words, the contractor takes the position that a reasonable interpretation of the approximate quantities provision of the specifications precludes the large overruns which were involved in the performance of the contract. It does not contend, however, as the contracting officer appears to have assumed in passing on some of the claims, that changes were made in the work within the meaning of article 3 of the contract, relating to changes. Indeed, the contractor expressly concedes with respect to Claim Items 2 and 3 that it is not its contention that "the Engineer demanded work of him in this instance which was outside of the limits of the contract." Similarly, with respect to Claim Items 4 and 5, although the contractor denies the theoretical assumption of the contracting officer that the contract was a requirements type of contract, it states:

It is not denied that the contracting officer had the right to increase the thickness of the rock mat or to order riprap placed at various locations as he might direct within the job. Increased mat thickness, interpretation of specifications regarding suitability of stone, and refusal of contractor's request to permit the use of another quarry are not the *basis* of this claim but are given as illustrations of how the overrun on this item increased the damage the contractor sustained by reason of the overrun.

So, too, with respect to Claim Item 6, although the contractor denies that "there was available in the specifications sufficient information from which the contractor himself could have calculated the quantities that were required," it explains that the basis of the contractor's claim on this item "is the same as for the others," and observes even with respect to the concededly erroneous estimate of the Government with respect to this item:

The fact that the Government's estimate was erroneous is of course now obvious but it does not appear to be more erroneous than the Government's estimate on other items in this claim and is less so than some.

Consistently with its general theory, the contractor also challenges the contracting officer's conclusion that it was required to protest against performing work that was greatly in excess of the estimated quantities. Thus, it states:

The contractor did protest and make a claim within a reasonable time after the work was completed and he then, for the first time, knew the extent of the overruns and their cumulative effect. A protest at any time during the course of the work as set out in paragraph 12 of the specifications does not appear to apply to this situation. If during the course of the job, the contractor protested the quantity of work up to that point, would the contracting officer not reply that he had waived his right by doing the work? And if he looks ahead, is he not

reduced to making a protest against what he may deduce to be then the contemplations or intentions of the Contracting Officer?

In effect, the contractor contends that the protest requirement does not apply in the performance of a contract in which no changes within the meaning of article 3 of the contract were involved, and the claims for additional compensation are based solely on overruns in estimated quantities.

In invoking the protest clause of the specifications with respect to all the items of claim except Item 6, the contracting officer also expressed the opinion that the claims were barred by reason of the approximate quantities provision of the specifications. Although the Board held in the appeal of *Jack Willson*, 62 I. D. 225 (1955), that a contracting officer cannot invoke the requirement of timely protest, if he has considered a claim on its merits, the consideration of the merits must involve a question of fact, or at least a mixed question of law and fact. Since in the present case, the contracting officer merely expressed an opinion on a question of law, he was not barred from denying the claims merely for failure to make timely protest, and the question whether protest was required in the circumstances of the present case is presented.

The particular question in this case whether protest is required at any particular time when the work required to be performed by the contractor is of a continuing nature is an interesting one, but the Board does not deem it necessary to decide it, since it has reached the conclusion that the claims of the contractor are claims for unliquidated damages.

The contractor concedes with respect to all the claims, including even Claim Item 6, which involves an admittedly erroneous estimate, that they did not involve changes within the meaning of article 3 of the contract, since they represented legitimate exercises of the contracting officer's discretionary powers. Even if the contractor did not concede that the erroneous estimate involved in Claim Item 6 was immaterial, the Board would be so constrained to hold in view of the decisions of the Comptroller General in B-114585, dated June 19, 1953. In that case, which also involved an erroneous estimate by the Government of work to be performed by the contractor under specifications that included an approximate quantities provision, the Comptroller General held that the contract could not be reformed on the ground of mutual mistake of fact, since the mistake was unilateral, and that even if it were to be assumed that a mutual mistake existed with respect to a collateral matter, namely the common belief of both parties to the contract that the estimate was correct, the contract still could not be reformed, since there was no agreement to perform so much work for a

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lump sum but only an agreement to perform an approximate quantity of work at so much a pound. Said the Comptroller General:

A contract may be reformed only if it fails to express the true intention of the parties, and this presupposes the existence of a mutual understanding and agreement other than the one sought to be reformed. Reformation cannot be used as an excuse to make for the parties which they themselves never actually agreed to, even though they might have made such a contract but for their mutual misunderstanding of existing facts or circumstances.

The Board could not in any event reform the contract, for this is a sphere of jurisdiction which is reserved either to the Comptroller General or the courts. 15 Comp. Gen. 240 (1935). The only other basis upon which the claims of the contractor could be allowed would be that the insistence of the Government that the contractor perform, at the unit prices stipulated in the contract, quantities of work far in excess of the estimated amounts itself constituted a breach of an implied condition of reasonability which must be read into the contract to control its elasticity. It is clear that if the Board allowed the claims upon such a theory it would be allowing the contractor to recover for a breach of contract. In this connection, it is interesting to note the court's statement in *Peter Kiewit Sons' Co.*, 109 Ct. Cl. 517 (1947), which involved a considerable underrun in estimated quantities of excavation. In analyzing the plaintiff's claim the court stated it to be either for "an equitable adjustment pursuant to Article 3 or Article 4 of the contract * * * or by reason of a mutual mistake of fact, or for *damages for breach of contract* by reason of a material variation in the work as represented in good faith by the Government and relied upon by the plaintiffs." (Italics supplied.) As the claim in the present case would rest upon a breach of contract, the Board must conclude that it is without jurisdiction to consider or allow it, for the fundamental test of a claim for unliquidated damages is that it rests upon a breach of contract. *Wm. Cramp & Sons v. United States*, 216 U. S. 494, 500 (1910); *Continental Illinois National Bank & Trust Co. of Chicago v. United States*, 126 Ct. Cl. 631, 640 (1953).

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the decision of the contracting officer, dated March 15, 1955, denying the claims of the contractor, is affirmed.

THEODORE H. HAAS, *Chairman.*

WILLIAM SEAGLE, *Member.*

Mr. BATCHELOR.

In rejecting consideration of this appeal on the merits, the majority has concluded that the Board is without authority to inquire into the estimated quantities provision of a Government contract where it is alleged that overruns or underruns of work are unreasonably excessive. I am unaware of any authority which justifies the establishment of such a rule.

The theory is advanced that under such circumstances the Board is confronted with a question of a mutual mistake of fact or a breach of an implied condition of reasonability. This is the same theory which this Department relied upon in its submission of January 19, 1949, to former Comptroller General Warren, requesting a more liberal interpretation of the estimated quantities provision of a Government contract.

The ruling of the former Comptroller General was sought at the suggestion of former Solicitor White in connection with Bureau of Reclamation Contracts Nos. I2r-15788 and I2r-15878, dated March 9, 1946, and April 8, 1946, respectively. Singularly, paragraph 4 of the specifications made a part of each of said contracts contains language identical with that set out in paragraph 4 of the specifications made a part of the contract here under consideration.

The departmental letter to the former Comptroller General, above referred to, was accompanied by a memorandum from the former Solicitor to the Secretary of the Interior dated January 12, 1949, which memorandum contained the following statement:

In the light of the *Kiewit* [*Peter Kiewit Sons' Co. v. United States*, 109 Ct. Cl. 517 (1947)] and *Chernus* [*Morris C. Chernus v. United States*, 110 Ct. Cl. 264 (1948)] decisions, it appears that the Court of Claims might regard the modification of the instant contracts as having been made under a mutual mistake of fact, or that the demand of the Government on the contractor to construct at no increase in the rate of compensation, drains in quantities far in excess of the estimated number constituted a breach of an implied condition of reasonability that is written into every agreement where terms, such as those relating to quantity, are elastic.

However, the former Comptroller General declined to subscribe to the views of this Department as expressed in the former Solicitor's memorandum and in his decision (B-83024) dated May 20, 1949, stated:

It is clear from a reading of the above-quoted language of the contracts [paragraph 4 of the specifications] that at the time the contracts were entered into the contractor not only was on notice that the quantities stated were mere approximations but that it would not be entitled to any adjustment in the contract prices for any excess or deficiency therein. * * * The change orders issued thereafter contain no language from which it might be inferred that the parties to the contracts considered the quantities stated in the change orders to be other than mere approximations or that the Government would pay any additional

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amount in the event of a variation in the estimated quantities. It seems apparent, therefore, that the contractor is obligated to construct all the drains required at the unit prices specified in the change orders *regardless of the extent of the variation between the estimated and actual quantities required.* [Italics supplied.]

This ruling of the former Comptroller General was subsequently recognized and referred to by the former Solicitor in *C. F. Lytle Company and Green Construction Company*, CA-99 (May 3, 1951). In this case, also, the wording of paragraph 4 of the specifications was identical with that of paragraph 4 of the specifications here involved.

Another instance of construction of paragraph 4 appears in the decision of the former Comptroller General (B-114585), dated June 19, 1953, cited by the majority in connection with the question of reformation of a contract on grounds of mutual mistake of fact. Again the provision was the same as that being presently considered. The former Comptroller General stated in part:

* * * In the present case, both parties contracted on the basis that the quantities stated were approximations only and that the figures were stated for bid comparison purposes only. They further contracted on the express understanding that no claim could be made by the contractor for "excess or deficiency therein, actual or relative." It is difficult to see how the risks attending the accuracy of the various estimates of quantities could have been expressed any more clearly.

It should be emphasized that the provisions of the estimated quantities clause in the *Kiewit* and *Chernus* decisions, *supra*, contain this phrase:

* * * and for determining the estimated amount of the consideration of the contract.

This language does not appear in the present specifications nor in the specifications considered by the former Comptroller General in the rulings above cited.

The majority does not suggest that the holdings in the *Kiewit* and *Chernus* cases, *supra*, would control if the case were to be considered on the merits, but certainly weight would have to be given to that portion of the *Kiewit* decision which discusses the case of *Sandor S. Hirsch and Pernice Contracting Corporation v. United States*, 104 Ct. Cl. 45 (1945). In the *Kiewit* decision it was stated:

In cases such as *Sandor S. Hirsch and Pernice Contracting Corporation v. United States*, 104 C. Cls. 45, and *Morris & Cumings Dredging Co., Inc. v. United States*, 78 C. Cls. 511, cited by the Government, there was a large excess of units above the estimates in the actual performance. But there was no question of a composite bid for two wholly different types of work where the prerequisite to a rational bid would be an approximately accurate estimate of the proportions of the two types of work. Instead, the contractors in those cases made improvident bids upon which they lost money, even on the estimated amounts, and for

that reason only they desired not to increase their losses by performing additional units of work. They expected to make a profit on the estimated number of units, and would have made the same or perhaps a larger profit on a larger number of units if their bids had not been too low to allow any profit at all. They could not assert that they would not have made the contract except on the assumption that the estimated amounts were approximately correct.

The most recent discussion of the estimated quantities clause by the Court of Claims was in *Thompson v. United States*, 124 F. Supp. 645, 648 (1954). The court therein said:

Any liability of the Government was specifically excluded by the provisions of the contract.

Overruns in estimated quantities as great as those involved in this appeal cannot be looked upon with favor, but when they occur under a contract containing the estimated quantities clause before us, it follows that the contractor is bound to perform at the unit price regardless of the extent of variation from the estimated quantities. The inequities, if any, lie in the contract itself and are not due to the action of the contracting officer in enforcing its plain provisions. Some Government agencies have met this problem by employing a form of contract which restricts overruns or underruns to a stated percentage. There is no such restrictive provision in the contract before us.

Accordingly, there appears to be no alternative but to consider these claims on the merits. Upon such consideration, I would affirm the decision of the contracting officer on the grounds that the work performed was within the contract requirements.

THOMAS C. BATCHELOR, *Member*.

JURISDICTION OF TRIBAL COURT AND COLORADO JUVENILE COURT FOR DETERMINATION OF CUSTODY OF DEPENDENT AND NEGLECTED INDIAN CHILD

Indians: Civil Jurisdiction—Indian Tribes: Tribal Government

An order issued by the Oglala Sioux Tribal Court of the Oglala Sioux Tribe at Pine Ridge Reservation, pertaining to the custody of a minor Indian child, does not prevail over a custody order of the Juvenile Court of the City and County of Denver, Colorado, where the child was neglected within the jurisdictional limits of the juvenile court.

M-36316

DECEMBER 1, 1955.

TO THE REGIONAL SOLICITOR, DENVER.

Your memorandum of November 16 requests our advice and opinion as to whether the order issued by the Oglala Sioux Tribal Court

December 1, 1955

of the Oglala Sioux Tribe at Pine Ridge Indian Reservation, pertaining to the custody of a minor Indian child supersedes and nullifies a custody order of the Juvenile Court of the City and County of Denver, Colorado.

The important facts appear to be that Eva Hawkins (born September 14, 1951) was found dependent and neglected in Denver on April 7, 1954. An officer of the Denver Police Department filed a petition in the Juvenile Court declaring her a dependent and neglected child. On May 1, 1954, the court committed the child to the State Children's Home, which subsequently placed her in a foster home. The foster parents are desirous of adopting her. The Oglala Sioux Tribal Court on September 12, 1955, granted the child's maternal grandmother custody and care of the child.

This office has studied the problem which you have suggested and is of the opinion that from the facts stated the Juvenile Court of the City and County of Denver, Colorado, had jurisdiction to place the child in a foster home and that such action would not be affected by the inconsistent order of the Oglala Sioux Tribal Court. It also appears that the Juvenile Court will have full authority to act upon a petition by the foster parents who are desirous of adopting the girl. Under Colorado law consent to the adoption can be given by several persons, including the executive head of the institution given by the court the custody of the child, including the right to consent to the adoption (Colorado Revised Statutes, 1953, 4-1-6). Consent by the parents is not required where the parent has abandoned the child. *Neville v. Bracher*, 31 P. 2d 911 (Colo., 1934). Your office might consider advising the maternal grandmother that she may also file a petition to adopt the child so that the Juvenile Court may determine who among the several possible adoptive parents would best care for the interests of the child. At all events, there is no Federal statute which would interfere with the jurisdiction of the Juvenile Court.

The above conclusion is based on the following legal considerations: The Constitution and By-Laws of the Oglala Sioux Tribe of the Pine Ridge Reservation of South Dakota provides that the jurisdiction of the Oglala Sioux Tribe of Indians shall extend to the territory within the original confines of the Pine Ridge Indian Reservation boundaries and to other lands which were added to it by law.

The Tribal Council is given authority "to provide for the appointment of guardians for minors * * * by ordinance or resolution subject to review by the Secretary of Interior." It is also provided that the judicial powers of the Oglala Sioux Tribe shall be vested in a court or courts which the Tribal Council may ordain or establish and that the judicial power shall extend to all cases involving members of the Oglala Sioux Tribe, arising under the constitution and

by-laws or ordinances of the Tribe, and to other cases in which all parties consent to jurisdiction. It therefore appears that the jurisdiction of the Tribal Council in connection with custody of persons would be limited by the Tribal Constitution and By-Laws to persons resident on the reservation.

This principle is further shown by the provisions of the Code of Federal Regulations which limit the jurisdiction of Courts of Indian Offenses to offenses committed by an Indian "within the reservation or reservations for which the court is established" (25 CFR 161.2).

It has long been recognized that the jurisdiction of Indian tribes ceases at the border of the reservation. (18 Op. Atty. Gen. 440, 1886; *Ex parte Morgan*, 20 Fed. 298 (1883).)

It therefore follows that the custody decree of the Tribal Council was without force and effect because the child concerned was not located within the jurisdiction of that court. Even if the tribal court had had jurisdiction, it would be in no different position from other courts in the State of Colorado whose determinations of custody would have been superseded by the Juvenile Court of Denver County in this case.

In *Hudson v. Mattingley*, 195 Pac. 113, it was decided in the Supreme Court of Colorado (Jan. 10, 1921) that the juvenile court at the father's residence has jurisdiction over children who were temporarily absent in another jurisdiction, since their residence is that of the father's. "When, therefore, they were brought into this city for the trial, they were lawfully and rightfully there and before the court. Their presence in Jefferson County was a mere incident of their mother's visit to her parents. The subject-matter of the proceeding was the custody and control of the children. We think the court had jurisdiction thereof."

In *Peterson v. Schwartzmann*, 179 P. 2d 662, decided April 7, 1947, the Supreme Court of Colorado pointed out that the juvenile court has jurisdiction over dependent children found within its jurisdiction. "Where the proper officer files a petition in dependency in the county where the child is found and the conditions alleged as constituting dependency also exist therein * * * the venue of a dependency action is in such county despite technical legal residence elsewhere." (P. 663.) Exclusive jurisdiction over dependency cases concerning children is given by statute to the juvenile courts in Colorado. (Colo. Rev. Stats., 1953, 37-9-1.) In case custody of a child is determined differently in another court, for example one hearing a divorce matter, the juvenile court's decision will prevail.

It is hoped that the above decision will assist you in disposing of this matter.

J. REUEL ARMSTRONG,
Solicitor.

December 15, 1955

**APPLICATION OF THE GENERAL LEASING ACT OF AUGUST 9, 1955
(69 STAT. 540), TO THE CROW INDIAN RESERVATION, MONTANA****Bureau of Indian Affairs—Indian Tribes: Reservations—Indian Lands:
Generally—Indian Lands: Leases and Permits: Generally**

The act of August 9, 1955 (69 Stat. 540), applies generally to the leasing of restricted Indian lands wherever situated, including reservations such as the Crow Reservation, where special leasing statutes had theretofore been enacted, thus supplying additional leasing authority without displacing or superseding the special statutes.

M-36318

DECEMBER 15, 1955

TO THE REGIONAL SOLICITOR, DENVER REGION.

This refers to your memorandum of October 18, 1955, enclosing a copy of memoranda from Superintendent L. C. Lippert of October 5, 1955, addressed to the Branch of Realty and Heads of all Departments of the Crow Agency, Montana, and from Acting Field Solicitor Bielefeld, of October 10, 1955, to the Regional Solicitor, Denver, Colorado, expressing the view that the leasing act of August 9, 1955 (69 Stat. 540), does not apply to the leasing of lands on the Crow Indian Reservation.

The memorandum of October 10, 1955, holds that the Crow acts (41 Stat. 751, 44 Stat. 658, and 44 Stat. 1365), continue to apply to the leasing of Crow Indian lands and that the act of August 9, 1955, *supra*, did not modify the provisions of these acts. In this conclusion we concur. However, the opinion further expressed that if Congress had intended to make the leasing of Indian land uniform to all tribes, a provision expressly repealing all special acts would probably have been included in the August 9, 1955, act. We are unable to subscribe to this latter conclusion.

This interpretation completely ignores section 6 of the act which reads, "Nothing contained in this Act shall be construed to repeal any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law." This section of the act does not in any way prevent its provisions from being applicable to the leasing of any restricted Indian lands, whether tribally or individually owned, by the Crow Indian owners with the approval of the Secretary of the Interior for public, religious, educational, recreational, residential, or business purposes under the terms and conditions therein prescribed. In other words, the 1955 act applies generally to all restricted Indian lands wherever situated, including restricted lands on reservations such as the Crow where special leasing statutes had theretofore been enacted. The act of 1955 thus supplies additional leasing authority

without displacing or superseding the special Crow statutes and the authority conferred by those special statutes may continue to be invoked whenever such action is deemed to be desirable.

