UNITED STATES DEPARTMENT OF THE INTERIOR

Fred A. Seaton, *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, 1956, to December 31, 1956. 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 and the undersigned served successively as Secretary of the Interior during the period covered by this volume; Mr. Clarence A. Davis served as Under Secretary; Messrs. Fred G. Aandahl, Felix E. Wormser, Wesley A. D'Ewart, and O. Hatfield Chilson 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 "63 I. D."

Fred A. Seaton

Secretary of the Interior.

EDITORIAL NOTE

Max Barash, The Texas Company, A–27239 (Feb. 14, 1956), page 51.

Suit against the Secretary in this case has been filed in the United States District Court for the District of Columbia. *Max Barash* v. *Fred A. Seaton, Secretary of the Interior*, Civil No. 939–56.

John C. de Armas, Jr., P. A. McKenna, A–27232 (March 19, 1956), page 82.

Suit against the Secretary in this case has been filed in the United States District Court for the District of Columbia. *Patrick A. McKenna* v. *Fred A. Seaton, Secretary of the Interior*, Civil No. 2125–56.

E. A. Vaughey, A–27291 (March 28, 1956), page 85.

Suit against the Secretary in this case was filed in the United States District Court for the District of Columbia. *E. A. Vaughey* v. *Fred A. Seaton, Secretary of the Interior*, Civil No. 1744–56.

On April 18, 1957, the action was terminated by the filing by the plaintiff of a stipulation of dismissal without prejudice.

Columbian Carbon Company, Merwin E. Liss, A–27294 (June 11, 1956), p. 166.

Suit against the Secretary in this case has been filed in the United States District Court for the District of Columbia. *Merwin E. Liss* v. *Fred A. Seaton, Secretary of the Interior*, Civil No. 3233–56.

ERRATA

Page 83, footnote 1—The act of August 2, 1954 (43 U. S. C. sec. 184) should read (30 U. S. C. sec. 184).

Page 288, footnote 2—The act of August 2, 1954 (60 Stat. 648) should read (68 Stat. 648).

Pages 408, 409, 410—Instructions (unpublished) issued by the Secretary of the Interior October 3, 1926, should read October 3, 1925.

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

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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 I. D. 42, 45. (See 280 U. S. 306.)

Lackawanna Placer Claim (36 L. D. 36); overruled, 37 L. D. 715.
La Follette, Harvey M. (26 L. D. 453); overruled so far as in conflict, 59 I. D. 416, 422.
Lamb *v.* Ullery (10 L. D. 528); overruled, 32 L. D. 331.
Largent, Edward B., et. al. (13 L. D. 397); overruled so far as in conflict, 42 L. D. 321.
Larson, Syvert (40 L. D. 69); overruled, 43 L. D. 242.
Lasselle *v.* Missouri, Kansas and Texas Ry. Co. (3 C. L. O. 10); overruled, 14 L. D. 278.
Las Vegas Grant (13 L. D. 646; 15 L. D. 58); revoked, 27 L. D. 683.
Laughlin, Allen (31 L. D. 256); overruled, 41 L. D. 361.
Laughlin *v.* Martin (18 L. D. 112); modified, 21 L. D. 40.
Law *v.* State of Utah (29 L. D. 623); overruled, 47 L. D. 359.
Lemmons, Lawson H. (19 L. D. 37); overruled, 26 L. D. 389.
Leonard, Sarah (1 L. D. 41); overruled, 16 L. D. 464.
Lindberg, Anna C. (3 L. D. 95); modified, 4 L. D. 299.
Linderman *v.* Wait (6 L. D. 689); overruled, 13 L. D. 459.
*Linhart *v.* Santa Fe Pacific R. R. Co. (36 L. D. 41); overruled, 41 L. D. 284. (See 43 L. D. 536.)
Little Pet Lode (4 L. D. 17); overruled, 25 L. D. 550.
Lock Lode (6 L. D. 105); overruled so far as in conflict, 26 L. D. 123.
Lockwood, Francis A. (20 L. D. 361); modified, 21 L. D. 200.
Lonergan *v.* Shockley (33 L. D. 238); overruled so far as in conflict, 34 L. D. 314; 36 L. D. 199.
Louisiana, State of (8 L. D. 126); modified, 9 L. D. 157.
Louisiana, State of (24 L. D. 231); vacated, 26 L. D. 5.
Louisiana, State of (47 L. D. 366); overruled so far as in conflict, 51 L. D. 291.
Louisiana, State of (48 L. D. 201); overruled so far as in conflict, 51 L. D. 291.
Lucy B. Hussey Lode (5 L. D. 93); overruled, 25 L. D. 495.
Luton, James W. (34 L. D. 468); overruled so far as in conflict, 35 L. D. 102.
Lyman, Mary O. (24 L. D. 493); overruled so far as in conflict, 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. 232); 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); critized and distinguished, 56 I. D. 340.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Mitchell *v.* Brown (3 L. D. 65); 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.
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Opinions of Solicitor, September 15, 1914, and February 2, 1915; overruled, September 9, 1919 (D. 43035, May Caramony). (See 58 I. D. 149, 154–156.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

South Star Lode (17 L. D. 280); overruled, 20 L. D. 204; 48 L. D. 523.
Spaulding *v.* Northern Pacific R. R. Co. (21 L. D. 57); overruled, 31 L. D. 151.
Spencer, James (6 L. D. 217); modified, 6 L. D. 772; 8 L. D. 467.
Spruill, Lelia May (50 L. D. 549); overruled, 52 L. D. 339.
Standard Shales Products Co. (52 L. D. 522); overruled so far as in conflict, 53 I. D. 42.
State of California (14 L. D. 253); vacated, 23 L. D. 230.
State of California (15 L. D. 10); overruled, 23 L. D. 423.
State of California (19 L. D. 585); vacated, 28 L. D. 57.
State of California (22 L. D. 428); overruled, 32 L. D. 34.
State of California (32 L. D. 346); vacated, 50 L. D. 628. (See 37 L. D. 499 and 46 L. D. 396.)
State of California (44 L. D. 118); overruled, 48 L. D. 98.
State of California (44 L. D. 468); overruled, 48 L. D. 98.
State of California *v.* Moccettini (19 L. D. 359); overruled, 31 L. D. 335.
State of California *v.* Pierce (3 C. L. O. 118); modified, 2 L. D. 854.
State of California *v.* Smith (5 L. D. 543); overruled so far as in conflict, 18 L. D. 343.
State of Colorado (7 L. D. 490); overruled, 9 L. D. 408.
State of Florida (17 L. D. 355); reversed, 19 L. D. 76.
State of Florida (47 L. D. 92, 93); overruled so far as in conflict, 51 L. D. 291.
State of Louisiana (8 L. D. 126); modified, 9 L. D. 157.
State of Louisiana (24 L. D. 231); vacated, 26 L. D. 5.
State of Louisiana (47 L. D. 366); overruled so far as in conflict, 51 L. D. 291.
State of Louisiana (48 L. D. 201); overruled so far as in conflict, 51 L. D. 291.
State of Nebraska (18 L. D. 124); overruled, 28 L. D. 358.
State of Nebraska *v.* Dorrington (2 C. L. L. 467); overruled so far as in conflict, 26 L. D. 123.
State of New Mexico (46 L. D. 217); overruled, 48 L. D. 98.
State of New Mexico (49 L. D. 314); overruled, 54 I. D. 159.
State of Utah (45 L. D. 551); overruled, 48 L. D. 98.
*Stevenson, Heirs of *v.* Cunningham (32 L. D. 650); overruled so far as in conflict, 41 L. D. 119. (See 43 L. D. 196.)
Stewart et al. *v.* Rees et al. (21 L. D. 446); overruled so far as in conflict, 29 L. D. 401.
Stirling, Lillie E. (39 L. D. 346); overruled, 46 L. D. 110.
Stockley, Thomas J. (44 L. D. 178, 180); vacated, 260 U. S. 532. (See 49 L. D. 460, 461, 492.)
Strain, A. G. (40 L. D. 108); overruled so far as in conflict, 51 L. D. 51.
Streit, Arnold (T–476 (Ir.)), August 26, 1952, unreported; overruled, 62 I. D. 12.
Stricker, Lizzie (15 L. D. 74); overruled so far as in conflict, 18 L. D. 283.
Stump, Alfred M., et al. (39 L. D. 437); vacated, 42 L. D. 566.
Sumner *v.* Roberts (23 L. D. 201); overruled so far as in conflict, 41 L. D. 173.
Sweeney *v.* Northern Pacific R. R. Co. (20 L. D. 394); overruled, 28 L. D. 174.
*Sweet, Eri P. (2 C. L. O. 18); overruled, 41 L. D. 129. (See 42 L. D. 313.)
Sweeten *v.* Stevenson (2 B. L. P. 42); overruled so far as in conflict, 3 L. D. 248.

Taft *v.* Chapin (14 L. D. 593); overruled, 17 L. D. 414.
Taggart, William M. (41 L. D. 282); overruled, 47 L. D. 370.
Talkington's Heirs *v.* Hempfling (2 L. D. 46); overruled, 14 L. D. 200.
Tate, Sarah J. (10 L. D. 469); overruled, 21 L. D. 211.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Weathers, Allen E., Frank N. Hartley (A–25128), May 27, 1949, unreported; overruled in part, 62 I. D. 62.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TABLE OF STATUTES CITED

(A) ACTS OF CONGRESS

(B) REVISED STATUTES

(C) UNITED STATES CODE

DEPARTMENTAL ORDERS AND REGULATIONS CITED

DECISIONS OF THE DEPARTMENT OF THE INTERIOR

APPEAL OF SAMUEL N. ZARPAS, INC.

IBCA–24

Decided January 4, 1956

Contracts: Changed Conditions—Contracts: Delays of Contractor—Contracts: Damages: Liquidated Damages

Where the contractor, who was engaged in the installation of a curtain in the Carter Barron Amphitheater in Rock Creek Park, Washington, D. C., accepted a change order which involved the operation of the boom and the curtain, so as to increase their operating speed, and the change order also provided for an extension of time of 100 days, delays occasioned by difficulties in procuring a special motor and adjusting electrical controls are not excusable, and the contractor is not entitled to an additional extension of time, which would permit the remission of liquidated damages, since the difficulties were clearly incident to the change, and so came within the scope of the change order. In the absence of any qualifications, acceptance by the contractor of a change order is legally binding, since it results in a new supplemental contract through modification of the original. The fact that the contracting officer might have granted a longer extension of time than the contractor accepted, and acted upon the assumption that a change order could not be issued unless it included a definite time extension, or stated that no change in time was involved, goes only to the motives of the contracting officer, and does not affect the binding character of the legal obligation. If any mistake of law was made, it was by the contracting officer and was wholly unilateral. But even if there had been a mutual mistake of fact, the change order could not be reformed by the Board, since reformation of contracts is a judicial rather than administrative function.

Contracts: Comptroller General—Contracts: Damages: Liquidated Damages

The question whether a recommendation should be made to the Comptroller General pursuant to Section 10 (a) of the act of September 5, 1950 (64 Stat. 578, 591), is referred to the Solicitor of the Department in whom the function of making such recommendations is vested by section 27 of Secretarial Order No. 2509, Amendment No. 16.

BOARD OF CONTRACT APPEALS

On December 21, 1954, Samuel N. Zarpas, Inc., now of 2503–50th Avenue, Tuxedo, Maryland,[1] filed notice of appeal, dated December

[1] Formerly located at 514 Rhode Island Avenue, N. E., Washington, D. C.

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21, 1954, from a decision of the contracting officer in the form of a letter, dated November 19, 1954, denying its request for an extension of time and the remission of liquidated damages in the amount of $2,580 assessed against it for delay in completing the performance of Contract No. 14–10–028–153, entered into on December 22, 1952, with the National Capital Parks, National Park Service.

The contract, which was on the standard form for Government construction contracts (Form No. 23, Revised April 3, 1942), provided for the installation by the contractor of a curtain at the Carter Barron Amphitheater in Rock Creek Park, Washington, D. C.

The curtain was to be of a rather elaborate nature, and the work was to include the construction of concrete footings and the installation of steel supporting members, and the installation of the curtain itself included booms and accessories which required motors and electrical controls. Section 5 of the specifications required the contractor to prepare working drawings, covering all phases of the installation, and these drawings were to be submitted by the contractor to the contracting officer for approval before proceeding with the work.

The Carter Barron Amphitheater is an open air summer theater, and time was of the essence in the making of the contract, which provided that the work was to be completed within 90 calendar days from the receipt by the contractor of notice to proceed. As such notice was received by the contractor on January 7, 1953, the work should have been completed by April 7, 1953.

As the work was far from completed on the scheduled date, and the summer season of 1953 was about to begin, the contracting officer entered a stop order pursuant to paragraph 3–8 of the specifications, which provided for the temporary suspension of work, when conditions were considered "unfavorable to the suitable prosecution of the work," or when the contractor had failed "to carry out orders given or to perform any provisions of the contract." The order was effective as of May 8, 1953, although it was actually dated May 19, 1953. An order to resume work was entered September 14, 1953.

While the stop order was in effect, the contracting officer entered Change Order No. 3, which is dated August 7, 1953, and was accepted by the contractor on August 10, 1953. This order extended the time of performance 100 days. The time of performance was further extended by 20 days by Change Order No. 4, dated November 16, 1953, and accepted by the contractor on November 17, 1953. The addition of these two time extensions to the time which had elapsed since the scheduled completion date of April 7, 1953, except for the period when the stop order was in effect, established the extended

completion date as December 11, 1953. In his findings of fact and decision of November 19, 1954, the contracting officer granted an additional extension of time of 5 calendar days to cover the period of a strike, and thus the final completion date became December 16, 1953. As beneficial use of the facility did not begin until June 7, 1954, liquidated damages were assessed for 172 calendar days at $15 a day, as provided in paragraph 3–2 of the specifications, which made the total of liquidated damages $2,580.

The record shows that during the period of the performance of the contract, the contracting officer or his representatives continually complained to the contractor that he was unduly delaying the work, and warned him that such delays might lead to the assessment of liquidated damages.[2] Complaint was made in particular of the failure of the contractor to submit the necessary shop drawings promptly. It was pointed out that the first shop drawings were not submitted until March 2, 1953, and that other shop drawings had not been submitted until nearly the end of April 1953.

The contractor, on its part, wrote a number of letters to the National Capital Parks,[3] explaining difficulties which it had encountered, and the delays to which these had led. It cited difficulties of design that had delayed preparation of the shop drawings, a change ordered by the contracting officer in the material of the curtain, shortages of required material, the discovery of obstructions in the course of the installation of the concrete work in the basement of the amphitheater, and an error in price quotation which had led the supplier of the curtain track, curtain machines, and the curtain itself to reject its subcontractor's order.

The controversy in this case is centered, however, upon the work done under Change Order No. 3, which had to do with the operation of the boom and the curtain, so as to increase their operating speeds. The achievements of this objective involved some electrical, mechanical and structural changes, of which the most important appear to have been changes in the motor and electrical controls. It turned out that the execution of Change Order No. 3 required far more time than the contractor and its subcontractor had anticipated. The first intimation of this was conveyed to the contracting officer when under date of January 27, 1954, the contractor forwarded a letter dated January 14, 1954 from J. R. Clancy, Inc., a supplier, to Criss Bros. & Co., its subcontractor, indicating that a long time would

[2] Such letters were dated April 8 and 27, 1953; May 8, 1953; September 11 and 30, 1953; December 16, 1953; and April 5, 1954. A letter dated June 30, 1954, was also written after the work had been accepted.

[3] These letters are dated March 20, 1953; April 13, 1953; and May 5, 1953.

be involved in obtaining the electrical equipment. An extension of time was not requested, however, until after completion of the whole contract. Under date of June 9, 1954, the contractor requested a time extension from December 11, 1953, "through the date the project was accepted as usably complete." It pleaded that the extension of time of 100 days provided in Change Order No. 3 had been "agreed upon on estimates by our suppliers and it was impossible to predict at that time the exact delays to be encountered." With this letter the contractor enclosed a letter dated April 21, 1954, from the Al Gleeson Electrical Co., Inc., the supplier of the electrical equipment, concerning the difficulties encountered in securing various items, and another letter dated April 20, 1954, from J. R. Clancy, Inc., to Criss Bros. & Co., in which delay was attributed to the insistence of a representative of the contracting officer upon the procurement of a very special type of motor, which necessitated a change in the entire control system, so that the controls that had already been ordered and obtained could no longer be used.

In his findings of fact and decision of November 19, 1954, the contracting officer reviewed the entire correspondence between the parties, and the various causes of delay advanced therein. Except for the 5 days' extension of time allowed by reason of the strike, he denied any further extension of time. He pointed out that the change of the curtain material had been effected by an agreed change order which made no provision for any extension of time, and that the extension of time granted in Change Order No. 4 covered the delay resulting from the discovery of the obstructions in excavating for the concrete pier footings. He also pointed out that the error in price quotation for the curtain track and accessories made by the subcontractor's supplier was a normal hazard of business which the contractor would have to assume. As for the delays encountered in the execution of Change Order No. 3, apparently he held that no causes of delay had been shown which were not within the scope of the change order.

In its letter of January 24, 1955, in support of its appeal, the contractor appears to rest its plea for an extension of time entirely upon the delays, which, it alleges, it encountered in executing Change Order No. 3. In the hearing on the case which the Board held at Washington, D. C., on August 18, 1955, the contractor also based its plea for the remission of liquidated damages upon the inadequacy of the time extension granted under the terms of Change Order No. 3. Samuel N. Zarpas, the President of the contractor, testified that he agreed to the time allowance of 100 days in Change Order No. 3 with

great reluctance in the expectation that the time would be extended if unforeseen difficulties were encountered. It is clear from the testimony that his expectation was not based upon any promise, and the time allowance in the change order cannot, therefore, be regarded as contingent and subject to later adjustment. Indeed, the Government first proposed an extension of time of 90 days, and agreed to the 100 days only after considerable negotiation. However, Robert C. Horne, the Chief Engineer for National Capital Parks, in testifying on behalf of the Government, explained that a definite extension of time was inserted in Change Order No. 3, only because "it was pointed out to us by a higher echelon in the Department that a change order must contain a specific number of calendar days extension of time, or it must contain a statement that no change in time was involved." (Tr., p. 22.) And that since the end of the summer theatrical season was approaching, "it wouldn't have made any difference if it had been 200 days." (Tr., p. 23.) Indeed, the witness agreed that it would be "substantially correct" to say that the time extension of 100 days had been inserted in the change order "merely to take care of a technicality." (Tr., p. 24.)

In the brief filed by Government counsel prior to the hearing the position was taken that the decision of the contracting officer should be affirmed but that, since there was "an absence of any monetary damage or consequential inconvenience suffered by the Government", the case should be referred to the Comptroller General pursuant to the statute 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." [4] At the hearing, this was also stated to be the position of the Government. However, in his post-hearing brief, Government counsel seemed to take the position that "if the evidence in the case justifies that conclusion," the Board order the Contracting Officer "to amend Change Order No. 3 to include an additional period of 172 calendar days, or so many thereof as the circumstances in their judgment warrant."

The Board cannot accept this suggestion, for it is not warranted by the evidence relating to the negotiation of the change order, and would be contrary to the law applicable to the case. The record does not show that the contracting officer committed any error in granting or denying any extensions of time to the contractor, which, indeed, must concede this to be so, since its whole case is based on Change Order No. 3. So far as this change order is concerned, the contractor has failed to

[4] See section 10 (a) of the act of September 5, 1950 (64 Stat. 578, 591; 41 U. S. C., 1952 ed., sec. 256a).

show that its acceptance was qualified, or that any of the delays which were encountered in its execution were not within the scope of the change order. The difficulties in procuring the special type of motor, or in adjusting the electrical controls were clearly incident to the change. The fact that the contracting officer might have granted a longer extension of time than the contractor accepted, and acted upon the assumption that a change order could not be issued unless it included a definite time extension, or stated that no change in time was involved,[5] goes only to the motives of the contracting officer, and does not affect the binding character of the legal obligation which was mutually accepted by the parties after considerable negotiation. If any mistake of law was made, it was by the contracting officer and was wholly unilateral. But even if there had been a mutual mistake of fact, an administrative board could not reform the change order, since it is well settled that the reformation of contracts is a judicial rather than an administrative function.[6]

It is no less well settled that the acceptance of a change order by the contractor is binding, since in effect it works a modification of the contract and creates a new supplemental contract.[7] This is as true of the provision of a change order providing for an extension of time [8] as of a provision of a change order providing additional compensation for extra work. Indeed, it has even been held that normally the failure to provide an extension of time in a change order raises the presumption that "the time limit of the initial contract shall apply to all work the performance of which is to be initiated prior to the expiration of that time limit." [9]

The Board is, therefore, constrained to hold, notwithstanding the position taken by the parties, that it may not disregard the change order and extend the contractor's time of performance. Whether the contractor is entitled to the remission of liquidated damages involves equitable considerations which are not for the Board to consider, since it is not authorized to make recommendations to the Comptroller

[5] As a matter of law, it was not necessary that the extent of the additional time to be allowed be determined in the change order, since a change order may be entered unilaterally by a contracting officer, and even the amount of additional compensation may be left open. It may have been decided as a matter of policy, however, that the extension of time should be fixed in the change order.

[6] See 15 Comp. Gen. 240 (1935), and judicial decisions there cited.

[7] See appeal of *Sam Bergesen,* 62 I. D. 295 (1955), and other cases there cited.

[8] See *Griffiths* v. *United States,* 74 Ct. Cl. 245, 257–58 (1932); *Irwin & Leighton* v. *United States,* 104 Ct. Cl. 84, 109 (1945); *Peterson,* BCA No. 114, May 25, 1943, 1 CCF 160; *Blystone,* Navy Dept., BCA No. 121, April 2, 1945, 3 CCF 904; *The Rust Engineering Co.,* Navy Dept., BCA No. 127, October 3, 1945, 3 CCF 1210. There are also a number of unreported decisions to the same effect by the Armed Services Board of Contract Appeals: *Oconee Garment Co.,* No. 553, dated December 15, 1950; *Waterbury Co., Inc.,* No. 949, dated March 14, 1952; *ABCD Corp.,* No. 1047, dated August 28, 1952.

[9] See *Peterson,* BCA No. 114, May 25, 1943, 1 CCF 160, 161.

General with reference thereto. This function is vested in the Solicitor of the Department by section 27 of Secretarial Order No. 2509, Amendment No. 16, and the case will, therefore, be referred by the Board to him to consider whether to recommend the remission of the liquidated damages.

The Board does not decide whether the request for an additional extension of time was timely. Any extension of time could be granted only pursuant to article 9, the "Delays—Damages" provision of the contract, which requires the contractor to notify the contracting officer of a cause of delay within 10 days of its commencement. It is clear that the letter of June 9, 1954, which was written by the contractor after the acceptance of the work performed under the contract was not timely. The contractor's prior letter of January 27, 1954, may have been intended, however, to give notice of delay, but the record does not make it clear whether it was timely.

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 request for an addiitonal extension of time, is affirmed, and the question whether a recommendation should be made to the Comptroller General that the liquidated damages assessed against the contractor be remitted is referred to the Solicitor for his consideration.

THEODORE H. HAAS, CHAIRMAN.
THOMAS C. BATCHELOR, MEMBER.
WILLIAM SEAGLE, MEMBER.

INTERPRETATION OF THE CHEYENNE RIVER ACT OF SEPTEMBER 3, 1954 (68 Stat. 1191)

Indian Lands: Generally—Statutory Construction: Generally

Under section XI of the act of September 3, 1954 (68 Stat. 1191), lessee Indians within the taking area of the Oahe Dam and reservoir project must continue to pay rent during the period the lands continue to be used under the provisions of this section.

Section XI of the act of September 3, 1954, does not authorize the purchase of lands in a trust status as a substitute for land in the taking area of the Oahe project which is held by an individual member of the Cheyenne River Sioux Tribe is unrestricted fee simple ownership. Memorandum-Opinion, of March 2, 1955, reconsidered and affirmed.

The benefits of section XI of the act of September 3, 1954, may not be extended to Indians who own no land within the taking area of the Oahe Dam project.

Indian Lands: Generally—Statutory Construction: Legislative History

Although the legislative history of an act of Congress may not be drawn upon to establish a meaning or intent contrary to the clear language of the act, this rule is without application where the legislative history supports, rather than disregards, the clear language of the statute.

Indian Lands: Generally—Words and Phrases

The phrase "all members of said tribe who are residents of the Cheyenne River Sioux Reservation at the time of the passage of this Act," means those members of the tribe who actually resided on the reservation and maintained their homes there to the exclusion of members of the tribe who maintain permanent residence elsewhere.

Indians: Generally—Funds: Generally—Expenditures: Special Funds

Expenses incurred by the Tribal Council on and after the date of the Secretarial proclamation declaring the act of September 3, 1954, to be in effect are not reimbursable by the United States.

The payment of $2,250,000 provided for in section II of the act may not be increased or decreased without further legislation by the Congress.

M-36323 JANUARY 12, 1956.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

This is in reply to your memorandum of October 13, 1955, in which you ask a number of specific questions concerning the Cheyenne River Act. For convenience, each question will be paraphrased in a separate paragraph preceding the answer.

1. Section IX of the act contains the following language: "Members of said Indian tribe now residing within the taking area of the project shall have the right without charge to remain on and use the lands hereby conveyed as said lands are now being used from and after the effective date of this Act * * *."

Your question is whether certain lessee Indians now residing within the taking area have by this language been given rent-free privileges to remain on and continue to use the lands conveyed until the lands are flooded.

Answer: After consideration of the purposes of the act as a whole, it is plain that Congress intended that this land should continue in use the same as it was before the taking and that an owner of the land who did not himself reside thereon should be entitled to continue to recover rental payments from his lessee. I believe that if any other meaning had been intended, Congress could, and no doubt would, have resorted to more expressive language.

2. Section XI of the act provides for the purchase of lands to replace those taken for the Oahe project. Should this be construed to mean that Indians losing deeded land (fee patent or purchased in nontrust status) in the taking areas may purchase tribal land in a trust status to replace the deeded lands lost?

The *answer* is "No." This question has heretofore received consideration by this office, and in an opinion dated March 2, 1955, it was held that section XI authorized the purchase of land in a trust status as a substitute only for such land in the taking area which was held under a trust patent or exchange assignment, and that section XI did not authorize "the purchase of land in a trust status as a substitute for land in the taking area which is held under fee patent."

Under date of December 1, 1955, the Sioux Tribe of Indians of the Cheyenne River Reservation, through the tribe's general counsel, Mr. Ralph H. Case, petitioned the Secretary of the Interior to review and reverse the opinion of March 2, 1955. In reviewing this petition, which has been referred to this office, I find that the chief contention of the petitioner is that the opinion of March 2, 1955, erred in disregarding the "clear language of section XI of the said act," and in relying on the legislative history of the act in disregard of the "well known rule of construction of statutes where the statute is clear and understandable and the intent of Congress is clearly expressed therein." We agree with the petitioner that the legislative history of an act of Congress cannot be drawn upon to establish a meaning or intent which is contrary to the clear language of the statute. However, that is not the situation here. The language of section XI in itself plainly shows that the acquisition of trust lands to replace lands in unrestricted fee simple ownership was not contemplated. Thus, provision is made for the issuance of trust patents for the new lands with the declaration that such trust patents "shall be in form and effect the same as corresponding trust patents heretofore issued to said individuals." This means, of course, that the Indians who are entitled to the benefits of section XI must be Indians who held under trust patents lands in the taking area, and not Indians who held the unrestricted fee simple title to lands in that area. The further statement in section XI that the "holders of exchange assignments within the said taking area shall be regarded as holders of trust patents and shall be accorded the same privileges and procedures as holders of land held in trust as in this section provided" demonstrates the purpose of the Congress to confine the benefits of section XI to trust patent Indians within the taking area.

With respect to the legislative history, the opinion of March 2, 1955, pointed out that the act of September 3, 1954, was derived from H. R.

2223, 83d Congress, and that although the bill contained a provision which would have extended the benefits of section XI to members of the tribe who held land in the taking area under patents in fee, that provision was stricken upon the recommendation of this Department for the reason that "those Indians who hold fee patents to lands within the Taking Area should continue to have full responsibility for managing their own property." The legislative history of the statute thus supports, rather than disregards, as contended by the petitioners, the clear language of the statute.

Section 1 of the 1954 act identifies the lands to be taken by the United States for the Oahe dam and reservoir project as the lands "described in Part II of this agreement." It has come to my attention that the description of lands contained in Part II contains lands which are owned in fee by certain individual Indians of the Cheyenne River Sioux Tribe. This would indicate that the Congress, in the exercise of its eminent domain powers, has, through the enactment of this legislation, taken the title to these fee-owned lands. Nevertheless, the Chief of Engineers of the Department of the Army has taken the position that the provisions of the act are not sufficient to permit a disregard of 40 U. S. C. sec. 255, which requires approval of the title to land by the Attorney General before payment therefor is made, and that it is likely that there are tax, judgment, or mortgage liens against the fee-owned lands. Accordingly, the Corps of Engineers, in a letter to the Commissioner of Indian Affairs dated November 4, 1955, requested that distribution of funds to the individual fee owners be withheld until the fee tracts are conveyed to the United States and the title is approved by the Attorney General.

Upon approval of the title so conveyed, the individual Indians will be entitled, as I see it, to receive the consideration for their lands wholly unrestricted, and this constitutes another reason why the benefits of section XI of the 1954 act may not be extended to them. In that section provision is made for payment of the purchase price for the new or substitute lands from moneys placed to the credit of the individual as compensation for lands taken from him under the provisions of the act. Since the compensation to which the fee title owner is entitled must be paid to him unrestricted, there would be nothing to his credit that could be applied to the purchase of new or substitute lands.

I find no error in the opinion of March 2, 1955, and that opinion is hereby affirmed.

3. May Indians owning no land in taking area purchase tribal land under this act? It will be very beneficial to proposed plans if this can be done.

The *answer* is "No." Section XI relates to individual members of the tribes "whose lands are within the taking area" and the funds for the purchase of substitute lands are the moneys placed to the credit of the individual member as compensation for lands which were taken from him under the act. Indians who own no land within the taking area may not be given the benefit of these provisions without adding to the language of the statute. This the administrative officers of the Government are without authority to do.

4. Section XIII of the act provides for reimbursement to the tribe for negotiation expenses, $50,000 of which may be paid as attorneys' fees. The section also provides that the tribe is to send a statement of said expenses to the Secretary of the Army setting out said expenses to the date of the proclamation issued by the Secretary of the Interior. Should this be construed to mean that only expenses paid or incurred prior to the effective date of the proclamation are reimbursable?

The *answer* is "Yes." By section XIII the United States agrees to reimburse the Tribal Council for expenses incurred by it and caused by, or incident to, the negotiations which have led up to the making and ratification of this agreement. Section XIII further provides that the Tribal Council shall send a statement to the Secretary of the Army setting out said expenses up to the date of the proclamation to be issued by the Secretary of the Interior declaring that the act of Congress approving the agreement is in full force and effect. These statements, considered together, show that only those expenses incurred up to the date of the proclamation of the Secretary declaring the act to be in effect are reimbursable by the United States. The date of the proclamation is April 6, 1955 (20 F. R. 2340). The expenses incurred up to that date only are reimbursable.

5. Another question relates to the replacement or payment for the Agency hospital referred to in section II of the act. What claim for replacement or payment, if any, does the tribe now have?

Answer: I would prefer not to answer this question since the Agency hospital and any possible replacement thereof or repayment therefor would be a matter within the jurisdiction of the Department of Health, Education, and Welfare.

6. Section V provides that residents of the reservation are eligible to participate in a rehabilitation program. Is residence defined by Federal or tribal law? If not, do you have any suggestion as to how residence may be determined for the purposes of this act?

Answer: The phrase "all members of said tribe who are residents of the Cheyenne River Sioux Reservation at the time of the passage of this Act" is not expressly defined either in Federal or tribal law,

and the legislative history does not shed any light on this situation. However, taking into consideration the objectives of Section V, it seems to me to be fairly plain that the Congress had in mind only those members of the tribe who actually resided on the reservation and maintained their homes there. This would, of course, include minor members of resident families and would exclude members who maintained permanent residence elsewhere.