Section 6 of the 1955 act is somewhat similar in its purport to the provision of section 4 of the act of February 5, 1948 (62 Stat. 17; 25 U. S. C. section 326), dealing with rights-of-way over Indian lands. This latter statute did not repeal the several other statutes dealing with the granting of rights-of-way. An applicant may file for a right-of-way under the general authority of the 1948 act or he may file under any of the other appropriate acts dealing with the granting of particular rights-of-way across Indian lands.

I see no inhibition in the leasing laws to the leasing of Indian lands on the Crow Reservation under the laws in force prior to the enactment of the act of 1955, or under the 1955 act.

J. REUEL ARMSTRONG,
Solicitor.

NOEL TEUSCHER

A-27195

Decided December 19, 1955

Oil and Gas Leases: Cancellation

Where a lessee has been given proper notice as provided in the Mineral Leasing Act, the pertinent regulation, and the lease that his lease will be canceled unless he files a bond or dispenses with the necessity of filing a bond, by paying the next year's rental in advance, and he fails to do either, his lease may be canceled prior to the expiration of the lease year.

Oil and Gas Leases: Rentals—Oil and Gas Leases: Termination

The provisions of the act of July 29, 1954, automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease apply to leases issued prior to July 29, 1954, only after the lessee has filed a written notice of his consent to have his lease bound by this provision.

Oil and Gas Leases: Cancellation

Where an oil and gas lease has been properly canceled, a lessee cannot avail himself of the later issuance of regulations making the automatic termination provision of the act of July 29, 1954, applicable to leases issued prior to July 29, 1954.

Oil and Gas Leases: Generally

Where an oil and gas lease is issued for land part of which is already included in an outstanding lease, the lessee is not entitled to a cancellation of his lease and the issuance of a new lease bearing a current date covering only the land available for leasing.

*December 19, 1955***APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Noel Teuscher has appealed to the Secretary of the Interior from a decision dated March 8, 1955, of the Associate Director of the Bureau of Land Management which denied his request for reinstatement of his noncompetitive oil and gas lease (Colorado 02449) and affirmed the action of the manager of the Denver land office canceling the lease.

Teuscher held oil and gas lease Colorado 02449, which was issued effective as of January 1, 1952, by assignment from D. Miller approved as of December 1, 1952. On or about September 1, 1954, the manager mailed Teuscher a notice informing him that the lessee must either pay the rental or file a \$1,000 bond.¹ On October 8, 1954, the manager mailed Teuscher, by registered mail, a default notice which stated:

Filing of a \$1,000 bond, or the payment of rental, in accordance with prior notice furnished, a copy of which is shown here, was due without notice from this Office. There is now default in this respect. If such default continues for thirty days from receipt of this notice, your lease will be cancelled without further notice to you.²

This notice was received by Teuscher on October 16, 1954. Upon the failure of the lessee to either pay the rental or file a bond, within the 30-day period, the manager, without further notice to Teuscher, canceled his lease on November 22, 1954.

Sometime before December 13, 1954, Teuscher submitted a check in full payment of the rental. By letter dated December 13, 1954, the manager returned this check with the statement that it could not be accepted and that the lease was closed on the land office records on November 22, 1954.

On December 22, 1954, Teuscher filed an application, Colorado 09896, covering the same land as Colorado 02449. In a letter dated December 23, 1954, the manager informed Teuscher that he considered the decision canceling lease Colorado 02449 proper; that Teuscher's new application would be processed in due course; and that part of the land covered by it had been filed on prior to receipt of his new application.

On December 29, 1954, Teuscher sent a telegram to the manager asking for the reinstatement of lease Colorado 02449 on several grounds. This telegram was treated as an appeal to the Director. From the Associate Director's decision refusing to reinstate the lease and affirming the manager's action, Teuscher has duly taken this appeal.

Teuscher contends that his lease should not have been canceled prior to the end of the third year, December 31, 1954. In a recent case, the Department held in identical circumstances that where a lessee fails

¹ Section 2 (a) of the lease.

² Section 7 of the lease; 30 U. S. C., 1952 ed., Supp. II sec. 188; 43 CFR 192.161.

to file a bond or pay the rental in advance, it is proper to cancel the lease prior to its anniversary date. *Zion Oil Company et al.*, 62 I. D. 369 (1955).

Teuscher also contends that his lease was automatically preserved until the end of the lease year by section 1 (7) of the act of July 29, 1954, which amended the Mineral Leasing Act by adding the following sentence to the second paragraph of section 31:

Notwithstanding the provisions of this section, however, upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law: *Provided however*, That when the time for payment falls upon any day in which the proper office for payment is not open, payment may be received the next official working day and shall be considered as timely made. (30 U. S. C., 1952 ed., Supp. II sec. 188.)

This amendment was not applicable to leases issued prior to July 29, 1954, until Circular 1894 was issued on December 7, 1954 (19 F. R. 9278), and then only if the lessee filed written notice of his consent to subjecting his lease to its provisions.³ Since the steps which resulted in the cancellation of Teuscher's lease were properly completed prior to the issuance of Circular 1894 and prior to the filing of the requisite consent, the later amendment of the pertinent regulation cannot affect the validity of actions taken prior thereto.

Finally, Teuscher argues that the fact that some of the land originally included in his lease was removed from it by a partial cancellation, dated May 27, 1952, on the grounds that this land was included within a prior preference right lease entitles him to a new lease for the lands actually subject to lease. This contention is without merit, first, because this action was completed well before Teuscher acquired any interest in the lease, secondly, because the lessee at the time of cancellation did not appeal from the partial cancellation, and, thirdly, because there is no reason that the partial cancellation of a lease should result in the redating of the lease as to the lands for which it remains effective.

It thus appears that Teuscher's lease was subject to cancellation at the time it was canceled and that it was properly canceled in accordance with the lease terms and regulations in effect at the time of 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 Associate Director of the Bureau of Land Management is affirmed.

J. REUEL ARMSTRONG,
Solicitor.

³ 43 CFR 192.161 (a). This regulation was amended by Circular 1904, March 17, 1955 (20 F. R. 1778), and the pertinent provision is now found in 43 CFR 192.161 (b).

December 27, 1955

**CAPITAL LIVESTOCK COMPANY
JAMES BOMPART**

A-27288

Decided December 27, 1955

Public Sales: Award of Lands

Where neither of two persons who submitted written bids for land offered at public sale has a preference right to purchase several of the offered tracts, and where the conflicting bids are identical in amount, an award of the tracts to the person whose bid was first received is required by departmental regulation.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Capital Livestock Company, a partnership, has appealed to the Secretary of the Interior from a decision of May 10, 1955, for the Director of the Bureau of Land Management, affirming an award by the manager of the Billings land office of several isolated tracts of land in Montana offered at public sale in accordance with section 2455 of the Revised Statutes, as amended (43 U. S. C., 1952 ed., sec. 1171). Mr. James Bompert filed a reply to the appeal by the Capital Livestock Company.

The tracts involved in this appeal are lots 10, 11, 12, and 15, sec. 4, and lot 1, sec. 5, T. 9 N., R. 3 W., M. P. M., situated in Jefferson and Lewis and Clark Counties. These tracts are small, fractional subdivisions, ranging from 0.02 of an acre to 8.95 acres and their combined acreage does not total quite 12 acres. Patented mining claims adjoin the tracts.

Pursuant to Mr. Bompert's application for the sale of these and other tracts, it was found that the tracts were not required for public purposes and they were classified as suitable for public sale at not less than \$4 an acre. The sale was held on January 26, 1954, and before that date the appellant and Mr. Bompert each submitted written bids for the tracts at \$4 an acre. Within the required time after the sale, the appellant, as owner of land adjoining lot 12, containing 0.02 of an acre, established its preference right to purchase that tract. One of the members of the appellant company owns a part interest in lands adjoining lots 10 and 15, sec. 4, and lot 1, sec. 5, and Mr. Bompert also owns a fractional interest in some of the same land. However, as neither the appellant nor Mr. Bompert owns the whole title to lands contiguous to lots 10, 11, and 15, sec. 4, and lot 1, sec. 5, as is required for the assertion of a preference right, neither is a preference right claimant for these tracts (43 CFR 250.11 (b) (1) (i)).

A departmental regulation (43 CFR 250.11 (a)) provides in part:

* * * In the event the bids of two or more persons sent by mail are the same in amount and are the highest offered, the first received,

as shown by the hour and date noted on the envelope, will be accepted by the manager. * * *

The record indicates that Mr. Bompert's bid was received at 12:15 p. m., on January 18, 1954, and that the appellant's bid was received at 1 p. m., on January 21, 1954. As Mr. Bompert's bid was received before that of the appellant, and there were no preference right bids for lots 10, 11, and 15, sec. 4, and lot 1, sec. 5, these four lots were awarded to Mr. Bompert. The record indicates that before the award was made, an opportunity was given to Mr. Bompert and the appellant to agree about division of the tracts, but no agreement could be reached.¹

It appears that the appellant is now leasing the four tracts awarded to Mr. Bompert, and on appeal it is asserted that the appellant or one of the three partners in the appellant's company has leased this land from the United States for over 10 years. However, the holder of a grazing lease on public land has no preference right, by reason of the lease, to purchase such land when it is offered at public sale. *Henry Petz, A-26787* (October 22, 1953). The record indicates that the grazing value of the tracts in dispute is approximately 4 AUM's (enough to support one cow or horse 4 months a year), or even as low as 2 AUM's, and that the tracts are worthless for grazing unless used as a part of the surrounding lands. Both the appellant and Mr. Bompert own land in the vicinity of these tracts, and both assertedly want the public land for use in connection with livestock operations.

On appeal, it is also asserted that the appellant has control, maintained at great expense, of much of the land south of the four tracts which were awarded to Mr. Bompert; that the manager's award is a hardship on the appellant because the four tracts are within much larger areas fenced by the appellant; that the tracts of public land are too small to be fenced; and that awarding them to Mr. Bompert will result in his cattle running promiscuously in trespass on the lands of the appellant.

None of these assertions provides a basis for altering the manager's award as between nonpreference right claimants to the land because the regulations make no provision for the consideration of such factors. Moreover, even if they could properly be considered, the record contains very little data relating to the many factors that would require consideration if the tracts were to be awarded on some basis other than in conformity with the above-quoted regulation. The tracts are small and of very little value. The ownership of the adjoining land is complex. For example, Mr. Bompert apparently owns an eighth interest in the surface rights only of a mining claim

¹The Department favors apportionment of lands by amicable agreement in situations of this kind (cf. *The Swan Co. v. Banzhaf*, 59 I. D. 262, 274 (1946)).

December 28, 1955

adjoining lots 10 and 15 and one of the members of the appellant company apparently owns a half interest in the mineral rights in the same claim in addition to an interest in another claim which adjoins the same tracts. Similarly, one of the members of the appellant company appears to own mineral rights in two mining claims which partly adjoin lot 1 and Mr. Bompert is said to own a fractional interest in the surface rights of the same claims. Persons owning the remaining fractional interest in some of the adjoining claims are not shown. Without a great deal of additional information and consideration of the conflicting interests of the appellant and Mr. Bompert and perhaps of persons who are not parties to this proceeding, it would be impossible to determine what would be an equitable division of these tracts as between the appellant and Mr. Bompert. In view of the very low monetary value of all the tracts, the Department would hardly be justified in spending the time and money required to develop the necessary information to resolve what appears to be no more than a private dispute.

This discussion is entirely academic, however, because the award of the tracts involved in this case is controlled by the departmental regulation, quoted earlier. This regulation requires that lots 10, 11, and 15, sec. 4, and lot 1, sec. 5, be awarded to Mr. Bompert.

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 for the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

B. E. VAN ARSDALE

A-27183

Decided December 28, 1955

Oil and Gas Leases: Cancellation—Mineral Leasing Act for Acquired Lands: Lands Subject to

An acquired lands oil and gas lease is properly canceled as to a tract of land covered thereby which was not available for leasing when the application therefor was filed because the tract was included in a prior lease and the relinquishment and cancellation of the prior lease had not been noted on the acquired lands plat records when the subsequent application was filed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

B. E. Van Arsdale has appealed to the Secretary of the Interior from a decision of September 23, 1954, by the Minerals Officer for

the Director, Bureau of Land Management, holding Mr. Van Arsdale's acquired lands oil and gas lease for cancellation as to one 40-acre tract included therein. The appellant's lease, covering 2,563.48 acres of land in Valley County, Montana, was issued as of September 1, 1954, pursuant to an application filed on October 22, 1951 (30 U. S. C., 1952 ed., sec. 351 *et seq.*). The lease included the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 8, T. 31 N., R. 38 E., M. P. M.

The decision of September 23, 1954, canceled the lease as to the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 8 on the ground that this tract was included in an outstanding lease at the time the appellant's application was filed. It appears that acquired lands lease BLM-A 011661, issued July 15, 1946, to Rush Greenslade, is the lease which barred the issuance of the appellant's lease on the above-described tract.¹ Departmental records show that on July 7, 1949, Mr. Greenslade filed a relinquishment of this lease. In a decision of August 7, 1950, the Assistant Director of the Bureau canceled the lease in its entirety, effective July 7, 1949. Apparently through oversight, the cancellation of the lease was not noted on the official acquired lands plat records in the Washington office (which records correspond to the tract books for public lands) until September 15, 1954, more than five years after the effective date of the relinquishment.

The departmental regulation governing the availability of lands for further lease offers after a lease has been canceled or relinquished which was in effect when Mr. Van Arsdale's application was filed provided in pertinent part that:

Where a noncompetitive lease is canceled or relinquished and the lands involved are not on the known geologic structure of a producing oil or gas field or are not withdrawn from further leasing, immediately upon the *notation* of the cancellation or relinquishment on the tract book of the land office or on the tract book of the Bureau of Land Management, if there is no land office in the State, the lands shall be open to further oil and gas lease offers. * * * (43 CFR, 1953 Supp., 192.43; italics added.)

The appellant asserts that the records of the land office were more accurate than the records in the Washington office with respect to the status of the tract of land involved in this appeal. The file of BLM-A 011661 contains a memorandum of September 2, 1954, to the Director from the manager which states that the serial page and case file of this lease in the land office indicate correctly the dates on which Mr. Greenslade's relinquishment was filed and on which the decision canceling the lease was rendered. As the appellant does not mention the official acquired lands plat records, it is presumably the serial page

¹ Lease BLM-A 011661 was issued by the Secretary of Agriculture as oil and gas protective lease OG-246 and covered 1,560 acres of land including the tract here involved. The administration of the mineral deposits in the leased lands was transferred effective July 16, 1946, to the Secretary of the Interior pursuant to section 402 of Reorganization Plan No. 3 of 1946.

December 28, 1955

and the case file in the land office which he is referring to in his assertion relating to the records in the land office. However, it is the notation of the cancellation or relinquishment of a prior lease on the official tract books or plat records, and not what the serial page or case file of a lease may show, which determines whether land included in a relinquished lease is available for further lease offers. *George B. Friden*, A-26402 (October 8, 1952); *Barney Cockburn*, A-26303 (October 10, 1951); *David C. Colony*, A-26175 (April 26, 1951); see *Kenneth A. Araas*, A-26672 (April 28, 1953); *Martin Judge*, 49 L. D. 171 (1922). Since the appellant's application was filed in the Washington office as required by the applicable regulation then in effect (43 CFR, 1949 ed., 200.5 (b)) and leases on the land could be issued only by the Washington office, it is reasonable to conclude that the notation on the official acquired lands plat records in the Washington office of the relinquishment or cancellation of Mr. Greenslade's lease was required by the above-quoted regulation before any of the land covered by that lease became available for further lease offers. Although it is possible that the Billings office may have maintained acquired lands plat records when the appellant's application was filed,² there is no suggestion on this appeal that there were any such records in Billings at that time. Thus, the question whether land was available for leasing in accordance with the above-quoted portion of 43 CFR 192.43 is properly determined in this case by what was shown on the acquired lands plat records of the Washington office, not by what the serial page and case file in the land office showed. Since the relinquishment and cancellation of Mr. Greenslade's lease were not noted on the acquired lands plat records in the Washington office until September 15, 1954, the appellant's application for the 40-acre tract here involved was filed when the land was not available for leasing.

The Department has held that an oil and gas lease will be canceled or voided where land or the mineral deposit included therein is not available for leasing when the lease was issued. *L. N. Hagood*, A-26226 (October 5, 1951); *J. U. Falke*, A-25871 (August 16, 1950); *Davidson Hill*, A-25673 (July 22, 1949). These cases are distinguishable from the instant case because they involved situations where a lease was issued on land in which the Government had no leasable interest, whereas, in the instant case, the land was unavailable for leasing only because a necessary administrative action, that is, the

² Pursuant to section 2.31 (b) of redelegation of authority order No. 46 of August 20, 1951 (16 F. R. 8617), the managers of land offices in Region III were authorized to act, after August 25, 1951, on matters relating to acquired lands oil and gas leases (with certain exceptions not here relevant), after the issuance of such leases by the Washington office. According to informal information from the Bureau, the managers were instructed to set up, in the land offices, a plat system for acquired lands which corresponded to the tract book system for public lands.

notation of the tract books, had not been taken. Nevertheless, because of the importance of making lands available at the same time to all persons who wish to apply for a noncompetitive lease, it is necessary to treat land as unavailable to anyone for leasing until the cancellation or relinquishment of a prior lease has been noted on the tract books of the office which issues the leases. In a situation where, as here, priority of filing an application determines who is entitled to a lease, a uniform rule as to when land becomes available for leasing must be strictly enforced to insure to all who wish to apply an equal chance to do so. It is entirely possible that persons other than the appellant were interested in applying for the tract in question but refrained from doing so prior to the notation on the Washington office records of the relinquishment of the Greenslade lease.

It is unfortunate that the failure to note on the proper records the relinquishment and cancellation of the Greenslade lease within a reasonable time after that lease was canceled was an inadvertent administrative error over which the appellant had no control. Nonetheless, the appellant is not entitled to a lease on land which the plat records showed was not available for leasing to anyone else, and which, by departmental regulation, decisions, and administrative practice was not subject to leasing. As the 40 acres here involved were not available for leasing when the appellant's application was filed, the issuance of the lease on that tract violated a departmental regulation and the cancellation of the lease as to that land was correct. *Cf. McKay v. Wahlensmaier*, 226 F. 2d 35 (App. D. C., 1955).

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 Minerals Officer for the Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

MADISON OILS, INC., T. F. HODGE

A-27163

Decided December 23, 1955

Oil and Gas Leases: Cancellation

It is improper to cancel an oil and gas lease on the ground that prior applications for leases on the same land have not been considered.

Oil and Gas Leases: Cancellation

Where an oil and gas lease is issued before final action has been taken on a prior offer to lease the lands, there must be a finding that the prior offeror is qualified to receive the lease before the lease is canceled.

December 28, 1955

Oil and Gas Leases: Applications

The mandatory requirement that an application for an oil and gas lease on acquired lands of the United States must contain a statement of the applicant's interests in oil and gas leases or applications therefor on acquired lands in the same State was not violated by one who, having no interests in oil or gas leases or lease applications on acquired lands in a State at the time he filed simultaneous applications, failed to indicate on each application that other applications for similar leases were being filed at the same time.