> 7. You will note that the act requires that payment be made to the landowners in the sum of $2,250,000 in accordance with an appraisal made by MRBI. The attached material submitted by the attorney for the tribe states that it is the desire of the tribe to pay landowners a sum greater than the $2,250,000. You have heretofore rendered an opinion that only the $2,250,000 could legally be paid to landowners. Will you please examine this act and advise whether or not there is any way that funds either appropriated by this act or held in the Treasury of the United States may be used to supplement this payment?

Answer: Upon reexamination of the act and consideration of the material submitted by Mr. Frank Ducheneaus, as Chairman of the Tribal Council, it is still my firm opinion that the $2,250,000 sum is an exact figure, every cent of which is accounted for in the revised appraisal of the Missouri River Basin Investigation staff. It would take another act of Congress either to decrease or increase this amount or to make the same or a different amount payable under any other appraisal.

J. Reuel Armstrong,
Solicitor.

CLAIMS OF MRS. ROXIE THORSON AND MRS. MARIE E. DOWNS

T–710 (Ir.)

Decided January 19, 1956

Irrigation Claims: Waters and Water Rights: Flooding and Overflow

Where property was damaged by flooding and the evidence indicates that Bureau of Reclamation activities, including pumping operations, reduced the water level of a lake below what it would have been under natural conditions, the owner may not be reimbursed from funds made available under the Public Works Appropriation Act, 1956.

Irrigation Claims: Waters and Water Rights: Generally

An owner of property adjoining or near a lake has no legal right to the salts which he extracts from waters appropriated from the lake and sells for medicinal purposes. Accordingly, even if activities of the Bureau of Reclamation cause the dilution or reduction of the salinity of the lake, such damage cannot be the foundation for a valid claim for damages against the Government.

January 19, 1956

ADMINISTRATIVE DETERMINATION

Mrs. Roxie Thorson, doing business as the Thorson Soap Lake Products Co., filed a claim in the amount of $3,000 on September 18, 1953, which was revised and raised on October 5, 1954, to the sum of $7,832.69, not including alleged extra costs for extracting salts from Soap Lake waters. Mrs. Marie E. Downs filed a claim on February 4, 1953, in the amount of $9,500. Both Mrs. Thorson and Mrs. Downs reside in the City of Soap Lake, Grant County, Washington.

Mrs. Thorson's claim is based on alleged damage to her property, a tract of land located in Government Lot 3, section 3, T. 22 N., R. 27 E., W. M., Soap Lake, on which are installed her tourist cottages, garage, and salt factory. Mrs. Thorson maintains that the high water level of Soap Lake floods some of her property and also increases the expense of extracting salts from the lake waters, which are necessary to her business. Mrs. Downs maintains that her basement has been flooded from the high water level of the lake. Both claimants attribute the high water level of the lake to the addition of waters from the Columbia Basin Project, now partly in operation and partly under construction by the Bureau of Reclamation.

There is no statement by either complainant regarding the legal basis upon which the recovery of damages is sought from the United States. Claims for damages to property resulting from the activities of the Bureau of Reclamation may be considered under the Public Works Appropriation Act, 1956 (69 Stat. 354, 388), and the Federal Tort Claims Act (28 U. S. C. sec. 2671 *et seq.*). The question whether the claims should be paid under either of these laws has been submitted to me, in accordance with sections 21 and 22, Order No. 2509, as amended (17 F. R. 6793).

The Public Works Appropriation Act, 1956, provides that appropriations of the Bureau shall be available for payment of claims for damage to or loss of property "arising out of activities of the Bureau of Reclamation * * *." However, the authority of this provision cannot be used to pay damages based upon a negligent or wrongful act or omission of an employee of the Bureau of Reclamation while acting within the scope of his office or employment. The remedy in such a tort case is governed exclusively by the Federal Tort Claims Act (28 U. S. C. sec. 2679), and the authority to make administrative awards under the Federal Tort Claims Act is limited to claims which are not in excess of $1,000 (28 U. S. C. sec. 2672).[1] Therefore, since

[1] Tort claims against the United States for amounts in excess of $1,000 may be asserted in the courts (28 U. S. C. sec. 1346 (b)).

the claims of both claimants are in excess of $1,000, they cannot be considered on their merits under the Federal Tort Claims Act. This leaves only the possibility of payment of the claims under the provision of the Public Works Appropriation Act, 1956, previously mentioned.

However, in view of the exclusiveness of the relief under the Federal Tort Claims Act, described *supra*, it will be necessary to reach a tentative conclusion with respect to whether the property damages involved were the result of negligence on the part of Government employees. It is neither alleged nor established by the record that, as a result of negligent acts on the part of employees of the Bureau of Reclamation in the construction, operation and maintenance of reservoirs, canals and laterals, substantial contributions of water were made to Soap Lake, or that the mineral concentration was diluted and reduced.

From an examination of the record, I conclude that the irrigation system in the vicinity of Soap Lake was constructed in accordance with plans and recommendations dating back as far as 1943, which were prepared by Government engineers and consultant engineers in accordance with the best engineering practices adaptable to the physiographical phenomena of the area, and that Government personnel have exercised reasonable diligence and skill in the operation and maintenance of the irrigation system since it was placed in operation.[2]

I

Issues

An issue in both claims is whether the activities of the Bureau of Reclamation caused the raising of the level of Soap Lake with the result that claimants' properties were damaged. The Thorson claim involves also the issue whether the activities of the Bureau caused the dilution and reduction of the mineral content of Soap Lake and whether this claimant has a property right in the minerals in the lake which was damaged by Bureau activities, and if so, whether such damage should be compensated under the Public Works Appropriation Act, 1956, *supra*.

[2] The Columbia Basin Project was first investigated for feasibility in 1904 by the Bureau of Reclamation and thereafter by various governmental agencies and private individuals. Work on Grand Coulee Dam, a part of the project, was begun in 1934 with funds made available by the act of June 16, 1933 (43 Stat. 195). For subsequent authorizations, see section 2 of the Rivers and Harbors Act of 1935 (49 Stat. 1028, 1039), and the Columbia Basin Project Act of March 10, 1943 (57 Stat. 14, 16 U. S. C., 1952 ed., secs. 835–835c).

II

Soap Lake Area[3]

An understanding is necessary of certain physiographic features of the Soap Lake area, the flow of water into the lake, the pumping operations of the Bureau, and the rise in level of the lake, before a proper determination of these claims can be made.

Soap Lake is a natural, navigable, body of water located in eastern Washington in the lower end of the Grand Coulee just north of the town of Soap Lake and about 6 miles northeast of Ephrata, Washington. The area of Soap Lake varies from 825 acres at altitude 1,072 feet, its aproximate average altitude from 1938 to 1947, to about 900 acres at altitude 1,079.2, its maximum elevation in 1953. The lake is known to have been higher (about altitude 1,081.4 feet in 1917 according to one resident), probably as high as 1,083.1 feet, based on alkali deposited on the rock cliff at the east side of the lake, and, according to some early residents, possibly as high as 1,084.2 feet. The waters of the lake are not now, and never have been, used for irrigation purposes.

The water of the lake is highly mineralized. Its principal chemical constituents are sodium, potassium, carbonate, bicarbonate, chloride, and sulfate. The salinity, expressed as electrical conductivity, averages about 39,000 micromhos, a proportion which is perhaps not much less than that of sea water.

Soap Lake lies at the south end of Grand Coulee, a spillway formed from the ice sheet of the last ice age. It lies in a closed erosional basin cut chiefly in basalt but also partly in lake sediment. The basin is partially filled, chiefly at each end, with glacial gravels. To the south the lowest point on the divide between Soap Lake and Rocky Ford Creek is at an altitude of 1,157 feet. Northward, the low point on the divide between Soap and Lenore Lake is at an altitude of about 1,117 feet. However, the land surface rises gradually northward up Grand Coulee so that the lowest point on the rim of the Soap Lake basin and the lower end of Grand Coulee would be southward toward Rocky Ford Creek coulee and Moses Lake. Soap Lake can receive surface inflow from all directions, but at its present level it has no surface

[3] See generally, report of the Water Resources Division, U. S. Geological Survey, Tacoma District, September 1954, entitled: "Investigation of the Rise in Level of Soap Lake at Soap Lake, Washington."

outflow. No streams empty into Soap Lake, but the lake does receive some surface inflow during storms.

Ground water occurs in the gravel and the shallower basalt aquifers under water-table conditions, and, in some of the deeper basalt aquifers it is under artesian pressure. The Bureau of Reclamation has mapped a number of interflow zones in the basalt and has designated them by number 1 through 8, from the top of the basalt section in the area downward. These basalt interflows serve as the principal aquifers in the basalt. The contours on water tables based on water level measurements made on wells ending in the gravel and the shallower basalt aquifers indicate that ground water is percolating into Soap Lake from the south end of the lake.

Measurements of water levels in wells west, north, and east of Soap Lake all show higher elevations than the level of Soap Lake, indicating that underground drainage from every direction is into Soap Lake. The locations of the ground-water divides north, west, and east of Soap Lake are not known but the location of the ground-water divide south of Soap Lake is known approximately, and, is indicated by water-table contour maps as being 1 to 2 miles south of Soap Lake.

III

The Soap Lake Problem

The increased inflow to Soap Lake is probably due to natural causes, the construction and operation of the Columbia Basin Project, and the irrigation on project farms. Many cyclical fluctuations have occurred in the past with a possible high level at elevation 1,084 feet and a low below 1,070. A natural cyclic high occurred just prior to the initial operation of the canal system on the Columbia Basin Project. From a study of the record, I conclude that a large amount of inflow to the lake is from natural causes and the return flow from irrigated lands, for neither of which is the Bureau responsible legally. While it is probable that some fresh water escapes from the Columbia Basin Project irrigation works into Soap Lake, the exact amount of such water cannot be ascertained. It is commingled with other surface and ground waters and with precipitation, all of which enter Soap Lake, and, therefore, cannot be separately identified. Moreover, the Bureau of Reclamation has pumped considerable water from Lake Lenore north of Soap Lake, some of the waters from which flow into Soap Lake. The Bureau, in cooperation with the City of Soap Lake, has also pumped from interceptor wells south of Soap Lake, and during the non-irrigation seasons of 1953, 1954 and 1955, the Bureau has

pumped directly from the lake to prevent the continual rising of the lake's water level.

Based on the record, I conclude that the amount of water pumped by the Bureau has far exceeded the increased inflow to the lake due to the construction and operation of the Columbia Basin Project. My conclusion is substantiated by a report entitled "Investigations of the Rise in Level of Soap Lake at Soap Lake, Washington," prepared by members of the Ground Water Branch and Surface Water Branch, Water Resources Division, U. S. Geological Survey, Tacoma District, Washington, in September 1954. The salient facts regarding "The Soap Lake Problem" are succinctly stated under the heading "Conclusions" substantially as follows:[4]

1. The level of Soap Lake has been considerably higher in the past, perhaps as much as 5 feet, than it was in January 1953. This fact is substantiated by statements of early residents and by alkali deposits on rock outcrops. (Pp. 1–2, 7.)

2. Lakes without surface or underground outlets have been rising because the Soap Lake region is in a period of greater than average precipitation, as shown by precipitation records. (P. 2.)

3. There appears to be abnormal inflow into both Soap Lake and Lenore Lake. In August 1953, if no pumping had been done during the year, Soap Lake might have been as much as 2.8 feet higher than it was. However, under natural conditions (without the irrigation-project operation) the lake at that time still probably would have been higher than it actually was, possibly to the extent of about 0.6 feet. (Pp. 8–10.)

4. In August 1953, if no pumping had been done during the year, Lenore Lake might have been as much as 0.9 feet higher than it was. However, under natural conditions the lake at that time still probably would have been higher than it actually was, possibly to the extent of about 0.3 feet. (P. 9.)

5. Rises in other closed lakes in the State of Washington indicate that Soap Lake should be high even under natural conditions. Two lakes, Medical and Jameson, were investigated and found to be at the highest levels ever known. (Pp. 10–11.)

6. Multiple correlations made, using the change in lake level as the dependent variable and temperature and precipitation as the independent variables, indicate unusually high changes in lake level during the years 1952 and 1953, with 1953 showing the greater abnormal increase. (P. 11.)

[4] Page references are to the more detailed discussion in the body of the report upon which the particular conclusion is based.

7. The curve of cumulative departure from normal inflow into Soap Lake shows an abnormal increase in inflow. (P. 11.)

The discharge records of Park Creek below Park Lake near Coulee City indicate unusual runoff during 1952 and 1953. A small part of this apparent excess is due to known spill from the Bacon Siphon into Deep Lake. The remainder may be due to leakage from the Main Canal or seepage from the Equalizing Reservoir or both. (P. 12.)

8. Not enough data are available as yet to make anything but a rough approximation of the added inflow to the streams or lakes due to the application of irrigation water to the land. The discharge records of Crab Creek near Moses Lake show added inflow during 1952 and 1953 but there is no way of separating Main Canal losses from applied water. (Pp. 12–15.)

The discharge records of Rocky Ford Creek near Ephrata also indicate added inflow during the last 2 years. Most of this must be due to applied water because there are no main canals passing through the drainage basin. However, there is at least one canal wasteway draining directly to the stream channel. Ground-water studies also show a rise in the water table in some of this area indicating substantial increases in ground-water storage. (Pp. 15–16.)

9. Ground-water underflow into the south end of Soap Lake through the main gravel channel was about 1.14 c. f. s. prior to the irrigation which began in 1952. This underflow did not increase appreciably before June 1953. At about that time underflow began to increase gradually. (Pp. 19–20.)

10. Pumping from protective wells F and H to the end of 1953 has exceeded the rate of underflow in the main gravel channel and some water has been moved from storage in this channel. Water levels have been lowered enough to permit movement of some Soap Lake water into the aquifer. (P. 20.)

11. The water added to the ground in the Soap Lake Basin by irrigation and lateral canal losses in 1952 and 1953 went chiefly into ground-water storage. (P. 23.)

12. There are one or more other gravel channels which may transmit additional ground-water into the south end of Soap Lake. (P. 23.)

13. Lenore Lake and Soap Lake probably are hydraulically connected and some water apparently moves from Lenore Lake to Soap Lake. The total quantity moving from Lenore Lake to Soap Lake probably is not great. Lowering Lenore Lake to reduce inflow into Soap Lake probably would not reduce Soap Lake appreciably. (P. 29.)

14. Considerable fresh water is recharged to the sand and gravel

between Lenore and Soap Lakes, most of which flows into Soap Lake. (P. 29.)

15. Leakage from the West Canal, where the canal lies within the Soap Lake drainage basin, may furnish inflow to Soap Lake. Such leakage could either move out and down through the overburden, appearing as surface flow where overburden is absent, or move downward along permeable interflow zones intersected by the canal and discharge directly into the lake. (Pp. 29–30.)

16. Leakage from the West Canal probably will increase only slightly and then only as the canal deteriorates. In the 2 years that water has been in the West Canal the flow pattern from the canal to Soap Lake probably has been fairly well established. Discharge into the lake from this source may increase in subsequent years, however, because a part of the present canal leakage may be going into groundwater storage. (Pp. 29–30.)

IV

Conclusion

I must conclude, therefore, that even without the irrigation system the waters from Soap Lake would be flooding the claimants' property, and that the Bureau pumping has prevented additional damage to their properties which would have occurred under "natural" conditions.

V

Claim of Mrs. Roxie Thorson for Dilution or Reduction of Salinity of Lake

I shall now consider Mrs. Thorson's claim for an unspecified amount for the alleged extra costs of extracting salts from Soap Lake waters. She states that originally it required the evaporation of 8 gallons of lake water to obtain one pound of salts by evaporation, but that in recent years, the ratio increased to 16 gallons of lake water for one pound of salts. She expresses concern that the water of Soap Lake might become so weakened that it would be impossible for her to carry on her business.

The record discloses that the Thorsons acquired their property by a deed dated March 2, and recorded March 20, 1917. They claim that they were selling bottled water in March 1917, and that the next month they were evaporating water for the purpose of recovering the salts and minerals therein. There is no record that they or their predecessor in interest in the preparation and sale of salts and minerals

ever obtained a right from the State to do so, or a permit from the City of Soap Lake or the State to appropriate waters from the lake for that purpose.

Moreover, even if such a permit had been obtained and water had been appropriated under the permit, the appropriator would not have obtained a right to the minerals in the water but merely a right to the beneficial use of the water as such.

From a study of the record I have concluded that the direct pumping from Soap Lake by the Bureau of Reclamation, in cooperation with the City of Soap Lake, while it has reduced the damage to the property of the City and its residents, has probably removed some of the salts in the lake. Tabulations of total dissolved solids in surface water in the lake show that salt concentration had decreased from October 14, 1946, when the water surface elevation was 1,071.8 feet and the dissolved solids 39,386 parts per million to October 23, 1955, when the water elevation was 1,075.1 feet and the dissolved solids 24,500 parts per million. However, prior to the start of irrigation in March 1952, the salinity of the lake had sharply decreased. This rate of reduction will vary with the inflow and pumping from the lake.

VI

Whether "Property" Was Damaged

The authority to pay claims under the pertinent provision of the Public Works Appropriation Act, 1956, is dependent upon a determination that there has been "damage to or loss of *property*." (Italics added.) Under State law, the claimant has no legal right to the salts in Soap Lake. In the case of *Deseret Livestock Co.* v. *State*, 171 P. 2d 401, 403, 404 (1946), the Supreme Court of Utah held that salts carried in solution in waters are considered to be minerals, and that the salt of a navigable lake is not subject to appropriation. The court stated in pertinent part as follows:

> "* * * a number of authorities prefer to define a 'mineral' as any natural substance having sufficient value to be mined, quarried, or extracted for its own sake or its own specific use." Under this definition it is apparent that the salt found in the waters of Great Salt Lake because of its quantity is a "mineral" and is valuable for its own sake. In fact it is because the salt found in the water is valuable for its own sake, that appellant seeks to appropriate the water and thereafter extract the salt from it.
>
> Our appropriation laws apply to water as such, and not to minerals valuable for their own sake which may be found therein. * * * The only manner in which water can be appropriated is by being placed to a beneficial use. The

use of water for the precipitation of salt is such a beneficial use, and if appellant were seeking to appropriate water to carry salt which belonged to it, it would be placing the water to a beneficial use and under our laws would be entitled to appropriate as much water as it needed for that purpose and which had not already been appropriated. However, appellant does not own the salt. The salt which it seeks is contained within Great Salt Lake, which is a navigable body of water. Because it is a navigable body of water its bed belongs to the state subject to the control of Congress for navigation in commerce. * * * It is our opinion that the state as the owner of the beds of navigable bodies of waters is entitled to all valuable minerals in or on them. * * *

* * * In the instant case appellant is not seeking to retain the salt from water which has escaped onto its lands but is seeking to divert it to its land by artificial means without first acquiring the right to the salt.

Since the state is the owner of the salt contained in the waters of Great Salt Lake, it follows that appellant is in no position, until it acquires rights to the salt therein, to place that water to a beneficial use as its sole purpose for its attempted appropriation is to extract the salt from the water. If it cannot place the water to a beneficial use it cannot appropriate the water because beneficial use is the only basis upon which water can be appropriated in this state. * * *

VII

Conclusion

I conclude, therefore, that the activities of the Bureau of Reclamation in the development of the Columbia Basin Project did not damage any property right of the claimant which can be the foundation of a valid claim for damages against the Government.[5]

Determination

Therefore, in accordance with the provisions of the Public Works Appropriation Act, 1956, and the authority delegated to me by the Secretary of the Interior (sec. 22, Order No. 2509, as amended; 17 F. R. 6793), I determine that:

(*a*) flood damage to the properties of Mrs. Roxie Thorson and Mrs. Marie E. Downs was not caused by the activities of the Bureau of Reclamation;

(*b*) Mrs. Roxie Thorson has suffered no property damage for which she can be awarded compensation under the provisions of the Public Works Appropriation Act, 1956; and

[5] The Solicitor, in the claim of the *City of Redding, California,* T–440 (Ir.) (August 8, 1952), denied a claim of the City against the Government because the City, through a riparian owner of the water of a stream, the temperature of which had been lowered as the result of a project of the Bureau of Reclamation, and consequently could no longer be used as a pool for swimming, could not assert a property right respecting the use of the pool for swimming.

(c) the claims of Mrs. Roxie Thorson and Mrs. Marie E. Downs must be denied.

EDMUND T. FRITZ,
Deputy Solicitor.

CHARLES F. AND CHARLES P. McCUSKEY

A-27247

Decided January 20, 1956

Rules of Practice: Appeals: Timely Filing

An appeal to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management will be dismissed where the notice of appeal was not filed within the period allowed by the Department's rules of practice.

Pittman Act

An application under the Pittman Act must be for contiguous land and cannot embrace cornering sections of land.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Charles F. and Charles P. McCuskey have appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated July 11, 1955, which affirmed decisions of the manager of the Reno land and survey office, dated April 29, 1954, rejecting their Pittman Act applications on the grounds that the lands applied for are incontiguous and not compact.

The concluding paragraph of the Director's decision stated that the decision was subject to the right of appeal to the Secretary within 30 days from receipt of same, and that if an appeal was filed it must conform to the provisions of 43 CFR 221.75 and 221.76. Circular 1818 was attached to the copies of the Director's decision sent to the appellants.

Circular 1818 contains the provisions of the Department's rules of practice governing appeals to the Secretary, which provide in pertinent part:

(a) An aggrieved person desiring to appeal to the Secretary of the Interior from a decision rendered by the Director of the Bureau of Land Management must, within 30 days from the date of the service upon such person or his authorized representative of notice of the Director's decision, file a notice of appeal with the Director, Bureau of Land Management, Department of the Interior, Washington 25, D. C.

* * * * * * *

(d) An appeal shall be subject to summary dismissal for failure to comply with any of the requirements prescribed in this section. (43 CFR 221.75.)

A registry return receipt shows that notice of the decision was served on both the appellants on July 18, 1955. On August 18, 1955, a notice of appeal was received in the Director's office from both of the appellants. Since August 17, 1955, was the last date upon which a notice of appeal could have been timely filed, the appeals were not timely filed and must be dismissed. The Department has consistently dismissed appeals which were not filed within the time prescribed in the Department's rules of practice, even though the appeals were only one day late. *Albert N. Froom*, A–27124 (May 23, 1955).

Even if the procedural defect were not present there does not appear to be any basis for changing the Director's decision.

The appellants each applied for four even-numbered sections of land which corner each other. In their appeal the appellants contend that the lands applied for are contiguous in that they corner one another; that the interpretation of the word "contiguous" as not including lands that corner one another is unrealistic when applied to the Pittman Act inasmuch as large areas of land were long ago granted to railroad companies in alternating checkerboard sections; and that a definition holding cornering lands incontiguous would remove large areas of land in Nevada from development under the act.

The Pittman Act (43 U. S. C., 1952 ed., sec. 351 *et seq.*) does not specifically provide that the land applied for must be contiguous. Section 5 of the act (43 U. S. C., 1952 ed., sec. 355) provides only that a permittee who is successful in discovering and developing underground water shall be entitled to a patent for one-fourth of the land in his permit, such area to be selected "in compact form." However, the legislative history of the act shows that at the time the House of Representatives was considering the Pittman Act prior to its passage, an amendment to section 5 of the act was proposed which read as follows: "*Provided*, That within the limits of a railroad grant land cornering shall be considered as contiguous and in compact form." In the discussion which followed the proposed amendment the very arguments advanced by the appellants were discussed by the House (i. e., that because of checkerboarded railroad land grants, a permittee should be allowed to hold cornering sections). However, the proposed amendment was rejected. 58 Cong. Rec. 6469, 6470.

Thus, one of the Department's regulations issued pursuant to the act, 43 CFR 234.4(d)(2), which provides that the lands applied for "must be contiguous and situated in reasonably compact form," clearly reflects the Congressional intent that "contiguous" shall not be interpreted to mean "cornering" lands. This is in accordance with the un-

varying interpretation of the word "contiguous" in public land laws as excluding "cornering". *Henry Petz et al.*, 62 I. D. 33, 37 (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 appeal is dismissed.

EDMUND T. FRITZ,
Deputy Solicitor.

APPEAL OF THE FLUOR CORPORATION, LTD.

IBCA–53 *Decided January 23, 1956*

Contracts: Specifications—Contracts: Drawings—Contracts: Interpretation

Where under a contract for the construction of a high school in the Virgin Islands, one of the specifications required the installation of an electrical tie-in between the vault in the school and a hospital, "as indicated on the plan," but the plan itself consisted of two drawings, each of which bore the notation "To hospital, N. I. C." meaning "Not In Contract," there is an ambiguity in the contract rather than a conflict between the specification and the drawings, and the ambiguity must be resolved in favor of the contractor by not requiring it to install the tie-in. This is in accordance with the rule that any ambiguity in a Government contract must be resolved against the Government, which drafted the contract.

Contracts: Contracting Officer

Where under the terms of the contract and specifications, the District Engineer was permitted to decide "all questions of fact which may arise as to the interpretation of the plans and specifications" with a right of appeal to the head of the department in case of dispute, the decision of the District Engineer that the contractor was not required to install the electrical tie-in must be regarded as final and binding, and may not be reversed by the contracting officer. As the contract in this case was administered largely by an absentee contracting officer, the provisions of the contract documents relating to the supervision of the work are to be liberally construed in favor of upholding the decision of the District Engineer. Although one of the specifications deprived the District Engineer of the authority to vary the terms of the contract documents, the interpretation of ambiguous provisions did no constitute such a variance. While the authority of the District Engineer to give final acceptance to the work was also limited, this did not limit his powers of interpreting ambiguous provisions of the contract documents while the work was in progress.

BOARD OF CONTRACT APPEALS

The Fluor Corporation, Ltd., assignee under Contract No. 14–04–001–58, Office of Territories,[1] has appealed from the findings of fact and decision of the contracting officer dated August 22, 1955, crediting

[1] Hereinafter referred to as the contractor.

the Government with $7,862.20 for the contractor's omission to install an electrical tie-in between a building involved in the project and an adjoining hospital.

The contract, which was on U. S. Standard Form No. 23 (Revised April 3, 1942), and was entered into February 16, 1953, was for construction of two high schools in the Virgin Islands for an expected consideration of $2,250,000. However, this appeal is concerned only with the school at Christiansted, St. Croix, under Project 53–504, and the omission of the construction of an electrical tie-in, which was to have consisted of four 15 KV single conductor direct burial cables and related equipment connecting the high school with the Charles Harwood Memorial Hospital. The purpose of the tie-in, as originally planned, was to insure that both the school and the hospital would continue to receive electrical energy if either institution's connection with its power plant was disrupted by a hurricane or some other cause.

The contracting officer first learned that the tie-in had been omitted when he visited the Virgin Islands on January 9–20, 1955 (his last previous visit to the Islands having been in January 1954). Upon his return to Washington, D. C., and after correspondence with the architect, he came to the conclusion that installation of the tie-in was the responsibility of the contractor. He, therefore, notified the Director of Virgin Islands Public Works to advise the contractor that it would be required to make the installation.

By this time, however, construction work on the high school had been completed, the work had been accepted, and the contractor had closed its Virgin Islands offices and removed its records from the site. Under these circumstances it was decided to deal with the matter by means of a change order and under date of February 8, 1955, the contractor signed Change Order No. 4–504–2, which had been submitted to him, crediting the Government with $6,000 for the omitted tie-in.

Under the same date, however, the contractor by letter executed its final release to the Government but made the following exception:

> Claim for $6,000 to be returned to The Fluor Corporation, Ltd., said amount being the reduction in contract price for the 15 KV primary electrical service between Project 53–504 and Charles Harwood Memorial Hospital at Christiansted, St. Croix.

The release letter also explained the acceptance of the change order, as follows:

> The writer accepted the change order only because the matter was brought to light by your office fourteen days after your final acceptance of the project,

at which time our offices in the Virgin Islands were closed, all records were shipped from the job sites, and primarily because a refusal to accept the change order at this time would have meant a long delay in receipt of payment of other monies due under the prime contract.

The Government then discovered that the amount in Change Order No. 4–504–2 was in error, the sum of $6,000 covering only three direct burial cables and related equipment, whereas four such cables were alleged to have been included in the installation. Accordingly, the contracting officer did not approve the change order and the contractor was requested to submit a revised change order for a higher credit. The contractor thereupon submitted, by letter dated April 28, 1955, a revised estimate, showing the amount of the credit to be $7,862.20, and stated that this was to supersede the original estimate of $6,000 covered by Change Order No. 4–504–2. The letter indicated, however, that the contractor considered the entire question of liability for omission of the cables to be in dispute and this was followed by a registered letter dated June 22, 1955, by contractor's counsel demanding payment of the balance due under the contract. The Government then proceeded to make payment in the amount of $196,160.83, which reflected a total deduction of $7,862.20, and the contractor's claim for remission of the credit was denied by the contracting officer in his findings of fact and decision of August 22, 1955.

The dispute in this case has arisen principally because of a sentence included in part V, section 20–09 of the specifications for the Christiansted High School, and notations on two of the drawings for the school. The provision of the specification in question reads:

> An underground primary tie shall be furnished and installed between the vault in the school and the vault in the hospital *as indicated on the plan.* (Italics supplied.)

However, the plan, i.e., Drawings E–101, and E–108, bear the notation: "To hospital, N.I.C.," meaning "Not In Contract."

Other provisions of the contract and specifications are or have been advanced as relevant also to the resolution of the dispute. The contract included the standard "disputes" clause, article 15, which reads as follows:

> Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto.

However, part I, section 6, subdivision 6–01, of the specifications, provided:

The work shall be done under the technical supervision of the District Engineer. The District Engineer shall decide any and all questions of fact which may arise as to the quality or acceptability of materials furnished and work performed, the manner of performance and rate of progress of the work, and shall decide *all questions of fact which may arise as to the interpretation of the Plans and Specifications*, and as to acceptable fulfillment of the Contract on the part of the Contractor. *All such decisions by the District Engineer shall be subject to appeal as provided in Article 15 of the Form of Contract.* (Italics supplied.)

And subdivision 6–06 of the same part and section of the specifications contained the further provision:

In case of any dispute which may arise between the Contractor and the Inspector as to materials furnished or the manner of performing the work, the Inspector shall have the authority to reject materials or to suspend the work until the question at issue can be referred to and decided by the District Engineer. *Neither the Inspector nor the District Engineer shall, however, be authorized to revoke, alter, enlarge, relax or release any requirements of these Specifications, nor to issue instructions contrary to the Contract Documents.* (Italics supplied.)

Finally, part I, section 6, subdivision 6–10 of the specifications, provided:

Upon completion of the work covered by the contract, the Contractor shall notify the District Engineer in writing that the work is complete. * * * If the work is found to be acceptable to the District Engineer, and complete and in accordance with the Plans and Specifications, the District Engineer will so report to the Government and recommend acceptance of the work and payment to the contractor of the amounts due him in accordance with the terms of the Contract. * * * Nothing herein shall be construed to preclude a subsequent inspection by the Government, and the recommendation of the District Engineer shall not be binding upon the Government.

In addition to these provisions relating to the handling of disputes, or acceptability of the work, the specifications contained other provisions relating to the interpretation of contract documents. Part I, section 3, headed "Instructions to Bidders," subdivision 3–05, included a provision that read:

If any person contemplating submitting a bid for the proposed Contract is in doubt as to the meaning of any part of the plans, specifications, or other proposed Contract Documents, he may submit to the Contracting officer a written request for an interpretation thereof.

And part IV of the specifications headed "General Provisions," provided in paragraph 3:

> In event of conflict between the Plans and Specifications, the provisions of the Specifications shall govern.

In his findings of August 22, 1955, the contracting officer stated that in discussing the omission of the tie-in with the Director of the

Virgin Islands Public Works, who had acted as District Engineer under the contract, that "he was informed that the Contractor interpreted the Contract as not requiring this installation in view of the letters N. I. C. on Electrical Drawings E–101 and E–108 dated November 13, 1952." The contracting officer further stated that he then requested the architect to supply his interpretation of the specifications, and that he had been informed by the architect in a letter dated January 27, 1955, that the electrical draftsmen had "inadvertently added the letters N. I. C. to the drawings," and that it was "the feeling of this office that it was always intended that the underground cable described hereinbefore be installed between the vault of the Christiansted High School and the Christiansted Hospital."

The contracting officer also quoted from a letter dated April 28, 1955, from the contractor to the Director of the Virgin Islands Public Works in which the contractor had stated:

> We understand that you (Director, V. I. P. W.), Mr. Gibean (Inspector) and Messrs. Dunn, Stevens, Dexter and Vasquez were all of the opinion that the N. I. C. notation on the drawings established the fact that the service was to be omitted and agreed that no Change Order was involved. We still believe that this is the correct interpretation. It would seem that a request for the Contracting Officer's interpretation would only be in order in the event of disagreement among the several parties involved at the job site.

The contracting officer commented upon this contention as follows:

> The Contractor seems to have acted in good faith, but under a misapprehension of fact as to the actual construction requirements of the Contract and the extent of the Director, V. I. P. W.'s authority to construe the terms of the Contract.
>
> The Government cannot be held liable for the contractor's mistaken conception of the Contract or its failure to obtain the Contracting Officer's interpretation even though the local representative of the Contracting Officer may have concurred in the contractor's opinion that no such interpretation was necessary.

As the contractor definitely asserts that the District Engineer interpreted the contract so as not to require the tie-in, and neither the District Engineer nor the contracting officer challenges the assertion, the Board must find as a fact that the District Engineer interpreted the contract as the contractor asserts.

While the contracting officer did not directly explain in his findings why the Government chose to ask for a credit because of the omission of the tie-in, rather than to insist on its construction, the reason for the decision is apparent from the record. Indeed, it is set forth in the original draft of Change Order No. 4–504, as follows:

> The 4–15KV single conductor, direct burial cable connecting the Christiansted High School with the Christiansted Hospital was eliminated from the contract, after consultation with the Manager of the Power Department of the Virgin

Islands Corporation (the supplier of electric power in St. Croix, Virgin Islands) because:

1. An underground cable is not as reliable as an overhead installation as trouble can develop in improper sealing of potheads, deterioration of or faulty splice joints, deterioration of the cable insulation due to aging, moisture, burrowing insects, acidity or alkalinity of soil, fungus growth, or because of physical damage (ditch digging machine cutting through cable, etc.).

2. In the event of a hurricane, the damage to the overhead installation would determine the length of time to reinstall service. The most probable damage would be line breakage which could be spliced and reinstalled within an hour or two. A storm severe enough to break the system's poles would probably damage the substation also. If the hurricane were of such intensity that general service would have to be discontinued, the Virgin Islands Corporation would disconnect all lines with the exception of the four-pole line from the substation to the hospital. The hospital alone would receive current.

3. The buried cable, if installed, should be kept energized at all times to retard deterioration and also to insure discovery of cable failure promptly. No provision was made for such maintenance.

The acceptance by a contractor of a change order which also receives the approval of the contracting officer ordinarily is binding on the contractor.[2] As the contracting officer in this case declined, however, to approve the change order, there is no occasion to decide whether under the circumstances of the present case, which included the writing by the contractor simultaneously of a letter contradicting the provisions of the change order, the contractor would have been bound. In view of the return of the change order by the contracting officer, and the increase in his demand for a credit from $6,000 to $7,862.20, it is also clear that the release offered by the contractor with an exception in the amount of $6,000 was provisional, and did not limit the contractor to the claim for the lesser amount. The question before the Board is, therefore, whether the contractor is entitled to the remission of the full credit taken by the Government in the amount of $7,862.20.

It is the opinion of the Board that the contractor is entitled to the remission of the credit taken by the Government upon either of two alternative grounds. The first ground is that under the terms of the specifications the contractor was not required to install the tie-in. The second ground is that the determination assumed by the Board to have been made by the District Engineer was binding upon the Government.

The Government takes the position, of course, that there was in this case a discrepancy or conflict between the specifications and the drawings. It argues, therefore, that the contractor should have sought an

[2] See appeal of *Sam Bergesen*, 62 I. D. 295 (1955), and authorities there cited. *See also* other more recent cases cited in the same appeal upon reconsideration (IBCA-11, December 19, 1955).

interpretation from the contracting officer but that since it failed to do so, it is bound by the provision of the specifications which gives paramount force to the specifications in case of conflict with the drawings. The Government emphasizes in this connection the inadvertent character of the initials "N. I. C." on the drawings.

The Board cannot accept this argument for a number of reasons. It may be that the initials "N. I. C." were inadvertent, but it was nevertheless an inadvertence that was twice repeated on different drawings, and the initials in the case of each drawing were coupled with the words "To hospital." The whole notation, "To hospital, N. I. C.," seems rather deliberate. In any event, whether or not the notations were inadvertent could certainly not have been determined by the contractor by requesting an interpretation from the contracting officer, as he suggests, for the record shows that he declined to give any interpretations prior to the bidding on the contract.[3] Thus the contractor was left to interpret the specifications and drawings for itself. If there had been an actual discrepancy or conflict between them, it would have to be held that the specifications prevailed. But the Board is unable to perceive the existence of any such discrepancy or conflict. The specifications did not contain an unqualified requirement that the tie-in be installed, since it referred the contractor to the drawings, and the drawings themselves indicated that the tie-in to the hospital was not in the contract. The specifications and the drawings, when read together, constituted, to be sure, a sort of verbal merry-go-round. But this, clearly, was an ambiguity, rather than a conflict, in the contract documents. In accordance with the familiar rule that any ambiguity in a Government construction contract must be resolved against the Government, which drafted the document,[4] the Board must conclude that the contractor was not required to install the tie-in.

It is interesting to note that a markedly similar case was decided also in favor of the contractor by the Armed Services Board of Contract Appeals.[5] This case involved a claim for additional compensation

[3] See the memorandum dated January 14, 1953, from the contracting officer to the Assistant Director of the Office of Territories. In this report on the bidding the contracting officer who was Lester M. Marx, stated: "In the opening statement, Mr. Marx welcomed those present and expressed appreciation on behalf of the Public Works Division for their interest in the Virgin Islands School Program. He explained that there would be no interpretation of the plans and specifications prior to the opening of the bids, as this would not be fair to the bidders who were not present at the opening."

[4] See *Amburšen 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); *George P. Henly Construction Co.*, CA–120 (November 1, 1951); *Durham & Sauer*, CA–124 (December 19, 1951); *S & S Engineering Corp.*, 61 I. D. 427 (1954).

[5] See *R. P. Farnsworth & Co.*, BCA No. 20, decided January 20, 1943, 1 CCF 32.

for the construction, at the direction of the contracting officer, of benches in theatre and recreation buildings of an overseas discharge and replacement depot at Jackson Barracks, New Orleans, Louisiana. The specifications included provisions relating to the construction of benches, while the relevant plan or drawing, in providing for the construction of benches included a legend, among others, in bold type, underscored, "BENCHES NOT IN CONTRACT." In holding that the contractor was entitled to additional compensation for constructing the benches, the Board said:

> It follows that where the Government, by its own act, whether inadvertently or not, provides general specifications for the furnishing of certain facilities, and then directs, in a bold manner, that such specifications are not included in the contract, it was the intent of the contract that those facilities should not be furnished by the contractor. And it is no answer to this ruling to demonstrate that, in point of time, the amendment to the specifications was adopted after the plan was adopted, because it must be held that the Government knew what was the direction upon that plan, and if it had intended to change that direction, it had the time, the opportunity and the power to make that change. If the leaving of it there was inadvertent, such inadvertence was the act of the Government, and no fault of the appellant.

It is apparent that the present case is even stronger. Although the notation "To Hospital, N. I. C.," was not underscored, the letters which are quite sizable, are white on a blue background, and not merely part of a series of legends, but placed directly upon the drawing of the facility. In addition, the specification referring to the tie-in in the present case was itself qualified, and there is no proof that the notation was placed upon the drawing prior to the preparation of the specifications.[6]

Even if there could be said to be any doubt concerning the conclusion in the present case, the Board would have to reject the Government's contentions on the alternative ground. The contract in this case was administered largely by an absentee contracting officer, and the Board believes that in such a case the provisions of the contract documents relating to the supervision of the work are to be liberally construed in favor of upholding the decisions of the resident engineer.[7] Article 15 of the contract itself, to be sure, left all disputes concerning questions of fact arising thereunder to be decided by the contracting officer but the provision was subject to the exception that

[6] See also *E & E. J. Pfotzer*, BCA Nos. 113, 121, 122, 129, 134, and 135, decided July 20, 1943, 1 CCF 230, another very similar case, in which the *Farnsworth* case was expressly followed. In this case the Board said: "The Board is not unmindful of the provisions of the contract which disclose that in cases of conflict, the specifications will prevail over the drawings. But here, there is no conflict which falls within the purview of these provisions."

[7] Compare *Art Pugsley, d/b/a Art Pugsley Construction Co.*, 62 I. D. 54 (1955).

it was not "otherwise specifically provided," in the contract. Article 21 (b) of the contract defined the term "contracting officer" so as to include "his authorized representative." Elaborate provisions concerning the resolution of disputes were also provided in this case in the specifications, one of which expressly gave the District Engineer authority to decide all questions of fact which might arise as to the interpretation of the plans and specifications. Moreover, this was coupled with the further provision that any such decision by the District Engineer was to be "subject to appeal as provided in Article 15 of the Form of Contract." Nothing could more plainly indicate that any decision of the District Engineer on a question of interpretation of the requirements of the contract was to have finality, and that for this purpose he was the contracting officer, for article 15 only provided for an appeal from the decision of the contracting officer to the head of the department concerned or his duly authorized representative, and also provided that his decision "shall be final and conclusive upon the parties thereto." [8] It is true that the specifications deprived the District Engineer of the authority to vary the terms of the contract documents but it cannot be said that an interpretation of ambiguous provisions thereof constitutes such a variance. Otherwise the District Engineer's power of interpretation would become meaningless. As for the limitation upon the District Engineer's authority to give final acceptance to the work, this, too, seems quite irrelevant in construing his powers of interpretation of ambiguous provisions of the contract documents while the work was in progress.

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 and decision of the contracting officer are reversed, and he is directed to pay to the contractor the $7,862.20 withheld from the final payment to the contractor.

THEODORE H. HAAS, *Chairman.*

WILLIAM SEAGLE, *Member.*

[8] The Board is not unmindful of the rule that the provisions of the standard form of contract are paramount to the specifications in case of inconsistency or conflict. See *Loftis* v. *United States,* 110 Ct. Cl. 551, 629 (1948), and *Pfotzer and Pfotzer* v. *United States,* 111 Ct. Cl. 184, 226 (1948). There is no inconsistency or conflict here since article 15 of the contract itself contemplated the making of other provisions, and paragraph 15 of the "Directions for Preparation of Contract" permitted other provisions to be made in the specifications.

U. S. GOVERNMENT PRINTING OFFICE: 1956

ALASKA RAILROAD FREIGHT RATES

Alaska: Alaska Railroad—Freight Rates

The Secretary of the Interior has authority under the provisions of the act of March 12, 1914 (38 Stat. 305; 48 U. S. C. sec. 301, *et seq.*), to establish through rates which are different from local rates applicable to intermediate points and to establish rates for freight shipped from ports in the States via steamship and the Alaska Railroad.

M–36317

JANUARY 19, 1956.*

TO THE SECRETARY OF THE INTERIOR.

You have referred for my consideration certain questions presented by the Alaska Freight Lines, Inc., in its protest of October 7 against the application of the Alaska Railroad Freight Tariff 5–M (ARR–16), issued August 29, 1955, effective October 1, 1955.

In its protest, Alaska Freight Lines, Inc., a common carrier offering a regularly scheduled combination water-truck service from the northwestern part of the United States and various points in Alaska, stated as follows:

> (2) The Alaska Railroad cannot lawfully charge the rates set forth in its Tariff 5–M since they constitute unequal and non-uniform rates in violation of the specific mandate of Congress set forth in the Alaska Railroad Act, 48 U. S. C. § 301.
>
> (3) The Alaska Railroad cannot lawfully publish through rates between the United States and Alaska.

Construction, operation, and maintenance of the Alaska Railroad was authorized by the act of March 12, 1914 (38 Stat. 305; 48 U. S. C. 301 *et seq.*). Under the provisions of that act the President of the United States was given broad authority to acquire then existing railroads, construct new railroads, and maintain and operate such railroad or railroads "so as best to aid in the development of the agricultural and mineral or other resources of Alaska, and the settlement of the public lands therein, * * * and for other governmental and public uses, and for the transportation of passengers and property." He was authorized specifically to perform generally all the usual duties of a common carrier by railroad, to make contracts or agreements with any railroad or steamship company or vessel owner for joint transportation of passengers and property, and to fix, change, or modify rates for the transportation of passengers and property, "which rates shall be equal and uniform." In addition, the act provided:

*Not released for publication in time for inclusion chronologically.

That it is the intent and purpose of the Congress through this Act to authorize and empower the President of the United States, and he is hereby fully authorized and empowered, through such officers, agents, or agencies as he may appoint or employ, to do all necessary acts and things in addition to those specifically authorized in this Act to enable him to accomplish the purposes and objectives of this Act. * * *"

Executive Order No. 3861 of June 8, 1923 (48 CFR 5.1), authorized and directed the Secretary of the Interior to operate the railroad or railroads "in all respects and to all intents and purposes, the same as if the operation thereof had been placed by law under the jurisdiction of the Secretary of the Interior." In accordance with these authorizations and under delegations of authority from the Secretary of the Interior to other officers, rates for the transportation of passengers and property have been adopted from time to time, including Alaska Railroad Freight Tariff 5–M (ARR–16), which is the subject of the protest by the Alaska Freight Lines, Inc.

As previously indicated, the Alaska Freight Lines, Inc., charges that the rates set out in Tariff 5–M are not equal and uniform as required by the act of March 12, 1914. Specifically, Alaska Freight Lines, Inc., contends that through rates specified in Tariff 5–M are lower than intermediate rates specified in Tariff 16–E as amended and supplemented. In support of this contention, it has submitted "Table I, Comparison Between Alaska Railroad Freight Tariff 5–M and Local Tariff 16–E," in which the difference between class rates from Seward to Anchorage, for example, are shown to be less under Tariff 5–M than under Tariff 16–E. In explanation, it states that the Alaska Railroad participation was obtained by subtracting the rates set forth in the proportional water tariff of Alaska Steamship Company from the through rate set forth in Alaska Railroad Freight Tariff 5–M. Since three elements enter into through rates, namely, the steamship haul charge, the railroad haul charge, and terminal charges, it is not possible to demonstrate, in the manner attempted by Alaska Freight Lines, Inc., the difference, if any, between the through rates and the intermediate local rates. It is true that through class rates established by Freight Tariff 5–M are generally lower than intermediate local rates. However, through commodity rates established by Freight Tariff 5–M and intermediate local rates reflect for the most part very small increases or decreases, except where minimum weights enter the picture.

The meaning of the term "equal and uniform" as applied to ratemaking, to taxation, protection under the laws, and similar fields, has been determined and reiterated by the courts many, many times. See *Giozza* v. *Tiernan*, 148 U. S. 657 (1893), and *Bell's Gap Railroad*

Company v. *Pennsylvania*, 134 U. S. 232 (1890). Reduced to its simplest terms, it merely requires like treatment of like subjects. In the field of ratemaking, differentials between through rates and local intermediate rates have a long history antedating the Interstate Commerce Act, State constitutional provisions, and other legislation. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 684 (1943). Even prior to legislative enactments requiring the establishment of equal and uniform rates, the responsibility of a common carrier to establish and adhere to such practices was well recognized so that the appearance of the term in the act of March 12, 1914, or in similar legislative enactments, established no new principle. *Texas & Pacific Railway Co.* v. *Interstate Commerce Commission*, 162 U. S. 197 (1896).

In the present instance, the Alaska Freight Lines, Inc., has merely shown that there may be a disparity between through rates and local rates applicable to intermediate points. In *Texas & Pacific Railway Co.* v. *Interstate Commerce Commission*, *supra*, the Court held: "The mere fact that the disparity between the through and the local rates was considerable did not, of itself, warrant the court in finding that such disparity constituted an undue discrimination" as prohibited by the Interstate Commerce Act. Nowhere in its protest has the Alaska Freight Lines, Inc., shown that the rates included in Tariff 5–M are not "equal and uniform" within the accepted meaning of that term. In the absence of such a showing, the Secretary cannot find that the rates in question are not "equal and uniform" as required by the act.

The next contention of the Alaska Freight Lines, Inc., with respect to the Alaska Railroad Freight Tariff 5–M is that the Alaska Railroad cannot lawfully publish through rates between the United States and Alaska. It supports this charge by reference to Alaska Rate Investigation No. 2 (2 U. S. M. C. 558, 584; *id.* 639, 652), and to decisions of the Interstate Commerce Commission which hold that a carrier subject to the regulatory jurisdiction of an agency cannot publish a through rate with a carrier not subject to regulatory jurisdiction of that agency.

It is true that the U. S. Maritime Commission suggested, both in the decision cited and elsewhere, that joint rates with the Alaska Railroad which had been established and published by a specified steamship company should be cancelled and replaced by proportionals. The Commission did not order the joint rates discontinued. It appears that proportional schedules now have been filed by at least the Alaska Steamship Company. See Alaska Steamship Company Local and Joint Proportional Rates, Tariff No. 768, FMBF 76, ICC No. 71.

Neither the Federal Maritime Board nor the Interstate Commerce Commission has any authority over the fixing of rates by the Alaska Railroad (34 Atty. Gen. 232) and thus, the references noted above could have no bearing on the authority of the Secretary to fix freight rates. At the same time, the act of March 12, 1914, specifically authorized contracts or agreements between the Alaska Railroad and any other railroads and with any other steamship company or vessel owner "for joint transportation of passengers and property" over the Alaska Railroad and such other railroad or steamship line or vessel. The Alaska Railroad has entered into agreements with the Alaska Steamship Company and the Coastwise Line covering the transportation of freight from certain ports of the United States and points on the Alaska Railroad, and from points on the Alaska Railroad to certain ports of the United States. The terms and conditions of these agreements are reflected in the rates established in Freight Tariff 5–M (ARR–16). It is the view of this office that the establishment of such through rates is entirely within the authority of the Secretary of the Interior under the provisions of the act of March 12, 1914.

Any question regarding the authority of the Secretary of the Interior to establish through rates between points within the 48 States, other than coastal ports and points on the Alaska Railroad, is reserved for later consideration, and nothing contained in this opinion is to be construed as supporting either the validity or invalidity of such action.

J. Reuel Armstrong,
Solicitor.

HOWARD M. WILSON, THE NAVAJO TRIBE

A–27233

Decided January 23, 1956

Indian Lands: Generally—Public Sales: Preference Rights

Where the United States acquires title to land in trust for an Indian tribe, the tribe is the beneficial owner of the land and such ownership is sufficient to entitle it to assert a preference right claim to purchase adjoining public land which is offered for sale.

Public Sales: Preference Rights

One who shows that he is the owner of a fee simple title to land contiguous to land offered at public sale is a preference-right claimant within the meaning of the public sale law and the regulations thereunder although the minerals in his land are reserved to his grantor.

Public Sales: Preference Rights

Where an Indian tribe asserts a preference right to purchase land offered at public sale, evidence contained in the files of the Department showing

ownership of contiguous land to be in the Tribe may properly be considered in determining the validity of the asserted claim.

Administrative Practice—Public Sales: Generally

There is no requirement that an award of land offered at public sale can be made to a preference-right claimant only after a hearing has been held for receiving evidence in support of and in opposition to the preference-right claim.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On December 7, 1953, Tract 37, secs. 14 and 15, T. 15 N., R. 17 W., N. M. P. M., New Mexico, was offered for public sale as an isolated tract pursuant to the provisions of the public sale law (sec. 2455, Rev. Stats., as amended; 43 U. S. C., 1952 ed., sec. 1171). On the date of the sale Howard M. Wilson was declared to be the highest bidder. Thereafter, on January 6, 1954, the Navajo Tribe, through Sam Ahkeah, Chairman of the Navajo Tribal Council, asserted a preference right to purchase the tract, as the owner of contiguous land. Mr. Wilson protested the assertion of the preference right by the Tribe on the ground that it is not the owner of contiguous land. By a decision dated October 12, 1954, the manager of the land office at Santa Fe dismissed the Wilson protest and declared the Navajo Tribe to be the purchaser of the tract. Mr. Wilson appealed to the Director of the Bureau of Land Management. On June 7, 1955, the Associate Director affirmed the action of the manager.

Mr. Wilson has appealed to the Secretary of the Interior from the Associate Director's decision. The grounds of his appeal are that the Navajo Tribe is not the owner of the whole title to contiguous land, as required by departmental regulation, because it holds under a deed which reserves the mineral rights in the land to its grantor; that the manager failed to hold a hearing on the matter, thus depriving Mr. Wilson of the opportunity to offer evidence; and that the manager made findings on matters not properly in evidence.

The public sale law authorizes the Secretary of the Interior—

* * * to order into market and sell at public auction * * * any isolated or disconnected tract * * * which, in his judgment, it would be proper to expose for sale * * * *Provided*, That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price * * *.

The regulation referred to by the appellant (43 CFR 250.11 (b) (1)) provides, in pertinent part:

A preference right to purchase must be supported by proof of the claimant's ownership of the whole title to the contiguous lands (that is, he must show that he had the whole title in fee), * * *.

The records of the Department show that the contiguous land upon which the Navajo Tribe bases its preference-right claim was acquired by the United States in trust for the Navajo Tribe, its successors and assigns forever, from the Santa Fe Pacific Railroad Company under a deed dated May 14, 1929. The deed reserved to the grantor, its successors and assigns

> * * * all oil, gas, coal and minerals whatsoever, already found or which may hereafter be found, upon or under said lands with the right to prospect for, mine and remove the same and to use so much of the surface of said lands as shall be necessary and convenient for shafts, wells, tanks, pipe lines, rights of way, railroad tracts, storage purposes and other and different structures and purposes necessary and convenient for the digging, drilling and working of any mines or wells which may be operated on said lands. * * *[1]

The records show further that the grantor had the fee simple title to the land granted[2] and that the land was acquired for the use and benefit of the Indians of the Navajo Tribe under an act of Congress which authorized the use of tribal funds on deposit in the Treasury of the United States to the credit of the Navajo Tribe for the purchase of land and which directed that title to the land should "be taken in the name of the United States in trust for the Navajo Tribe" and which authorized title to be taken, "in the discretion of the Secretary of the Interior, for the surface only." 45 Stat. 1569.

Thus the Indians are the beneficial owners of the land granted under the deed. The United States Supreme Court has characterized such beneficial ownership to be "as sacred as the fee." For all practical purposes, the Tribe owns all that was conveyed by the deed[3] and, aside from the question to be discussed next, may be considered to be the owner of contiguous land within the meaning of the public sale law although naked legal title to the land is in the United States.

As the deed reserves the minerals to the grantor, the primary question presented is whether the Tribe's ownership of the title to contiguous land less the minerals meets the requirement of the regulation that ownership of the "whole title in fee" must be shown.

The question whether ownership of land under a deed which reserves the minerals is sufficient to support a preference-right claim under the Public Sale Act and the departmental regulations thereunder appears to be one of first impression.

In common usage, "whole title" or "title in fee" contemplates ownership in fee simple, that is, ownership of an estate of inheritance as

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[1] The deed is contained in Office of Indian Affairs File No. 38847, Part 2, and is recorded in the Miscellaneous Deed Book, Office of Indian Affairs, Volume 28, p. 39. It is also recorded in Book 7 of Deeds, p. 243, McKinley County, New Mexico.

[2] See Solicitor's Opinion M–25205, September 13, 1929.

[3] Cf. *United States* v. *Shoshone Tribe of Indians*, 304 U. S. 111 (1938).

distinguished from an estate for life or for years. Such an estate excludes all restrictions or qualifications as to the persons who may inherit as heirs. One who owns a fee simple title to land ordinarily owns the right to the minerals beneath that land and the right to extract and use the minerals. The right to the minerals passes with a grant of the surface unless the minerals have been separated from the surface.[4] But it is well settled that the minerals and the surface may be made the subject of separate and distinct ownerships.[5] The owner of a fee simple estate in land may separate the minerals in the land from the land itself, thus creating two estates, either by conveying the minerals and reserving the remaining interests in the land or by conveying the land and reserving the minerals. Once such a separation of the original estate has been made, if what is granted and retained are estates of inheritance, each estate becomes a fee simple estate, that is, one party obtains a fee simple title to the minerals and the other party obtains a fee simple title to the remaining estate. After severance, each estate is entirely independent of the other, separately inheritable and capable of conveyance.[6]

Thus where there has been a separation of land into two distinct estates of inheritance, the owner of each estate may be said to own a fee simple estate. Each is the owner of the whole title in fee in that estate.

As the owner of a fee simple estate in land under a deed reserving the minerals is as much an owner of land as is one who owns a fee simple estate in land from which the mineral estate has not been carved,[7] it must be held that such an owner meets the requirements of the statute, and that where it is shown that a preference-right claimant owns a fee simple title in land under a deed reserving the minerals and that land is contiguous to land offered at public sale, that applicant has met the requirements of the departmental regulation that "ownership of the whole title" or "the whole title in fee" must be shown.

As the Navajo Tribe made such a showing, it was correct for the manager to recognize the claim of the Tribe.

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[4] *Lacustrine Fertilizer Co.* v. *The Lake Guano & Fertilizer Co.*, 82 N. Y. 476 (1880).

[5] *Halla* v. *Rogers*, 176 Fed. 709 (9th Cir. 1910); *Saulsberry* v. *Maddix*, 125 F. 2d 430 (6th Cir. 1942); *Chicago, Wilmington and Franklin Coal Co.* v. *Minier*, 127 F. 2d 1006 (7th Cir. 1942); Thompson, *Real Property*, Vol. 1, §§ 88, 89; *Bouvier's Law Dictionary*, Mines and Mining, Vol. 2, p. 2214.

[6] *Adam* v. *The Briggs Iron Co.*, 7 Cush. 361 (Mass.) (1851); *Williams* v. *Gibson*, 4 So. 350 (Ala., 1888); *Riddle* v. *Brown*, 20 Ala. 412, 56 Am. Dec. 202 (1852); Thompson, *Real Property*, Vol. 1, §§ 90, 91, 97; *Bouvier's Law Dictionary*, Mines and Mining, Vol. 2, p. 2214.

[7] Cf. *British-American Oil Producing Co.* v. *Board of Equilization of Montana, et al.*, 299 U. S. 159 (1936).

Neither of the remaining contentions of the appellant has merit.

Nothing in the public sale law or the regulations of the Department governing public sales (43 CFR, Part 250) or any other regulations of the Department requires that the evidence which the preference-right claimant must submit in support of his claim must be taken at a hearing or that a bidder who is not a preference-right claimant must be given an opportunity to offer evidence against the claim at such a hearing. It is the duty of the Department to determine whether the claimant has met the requirements of the act. In making such a determination, the Department will consider evidence presented or charges made that a preference-right claimant does not satisfy the requirements of the statute but this may be done, as it was in the present case, without a hearing.[8] The appellant in this case presented his contentions against the title which the Tribe asserted both to the manager and to the Director. Both officials considered these contentions and found them insufficient to deprive the Tribe of its asserted preference right. The appellant has been deprived of no right by the failure of the manager to hold a hearing on the preference-right claim asserted by the Navajo Tribe.

The charge that the manager made his findings on matters not properly in evidence is not supported by the record. In asserting its preference right, the Navajo Tribe referred to the deed under which it claimed contiguous land. That deed is contained in the records of the Department. These records are evidence which the manager could properly consider in making his determination that the Navajo Tribe is a preference-right claimant for the tract in question.

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, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

RACHAEL S. PRESTON

A-27174

Decided February 6, 1956

Withdrawals and Reservations: Revocation and Restoration

Where an order opening land for disposition under the public land laws provides that commencing on the 126th day after the date of the order the

[8] Cf. *Mary Volk et al.*, A-26601 (May 5, 1953).

land shall be subject to nonpreference-right applications and provides that all such applications filed on or before the 126th day after the date of the order are to be treated as simultaneously filed, applications may be filed at any time after the date of the order.

Oil and Gas Leases: Applications

One who files an offer for an oil and gas lease on land which is opened to disposition under the public land laws by an order which specifies a future date on which the land shall become subject to such offers and which provides that applications filed before such future date shall be treated as simultaneously filed as of that date does not acquire priority for his offer by filing it prior to the future date specified in the order.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior by Mrs. Rachael S. Preston from a decision by the Associate Director of the Bureau of Land Management which reversed a decision by the manager of the land and survey office at Salt Lake City, Utah, holding that Mrs. Preston's oil and gas lease offer had priority over other similar offers to lease the same land. The offers were filed following the issuance of an order (No. 21 (R–IV)) dated January 11, 1954, by the Acting Regional Administrator, Region IV, Bureau of Land Management.

The order provided for the opening of public lands in Utah acquired by the United States in exchanges effected under section 8 (b) of the Taylor Grazing Act, as amended (43 U. S. C., 1952 ed., sec. 315g (b)), and set forth particulars relating to the characteristics of the land and the manner in which applications for the land should be processed. It covered, among other land, certain described subdivisions of land in T. 21 S., R. 7 E., S. L. M., Utah, the subject of this appeal. The order was filed with the Division of the Federal Register on January 19, 1954, and appeared in the daily issue of the Federal Register for January 20, 1954 (19 F. R. 362). Its provisions, pertinent to this appeal, are as follows:

This order shall not otherwise become effective to change the status of such lands until 10:00 a. m. on the 35th day after the date of this order. At that time the said lands shall, subject to valid existing rights and the provisions of existing withdrawals, become subject to application, petition, location, and selection as follows:

(a) *Ninety-one day period for preference-right filings.* For a period of 91 days, commencing at the hour and on the day specified above, the public lands affected by this order shall be subject only to (1) application under the homestead or the desert-land laws or the Small Tract Act of June 1, 1938, 52 Stat. 609 (43 U. S. C. 682a), as amended, by qualified veterans of World War II and other qualified persons entitled to preference under the act of September 27,

1944, 58 Stat. 747 (43 U. S. C. 279–284), as amended, subject to the requirements of applicable law, and (2) application under any applicable public-land law, based on prior existing valid settlement rights and preference rights conferred by existing laws or equitable claims subject to allowance and confirmation. Applications under subdivision (1) of this paragraph shall be subject to applications and claims of the classes described in subdivision (2) of this paragraph. All applications filed under this paragraph either at or before 10:00 a. m. on the 35th day after the date of this order shall be treated as though filed simultaneously at that time. All applications filed under this paragraph after 10:00 a. m. on the said 35th day shall be considered in the order of filing.

(b) *Date for non-preference-right filings.* Commencing at 10:00 a. m. on the 126th day after the date of this order, any lands remaining unappropriated shall become subject to such application, petition, location, selection, or other appropriation by the public generally as may be authorized by the public-land laws. All such applications filed either at or before 10:00 a. m. on the 126th day after the date of this order, shall be treated as though filed simultaneously at the hour specified on such 126th day. All applications filed thereafter shall be considered in the order of filing.

* * * * * * *

Applications for these lands, which shall be filed in the Land and Survey Office at Salt Lake City, Utah, shall be acted upon in accordance with the regulations contained in § 295.8 of Title 43 of the Code of Federal Regulations and Part 296 of that title, to the extent that such regulations are applicable. * * *

On January 21, 1954, Mrs. Preston filed an offer (Utah 011116) to lease the land involved in this appeal for oil and gas purposes under section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226), and thereafter other parties filed similar offers to lease the same land.

On April 20, 1954, the manager of the land and survey office at Salt Lake City held that the land became available for oil and gas leasing upon the filing of the order with the Division of the Federal Register and that the first offer filed thereafter, i. e., that of Mrs. Preston, had priority over other offers subsequently filed. He thereupon rejected 75 other offers to lease the land.[1] Sixty-four of the 75 applicants whose offers had been rejected appealed to the Director of the Bureau of Land Management.

On February 16, 1955, the Associate Director of the Bureau of Land Management reversed the decision of the manager and held that under paragraph (b) of the order, quoted above, all offers to lease the land under the Mineral Leasing Act filed after the order was published and within the 126-day period mentioned therein must be treated as though filed simultaneously at 10 a. m. on the 126th day and that preference rights between conflicting offers must be deter-

[1] The serial numbers of the offers rejected by the manager appear as a part of his decision.

mined by a drawing in accordance with the procedure prescribed in 43 CFR 295.8, relating to the processing of applications simultaneously filed.[2]

Mrs. Preston contends that the order does not mention offers under the Mineral Leasing Act and that it was error for the Associate Director to hold that offers for oil and gas leases on the lands covered by the order are to be governed by paragraph (b) thereof.