Rules of Practice: Appeals: Service on Adverse Party

As the rules of practice of the Department require an appellant, where the decision of the Director of the Bureau of Land Management indicates that another party has an interest in the proceeding adverse to the appellant, to file a certificate showing that a copy of the notice of appeal has been served on such adverse party, the Director's decision should identify the adverse party in order that the appellant may meet this requirement.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Madison Oils, Inc., has appealed to the Secretary of the Interior from a decision by the Director of the Bureau of Land Management dated December 31, 1954, which held for cancellation two oil and gas leases, BLM-A 029297 and 029298, issued to Henrietta N. Tucker as of September 1, 1953, and thereafter assigned to it, under the provisions of the Mineral Leasing Act for Acquired Lands (30 U. S. C., 1952 ed., secs. 351-359). The reason given for the action taken by the Director was that the leases were issued erroneously because at the time of their issuance there were prior applications for leases on the same lands which applications had not been considered. The prior applications were not identified in the decision.

In its appeal, Madison Oils, Inc., states that oil and gas leases BLM-A 027046 and 027049 covering, among other lands, those in the Tucker leases were issued to T. F. Hodge as of November 1, 1954. The appellant contends that Mr. Hodge, although his applications were filed prior to the Tucker applications, was not the first qualified applicant for leases on those lands. It contends that its predecessor in interest, Mrs. Tucker, was the first qualified applicant and that it is the Hodge leases rather than its leases which should be canceled. The appellant states that the Hodge applications did not meet the requirements of 43 CFR 200.5 and that therefore those applications did not entitle Mr. Hodge to priority over Mrs. Tucker. It contends, further, that the Hodge applications on which leases BLM-A 027046 and 027049 are based were but two of twelve applications filed by Mr. Hodge on the same date and that Mr. Hodge was not qualified to hold the leases here in question because, when he filed those applications,

he held under lease applications more than the maximum acreage then authorized by law.

Mr. Hodge has submitted a brief in opposition to the position taken by the appellant and in support of his leases. He states that the Tucker applications are defective in the same respect as his in their failure to meet the requirements of the departmental regulation above cited. He denies that the acreage held by him under lease applications when he filed the applications on which leases BLM-A 027046 and 027049 are based exceeded the limitation imposed by statute.

Before considering the issues raised by the appeal and the answer thereto, it should be noted that the appellant's leases were held for cancellation on the ground that prior applications for leases on the same land had not been considered. The stated reason is not a valid ground for holding leases for cancellation.

43 CFR 192.42 (m), made applicable to leases and lease offers under the Mineral Leasing Act for Acquired Lands by 43 CFR 200.4, provides that no lease shall be issued before final action has been taken on any prior offer to lease the land and that, if a lease is issued before such final action, the lease is subject to cancellation, after due notice to the lessee, upon a finding that the prior offeror is qualified and entitled to receive a lease on the land. The decision appealed from does not indicate that any prior offeror had been found to be qualified and unless such a finding had been made it was improper for the Director to hold the appellant's leases for cancellation.

It should be noted, too, that while the decision indicates that there are other parties who have an interest in the proceeding adverse to the appellant, the decision does not name those parties. The rules of practice of the Department governing the taking of appeals to the Secretary of the Interior from decisions of the Director require the appellant, where the Director's decision indicates that any other person has an interest in the proceeding adverse to the appellant, to file a certificate showing that a copy of the notice of the appeal has been served on such adverse party (43 CFR 221.75 (c)). Where there are adverse parties, the Director's decision should, therefore, identify such parties in order that an appellant may meet this requirement.

The record reveals that there are, in fact, two outstanding leases, BLM-A 027046 and 029297, covering lots 1, 2, and 3, sec. 18, T. 134 N., R. 106 W., 5th P. M., North Dakota, and two outstanding leases, BLM-A 027049 and 029298, covering lots 5 and 6, sec. 6, T. 133 N., R. 106 W., 5th P. M., North Dakota. As it is obvious that two leases cannot remain outstanding covering the same land and that the Director must have, in fact, determined that Mr. Hodge, as a prior offeror, was qualified to receive leases on the lands in question, since leases

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had been issued to him prior to the decision of December 31, 1954, the appeal will be considered notwithstanding the erroneous reason assigned for the action taken by the Director.

Section 3 of the Mineral Leasing Act for Acquired Lands (30 U. S. C., 1952 ed., sec. 352) makes applicable to acquired lands of the United States the provisions of section 17 of the Mineral Leasing Act (30 U. S. C., 1952 ed., sec. 226). It thus requires that if acquired lands are to be leased and if they are not within any known geologic structure of a producing oil or gas field they must be leased to the person first making application for the lease who is qualified to hold a lease under the act. Implicit in the requirement that the lands must be leased to the party first making application therefor who is qualified to hold a lease is that the party, in order to enjoy the advantage of being the first applicant for the land, must comply with the requirements of the Department governing such applications. Cf. *McKay v. Wahlenmaier*, 226 F. 2d 35 (App. D. C., 1955). When an application which complies with those requirements is filed, the party filing such application, if he is qualified to hold the lease, enjoys a preference right to the lease over subsequent applicants for the same land. Leases issued in disregard of this statutory preference right must be considered as having been issued without authority of law and are subject to cancellation. Cf. *Transco Gas & Oil Corporation*, 61 I. D. 85 (1952).

Both parties to this appeal contend that the other's applications were defective because they failed to satisfy the requirements of 43 CFR 200.5. When the four applications involved in this appeal were filed (the Hodge applications on October 15, 1951, and the Tucker applications on January 18, 1952) that regulation required that each application for an oil and gas 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 * * *

As the Hodge applications were the first in time, they will be considered first.

Paragraph (C) in both of the Hodge applications involved in this appeal stated:

My other interests, direct and indirect, held in oil and gas leases, and applications therefor on acquired lands in the State of North Dakota with identification

¹The regulation was amended on October 28, 1954 (19 F. R. 7127), to require that the application contain a statement that applicant's interest, direct or indirect, in leases, permits, or applications for similar minerals does not exceed a maximum chargeable acreage permitted by law to be held for that mineral in federally owned acquired lands in the same State.

by serial numbers of the records wherein such interests may be found are as follows:

NONE

Such interests, with the acreage herein applied for, do not exceed in the aggregate 15,360 acres in the State.

The appellant contends that when Mr. Hodge filed the two applications here in question he filed ten other applications, that the applications were serialized consecutively as BLM-A 027038 to 027049, inclusive, and that none of the applications disclosed that twelve applications were being filed simultaneously. He argues that the statement appearing in the Hodge applications 027046 and 027049 that he had no other interests in leases or lease applications in the State of North Dakota was erroneous and that it violated the mandatory requirement of the regulation.

In defense of his leases Mr. Hodge alleges that the statement on each of his applications that he had no other interest in leases or lease offers in the State of North Dakota was true, since he had no other applications of record when those applications were filed on October 15, 1951. He states that he forwarded the twelve applications to the Bureau by mail in one envelope and that there was no possible way for him to comply with the regulation at that time.

On August 3, 1954, the Department held in *S. J. Hooper*, 61 I. D. 346, that the above-quoted language in 43 CFR 200.5 is mandatory and that an application which does not list the other interests of the applicant in leases or permits for similar mineral deposits, or in applications therefor, on federally owned acquired lands, identifying the serial number thereof, will accord no priority to the applicant and that such an application is properly rejected. However, in that case, Hooper was found to have had other applications pending at the time he filed the application there in question. Here, Hodge had no applications pending when he filed the twelve applications. The question then is whether the regulation required an applicant who filed more than one application at the same time to include in each application a statement that other applications were being filed simultaneously.

The regulation did not clearly impose such an obligation on an applicant. On the contrary, it is arguable that the intent of the regulation was not to impose such an obligation since it required the identification of other applications by serial number, an impossible task where, as here, a number of applications are mailed in at the same time. Moreover, in view of the fact that an application is not in effect until it is filed, it is arguable that the regulation required only the identification of applications that were in effect, i. e., filed, when the application in question was filed. Where applications are

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simultaneously filed, it cannot be said, except in a very technical sense, that one application was filed before the other. On the other hand, it can be persuasively argued that if simultaneously filed applications are not required to be cross-referred to in each application, the door has been open to a means of evading the purpose of the regulation. This may be conceded. However, it seems to me that when an applicant is to be deprived of a statutory preference right because of his failure to comply with the requirement of a regulation, that requirement should be spelled out so clearly that there is no basis for disregarding his noncompliance. It is my opinion that the regulation in question was not violated by one who, having no interest in oil or gas leases or lease applications on acquired lands in a State at the time he filed simultaneous applications for such leases, failed to indicate on each application that other applications for similar leases were being filed at the same time.

Therefore, it must be held that the Hodge applications BLM-A 027046 and 027049 met the requirements of the above-quoted portion of 43 CFR 200.5 and that they accorded priority to Mr. Hodge, if all else were regular.

Turning now to the Tucker applications, we find the following statement in both applications:

My interests, direct and indirect, in other acquired land leases and applications therefor, in the same state, are not in excess of 15,360 acres.

Mrs. Tucker did not list those interests and under the *Hooper* decision, *supra*, her applications could accord her no priority. However, leases had been issued to Mrs. Tucker as of September 1, 1953, prior to the date of the *Hooper* decision, apparently as the result of the then prevailing practice of the Bureau of Land Management to regard such a statement as sufficient to invest an applicant for an acquired lands lease with priority.

The *Hooper* decision, *supra*, was supplemented on October 28, 1954, 61 I. D. 350. Under the supplemental decision, to prevent unfairness to applicants who had relied on the Bureau's administrative construction of the regulation as not being mandatory, the Department allowed those persons who had, prior to August 31, 1954, filed applications defective in this one respect to and including December 1, 1954, within which to submit statements of their other interests as required by 43 CFR 200.5 without loss of priority to their applications, if all else were regular.

On November 16, 1954, Mrs. Tucker filed statements in support of the two applications here in question and on November 29, 1954, she filed amendments to her lease applications, listing her interests in

other applications for oil and gas leases on acquired lands in the State of North Dakota. The statements filed on November 29, 1954, appear to be correct statements of Mrs. Tucker's interests in acquired lands in the State of North Dakota as of January 18, 1952, when the applications on which leases BLM-A 029297 and 029298 are based were filed. Mrs. Tucker therefore cured her defective applications within the time allowed under the supplemental *Hooper* decision and her applications, if all else were regular accorded her priority from January 18, 1952.

Therefore, it must be held that both parties to this appeal satisfied the requirements of 43 CFR 200.5.

As the Hodge applications were filed several months prior to the Tucker applications, Mr. Hodge enjoyed a preference right over Mrs. Tucker to leases on the lands in controversy and he is entitled to the leases if he was otherwise qualified to maintain his applications.

As stated above, the appellant claims that Mr. Hodge was not so qualified because the total amount of acreage covered by the twelve applications filed simultaneously exceeded in the aggregate the 15,360 acres then permitted to be held under oil and gas leases² and that he still held this excess acreage under application on January 18, 1952, when the Tucker applications were filed. It argues that the intervening valid Tucker applications were entitled to priority over the Hodge applications.

Mr. Hodge, on the other hand, contends that the total land applied for did not exceed the limitation imposed by statute and that, in any event, he was entitled to the benefit of that part of 43 CFR 192.3 (c) which provides:

* * * Any party found to hold or control accountable acreage computed in accordance with the principles above set forth in excess of the prescribed limitations shall be given thirty days within which to file proof of the reduction of his holdings or control so as to conform with the prescribed limitation.

As the Bureau of Land Management has had no opportunity to consider the arguments relating to the qualifications of Mr. Hodge as an applicant advanced as the result of this appeal and as the Department does not have before it at this time the necessary records from which to make a determination as to the acreage holdings of Mr. Hodge under the twelve applications, the matter is, 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), remanded to the Bureau of Land Management for a redetermination of the acreage account of Mr. Hodge. If the Bureau determines that the applications filed by Mr. Hodge did not exceed the acreage limitation then imposed, then Mr.

² The limitation was raised to 46,080 acres by the act of August 2, 1954 (68 Stat. 648).

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Hodge is entitled to retain his leases and the Bureau should so advise both parties, and cancel the appellant's leases. If the Bureau determines that the Hodge applications covered, in the aggregate, more than 15,360 acres when the applications were filed and that Mr. Hodge still held an excessive amount of acreage under application on January 18, 1952, when the Tucker applications were filed, then the Bureau should resubmit the matter for further departmental consideration.

J. REUEL ARMSTRONG,
Solicitor.

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<p>Where a contract provided for the excavation of a par- ticular section of a channel in accordance with specifications and drawings, and the require- ments of the work were reason- ably ascertainable from the drawings relating to that sec- tion of the canal and a related drawing, which showed that there was much more material on one side of the centerline of the channel than on the other side, and that the em- bankments were designed to be approximately equal and to contain a water flow of 4,000 c. f. s., which would require the embankments to be a minimum height of 18 feet above the bottom grade of the channel if allowance was also to be made for a freeboard, the contractor is not entitled to additional compensation for equalizing the embankments to the necessary minimum height, notwithstanding the omission of the 18-foot dimen- sion on one of the drawings,</p>	118	<p>A contractor who was re- quired to lengthen and recon- struct a bridge in accordance with unit prices stipulated in a schedule for erecting salvaged timber in structures; removing timber in existing structures, and salvaging timber, was not entitled to additional compen- sation for removing the center span of the existing bridge prior to the construction of the center pile bent for the lengthened bridge, and replac- ing the center span in its original position, when the removal of the center span was a necessary operation in reconstructing the bridge, and no provision for payment for this work was contemplated by the contract.....</p>	165
		<p>Where the plans and speci- fications for the construction of footings for a high school gave the results of subsurface in- vestigations and indicated the depth of the footings, which were to be keyed in solid rock, to be 1 foot 6 inches; but also contained language that in- dicated uncertainty in the plans, and that the rock lines shown on the plans were "approximate", the depth of the footings cannot be re- garded as definite and precise. The contractor is, neverthe- less, entitled to additional compensation for construct- ing footings which exceeded the indicated depth by more than one foot, as held by the original contracting officer.....</p>	422

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Additional Compensation—Con.

A contractor is not entitled to additional compensation for work voluntarily undertaken.

422

Where the specifications for the construction of a high school required that the building be constructed entirely of various types of steel and aluminum panels manufactured by the Detroit Steel Products Company, except for the foundations and structural steel, and that the manufacturer or his authorized representative erect the panels, the contractor is not entitled to additional compensation for work undertaken to correct leaks which appeared in the building after the installation of the wall and roof panels when the evidence shows that the panels were erected by a subcontractor not authorized by the Detroit Steel Products Company, and the instructions of the manufacturer for the erection of the panels were not followed in a considerable number of respects. The contractor has the burden of proving that the panels could not produce a weather-tight building, even if the instructions of the manufacturer had been followed in their entirety.

422

A contractor is not entitled to additional compensation for providing ventilating outlets in the concrete floor of the auditorium of a high school as part of the ventilating system even though the auditorium floor seating, which was an alternate in the bidding, was temporarily eliminated, and the specifications may not have provided all the details for the outlets, since openings were required by the specifications to be constructed as part of the ventilating system,

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Additional Compensation—Con.

which had not been eliminated, and the specifications also permitted the contracting officer to supply such detailed drawings as might be necessary.

422

When in the performance of a contract for the completion of earthwork and structures to be paid for at unit prices, the units of work were estimated, and the specifications included a provision stating that the estimated quantities were approximations for comparing bids, and no claim should be made against the Government for excess or deficiency therein, claims of the contractor for additional compensation based on large overruns in the estimated quantities, which concededly did not result from changes in the work within the meaning of the "changes" article in the standard form of Government construction contract, are claims for breach of an implied condition of reasonability in the performance of the contract, and, as such, are claims for unliquidated damages which the Board lacks jurisdiction to consider or allow. Even though the Government erroneously estimated one of the units of work, the contract may not be reformed on the ground of mutual mistake of fact, since there was no agreement to perform so much work for a lump sum but only an agreement to perform an approximate quantity of work at so much a unit of work.

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Appeals

The appeal of a contractor from the decision of a contracting officer assessing liq-

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undated damages against the contractor by reason of the late completion of the work under the contract must be dismissed when the contractor failed to give the contracting officer timely notice of the causes of the delay as required by article 9 of the contract. The consideration of the causes of delay by the contracting officer on the merits does not amount to a waiver of the requirement of notice, since the contracting officer could extend the time for giving notice only with the approval of the head of the Department.

6

A contractor who bids on a Government contract is charged with the obligation of having available whatever machinery and labor may be necessary to execute the contract, and the burden of proving that delays were excusable rests upon the contractor who has taken an appeal.

145

The appeal of a contractor from the decision of a contracting officer assessing liquidated damages against the contractor by reason of the late completion of the work cannot be considered on the merits when the contractor failed to give the contracting officer notice of the causes of the delay as required by Article 9 of the standard form of Government construction contract. The consideration of the causes of delay by the contracting officer on the merits does not amount to a waiver of the requirement of notice, since the contracting officer could extend the time for giving notice only with the approval of the head of the

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Department. Although the head of the Department had delegated to the heads of bureaus the authority to extend the time for giving notice, and had authorized them to redelegate the authority to their subordinates by order published in the Federal Register, no effective redelegation was accomplished in this case, since the Commissioner of Reclamation authorized his contracting officers to extend the time for giving notice by means of an unpublished instruction in the Bureau of Reclamation Manual.

146

The fact that the contractor excepts his claim of additional compensation in executing his release on the contract merely saves whatever rights he had, and is in no way a concession by the Government that his claim is valid, and such exception does not serve to improve the legal position of the contractor, in the absence of statements by the contracting officer which would lead the contractor to believe that his signing of the change order would be conditional.

295

While an appeal opens up the entire record, and the Board may, upon urging by counsel for the Government, disallow an extension of time granted by the contracting officer, by reason of unusually severe weather, where the contracting officer's calculations were not entirely correct, and when several factors in the case, including the average number of days of windstorm and rainstorm are obscure, the Board will not disturb the contracting officer's decision.