The land involved in this appeal was conveyed to the United States under an exchange of lands made pursuant to section 8 (b) of the Taylor Grazing Act, as amended, *supra*. The decision of the Bureau of Land Management accepting title to this land provided that "the land acquired by the United States in exchange shall immediately become subject to administration for grazing use but will not become subject to appropriation under the public land laws until an order authorizing such appropriation has been issued by this Bureau." Under that decision, the land was subject to administration for grazing use only. It was not subject to application for other uses under the public land laws. Before the land could become subject to such application, a subsequent order was needed. The order of January 11, 1954, was for this purpose.

The order provided that at 10 a. m. on the 35th day after the date thereof the status of the land should change from land reserved for grazing use only to land available for other types of acquisition or use under the public land laws. Paragraph (a) granted a period of 91 days after this time for the assertion of preference rights under certain laws by veterans and others entitled to assert preference rights and provided that during that 91-day period the land should be subject only to application by those asserting such preference rights. It provided further that all applications filed by such preference right claimants either at or before 10 a. m. on the 35th day after the date of the order should be treated as though filed simultaneously at that time and that applications by such preference right claimants filed after 10 a. m. on the 35th day should be considered in the order of filing.

Paragraph (b) set forth the time at which the lands should become subject to applications by nonpreference-right applicants. It provided that commencing at 10 a. m. on the 126th day after the date of

[2] Attached to the Associate Director's decision is a list of offerors. It is noted that included in that list are the names of two offerors, Imer Pett, Utah 011268 (erroneously listed as Utah 011269), and Royden G. Derrick, Utah 011300, who apparently took no appeal from the manager's decision rejecting their offers. Also listed are two offerors, Maybeth F. Reimann, Utah 011519, and Virginia Hilton, Utah 011553, whose offers were filed after the manager's decision and after the expiration of the 126-day period.

the order any lands remaining unappropriated should become subject to such application, petition, location, selection or other appropriation by the public generally as might be authorized by the public land laws and that all such applications filed either at or before 10 a. m. on such 126th day should be treated as though simultaneously filed at the hour specified on the 126th day. It provided that all applications filed thereafter should be considered in the order of filing.

The order, by its very terms, provided that the status of the land, which had previously been reserved for grazing administration, should not change until the 35th day after the date of the order. But it authorized the filing of applications for the land at any time after the date of the order. Ordinarily applications filed while land is in reserved or withdrawn status have no validity and will confer no rights upon the applicant but, to the extent that this order permitted the filing of applications prior to the date of the change in the status of the land, it constituted a departure from the previous practice of the Department of refusing to recognize applications filed prior to the date when the land becomes subject to application. It must be construed, as is every order restoring lands to the operation of the public land laws, according to its terms.

The net effect of the order was that all types of applications, including offers for oil and gas leases, could be filed at any time after the date of the order. However, except for applications filed by veterans and preference right claimants all applications filed from the date of the order to 10 a. m. on the 126th day after the order were not to be treated as filed until that time and then as being simultaneously filed as of that time.[3]

In this respect the order is to be distinguished from Public Land Order No. 543 (14 F. R. 79), mentioned by the manager. That order provided that it would "become effective immediately for the purpose of oil and gas leasing under the mineral-leasing laws" but that it (the order) "shall not otherwise become effective to change the status of such lands" until a future date. The effect of that order was that an oil and gas lease could have been issued immediately after the date of the order upon an application filed immediately after the date of the order. In other words there was no provision for delaying the effective filing date of applications for oil and gas leases filed after the date of the order.

[3] See letter from the Solicitor dated May 12, 1955, to Senator Joseph C. O'Mahoney, relating to Public Land Order No. 1043 (20 F. R. 53).

The order involved in this appeal is also substantially different from that dealt with in the case of *D. K. Edwards et al.* v. *Albert G. Brockbank et al.*, A–25960 (April 3, 1951), cited by both the manager and the Associate Director as being applicable to the present situation. The order under discussion in that case (Order of July 1, 1948; 13 F. R. 4105) dealt with two separate and distinct groups or classes of land. With respect to land in the first category, the order merely revoked an existing withdrawal while with respect to the land in the other category the order, like the order in this case, specified a future date upon which the status of the land would change and provided for a 90–day period thereafter during which veterans and other preference right claimants could file, and for filing after the 90–day period by the general public. However, unlike the order involved in this case, it did not allow the advance filing of applications at any time after the date of the order but restricted such advance filings to a period of 20 days preceding the beginning of the 90–day period, in the case of veterans and preference right claimants, and to a period of 20 days preceding the end of the 90–day period, in the case of the general public.

The Department held that the fact that no future date on which the land in the first category would become subject to application was specified, while a future date was specified for land in the second category, evidenced an intent that the land in the first category should become subject to application on a different date from that mentioned in connection with the land in the second category. It held, in the *Brockbank* case, that the land in the first category became subject to applications for oil and gas leases when the order was filed with the Division of the Federal Register.

In *Mary E. Brown*, 62 I. D. 107 (1955), the Department had for consideration the availability of land falling in the second category of land covered by the order of July 1, 1948. Miss Brown had filed an application for an oil and gas lease prior to the date specified in the order for the change in the status of the land and consequently prior to the date specified in the order for the advance filing of applications by the general public. It was held that her application, filed after the revocation of the withdrawal, but before the date specified in the revocation order for the receipt of applications for the land, must be rejected.

As the terms of the order discussed in the *Edwards-Brockbank* case and in the *Mary E. Brown* case are substantially different from the terms of the order involved in this appeal, the orders are not com-

parable and the rules laid down in those cases have no application to the present appeal.[4]

Therefore, as the order here under discussion does permit the filing of applications for oil and gas leases at any time after the date of the order and as it provides that all applications filed during the 126-day period by nonpreference right claimants shall be treated as simultaneously filed, it was correct for the Associate Director to hold that Mrs. Preston did not acquire priority for her offer by being the first applicant to apply for the land after the order was filed with the Division of the Federal Register and that all those who filed conflicting offers for the land within the 126-day period are entitled to participate in a drawing for the land as provided for in 43 CFR 295.8.[5]

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

EDMUND T. FRITZ,
Deputy Solicitor.

CONRAD LUFT

A-27246

Decided February 13, 1956

Patents of Public Lands: Amendments—Enlarged Homesteads: Mineral Reservation—Stock-Raising Homesteads

Where a patent was issued in 1919 containing a mineral reservation to the United States of all minerals under the Stockraising Homestead Act of December 29, 1916, and the patentee accepted the patent without objection, a supplemental patent without a mineral reservation as to part of the land as to which the reservation may have been erroneously imposed will not be issued where the patentee did not object and the successor to the patentee has held title for 24 years without protest and the Department has issued an oil and gas lease for the land involved.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Conrad Luft has appealed to the Secretary of the Interior from a decision dated July 11, 1955, by the Acting Director of the Bureau of

[4] On August 2, 1955, the Bureau of Land Management issued explicit instructions relating to the restoration of lands. Under those instructions future restorations will state plainly that the lands are open to the filing of applications under the Mineral Leasing Act and will specify the future date on which such applications will be considered as filed.

[5] Those offerors whose offers were rejected by the manager and who failed to take an appeal from the manager's decision are, of course, precluded from participating in such a drawing. *Charles D. Edmonson et al.*, 61 I. D. 355 (1954).

Land Management which rejected his application (Colorado 011094) to have patent No. 673405 corrected by removing the mineral reservation as to part of the lands therein.

Luft alleges that he is the record title holder of the lands granted in patent No. 673405 by mesne conveyances from John Franklin Watts, the original entryman and patentee. On March 9, 1914, Watts made enlarged homestead entry Sterling 020306 for 320 acres in sec. 3, T. 6 N., R. 52 W., 6th P. M., Colorado, under the act of February 19, 1909 (43 U. S. C., 1952 ed., sec. 218). On April 25, 1917, Watts filed a "Petition for Designation Stockraising Homestead Law" (act of December 29, 1916, 43 U. S. C., 1952 ed., sec. 291 *et seq.*) in which he asked that the S½ sec. 4, same township and range, and the 320 acres in sec. 3 be designated as "stock-raising lands" and subject to entry under the act of December 29, 1916. At the same time he filed an application (Sterling 026669) for a stockraising homestead entry-additional for the S½ sec. 4. This application was suspended until action on the petition for designation was taken. The Department's records indicate that the land in sections 3 and 4 was designated as subject to entry under the Stockraising Homestead Act. Thereafter on August 12, 1918, entry Sterling 026669 was allowed. On August 13, 1918, Watts filed notice of intention to make final proof on both his original and additional entry. Final proof was made on September 30, 1918. The final certificate was issued on the same day, without any reference to a mineral reservation. However, when the patent (No. 673405) was issued on April 8, 1919, it contained a reservation of all minerals pursuant to section 9 of the Stockraising Homestead Act (43 U. S. C., 1952 ed., sec. 299).

The appellant contends that this reservation was erroneous as to the lands in section 3, which were entered under the Enlarged Homestead Act, and asks that a supplemental patent without a mineral reservation be issued to him for these lands. Luft's request was filed on May 4, 1955. Prior thereto a 5-year oil and gas lease effective as of December 1, 1954, was issued to P. Y. Berri for the land in section 3.

The Acting Director, while saying that the mineral reservation was erroneous as to the land in section 3, rejected Luft's request on the ground that the patentee or his successors could only sell what he had, that is, the land without the minerals, and that as a result Luft had no legal or equitable title to the minerals.

The appellant contends that the land in section 3 was entered as an enlarged homestead entry and taken to final proof as such, that

the mineral reservation should only have applied to the land in entry 026669 (i. e., the S½ sec. 4), that the reservation was erroneous and therefore without authority of law and void as to the land in section 3, that he has full title to the land and minerals in section 3, that the issuance of an oil and gas lease to Berri was unauthorized, and that, under the laws of Colorado, he is the owner of all the rights of the patentee.

Luft's argument and the Acting Director's decision assume that the mineral reservation was improperly attached to the patent of the land in section 3. An examination of the record raises some doubts as to the validity of this assumption. The final certificate is devoid of any notation indicating a mineral reservation although the pertinent regulation, which clearly applied to entry 026669, stated:

> * * * The face of final certificates issued on every homestead entry made under the provisions of this act must bear the following:
>
> "Patent to contain reservation of coal and other minerals, and conditions and limitations as provided by act of December 29, 1916 (Public 290)." Instructions 45 L. D. 625, 636.

Furthermore, at the top of the first page of Watts' final proof, the words "Acts 6/6/12; 2/19/09; 12/29/16" are written in ink with a line drawn through "2/19/09." There is no indication of when these words were added, but the fact that the reference to the Enlarged Homestead Act is lined out reveals some uncertainty as to under which act the final proof was made.

It must also be borne in mind that it was permissible to amend an unperfected enlarged homestead entry covering land suitable for entry under the Stockraising Homestead Act into an entry under the latter and to include in the entry, as amended, additional stockraising homestead land. *Charles Makela*, 46 L. D. 509 (1918); *Mary T. Jurgens*, 50 L. D. 595, 597 (1924). Although Watts' application for a stockraising homestead entry (Sterling 026669) specifically included only the S½ sec. 4, his petition for designation which accompanied the application strongly indicates that he intended or contemplated changing his enlarged homestead entry for the land in section 3 to a stockraising entry. The petition expressly requested that the land in section 3 "be designated as 'stock-raising lands' and subject to entry under the act of December 29, 1916." In his detailed description of each quarter-quarter section of the lands in sections 3 and 4, he described only 50 acres in the SE¼ section 3 as having been cultivated and the remaining 270 acres in section 3 as "containing sage brush" and being "open grass lands" and said the lands in sections 3 and 4 were suitable for grazing during the spring, summer,

and fall. In describing the cultivation of the 50 acres in section 3, he said that he had had a fair corn crop in 1915 but the crop in 1916 was a complete failure and that "from my experience in 1916, I am convinced that it was a mistake to ever have broken out the land and that the soil is such a sandy and blowy nature that it will not pay to seed any portion of it in the future."

Finally the fact that Watts accepted, without apparent protest, a restricted patent, raises a presumption that this was the type of patent to which he was entitled.[1] *United States* v. *Price et al.*, 111 F. 2d 206, 208 (10th Cir. 1940).

These factors, while by no means conclusive that Watts' final proof was made under the Stockraising Homestead Act, are sufficient to temper an unqualified assertion that final proof was made under the Enlarged Homestead Act and that the mineral reservation was erroneous.

If the patent was in fact issued under the Stockraising Homestead Act, the mineral reservation was proper and there would be no basis for issuing a supplemental patent.

The appellant contends that the mineral reservation was without authority of law and therefore a nullity, citing *Burke* v. *Southern Pacific Railroad Company*, 234 U. S. 669 (1914). In that case the Department had issued a patent to the railroad company covering large areas of land, the patent containing a clause excluding all mineral lands should any be found in the lands patented. The court held that, although under the granting act mineral land did not pass to the railroad, the Department had to determine which lands were mineral before it issued a patent and could not include in the patents a clause excluding from the patent any land later found to be mineral.

Here the patent on its face is completely regular and the reservation imposed is the one required under the Stockraising Homestead Act. The defect, if any, is apparent only when an examination is made of the proceedings lying behind the issuance of the patent. Cf. *United States* v. *Price et al.* (*supra*). The question is not whether the Department could insert the reservation in the patent, but whether the patent was issued under the proper statute. In other words, the

[1] A Mary E. Watts, who on March 9, 1914, the same day that Watts made entry 020306, made entry Sterling 020305 for land in sections 2 and 3, and who on August 12, 1918, the same day on which Watts' stockraising homestead entry 026669 was allowed, had a similar entry (Sterling 025823) allowed on other land in sections 2 and 3, was issued two separate patents, one (patent 774034) without a mineral reservation covering the land in entry 020305 and one containing a mineral reservation under the act of December 29, 1916 (patent 746287, April 26, 1920) for the land in entry 025823.

reservation itself is not unauthorized as it was in the *Burke* case, but, at most, was erroneously inserted in the patent.

If it be assumed that the patent for the lands in question here should have been granted under the Enlarged Homestead Act without a mineral reservation, it still does not follow that a supplemental patent must now issue. In many other instances the Department has refused to issue a supplemental patent for minerals which were erroneously reserved in the original patent. In *Edward Christman et al.*, 62 I. D. 127 (1955), the Department denied a request for a supplemental patent for oil and gas deposits filed by a successor to the patentee on the grounds that the validity of the mineral reservation had been adjudicated, although erroneously, many years ago, that no question concerning the reservation had been raised for 34 years, and that the applicant had no equities supporting his petition. In *Lillie M. Kelly*, 49 L. D. 659 (1923), the Department refused to issue an unrestricted patent only 5 years after the patentee had accepted a patent with an oil and gas reservation required by a departmental practice then in effect but later held to be erroneous. In *Karl A. P. Loyning*, 53 I. D. 479 (1931), the Department, in denying a request to exchange a patent with an oil and gas reservation for an unrestricted one, noted that the patent had been accepted and no objection raised until 14 years after its issuance.

In many other cases the Department has held it will not correct, after a long lapse of time, erroneous decisions acquiesced in by the parties involved. *State of Louisiana et al.*, A–26980 (December 29, 1954); *State of Louisiana*, 61 I. D. 170 (1953); *John C. Carter et al.*, A–26545 (December 24, 1952).

In the instant case, the patentee accepted the restricted patent in 1919 without objection, his successors took title with full knowledge of the reservation, and the appellant held the title for 24 years before requesting relief. In the meantime the Department has issued an oil and gas lease for the lands involved.

Under these circumstances I must conclude that there is no warrant for issuing a supplemental patent conveying the reserved minerals.

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.

MAX BARASH
THE TEXAS COMPANY

A-27239

Decided February 14, 1956

Administrative Procedure Act: Generally

The definition of the known geologic structure of a producing oil or gas field is not an "interpretation formulated and adopted by the agency for the guidance of the public" within the meaning of section 3 (a) (3) of the Administrative Procedure Act and it is effective without publication in the Federal Register.

Oil and Gas Leases: Known Geological Structure

If the producing character of the geological structure underlying a tract of land is actually known prior to the date of the Department's official pronouncement on that subject, it is the date of the ascertainment of the fact and not the date of pronouncement that is determinative of rights which depend on whether the land is or is not situated within the known geological structure of a producing oil or gas field.

Oil and Gas Leases: Known Geological Structure—Geological Survey

When the Director of the Geological Survey recommends certain acquired lands of the United States for leasing in accordance with the competitive leasing provisions of the Mineral Leasing Act, he has, in effect, defined them as being within the known geologic structure of a producing oil and gas field.

Oil and Gas Leases: Known Geological Structure

A definition of the known geological structure of a producing oil or gas field is, in effect, a withdrawal of the lands included within the bounds of the structure from noncompetitive leasing.

Oil and Gas Leases: Lands Subject to

An application for a noncompetitive lease for lands which are within the known geologic structure of a producing oil and gas field at the time the application is filed must be rejected because such lands are withdrawn from noncompetitive leasing.

Oil and Gas Leases: Known Geological Structure—Oil and Gas Leases: Cancellation

When a competitive oil and gas lease has been issued for a tract of land upon the recommendation of the Geological Survey and there are no intervening interests, there is no justifiable basis for later canceling the lease because the Geological Survey later determines that the leased land was not situated within the known geologic structure of a producing oil or gas field at the time of issuance of the lease.

Statutory Construction: Administrative Construction

A long continued and uniform administrative interpretation of a statute is entitled to great weight in its construction, particularly where Congress has accepted, and acted upon the basis of, the administrative interpretation.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Max Barash and The Texas Company have each appealed to the Secretary of the Interior from a decision dated June 21, 1955, of the Director of the Bureau of Land Management which rejected in part Barash's noncompetitive offer to lease for oil and gas certain acquired lands in Texas and which canceled all of one and part of another competitive oil and gas lease previously issued to The Texas Company.

The lands involved in these appeals are situated in Gray County, Texas, and were acquired by the Soil Conservation Service of the Department of Agriculture for its Lake McClellan Park Project. They are now under the jurisdiction of the Forest Service. They lie on the southern edge of the Panhandle Field.

On June 12, 1952, the Director of the Geological Survey sent a memorandum to the Director of the Bureau of Land Management, which read in part as follows:

> The Department of Agriculture, Soil Conservation Service, has inquired of the Geological Survey whether it is in the best interests of the United States to offer for competitive lease sale certain lands in Gray County, Texas.
>
> The records of the Geological Survey disclose that this land may be subject to drainage of its oil and gas content as the subject area is on the southern edge of the Panhandle field. In order that the extent and worth of the deposits in the field may be determined and development may proceed in an orderly manner, the Geological Survey recommends that the oil and gas rights owned by the United States within the area involved be offered for lease in accordance with the competitive leasing provision of the Mineral Leasing Act, as amended.

In response to an inquiry from the Bureau of Land Management, the Soil Conservation Service on November 5, 1952, forwarded to it a metes and bounds description of the land available for leasing, stated that oil and gas leasing would not interfere with the primary purpose for which the lands had been acquired and were being administered, and set out several special terms and conditions which it desired to be included in any leases issued for these lands.

On December 22, 1952, the Geological Survey, in answer to a request from the Bureau of Land Management for a supplemental report on the offering of these lands for oil and gas leasing by competitive bidding, sent a memorandum to the Bureau of Land Management saying it had no objections to the special terms and conditions requested by the Soil Conservation Service and making certain suggestions on other aspects of the proposed leases.

After further correspondence between the three agencies, the Bureau of Land Management on June 2, 1953, mailed out notices to various officials of the Department, to certain elected public officials, to various

private persons, and to the trade magazine and local newspaper in which the advertisement of the sale was to appear, setting out the date (July 22, 1953) and conditions of the sale of the leases.

On the appointed day the bids were opened. The Texas Company was named high bidder for parcels 1 and 2, containing 462.57 and 453.64 acres, more or less, respectively, and Baker and Taylor Drilling Co. for parcel 3, containing 38.30 acres, more or less. Thereafter leases BLM–A 034714 and 034715 were issued to The Texas Company, effective September 1, 1953, for parcels 1 and 2, respectively, and lease BLM–A 034716 to Baker and Taylor Drilling Co., effective October 1, 1953, for parcel 3.

Meanwhile on June 5, 1953, Barash filed a noncompetitive oil and gas offer, BLM–A 034282, for the lands in parcels 1, 2 and 3. On September 24, 1954, he filed a protest against the issuance of leases BLM–A 034714–6 and asked that they be canceled.

At the request of the Bureau of Land Management the Geological Survey, on February 11, 1955, submitted a supplemental report on the lands involved in this appeal, which read in part as follows:

> As of June 12, 1952, when the Geological Survey reported that the Lake McClellan Park lands "may be subject to drainage," no determination had been made as to whether all of the lands were or were not within a known geologic structure.
>
> A review of the structural aspects of the lands involved has been made as of June 5, 1953, the date of filing of application BLM–A 034282. This review shows that part of the lands on which competitive leases were sold in July 1953 are not within a known geologic structure as those limits were deemed to exist on June 5, 1953.
>
> The lands believed to be within the known geologic structure are confined to surveys (sections) 9 and 10 of the subdivision of the Rockwell County School Land, Gray County, Texas. The remainder of the lands were not within a known geologic structure on June 5, 1953.

Upon consideration of this report and the applicable law, the Director determined that all the land included in leases BLM–A 034715 and 034716 and 126.67 acres of the land covered by lease BLM–A 034714 had not been embraced within the known geologic structure of a producing oil and gas field on or prior to June 5, 1953, the date on which Barash filed his application, and canceled leases BLM–A 034715 and 034716 in their entirety and lease BLM–A 034714 as to the 126.67 acres. He further rejected Barash's application BLM–A 034282 as to the land left in BLM–A 034714 (335.90 acres) and withheld action on issuing Barash a lease for the remaining lands in his application until the cancellation proceedings had been completed. Thereupon

The Texas Company appealed to the Secretary from so much of the Director's decision as canceled lease 034714 in part and 034715 in whole, and Barash appealed from the partial rejection of his application. Baker and Taylor Drilling Co. filed no appeal from the cancellation of lease BLM–A 034716.

The lands involved in this appeal, as lands acquired by the United States, are subject to leasing under the provisions of the Mineral Leasing Act for Acquired Lands of August 7, 1947 (30 U. S. C., 1952 ed., sec. 351 *et seq.*). Section 3 of this act (id., sec. 352) provides that oil and gas deposits in such lands may be leased by the Secretary under the same conditions as contained in the mineral leasing laws. The provisions pertinent here for leasing oil and gas deposits are found in sections 17 and 32 of the Mineral Leasing Act of 1920 (30 U. S. C., 1952 ed., secs. 226, 189). Section 17 states in part:

* * * When the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations * * *. 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 said section shall be entitled to a lease of such lands without competitive bidding. * * *

Section 32 reads:

* * * the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this act * * *.[1]

Barash next contends that the provisions of sec. 3 (a) (3) of the Administrative Procedure Act of June 11, 1946 (5 U. S. C., 1952 ed., sec. 1002 (a) (3)), require the publication in the Federal Register of all definitions of known geologic structures of producing oil and gas fields.

That section provides, in pertinent part, as follows:

(a) Every agency shall separately state and currently publish in the Federal Register * * * (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public * * *. (5 U. S. C., 1952 ed., sec. 1002 (a).)

Barash argues that the definition of the known geologic structure

[1] Section 10 of the Acquired Lands Mineral Leasing Act (30 U. S. C., 1952 ed., sec. 359) authorizes the Secretary to prescribe necessary rules and regulations, which are to be the same as those prescribed under the mineral leasing laws to the extent they are applicable.

of a producing oil or gas field is an "interpretation[s] formulated and adopted by the agency for the guidance of the public." He states that the Department adopted this view after the passage of the Administrative Procedure Act and thereafter has regularly published such definitions in the Federal Register.

Barash does not cite, nor has careful research revealed, a departmental decision or memorandum stating that the definition of a known geologic structure must be published in the Federal Register before it is effective against applications filed prior to publication. It is true, as he states, that the Department does publish such definitions. It may also be true that the definitions were originally published with the view that such publication was required by sec. 3 (a) (3). However, it is also possible that the definitions were published out of an abundance of caution; that is, the Department was uncertain whether sec. 3 (a) (3) required the publication of definitions but decided to err on the safe side.

In furtherance of the latter statutory provision, the pertinent regulation provides:

> The Director of the Geological Survey will determine the boundaries of the known geologic structures of producing oil or gas fields * * *. Maps or diagrams showing the boundaries of known geologic structures of producing oil or gas fields * * * will be placed on file in the appropriate district land office, and office of the oil and gas supervisor. 43 CFR 192.6.

There is no indication in the record that at the times material here any map or diagram showing the boundaries of the Panhandle field had been prepared or filed. Even if this be so, the Department has held many times that if the producing character of the structure underlying a tract of land is actually known prior to the date of the Department's official pronouncement on that subject, it is the date of the ascertainment of the fact, and not the date of the pronouncement, that is determinative of rights which depend upon whether the land is or is not situated within the known geologic structure of a producing oil or gas field. *Ernest A. Hanson*, A–26375 (May 29, 1952), and cases cited therein. In one of the cases cited, *H. E. Christensen*, A–26221 (August 31, 1951), the appellant argued to the contrary, citing 43 CFR 192.6. However, the Department adhered to the established rule. Thus, it must be held that, under the Department's long established policy, the fact that no maps or diagrams were filed in the designated offices does not of itself require the Department to issue a noncompetitive lease to Barash if the producing character of the structure was actually known prior to the date of his application.

Whatever the situation may have been, it is clear that from the very beginning the Department has held the view that a definition can be effective long before it is published. An examination of published definitions will reveal that they consist of the name of the field, the effective date, and the acreage. The effective date of the definition does not coincide with the date of publication,[2] a fact which is inconsistent with the view that the Department has thought the act of publication was essential to the effectiveness of a definition. In other words, if a definition became effective only upon publication there would be no occasion to list as an effective date, a date which always appears to be some time prior to the date of publication. Therefore, it must be concluded that so far as it is material the Department has not in fact interpreted section 3 (a) of the Administrative Procedure Act to require the publication in the Federal Register of a definition of a known geologic structure before such definition is effective for the purposes of the Mineral Leasing Act.

This conclusion is supported by the Department's decisions in cases involving a definition of a known geologic structure. In *Ernest A. Hanson, supra*, an application for a noncompetitive oil and gas lease filed on January 3, 1949, was rejected on the basis of a determination made by the Geological Survey on May 31, 1949, that the land applied for was within a known geologic structure of an "undefined addition" to the Maljamar field and the facts sustaining such a determination were known prior to the date of the application although there had been no official announcement prior to that date.[3] In *The Texas Company*, A–26214 (July 27, 1951), a lessee was denied a preference right oil and gas lease pursuant to section 1 of the act of July 29, 1942 (56 Stat. 726), on the basis of a report made by the Geological Survey on October 4, 1950, that at the date of expiration of the original lease (September 30, 1950) the lands at issue were known to be within the known geologic structure of a proposed addition to the Bowdoin gas field although the official approval of the addition was not made until October 6, 1950.[4] It will be observed that in both these cases the determinations were made after the enactment of the Administrative Procedure Act but that the Department considered the determinations to be effective as of dates well in advance of any publication in the Federal Register.

A recent amendment of the Mineral Leasing Act enacted after the passage of the Administrative Procedure Act demonstrates that the

[2] For a recent example, see 20 F. R. 3085.
[3] *Grace E. Van Hook*, A–26494 (November 18, 1952).
[4] To the same effect: *H. E. Christensen, supra.*

Congress was aware of the Department's practice in determining the effective date of the definition of the known geologic structure of a producing oil or gas field and accepted and acted upon that practice.

Section 1 of the act of July 29, 1942, *supra*, amended the Mineral Leasing Act by granting to the holder of a 5–year oil and gas lease a preference right to a new lease upon the expiration of his old lease except that "* * * The preference right herein granted shall not apply to lands which on the date of the expiration of a lease are within the known geologic structure of a producing oil or gas field."

In administering section 1, the Department adhered to its established policy in determining the effective date of the definition of a known geologic structure. Solicitor's Opinion, 58 I. D. 766, 775–776 (1944); *The Texas Company, supra; H. E. Christensen, supra.*

In the extensive revision of the Mineral Leasing Act by the act of August 8, 1946 (60 Stat. 950), the preference right to a new lease granted by the 1942 act was replaced by the grant of a right to a 5–year extension of the original lease as to lands not within the known geologic structure of a producing oil or gas field (30 U. S. C., 1952 ed., sec. 226). As to lands within the latter category, the act provided:

> * * * 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. 30 U. S. C., 1952 ed., sec. 226.

It is noteworthy that this statute was enacted less than two months after the passage of the Administrative Procedure Act and shortly before the Department published its first list of known geologic structures in the Federal Register (11 F. R. 9104). Yet neither the Administrative Procedure Act nor the practice of publishing these definitions in the Federal Register changed the Department's views as to the effective date of the definition of a known geologic structure. In other words, in determining whether a lessee was entitled to a 5-year extension under the 1946 amendment, the Department continued the practice of ascertaining whether the facts known on the expiration date of the lease established that the leased land was situated within the known geologic structure of a producing field although this determination was not made until some time after the expiration date of the lease.

The continuity of the Department's practice is clearly demonstrated by testimony at the hearing on S. 2380, 2381, and 2382 (83d Cong.,

2d sess.) held by the Senate Subcommittee on Public Lands of the Committee on Interior and Insular Affairs. In discussing suggested amendments to the extension provisions of section 17 of the Mineral Leasing Act, which became section 2 of the act of July 29, 1954 (30 U. S. C., 1952 ed., Supp. II, sec. 226), Assistant Secretary of the Interior Lewis said:

Mr. LEWIS. Now, another point that is covered in 1 of these 2 bills—I have considered them together, and I cannot refer to which bill it is in—is the provision for the extension of leases.

You know at the present time the law provides that if a lease on its last day is on a known geological structure then no extension can be had. *Well, as a practical matter, it is not possible for the Geological Survey to decide on the last day of your lease whether it is or it is not on such a structure.* You do not know at that time whether you have an extension of your lease or not.

Under the provisions of the new measure, it would mean that you could make your application, as you usually do, for an extension; and you would know that that application would extend your lease either for a period of 5 years, if it was not on a structure on the last day of the lease, or for a period of 2 years, if it was.

It would injure no one, and it would leave you knowing what your situation is. *Two years would be more than ample time to decide whether or not, at that time, you had been on a structure.* And it would be workable.

As it is at the present time, it is not workable and it is very unfair to the lessees.

Senator BARRETT. That would be automatic then, Mr. Secretary?

Mr. LEWIS. Yes. He would make his application and would know it would extend his lease. He would not know how long it would extend his lease for some time, but certainly he would know it would extend it long enough for him to go ahead and take steps that he otherwise might not be able to take. (Pages 14–15, italics added.)

An industry representative stated:

Referring now to the second amendment in S. 2380, which amends the third paragraph of section 17, we think that Secretary Lewis in his report to the committee this morning has very adequately presented the reasons behind the proposed amendment.

We were aware when we encountered this problem initially that there were a number of situations faced by operators in our section of the country in which they found themselves on the last day of their initial 5-year term of a noncompetitive lease in a dilemma, not knowing whether or not they would be entitled to an extension of an additional 5 years or whether the lands were in a known geologic structure.

It also precipitated a situation where, in order to protect their rights under their lease, they would be forced to commence drilling a well at possibly a location which would be unwise from the standpoint of their geology and their particular financial circumstances.

We feel that this amendment will adequately take care of these various situations which have been encountered in that respect. (Page 21.)

Lewis Hoffman, Minerals Officer, Bureau of Land Management, explained the proposed amendment as follows:

Mr. HOFFMAN. Under the existing law, the 1946 act provides that a holder of a 5–year noncompetitive lease may have it extended for a period of 5 years provided—and here are the provisions—first, that he applies for such extension within 90 days prior to the termination of the 5–year period;

Second, that the lands on the termination date of the 5–year period are not on a producing structure;

Third, that the lands were not withdrawn from oil and gas leasing during the interim, while the lease was in existence.

In that withdrawal there is a further provision that notwithstanding the withdrawal of the lands from oil and gas leasing unless the lessee has been notified for a period of 90 days prior to the termination of the lease, then he would get the 5–year extension nevertheless.

This amendment leaves all those provisions intact except the one that it is on a producing structure on the termination date of 5 years.

The reason for this is that under our procedure we call for a report in every instance where a lessee applies for a 5–year extension from the Geological Survey as to whether or not on the termination date of the 5 years the lands were or were not on a producing structure.

Very often, the Geological Survey, on a recent discovery in the vicinity, is unable for months later to actually define or ascertain whether the lands are or are not on a producing structure.

The lessee is held in abeyance with the result that if the survey does find and he reports on the termination date of the lease the lands are on a producing structure, his lease has terminated by operation of law at the end of its fifth-year term notwithstanding he has paid his rental and he has applied for a 5–year extension.

This would remedy that situation that if he applied within 90 days prior to the termination date of the lease and if he pays the sixth year rental and when the determination is made that it is not on a producing structure he would get the 5–year extension.

If it is determined that it is on a producing structure, he would get a 2–year extension without any notice to him whatever.

Senator BARRETT. He would get a 2-year extension for the lands within——

Mr. HOFFMAN. For the continuation of the whole lease.

Senator BARRETT. Inside and outside a known structure?

Mr. HOFFMAN. No; as to the portion outside the structure you get 5 years; as to the portion within you get two years. Not only 2 years but it is as long thereafter as gas and oil is produced in paying quantities.

The industry has asked us to recommend the amendment of the law so that people will not be out and not knowing whether they are out or in on the termination date of the lease. (Page 38–39.)

The act of July 29, 1954, *supra*, amended the third paragraph of section 17 of the Mineral Leasing Act, as amended, to read in pertinent part as follows:

Upon the expiration of the initial five–year term of any noncompetitive lease maintained in accordance with applicable statutory requirements and regula-

tions, 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 withdrawn from leasing under this section. * * * A noncompetitive lease, as to lands not within the known geologic structure of a producing oil or gas field, shall be extended for a period of five years and so long thereafter as oil or gas is produced in paying quantities. A noncompetitive lease, as to lands within the known geologic structure of a producing oil or gas field, shall be extended for a period of two years and so long thereafter as oil or gas is produced in paying quantities. * * *

Thus, it is apparent that under both the 1946 and 1954 amendments to the Mineral Leasing Act the Department made clear its position that rights depending upon whether land was in the known geologic structure of a producing oil and gas field were to be determined as of the date of the ascertainment of the fact and not the date of its pronouncement and that the Congress, in adopting the 1954 amendment, accepted and acted upon that position. It is equally apparent that if, as Barash urges, a definition of a known geologic structure, is of no effect until after it has been published in the Federal Register, the 1954 amendment to the Mineral Leasing Act would have been largely unnecessary. That amendment was specifically designed to alleviate the situation where, after the expiration date of a lease, the Geological Survey made a determination that on or before such expiration date the leased lands were situated on the known geologic structure of a producing field and the lessee was therefore not entitled to a 5-year extension. This situation, which Congress recognized, obviously could not have arisen if the determination was not effective until published.

The only possible and reasonable conclusion that can be drawn from the consistent and unvarying departmental practice and the legislative history of the 1954 amendment is that the Department has not construed section 3 (a) of the Administrative Procedure Act as requiring the publication of definitions of known geologic structures of producing fields in order for such definitions or determinations to become effective. A long continued and uniform administrative interpretation of a statute is entitled to great weight in its construction. *United States* v. *Wyoming*, 331 U. S. 440, 454 (1947); *Lykes* v. *United States*, 343 U. S. 118, 126–127 (1952); *United States* v. *American Trucking Associations, Inc., et al.*, 310 U. S. 534, 549 (1940). Particularly is this so where Congress has accepted, and acted upon the basis of, the administrative interpretation. *Brooks* v. *Dewar*, 313 U. S. 354, 360–61 (1941).

Therefore, I conclude that the Department may properly reject a noncompetitive offer to lease for oil and gas because it covers land within the known geologic structure of a producing oil or gas field

so long as the determining facts are ascertained prior to the date of the offer.

This conclusion disposes of Barash's appeal from the partial rejection of his application as to the lands included in BLM–A 034714.[5]

As has been noted above, The Texas Company has appealed from the Director's decision insofar as it canceled lease BLM–A 034714 in part and BLM–A 034715 in its entirety. The Director's decision was based upon his conclusion that the tracts as to which the leases were canceled were not within the known geologic structure of a producing oil or gas field on June 5, 1953, the day on which Barash's application was filed. This conclusion, in turn, resulted from the supplemental report, dated February 11, 1955, of the Geological Survey stating that at the time of its previous report of June 12, 1952, no determination had been made as to whether all the lands involved in this appeal were or were not within a known geologic structure and that a review of the structural aspects of the land involved showed that as of June 5, 1953, only part of the land (the 335.90 acres as to which lease BLM–A 034714 was not canceled) was within a known geologic structure.

The Director held that since competitive leases can be issued only for lands on a known geologic structure of a producing oil or gas field, the issuance of competitive leases BLM–A 034715 and BLM–A 034716 in whole and BLM–A 034714 in part was unauthorized and invalid and therefore subject to cancellation.

The correctness of the Director's action depends, in the first instance, upon whether the lands originally leased had been determined to be within the known geologic structure of a producing oil and gas field.

It appears that the Department's attention was first called to the land in question by an inquiry from the Soil Conservation Service, Department of Agriculture, asking whether it was in the interest of the United States to lease the land on a competitive basis. In his memorandum dated June 12, 1952, the Director of the Geological Survey informed the Director of the Bureau of Land Management as follows:

> The records of the Geological Survey disclose that this land may be subject to drainage of its oil and gas content as the subject area is on the southern

[5] In his brief on appeal, Barash states that he has not waived his right to argue the applicability of the Federal Register Act of July 26, 1935 (44 U. S. C., 1952 ed., sec. 301 *et seq.*). It is sufficient to note that the definition of "known" lands does not fall within any of the classes of documents whose publication is required by section 5 (a) of the act, unless it comes within the clause (3) by reason of section 3 (a) (3) of the Administrative Procedure Act. Since it is my opinion that the latter section is not applicable, I am also of the opinion that the Federal Register Act is equally inapplicable.

edge of the Panhandle field. In order that the extent and worth of the deposits in the field may be determined and development may proceed in an orderly manner, the Geological Survey recommends that the oil and gas rights owned by the United States within the area involved be offered for lease in accordance with the competitive leasing provisions of the Mineral Leasing Act, as amended.

Although there is no specific statement that the land is within the known geologic structure of a producing oil or gas field, such a determination is necessarily inherent in the Geological Survey's memorandum. Only lands within a known geologic structure of a producing oil or gas field are subject to competitive leasing. 30 U. S. C., 1952 ed., sec. 226.[6] Therefore a recommendation that a tract of acquired land be leased competitively must be the equivalent of a finding that it is within the known geologic structure of a producing oil or gas field.

Furthermore, the first sentence of the paragraph quoted above shows that the Geological Survey consulted the records before it recommended that the land be leased competitively. It also felt that there was a possibility of drainage, a factor which is, of course, significant in deciding whether land is within the known geologic structure of a producing oil or gas field. See *Hugo Giomi*, A–25672 (November 21, 1949).

The Geological Survey was consulted at various times during the next 12 months on matters relating to the competitive lease offering. At no time did it indicate that the land was not qualified for competitive leasing. Finally, on June 2, 1953, the notice of the competitive sale was distributed to many persons and agencies within and without the Department, including the Geological Survey.

Therefore, it must be concluded that no later than June 2, 1953, all the land involved had been determined to be within the known geologic structure of a producing oil or gas field.

I am aware that on February 11, 1955, the Director of the Geological Survey informed the Director of the Bureau of Land Management that at the time of his previous memorandum of June 12, 1952, no determination had been made as to whether all of the lands involved were or were not within a known geologic structure. However, in view of the contents of the June 12, 1952, memorandum, and the well-known statutory requirement that only lands within a known geologic structure can be leased competitively, I cannot accept the later statement as an accurate summation of the Geological Survey's earlier action. It may have misread the evidence at that earlier time and

[6] By section 3 of the Mineral Leasing Act for Acquired Lands (30 U. S. C., 1952 ed., sec. 352) the terms and conditions of the mineral leasing laws are made applicable to acquired lands leases.

perhaps its current opinion that the land involved in The Texas Company appeal was not within a known geologic structure as of June 5, 1953, is correct; but these considerations cannot alter the fact that when the Geological Survey recommends land for competitive leasing, it has, in reality, found that it is within the known geologic structure of a producing oil or gas field.

Turning now to the effect of this finding on Barash's application, which was not filed until several days after June 2, 1953, and almost a year after June 12, 1952, I find that the Department has summarized its views on this problem as follows:

> A definition of the known geologic structure of a producing oil or gas field is, in effect, a withdrawal of the lands included within the boundaries of such structure from noncompetitive leasing. *Lincoln-Idaho Oil Company*, 51 L. D. 235 (1925). While the lands remain so defined, they may be leased only by competitive bidding. *George C. Vournas*, 56 I. D. 390 (1938). Mr. Shell's application, having been filed at a time when the land was still defined to be within the structure was, therefore, properly rejected.
>
> Furthermore, it is well settled that an application for land filed while the land is withdrawn from entry is invalid; that the revocation of a withdrawal during the pendency of an applicant's appeal from the rejection of his application does not validate the application; and that an application relating to withdrawn land may not be suspended to await the lifting of the withdrawal and then considered as if filed at the instant that the land is restored to entry. *D. Miller*, 60 I. D. 161 (A-24692, April 15, 1948); *Charles W. Trounson*, 60 I. D. 182 (A-24583, May 27, 1948). Hence, where an application for a noncompetitive oil and gas lease is filed covering lands which are at the time of the filing of the application within the known geologic structure of a producing oil or gas field, it may not be suspended to await action by the Department on the redefinition of the boundaries of the structure. *W. Nelson Shell*, A-26623 (June 1, 1953).

Therefore, regardless of whether The Texas Company leases were properly canceled, Barash's application must be rejected in its entirety.

There remains the disposition of The Texas Company's appeal from the cancellation in whole or in part of leases BLM-A 032715 and 032714. The only defect urged against these leases is that they are competitive leases covering land which the Geological Survey has decided, almost 18 months after the leases were issued, was not at the time the leases were issued within the known geologic structure of a producing oil or gas field. Yet, as we have seen, it had been clearly determined at the time the leases were issued that the leased lands were situated on the known geologic structure of a producing field.

The matter thus resolves itself into a case in which at best there is some confusion or uncertainty as to the character of the lands on the date on which the leases were issued. In the circumstances, since Barash's application must in any event be rejected and there are no

other intervening or adverse rights, I see no justifiable basis for canceling the leases. Cf. *Hugo Giomi, 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 Director of the Bureau of Land Management is affirmed insofar as it held Barash's application for rejection for part of the land included in lease BLM–A 034714 and reversed insofar as it canceled leases BLM–A 034714 in part and BLM–A 034715 in its entirety and held Barash's application for further processing with respect to the lands in the canceled leases.

J. REUEL ARMSTRONG,
Solicitor.

U. S. GOVERNMENT PRINTING OFFICE: 1956

FRED AND MILDRED M. BOHEN ET AL.

A–27280

Decided February 17, 1956

Public Sales: Preference Rights

One who fails to submit satisfactory evidence of his ownership of contiguous land within 30 days after the date of a public sale loses his preference right to purchase the land.

Charles H. Hunter, 60 I. D. 395 (1950), *distinguished.*

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Fred and Mildred M. Bohen and John L. Brinkerhoff and Mary Emma Morris have appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated September 28, 1955, wherein it was held that the appellants had lost their preference rights to purchase an isolated tract of 304.76 acres offered at public sale in accordance with section 2455 of the Revised Statutes, as amended (43 U. S. C., 1952 ed., sec. 1171), because of their failure to submit their proofs of ownership of contiguous lands within 30 days after the date of the sale, as required by departmental regulation.

The regulation (43 CFR 250.11 (b)), adopted on August 11, 1954, provides, in accordance with the provisions of the public sale law, 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 at the highest bid price * * *." The regulation further provides:

(1) (i) A preference right to purchase must be supported by proof of the claimant's ownership of the whole title to the contiguous lands (that is, he must show that he had the whole title in fee), and must be accompanied by the purchase price of the land.

(ii) Failure to submit to the land office satisfactory proof during the 30-day period after the highest bid has been received will cause the preference right to be lost as to the particular public sale. Such proof must consist of (a) a certificate of the local recorder of deeds, or (b) an abstract of title or a certificate of title prepared and certified by a title company or by an abstracting company, showing that the claimant owns adjoining land in fee simple at or after the date of the sale. * * *

The tract was offered for sale pursuant to the application of Jacob E. Brolsma (Arizona 06166). On the date of the sale, March 15,

1955, only one bid was received, that of Maurice D. Brown, who was declared to be the high bidder. Action was suspended on the sale for a period of 30 days to allow preference right claimants to assert their rights to purchase the land.

During the 30-day period, Jacob E. Brolsma, Fred and Mildred M. Bohen (Arizona 08601), John L. Brinkerhoff and Mary Emma Morris (Arizona 08602), and the S and J Copper Mine, Inc. (Arizona 08603) met the high bid and all asserted preference rights as owners of contiguous land.

On April 13, 1955, Mr. Brolsma submitted a certificate from the Phoenix Title and Trust Company that title to property contiguous to that offered at the public sale was vested, on April 13, 1955, in Mr. Brolsma.

On April 14, 1955, the Bohens asserted their preference right but submitted nothing to support their claim. On the same day, John L. Brinkerhoff and Mary Emma Morris asserted a joint preference right to the land. Their agent stated that he would submit a certificate from the title company showing ownership of adjoining land to be in John L. Brinkerhoff and Mary Emma Morris. Submitted with their bid were copies of certain court decrees.

On April 19, 1955, the manager rejected the Bohens' application because no evidence had been furnished to show that the applicants were owners of contiguous land. On the same date, the manager rejected the claim of John L. Brinkerhoff and Mary Emma Morris because the applicants had failed to submit evidence showing their ownership of contiguous land at the time they submitted their preference right bid.

The decision of the Director affirmed the action of the manager in rejecting the two bids.

In their appeal, the Bohens allege that their agent inquired of the manager as to the procedure to be followed in the exercise of their preference right and that he was informed that a preference right claimant must make application and post the required amount of money to meet the high bid. They state that he was not informed as to any other requirement or given any circulars or other material from which they could ascertain the requirements and procedure necessary in the matter. They argue, further, that the regulation in question has been interpreted in *Charles H. Hunter*, 60 I. D. 395 (1950), to require the submission of proof of ownership of contiguous land only in the event there is some objection to the claim.

In answer to the first contention, it is sufficient to say that it was the obligation of the claimants to ascertain what was required of them in order to preserve their preference right. That obligation is fully set forth in the regulation. It specifically provides that the claim must be supported by proof of ownership of contiguous land at or after the date of sale and that the failure to submit such proof, in the form specified therein, within the 30-day period will cause a claimant to lose his preference right. It is not incumbent on the personnel of the local offices to advise claimants in detail how to assert their rights and while the Department would frown on a deliberate attempt on the part of Bureau personnel to mislead an applicant with respect to the requirements of any particular procedure, no such showing has been made here. It is well settled that the Department is not bound by erroneous advice given by its employees and that one who acts on such advice acts at his peril. One of the purposes of the codification of the regulations of the Department is to provide an authoritative public source of information as to the procedure to be followed in asserting rights granted under the public land laws.

The decision in the *Hunter* case is not controlling. That decision was rendered with respect to a regulation which did not specifically state when the proof of ownership of contiguous land must be submitted. There the Department held that members of the public should be clearly informed in regulations regarding any time limits to which they are subject and that under the then existing regulation it was doubtful whether the average person would come to the conclusion that the regulation required the proof of ownership of contiguous land to be submitted within a period of 30 days after the high bid had been received. Following that decision, the regulation was amended as set forth above. Under the amended regulation, there can be no doubt that satisfactory proof of the ownership of contiguous land on or after the date of the sale must be submitted within the 30-day period.

The other appellants, John L. Brinkerhoff and Mary Emma Morris, contend that the manager did not properly examine the proof of ownership which they submitted within the 30-day period, and that the evidence which they submitted is the best possible evidence of title. The evidence submitted by the claimants will be reexamined. It consists, first, of a copy of a decree rendered on May 27, 1948, in the case of *Lydia Brinkerhoff and Mary Emma Morris, Plaintiffs* v.

State of Arizona et al., Defendants (No. 60021), in the Superior Court of the State of Arizona in and for the County of Maricopa. It finds that the plaintiffs are the owners in fee simple of certain described real property in Arizona. The second document submitted is a copy of the order settling and approving the first and final account and report of John L. Brinkerhoff, the executor of the Last Will and Testament of Lydia Brinkerhoff, deceased, *In the matter of the Estate of Lydia Brinkerhoff, deceased* (No. 28094–Div. I), also in the Superior Court of the State of Arizona in and for the County of Maricopa. The order, signed on January 30, 1952, determines that an undivided one-half interest in certain described real estate in Arizona is vested in John L. Brinkerhoff.

Admittedly, property described in both decrees is contiguous to the land offered at public sale on March 15, 1955, and admittedly title to that property was at one time or another vested in undivided ownership in both John L. Brinkerhoff and Mary Emma Morris. However, nothing in the documents tends to show that title to the contiguous land was vested in either of the claimants at the date of the sale or at any time thereafter. Therefore, these claimants did not meet the requirements of the regulation within the time allowed.

In the circumstances, it was correct to hold that both groups of claimants lost their preference rights to purchase the isolated tract through their failure to submit within 30 days after the date of sale satisfactory evidence of their ownership of contiguous land at or after the date of sale.

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

EDMUND T. FRITZ,
Acting Solicitor.

ESTATE OF ANNIE GRACE

IA–144 *Decided February 21, 1956*

Indian Lands: Descent and Distribution: Wills

An Examiner's decision that undue influence was practiced on a testatrix will not be disturbed on appeal if that decision is supported by credible evidence adduced at a probate hearing where all interested parties were given full opportunity to testify and present evidence in support of their contentions.

APPEAL FROM AN EXAMINER OF INHERITANCE
BUREAU OF INDIAN AFFAIRS

Ruth Hunt Wermy has appealed to the Secretary of the Interior from the decision, dated June 10, 1954, of an Examiner of Inheritance, denying her petition for rehearing in the matter of the estate of Annie Grace, deceased Wichita allottee No. 402, whose last will and testament dated November 15, 1947, was disapproved by the Examiner on March 2, 1954.

The testatrix died on February 23, 1953, at the age of 68, survived by three nieces. Her estate was appraised at $23,669.10. Under the provisions of her last will and testament, which was disapproved by the Examiner, she devised property valued at $1,375 to her three nieces, property valued at $2,544.10 to two grandnieces, and the residue of her estate valued at $19,750 to another grandniece, Ruth Hunt Wermy, the appellant.

The Examiner found from the evidence adduced at the hearing that the appellant made her home with the decedent from February 19, 1947, until shortly after the will was executed. During this period the appellant handled the household affairs, cashed the decedent's checks, paid the decedent's bills, and maintained a joint bank account with her. The evidence also showed that the appellant obtained from the Indian agency, where she was employed, a list of the decedent's trust lands, and that she employed an attorney as scrivener, arranged for two witnesses, and participated as interpreter for the testatrix in the preliminary discussions between the testatrix and the scrivener concerning the provisions of her will. At the hearing before the Examiner, the subscribing witnesses to the will, one of whom acted as interpreter at the time of its execution, testified that as soon as the will had been executed the decedent stated to them that "they told her" or "were always telling her" to make "the paper."

Upon this and other credible evidence, which is not controverted here on appeal, the Examiner found that the testatrix's will of November 15, 1947, was executed as the result of undue influence practiced upon her by the appellant, and by his order of March 2, 1954, he disapproved the will, determined the decedent's heirs and ordered distribution of the estate.

The appellant's contentions on appeal may be summarized as follows:

(1) That the Examiner erred in disapproving the decedent's will;
(2) That the Examiner erred while questioning witnesses by referring to the decedent's will as "a purported will"; and
(3) That the appellant had not anticipated a contest on the will and had not therefore employed counsel in advance of the hearing.

The charge that the Examiner erred when he disapproved the will is based largely on statements contained in affidavits filed in support of appellant's petition for rehearing to the effect that the decedent was competent, not easily influenced, set in her ways, stubborn, and signed her own leases. However, the conclusions of the affiants are in conflict with evidence adduced by the Examiner which indicated that the testatrix was an uneducated, shy individual who was unfamiliar with business matters and easily influenced by others. Moreover, the supporting affidavits were all made by persons who were not present during the preparation and execution of the will and were therefore personally unfamiliar with the actual facts and circumstances surrounding the making of that instrument. The appellant's supporting affidavits have little probative value when considered against the record as a whole and, particularly, the testimony of the subscribing witnesses.

With respect to the Examiner's reference to the decedent's will as a "purported will," we note that it is customary for Examiners of Inheritance, as well as probate courts in general, to refer to wills prior to their approval or disapproval as "purported wills," and the Examiner's use of the adjective "purported" in this case is of no significance.

The gist of the appellant's third contention is that she was denied an opportunity to prepare her case or to combat the opposition.

The record shows that the Examiner scheduled the hearing in this case for 11:00 a. m. on December 16, 1953, at the Indian agency office, Anadarko, Oklahoma, and so notified the appellant on October 23, 1953. The appellant appeared at the appointed time and participated in the hearing. The record shows that two witnesses testified before the luncheon recess and during that recess the appellant employed counsel who appeared on her behalf when the hearing reconvened at 1:00 p. m. Counsel for appellant recalled and cross-examined the second witness who had testified earlier, and counsel continued to represent the appellant thereafter during the course of the hearing. At no time during the hearing or prior to the Examiner's decision,

which was rendered two and one-half months after the hearing, did the appellant or her attorney ask for a continuance or request an opportunity to present further evidence in the matter. The appellant's claim that she was surprised at the hearing and denied an opportunity to combat the opposition to the will was fully considered and disposed of by the Examiner in his denial of her petition for a rehearing. The correctness of the Examiner's decision on this point is abundantly clear from the record.

Stripped to its essentials, the question presented by this appeal is whether an Examiner's ruling on a controverted question of fact is to be reversed on appeal when that ruling is supported by credible evidence adduced at a fair probate hearing. It has been the established practice of this office to uphold an Examiner's ruling in such circumstances. The Examiner had full opportunity to observe the witnesses in the instant case and to evaluate the probative effect of their testimony. There being no persuasive evidence of error in the Examiner's decision, no justification appears for disturbing it on appeal.

Therefore, 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 decision of the Examiner of Inheritance in denying the appellant's petition for rehearing is affirmed, and the appeal is dismissed. The Area Director is accordingly directed to make distribution of the decedent's estate in accordance with the Examiner's order dated March 2, 1954.

EDMUND T. FRITZ,
Acting Solicitor.

MARION F. JENSEN ET AL.
ELDEN F. KEITH ET AL.

A–27254
A–27256
A–27257

Decided February 24, 1956

Rules of Practice: Appeals: Service on Adverse Party

Appeals to the Secretary of the Interior will be dismissed where the appellants did not file, within the time required by the Department's rules of practice, a certificate showing service of notice of the appeal upon a party having an adverse interest.

Mining Claims: Possessory Right—Oil and Gas Leases: Lands Subject to—Oil and Gas Leases: Cancellation

Where the record of an application for patent on mining claims indicates that the claims were located in 1948 on lands open to mining location and that the claims are valid, oil and gas leases issued for land included in the claims are properly canceled to the extent that they conflict with such locations where the applications for the leases were filed several years after the mining claims were located.

Mineral Lands: Multiple Mineral Development

The Multiple Mineral Development Act does not authorize the issuance of oil and gas leases on lands covered by valid mining claims which were located on lands subject thereto in 1948, several years before the filing of oil and gas lease applications therefor.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Mr. Marion F. Jensen, Maurice E. Jensen, Mrs. Elizabeth Jensen, Mrs. Caroline A. Newell, and Alvin J. McDaniel have appealed to the Secretary of the Interior from a decision of August 4, 1955, by the Associate Director, Bureau of Land Management, holding the appellants' oil and gas leases for cancellation.

The leases cover lands in Johnson County, Wyoming, and were canceled because of the location of valid and subsisting mining claims by Elden F. Keith and others [1] before the appellants filed the applications pursuant to which their leases were issued. Mr. Keith, who, on January 29, 1953, filed for himself and the other persons listed in footnote 1 an application for mineral patent on claims which covered the lands included in appellants' leases, was a party to the Associate Director's decision which plainly indicated that Mr. Keith's interest in the lands was adverse to the interests of the appellants. Moreover, on March 27, 1953, Mr. Keith filed in the Cheyenne land office protests against the issuance of these leases and submitted with the protests copies of the location notices of the mining claims which conflicted with the appellants' leases. Mr. Keith also submitted registry return receipts showing that copies of the protests and location notices were served on the individual appellants. It is clear that the appellants had notice of an interest adverse to their own in this proceeding.

[1] The other applicants for mineral patent under Wyoming 020016 are: Zola Keith, Leon Keith, Lee F. Keith, R. L. Greene, Rose Greene, Sam Gibson, W. B. Barnard, Helen E. Specht, James S. Harlan, Joanne Harlan, Waldo Teeter, Robert Arndt, Thelma Arndt, and Harry T. Thorson.

The decision holding the leases for cancellation allowed the right of appeal and indicated that, if an appeal were filed, it should conform with the rules of practice (43 CFR 221.75 and 221.76) contained in Circular 1818, a copy of which was presumably attached to the decision.

43 CFR 221.75(c) and (d) provide that:

> (c) If the Director's decision indicates that any other person has an interest in the proceeding adverse to the appellant, the appellant shall, within the 30-day period prescribed in paragraph (a) of this section (or such further period as may be allowed by the Secretary or his representative for good cause shown), file a certificate showing that a copy of the notice of appeal has been served personally upon or mailed to each such person or his authorized representative. If the certificate accompanies the notice of appeal, it shall be filed with the Director of the Bureau of Land Management. Otherwise, it shall be filed with the Solicitor, 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.

There is no evidence in these records that any of the appellants served a copy of his appeal notice on Mr. Keith. The Department has consistently ruled that where an appellant does not serve a copy of the notice of appeal on adverse parties, as required by 43 CFR 221.75(c), the appeal will be dismissed. *Edna R. (Anderson) Fife*, A–27216 (December 12, 1955); *Lloyd Dean Cureton*, A–27208 (November 7, 1955); *Marlow D. Butler, Lala A. Butler*, A–27186 (October 10, 1955). In accordance with these decisions, these appeals will be dismissed.

Even if there were no procedural defect in the appeals, there is no basis for modifying the Associate Director's decision.

The appellants' lease applications were filed between November 7, 1951, and January 22, 1952. The mining claims which conflict with the oil and gas leases were located on February 25 and 27, 1948. The record shows that the lands included in the appellants' leases were vacant and were subject to the mining laws when the claims were located; that there is a discovery of commercial bentonite on each of the claims; and that the required expenditures, inclusive of road work necessary to mine and remove the deposits, have been made. Publication of notice of application for patent was completed on June 10, 1954; the purchase price for the claims was paid on June 11, 1954; and final certificate thereon was issued on the same date.

The location of a valid mining claim has the effect of a grant by the United States and gives the locator a possessory title, good as against the world, including the United States. *Wilbur* v. *Krushnic*, 280 U. S. 306, 316, 317 (1930). There is no requirement that a locator of mining claims apply for a patent at any time or that he record an interest in a mining claim in the land office. Consequently, there is no record in the land office of lands covered by mining claims, and one who takes an oil and gas lease, or makes any other entry on public lands, does so subject to the possibility that a valid mining claim exists thereon. When an application is filed for patent on a valid and subsisting mining claim which was located on vacant public land not known to be valuable for minerals subject to leasing under the Mineral Leasing Act, and it appears that the mining location was completed before any application under the Mineral Leasing Act was filed for such land, the only course which the Department may follow is to cancel any oil and gas lease which was issued on the land. This is necessary because the locator of such a mining claim had a possessory right to the land before the lease applications were filed and the United States had no interest in the land which it could lease. Cf. *Davidson Hill*, A–25673 (July 22, 1949).

On appeal it is asserted, in effect, that oil and gas leases may be issued on lands covered by previously located mining claims. In support of the assertion, the appellants refer to departmental regulations in Circular No. 1920 (43 CFR, Part 186; 20 F. R. 6128) issued pursuant to the Multiple Mineral Development Act of August 13, 1954 (30 U. S. C., 1952 ed., Supp. II, sec. 521 *et seq.*). The provisions of section 4 of that act (30 U. S. C., *supra*, sec. 524) and of the regulations issued pursuant to it authorizing the reservation to the United States, in patents issued on certain mining claims, of minerals subject to disposition under the Mineral Leasing Act and acts amendatory thereof, and authorizing also a reservation of the right to prospect for, mine, and remove such minerals, are applicable only to certain mining claims located after August 13, 1954, the effective date of the act, and to claims coming within the provisions of sections 1, 2, and 3 of the act. The first three sections of the act refer to claims located between July 31, 1939, and February 10, 1954, on lands which, when the claim was located, were included in a permit or a lease issued under the mineral leasing laws, or were covered by an application or an offer

for such a permit or lease, or were known to be valuable for minerals subject to disposition under the mineral leasing laws, and to preference right mining claims of holders of uranium leases or of applicants therefor. 30 U. S. C., *supra*, secs. 521–523. As the mining claims involved in this appeal were located on vacant public land more than 6 years before the effective date of the Multiple Mineral Development Act, and do not come within the provisions of the first three sections of the act, the provisions of section 4 of the act are clearly inapplicable to this case.

As there is nothing in the Multiple Mineral Development Act or any other statute which authorizes the United States in the circumstances of this case to issue oil and gas leases which conflict with valid mining claims located on vacant lands open to mining locations several years before the filing of lease applications for the lands, the decision holding the appellants' leases for cancellation was correct.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the appeals are dismissed.

EDMUND T. FRITZ,
Acting Solicitor.

APPEAL OF ELECTRIC ENGINEERING AND CONSTRUCTION SERVICE, INC.

IBCA–58

Decided February 29, 1956

Contracts: Damages: Unliquidated Damages—Contracts: Delays of Government—Contracts: Interpretation

A claim for additional compensation to cover increased costs incurred by a contractor because of an allegedly unreasonable delay of the Government in furnishing materials under a construction contract which provides that "the Government may at any time suspend the whole or any portion of the work under this contract but this right to suspend the work shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension," is in the nature of a claim for unliquidated damages and is not within the authority of administrative officials of the Government to consider or allow, when the contracting officer never issued a suspension order.

BOARD OF CONTRACT APPEALS

Electric Engineering and Construction Service, Inc., has appealed from the decision of the contracting officer in the form of a letter dated October 6, 1955, denying it additional compensation in the amount of $1,031.55 for alleged extra costs resulting from delays of the Government in furnishing a transformer required in the construction of additions and modifications to Washburn Substation, Transmission Division, North Dakota, Missouri River Basin Project.

The Contract, No. 14–06–D–910, with the Bureau of Reclamation, was dated April 15, 1954, and was on standard Government Form No. 23A (March 1953). The claim arises under Schedule 2 of Specifications No. DC–4103. The decision of the contracting officer proceeds upon the ground that the claim is for unliquidated damages.

The contractor first raised the question of the Government's delay in a letter dated October 21, 1954, addressed to the Construction Engineer. The contractor later specifically excepted from its release on contract, dated August 22, 1955, a claim for additional compensation on account of the delay in the amount of $1,031.55.

In the letter to the Construction Engineer the contractor described the Government's delay as amounting to a suspension of work by the Government, and contended that, notwithstanding the failure of the contracting officer to enter a suspension order, additional compensation should be paid under paragraph 13 of the specifications. This paragraph reads as follows:

> The Government may at any time suspend the whole or any portion of the work under this contract but this right to suspend the work shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension, it being understood that expenses will not be allowed for such suspensions when ordered by the Government on account of weather conditions or on account of the failure of Congress to make the necessary appropriations for expenditures under this contract.