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Breach

While the issuance by the Government of a stop order which is not justified by the terms of the contract between the Government and the contractor, and which is extraneous to the performance of the contract itself, is a breach of contract, and a claim arising therefrom is one for unliquidated damages, a stop order which constitutes a change in the contract or in the performance of work required by the specifications under the contract entitles a contractor to additional compensation as an equitable adjustment pursuant to the "changes" clause of the standard contract. -----

280

Changes

Where, in the construction of a sewer, the original plans were discovered by the Project Engineer, who was the active supervisor of the work, to be erroneous, and he was allowed to revise the plans without any corrective action on the part of the contracting officer who was remote from the job, and as Chief Administrative Officer of the Bureau of Indian Affairs had other numerous and important duties to perform, and the Project Engineer thereafter made an error in laying out the sewer, the contractor is entitled to additional compensation for relaying part of the sewer in order to correct the error, and a proper change order should be entered. -----

54

A contract for aerial photography and topographic mapping of a reservoir and project lands provided for the mapping of all lands within a

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designated boundary up to a limiting contour, and for aerial photography only of the lands within the designated boundary north of a certain parallel of latitude. The parties, nevertheless, treated the designated boundary as only approximate, and the contractor was paid for mapping a considerable number of areas outside the designated boundary but within the limiting contour. In these circumstances, the contractor is entitled to additional compensation for aerial photography necessary to map an area on the northern edge of the project where the limiting contour ran considerably beyond the designated boundary. The fact that the additional work was not supported by a written change order, does not bar the allowance of the claim since the disputed area was mapped with the knowledge and consent of representatives of the contracting officer, payment was made for the maps which were retained by the Government, and the mapping could not be required without also consenting to the photography. -----

118

When extra work has been performed by a contractor, pursuant to an order of the contracting officer, a subsequent claim therefor by the contractor is not barred because no written order for extras was entered, as required by Article 5 of the standard form of Government construction contract, and the contracting officer may be directed to enter an appropriate change order. The purpose of Article 5 is to protect the Government against claims for extra com-

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compensation for work voluntarily undertaken by a contractor, or ordered by a subordinate of a contracting officer without his approval 280

While the issuance by the Government of a stop order which is not justified by the terms of the contract between the Government and the contractor, and which is extraneous to the performance of the contract itself, is a breach of contract, and a claim arising therefrom is one for unliquidated damages, a stop order which constitutes a change in the contract or in the performance of work required by the specifications under the contract entitles a contractor to additional compensation as an equitable adjustment pursuant to the "changes" clause of the standard contract 280

In case of a dispute as to allowances due the contractor under a change order, where the contracting officer requests the contractor to either accept the change order or take an appeal from his decision, which he has declared to be final, such conduct does not amount to duress. The contractor had been merely asked to choose between two perfectly legal alternatives 295

Where the acceptance of a change order by the contractor represents a unilateral mistake on his part, administrative relief may not be had, since it is well-settled that the reformation of contracts is a judicial rather than an administrative function 295

Where a contractor voluntarily accepts and signs a change order or similar form

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of contract modification, which expressly states that it is an adjustment of both of his claims arising from alleged changes, he cannot, in the absence of fraud or duress, successfully assert a claim for additional costs alleged to have resulted from the changes ordered 295

The specifications under a contract for the construction of a timber dam at a lump sum price required the contractor to make his own investigation of the site; warned the contractor that subsurface information shown on the plans was not guaranteed; and stipulated that hitches be cut to solid bedrock. Nevertheless, the contractor is entitled to recover on his claim for additional compensation for labor and materials in constructing the dam, when the excavation required to reach bedrock was greater than indicated in a table of test pit results included in the plans, and the dam itself, which was designed on the basis of this information, had to be considerably redesigned. As the contract also included the "changes" and the "changed conditions" articles of the standard form of Government construction contract, the specifications must be read in the light of these provisions, so that the contract will be construed as a whole, and effect given to all of its provisions. As a general proposition, however, it must not be assumed that test pit results which are not guaranteed constitute in themselves a definite representation of fact on which a contractor may always rely as if they were warranties 311

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Changes—Continued

Delay in the completion of pumps due to additional model tests voluntarily undertaken by contractor in order to discover cause of vibration in the pumps is not an excusable cause of delay entitling the contractor to the benefits of an escalation clause, even though technical problems of unusual difficulty may have been involved in the manufacture of the pumps, nor can adjustments made in the pumps be held to constitute changes which would entitle the contractor to extensions of time by way of an equitable adjustment under article 2 of the contract when the contractor voluntarily accepted the responsibility for making the changes-----

385

Changed Conditions

The specifications under a contract for the construction of a timber dam at a lump sum price required the contractor to make his own investigation of the site; warned the contractor that subsurface information shown on the plans was not guaranteed; and stipulated that hitches be cut to solid bedrock. Nevertheless, the contractor is entitled to recover on his claim for additional compensation for labor and materials in constructing the dam, when the excavation required to reach bedrock was greater than indicated in a table of test pit results included in the plans, and the dam itself, which was designed on the basis of this information, had to be considerably redesigned. As the contract also included the "changes" and the "changed conditions"

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Changed Conditions—Con.

articles of the standard form of Government construction contract, the specifications must be read in the light of these provisions, so that the contract will be construed as a whole, and effect given to all of its provisions. As a general proposition, however, it must not be assumed that test pit results which are not guaranteed constitute in themselves a definite representation of fact on which a contractor may always rely as if they were warranties-----

311

Where a contractor who was excavating for footings for a high school in Ketchikan, Alaska, was required to visit the site, and acquaint himself with actual conditions of the work, and did visit the site which was covered with muskeg and hard rock exposed as the result of preliminary grading by another contractor, the contractor cannot be said to have encountered changed conditions even though continued rainfall subsequently softened the hardpan material underlying the site. The conditions encountered were to be expected in that region of Alaska, and the effects of blasting performed by the preliminary grading contractor should also have been known to the contractor, since it was performed prior to the bidding on the construction contract-----

422

Contracting Officer

The appeal of a contractor from the decision of a contracting officer assessing liquidated damages against the contractor by reason of the late completion of the work cannot be considered on the

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Contracting Officer—Con.

merits when the contractor failed to give the contracting officer notice of the causes of the delay as required by Article 9 of the standard form of Government construction contract. The consideration of the causes of delay by the contracting officer on the merits does not amount to a waiver of the requirement of notice, since the contracting officer could extend the time for giving notice only with the approval of the head of the Department. Although the head of the Department had delegated to the heads of bureaus the authority to extend the time for giving notice, and had authorized them to redelegate the authority to their subordinates by order published in the Federal Register, no effective redelegation was accomplished in this case, since the Commissioner of Reclamation authorized his contracting officers to extend the time for giving notice by means of an unpublished instruction in the Bureau of Reclamation Manual.-----

146

The findings of a contracting officer will be presumed to be correct in the absence of contrary proof by the contractor.-----

165

Where a contracting officer has granted certain authority to a construction engineer for specific purposes, it does not follow that by such grant the contracting officer has divested himself of his general authority, nor that the construction engineer had authority to authorize changes.-----

422

Damages

Liquidated Damages

It is well settled that the failure to except an item from

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Damages—Continued

Liquidated Damages—Continued
 settlement has the effect of barring any claim based on such item, and, therefore, a contractor who, in executing a release on the contract, requested an extension of time of a certain number of days for the completion of the work under the contract, cannot subsequently increase its request to a greater number of days, in order to avoid the assessment of liquidated damages.-----

145.

Remission of Liquidated Damages

The partial use of the facility constructed by the contractor is not a sufficient reason for remitting liquidated damages, when such use in no way interfered with the work of the contractor.-----

6

Where a contract was modified by an understanding between the parties which was, strictly speaking, inconsistent with its literal terms, and so constituted a change "within the general scope" thereof, as provided in article 2 thereof, and where as a result of the change the contractor was required to perform extra work, he is entitled not only to payment for the extra work accomplished but also to an extension of time for the completion of the work by way of an equitable adjustment, and liquidated damages which have been assessed against him should be remitted.-----

118

The Interior Board of Contract Appeals is not authorized to make recommendations to the Comptroller General with respect to the remission of liquidated damages pursuant to section 10 (a) of the act of September 5, 1950 (64 Stat.

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Remission of Liquidated Damages—Continued

578, 591; 41 U. S. C., 1952 ed., sec. 256a). This function is vested in the Solicitor of the Department by section 27 of Order No. 2509, Amendment No. 16.....

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Unliquidated Damages

A claim for additional compensation to cover increased costs allegedly incurred by a supply contractor because the Government withheld what was contended to be an excessive amount of money to insure that the contractor paid a back-charge for corrective work, and because the Government failed to give notice to the contractor as required by the contract, is in the nature of a claim for unliquidated damages, which an administrative officer of the Government has no authority to consider or settle.....

257

To the extent that the Government may have withheld from the contractor information concerning subsurface conditions, such conduct could only form the basis of a claim for unliquidated damages which the Board lacks jurisdiction to consider.....

311

When in the performance of a contract for the completion of earthwork and structures to be paid for at unit prices, the units of work were estimated, and the specifications included a provision stating that the estimated quantities were approximations for comparing bids, and no claim should be made against the Government for excess or deficiency therein, claims of the contractor for additional compensation based on large over-

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Unliquidated Damages—Continued

runs in the estimated quantities, which concededly did not result from changes in the work within the meaning of the "changes" article in the standard form of Government construction contract, are claims for breach of an implied condition of reasonability in the performance of the contract, and, as such, are claims for unliquidated damages which the Board lacks jurisdiction to consider or allow. Even though the Government erroneously estimated one of the units of work, the contract may not be reformed on the ground of mutual mistake of fact, since there was no agreement to perform so much work for a lump sum but only an agreement to perform an approximate quantity of work at so much a unit of work.....

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Delays of Contractor

The appeal of a contractor from the decision of a contracting officer assessing liquidated damages against the contractor by reason of the late completion of the work under the contract must be dismissed when the contractor failed to give the contracting officer timely notice of the causes of the delay as required by article 9 of the contract. The consideration of the causes of delay by the contracting officer on the merits does not amount to a waiver of the requirement of notice, since the contracting officer could extend the time for giving notice only with the approval of the head of the Department.....

6

A request for an extension of time to take care of delays in

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Delays of Contractor—Con.

the performance of a contract that led to the assessment of liquidated damages against a contractor must be denied, notwithstanding the claim that the delays were attributable to the Korean conflict, when the contractor sold machinery in good condition that was usable in the performance of the contract, and subsequently entered into another contract which required the simultaneous use of the available machinery in the performance of both contracts. Moreover, since the contractor was allowed an extension of time for the performance of the contract because of the shortage of parts due to the Korean conflict, the contractor must demonstrate that delays attributed to the unavailability of new machinery were not concurrent with the delays due to the shortage of parts.

145

A request for an extension of time to take care of delays in the performance of a contract that led to the assessment of liquidated damages must be denied when the contractor has failed to meet the burden of proving that an alleged labor shortage was of calculable duration and was attributable to the Korean conflict rather than to its own lack of forethought and diligence. The record indicates that an adequate supply of labor could have been obtained if adequate advance notice had been given to the state employment agency, and adequate housing facilities had been supplied at or near the job site as required by the specifications, and hence the situation cannot be said to have been "beyond the control and

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Delays of Contractor—Con.

without the fault or negligence of the contractor" within the meaning of Article 9 of the standard form of Government construction contract. The Board cannot find that the provisions of the specifications requiring the contractor to furnish adequate housing facilities for workers at the job site were waived by the Government in the absence of positive evidence of such a waiver. The contracting officer has entered no change order eliminating the provisions of the specifications in question, and the Board cannot indulge any presumption that he did so informally in view of the obvious need for the housing facilities. As the housing problem at or near the job site was, moreover, necessarily known to the contractor at the time it bid for the contract, it could have had no connection with the Korean conflict and cannot constitute an "unforeseeable" cause within the meaning of Article 9 of the standard form of Government construction contract.

145

Delay in the completion of pumps due to additional model tests voluntarily undertaken by contractor in order to discover cause of vibration in the pumps is not an excusable cause of delay entitling the contractor to the benefits of an escalation clause, even though technical problems of unusual difficulty may have been involved in the manufacture of the pumps, nor can adjustments made in the pumps be held to constitute changes which would entitle the contractor to extensions of time by way of an equitable ad-

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justment under article 2 of the contract when the contractor voluntarily accepted the responsibility for making the changes.....

385

Where counsel for the Government contends that the delay in the completion of the contract is attributable to the tardiness of the contractor in commencing and prosecuting the work under the contract rather than to weather conditions, and the record shows that the contractor delayed in commencing work for a greater number of days than the probable number of unforeseeable days of bad weather, there is serious doubt that the contractor is entitled to any extension of time at all.....

449

Extras

When extra work has been performed by a contractor, pursuant to an order of the contracting officer, a subsequent claim therefor by the contractor is not barred because no written order for extras was entered, as required by Article 5 of the standard form of Government construction contract, and the contracting officer may be directed to enter an appropriate change order. The purpose of Article 5 is to protect the Government against claims for extra compensation for work voluntarily undertaken by a contractor, or ordered by a subordinate of a contracting officer without his approval....

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Interpretation

Article 6 of the form of land-purchase contract used by the Bureau of Reclamation for several years prior to its revision in 1952 which pro-

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vides in pertinent part that the amount paid by the United States for the purchased land should constitute "full payment for all damages for entry upon the said property and the construction, operation, and maintenance of reclamation works thereon * * *" has been interpreted by several rulings of the Solicitor beginning in 1948 to release the Government from liability for damage to remaining lands which are appurtenant to the land purchased from the claimant. Such rulings are hereby reversed and claims denied on that basis will be reconsidered on their merits.....

12

Although such varying terms as "solid bedrock," "solid rock," or "bedrock" were employed in the plans and specifications, the contractor was not unreasonable in regarding all these terms as synonymous. The term "solid rock" is only a synonym for "bedrock," and the term "solid bedrock" could be regarded by the contractor as mere tautology.....

311

When the specifications limited the application of an escalation clause to the period from bidding to shipment, the contractor is not entitled to the benefit of the clause beyond the period when shipment was due, even though after installation of the pumps it was found that adjustments were necessary.....

385

A contractor is not entitled to additional compensation for installing a backing of lath and plaster rather than cheaper gypsum board in certain rooms of a high school, even though there was a discrepancy in indicating the type of backing

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Interpretation—Continued

between the applicable drawings and a room finish schedule constituting the last sheet of the drawings. The room finish schedule was not part of the specifications and since the discrepancy was only between two sheets of the drawings, it was to be resolved by submission to the contracting officer as required by the specifications.....

422

Modification

Where the acceptance of a change order by the contractor represents a unilateral mistake on his part, administrative relief may not be had, since it is well-settled that the reformation of contracts is a judicial rather than an administrative function.....

295

Notices

The appeal of a contractor from the decision of a contracting officer assessing liquidated damages against the contractor by reason of the late completion of the work under the contract must be dismissed when the contractor failed to give the contracting officer timely notice of the causes of the delay as required by article 9 of the contract. The consideration of the causes of delay by the contracting officer on the merits does not amount to a waiver of the requirement of notice, since the contracting officer could extend the time for giving notice only with the approval of the head of the Department.....

6

The appeal of a contractor from the decision of a contracting officer assessing liquidated damages against the contractor by reason of the

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late completion of the work cannot be considered on the merits when the contractor failed to give the contracting officer notice of the causes of the delay as required by Article 9 of the standard form of Government construction contract. The consideration of the causes of delay by the contracting officer on the merits does not amount to a waiver of the requirement of notice, since the contracting officer could extend the time for giving notice only with the approval of the head of the Department. Although the head of the Department had delegated to the heads of bureaus the authority to extend the time for giving notice, and had authorized them to redelegate the authority to their subordinates by order published in the Federal Register, no effective redelegation was accomplished in this case, since the Commissioner of Reclamation authorized his contracting officers to extend the time for giving notice by means of an unpublished instruction in the Bureau of Reclamation Manual.....

146

Performance

A Project Engineer assigned to supervise the construction of a sewer does not transcend his proper function when he assists the contractor in making the necessary preparations and computations in the laying out of the sewer after it has been discovered that the original plans for the sewer were erroneous.....

54

A contractor who bids on a Government contract is charged with the obligation of having available whatever machinery and labor may be

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necessary to execute the contract, and the burden of proving that delays were excusable rests upon the contractor who has taken an appeal..... 145

When bids on a contract were opened on June 26, 1950, a day after the commencement of the Korean conflict, and the contract was awarded on June 29, 1950, four days later, even though the contractor was already bound by its bid when the conflict commenced, and the proportions and probable duration of the conflict were not then entirely manifest, the contractor was at least put on notice at the very beginning of the performance of the contract that difficulties in procuring labor equipment might be expected, and that early and determined efforts would be necessary if shortages were to be avoided..... 145

When the specifications limited the application of an escalation clause to the period from bidding to shipment, the contractor is not entitled to the benefit of the clause beyond the period when shipment was due, even though after installation of the pumps it was found that adjustments were necessary..... 385

Where the specifications for the construction of a high school required that the building be constructed entirely of various types of steel and aluminum panels manufactured by the Detroit Steel Products Company, except for the foundations and structural steel, and that the manufacturer or his authorized representative erect the panels, the contractor is not entitled to additional compensation for

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work undertaken to correct leaks which appeared in the building after the installation of the wall and roof panels when the evidence shows that the panels were erected by a subcontractor not authorized by the Detroit Steel Products Company, and the instructions of the manufacturer for the erection of the panels were not followed in a considerable number of respects. The contractor has the burden of proving that the panels could not produce a weather-tight building, even if the instructions of the manufacturer had been followed in their entirety..... 423

Protests

A contracting officer waives the requirement of timely protest by considering a claim on the merits..... 225

Although the Board has held that a contracting officer cannot invoke the requirement of timely protest if he has considered a claim on the merits, the consideration of the merits must involve a question of fact, or at least a mixed question of law and fact that is disputed. Since in the present case the contracting officer merely held that the claims could not be allowed in view of the approximate quantities provision of the specifications, which was an expression of an opinion on a question of law, he was not barred from denying the claims merely for failure to make timely protest..... 456

Release

It is well settled that the failure to except an item from settlement has the effect of barring any claim based on such item, and, therefore, a

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contractor who, in executing a release on the contract, requested an extension of time of a certain number of days for the completion of the work under the contract, cannot subsequently increase its request to a greater number of days, in order to avoid the assessment of liquidated damages.....

145

Specifications

Where a contract provided for the excavation of a particular section of a channel in accordance with specifications and drawings, and the requirements of the work were reasonably ascertainable from the drawings relating to that section of the canal and a related drawing, which showed that there was much more material on one side of the centerline of the channel than on the other side, and that the embankments were designed to be approximately equal and to contain a water flow of 4,000 c. f. s., which would require the embankments to be a minimum height of 18 feet above the bottom grade of the channel, if allowance was also to be made for a freeboard, the contractor is not entitled to additional compensation for equalizing the embankments to the necessary minimum height, notwithstanding the omission of the 18-foot dimension on one of the drawings, and its revision by the contracting officer to show the omitted dimension, at a time when the contractor had virtually completed the excavation work on that section of the canal.....

164

A contractor who was required to lengthen and recon-

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struct a bridge in accordance with unit prices stipulated in a schedule for erecting salvaged timber in structures, removing timber in existing structures, and salvaging timber, was not entitled to additional compensation for removing the center span of the existing bridge prior to the construction of the center pile bent for the lengthened bridge, and replacing the center span in its original position, when the removal of the center span was a necessary operation in reconstructing the bridge, and no provision for payment for this work was contemplated by the contract.....

165

When ambiguity of a phrase in the specifications was due to its position in the sentence and such ambiguity was clarified by other provisions in the same paragraph and by information received by the contractor from the contracting officer prior to the submission of the bid, a claim for extra work based on the phrase should be rejected.....

225

When, under specifications prescribing in detail the manner in which plaster work was to be performed, and expressly requiring plaster to be 3/4 of an inch thick, the contractor was required to apply plaster exceeding twice the specified thickness in a considerable area, and to do an excessive amount of shimming, the contractor was entitled to an equitable adjustment for the extra work.....