Counsel for the Government, on the other hand, takes the position that this paragraph has application only when the Government acts affirmatively to suspend the work. In the absence of such affirmative action, it is asserted, delay of the Government can give rise only to a claim for unliquidated damages which administrative officials may not consider or adjust.

The rule has long been settled that the authority to pass upon various types of disputes that is conferred upon administrative officials by the standard Government contract forms does not extend to the consideration and adjustment of claims for unliquidated damages growing out of alleged breaches of the contract by the United States.[1] The issue that must be decided in the present case is whether the provisions of paragraph 13 of the specifications create an exception to this rule, under which a claim for unliquidated damages based upon the delay by the Government in furnishing the required transformer may be administratively allowed, if the delay should be found by the Board to have been unreasonable.

The issue so posed is not a new one in the Department of the Interior. It was expressly ruled upon by the Solicitor of the Department in *Parker-Schram Company*, CA–152 (March 5, 1952). Paragraph 14 of the specifications of the contract under which that appeal arose was identical with paragraph 13 of the specifications of the contract involved in the present appeal. The claim asserted by the contractor was for additional compensation to cover expenses incurred by the contractor as a result of delay by the Government in furnishing structural steel required for the performance of the contract. The Solicitor concluded that the claim was one for unliquidated damages which could not be considered or adjusted by administrative officials of the Government, saying:

> Since the cause of the delay for which compensation is sought was not due to the affirmative action of the Government in issuing a formal notice of suspension, the provision quoted above [paragraph 14 of the specifications] is also inapplicable. This interpretation of the express language of paragraph 14 of the specifications is buttressed by a report of the proceedings of the Interdepartmental Board of Contracts and Adjustments. The Board, when considering a draft of this paragraph, rejected a proposal which, if adopted, would have permitted administrative officials to grant affirmative relief of the kind which the present appellant is seeking. See reporter's statement, *Harwood-Nebel Construction Co., Inc.* v. *United States*, 105 Ct. Cl. 116 (1946).

Claims based upon facts similar to those involved in the present case, and arising under contracts that contained the same language as that under which relief is here sought, were ruled to be claims

[1] *Continental Ill. National Bank & Trust Co.* v. *United States*, 126 Ct. Cl. 631 (1953); *Langevin* v. *United States*, 100 Ct. Cl. 15 (1943); *Southwest Welding and Manufacturing Company*, IBCA–33, 62 I. D. 257 (June 29, 1955); *J. M. Montgomery & Co., Inc.*, CA–193 (April 9, 1954); 32 Comp. Gen. 333, 336–337 (1953).

for unliquidated damages outside the jurisdiction of this Board in *Lowdermilk Brothers*, IBCA-10 (February 11, 1955), and in *Fischbach and Moore*, IBCA-26 (July 25, 1955).[2]

The rule against the allowance of unliquidated damages by administrative officials is deeply ingrained in the body of Government contract law.[3] Reason strongly suggests that in order for a provision of a Government contract to be read as creating an exception to a rule so well known and so frequently invoked, the intention to create the exception would need to be expressed in fairly unequivocal terms. This need is emphasized by the declaration of the Supreme Court that "the intention of parties to submit their contractual disputes to final determination outside the courts should be made manifest by plain language." [4]

Under the provision here in question the Board would not be authorized to allow a claim for unliquidated damages unless the provision could be read as saying, first, that an unreasonable delay by the officers of the Government in furnishing material required for the performance of the contract is tantamount to an exercise by the United States of its reserved "right to suspend the work," and, second, that the negative statement to the effect that the right to suspend the work "shall not be construed as denying" the contractor the expenses sustained by him on account of the suspension is tantamount to an affirmative grant of authority to the contracting officer for the assessment of these expenses against the United States.

The modern trend is to provide by contract for the administrative determination of claims for additional compensation. The Board believes that this trend is a good one, and, therefore, if the precedents in regard to the suspension provision referred to in an earlier part of this decision were not so clearly established, it would be inclined to favor a liberal construction of the provision. A broad interpretation would permit in proper cases an administrative remedy, and, thereby, not compel the contractor to have recourse to the courts. However, under the circumstances, the Board feels that it should

[2] The contracts involved in these appeals contained provisions identical with paragraph 13 of the specifications of the contract under which the present appeal is prosecuted, but the existence of these provisions was not expressly mentioned in the decisions of the Board.

[3] The landmark decisions in this field are *Wm. Cramp & Sons* v. *United States*, 216 U. S. 494 (1910), and *Power* v. *United States*, 18 Ct. Cl. 263 (1883).

[4] *United States* v. *Moorman*, 338 U. S. 457, 462 (1950).

adhere to the result reached in the *Parker–Schram Company* decision and in subsequent decisions of the Board.[5]

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 claim of the contractor is affirmed.

THEODORE H. HAAS, *Chairman.*
WILLIAM SEAGLE, *Member.*
HERBERT J. SLAUGHTER, *Member.*

OMA B. DAVIDSON ET AL.

A–27251

Decided March 12, 1956

Desert Land Entry: Water Right

Applications to make desert land entries in Arizona cannot be allowed where the entries would be dependent upon percolating waters for reclamation.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Oma B. Davidson and 21 other persons [1] have appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management dated July 13, 1955, which affirmed decisions of the manager of the land and survey office at Phoenix, Arizona, in rejecting their applications to make entry under the Desert Land Act (43 U. S. C., 1952 ed., sec. 321 *et seq.*) on land in Ts. 11 and 12 S., R. 6 E., G. & S. R. M., Arizona. The manager's action with respect to these and other applications for desert land entry in the Quijotoa Draw area in Arizona was based on the classification of the land as unsuitable for desert land entry and as primarily suitable for grazing purposes.

[5] The Board is aware of the decision of the Army Board of Contract Appeals in *Guerin Brothers,* BCA No. 1551 (November 30, 1948), and the decision of the Armed Services Board of Contract Appeals in *J. A. McNeil Co., Inc.,* ASBCA No. 1156. The language of the suspension of work clauses involved in those appeals, however, differs materially from the language of the suspension of work clause in issue in the present appeal.

[1] The names of the applicants and the serial numbers of their applications are listed on Schedule A, p. 81.

The appellants allege that it was improper for the Director to refuse to classify the land as suitable for desert land entry.

However, for the reason set forth below, it is unnecessary to consider whether the land was properly classified.

The Desert Land Act requires every applicant for a desert land entry to file a declaration that he intends to reclaim the land applied for by conducting water upon the same, and, further, "That the right to the use of water by the person so conducting the same * * * shall depend upon bona fide prior appropriation." A regulation of the Department (43 CFR 232.13) provides that no application will be allowed unless accompanied by evidence satisfactorily showing that the applicant 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 of the applicants who have taken this appeal show that, if the land is classified for desert land entry, they intend to reclaim the land by the use of percolating water, which they expect to obtain by drilling one or more wells on the land applied for.

The Solicitor considered last year the question whether applications for desert land entries in Arizona can be allowed where the reclamation of the land would depend upon percolating water. In an opinion dated February 23, 1955 (M–36263, 62 I. D. 49), he concluded that whether water is subject to the doctrine of prior appropriation, as required to support an entry under the Desert Land Act, is a matter governed by State law and that under Arizona law, as set forth by the Supreme Court of Arizona in the case of *Bristor* v. *Cheatham*, 75 Ariz. 227, 255 P. 2d 173 (1953), the right to the use of percolating water cannot be acquired under the doctrine of prior appropriation. The Solicitor also expressed the opinion that the doctrine of reasonable use, adopted by the State of Arizona insofar as percolating waters are concerned, does not meet the requirement of the Desert Land Act that "the right to the use of water * * * shall depend upon bona fide prior appropriation"; that the Department's regulations do not sanction the allowance of desert land entries which depend upon percolating water subject only to the doctrine of reasonable use; and that

applications to make desert land entries on land in Arizona cannot be allowed where the entries would be dependent upon percolating waters for reclamation.

The Solicitor's opinion was tacitly approved by the Congress when it passed the act of August 4, 1955 (69 Stat. 491). This act waived the requirement that the right to use of water for reclamation of desert land entries must depend upon bona fide appropriation in the case of all desert land entries in Arizona which were allowed prior to the date of the act. The legislative history of the act shows clearly that the legislation was felt to be necessary in view of the Solicitor's opinion but the legislation was restricted only to those entries which had already been allowed and did not waive the requirements of the law as to applications then pending and not yet allowed.

On February 20, 1956, Assistant Secretary D'Ewart instructed the Director of the Bureau of Land Management "to proceed with the adjudication of desert land applications in Arizona in light of the Solicitor's opinion of February 23, 1955." Accordingly, the applications involved in this appeal cannot be allowed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Bureau of Land Management in affirming the rejection of the 22 applications to make desert land entry in Arizona, is, for the reason stated, affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

Schedule A

Name	*Serial No.*	*Name*	*Serial No.*
Oma B. Davidson	Arizona 01621	F. Preston Sult	Arizona 02010
Charles W. Wheeler	Arizona 01935	Walter J. Ellis	Arizona 02017
Florence K. Gray	Arizona 01936	William E. Ellis	Arizona 02018
William C. Kroger	Arizona 01937	Connie C. Jones	Arizona 02205
John D. Singh	Arizona 01939	Paritem S. Poonian	Arizona 02214
Amelia Cabanillas	Arizona 01954	John R. Hogle	Arizona 02336
Socorro Cabanillas	Arizona 01955	Parley P. Eccles	Arizona 02911
Paul M. Brophy	Arizona 01957	Rachel Noble	Arizona 03364
Diwan Singh	Arizona 01960	Isabel C. Singh	Arizona 05392
Jimmie B. Garcia	Arizona 01961	Dorothy L. Singh	Arizona 05393
Nora Singh Nichols	Arizona 01986	Alfred Cabanillas	Arizona 05949

JOHN C. de ARMAS, JR.
P. A. McKENNA

A–27232

Decided March 19, 1956

Oil and Gas Leases: Applications

An applicant for a noncompetitive acquired lands lease, who corrects his defective application within the period allowed by the Secretary to all similarly situated persons to make such correction without loss of priority, has priority in the issuance of a lease over a junior applicant who filed a proper application.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

P. A. McKenna has appealed to the Secretary of the Interior from a decision dated April 8, 1955, by the Supervisor of the Eastern States Office, Bureau of Land Management, which dismissed McKenna's protest against the issuance of a noncompetitive oil and gas lease for certain acquired lands in Louisiana to John C. de Armas, Jr., and offered a lease for the lands to John C. de Armas.

De Armas filed his application, BLM–A–022956, on April 2, 1951, and an amendment of it on April 12, 1951, pursuant to the Mineral Leasing Act for Acquired Lands (30 U. S. C., 1952 ed., secs. 351–359). The application embraced 1,865.36 acres of acquired land in Ts. 24 S., Rs. 32 and 33 E., Louisiana Meridian, Louisiana.

On August 17, 1954, P. A. McKenna filed an application, BLM–A–038070, under the same act for the same lands. Thereafter, on January 24, 1955, he filed a protest against favorable action being taken on de Armas' application on the grounds that the latter was not in compliance with certain mandatory requirements of the pertinent regulation when it was filed and was not placed in compliance until after McKenna had filed an application proper in all respects.

The regulation in question is 43 CFR, 1949 ed., 200.5 which at the time de Armas and McKenna filed their applications read in part as follows:

(a) * * * each application for a lease * * * 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 * * *.

In his application de Armas stated:

> Applicant's interests, direct or indirect, in oil and gas leases or in applications for oil and gas leases, on any lands owned by the United States, do not exceed 15,360 acres in the State of Louisiana.

McKenna's application, on the other hand, contains the following statement:

> My other interests, direct and indirect, in permits and leases and applications therefor, in the same state, with identification of records wherein such interests may be found are as follows: BLM–A–022896; BLM–A–022893; BLM–A–022969; BLM–A–024048; BLM–A–024125; BLM–A–024126; BLM–A–033065; BLM–A–021391; and Four (4) Applications filed late yesterday (August 16, 1954) totaling 2,795 acres, more or less, which Serial Numbers are not as yet available to the Applicant. Such interests, with the acreage applied for, do not exceed in the aggregate (46,080) acres in the State of Louisiana.[1]

Shortly before McKenna filed his application, the Department, on August 3, 1954, issued a decision holding that the requirement set out in 43 CFR, 1949 ed., 200.5 (a) (1), was mandatory and that an application which did not comply with it would not confer any priority upon the applicant. *S. J. Hooper*, 61 I. D. 346 (1954).

On October 21, 1954, de Armas filed a statement listing the serial numbers of oil and gas leases and applications for such leases in which he had an interest. On October 28, 1954, the Department, in a supplemental decision, determined that all persons who had prior to August 31, 1954, filed applications for acquired lands defective in that the applications did not comply with the specific statement of interest requirement of 43 CFR, 1949 ed., 200.5 (a) (1), would be allowed to and including December 1, 1954, to submit such statements of interests without loss of priority to their applications. *S. J. Hooper* (supplemental decision), 61 I. D. 350 (1954).

The supervisor held that since de Armas' application was amended within the time allowed by the decision of October 28, 1954, it was entitled to priority as of the date it was filed, that McKenna was a subsequent applicant, and that de Armas was otherwise qualified to hold a lease. Therefore, he offered a lease, upon the acceptance of certain stipulations not material here, to de Armas and dismissed McKenna's protest.

Thereupon, McKenna took this appeal to the Secretary.

[1] The act of August 2, 1954 (43 U. S. C., 1952 ed., Supp. II, sec. 184), increased the amount of acreage an individual could hold under lease from 15,360 to 46,080 acres in the same state.

In view of the fact that this case, insofar as priority of applications is concerned, is similar to the *Hooper* case, it would appear that, under the supplemental decision in that case, de Armas by submitting the required statement prior to December 1, 1954, cured the defect in his application without loss of priority. The appellant, in effect, recognizes this, but contends that the supplemental decision was unlawful and erroneous because it deprived "a qualified person who submitted the first proper application for a noncompetitive oil and gas lease of his statutory right of priority in connection with the oil and gas leasing of land outside the known geological structure of a producing oil and gas field."

The original *Hooper* decision clearly stated the principles which the appellant would apply to this case. However, the supplemental decision set out the factual situation and the reasons which led the Department to determine that applicants for leases on acquired land would be permitted a limited time to supply a detailed statement of their interests in other leases and applications without loss of priority. The Bureau of Land Management has been awarding leases on the basis of the supplemental *Hooper* decision.

Therefore, in the absence of any other supervening consideration, under the supplemental decision in the *Hooper* case, de Armas was properly held to have earned priority for the issuance of a lease.

The appellant contends that the Department's ruling in the supplemental *Hooper* decision and the notice of it, dated November 1, 1954 (19 F. R. 7200), is in conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in *McKay* v. *Wahlenmaier*, 226 F. 2d 35 (1955). In that case the court held, insofar as is pertinent here, that an applicant for an oil and gas lease who fails to list in his application, as required by the pertinent regulation, the leases held by a corporation in which he held 23.7 percent of the capital stock was not a qualified applicant and that a lease issued to such a person must, upon the objection of a properly qualified junior applicant, be canceled.

The court reached this conclusion after finding that the Secretary had a consistent policy of rejecting applications which did not comply with the regulation. As a result it was the court's opinion that the Secretary could not depart from his consistent policy in a single case.

In the instant matter, the Secretary is, of course, not attempting to treat de Armas or McKenna in a manner different from all others

similarly situated. His interpretation of the regulation involved in the *Hooper* case and this case applies to all persons who filed acquired lands oil and gas lease applications prior to August 31, 1954.

The question here is not whether an admitted practice or interpretation of a regulation should be deemed not binding on one applicant alone, but rather whether the Secretary can determine that a decision of his holding a prior interpretation of a regulation invalid, which interpretation has controlled the Department's practice consistently for several years, need only be applied prospectively.

On this issue the court expressed no opinion. In fact, it stated that it need not decide the question of whether the Secretary alone could decide the consequences of the violation of a regulation which he has revised. The court was concerned only that the Secretary should apply a consistent policy to all persons in the same situation.

Furthermore, in the *Wahlenmaier* case the court found that the person to whom the lease was issued had unfairly and secretly attempted to gain an advantage over other persons in the issuance of the lease, a factual situation which is not present here.

Consequently, the *Wahlenmaier* case is distinguishable from the supplemental *Hooper* decision and affords no reason for the Secretary to depart from his ruling in the latter.

It follows that de Armas was the first applicant to file a proper application for a lease of the lands sought by the parties here and that a lease may properly be issued to him.

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 Supervisor of the Eastern States Office is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

E. A. VAUGHEY

A–27291

Decided March 28, 1956

Mineral Leasing Act for Acquired Lands: Lands Subject to

Where applications for noncompetitive oil and gas leases for acquired lands are filed for lands which are embraced in outstanding leases which have been relinquished but the relinquishments have not been noted on the acquired

lands plat books, the applications are prematurely filed and are properly rejected.

Oil and Gas Leases: Applications

Although a relinquishment of an acquired lands noncompetitive oil and gas lease may become effective to terminate the lease as of the day the relinquishment is filed, the lands embraced in the former lease are not open to further filing until such time as the relinquishment is noted on the acquired lands plat records, and lease offers filed before such notation is made must be rejected.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

E. A. Vaughey has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated November 7, 1955, which affirmed the several decisions of the Chief, Adjudication Section, Eastern States Office, Bureau of Land Management, dated July 28, 1955, and August 17, 1955, rejecting Mr. Vaughey's applications (BLM–A 038980, 038981, 038982 and 038983) for noncompetitive oil and gas leases on certain acquired lands in Mississippi, under the provisions of the Mineral Leasing Act for Acquired Lands (30 U. S. C., 1952 ed., secs. 351–359). Rejection of the applications was based upon a determination that the applications were filed prior to the notation upon the appropriate records of the Department of the cancellation of prior leases covering the same lands as applied for.

The record shows that all of the lands applied for by appellant were embraced in prior leases (BLM–A 011062, 011063, 011064 and 011087) which had been extended to December 6, 1955. However, on November 4, 1954, the holder of the leases filed relinquishments of all of them. The leases were thereafter canceled effective as of the date of filing and notations were made of the cancellations on the official records of the Department on February 17, 1955, and subsequent dates.

The appellant's applications were all filed on December 1, 1954, or prior to the notation of the cancellations of the prior leases on the official records of the Department. The decisions below rejecting the appellant's applications were based on the fact that, as the cancellations of the prior leases had not been officially recorded, the lands were not open for new filings at the time the appellant's applications were filed, and, therefore, the applications should be rejected.

The Acting Director specifically relied upon the provisions of the Department's regulation 43 CFR, 1953 Supp., 192.43 (Circular No. 1773, November 29, 1950), which at the times material in this case provided in pertinent part as follows:

> *Opening of lands to further filings, where a noncompetitive oil and gas lease is canceled or relinquished.* 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 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. * * *

The Acting Director's decision stated that in applying the quoted regulation the Department has consistently held that an application for an oil and gas lease filed before the notation upon the tract book of the cancellation or relinquishment of a prior lease on the same land must be rejected, because the land is not available for leasing.

The Department has held for over 50 years that an outstanding entry on public land is an absolute bar to the filing of other applications for the same lands until such time as the outstanding entry is canceled or relinquished and that fact is noted on the records of the local office. *Stewart* v. *Peterson*, 28 L. D. 515 (1899); Circular of July 14, 1899, 29 L. D. 29. This rule has been followed consistently through the years in a variety of different types of entries and situations.[1]

After the passage of the Mineral Leasing Act of February 25, 1920, the Department adopted the policy that prior to cancellation of an outstanding oil and gas prospecting permit [2] and notation of such cancellation upon the records of the local land office, no other person would be permitted to gain any right to a permit on the same

[1] *Emma H. Pike*, 32 L. D. 396 (1904) (cancellation of desert land entry); *Young* v. *Peck*, 32 L. D. 102 (1903) (cancellation of desert land entry); *Hall* v. *State of Oregon*, 32 L. D. 565 (1904) (cancellation of State selection); *Gunderson* v. *Northern Pacific Ry. Co.*, 37 L. D. 115 (1908) (homestead patent canceled by court action); *Hiram M. Hamilton*, 38 L. D. 597 (1910) (coal land patent canceled by court action); *Nathaniel J. Chapin*, 44 L. D. 222 (1915) (reconveyance of land to United States); *California and Oregon Land Co.* v. *Hulen and Hunnicutt*, 46 L. D. 55 (1917) (patents canceled by court action).

[2] Prior to the amendment of the Mineral Leasing Act by the act of August 21, 1935 (49 Stat. 674), only prospecting permits were issued for land not on the known geologic structure of a producing field. After the passage of the act of August 21, 1935, such permits were no longer issued and noncompetitive leases were issued instead.

lands by the filing of an application. *Martin Judge*, 49 L. D. 171 (1922). In the *Martin Judge* decision the Department stated:

> Proper administration requires that where permit applications for lands included in outstanding permits under the leasing act are filed the Department should follow the rule expressed in California and Oregon Land Company *v.* Hulen and Hunnicutt, *supra* [46 L. D. 55], that—
>
> > "the orderly administration of the land laws forbids any departure by the Department from the salutary rule that land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office."
>
> It is recognized that a permit does not constitute a technical segregation or entry, as those terms are ordinarily used in connection with the public land laws, as it is not an appropriation with a view to the acquisition of title, but that does not prevent the application of the principle of the general administrative rule * * *. (P. 172.)

Thus, at an early date after the passage of the Mineral Leasing Act of 1920, the Department determined that the general administrative rule should be applied to oil and gas permits in the same manner that it had been applied to other forms of entry on the public domain since 1899. (See 43 CFR, 1940 ed., 192.14.)

After the amendment of the Mineral Leasing Act by the act of August 21, 1935, no regulations were issued concerning the relinquishment of oil and gas leases until December 29, 1948.[3] Nonetheless, during this interval of over 13 years the Department administered oil and gas leases in the same manner as oil and gas permits had been administered insofar as the requirement that a relinquishment must be noted on the official records of the local land office before the lands embraced in the relinquished lease would be open to further entry is concerned. *Barney Cockburn*, A–26303 (October 10, 1951).[4]

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[3] On May 14, 1942, a regulation was adopted covering the opening of lands to filing upon the notation of cancellation of leases (43 CFR, 1940 ed., Cum. Supp., 192.14b). This regulation was modified and renumbered as section 192.43 on October 28, 1946 (43 CFR, 1946 Supp., 192.43). On December 29, 1948, it was amended to include relinquishments (43 CFR, 1949 ed., 192.43). On November 29, 1950, it was amended slightly to read as quoted above in the text. So far as the quoted portion of the regulation is concerned, the only changes made in the regulation were to substitute "land office" for "district office" in the 1948 regulation and "lease offers" for "leasing."

[4] Cf. *Kenneth A. Araas*, A–26672 (April 28, 1953), in which the Department held that where a noncompetitive lease terminated after its primary term because of cessation of production, the land would not become available for filing until the termination was noted on the local records.

The appellant contends that the *Martin Judge* rule is not applicable to acquired lands leasing situations because that rule was adopted at a time when section 30 of the Mineral Leasing Act (30 U. S. C., 1952 ed., sec. 187) provided that leases could be relinquished only with the approval of the Secretary. On August 8, 1946, the appellant asserts, section 30 (b) was added to the Mineral Leasing Act (30 U. S. C., 1952 ed., sec. 187b) giving oil and gas lessees the right to relinquish their leases without approval of the Secretary, the relinquishment becoming effective upon filing. Since the Mineral Leasing Act for Acquired Lands was not enacted until August 7, 1947, and section 3 of that act (30 U. S. C., 1952 ed., sec. 352) incorporates by reference section 30 (b) of the Mineral Leasing Act, the appellant argues, acquired lands lessees have had the right of relinquishment, without approval of the Secretary, from the very beginning. Therefore, the appellant concludes, the rationale of the *Martin Judge* rule has never applied to acquired lands leases.

The appellant is in error as to the basis for the general administrative rule of which the *Martin Judge* case is only an extension. The Department long ago considered an objection of the nature of that raised here by the appellant and held it not to be relevant. In *Young* v. *Peck*, *supra*, fn. 1, the Department said:

> * * * for the sake of good practice it is deemed well that the cancellation of an entry, so far as releasing the land is concerned, shall take effect from the time the same is noted on the records of the local office. The cancellation is operative and effective, so far as any validity of and vitality in the entry itself or any claim or right left in the entryman, are concerned, from the moment of the rendition of the final and adverse judgment. As to the initiation of other claims or rights, the Department has said that they must await the notation of the cancellation of the prior entry on the records of the local office * * *. (32 L. D. at 104.)

See also *Gunderson* v. *Northern Pacific Ry. Co.*, *supra*, fn. 1, where the Department rejected a railroad selection of land included in a homestead patent which was canceled by a court decree entered the day before the selection was filed but the notation of cancellation was not made until almost a month later. The railroad contended that the court decree cleared the record, "that no further action by the land department was necessary, and that the tract in question thereafter became subject to entry by the first legal applicant." The Department said:

* * * Though the decree of the court operated to revest the title in the United States, it still remained for the land department to restore the land to entry by taking such steps, in conformity with the decree, as would clear its records of the entry on which the patent vacated by the court was based. (37 L. D. at 116.)

Moreover, as to public land oil and gas leases, it was held in *Barney Cockburn, supra*, that the *Martin Judge* rule applied where a lease was relinquished on December 6, 1946, after section 30 (b) of the Mineral Leasing Act was adopted, but the notation of relinquishment was not made until June 21, 1948. Cockburn's application, filed on April 7, 1947, was rejected as premature. It will be noted that in the *Cockburn* case, 43 CFR 192.43 had not then been amended to cover relinquishment of leases.

It is therefore clear that the change made in the Mineral Leasing Act as to the mode of relinquishing oil and gas leases has no bearing upon the applicability of the *Martin Judge* rule.

The appellant next contends that the regulation relied on by the Acting Director, 43 CFR, 1953 Supp., 192.43, cannot be applied in the present case, since its terms plainly limited it to situations involving public lands. The basis of this contention is the fact that the regulation stated that "Where a noncompetitive lease is canceled or relinquished * * * immediately upon the notation of the cancellation or relinquishment *on the tract book* * * * the lands shall be open to further oil and gas lease offers." [Italics supplied.] Tract books are maintained only in connection with public lands. Therefore, the appellant contends, this regulation did not apply to acquired lands and the filing of the relinquishment was all that was necessary to open the land for further filing of lease offers.

This contention was recently answered in the case of *B. E. Van Arsdale*, 62 I. D. 475 (1955). It was there held that land in an acquired lands oil and gas lease which is relinquished becomes open to further filing only at the time when the relinquishment is noted on the acquired lands plat records maintained by the Department. The Department in effect construed the words "tract book" to mean, in the case of acquired lands leases, the acquired lands plat records. This interpretation seems completely reasonable in that the acquired land plat records correspond to the tract books maintained for public lands. Section 3 of the Mineral Leasing Act for Acquired Lands, *supra*, provides that all deposits of oil and gas within acquired lands

of the United States may be leased by the Secretary of the Interior under the same conditions as contained in the leasing provisions of the mineral leasing laws. None of the provisions of the Mineral Leasing Act for Acquired Lands in any way distinguish as to the manner of administration between public lands and acquired lands insofar as making lands in relinquished leases available for further application is concerned. On the contrary the reasons for applying the same rule are compelling. In the *Van Arsdale* decision, the Department said:

> * * * 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. (62 I. D. at 478.)

In view of the long established practice of the Department, its applicability to all types of applications and entries, the salutary purpose that it serves, and the complete absence of any reasonable basis for distinguishing between public land leases and acquired lands leases in the application of the rule, the appellant's narrow construction that 43 CFR, 1953 Supp., 192.43 should not be construed to apply to acquired lands leases because the term "tract book" refers only to records relating to public lands cannot be accepted.

On March 17, 1955 (20 F. R. 1778), 43 CFR 192.43 was amended to read as follows:

> * * * (a) Where the lands embraced in a relinquished or cancelled noncompetitive lease are not on the known geologic structure of a producing oil and gas field, and are not withdrawn from leasing, such lands become available for, and subject to, filings of new lease offers immediately upon the notation of the cancellation or relinquishment on the tract book, or, *for acquired lands, on the official records relating thereto, of the appropriate land office.* * * * [Italics supplied.]

Contrary to the contention made by the appellant that the act of amending this regulation was for the express purpose of bringing the cancellation or relinquishment of oil and gas leases on acquired

lands within the scope of regulation, the records of the Department show that the amendment was merely incidental to other amendments made to the regulation, which are not quoted, and to amendments made to 43 CFR 192.120 and 192.161, respecting the making available of land included in leases terminated by operation of law. In fact, in his memorandum of February 15, 1955, to the Secretary recommending adoption of the amendments, the Director of the Bureau of Land Management did not even mention the particular amendment at issue. Such silence is hardly indicative of any thought that the particular amendment to 192.43 was establishing a new departmental policy, as contended by the appellant.

Inasmuch as the lands applied for by the appellant on December 1, 1954, were all included in outstanding leases, the relinquishment of which had not been noted on the acquired lands plat records on that date, the applications were properly rejected and the appellant gained no rights in the lands applied for by such filing.

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.

APPEAL OF EMSCO MANUFACTURING COMPANY

IBCA-66

Decided April 6, 1956

Contracts: Appeals—Rules of Practice: Appeals: Timely Filing

Under a Government contract that contains the usual form of "disputes" clause, providing that decisions of the contracting officer concerning questions of fact arising under the contract shall be final and conclusive unless appealed from within 30 days, an appeal from a decision of the contracting officer must be dismissed if the notice of appeal was not mailed or otherwise furnished to the contracting officer within the 30 days allowed by the contract.

Contracts: Appeals—Rules of Practice: Evidence

The date borne by a notice of appeal is not proof that it was actually mailed on that date.

Contracts: Appeals—Rules of Practice: Evidence

The postmark on the envelope in which a notice of appeal was received is evidence that the envelope and its contents passed through the mails at the

time and place stated in the postmark, and is a circumstance from which the date when the notice of appeal was first deposited in the mails may legitimately be inferred by the trier of the fact.

Contracts: Appeals—Rules of Practice: Evidence

The deposit in the mails of a notice of appeal enclosed in an envelope that is properly addressed, and has stamps for the correct amount of postage affixed, creates a rebuttable presumption of fact that the notice of appeal is delivered to its destination in the ordinary course of the mails.

BOARD OF CONTRACT APPEALS

Emsco Manufacturing Company has appealed from a decision of the contracting officer, in the form of a letter dated October 28, 1955, assessing against the appellant a backcharge in the amount of $1,033.39 to reimburse the Government for the cost of correcting alleged defects in material furnished by the appellant pursuant to the contract.

The contract, which is on Government Standard Form 32 (November 1949 Edition), was entered into on May 26, 1954. It provided for the manufacture and delivery of fabricated steel structures to be incorporated into the Casa Grande and Maricopa Substations of the Davis Dam Project, Arizona-Nevada. Upon delivery of the steel structures, they were found to contain certain alleged defects. These defects were corrected, under instructions from the Project Manager, by J. M. Montgomery and Company, Inc., the contractor engaged in performing the construction work on the substations.

The contracting officer in his decision of October 28, 1955, found that the cost of the corrective work was $1,033.39, and directed that this sum be deducted from the final payment to Emsco Manufacturing Company. The appellant does not claim that the corrective work was unnecessary or that a backcharge for its cost is improper, but does claim that the amount assessed by the contracting officer was excessive and should be reduced to $306.47.[1]

After the filing of the appeal, a motion to dismiss for lack of jurisdiction was submitted by the Department counsel. The motion is based upon the ground that the appeal was not filed within the time prescribed by the contract. The Board thereupon notified the appellant, by a letter dated February 17, 1956, that action upon the motion

[1] The appellant's contentions are stated in a letter to Mr. E. A. Benson, the Project Manager, dated August 19, 1955, and in a letter to the Board, dated November 27, 1955. The notice of appeal refers to these letters as stating the grounds for the appeal.

would be postponed for a period of 15 days, during which period the appellant might file with the Board objections to the granting of the motion, or might request a conference or hearing on the motion. No response to this letter has been received by the Board.