225

Where the plans and specifications for the construction of footings for a high school gave the results of subsurface investigations and indicated the

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depth of the footings, which were to be keyed in solid rock to be 1 foot 6 inches, but also contained language that indicated uncertainty in the plans, and that the rock lines shown on the plans were "approximate", the depth of the footings cannot be regarded as definite and precise. The contractor is, nevertheless, entitled to additional compensation for constructing footings which exceeded the indicated depth by more than one foot, as held by the original contracting officer. 422

A contractor is not entitled to additional compensation for providing ventilating outlets in the concrete floor of the auditorium of a high school as part of the ventilating system even though the auditorium floor seating, which was an alternate in the bidding, was temporarily eliminated, and the specifications may not have provided all the details for the outlets, since openings were required by the specifications to be constructed as part of the ventilating system, which had not been eliminated, and the specifications also permitted the contracting officer to supply such detailed drawings as might be necessary. 422

When in the performance of a contract for the completion of earthwork and structures to be paid for at unit prices, the units of work were estimated, and the specifications included a provision stating that the estimated quantities were approximations for comparing bids, and no claim should be made against the Government for excess or deficiency therein, claims of the contractor for

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additional compensation based on large overruns in the estimated quantities, which concededly did not result from changes in the work within the meaning of the "changes" article in the standard form of Government construction contract, are claims for breach of an implied condition of reasonableness in the performance of the contract, and, as such, are claims for unliquidated damages which the Board lacks jurisdiction to consider or allow. Even though the Government erroneously estimated one of the units of work, the contract may not be reformed on the ground of mutual mistake of fact, since there was no agreement to perform so much work for a lump sum but only an agreement to perform an approximate quantity of work at so much a unit of work. 456

Substantial Evidence

Where contractor on appeal has submitted affidavits tending to establish that he was not responsible for the incorrect installation of a sewer, and the Government offers no counter proof of a substantial nature, the contention of the contractor must be accepted. 54

Subcontractors and Suppliers

Insolvency of a subcontractor or supplier is not an unforeseeable and excusable cause of delay entitling a contractor to the benefits of an escalation clause. 385

Unforeseeable Causes

When bids on a contract were opened on June 26, 1950, a day after the commencement of the Korean conflict, and the contract was awarded on June

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 29, 1950, four days later, even though the contractor was already bound by its bid when the conflict commenced, and the proportions and probable duration of the conflict were not then entirely manifest, the contractor was at least put on notice at the very beginning of the performance of the contract that difficulties in procuring labor equipment might be expected, and that early and determined efforts would be necessary if shortages were to be avoided. 145

A request for an extension of time to take care of delays in the performance of a contract that led to the assessment of liquidated damages must be denied when the contractor has failed to meet the burden of proving that an alleged labor shortage was of calculable duration and was attributable to the Korean conflict rather than to its own lack of forethought and diligence. The record indicates that an adequate supply of labor could have been obtained if adequate advance notice had been given to the state employment agency, and adequate housing facilities had been supplied at or near the job site as required by the specifications, and hence the situation cannot be said to have been "beyond the control and without the fault or negligence of the contractor" within the meaning of Article 9 of the standard form of Government construction contract. The Board cannot find that the provisions of the specifications requiring the contractor to furnish adequate housing facilities for workers at the job site were waived by

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 the Government in the absence of positive evidence of such a waiver. The contracting officer has entered no change order eliminating the provisions of the specifications in question, and the Board cannot indulge in any presumption that he did so informally in view of the obvious need for the housing facilities. As the housing problem at or near the job site was, moreover, necessarily known to the contractor at the time it bid for the contract, it could have had no connection with the Korean conflict and cannot constitute an "unforeseeable" cause within the meaning of Article 9 of the standard form of Government construction contract. 145

Article 5 of the standard form of Government supply contract, which prevents the Government from charging the contractor with excess costs when delays are due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, is not strictly applicable in determining whether the contractor is entitled to the benefit of escalation clause by reasons of such delays, but the provision of the contract may nevertheless be applied by analogy. 385

Insolvency of a subcontractor or supplier is not an unforeseeable and excusable cause of delay entitling a contractor to the benefits of an escalation clause. 385

A claim for an extension of time for performance of a Government construction contract based on unusually severe weather conditions can be allowed only when the evidence indicates that the severe weather

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Unforeseeable Causes—Con.

er exceeded the average weather conditions reasonably to be expected, since such conditions are "foreseeable" and hence not excusable under the terms of article 5(c) of the revised standard form of Government construction contract.....

449

Where counsel for the Government contends that the delay in the completion of the contract is attributable to the tardiness of the contractor in commencing and prosecuting the work under the contract rather than to weather conditions, and the record shows that the contractor delayed in commencing work for a greater number of days than the probable number of unforeseeable days of bad weather, there is serious doubt that the contractor is entitled to any extension of time at all.....

449

Waiver and Estoppel

Where a contractor, who is liable to the Government for corrective work performed by another contractor, voluntarily and with full knowledge of the facts constituting the basis for charges for the work enters into a settlement with the other contractor, such settlement constitutes an accord and satisfaction. Such settlement cannot be avoided because the contractor might have entered into the settlement reluctantly, or to avoid the trouble and expense of an administrative determination of fact and a possible appeal therefrom and litigation, or because the Government, an interested third party, urged such a settlement, and withheld the sum of \$5,000 otherwise due the contractor, pending determination of the

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amount chargeable to the contractor for the corrective work..

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If a contracting officer or any other officer of the Government had intended to waive the defense based on the change order, he would lack authority to do so in the absence of a new and valuable consideration moving to the Government, it being well-settled that Government officers may not modify a contract when it is to the disadvantage of the Government to do so.....

295

DELEGATION OF AUTHORITY

Generally

The President's authority under the Defense Production Act with respect to priorities and allocations has, with respect to helium, been delegated to the Secretary of the Interior, subject to certain limitations, and can be redelegated by the Secretary of the Interior to any official or agency of the Federal Government, including the Bureau of Mines.....

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Redelegations

The appeal of a contractor from the decision of a contracting officer assessing liquidated damages against the contractor by reason of the late completion of the work cannot be considered on the merits when the contractor failed to give the contracting officer notice of the causes of the delay as required by Article 9 of the standard form of Government construction contract. The consideration of the causes of delay by the contracting officer on the merits does not amount to a waiver of the requirement of notice, since the contracting

DELEGATION OF AUTHORITY— Page

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Redelegations—Continued

officer could extend the time for giving notice only with the approval of the head of the Department. Although the head of the Department had delegated to the heads of bureaus the authority to extend the time for giving notice, and had authorized them to redelegate the authority to their subordinates by order published in the Federal Register, no effective redelegation was accomplished in this case, since the Commissioner of Reclamation authorized his contracting officers to extend the time for giving notice by means of an unpublished instruction in the Bureau of Reclamation Manual..... 146

DESERT LAND ENTRY

Cancellation

A desert land entry is not to be canceled for defects not appearing on the face of the record without giving the entryman an opportunity to be heard..... 99

The report of a field examination, although a proper basis for charges, notice, and a hearing, is not evidence on which the final action of cancellation of a desert land entry may be taken..... 99

Proof

Satisfactory final proof of the reclamation, irrigation, and cultivation of land in a desert land entry must show that the entryman has made a bona fide effort to produce an agricultural crop. The adequacy of such good faith is to be measured by the extent of the entryman's efforts to produce a productive and profitable crop,

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Proof—Continued

provided always that such efforts include performance of the acts of reclamation, irrigation, and cultivation within the defined scope of those terms..... 99

The desert land law requires that in order to make satisfactory final proof of entry, an entryman must, in addition to the reclamation of the irrigable land in his entry, actually irrigate and cultivate one-eighth of this land..... 99

The actual production of an agricultural crop is not required in order to make satisfactory final proof of the reclamation, irrigation, and cultivation of the one-eighth portion of the land in a desert land entry, but, except where grass crops only can be grown or where tillage would be detrimental to the soil, the cultivation of a desert land entry must at least include tillage... 99

Reclamation

The desert land law requires that in order to make satisfactory final proof of entry, an entryman must, in addition to the reclamation of the irrigable land in his entry, actually irrigate and cultivate one-eighth of this land..... 99

Water Right

When Congress provided in the Desert Land Act that the right to use of water by the entryman "shall depend upon bona fide prior appropriation," Congress used the words "prior appropriation" as words of art having reference to the well-established doctrine of prior appropriation then obtaining in the Western States and Territories..... 49

DESERT LAND ENTRY—Con.

Water Right—Continued

Whether water is subject to prior appropriation as required in the Desert Land Act is a matter governed by State law.....

49

Applications for desert land entries in Arizona cannot be allowed, and allowed desert land entries in that State cannot be patented, where the entries are dependent upon percolating waters for reclamation.....

49

ENLARGED HOMESTEADS

Mineral Reservation

Where a patent issued containing a reservation to the United States under the act of July 17, 1914, of all oil and gas in an enlarged homestead entry in accordance with the notation of the reservation in the final certificate, and where that notation is identical with the amendment of the final certificate to which the entryman was required to, and did, consent before the final certificate was approved, the fact that only a part of the land in the entry was included within a petroleum withdrawal when the entryman filed his consent to the reservation does not warrant a conclusion that the reservation as to the land not within the withdrawal was erroneous.....

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FEDERAL EMPLOYEES AND OFFICERS

Members of Congress

The provisions of 18 U. S. C. sec. 431, and of section 9 of noncompetitive oil and gas leases make unlawful the holding of an oil and gas lease by a Member of Congress even though the lease was issued at a time when the lessee was not a Member of Congress.....

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GRAZING LEASES

Page

Cancellation

The existence of a grazing lease will not bar the disposal, in accordance with the general authority of section 7 of the Taylor Grazing Act, of the leased land through public sale as an isolated tract; and the grazing lease may be canceled in order to effect such disposal.....

33

A determination by the manager of the amount of compensation to be paid to a grazing lessee for his improvements upon the cancellation of his lease will not be disturbed where it is accurate and reasonable; however, an award of compensation for the loss of grazing use should be reexamined where in fact the lease has been allowed to run for its full term and the lessee has not apparently suffered any loss of grazing use.....

33

GRAZING PERMITS AND LICENSES

Appeals

The cancellation of a grazing permit without according the permittee an opportunity to demonstrate or achieve compliance with lawful requirements is unlawful under section 9 (b) of the Administrative Procedure Act except in cases of willfulness or those in which the public health, interest or safety requires otherwise; the departmental regulation that a decision canceling a grazing permit will not become effective pending disposition of a timely appeal precludes the possibility of such a decision coming within the scope of the exception clause in section 9 (b) of the Administrative Procedure Act.....

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GRAZING PERMITS AND LICENSES—Continued

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Base Property (Land)

Generally

The cancellation of a 10-year grazing permit on the ground that the base lands lack dependency by use is erroneous where the evidence in the record as a whole does not support such a determination.

344

Dependency by Use

Where a livestock operator sells his ranch, and as a part of the transaction he is entitled to use of the ranch for care of his sheep for an indeterminate time, use of the ranch under such an agreement may give the operator such control of the ranch that use of the land in conjunction with the Federal range will serve to vest the land with the attributes of land dependent by use.

344

Cancellation and Reductions

The cancellation of a grazing permit without first giving the permittee an opportunity to show cause why such cancellation should not be made final is contrary to departmental regulation.

344

The provision in the Federal Range Code authorizing certain officers, where the orderly administration of the range or other public interest requires, to make immediately effective a decision from which an appeal may be taken, does not apply to decisions canceling grazing licenses or permits.

344

Where a grazing permittee has been wrongfully denied use of the range for two grazing seasons under a 10-year grazing permit, the permittee will be granted use of the range for that length of time even though his permit has expired.

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GRAZING PERMITS AND LICENSES—Continued

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Federal Range Code

The provision in the Federal Range Code authorizing certain officers, where the orderly administration of the range or other public interest requires, to make immediately effective a decision from which an appeal may be taken, does not apply to decisions canceling grazing licenses or permits.

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HELIUM

The Helium Act (50 U. S. C. sec. 161) is less suitable than the Defense Production Act (50 U. S. C., App. 2061 *et seq.*) as a legal basis for operating a priorities and allocations system because the Helium Act lacks, while the Defense Production Act contains, adequate provisions for (a) control of helium use by the purchaser or his transferees, (b) diversion of helium from use by a Federal agency to a non-Federal consumer and vice versa, (c) exemptions from liability for breach of contract incurred in complying with priorities and allocations directives concerning helium, and (d) requiring rendition of information concerning helium stocks and uses.

323

Under the Helium Act (50 U. S. C. sec. 161), which requires the Bureau of Mines to dispose of helium to Federal agencies in preference over all other applications for purchase of helium, but permits the Bureau to give preference to any Federal agency over another Federal agency, and to the applications of any non-Federal applicant over another non-Federal applicant, the Bureau of Mines may, in effect, operate a partial priorities and allo-

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cations system effective as to direct recipients of helium from the Bureau.....

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HOMESTEADS (ORDINARY)

(See also Enlarged Homesteads, Reclamation Homesteads, Stockraising Homesteads.)

Final Proof

Where an entryman fails to appeal from the rejection of his final proof based upon his failure to comply with a condition improperly imposed upon him more than 2 years after the date of the register's receipt, he loses whatever rights he had under his final proof.....

27

Mineral Reservation

Where land within a reclamation homestead entry is reported to be prospectively valuable for oil and gas at and subsequent to the time when the entryman filed satisfactory reclamation final proof, it is proper to require the entryman to file a consent to a reservation in the United States of the oil and gas in the land covered by the entry.....

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Where an entryman fails to appeal from the rejection of his final proof under which he would have been entitled to an unrestricted patent and the land is later reported to be valuable for oil and gas at and subsequent to the time when he later files another final proof, it is proper to require the entryman to file a consent to a reservation of the oil and gas to the United States in the land covered by the entry....

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INDIAN LANDS

Generally

The act of August 9, 1955 (69 Stat. 540), applies gener-

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Generally—Continued

ally to the leasing of restricted Indian lands wherever situated, including reservations such as the Crow Reservation, where special leasing statutes had theretofore been enacted, thus supplying additional leasing authority without displacing or superseding the special statutes.....

469

Descent and Distribution

A petition for rehearing filed in the estate of a deceased Indian which seeks to modify the inventory of the estate and exclude property acquired by the decedent by inheritance in probate proceedings completed 17 years earlier, is properly treated as a petition to reopen the earlier proceedings, and will be denied when it is not timely filed under the regulations applicable to reopening the earlier proceedings.....

337

Intestate Succession

Under section 9 of the act of August 13, 1954 (68 Stat. 718), (1) all trust and restricted property of members of the Klamath Tribe who die 6 months or more after the date of the act is subject to the probate jurisdiction of State courts; (2) if the State court orders a sale of such property in order to pay claims and probate expenses, the purchaser, whether Indian or non-Indian, takes a fee simple title to the property sold; (3) if the court distributes such property to an Indian heir, such heir acquires the property in a trust or restricted status unless such status has been removed by operation of said act; but if the distributee or devisee is a non-Indian, the trust and re-

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Intestate Succession—Continued

stricted status is removed; (4) if the court decides it would be advantageous to cause a trust or restricted allotment to be leased during the period of probate, it must be leased in accordance with Federal rules and regulations; (5) the court, in probating such property, may appoint guardians ad litem to protect the interests of minors, incompetents or persons *non compos mentis*; (6) where the court orders a sale of such trust or restricted property, the United States is a necessary party to the proceedings therefor, and must be served with the petition for sale and accorded an opportunity to be heard. Service should be made upon the U. S. Attorney and upon the Attorney General of the United States; (7) heirs or devisees of Klamath Indians need not be qualified by the 1/16th degree Indian blood of the Klamath Tribe as formerly required; (8) trust and restricted estates of Klamath Indians who died prior to February 13, 1955, will be probated by the Federal Examiner of Inheritance and not by a State court.....

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Wills

Where the testamentary capacity of the testatrix is attacked, and the evidence concerning her competency is conflicting, and her competency is supported by the testimony of the scrivener and the two witnesses to the will and the fact that the terms of the will were not unnatural, no sufficient basis exists for disapproval by the Secretary of the Interior in the exercise of his administrative

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discretion under applicable statutes.....

222

Under section 9 of the act of August 13, 1954 (68 Stat. 718), (1) all trust and restricted property of members of the Klamath Tribe who die 6 months or more after the date of the act is subject to the probate jurisdiction of State courts; (2) if the State court orders a sale of such property in order to pay claims and probate expenses, the purchaser whether Indian or non-Indian, takes a fee simple title to the property sold; (3) if the court distributes such property to an Indian heir, such heir acquires the property in a trust or restricted status unless such status has been removed by operation of said act; but if the distributee or devisee is a non-Indian, the trust and restricted status is removed; (4) if the court decides it would be advantageous to cause a trust or restricted allotment to be leased during the period of probate, it must be leased in accordance with Federal rules and regulations; (5) the court, in probating such property, may appoint guardians ad litem to protect the interests of minors, incompetents or persons *non compos mentis*; (6) where the court orders a sale of such trust or restricted property, the United States is a necessary party to the proceedings therefor, and must be served with the petition for sale and accorded an opportunity to be heard. Service should be made upon the U. S. Attorney and upon the Attorney General of the United States; (7) heirs or devisees of

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Klamath Indians need not be qualified by the 1/16th degree Indian blood of the Klamath Tribe as formerly required; (8) trust and restricted estates of Klamath Indians who died prior to February 13, 1955, will be probated by the Federal Examiner of Inheritance and not by a State court.....

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Individual Rights in Tribal Property

Annuity and Per Capita Payments

When pursuant to section 5 (a) (3) of the act of August 13, 1954 (68 Stat. 718), the selection is made of all that property of the Klamath Tribe which is to be sold to pay off withdrawing members, a partition of the tribal property results. Thereafter withdrawing members will be entitled to receive all the income from the property so selected, but will not receive per capita payments from the remaining tribal property.....

188

Under section 16 of the act of August 13, 1954 (68 Stat. 718), per capita payments may be made from the capital reserve fund of the Klamath Tribe established by 50 Stat. 872.....

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Leases and Permits

Generally

The act of August 9, 1955 (69 Stat. 540), applies generally to the leasing of restricted Indian lands wherever situated, including reservations such as the Crow Reservation, where special leasing statutes had theretofore been enacted, thus supplying additional leasing authority without displacing or superseding the special statutes.....

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Leases and Permits—Con.

Grazing

The right of members of the Klamath Tribe to free-use grazing on tribal land will not terminate upon publication, under the act of August 13, 1954 (68 Stat. 718), of the final membership roll. The right to so use tribal land will continue until tribal title is extinguished by sale, or by transfer pursuant to section 6 (a) of that act, in which latter event the use of the range will be governed by the terms of the plan pursuant to which such transfer is made.....

186

Oil and Gas

Requirement in a notice of public sale for oil and gas mining leases on Indian lands that sealed bids be submitted by a definite time must be observed and where a bid covering eight tracts was submitted after other timely bids on two of the tracts had been opened and the sale closed the late bid for the two tracts cannot be considered. Only the timely bids are acceptable under the public sale or steps may be taken in accordance with other provisions of the sale to reject all bids for the two tracts and readvertise those tracts at another public sale. Bids received late for the public sale on six tracts regarding which no competing bids had been received may be regarded as offers to purchase at a private or negotiated sale.....