The contracting officer's decision of October 28, 1955, was sent to the appellant by certified mail. The Post Office return receipt indicates that delivery was made to the appellant on October 31, 1955, and constitutes prima facie evidence that delivery was made on that date.[2] Clause 12 of the General Provisions of the contract fixes 30 days as the period of time within which an appeal may be taken; specifies that this period shall run from the date on which the contractor receives a copy of the decision; and further specifies that the appeal shall be mailed or otherwise furnished to the contracting officer within the 30 days.[3] It follows that the last day allowed by clause 12 for the taking of the instant appeal was November 30, 1955.

The notice of appeal and the accompanying letter of transmittal from the appellant to the Board give the address of the appellant as being in Los Angeles, California. Each of these documents is dated November 27, 1955. On the other hand, a photostatic copy of the envelope in which the appellant transmitted these documents to the office of the contracting officer, situated in Denver, Colorado, discloses that the envelope bears the following postmark: "Los Angeles, 2 Calif., Dec. 1, 8 PM, 1955." The envelope is properly addressed, is marked "Via air mail," and bears a six-cent air mail stamp. No further evidence to show the time when the notice of appeal was mailed or otherwise furnished to the contracting officer has been tendered by either party.

The legal principles applicable to such a situation are well established. The first is that the date borne by a letter, or other document

[2] Act of October 30, 1951, title I, sec. 7, 65 Stat. 675, 39 U. S. C., 1952 ed., sec. 388a.

[3] The full text of clause 12 is as follows: "Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive: *Provided,* That if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

transmitted through the mails, is not proof that it was actually mailed on that date.[4] The second is that the postmark on the envelope in which a letter or document was received is evidence that the envelope and its contents passed through the mails at the time and place stated in the postmark.[5] The third is that the deposit in the mails of mailable matter properly addressed, and with stamps for the correct amount of postage affixed, creates a rebuttable presumption of fact that such matter is delivered to its destination in the ordinary course of the mails.[6]

Applying these principles to the instant case, it is apparent that the evidence fails to establish a timely mailing of the notice of appeal. Between midnight on November 30, 1955, when the time to appeal expired, and 8 p. m. on December 1, 1955, when the envelope containing the notice of appeal was postmarked, a period of 20 hours elapsed. This period included the whole of the usual business hours of a usual working day, Thursday, December 1. In these circumstances it cannot reasonably be inferred that the actual deposit of the envelope in the mails necessarily occurred not later than midnight, Wednesday, November 30.[7] Such an inference would be opposed not only to general experience and ordinary probabilities, but also to the legal presumption that the Post Office Department does its job properly.[8] Rather, the evidence that the envelope was post-

[4] *Uhlman* v. *Arnholdt & Schaefer Brewing Co.*, 53 Fed. 485 (C. C. E. D. Pa., 1893); *Cowan* v. *Tremble*, 111 Calif. App. 458, 296 Pac. 91 (1931); *Union Gas & Oil Co.* v. *Indian-Tex Petroleum Co.*, 202 Ky. 236, 259 S. W. 57 (1924); *Phelan* v. *Northwestern Mut. Life Ins. Co.*, 113 N. Y. 147, 20 N. E. 827 (1889); *Farrow* v. *Department of Labor and Industries*, 179 Wash. 453, 38 P. 2d 240 (1934).

[5] *Whelton* v. *Daly*, 93 N. H. 150, 37 A. 2d 1 (1944); *Fairfield Packing Co.* v. *Southern Mut. Fire Ins. Co.*, 193 Pa. 184, 44 Atl. 317 (1899); 1 *Wigmore on Evidence* (3d ed. 1940), sec. 151; 7 *id.* sec. 2152.

[6] This principle has been applied to petitions instituting suit against the United States addressed to the Court of Claims, *Schultz* v. *United States*, 132 F. Supp. 953 (Ct. Cl. 1955); to petitions for the review of decisions of the Commissioner of Internal Revenue addressed to the Tax Court, *Detroit Automotive Products Corp.* v. *Commissioner of Internal Revenue*, 203 F. 2d 785 (6th Cir. 1953); *Central Paper Co.* v. *Commissioner of Internal Revenue*, 199 F. 2d 902 (6th Cir. 1952); *Arkansas Motor Coaches* v. *Commissioner of Internal Revenue*, 198 F. 2d 189 (8th Cir. 1952); to claims for drawbacks addressed to the Internal Revenue Service, *Borden Co.* v. *United States*, 134 F. Supp. 387 (D. C., N. J. 1955); as well as to letters addressed to private persons, *Beeman* v. *Supreme Lodge*, 215 Pa. 627, 64 Atl. 792 (1906).

[7] A document may be mailed by depositing it in the post office, or by placing it in an official street letter box, or by handing it to a letter carrier while on his official route, or by depositing it in any place designated by the Government for the receipt of the mails. 31 C. J. S. 783; 72 C. J. S. 299.

[8] See cases cited in note 6.

marked at 8 p. m. on December 1 leads fairly and naturally to an inference that the notice of appeal was not actually deposited in the mails until sometime after midnight on November 30.

The weight of authority supports the proposition that, while the date when a document was first deposited in the mails is not conclusively presumed to be the same as the date shown by the postmark on the envelope, nevertheless, the date shown by the postmark is a circumstance from which the trier of the fact may legitimately infer the date when the document was first deposited in the mails.[9] But even if this were not so, the evidence in the instant case would still fail to establish a timely mailing, since, apart from the postmark, there is no trustworthy evidence to show at what time the notice of appeal was mailed. The Board finds, therefore, that the appeal was not taken within the period of 30 days prescribed by clause 12.

The foregoing finding necessitates the granting of the motion to dismiss, since it is well established that provisions of the nature of those contained in clause 12 of the contract are jurisdictional, and preclude review of the contracting officer's decisions upon questions of fact arising under the contract unless an appeal is taken within the 30 days allowed for that purpose. The Board has no authority to waive this limitation or otherwise extend the 30-day period.[10]

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 appeal from the decision of the contracting officer is dismissed for lack of jurisdiction.

THEODORE H. HAAS, *Chairman.*

WILLIAM SEAGLE, *Member.*

HERBERT J. SLAUGHTER, *Member.*

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[9] *Shelburne Falls National Bank* v. *Townsley,* 102 Mass. 177, 3 Am. R. 445 (1869); *Hurley Bros.* v. *Haluptzok,* 142 Minn. 269, 171 N. W. 928 (1919); *In re Powell's Estate,* 63 Nev. 19, 158 P. 2d 545 (1945); 1 *Wigmore on Evidence* (3d ed. 1940) sec. 96. *Contra: Uhlman* v. *Arnholdt & Schaefer Brewing Co.,* 53 Fed. 485 (C. C. E. D. Pa., 1893).

[10] 43 CFR, secs. 4.5, 4.16.

U. S. GOVERNMENT PRINTING OFFICE: 1956

YAKUTAT DEVELOPMENT COMPANY DEVELOPMENT CONTRACT FOR ICY BAY—CAPE FAIRWEATHER AREA, ALASKA

Oil and Gas Leases: Applications

Where an offeror for an oil and gas lease enters into an agreement with an agent and grants an irrevocable power of attorney to the agent, under which the agent is granted extensive powers of control over the lease offer and any lease to be issued pursuant to the offer and the agent is to derive a substantial beneficial interest in any proceeds to be obtained under the lease, the agent is chargeable with the acreage in the lease offer.

Oil and Gas Leases: Acreage Limitations

Where an agent for numerous oil and gas offerors is chargeable with the acreage in the lease offers because of arrangements he has with the offerors and such chargeable acreage exceeds the maximum acreage holding permitted by regulation, the agent is entitled to 30 days in which to reduce his excess acreage holdings.

Oil and Gas Leases: Applications—Oil and Gas Leases: Acreage Limitations

Where an agent for lease offerors is chargeable with the acreage in the lease offers because of powers granted to him by the offerors to control the offers and any leases to be issued and such chargeable acreage exceeds the maximum permitted to be held, the filing of a release of practically all the powers vested in the agent will relieve the agent of the acreage charges and permit the issuance of leases to the offerors.

Oil and Gas Leases: Development Contracts—Oil and Gas Leases: Operating Agreements

A development contract consisting in part of an operating agreement will not be approved where the operating agreement was entered into on behalf of lease offerors by an agent for the offerors who at the time he signed the agreement was chargeable with excess acreage holdings in connection with the lease offers because of powers of control exercised by him over the lease offers.

A–27067

APRIL 10, 1956.

TO THE SECRETARY OF THE INTERIOR.

Attached for your consideration are a development contract and operating agreement for the exploration, development, and operation for oil and gas of approximately 1,200,000 acres of public land in the Icy Bay—Cape Fairweather area, Alaska.* There are also submitted for action by you several related matters.

*These documents are not reproduced since the decision in this case is not dependent upon the contents of the documents.

Because the situation is rather complicated, it is necessary to set forth the facts of the case in some detail: On July 29, 1953, and on subsequent dates through October 19, 1953, the Yakutat Development Company filed 340 offers for noncompetitive oil and gas leases covering 862,720 acres of land in the Icy Bay area, Alaska. Each offer was signed by an individual offeror, some submitting more than one offer. Each offer was accompanied by two documents: (*1*) an agreement between the offeror and the Yakutat Development Company, whereby the company was given certain powers with respect to handling the lease offers and to negotiate agreements with oil companies for the development of the leased lands and was to share in the proceeds to be derived from the leases, and (*2*) and irrevocable power of attorney given by the offeror to the company to negotiate for and execute such agreements for the exploration and development of the leased lands.

In a decision dated October 23, 1953, as amended on November 13, 1953, the manager of the Anchorage land office rejected the offers on the ground that, under the powers of attorney and the agreements between the offerors and Yakutat, the latter had effective direct control over the area applied for, was the real party in interest, and was therefore chargeable with acreage greatly in excess of the limitation prescribed by law. At that time and until August 2, 1954, the maximum acreage that a single individual, association, or corporation could hold in Alaska was 15,360 acres. On August 2, 1954, the limitation was raised to 100,000 acres (30 U. S. C., 1952 ed., Supp. II, sec. 184).

Yakutat appealed to the Director on behalf of the offerors. On June 21, 1954, the Acting Assistant Director affirmed the manager's decision with the modification that the appellants should be allowed 30 days, in accordance with 43 CFR 192.3 (c), in which to reduce the excess acreage. The regulation cited provides that "Any party found to hold or control accountable acreage * * * 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."

Yakutat filed a timely appeal to the Secretary (A–27067).

On December 31, 1955, before action was taken on the appeal, an operating agreement was executed, subject to approval by the Secretary, between the Colorado Oil and Gas Corporation, as the operator, the lease offerors, and Yakutat. On January 27, 1956, after discussions with the Geological Survey, a development contract between Colorado and the United States was filed for execution by the Secretary.

The legal question presented in this matter involves the rejection of the lease offers by the manager and the Acting Assistant Director of the Bureau of Land Management on the ground of excess acreage hold-

ings.[1] To understand this fully, it is necessary to go back a few years. In 1952 the Department had before it two protests filed by Indian groups against the issuance of some 400 oil and gas leases covering approximately 1,000,000 acres of land in the Katalla-Yakataga area in Alaska. In the consideration of the protests, a question occurred as to the validity of the lease offers. Each offeror had given the Northern Development Company, a partnership, an irrevocable power of attorney to negotiate a unit agreement to which the leases could be committed, and each offeror had executed an agreement with the company which gave the latter considerable powers over the offers and leases to be issued. The powers of attorney and agreements were substantially identical with those involved in the present Yakutat matter. In a memorandum dated July 18, 1952, to the Secretary, the Solicitor expressed the view that the agreements between the offerors and Northern Development, coupled with the powers of attorney, would serve to give the latter an interest in any lease that might be issued and that, if all the leases were issued, the interest of Northern Development would exceed the acreage limitation. The Solicitor said this view had been expressed to the attorney for Northern Development, Nathaniel Ely, and that it had been agreed that the best procedure was to delay issuance of the leases until a development contract or unit plan could be submitted to the Department and approved simultaneously with the issuance of the leases.

Accordingly, the Indian protests were dismissed on August 2, 1952, and, no action was taken on the lease offers at that time. Subsequently, the lease offerors negotiated an operating agreement with the Phillips Petroleum Company and Phillips prepared a development contract with the United States. On February 6, 1953, the Secretary approved the development contract and operating agreement, issued all the leases, and approved an assignment by Northern Development of its overriding royalty interest so as to bring its chargeable acreage well below the maximum permitted. Each lessee, of course, had less than the permissible acreage, and Phillips, as the operator under a development contract, was not chargeable with the acreage under section 17b of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226e).

The Yakutat situation is substantially identical with the Northern Development case save for two factors:

[1] Subsequent to the decisions earlier mentioned, Yakutat on or about January 24, 1955, filed an additional 104 lease offers covering 266,240 acres and on January 31, 1955, filed another 10 offers covering 25,600 acres. These groups of offers were rejected by the manager in decisions dated January 24 and February 9, 1955, respectively, on the same grounds that the first group was rejected on, but in the last two decisions the manager allowed the offerors 30 days to dispose of excess acreage. Yakutat appealed to the Director from both decisions. No action has been taken on the appeals.

1. In the Northern Development case there were no conflicting applications for leases on the same land. In the present case, there are a number of conflicting lease offers filed subsequent to the Yakutat filings. These junior offers were all filed after August 2, 1954, when the acreage limitation was increased to 100,000 acres. Anthony Maio, who holds nine of the junior offers which were filed on January 14, 1955, has very recently filed a protest against the issuance of leases to Yakutat which would conflict with his offers.

2. In the Northern Development case no action had ever been taken on the lease offers there involved. Here the lease offers have been rejected by both the manager and the Acting Assistant Director of the Bureau of Land Management.

The existence of the conflicting offers raises squarely the question of whether the lease offers filed on behalf of the offerors by Yakutat have priority as the first qualified offers. Under the view taken by the Solicitor of the same arrangements in the Northern Development case, it would have to be concluded that by reason of the powers of attorney given to Yakutat and the agreements executed with Yakutat by each offeror, Yakutat was given such powers of control over the lease offers and the leases to be issued and such a beneficial interest in the proceeds to be obtained under the leases that Yakutat would have to be charged with the acreage in the lease offers, a total of around 1,200,000 acres. This is over 10 times the acreage that any person or association can hold today and many times greater than the acreage that one could hold at the time the lease offers were filed.

However, the limitation imposed upon acreage holdings in lease *offers*, as distinguished from holdings in *leases*, is a matter of administrative regulation and is not required by statute. The pertinent regulation, 43 CFR 192.3 (c), has been quoted earlier. It provides that any party holding or controlling excess acreage shall be given 30 days to reduce his holdings. On the basis of this regulation, if the pending appeal to the Secretary by Yakutat were taken up and disposed of unfavorably to Yakutat, the latter would have to be given 30 days in which to give up its control over the excess acreage it controlled under its powers of attorney and agreement with the offerors, without loss of priority to the offers. *Albert C. Massa et al.*, 62 I. D. 339 (1955).

It is unnecessary, however, to consider further the granting of a 30-day period because Yakutat has now given up its control over the lease offers and leases except to a very limited extent. On March 13, 1956, the four individuals comprising Yakutat filed a release dated March 10, 1956, whereby they renounced and released with respect to the lease offers in question the powers vested in them jointly and severally by the powers of attorney granted them by the offerors and the agreements they had with the offerors, except as to a very limited

power to select a bank to act as agent for the offerors in receiving and distributing the funds to which they are entitled under the pending operating agreement. With the filing of this release in advance of the 30-day period to which Yakutat would be entitled under 43 CFR 192.3 (c), the objection to issuance of the leases raised by the manager and Acting Assistant Director has been removed and it appears that the leases can be issued if all other requirements have been met. Since the basis for rejection of the lease offers no longer obtains, Yakutat's appeal is moot and should be dismissed. It follows also that the lease offers filed on behalf of the offerors by Yakutat have not lost their priority and that the protest of Mr. Maio, the junior applicant, should be dismissed.

There remains the question whether, in the circumstances related, the operating agreement and development contract should be approved. The operating agreement was executed on behalf of the offerors by Wm. T. Foran as attorney in fact for each of the offerors under the agreements with, and powers of attorney given to, Yakutat and its members, jointly and severally. The operating agreement was executed on December 31, 1955, well in advance of the renunciation of the agreements and powers of attorney by Yakutat on March 10, 1956. If the operating agreement were to be approved now, it would be a recognition that it was properly executed on behalf of the offerors by Mr. Foran. The net effect would be that the later execution of the release by Yakutat was a meaningless act. Yakutat had already accomplished its purposes under the agreements and powers of attorney and was giving up nothing by its release. To approve the operating agreement in such circumstances would be to ignore the substance of what actually had been done.

It would seem, therefore, that the only course that the Department can consistently follow is to refuse approval of the operating agreement and of the development contract, the two documents forming together the plan for development of the area involved. If upon the issuance of the leases to the offerors they wish again to enter into another operating agreement with Colorado, that is the privilege of the parties. And if, upon the execution of a new operating agreement, Colorado wishes to submit a new development contract to the Department, that is its privilege. Such new arrangements, made free from the agreements held here to vest excess acreage in Yakutat, might well receive the approval of the Department.

I recommend, therefore, that by your approval of this memorandum, you take the following actions:

1. Dismiss the appeals of the Yakutat Development Company to the Secretary (A–27067) and to the Director.

2. Dismiss the protest of Anthony Maio.

3. Remand the case to the Bureau of Land Management for issuance of leases upon the lease offers involved in the appeals by Yakutat, if all other requirements have been met by the offerors.

4. Refuse approval of the development contract executed by the Colorado Oil and Gas Corporation and the operating agreement executed on December 31, 1955, by Colorado, Yakutat, and the offerors (acting through Wm. T. Foran).

J. REUEL ARMSTRONG,
Solicitor.

Approved:
WESLEY A. D'EWART,
Assistant Secretary of the Interior.

HALVOR F. HOLBECK

A-27330

Decided April 11, 1956

Oil and Gas Leases: Applications

Where an offer for oil and gas lease is filed for 640 acres or more and the offer is then voluntarily withdrawn as to part of the acreage so as to bring the remaining acreage in the offer below 640 acres, the offer is properly rejected as being in violation of the departmental regulation requiring that an offer be for not less than 640 acres.

Eugene J. Bernardini et al., 62 I. D. 231 (1955), *distinguished.*

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On June 21, 1955, Halvor F. Holbeck filed an oil and gas lease offer (Montana 019172) for two separate tracts of land, totaling 963.81 acres, in sections 9 and 24, respectively, T. 6 S., R. 41 E., P. M. A little over a month later, on July 28, 1955, he filed a withdrawal of his offer as to most of the tract in section 24. The withdrawal left 560 acres in his offer.

On August 31, 1955, the manager of the Billings land office issued a lease to Mr. Holbeck for all the tract in section 9 (except as to a 40-acre tract which the United States had patented without an oil and gas reservation) and rejected his offer as to the remaining land in section 24. The rejection was based on the ground that, by virtue of Mr. Holbeck's withdrawal, less than 640 acres were left in the offer and, since the remaining land in section 24 adjoined land available for leasing, the offer was required to be rejected under 43 CFR 192.42 (d).

Presumably the lease was issued as to the tract in section 9 on the theory that that tract was isolated and therefore leasable, although less than 640 acres in extent, under one of the exceptions in 43 CFR 192.42 (d).

Mr. Holbeck appealed to the Director of the Bureau of Land Management from the rejection of his offer as to the land in section 24. On January 24, 1956, the Director affirmed the manager's decision. Thereupon Mr. Holbeck appealed to the Secretary.

The decision on this appeal hinges upon the interpretation to be given to the following provisions from 43 CFR 192.42:

> (d) * * * 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:
>
> (1) Where the offer is accompanied by a showing that the lands are in an approved unit or cooperative plan of operation or such a plan which has been approved as to form by the Director of the Geological Survey.
>
> (2) Where the land is surrounded by lands not available for leasing under the act, except that where the tract was isolated as the result of a partial relinquishment of a lease, no lease offer will be received for the relinquished land other than one filed under the conditions prescribed in subparagraph (1) of this paragraph for a period of 60 days from and after the date of filing of the partial relinquishment.

The appellant contends that this regulation requires only that an offer must contain 640 acres or more at the time it is filed and that subsequent thereto withdrawals of lands may be made from the offer which would reduce it to less than 640 acres without violating the regulation. The Director held that this interpretation would permit a person by a simple ruse to defeat the purpose of the regulation, and he held, in effect, that if an offer is reduced below 640 acres by an offeror after the offer is filed it falls within the prohibition of the regulation and must be rejected.

In *Eugene J. Bernardini et al.*, 62 I. D. 231 (1955), the Department used some language which would support the appellant's position:

> * * * 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. (P. 235.)

However, the facts in the *Bernardini* case were completely different from those presented here. In that case one Travis filed an offer for all of section 4. He filed a separate offer for some additional land and, for some unknown reason, 120 acres of section 4. The manager eliminated the 120 acres from both offers, bringing the first offer below 640 acres. Bernardini, who had filed a conflicting offer for section 4, contended that the Travis offer for section 4 should be rejected be-

cause it was now in violation of the 640-acre regulation. The Department held that the Travis offer was proper.

In the *Bernardini* case, the Department was concerned only with a situation where, after an offer for the proper acreage was filed, land was eliminated from the offer not by a voluntary act on the part of the offeror but by the action of the manager. The Department likened the situation to one where, after an offer is filed for the proper amount of acreage, part of the land is then withdrawn by the Department or otherwise rendered unavailable for leasing. In such circumstances the Department concluded that the offeror should not be penalized. The *Bernardini* decision pointed out that the purpose of the regulation was to curtail the then prevalent practice of filing for small tracts, usually 40 acres in size. In other words, the regulation was aimed at *voluntary* filings for small tracts, not at filings which originally contained sufficiently large tracts but which were later reduced in acreage because of actions over which the offerors had no control. The language quoted above was used in the light of these considerations.

The purpose of the regulation was set forth in greater detail in *Annie Dell Wheatley et al.*, 62 I. D. 292 (1955). The Department said there—

> 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 intervener 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 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. (P. 293.)

Obviously the purpose of the regulation would be largely defeated if an offeror, after filing for 640 acres or more, could immediately

reduce his acreage to less than 640 acres by withdrawing acreage from his offer. An interpretation of the regulation to permit this result would be completely unreasonable in light of its history and purpose. There is nothing in the language of the regulation which would require such an interpretation.

An offer for lease remains an offer until it is accepted. During its continuance as an offer it is governed by the regulation in question so far as voluntary acts of the offeror are concerned. If an offeror should file for 640 acres, then withdraw his offer and file a new offer for only a part of the same land, there is no question but that the new offer would be in violation of the regulation. It would be wholly irrational, in the absence of clear words compelling it, to hold that a partial withdrawal of an offer, which has the same effect, is permitted by the regulation.

The Director observed in his decision that the appellant and others have made a practice of filing offers which are for 640 acres or more at the time of filing but which are then withdrawn in part, leaving less than 640 acres in the offer. I am informed that there are pending before the Director at least 15 appeals involving offers of this nature filed by the appellant and others apparently associated with him during the 7-month period preceding the filing of the offer involved in this appeal. While such numerous filings suggest the possibility of a deliberate purpose to evade the regulation in question, no opinion is expressed on that point. The other filings are referred to here merely to emphasize the point that to hold that an offer for 640 acres or more at the time of filing can be reduced below that acreage by a voluntary withdrawal by the offeror would be to sanction an easy way of defeating the purpose of the regulation.

For these reasons, I am of the opinion that the Director's decision was correct.

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

J. REUEL ARMSTRONG,
Solicitor.

APPEAL OF L. D. SHILLING COMPANY, INC.

IBCA–23 (Supp.)

Decided April 30, 1956

Contracts: Additional Compensation—Contracts: Changed Conditions

A contractor who has encountered a quantity of rock in re-excavating a portion of a recently excavated canal is not entitled to additional compensation under

article 4, the "changed conditions" article of the standard form of Government construction contract (No. 23) when the specifications and drawings provided for unclassified excavation and indicated the presence of rock, and the contractor had information or sources of information from which it could readily have ascertained the condition which was encountered. Conditions cannot be said to be "unknown" within the meaning of article 4 when they are foreseeable or ascertainable with the exercise of ordinary prudence, nor can conditions be said to be unusual within the meaning of the same article unless they turn out to be substantially worse than might reasonably be anticipated under the circumstances of the case.

BOARD OF CONTRACT APPEALS

By letter dated January 3, 1955, the contractor appealed from the findings of fact and decision, dated November 30, 1954,[1] of the contracting officer, in so far as he had denied two of the contractor's claims for additional compensation.

The claims arose in connection with work done in repairing the so-called Feeder Canal of the Columbia Basin Project, Washington, under a contract dated October 23, 1953, and entered into on Standard Form No. 23 (Revised April 3, 1942).

One of the claims involved a mistake in bid, and the other was for additional compensation in the amount of $25,701.65 to cover extra costs of excavation by reason of the fact that the contractor allegedly encountered rock and boulder conditions which it had not anticipated.

The Government made a motion to dismiss both claims, and oral arguments on the motion were held in Seattle, Washington, on June 17, 1955, before two members of the Board, Messrs. Thomas C. Batchelor and William Seagle.

In a decision dated August 19, 1955, the Board granted the motion with respect to the claim involving the mistake in bid, on the ground that it was without authority to grant relief where a mistake in bid had been made and discovered after award, but denied the motion with respect to the excavation claim, on the ground that disputed issues of fact, as well as of law, appeared to be involved. The Board held, in view of such cases as *Loftis* v. *United States*, 110 Ct. Cl. 551 (1948) and *Shepherd* v. *United States*, 125 Ct. Cl. 724 (1953), that notwithstanding the provisions of the specifications providing for unclassified excavation, the presence in the contract of a "changed conditions" article opened the possibility that the discovery of rock of a monumental nature might constitute a changed condition entitling the contractor to additional compensation.

On October 10, 1955, a hearing was held at Coulee Dam, Washington, before Mr. Theodore H. Haas, Chairman of the Board, for the purpose

[1] This document was not received by the contractor until December 9, 1954, and the appeal was, therefore, timely.

of taking testimony with respect to the excavation claim. The contractor was represented at the hearing by Mr. Paul R. White, of the firm of Collins and White, Ephrata, Washington, and the Government was represented by Mr. Palmer King, Department Counsel. The contractor, as well as the Government, have filed post-hearing briefs, which the Board has considered. In the light of the whole record, the Board must conclude that the claim is not meritorious.

It is important to stress at the outset of the consideration of this case that the present contract involved the partial *re-excavation* of an existing canal which had been completed by J. A. Terteling & Sons, Inc., in 1951, but which had been damaged in the course of its operation. The section to be re-excavated extended from station 81+04.5 to station 91+04, a distance of approximately 1,000 feet. The principal items of work required of the present contractor were the removal of the concrete lining from the floor of the canal, the deepening of the canal excavation by approximately 18 inches, the installation of drains running beneath the canal floor, the installation of a new lining on the floor of the canal, the making of some minor repairs to the check structure at the upper end of the re-excavated section, and the building of a triangular overflow control structure at the lower end of the section. This latter structure, which began at station 89+00 about 800 feet below the check structure, was designed to replace part of an existing chute that served as the outlet of the canal, and its building necessitated both the deepening and the widening, at some points, of the existing excavation for the chute.

The contractor's claim is based upon the difficulties which it encountered in the work of re-excavation. The contractor alleges that these difficulties arose when, expecting to encounter, after removing the concrete, only clay, silt and small, scattered boulders, it encountered instead extremely large boulders, and solid rock which extended under considerable reaches of the canal, and that to deal with this rock, it had to resort to means which considerably increased the expense of the excavation. The contracting officer found, however, that there was "little or none of the required excavation for the canal" that could be classified as rock excavation, and that it was only in short reaches along the sides of the overflow control structure and at some points under the cutoff walls where the required excavation extended several feet beyond the limits of the excavation of the canal as originally constructed that rock was encountered which could not be removed until loosened by blasting.

The specifications on which the contractor bid called for "Excavation, all classes." This, in itself, indicated that the contractor would be required to remove whatever material would be encountered, even

though it included at least some rock. In addition, paragraph 38 of the specifications included the statement: "Materials excavated will not be classified for payment." Furthermore, the same paragraph indicated that some rock excavation was to be expected by defining both "Rock excavation" and "Common excavation," as follows:

> Rock excavation.—Rock excavation includes all solid rock in place which cannot be removed until loosened by blasting, barring, or wedging, and all boulders or detached pieces of solid rock more than 1 cubic yard in volume. Solid rock under this class, as distinguished from soft or disintegrated rock under common excavation, which also required blasting before removal, is defined as sound rock of such hardness and texture that cannot be loosened or broken down by hand-drifting picks. No material, except boulders or detached pieces of solid rock, will be classified as rock excavation, which is not actually loosened by blasting before removal, unless blasting is prohibited and barring, wedging, or similar methods are prescribed by written order of the contracting officer.
>
> Common excavation.—Common excavation includes all material other than rock excavation; including, but not restricted to earth, gravel, and also such hard and compact material as hardpan, cemented gravel, and soft or disintegrated rock, which cannot be removed efficiently by excavating machinery until loosened by blasting; also all boulders or detached pieces of solid rock not exceeding 1 cubic yard in volume.

That some rock excavation might well be involved was also indicated by a number of provisions in paragraph 39 of the specifications. It stated that "The item of the schedule for excavation includes all of the required excavation * * * ." It also stated that, except as provided in the drawings for the overflow structure, "excavation of common material, will be made to 12 inches below the neat lines of the under side of the concrete, and in excavation of rock material the foundation shall be excavated so that there will be not less than 6 inches between rock points and the under side of the concrete and with an average depth of approximately 12 inches outside the under side of the concrete. In the excavation of rock material or of hard and compact material which cannot be removed efficiently by excavating machinery, until loosened by blasting, special care shall be taken to prevent overbreakage outside of the limits to which measurement for payment is made." In the provision for measurement for payment in this paragraph, it was stated that at the vertical walls "excavation will be measured to lateral dimensions 1 foot outside the foundations of the structure, and to slopes of 1 to 1 in common material and ¼ to 1 in rock material." Finally, in the provision for "Payment for excavation, all classes," in this paragraph, it was stated that the unit price bid for this work "shall include the costs of blasting or ripping * * * ."

In addition to the specifications, themselves, the contractor was supplied with three drawings that contained references to rock. The drawing listed in the specifications under No. 4, which depicts the overflow control structure, had a reference to rock in the notes to the

drawing. The drawings listed in the specifications under Nos. 6 and 8, which were included in the specifications under the Terteling contract but were reproduced in the specifications under the Shilling contract for the information of the contractor, also indicated rock. Drawing No. 6 showed lining detail applicable to rock excavation, while even more significantly, the longitudinal section of Drawing No. 8, showing the entire chute section as constructed by Terteling from station 88+75 to beyond station 91+04, has a dotted line labeled "Probable rock line" running the entire length of the section at a level considerably above the excavation performed by the present contractor.

The "changed conditions" article of revised U. S. Standard Form No. 23, which is article 4, provides:

> Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

In view of the provisions of the specifications and drawings, plainly indicating that some rock excavation was to be expected, it is patent that the contractor cannot assert that it had encountered subsurface or latent conditions at the site "materially differing from those shown on the drawings or indicated in the specifications * * *." Indeed, the case of the contractor is not really based on such a contention, but rather on the theory that it encountered "unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications." But conditions cannot be said to be "unknown" within the meaning of article 4 when they are foreseeable or ascertainable with the exercise of ordinary prudence, nor can conditions be said to be "unusual" within the meaning of the same article unless they turn out to be substantially worse than might reasonably be anticipated under the circumstances of the case.

The contractor appears to have been almost determined to ignore all circumstances indicating that large quantities of rock might be encountered in the course of the excavation. Lloyd D. Shilling, its chief officer, testified in detail concerning these circumstances. It appears that after receiving the invitation to bid he made a trip to investigate

the site of the work and was taken around by C. H. Jackson, the Chief of the Civil and Structural Section of the Bureau of Reclamation office that was involved. In his examination of the site, Shilling noticed that—to use his own words—"This entire feeder canal was, in effect, running down through a channel between rock outcroppings * * *." (Tr., p. 5.) He, therefore, asked Jackson whether in his opinion they would encounter rock in the excavation but the latter stated that he was not familiar enough with the project to express an opinion, and suggested to Shilling that he contact Pat O'Donnell, who had been field engineer in charge of operations under the Terteling contract.