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Minerals

The requirement in section 8 (b) of the act of August 13, 1954 (68 Stat. 718), that the Secretary of the Interior transfer the sub-surface rights in trust or restricted land owned

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by members of the Klamath Tribe to one or more trustees becomes applicable at and after the date of the proclamation to be issued pursuant to section 18 (a) of that act and does not apply to situations prior thereto.....	188	board without a clear indication on the part of Congress that such action may be taken.....	285
Patents		Officers and employees of the United States are without authority to sell or lease property belonging to the United States unless specifically authorized by the Congress to do so.....	285
It will be advisable for a member of the Klamath Tribe, who elects to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), at the time of his election and as a part of that election, to petition the Secretary of the Interior to issue to him, pursuant to section 8 of the act, a patent in fee for any trust lands, or to remove restrictions covering any restricted lands he might now or hereafter hold.....	188	An operating agreement between the Secretary of the Interior and private utilities defining the areas to be served by each may properly be entered into where the relevant statutes contain no prohibition against such an agreement....	285
The subsequent issuance and delivery of a patent in fee to a tract upon which a bidder's offer to lease had been accepted prevents the Department from granting a mineral lease covering such tract because the land has become unrestricted. Since the Indian owner of the tract has instituted litigation in that respect the deposit made for a lease on the tract will be held pending the outcome of the litigation or subject to further action by the parties interested in the deposit.....	262	Removal of Restrictions	
Power		The subsequent issuance and delivery of a patent in fee to a tract upon which a bidder's offer to lease had been accepted prevents the Department from granting a mineral lease covering such tract because the land has become unrestricted. Since the Indian owner of the tract has instituted litigation in that respect the deposit made for a lease on the tract will be held pending the outcome of the litigation or subject to further action by the parties interested in the deposit.....	262
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		The requirement in section 8 (b) of the act of August 13, 1954 (68 Stat. 718), that the Secretary of the Interior transfer the sub-surface rights in trust or restricted land owned by members of the Klamath Tribe to one or more trustees becomes applicable at and after the date of the proclamation to be issued pursuant to section 18 (a) of that act and does not apply to situations prior thereto.....	188

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Under section 9 of the act of August 13, 1954 (68 Stat. 718), (1) all trust and restricted property of members of the Klamath Tribe who die 6 months or more after the date of the act is subject to the probate jurisdiction of State courts; (2) if the State court orders a sale of such property in order to pay claims and probate expenses, the purchaser whether Indian or non-Indian, takes a fee simple title to the property sold; (3) if the court distributes such property to an Indian heir, such heir acquires the property in a trust or restricted status unless such status has been removed by operation of said act; but if the distributee or devisee is a non-Indian, the trust and restricted status is removed; (4) if the court decides it would be advantageous to cause a trust or restricted allotment to be leased during the period of probate, it must be leased in accordance with Federal rules and regulations; (5) the court, in probating such property, may appoint guardians ad litem to protect the interests of minors, incompetents or persons *non compos mentis*; (6) where the court orders a sale of such trust or restricted property, the United States is a necessary party to the proceedings therefor, and must be served with the petition for sale and accorded an opportunity to be heard. Service should be made upon the U. S. Attorney and upon the Attorney General of the United States; (7) heirs or devisees of Klamath Indians need not be qualified by the 1/16th degree Indian blood of the Klamath Tribe as

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formerly required; (8) trust and restricted estates of Klamath Indians who died prior to February 13, 1955, will be probated by the Federal Examiner of Inheritance and not by a State court..... 189

Tribal Lands

Alienation

Since section 6 (b) of the act of August 13, 1954 (68 Stat. 718), provides that "all of the actions required by sections 5 and 6 of this Act shall be completed at the earliest practicable time and in no event later than four years from the date of this Act," sales of land pursuant to section 5 of the act may not be made subsequent to August 13, 1958..... 187

Water Rights

The term "subsurface rights" as used in section 8 (b) of the act of August 13, 1954 (68 Stat. 718); does not include water rights..... 188

Section 14 (a) of the act of August 13, 1954 (68 Stat. 718), defers the application of the laws of Oregon with respect to the abandonment of water rights by the Klamath Tribe or its members for a period of 15 years after the date of the proclamation issued pursuant to section 18 of that act. Except for such deferment, section 14 (a) is merely a saving clause which operates to preserve whatever water rights the tribe and its members may have under the law in force on the date of the act..... 189

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Fiscal Matters

Under section 16 of the act of August 13, 1954 (68 Stat.

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718), per capita payments may be made from the capital reserve fund of the Klamath Tribe established by 50 Stat. 872-----

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Membership

Under the provisions of section 5 (a) (2) of the act of August 13, 1954 (68 Stat. 718), which allows "each adult member of the [Klamath] tribe * * * an opportunity to elect for himself, and, in the case of a head of a family, for the members of the family who are minors" to withdraw from or remain in the tribe: (1) when the parents of a child are separated and the child is living with one of the parents, the latter parent may make the decision for the child to withdraw; (2) when the parents of a child are separated and the child is living with some third person, the question of who is the head of the minor's family is one of fact which must be considered in each case; (3) where the child has a judicially appointed guardian of his person and his property, the guardian may not elect for the child unless the guardian is otherwise qualified as an adult member and head of the family of the minor; (4) if the child is an orphan who is living in an institution where he cannot be considered as a member of the family of an adult Klamath Indian, no one may make the decision for him to withdraw; (5) an adult member of the tribe who has judicially been deprived of control over his child may not make an election for his child to withdraw; (6) a parent who is judicially de-

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clared to be *non compos mentis* may not elect for himself or his child to withdraw; and (7) an adult member who is the head of a family may make the decision to withdraw for his wife if she is under, but not if she is over, 21 years of age-----

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An adult member of the Klamath Tribe, if incompetent, insane or *non compos mentis* may not, under section 5 (a) (2) of the act of August 13, 1954 (68 Stat. 718), make an election to withdraw from the tribe-----

187

A judicially appointed guardian for an adult member of the Klamath Tribe who is insane, incompetent or *non compos mentis* may not, under the provisions of section 5 (a) (2) of the act of August 13, 1954 (68 Stat. 718), make an election for him to withdraw from the tribe-----

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Should a member of the Klamath Tribe, who has elected to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), inherit an interest of a member who has elected to remain in the tribe, the withdrawing member would not acquire by such inheritance the decedent's right to vote as a member of the tribe-----

188

Members of the Klamath Tribe who elect to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), remain tribal members and may participate in tribal affairs to the same extent as any member until they have been paid in full the money value of their interests in tribal property-----

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Reservations

The act of August 9, 1955 (69 Stat. 540), applies generally to the leasing of restricted Indian lands wherever situated, including reservations such as the Crow Reservation, where special leasing statutes had theretofore been enacted, thus supplying additional leasing authority without displacing or superseding the special statutes.....

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Terminal Legislation

Since section 2 (e) of the act of August 13, 1954 (68 Stat. 718), defines an "adult" for the purposes of that act as "a member of the tribe who has attained the age of twenty-one years," married women or emancipated minors under the age of 21 may not be considered adults for the purposes of that act even though they may be "adults" under State law.....

186

The question of whether a member of the Klamath Tribe may alienate his interest in tribal property after the transfer of such property pursuant to section 6 (a) of the act of August 13, 1954 (68 Stat. 718), and prior to the date of the proclamation to be issued pursuant to section 18 of said act, is a question to which no definite answer can be given at this time, as such answer will depend upon the terms of the plan pursuant to which title to such property is transferred.....

186

The right of members of the Klamath Tribe to free-use grazing on tribal land will not terminate upon publication, under the act of August 13, 1954 (68 Stat. 718), of the final membership roll. The

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right to so use tribal land will continue until tribal title is extinguished by sale, or by transfer pursuant to section 6 (a) of that act, in which latter event the use of the range will be governed by the terms of the plan pursuant to which such transfer is made.....

186

A judicially appointed guardian for an adult member of the Klamath Tribe who is insane, incompetent or *non compos mentis* may not, under the provisions of section 5 (a) (2) of the act of August 13, 1954 (68 Stat. 718), make an election for him to withdraw from the tribe.....

187

Under the provisions of section 5 (a) (2) of the act of August 13, 1954 (68 Stat. 718), which allows "each adult member of the [Klamath] tribe * * * an opportunity to elect for himself, and, in the case of a head of a family, for the members of the family who are minors" to withdraw from or remain in the tribe: (1) when the parents of a child are separated and the child is living with one of the parents, the latter parent may make the decision for the child to withdraw; (2) when the parents of a child are separated and the child is living with some third person, the question of who is the head of the minor's family is one of fact which must be considered in each case; (3) where the child has a judicially appointed guardian of his person and his property, the guardian may not elect for the child unless the guardian is otherwise qualified as an adult member and head of the family of the minor; (4) if the child is an orphan who is

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living in an institution where he cannot be considered as a member of the family of an adult Klamath Indian, no one may make the decision for him to withdraw; (5) an adult member of the tribe who has judicially been deprived of control over his child may not make an election for his child to withdraw; (6) a parent who is judicially declared to be *non compos mentis* may not elect for himself or his child to withdraw; and (7) an adult member who is the head of a family may make the decision to withdraw for his wife if she is under, but not if she is over, 21 years of age.....

187

An adult member of the Klamath Tribe, if incompetent, insane or *non compos mentis* may not, under section 5 (a) (2) of the act of August 13, 1954 (68 Stat. 718), make an election to withdraw from the tribe.....

187

The right of members of the Klamath Tribe to hunt and fish on tribal lands does not, for purposes of the appraisal to be made under section 5 (a) (1) of the act of August 13, 1954 (68 Stat. 718), have an appraisable value, as this right comes to an end when membership ceases, and is not subject to transfer.....

187

Since section 6 (b) of the act of August 13, 1954 (68 Stat. 718), provides that "all of the actions required by sections 5 and 6 of this act shall be completed at the earliest practicable time and in no event later than four years from the date of this Act," sales of land pursuant to section 5 of the act may not be

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made subsequent to August 13, 1958.....

187

When pursuant to section 5 (a) (3) of the act of August 13, 1954 (68 Stat. 718), the selection is made of all that property of the Klamath Tribe which is to be sold to pay off withdrawing members, a partition of the tribal property results. Thereafter withdrawing members will be entitled to receive all the income from the property so selected, but will not receive per capita payments from the remaining tribal property.....

188

Should a member of the Klamath Tribe, who has elected to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), inherit an interest of a member who has elected to remain in the tribe, the withdrawing member would not acquire by such inheritance the decedent's right to vote as a member of the tribe.....

188

Members of the Klamath Tribe who elect to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), remain tribal members and may participate in tribal affairs to the same extent as any member until they have been paid in full the money value of their interests in tribal property.....

188

It will be advisable for a member of the Klamath Tribe, who elects to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), at the time of his election and as a part of that election, to petition the Secretary of the Interior to issue to him, pursuant to section 8 of the act,

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a patent in fee for any trust lands, or to remove restrictions covering any restricted lands he might now or hereafter hold.....	188	leased during the period of probate, it must be leased in accordance with Federal rules and regulations; (5) the court, in probating such property, may appoint guardians ad litem to protect the interests of minors, incompetents or persons <i>non compos mentis</i> ; (6) where the court orders a sale of such trust or restricted property, the United States is a necessary party to the proceedings therefor, and must be served with the petition for sale and accorded an opportunity to be heard. Service should be made upon the U. S. Attorney and upon the Attorney General of the United States; (7) heirs or devisees of Klamath Indians need not be qualified by the 1/16th degree Indian blood of the Klamath Tribe as formerly required; (8) trust and restricted estates of Klamath Indians who died prior to February 13, 1955, will be probated by the Federal Examiner of Inheritance and not by a State court.....	189
The requirement in section 8(b) of the act of August 13, 1954 (68 Stat. 718), that the Secretary of the Interior transfer the subsurface rights in trust or restricted land owned by members of the Klamath Tribe to one or more trustees becomes applicable at and after the date of the proclamation to be issued pursuant to section 18(a) of that act and does not apply to situations prior thereto.....	188	Loans transferred to the Klamath Tribe pursuant to section 12 of the act of August 13, 1954 (68 Stat. 718), are assets of the tribe and subject to management by the trustee, corporation or other legal entity selected pursuant to section 5 (a) (5) of the act.....	189
The term "subsurface rights" as used in section 8(b) of the act of August 13, 1954 (68 Stat. 718); does not include water rights.....	188	The fishing rights secured to the Klamath Indians by the Treaty of 1864 and reserved under section 14 (b) of the act of August 13, 1954 (68 Stat. 718), are: (1) neither alienable nor descendible; (2) may be exercised by a withdrawing member of the tribe until fully paid his share in the tribal assets; (3) may be exercised by	
Under section 9 of the act of August 13, 1954 (68 Stat. 718), (1) all trust and restricted property of members of the Klamath Tribe who die 6 months or more after the date of the act is subject to the probate jurisdiction of State courts; (2) if the State court orders a sale of such property in order to pay claims and probate expenses, the purchaser whether Indian or non-Indian, takes a fee simple title to the property sold; (3) if the court distributes such property to an Indian heir, such heir acquires the property in a trust or restricted status unless such status has been removed by operation of said act; but if the distributee or devisee is a non-Indian, the trust and restricted status is removed; (4) if the court decides it would be advantageous to cause a trust or restricted allotment to be			

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an heir of a member only if the heir is also a member; (4) may not be exercised with respect to tribal land which is sold and conveyed in fee simple; and (5) may continue to be exercised by members who elect to remain in the tribe.....

189

Section 14 (a) of the act of August 13, 1954 (68 Stat. 718), defers the application of the laws of Oregon with respect to the abandonment of water rights by the Klamath Tribe or its members for a period of 15 years after the date of the proclamation issued pursuant to section 18 of that act. Except for such deferment, section 14 (a) is merely a saving clause which operates to preserve whatever water rights the tribe and its members may have under the law in force on the date of the act.....

189

Under section 15 of the act of August 13, 1954 (68 Stat. 718), (1) the Secretary of the Interior may, where there is an existing guardianship over a Klamath Indian, recognize the guardian and deliver the property of the ward to him; (2) approval of the appointment of such a guardian by the Secretary is not necessary as a matter of law; (3) no impropriety is seen in the appearance of an authorized representative of the Secretary in a guardianship proceeding for the purpose of assisting the court in making a proper appointment; (4) there is nothing in the Oregon statutes that would preclude an authorized representative of the Secretary from filing a guardianship petition or to prevent an Oregon court from appointing a guardian pursuant to such a petition; (5) the

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Secretary in the absence of a guardianship, may transfer trust and restricted personal property to a minor himself, if the Secretary believes the minor competent to handle the property; or the Secretary may transfer such property to a State or county welfare agency, to a parent as natural guardian, or to a private trustee.....

190

Under section 16 of the act of August 13, 1954 (68 Stat. 718), per capita payments may be made from the capital reserve fund of the Klamath Tribe established by 50 Stat. 872....

190

The Klamath Tribe will continue to exist subsequent to the date of the proclamation issued under section 18 of the act of August 13, 1954 (68 Stat. 718), and will continue as such for the purpose of exercising such rights and privileges as are reserved to it by that act.....

190

Tribal Government

Should a member of the Klamath Tribe, who has elected to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), inherit an interest of a member who has elected to remain in the tribe, the withdrawing member would not acquire by such inheritance the decedent's right to vote as a member of the tribe.....

188

Members of the Klamath Tribe who elect to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), remain tribal members and may participate in tribal affairs to the same extent as any member until they have been paid in full the money value of their interests in tribal property.....

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An order issued by the Oglala Sioux Tribal Court of the Oglala Sioux Tribe at Pine Ridge Reservation, pertaining to the custody of a minor Indian child, does not prevail over a custody order of the Juvenile Court of the City and County of Denver, Colorado, where the child was neglected within the jurisdictional limits of the juvenile court.----- 466

Tribal Personality

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Loans transferred to the Klamath Tribe pursuant to section 12 of the act of August 13, 1954 (68 Stat. 718), are assets of the tribe and subject to management by the trustee, corporation or other legal entity selected pursuant to section 5 (a) (5) of the act.----- 189

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Civil Jurisdiction

An order issued by the Oglala Sioux Tribal Court of the Oglala Sioux Tribe at Pine Ridge Reservation, pertaining to the custody of a minor Indian child, does not prevail over a custody order of the Juvenile Court of the City and County of Denver, Colorado, where the child was neglected within the jurisdictional limits of the juvenile court.----- 466

Domestic Relations

Under the provisions of section 5 (a) (2) of the act of August 13, 1954 (68 Stat. 718), which allows "each adult member of the [Klamath] tribe * * * an opportunity to elect for himself, and, in the case of a head of a family, for the members of the family who are minors" to withdraw from or remain in the tribe: (1) when

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the parents of a child are separated and the child is living with one of the parents, the latter parent may make the decision for the child to withdraw; (2) when the parents of a child are separated and the child is living with some third person, the question of who is the head of the minor's family is one of fact which must be considered in each case; (3) where the child has a judicially appointed guardian of his person and his property, the guardian may not elect for the child unless the guardian is otherwise qualified as an adult member and head of the family of the minor; (4) if the child is an orphan who is living in an institution where he cannot be considered as a member of the family of an adult Klamath Indian, no one may make the decision for him to withdraw; (5) an adult member of the tribe who has judicially been deprived of control over his child may not make an election for his child to withdraw; (6) a parent who is judicially declared to be *non compos mentis* may not elect for himself or his child to withdraw; and (7) an adult member who is the head of a family may make the decision to withdraw for his wife if she is under, but not if she is over, 21 years of age.--- 187

Under section 15 of the act of August 13, 1954 (68 Stat. 718) (1) the Secretary of the Interior may, where there is an existing guardianship over a Klamath Indian, recognize the guardian and deliver the property of the ward to him; (2) approval of the appointment of such a guardian by the Secretary is not necessary as a

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matter of law; (3) no impropriety is seen in the appearance of an authorized representative of the Secretary in a guardianship proceeding for the purpose of assisting the court in making a proper appointment; (4) there is nothing in the Oregon statutes that would preclude an authorized representative of the Secretary from filing a guardianship petition or to prevent an Oregon court from appointing a guardian pursuant to such a petition; (5) the Secretary in the absence of a guardianship, may transfer trust and restricted personal property to a minor himself, if the Secretary believes the minor competent to handle the property; or the Secretary may transfer such property to a State or county welfare agency, to a parent as natural guardian, or to a private trustee.....

190

Hunting and Fishing

The right of members of the Klamath Tribe to hunt and fish on tribal lands does not, for purposes of the appraisal to be made under section 5 (a) (1) of the act of August 13, 1954 (68 Stat. 718), have an appraisable value, as this right comes to an end when membership ceases, and is not subject to transfer..

187

The fishing rights secured to the Klamath Indians by the Treaty of 1864 and reserved under section 14 (b) of the act of August 13, 1954 (68 Stat. 718), are: (1) neither alienable nor descendible; (2) may be exercised by a withdrawing member of the tribe until fully paid his share in the tribal assets; (3) may be exercised by an heir of a

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member only if the heir is also a member; (4) may not be exercised with respect to tribal land which is sold and conveyed in fee simple; and (5) may continue to be exercised by members who elect to remain in the tribe.....

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IRRIGATION CLAIMS

Flooding and Overflow

Article 6 of the form of land-purchase contract used by the Bureau of Reclamation for several years prior to its revision in 1952 which provides in pertinent part that the amount paid by the United States for the purchased land should constitute "full payment for all damages for entry upon the said property and the construction, operation, and maintenance of reclamation works thereon * * *" has been interpreted by several rulings of the Solicitor beginning in 1948 to release the Government from liability for damage to remaining lands which are appurtenant to the land purchased from the claimant.

Such rulings are hereby reversed and claims denied on that basis will be reconsidered on their merits.....

12

MATERIALS ACT

The Bureau of Land Management may issue permits to the Alaska Road Commission under the Materials Act authorizing the Commission to remove roadbuilding material from sections reserved for the Territory of Alaska by the act of March 4, 1915 (48 U. S. C. 353), providing consent of the Territory is first obtained.....

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MINERAL LEASING ACT

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Lands Subject to

Where oil and gas deposits reserved to the United States under stockraising homestead entries or patents were undisposed of on March 1, 1933, when the lands containing such deposits were permanently withdrawn from all forms of entry or disposal, those deposits are not subject to leasing under the terms of the Mineral Leasing Act.....

260

MINERAL LEASING ACT FOR ACQUIRED LANDS

Lands Subject to

An acquired lands oil and gas lease is properly canceled as to a tract of land covered thereby which was not available for leasing when the application therefor was filed because the tract was included in a prior lease and the relinquishment and cancellation of the prior lease had not been noted on the acquired lands plat records when the subsequent application was filed.....

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MINING CLAIMS

Generally

A conflict between a lode claimant and a placer claimant is an adverse claim within the meaning of Rev. Stat. 2325-2326 and may be made the basis of an adverse suit as provided therein.....

395

A suit pending between two mining claimants prior to the time when one claimant files an adverse claim against the other claimant under Rev. Stat. 2326 may, under proper circumstances, be considered as an adverse action brought under that section, and where the highest court of a State has

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specifically held, in a suit involving the same parties and the same mineral deposit, that the suit in the State courts constitutes such an adverse action, the Department will accept the State court's holding.....

395

Where an adverse suit brought in a State court pursuant to Rev. Stat. 2326 has terminated in a judgment adverse to the applicant for a mineral patent, he may not proceed further before the Department with his application and his application must be rejected.....

395

NOTICE

A statement by the Acting Director, Bureau of Land Management, in a decision approving an application for public sale of an isolated tract, that the grazing lessee on that tract would be given personal notice of the time and place of the sale (apart from the usual general notice by publication and posting) was properly construed as the extension of a courtesy and not as the conferring of a right, there being no law or regulation requiring such personal notice.....

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OIL AND GAS LEASES

Generally

Although an extension of an oil and gas lease is unauthorized and is subject to cancellation, it serves to segregate the land and prevent other filings until the cancellation is effected and noted on the land office records.....

1

The last sentence of the fourth paragraph of section 17 (b) of the Mineral Leasing Act, as amended, relating to

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the extension of unitized oil and gas leases upon their elimination from a unit agreement or the termination of the unit agreement applies to all such leases without the necessity of the lessee filing the notice of election provided for by section 15 of the act of August 8, 1946..... 88

The provisions of 18 U. S. C. sec. 431, and of section 9 of noncompetitive oil and gas leases make unlawful the holding of an oil and gas lease by a Member of Congress even though the lease was issued at a time when the lessee was not a Member of Congress..... 135

Under item (1) of section 12 of the act of August 8, 1946, definitions of the productive limits of oil and gas deposits found to exist on that date cannot later be changed on the basis of information developed after that date..... 269

Where an oil and gas lease is issued for land part of which is already included in an outstanding lease, the lessee is not entitled to a cancellation of his lease and the issuance of a new lease bearing a current date covering only the land available for leasing..... 470

Acreage Limitations

An offeror for a noncompetitive oil and gas lease has 30 days within which to reduce his acreage holdings to the limitations prescribed by the Mineral Leasing Act without the loss of priority of his offer but in order to qualify to receive a lease on the acreage covered by his offer it must be shown that the offeror has been divested of his excess acreage within the prescribed period... 339

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Acreage Limitations—Con.

Acreage included in pending assignments of oil and gas leases in favor of an offeror must be charged to the acreage account of the offeror in determining the offeror's qualifications to receive a lease..... 339

Where approval of an assignment of an oil and gas lease is not given until after the first day of the lease month following the filing of the assignment the acreage covered by the assignment remains charged to the acreage account of the assignor until the approval date..... 339

As the first day of the lease month following the filing of an assignment of an oil and gas lease is the earliest date upon which an assignment can take effect, an assignor is not divested of his interest in the assigned acreage at least until that date..... 339

Applications

An application for a present interest oil and gas lease on acquired lands is properly rejected where at the time when the application was filed the United States owned only a future interest in the oil and gas deposits..... 69

A defective application for a future interest oil and gas lease on acquired lands which are subject only to future interest leasing when the application is filed cannot support the issuance of a present interest lease following the vesting of the present mineral rights in the United States..... 69

The first qualified applicant for land available for oil and gas leasing has a statutory preference right to a lease, if a lease is to be issued for the land, which must be honored... 77

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Applications—Continued

An oil and gas lease application which is filed for lands included in prior applications should be suspended rather than rejected pending determination of whether any of the prior applicants are entitled to a lease.....

136

An application for an oil and gas lease must be rejected when at the time it was filed the Mineral Leasing Act excluded the land applied for from leasing, although subsequently the act was amended to permit the leasing of such land.....

210

Where three or more oil and gas lease offers wholly or partially covering the same lands are filed simultaneously, necessitating a public drawing to determine the priority of preference, fraud on the part of one or more of the offerors, or collusion on the part of two or more of the offerors, aimed at unfairly enhancing the mathematical probabilities of success in the drawing for those offerors, will result in the total rejection of the offers involved in the fraud or collusion.....

231

Where several oil and gas lease offers wholly or partially covering the same lands are filed simultaneously, necessitating a public drawing to determine the priority of preference, a partial duplication of land in two offers by the same offeror will not result in the total rejection of either offer if there is no evidence that the duplication was the result of a deliberate effort on the part of that offeror to enhance the mathematical probabilities of his success in the drawing.....

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Quaere: Whether, where there is a partial duplication of land in two oil and gas lease offers filed simultaneously by the same individual, such offers being among several which others had likewise filed simultaneously, it is proper, in the absence of any evidence of fraud or bad faith, to eliminate the duplicated parcel from both of the aforesaid two offers prior to the holding of a public drawing to determine the priority of preference among all the simultaneously filed offers.....

232

The departmental regulation establishing a minimum acreage requirement of 640 acres for each oil and gas lease offer has reference to land which is available for oil and gas leasing at the time of the offer; therefore, such an offer, if otherwise valid, may be accepted for an area of less than 640 acres so long as it embraced, at the moment of filing, at least 640 acres of available land.....

232

A regulation which requires that, with certain exceptions, an offer for a noncompetitive oil and gas lease under the Mineral Leasing Act must include 640 acres of land is a reasonable exercise of the discretion vested in the Secretary of the Interior by the Mineral Leasing Act, and an offer which includes less than 640 acres and does not come within the exceptions is properly rejected.....

292

The first qualified applicant for land available for oil and gas leasing has a statutory preference right to a lease, if a lease is to be issued for the land, which must be honored.....

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Applications—Continued

An application for a noncompetitive oil and gas lease filed after the cancellation of a former lease on the same lands and the notation of the cancellation of the former lease on the tract books is not prematurely filed even though filed prior to the expiration of the lease year of the canceled lease for which the rent had been paid.....

369

Where an application for an oil and gas lease covers unsurveyed land in the bed of a non-navigable lake and the United States is only one of several owners of the upland, it is proper to require the applicant to submit an agreement with the owners of the upland adjoining the federally owned uplands as to the boundaries of the land applied for or to demonstrate exactly what portions of the lakebed belong to the United States..

411

In describing a tract of unsurveyed land in a lakebed by metes and bounds in an oil and gas application, it is sufficient to use the meandered lakeshore as a part of the description without giving bearings and distances.....

411

The fact that public land is covered by an outstanding application for an oil and gas lease does not render it not available for leasing within the meaning of the regulation requiring that, with certain exceptions, an application for an oil and gas lease include not less than 640 acres.....

417

Where an application for an oil and gas lease covers less than 640 acres and the land applied for adjoins land available for leasing, it will be deemed to be for the equiva-

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lent of a section and therefore proper so long as the amount by which it is under 640 acres is less than the amount that the inclusion of the smallest of the adjoining subdivisions available for leasing would put it in excess of 640 acres.....

417

The mandatory requirement that an application for an oil and gas lease on acquired lands of the United States must contain a statement of the applicant's interests in oil and gas leases or applications therefor on acquired lands in the same State was not violated by one who, having no interests in oil or gas leases or lease applications on acquired lands in a State at the time he filed simultaneous applications, failed to indicate on each application that other applications for similar leases were being filed at the same time.....

479

Assignments or Transfers

The attempted assignment of an oil and gas lease after the record titleholder thereof has served as Member of Congress for more than a year or after his term as Congressman has ended is ineffective even though such assignments are purportedly approved by employees of the Bureau of Land Management.....

135

A partial assignment of a lease made during the period of the single 5-year extension provided for in section 17 of the act of August 8, 1946 (60 Stat. 955), and prior to the act of July 29, 1954, is valid..

216

A separate lease created by an assignment of part of the acreage in a lease pursuant to the provisions of the act of July 29, 1954 (68 Stat. 585;

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30 U. S. C., Supp., 187 (a)), where the lease is in its extended term by reason of any provision of the Mineral Leasing Act, as amended, is not limited to the 2-year extension prior to the production of oil and gas in paying quantities resulting from such assignment if, were it not for the assignment, the original lease would have continued longer without such production.....

216

As the first day of the lease month following the filing of an assignment of an oil and gas lease is the earliest date upon which an assignment can take effect, an assignor is not divested of his interest in the assigned acreage at least until that date.....

339

Where approval of an assignment of an oil and gas lease is not given until after the first day of the lease month following the filing of the assignment the acreage covered by the assignment remains charged to the acreage account of the assignor until the approval date.....

339

Acreage included in pending assignments of oil and gas leases in favor of an offeror must be charged to the acreage account of the offeror in determining the offeror's qualifications to receive a lease.....

339

Cancellation

The Secretary of the Interior (or his delegate) can revoke the extension of an oil and gas lease granted in contravention of the pertinent statute and regulation at any time he is made aware of the improper action, without regard to the merits of any other offer for the lands covered by the lease.....

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Cancellation—Continued

One whose oil and gas lease is erroneously canceled and who fails to appeal from the decision canceling the lease loses his rights in his lease.....

77

Where a noncompetitive oil and gas lease is committed to a unit agreement, the unit operator is not entitled to notice of default in terms of the lease prior to the cancellation of the lease.....

369

Where an oil and gas lease has been properly canceled, a lessee cannot avail himself of the later issuance of regulations making the automatic termination provision of the act of July 29, 1954, applicable to leases issued prior to July 29, 1954.....

470

Where a lessee has been given proper notice as provided in the Mineral Leasing Act, the pertinent regulation, and the lease that his lease will be canceled unless he files a bond or dispenses with the necessity of filing a bond, by paying the next year's rental in advance, and he fails to do either, his lease may be canceled prior to the expiration of the lease year.....

470

An acquired lands oil and gas lease is properly canceled as to a tract of land covered thereby which was not available for leasing when the application therefor was filed because the tract was included in a prior lease and the relinquishment and cancellation of the prior lease had not been noted on the acquired lands plat records when the subsequent application was filed.....

475

It is improper to cancel an oil and gas lease on the ground that prior applications for leases on the same land have not been considered.....

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Cancellation—Continued

Where an oil and gas lease is issued before final action has been taken on a prior offer to lease the lands, there must be a finding that the prior offeror is qualified to receive the lease before the lease is canceled.....

478

Discovery

A suspension of production under an oil and gas lease cannot be granted where the lease contains neither a producing well nor a well capable of production, even though such a discovery had been made on the lease as would support a determination that part of the leased land is situated on the known geological structure of a producing oil or gas field.....

82

Extensions

An application for a 5-year extension of a noncompetitive oil and gas lease must be rejected where the application was not filed within the 90-day period prior to the expiration date of the lease.....

1

An application for a 5-year extension of a noncompetitive oil and gas lease must be rejected where the application was not filed in the land office within a period of 90 days prior to the expiration date of the lease.....

73

Where an application for a 5-year extension of an oil and gas lease is addressed to the home address of the manager of the land office and received by him after business hours on Friday, the application will not be considered filed until such time as it is received by the land office on the following Monday, the first business day in which the application can be filed.....

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Extensions—Continued

Under section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946, where there has been no production during the primary term of a lease from the leased land, part of which is, and part of which is not, within the known geological structure of a producing oil or gas field at the expiration of the primary term, such a lease is not extended as to that portion of the land not within the structure of a producing field by the prosecution of diligent drilling operations on the portion of land which is within the structure of a producing field.....

81

In order to obtain a 5-year extension of his lease, a lessee must file an application for such extension; diligent drilling operations do not have the effect of an application.....

81

An oil and gas lease is not extended beyond its primary term by a mere discovery on the lease without actual production of oil or gas in paying quantities at the expiration of the primary term.....

82

The last sentence of the fourth paragraph of section 17 (b) of the Mineral Leasing Act, as amended, relating to the extension of unitized oil and gas leases upon their elimination from a unit agreement or the termination of the unit agreement applies to 20-year oil and gas leases.....

88

Where, during the primary term of a lease on land not within the known geologic structure of a producing field, the lessee becomes disqualified to hold the lease, and it terminates by operation of law, the lease is not subject to the

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single extension provided for by section 17 of the Mineral Leasing Act.....

136

The issuance of a patent excepting and reserving to the United States the oil and gas deposits but providing that title to the same shall vest in the patentee upon termination of an outstanding oil and gas lease, does not preclude the extension of the oil and gas lease authorized in section 17 of the Mineral Leasing Act as amended August 8, 1946 (60 Stat. 951; 30 U. S. C. sec. 226).....

177

A partial assignment of a lease made during the period of the single 5-year extension provided for in section 17 of the act of August 8, 1946 (60 Stat. 955), and prior to the act of July 29, 1954, is valid.....

216

A separate lease created by an assignment of part of the acreage in a lease pursuant to the provisions of the act of July 29, 1954 (68 Stat. 585; 30 U. S. C., Supp., 187 (a)), where the lease is in its extended term by reason of any provision of the Mineral Leasing Act, as amended, is not limited to the 2-year extension prior to the production of oil and gas in paying quantities resulting from such assignment if, were it not for the assignment, the original lease would have continued longer without such production.....

216

The 1954 amendment to the Mineral Leasing Act with respect to the extension of leases capable of producing on which production has ceased does not apply to a lease on which production had ceased over 3 years prior to the amendment.....

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Where an application for a 5-year extension of an oil and gas lease is deposited in the mail slot of the land office on a Saturday, a nonbusiness day, the application will not be considered filed until such time as it is received by the land office on the following Monday, the first business day in which the application can be filed.....

334

An application for a 5-year extension of a noncompetitive oil and gas lease must be rejected where the application was not filed in the land office prior to the expiration date of the lease.....

334

Lands Subject to Leasing

Applications for noncompetitive oil and gas leases on a narrow strip of land along the United States-Canadian border which has been reserved to aid in the better enforcement of the customs and immigration laws are properly rejected where the proposed use of the land would not be compatible with the purpose for which the reservation was created and the land is not well adapted to exploration or exploitation on a sound basis.....

9

Where an application for an oil and gas lease on acquired lands is rejected as to part of the land on the basis that such land is privately owned and, on appeal, the applicant submits evidence that one tract applied for is owned by the United States, the case will be remanded for consideration of the evidence that the tract is available for leasing.....

68

When an oil and gas lease is canceled and that cancellation is noted on the tract books of the land office, the lands

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title to the same shall vest in the patentee upon termination of an outstanding oil and gas lease, does not preclude the extension of the oil and gas lease authorized in section 17 of the Mineral Leasing Act as amended August 8, 1946 (60 Stat. 951; 30 U. S. C. sec. 226).....

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Preference Right Leases

The provision added to section 17 of the Mineral Leasing Act by the act of August 8, 1946, which states that no withdrawal from oil and gas leasing shall be effective until 90 days after notice thereof shall be mailed, registered mail, to each lessee to be affected, has no application to a lessee asserting a preference right to a new lease under the act of July 29, 1942.....

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An application for a preference right oil and gas lease under the act of July 29, 1942, directed to land not subject to leasing at the time it was filed, is invalid and is not validated by the restoration of the land to leasing even though the restoration occurs prior to the adjudication of the application.....

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The act of July 29, 1942, confers upon the holder of an expiring lease only a right to be preferred over other applicants if a new lease is awarded; it gives no right against the Government to insist on a lease, if the Department of the Interior determines to withhold the land from leasing entirely.....

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Reinstatement

One whose oil and gas lease is erroneously canceled and who fails to appeal from the cancellation is entitled to reinstatement of his lease only

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in the absence of intervening rights.....

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There is no authority in the Secretary of the Interior to reinstate an oil and gas lease which has been relinquished..

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Relinquishments

One who voluntarily surrenders his oil and gas lease by filing a written relinquishment thereof, in the appropriate land office, cannot withdraw his relinquishment.....

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Rentals

Where the rental due on a noncompetitive oil and gas lease has been paid by the operator under an operating agreement approved by the Department, and no evidence has been submitted that the operating agreement has been terminated in accordance with its terms respecting termination, it is proper to refuse to accept a payment from the lessee for the same rental.....

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Unit Agreements

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The Secretary of the Interior has no authority to reform a unit agreement, approved by him pursuant to the provisions of the Mineral Leasing Act, to include land which, through error, was not committed to the unit agreement.....

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Where a tract of land was not committed to a unit agreement through error and the parties to the agreement and the Department have assumed all along that the land was committed, and where there are no intervening rights to the tract which would be adversely affected by such action, the Department will recognize

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the tract as having been committed at the time of the original agreement upon the submission by all parties in interest of a proper reformation of the agreement.....

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OUTER CONTINENTAL SHELF LANDS ACT

(See also Oil and Gas Leases.)

Boundaries

A former State lease which was divided into two parts by operation of the Submerged Lands and Outer Continental Shelf Lands Acts does not continue as a single lease subject to its original terms. Instead the portion of the former lease situated on the outer Continental Shelf bears a later effective date, is subject to different terms as to royalties and its primary term will expire at a later date than the portion situated within the State boundaries. It is, therefore, a separate and distinct lease to which the terms of the former State lease, to the extent that they apply, apply separately.....

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Oil and Gas Leases

A former State lease which was divided into two parts by operation of the Submerged Lands and Outer Continental Shelf Lands Acts does not continue as a single lease subject to its original terms. Instead the portion of the former lease situated on the outer Continental Shelf bears a later effective date, is subject to different terms as to royalties and its primary term will expire at a later date than the portion situated within the State boundaries. It is, therefore, a separate and distinct lease to which the terms of the

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former State lease, to the extent that they apply, apply separately-----

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Former State leases which qualify as to part of the acreage under the Outer Continental Shelf Lands Act are subject to rental payments to the United States only for the acreage which is qualified. Where such rentals are on a lump sum basis they should be prorated. Royalties in such case are due the United States only on account of production from the outer Continental Shelf lease. The payment of royalty to a State from production elsewhere does not affect the lessee's obligation to the United States-----

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Where a patent on an enlarged homestead entry with a reservation to the United States of oil and gas was issued more than 36 years ago and the entryman later filed a petition requesting issuance of an unrestricted patent on the entry, which petition was denied more than 33 years ago, and the entryman did not appeal from the denial, the matter is res adjudicata and will not be reopened upon an application for an unrestricted patent by a subsequent owner of a portion of the land who does not conclusively establish that the mineral reservation was unauthorized and who has no equities entitling him to an unrestricted patent-----

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Development and Sale

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An operating agreement between the Secretary of the Interior and private utilities defining the areas to be served by each may properly be entered into where the relevant statutes contain no prohibition against such an agreement-----

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Officers and employees of the United States are without authority to sell or lease property belonging to the United States unless specifically authorized by the Congress to do so-----

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PRIVATE EXCHANGES

Protests

Where the notice of publication of a private exchange states that the purpose of the notice is to give persons objecting to the exchange an opportunity to file their objections within 45 days after the first publication of the notice, a protest filed after the end of the 45-day period can be considered by the Department-----

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Where consummation of a private exchange would result in the blocking out of an area of public land and the disposal of an isolated tract of public land, but there is little need for acquiring the offered land and disposal of the selected land would seriously disrupt the grazing operations of two lessees of the selected land, there does not appear to be

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such a benefit to the public interest as to warrant allowance of the exchange.....

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PUBLIC LANDS

(See also Boundaries, Surveys of Public Lands.)

Jurisdiction Over

An island which was stable land in the Yellowstone River when Montana became a State did not pass to the State upon its admission to the Union but remained public land subject to disposition under the public land laws.....

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PUBLIC SALES

Generally

The existence of a grazing lease will not bar the disposal, in accordance with the general authority of section 7 of the Taylor Grazing Act, of the leased land through public sale as an isolated tract; and the grazing lease may be canceled in order to effect such disposal.....

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Section 2455, Revised Statutes, as amended (43 U. S. C. sec. 1171), was extended to the Territory of Alaska by section 3 of the act of August 24, 1912 (37 Stat. 512; 48 U. S. C. sec. 23), and now applies to that Territory.....

380

Applications

A defect in an application for the public sale of an isolated tract does not affect the validity of the sale thereafter held since the filing of an application is not a prerequisite to the holding of the sale.....

34

Where it appears from the records of the Department that land embraced in a power site withdrawal created by the President under the act of June 25, 1910, may have been

PUBLIC SALES—Continued

Applications—Continued

erroneously withdrawn or is without value for power site purposes, and an application for the public sale of such land is filed, a field examination of the land will be ordered to determine if such is the case, and, if so, consideration will be given to a revocation of the withdrawal so as to open the lands for disposal at public sale. If the land is determined to be valuable for a power site, the applicant can seek to have the land restored for disposition pursuant to section 24 of the Federal Water Power Act, subject to the conditions therein stated.....

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Award of Lands

In a division among conflicting preference-right claimants of lands offered at public sale, the land awarded need not be contiguous to the claimant's privately owned land, if the award is otherwise equitable.....

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Where a tract of land has been awarded to a bidder at a public sale solely for the purpose of giving the bidder a needed outlet to a county road, and it is impossible on the basis of the evidence to determine whether an outlet in fact is needed and whether the award made will give the desired outlet, the case will be remanded for a determination of the facts.....

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An award of land on public sale between two preference right claimants will be reversed where all the land has been included in a grazing lease issued to one claimant and equitable considerations based upon desirable land use, land pattern, fences, and other factors providing for proper utilization of the land require that

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Where neither of two persons who submitted written bids for land offered at public sale has a preference right to purchase several of the offered tracts, and where the conflicting bids are identical in amount, an award of the tracts to the person whose bid was first received is required by departmental regulation..... 473

Competitive Bidding

Requirement in a notice of public sale for oil and gas mining leases on Indian lands that sealed bids be submitted by a definite time must be observed and where a bid covering eight tracts was submitted after other timely bids on two of the tracts had been opened and the sale closed the late bid for the two tracts cannot be considered. Only the timely bids are acceptable under the public sale or steps may be taken in accordance with other provisions of the sale to reject all bids for the two tracts and readvertise those tracts at another public sale. Bids received late for the public sale on six tracts regarding which no competing bids had been received may be regarded as offers to purchase at a private or negotiated sale..... 262

Preference Rights

A person has no preference right in connection with a public sale of an isolated tract merely because he holds a grazing lease on the tract to be sold..... 33

One who owns land merely touching the corner of an iso-

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olated tract is not entitled to the preference granted by the first proviso of section 2455 of the Revised Statutes, as amended, to the owners of land contiguous to the isolated tract offered..... 33

Where preference right claims are asserted for two tracts of land offered at public sale by a father on behalf of his daughter, who was the applicant for the sale and who asserted in her application that she owned land contiguous to one of the tracts, the preference right claims are properly disallowed where it appears that such contiguous land is owned by a family corporation and that the only land contiguous to the other tract is owned by the father in his own name..... 38

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chase issued under the act require that proof of use of the land for the purpose for which it was classified for sale be submitted within 3 years after issuance of a certificate of purchase, and the Department has no authority to modify the statutory provision that the required proof be submitted within the 3-year period.....

243

The Department is not authorized to issue patents under the Alaska Public Sale Act to holders of certificates of purchase who do not submit any proof as to use of the land or applications for patent until more than 5 months after the period required by statute....

243

RAILROAD GRANT LANDS

Although title to an unsurveyed island in a navigable river passed to a railroad under its grant upon the filing of its map of definite location of its line, a patent confirming its right to "all" of the section in which the island is located, did not confirm its right to the unsurveyed island since the patent confirmed the railroad's right only to surveyed public land.....

401

A railroad's claim to an unsurveyed island within the primary limits of its grant is one of the types of claims which the railroad has relinquished under a release filed pursuant to the Transportation Act of 1940....

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RECLAMATION HOMESTEADS

Generally

Where land within a reclamation homestead entry is reported to be prospectively valuable for oil and gas at and subsequent to the time when the entryman filed satisfactory

**RECLAMATION HOMESTEADS—
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reclamation final proof, it is proper to require the entryman to file a consent to a reservation in the United States of the oil and gas in the land covered by the entry.....

27

REGULATIONS

(See also Administrative Procedure Act.)

A regulation which requires that, with certain exceptions, an offer for a noncompetitive oil and gas lease under the Mineral Leasing Act must include 640 acres of land is a reasonable exercise of the discretion vested in the Secretary of the Interior by the Mineral Leasing Act, and an offer which includes less than 640 acres and does not come within the exceptions is properly rejected..

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REORGANIZATION PLANS

Reorganization Plan No. 3 of 1950 removed any limitations which the provisions of section 3 of Reorganization Plan No. III, of 1940 may have imposed with respect to the organization through which functions relating to fish or wildlife are to be performed..

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The reorganization of legal activities of the Department represents an exercise by the Secretary of continuing authority under Reorganization Plan No. 3 of 1950 to transfer and reassign functions.....

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RES ADJUDICATA

Where a patent on an enlarged homestead entry with a reservation to the United States of oil and gas was issued more than 36 years ago and the entryman later filed a petition requesting issuance of an unrestricted patent on the entry, which petition was denied more

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than 33 years ago, and the entryman did not appeal from the denial, the matter is res adjudicata and will not be reopened upon an application for an unrestricted patent by a subsequent owner of a portion of the land who does not conclusively establish that the mineral reservation was unauthorized and who has no equities entitling him to an unrestricted patent.....

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RIGHTS-OF-WAY

(See also Indian Lands, Outer Continental Shelf Lands Act.)

Act of November 9, 1921

A throughway or limited-access-highway may be established on public lands under sec. 17 of the Federal Aid Highway Act, and the regulations (43 CFR secs. 244.54-244.56). The Secretary of the Interior probably could reserve a special right of access to such highway if necessary to his administration of the public lands as a condition of his certification of the land for disposition to the State for highway purposes. In the absence of a special reservation, the United States as owner of the abutting lands, is subject to the same limitations on access to the highways as other adjoining owners under State law; and persons subsequently deriving title from the United States are subject to the same limitations. The Secretary of the Interior may surrender to the State a reserved right of access prior to disposing of the abutting lands.....

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Revised Statutes Sec. 2477

A throughway or limited-access type of highway may be established across the public

RIGHTS-OF-WAY—Continued**Revised Statutes Sec. 2477—Continued**

lands, under Rev. Stats. 2477 and the regulations (43 CFR secs. 244.57-244.59). The United States as grantor does not have any special right of access to such highways, other or different from that accorded other abutting owners under State law. Persons subsequently acquiring the abutting lands from the United States likewise do not have any special right of access which the State need consider for the purpose of eliminating by purchase or otherwise.....

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RULES OF PRACTICE**Appeals****Failure to Appeal**

Where an entryman fails to appeal from the rejection of his final proof based upon his failure to comply with a condition improperly imposed upon him more than 2 years after the date of the register's receipt, he loses whatever rights he had under his final proof...

27

One whose oil and gas lease is erroneously canceled and who fails to appeal from the decision canceling the lease loses his rights in his lease.....

77

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

127

Where a decision of a land office manager contains a questionable ruling on a particular legal issue, but the party adversely affected, though apprised of his remedy to appeal, fails to do so, there is no need, in the appeal to the Secretary of a subsequent, collateral case,

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Failure to Appeal—Continued

to decide such legal issue if it is not necessarily involved in a proper disposition of the appeal at hand. Moreover, in such circumstances the importance of administrative finality cannot be disregarded.

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Service on Adverse Party

An appeal to the Secretary of the Interior will be dismissed where the appellant did not file, within the time prescribed by the Department's rules of practice, a certificate showing service of notice of appeal upon a party having an adverse interest and no service in fact was made upon the adverse party.

27

As the rules of practice of the Department require an appellant, where the decision of the Director of the Bureau of Land Management indicates that another party has an interest in the proceeding adverse to the appellant, to file a certificate showing that a copy of the notice of appeal has been served on such adverse party, the Director's decision should identify the adverse party in order that the appellant may meet this requirement.

479

Standing to Appeal

A person has no standing to appeal with respect to action taken on an oil and gas lease in which he has no present interest.

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Timely Filing

An appeal to the Secretary of the Interior will be dismissed where it was not filed with the Director of the Bureau of Land Management within the time prescribed by the Department's rules of practice.

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Appeals—Continued

Timely Filing—Continued

A petition for rehearing filed in the estate of a deceased Indian which seeks to modify the inventory of the estate and exclude property acquired by the decedent by inheritance in probate proceedings completed 17 years earlier, is properly treated as a petition to reopen the earlier proceedings, and will be denied when it is not timely filed under the regulations applicable to reopening the earlier proceedings.

337

Hearings

In a hearing on the propriety of a range manager's notice canceling an outstanding 10-year grazing permit, the Government has the burden of proof.

344

Private Contests

It is proper to reject an application for a contest where all the factors upon which the claim to a contest is based are shown by the records of the Bureau of Land Management.

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SCHOOL LANDS

Mineral Lands

The Secretary of the Interior may withdraw after January 25, 1927, a mineral school section unsurveyed at the time of the enactment of the act of January 25, 1927, and title to the section will not pass to the State upon the acceptance of the plat of survey thereafter so long as the withdrawal is unrevoked.

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SECRETARY OF THE INTERIOR

There is authority in the Secretary, under Reorganization Plan No. 3 of 1950 and his general authority to establish an organization to perform functions vested in him, to establish the position of "Asso-

SECRETARY OF THE INTERIOR—	Page	SECRETARY OF THE INTERIOR—	Page
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ciate" or "Deputy" Director of the Fish and Wildlife Service and to provide that this officer perform such functions relating to fish or wildlife as may be deemed desirable.....	65	to the Secretary of the Interior, subject to certain limitations, and can be redelegated by the Secretary of the Interior to any official or agency of the Federal Government, including the Bureau of Mines.....	323
The reorganization of legal activities of the Department represents an exercise by the Secretary of continuing authority under Reorganization Plan No. 3 of 1950 to transfer and reassign functions.....	181	SOLICITOR, DEPARTMENT OF THE INTERIOR	
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An operating agreement between the Secretary of the Interior and private utilities defining the areas to be served by each may properly be entered into where the relevant statutes contain no prohibition against such an agreement....	285	STATUTORY CONSTRUCTION	
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Legislative History

Act of May 11, 1938 (52 Stat. 345), as amended, did not contemplate that title to Columbia River fishery facilities constructed on State-owned lands would pass to the States.

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STOCKRAISING HOMESTEADS

An entry of land under the Stockraising Homestead Act segregates the land entered into two separate estates—the surface and the mineral.

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SURVEYS OF PUBLIC LANDS

Generally

An island which was stable land in the Yellowstone River when Montana became a State did not pass to the State upon its admission to the Union but remained public land subject to disposition under the public land laws.

401

When in the course of a survey the banks of a river are meandered, the area within the meander lines is segregated from the survey and an island within the meander lines, otherwise unsurveyed, is not surveyed public land.

401

UNITED STATES

Under section 9 of the act of August 13, 1954 (68 Stat. 718), (1) all trust and restricted property of members of the Klamath Tribe who die 6 months or more after the date of the act is subject to the probate jurisdiction of State courts; (2) if the State court orders a sale of such property in order to pay claims and probate expenses, the purchaser whether Indian or non-Indian, takes a fee simple title to the property sold; (3) if the court distributes such property to an

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Indian heir, such heir acquires the property in a trust or restricted status unless such status has been removed by operation of said act; but if the distributee or devisee is a non-Indian, the trust and restricted status is removed; (4) if the court decides it would be advantageous to cause a trust or restricted allotment to be leased during the period of probate, it must be leased in accordance with Federal rules and regulations; (5) the court, in probating such property, may appoint guardians ad litem to protect the interests of minors, incompetents or persons *non compos mentis*; (6) where the court orders a sale of such trust or restricted property, the United States is a necessary party to the proceedings therefor, and must be served with the petition for sale and accorded an opportunity to be heard. Service should be made upon the U. S. Attorney and upon the Attorney General of the United States; (7) heirs or devisees of Klamath Indians need not be qualified by the 1/16th degree Indian blood of the Klamath Tribe as formerly required; (8) trust and restricted estates of Klamath Indians who died prior to February 13, 1955, will be probated by the Federal Examiner of Inheritance and not by a State court.

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WATERS AND WATER RIGHTS

State Laws

Under the second opinion of the Arizona Supreme Court in the case of *Bristor v. Cheatham*, percolating waters are not subject to the doctrine of prior appropriation but only to the doctrine of reasonable use.

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WILDLIFE REFUGES AND PROJECTS

Act of May 11, 1938 (52 Stat. 345), as amended, did not contemplate that title to Columbia River fishery facilities constructed on State-owned lands would pass to the States.....

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WITHDRAWALS AND RESERVATIONS

Generally

Solicitor's Opinion M-36254 [61 I. D. 459] which held that a patent may be issued to a homestead entryman, which patent excepts oil and gas deposits previously leased but provides that title to such deposits shall vest in the patentee upon termination of the lease, does not constitute a withdrawal of the lands within the meaning of section 17 of the Mineral Leasing Act (30 U. S. C. sec. 226).....

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Authority to Make

The Secretary of the Interior may withdraw after January 25, 1927, a mineral school section unsurveyed at the time of the enactment of the act of January 25, 1927, and title to the section will not pass to the State upon the acceptance of the plat of survey thereafter so long as the withdrawal is unrevoked.....

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Effect of

In general, unless the Mineral Leasing Act or a withdrawal or reservation specifically provides otherwise, lands withdrawn or reserved for a specific purpose are available for leasing under the Mineral Leasing Act, if the issuance of a lease will not be inconsistent with or materially interfere with the purposes for which the land is withdrawn or reserved.....

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Effect of—Continued

Executive Order No. 5214 which withdrew lands in Alaska for the exclusive use and benefit of the Navy Department for naval purposes is properly interpreted as not by itself prohibiting the leasing of the withdrawn lands under the Mineral Leasing Act.....

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Power Sites

Where it appears from the records of the Department that land embraced in a power site withdrawal created by the President under the act of June 25, 1910, may have been erroneously withdrawn or is without value for power site purposes, and an application for the public sale of such land is filed, a field examination of the land will be ordered to determine if such is the case, and, if so, consideration will be given to a revocation of the withdrawal so as to open the lands for disposal at public sale. If the land is determined to be valuable for a power site, the applicant can seek to have the land restored for disposition pursuant to section 24 of the Federal Power Act, subject to the conditions therein stated.....

305

A power site withdrawal made by the President in 1917 pursuant to the authority contained in section 1 of the act of June 25, 1910, can now be revoked by the President (or the Secretary of the Interior under a delegation of authority from the President) under the authority of that act, despite the intervening passage of the Federal Water Power Act of June 10, 1920.....

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Revocation

Where an order revoking a withdrawal of land specifies

WITHDRAWALS AND RESERVATIONS—Continued

Revocation—Continued

that the revocation shall not be effective to change the status of a part of the land affected by the revocation until a future date, that part of the land is not available for oil and gas leasing until that future date.....

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A power site withdrawal made by the President in 1917 pursuant to the authority contained in section 1 of the act of June 25, 1910, can now be revoked by the President (or the Secretary of the Interior under a delegation of authority from the President) under the authority of that act, despite the intervening passage of the Federal Water Power Act of June 10, 1920.....

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WORDS AND PHRASES

Adjoining lands. The term "contiguous land" used in the first proviso of section 2455 of the Revised Statutes, as amended, does not include "cornering" lands, since in the administration of the public land laws the terms "contiguous" or "adjoining" lands have been consistently defined and construed to exclude "cornering" lands.....

33

Adult. Since section 2 (e) of the act of August 13, 1954 (68 Stat. 718), defines an "adult" for the purposes of that act as "a member of the tribe who has attained the age of twenty-one years," married women or emancipated minors under the

WORDS AND PHRASES—Con.

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age of 21 may not be considered adults for the purposes of that act even though they may be "adults" under State law...

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Contiguous lands. The term "contiguous land" used in the first proviso of section 2455 of the Revised Statutes, as amended, does not include "cornering" lands, since in the administration of the public land laws the terms "contiguous" or "adjoining" lands have been consistently defined and construed to exclude "cornering" lands.....

33

Cultivation. As used in the desert land law, cultivation of land means tillage, which is "the operation, practice, or act of tilling or preparing land for seed, and keeping the ground in a state favorable for the growth of crops." Because the cultivation of desert land without irrigation would be a useless proceeding, the irrigation of such land is required as an attendant act.....

99

Irrigation. As used in the desert land law, irrigation means the application of water to land.....

99

Reclamation. As used in the desert land law, reclamation of land is interpreted to mean conducting water in adequate supply to the land so as to render it available for distribution when needed.....

99

Subsurface rights. The term "subsurface rights" as used in section 8 (b) of the act of August 13, 1954 (68 Stat. 718), does not include water rights..

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