Shilling went back to his office in Moses Lake and telephoned to O'Donnell, who was then located at Palisades, Idaho. O'Donnell, as well as Shilling, testified concerning this conversation. Shilling testified that O'Donnell told him that when he was on the Terteling job "they had encountered clay, silt, and scattered boulders" (Tr., p. 5), which, Shilling assumed, did not exceed a cubic yard in volume. But O'Donnell testified that he had told Shilling that the excavation of the Feeder Canal "had been quite a messy job. The geology had varied considerably from area to area and that he should try to get hold of the North Dam Completion Report and if that were not available that he get pictures from the Photo Lab." (Tr., p. 48.) O'Donnell also testified that he told Shilling that "as I remembered it we had encountered a considerable number of large boulders immediately below the check. These boulders had sand and gravel interspersed there between the boulders and we had shot the boulders and even shot below grade." (Tr., p. 48.) There is also in evidence a memorandum dated August 3, 1954, in which O'Donnell stated that he told Shilling that "in excavating the area in the vicinity of the check structure and for some distance downstream, we had encountered a series of large boulders interspersed with pockets of clay, sand and gravel. The large boulders required shooting and were excavated below grade as was the clay, sand and gravel. I told him that the original excavation was rather a difficult job." In the same memorandum O'Donnell stated also that he had suggested to Mr. Shilling that he ask Mr. Jackson to obtain "The North Dam Completion Report in which could be found a very good picture of the canal excavation in that area." In view of the confirmation of O'Donnell's testimony by this written record, the Board is constrained to find that the contractor was warned by O'Donnell that large boulders had been encountered in the excavation under the Terteling contract, and also that the contractor had notice of the North Dam Completion Report. Although Shilling testified that he did not remember whether O'Don-

nell had mentioned the North Dam Completion Report, he conceded that he may have done so (Tr., p. 19).

After talking to O'Donnell, Shilling called the Ephrata office of the Bureau of Reclamation, and asked to speak to one of the geologists there. Although he could not identify the geologist to whom he spoke, he testified on direct examination that the geologist informed him that while there were "some floaters nearby," there would not be any solid rock (Tr., p. 6). On cross-examination, he testified that the geologist told him that "in that area adjacent to the work they had what was known as basalt floaters which he went on to describe were masses of basalt rock that had drifted in with the ice flow." (Tr., p. 17.) Shilling did not deduce from the presence of the basalt floaters in a glaciated area that they might be encountered under, as well as above, the surface of the ground. He obtained five photographs from the Ephrata office of the Bureau of Reclamation (Appellant's Exhibits 1 to 5), which satisfied him that he would not encounter rock in the area of the excavation because of the nature of the material which they showed (Tr., p. 6). But he conceded on cross-examination that this material did not appear to be natural material but material that had been brought in (Tr., p. 30). Thus, the material would not reveal the natural conditions which had been found in the previous excavation.

This appears to have been the extent of the investigation made by Shilling. Although he knew, of course, of the Terteling contract, and the feeder canal had been constructed quite recently, he manifested no further curiosity. He was personnally acquainted with a Robin Dixon, who worked for Terteling, and he did, to be sure, contact him after talking to O'Donnell and the geologist but Dixon did not happen to know who the Superintendent had been on the Terteling job, and Shilling decided to make no further efforts to find out. Indeed, he overlooked many more sources of information than he explored. He conceded that he had had considerable experience performing work for the Bureau of Reclamation, and that he would assume that cross sections of the material excavated under the Terteling contract would be available in the Bureau files but since he was satisfied that they would not show any rock, he apparently saw no point in looking at them (Tr., p. 17). He also did not inquire whether under the Terteling contract the excavation had been classified for payment as rock (Tr., p. 17). Moreover, he did not even attempt to secure a copy of the North Dam Completion Report.

The exact title of this report is "Final Construction Report on North Coulee Dam Feeder Canal and Clearing of the Equalizing Reservoir." It was prepared under the direction of Bert A. Hall,

Assistant Supervising Engineer, and bears the date 1952. It consists of 442 pages, including 59 photographic plates, and 44 engineering drawings. It describes all the work done on the Feeder Canal, including the work done under the Terteling contract. If the contractor's chief officer had examined this report, he could hardly have come to the conclusion which he reached that he would not encounter appreciable quantities of solid rock. Thus, in Part I of the report, headed "General," on page 29, it is stated:

> For the first 3,500 feet, the canal is cut through granite. From station 35+00 to about station 54+00, it passes principally through Latah sediments. From stations 54+00 to the end of the canal, station 98+00, the geological conditions are variable. Here, the canal was excavated through an area which had been subjected to sliding in the post-glacial period, consequently, the bedded clay and shale formations are somewhat disturbed. Many of the large basalt boulders in the area were detached from the main basalt ridge to the right and above the canal. They have moved downhill, sliding on the slick clays, and are at present resting on or embedded in these clays and shales. Because of the unstable foundation conditions, the canal was redesigned to provide a cut-and-cover conduit between stations 54+00 and 75+00, the most dangerous part of the section.

Thus, too, in Table XI, entitled "Location and Types of Materials Encountered During Excavation of Common Materials in the Feeder Canal," which appears on page 130 of the report, the material between stations 52+00 and 98+00 is described in the column headed "Remarks," as follows:

> The relationship of materials in this section is very complex. The materials of later origin than the shales are inter-mingled and occur at varying depths and relative locations. Large basalt blocks appear frequently. The underlying shales are disturbed by slides which occurred in earlier times.

On the next page of the report, in part of a section entitled "Rock Excavation for Canal and Canal Structures" appears the statement:

> Between stations 35+00 and 94+00 the rock encountered was basalt which occurred either as boulders or large blocks.

W. E. Walcott, one of the Government geologists, who had studied the geology of the Columbia Basin area, described the geological conditions which existed there. The contractor emphasizes the opinion which Walcott expressed on direct examination that the geological conditions in the Coulee Dam area were so unusual that a contractor would not expect to encounter boulders embedded in the sediment which might be as large as big buildings (Tr., p. 67). The context of this statement, however, suggests that the hypothetical contractor the witness had in mind was one who had no knowledge at all of the physical conditions at the site, rather than one who had obtained through visual inspection at least some familiarity with the surface formations around and about the site. Moreover, Walcott also ex-

pressed the opinion, both on direct examination and on cross-examination, that the outcroppings of large rocks in the area would probably cause a contractor to suspect the presence of massive rocks underneath the surface (Tr., pp. 66, 69 and 70). These latter statements are more pertinent to the instant appeal than the opinion first expressed by the witness on his direct examination, since the question at issue is not what a contractor might generally expect to encounter, but what the particular contractor in this case should have expected to encounter in the particular circumstances which confronted him, and in the light of the knowledge which he possessed or could readily have obtained.

Ignoring all warnings, the contractor bid the extraordinarily low price of 50 cents a cubic yard for "excavation, all classes." The next lowest bidder bid $2 a cubic yard, while two of the bidders went as high as $5 a cubic yard. The Bureau of Reclamation's own estimate was $2.50 a cubic yard. Indeed, the Shilling bid was considered by the Bureau to be so low that the contractor was asked to verify the bid, and did so. It is apparent that neither the other bidders nor the Bureau shared the confidence of Shilling that only a very small amount of rock excavation would have to be performed. It was based, apparently, not only on the results of his investigations but also upon the wholly unwarranted assumption that since the unit of the schedule for excavation was unclassified, it must necessarily embrace only a negligible amount of rock. The real reason for not classifying the excavation was explained by D. D. Johnson, a Bureau of Reclamation employee who was concerned in the preparation of the specifications. He testified that the specifications provided for unclassified excavation because sufficient information to indicate even approximately the quantity of rock that might be encountered was not available. While it was known that there was rock in the area, it had been overshot by Terteling to a depth not known. As a result it was not possible to hazard even a reasonable guess as to the amount of solid rock that would have to be excavated.

In so far as the quantitative factor is involved in the application of the "changed conditions" article of the contract, the Board cannot find, moreover, that the contractor encountered far more rock excavation than it should reasonably have anticipated from information which was available. The testimony is conflicting with respect to the amount of rock encountered, and consists entirely of opinions and impressions of the witnesses, so that no more than a rough guess can be made.

Shilling himself testified on direct examination that some rock in the form of scattered big boulders was encountered for the first few hundred feet of the excavation, which would be from the check structure going downstream, but that the further the excavation proceeded towards the outlet end, the more solid the rock and the larger the boulders became. Generally speaking, he stated that "over about 75 percent of the area was rock but the last 50 percent of the area was underlaid almost completely by rock," (Tr., pp. 8–9) and that it had to be loosened by ripping and the use of drift picks and pavement breakers (Tr., p. 9). On cross-examination, he stated that in his opinion approximately 30 to 40 percent of the top 18 inches of the excavation in the first 800 feet from the check structure would have been classified as rock within the meaning of the specifications (Tr., pp. 20, 27). He testified also that before bidding he had estimated that about 5 percent of the total excavation would be rock (Tr., p. 23).

However, V. J. Peterson, the Resident Engineer, testified that in the canal proper from the check structure to station 89+00, the beginning of the overflow structure, there was little excavation that in his opinion could be classified as rock (Tr., p. 54). Moreover, Jack Groom, the contractor's own superintendent on the excavation job, testified that all the rock encountered in approximately the first 850 feet of the excavation from the check structure, which would be approximately at the overflow structure, could be removed pretty successfully by ripping, apart from one boulder (Tr., pp. 13 and 16). There is also evidence that the ripper which would have been used to loosen the material upstream from the overflow structure was not even brought on the job until December 28, 1953, and that the excavation was started on November 30, 1953, and completed on January 6, 1954, to station 89+00.

C. H. Jackson, the Chief of the Civil and Structural Section testified that less than 10 percent of the excavation below the lining of the canal (exclusive of the two feet of excavation for the trenches) would have been classified as rock (Tr., pp. 43–44). Peterson testified that the percentage of rock encountered from the beginning of the overflow structure to the end of the excavation was approximately 10 percent (Tr., p. 60). Frank Whalen, who was the inspector on the job, testified that drift picks and concrete breakers, which he would regard as methods of rock excavation, were not used more than 10 percent of the time in the excavation from the check structure to station 89+00. He also testified that most of the rock was encountered in the cutoff walls and the wing walls, which would be between station 89+00 and the chute, but, nevertheless, that "there was about the same amount of rock below the overflow structure as there was above it" (Tr., p. 63).

The Board does not doubt that the contractor encountered along some reaches of the canal boulders or rocks "the size of haystacks or houses" (Tr., p. 29). But, since it was not required to remove these formations but only to excavate to the specified depths, their presence does not in itself indicate the amount of the rock excavation. While the Board does not believe that any of the witnesses were deliberately exaggerating or minimizing the quantity of rock in the excavation, the variances in their estimates may, perhaps, be accounted for by differences in their conceptions of what constituted rock excavation. Shilling doubtless regarded as rock excavation any material that had to be subjected to ripping, or breaking, while the Bureau engineers doubtless took into consideration the more restrictive definition of rock excavation contained in the specifications. There were also doubtless differences of opinion concerning the extent to which the rock that was present had already been shattered in the course of the Terteling excavation. Considering that the burden of proof rests upon the contractor, the Board must conclude that it has not shown that the amounts of rock encountered were "unknown conditions of an unusual nature" within the meaning of article 4 of the contract.

The Government also contends that the contractor engaged in conduct which in effect amounted to an admission that it had not encountered changed conditions within the meaning of this article of the contract. It points to several circumstances in support of this contention. After the bid opening, the contractor experienced difficulty in securing a performance bond because its bid had been so low in comparison with the other bids. In order to satisfy the bonding company that it could successfully perform the contract, it obtained from Peterson cross sections of the Terteling job in order to determine where rock might be encountered (Tr., pp. 7, 21). Counsel stipulated at the hearing that these cross sections showed that between the check structure and the overflow structure at station 89+00 approximately 55 percent of the excavation of the canal floor was classified as rock (Tr., p. 60). At this point the contractor made no contention that it had encountered a changed condition. On the contrary, it employed a consulting engineer to remove the qualms of the bonding company, and eventually succeeded in securing a performance bond.

It also appears that when much later trouble was experienced in constructing trenches for drains underneath the canal floor due to the fact that the broken condition of the rock made it difficult to hold the slopes of the trenches, the contractor agreed to "excavate the entire bottom of the canal flat to the bottom of the trenches" (Tr., p. 25), and refill the excavation with selected material. The contractor agreed to do the additional excavation involved in this procedure at its bid

price of 50 cents a cubic yard, although this meant additional excavation involving the removal of the material between the trenches, which might require more excavation in unbroken rock than would otherwise have been necessary.

Shilling explained in his testimony that he had no alternative but to proceed with the performance of the contract, notwithstanding what the cross sections of the Terteling contract showed, since the award had already been made, and he still hoped that the rock would be found to be in a shattered condition (Tr., p. 22). Similarly, he explained that in making the agreement for the construction of the trenches for the drains, he was presented with a choice between evils. It was easier to do the excavation at the bid price than to make the berm stand between the trenches (Tr., p. 26). Doubtless both of these explanations are valid, as far as they go, and the Board cannot regard the conduct of the contractor in either case as tantamount to admissions. Nevertheless, it considerably weakens the contractor's case. Apparently, it did not assert a claim for additional compensation immediately upon discovery of the cross sections. It did so only "during the progress of the work" (Tr., p. 22). Its explanation of its agreement in connection with the construction of the trenches for the drains is particularly unsatisfactory, since it was not barred in this instance from at least requesting additional compensation for the more difficult excavation.

In its interlocutory decision, the Board merely recognized that under the decisions in the *Loftis* and *Shepherd* cases, the possibility of recovery existed by virtue of the provisions of the "changed conditions" article, so that a motion to dismiss should not be granted. In view of the testimony subsequently adduced at the hearing, it is clear, however, that these cases are not controlling. While both of these cases involved specifications providing for unclassified excavation, the provisions of the specifications did not in themselves warn the contractor of the type of materials actually encountered, nor did the contractors in these cases have any information, or sources of information, from which they could readily have ascertained the conditions which they would actually encounter. Opportunities to visit the site, and the availability of tests of subsurface materials by methods which could not be absolutely reliable are not to be compared to the certainties which existed in the present case by virtue of a previous excavation so recently performed. While the Court of Claims has emphasized that the limiting provisions of specifications must be read in the light of the "changed conditions" article, so that effect will be given to all the provisions of the contract, the Board does not believe that the Court intends that the article be made the Achilles heel of every construction contract.

The Board has reached its negative conclusion in the present case with regret. The Government states that the work performed, which was of a critical nature, was very satisfactory, and that it found the contractor very cooperative. The losses which were doubtless sustained by the contractor were, however, due to its extremely low bid and its own errors and inattention, and these are factors which the Board may not properly take into account. While the Court of Claims has emphasized that one of the purposes of the "changed conditions" article is to induce contractors to make low bids by eliminating unknown conditions and contingencies,[2] it was certainly not intended to encourage prodigal bidding in the face of readily ascertainable conditions.

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 and decision of the contracting officer are affirmed and the appeal of the contractor is dismissed.

THEODORE H. HAAS, *Chairman.*
WILLIAM SEAGLE, *Member.*
HERBERT J. SLAUGHTER, *Member.*

WILLIS HIGHT MORRIS

A-27273

Decided May 7, 1956

Alaska: Headquarters Sites

An Alaska headquarters site application will be rejected where the applicant is not engaged on his own behalf in trade, manufacture, or other productive industry and relies solely upon his employment as a construction engineer, land surveyor, and draftsman by the United States Air Force to meet the requirements for a headquarters site.

Alaska: Headquarters Sites

The first proviso to section 10 of the act of May 14, 1898, applies to mutually exclusive classes of persons: those who are employed by others engaged in trade, manufacture, or other productive industry, and those who are not so employed but are engaged on their own behalf in trade, manufacture, or other productive industry.

Alaska: Headquarters Sites

One who is employed by the United States Air Force does not come within the category of persons "employed by citizens of the United States, associa-

[2] See *Hirsch* v. *United States*, 94 Ct. Cl. 602, 638 (1941); *The Arundel Corp.* v. *United States*, 103 Ct. Cl. 688, 711 (1945); *Chernus* v. *United States*, 110 Ct. Cl. 264, 267 (1948); *Joseph Meltzer, Inc.* v. *United States*, 111 Ct. Cl. 389, 481 (1948).

tions of such citizens, or by corporations organized under the laws of the United States, or of any State or Territory."

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Willis Hight Morris has appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management dated September 1, 1955, which affirmed the decision of the manager of the Anchorage land office dated October 7, 1954, rejecting his application for a headquarters site filed under the first proviso to section 10 of the act of May 14, 1898 (48 U. S. C., 1952 ed., sec. 461). The application was filed on June 29, 1950.

The first proviso was added by the act of March 3, 1927 (44 Stat. 1364). It reads in pertinent part as follows:

Provided, That any citizen of the United States * * * employed by citizens of the United States, associations of such citizens, or by corporations organized under the laws of the United States, or of any State or Territory, whose employer is engaged in trade, manufacture, or other productive industry, and any citizen * * * who is himself engaged in trade, manufacture, or other productive industry may purchase one claim, not exceeding five acres, of unreserved public lands * * * in Alaska as a homestead or headquarters * * *.

In his application filed June 29, 1950, the appellant stated that the nature of the trade, business or productive industry in which he or his employer was engaged was "Cabin, boat and motor rentals for sportsmen." He also stated that he had erected a 16′ x 16′ cabin on the land, and that he had occupied the land since March 6, 1950. Later, on October 25, 1951, he submitted a detailed description of his rental business, indicating it had been limited to friends and relatives, and stated that he had obtained an Alaskan business license for his rental business.

On January 8, 1952, the manager of the Anchorage land office rejected his application on the ground that the applicant had not actually utilized the land for business purposes, that he had used the land primarily for the personal recreation and pleasure of his relatives and friends. Mr. Morris appealed to the Director, claiming he was engaged in business on the land. The Assistant Director of the Bureau of Land Management affirmed the manager's decision whereupon Mr. Morris appealed to the Secretary. However, his appeal was late and was dismissed (*Willis H. Morris*, A–26783 (November 12, 1953)). On the same date, the Acting Solicitor, taking note of the statements in the Bureau's decisions that the first proviso of section 10 requires an applicant's business to be conducted *on* the land applied for, held that this interpretation was erroneous (Solicitor's opinion, M–36187, Nov. 12, 1953). He also suggested that the Bureau reopen the case in the light of the opinion.

On October 7, 1954, the manager again rejected Mr. Morris' application, stating that he had been employed as an engineer for the United States Air Force, Air Installations, Elmendorf Air Force Base, for the last 12 years; that his employer was not engaged in trade, manufacture, or other productive industry; and that it had already been held that the applicant did not conduct a business on the land. Mr. Morris appealed to the Director, claiming that he is a construction engineer, land surveyor, and draftsman and consequently engaged in a productive industry. He also claimed that the Air Installations branch of the United States Air Force is engaged in productive industry.

In his decision which is the subject to this appeal, the Director held that there was no evidence in the record to show that the appellant had utilized the land applied for as a homesite or headquarters in connection with his trade or business, and that the United States Air Force, being a governmental agency, is not engaged in trade, manufacturing, or other productive industry within the meaning of the first proviso to section 10.

The appellant reiterates in his present appeal that he is engaged in productive industry because he is a construction engineer, land surveyor, and draftsman and that his employer is also engaged in productive industry. He has abandoned his earlier contention that he operated a rental business in connection with the tract applied for.

The first proviso to section 10 applies to two classes of persons: (*1*) any citizen who is employed by other citizens, associations, or corporations and whose employer is engaged in trade, manufacture, or other productive industry, and (*2*) any citizen who is himself engaged in trade, manufacture, or other productive industry. The appellant assumes, without discussion, that these categories are mutually inclusive, i. e., that one who is employed by another can still be considered to be engaged himself in trade, manufacture, or other productive industry by reason of such employment. I do not believe that either the words or the legislative history of the proviso warrants this interpretation. With respect to persons in the second category, the proviso states "any citizen * * * who *is himself* engaged" in trade, etc. [Italics added.] Following as it does the clause defining persons in the first category as persons who are employed by others, the language just quoted seems clearly to refer only to persons who are in business on their own behalf and not to persons whose only claim to being engaged in trade, etc., derives from their being employed by others who are so engaged.

The legislative history of the proviso, which is set forth in some detail in the Acting Solicitor's opinion of November 12, 1953, *supra*,

bears this out. It shows that the proviso had its origin in a memorandum of December 1, 1925, from First Assistant Secretary of the Interior Finney to the Board of Appeals of this Department in which he asked whether section 10 of the act of May 14, 1898, was sufficient to cover the following described situation or whether an amendment was necessary:

> The Department of Agriculture advises me that there are many individuals, usually of Scandinavian descent, who are located on public or national forest lands in Alaska, and who are *either* employed in canneries, sawmills, and other corporate enterprises, or *who are themselves engaged* in fishing, mining, or other industries *as individuals*. These people would like to be able to acquire patents to small tracts of land for their homes and headquarters, ranging, say, from one acre up * * *. [Italics added.]

Mr. Newman of the Board of Appeals replied on the same day that additional legislation was necessary and suggested a proviso which is identical with the proviso added by the 1927 act so far as the relevant language is concerned. The proviso was in fact recommended to the Congress for enactment by the Secretary of the Interior and the Acting Secretary of Agriculture in a joint letter of January 25, 1926.

This legislative history shows without much question that the proviso in question was intended to apply to mutually exclusive classes of persons: (*1*) those who are employed by others engaged in trade, manufacture, and other productive industry, and (*2*) those who are not so employed but who are engaged on their own behalf in trade, manufacture, or other productive industry.

In adopting this interpretation of the proviso, I do not intend to hold that a person who is employed by another is barred by reason of such employment from qualifying as an applicant within the second category if he, separate and apart from his employment, is engaged on his own in trade, manufacture, or other productive industry. However, in order to entitle such an applicant to a headquarters site or homesite, such self-employment must meet the same tests as the self-employment of an applicant for a homesite or headquarters site who is not employed by another. In the present proceeding, the appellant is resting his entire case on his employment by the Air Force as a construction engineer, land surveyor, and draftsman and not on any self-employment.

The appellant cites, in support of his position, the allowance by the Bureau of Land Management of an application filed by Charles B. Abbott under the first proviso to section 10. This application (Anchorage 011602) was allowed and patent issued on a showing that Mr. Abbott operated a map making business and that he had a drafting studio on the land applied for which he used in his business. Mr. Abbott, being self-employed, came within the second class of persons

referred to in the proviso. The appellant, on the other hand, must fit himself in the first class of persons described in the proviso.

In doing so, however, he is met at the outset with an insurmountable obstacle. The first category of persons referred to are persons who are "employed by citizens of the United States, associations of such citizens, or by corporations organized under the laws of the United States, or of any State or Territory." The United States Air Force does not fit into any of these classes of employers. It has been held that the phrase "citizen of the United States," as used in section 9 of the Shipping Act of 1916, does not include the United States. *United States* v. *Tanker Lake George et al.*, 123 F. Supp. 216 (D. C. Del., 1954). The court said in that case:

> "Citizen" as such is not defined in the Act. Its ordinarily understood meaning must thus be taken. In common usage, the term does not include the sovereign itself, which, logically at least, can hardly be termed a citizen of itself. (P. 223.)

Although this statement was directed to an interpretation of the particular statute under consideration in that case, there is nothing in the legislative history of the first proviso to section 10 to suggest that Congress had in mind that the proviso would apply to persons employed by the United States or by any governmental agency of the United States. Thus there is no sound or reasonable basis for straining the interpretation of the words "citizens of the United States" or "associations of such citizens" to include the United States Air Force. Of course, the Air Force is not a corporation organized under the laws of the United States.

This makes it unnecessary to determine whether the United States Air Force, as the employer of the appellant, is engaged in trade, manufacture, or other productive industry.

Inasmuch as it appears that the appellant does not qualify under the first proviso to section 10 of the act of May 14, 1898, his 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 decision of the Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

JOYCE A. CABOT
ALLEN B. CABOT
WALTER G. DAVIS ET AL.

A-27270

Decided May 7, 1956

Oil and Gas Leases: Lands Subject to—Oil and Gas Leases: Applications

Lands included within an outstanding oil and gas lease, whether such lease is void, voidable, or valid, are not available for leasing and applications filed for such lands must be rejected.

Oil and Gas Leases: Generally

An applicant who furnishes the Department with information which leads to the cancellation of an outstanding oil and gas lease does not thereby acquire a preference right to a lease when the land becomes available for leasing.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Joyce A. Cabot and Allen B. Cabot have appealed to the Secretary of the Interior from a decision dated August 29, 1955, of the Acting Director of the Bureau of Land Management, affirming the rejection by the acting manager of the Cheyenne land and survey office of 15 noncompetitive offers to lease for oil and gas. Twelve of the offers, Wyoming 021414—021425, inclusive, were filed by Joyce A. Cabot, and three, Wyoming 021410—021412, inclusive, were filed by Allen B. Cabot.

It appears that all of the lands applied for by the appellants were covered by one or more of 21 outstanding oil and gas leases at the time their offers were filed. The appellants allege that these 21 leases and others were held by Walter G. Davis, either directly or indirectly, under a fraudulent scheme to violate the acreage limitation provisions of section 27 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 184).[1]

The Department has long followed the rule that offers for oil and gas leases filed for lands included in an outstanding lease must be rejected. *Martin Judge*, 49 L. D. 171 (1922); *Sam Unruh*, A-26803 (October 21, 1953). This rule applies either where the application is filed after the conflicting permit or lease has been canceled but before the notation of the cancellation has been made on the tract books or where the application is filed prior to the cancellation or relinquishment of the outstanding lease. *E. A. Vaughey*, 63 I. D. 85 (1956); *Monson* v. *Sawyer*, 50 L. D. 395 (1924); *Sam Unruh, supra; George B. Friden*, A-26402 (October 8, 1952).

[1] The acreage limitation for oil and gas leases was increased from the 15,360 acres fixed by the act of June 3, 1948 (62 Stat. 289, 291), to 46,080 acres by the act of August 2, 1954 (68 Stat. 648).

The appellants, however, contend that if the conflicting leases are held as part of a fraudulent scheme to violate the acreage limitations, the leases are void *ab initio* and the rule should not apply because a void lease cannot have a segregative effect.

In *Hodges* v. *Colcord*, 193 U. S. 192 (1904), the Supreme Court, in considering the segregative effect of a void entry, held that a prima facie valid entry, though void and ineffectual to vest any rights in the entryman, segregates the land from the public domain and prevents the initiation of rights by another person until it has been set aside and removed from the records of the land office.[2]

In similar situations arising under the coal land entry laws (30 U. S. C., 1952 ed., sec. 71 *et seq.*) the Department has held that despite the fact that entries were made by applicants who conspired to evade the acreage limitations of the law, the entries segregated the land they covered from other filing until their cancellation was noted on the tract books. *Hiram M. Hamilton*, 38 L. D. 597 (1910); *cf. Thorne et al.* v. *Kirkpatrick et al.*, 47 L. D. 219 (1919).

Therefore, in the circumstances of this case, whether the outstanding leases are void or voidable, as far as the appellants are concerned, they are outstanding on the tract books and are of sufficient force to bring the *Judge* rule into play.

Finally, the appellants urged that the rule ought not to be followed in a case in which the outstanding lease was improperly obtained and that to refuse to follow it in such circumstances would provide an effective means of enforcement of the Mineral Leasing Act.

Early in the administration of the Mineral Leasing Act, the Department considered the problem of whether an application accompanied by a protest against an outstanding permit which ultimately results in its cancellation is excepted from the operation of the *Judge* rule or gains a preferred status. The Department decided that the rule applied and that such an application acquired no preference right. *Stahl* v. *Stiffler*, 49 L. D. 406 (1923); *State of New Mexico* v. *Weed*, 49 L. D. 580 (1923).[3] While the Department will avail itself of the assistance of citizens in the disposal of public lands, it has determined that it will not grant a preference right to an applicant who furnishes the information leading to the cancellation of an oil and gas lease.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17

[2] To the same effect: *McMichael* v. *Murphy*, 197 U. S. 304 (1905). Cf. *Bunker Hill & Sullivan Mining and Concentrating Company* v. *United States*, 226 U. S. 548 (1913); *Hastings and Dakota Railroad Company* v. *Whitney*, 132 U. S. 357, 361 (1889); *Annie L. Hill* v. *N. S. Williams and T. C. Liddell et al.*, 59 I. D. 370, 376–377 (1947); *Lula T. Pressey*, 60 I. D. 101 (1947).

[3] Cf. *Richardson* v. *Wilson et al.*, 41 L. D. 275, 277 (1912).

F. R. 6794), the decision of the Acting Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

R. B. WHITAKER, MRS. JACQUELINE ANDERSON

A-27284

Decided May 7, 1956

Oil and Gas Leases: Lands Subject to

This Department is without authority to issue an oil and gas lease covering land already leased for oil and gas purposes under the Mineral Leasing Act.

Oil and Gas Leases: Generally—Oil and Gas Leases: Lands Subject to—Oil and Gas Leases: Cancellation

Although an oil and gas lease may be a nullity insofar as it purports to convey an interest in oil and gas deposits already under lease, it nevertheless serves to segregate the land and makes it unavailable for further leasing until such time as its revocation is noted on the records of the local land office and an oil and gas lease issued to another for the same land prior to such notation must be canceled.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior by R. B. Whitaker from a decision by the Director of the Bureau of Land Management dated October 19, 1955. The Director affirmed a decision by the manager of the land office at Cheyenne, Wyoming, dated March 23, 1955, revoking Mr. Whitaker's oil and gas lease Wyoming 010204 insofar as that lease purported to cover the N½ (lots 1 and 2, E½NW¼, NE¼) sec. 30, T. 43 N., R. 107 W., 6th P. M., Wyoming. The Director held, also, that oil and gas lease Wyoming 031810, covering the same land, is a valid lease.

Oil and gas lease Wyoming 07719, covering, among other lands, the above described land in sec. 30, was issued to A. G. McClintock as of September 1, 1951, pursuant to the provisions of section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226). That lease was canceled on August 27, 1954, for failure to comply with the terms of the lease, and the notation of the cancellation of the lease was made on the tract book on the same day. Meantime, however, and while the McClintock lease was still in effect, Mr. Whitaker, on November 5, 1951, applied for a lease on the land in sec. 30 and a lease was issued to him effective as of January 1, 1952. Thereafter, on February 7, 1955, Mrs. Jacqueline Anderson filed an offer, Wyoming 031810, for a lease on the land in sec. 30. On March 23, 1955, the manager advised Mr. Whitaker that a recheck of the record showed

that the land in sec. 30 was covered by Wyoming 07719 at the time Wyoming 010204 was issued. He therefore revoked Mr. Whitaker's lease as to that land and advised Mr. Whitaker that the action taken would become final 30 days after the receipt of the decision by Mr. Whitaker and that a refund of the first year's rental on the land eliminated from the lease would be made. The right of appeal was allowed. However, without waiting for Mr. Whitaker to exercise his right of appeal and before the final revocation date set forth in his decision, the manager, on April 8, 1955, issued a lease to Mrs. Anderson, effective as of May 1, 1955.

The Director held that Mr. Whitaker's lease, insofar as it covered the land in sec. 30, was a nullity because at the time of its issuance the land was under lease to Mr. McClintock. He held that since Mrs. Anderson's offer to lease the land was the first offer received after the land again became available for leasing, upon the notation of the cancellation of the McClintock lease on the tract book, Mrs. Anderson was entitled to retain her lease.

In his appeal, Mr. Whitaker concedes that his offer to lease the land should have been rejected because of the outstanding McClintock lease. But he contends that since his offer was not rejected and since he was not put on notice as to any defect in his lease until after the land again became available for leasing and until after Mrs. Anderson had filed her offer, he must be considered the first qualified applicant for a lease on the land, that he is entitled to retain the land in his lease, and that the land should not have been included in Mrs. Anderson's lease.

The first question for consideration is whether the action taken in revoking the Whitaker lease as to the land in sec. 30 was proper. The fact that the Whitaker lease, covering in part land in the then outstanding McClintock lease, was issued in the first place is apparently attributable to the failure of the local land office to note the issuance of the McClintock lease on the proper records. However regrettable such a failure is, the Department is without authority to issue a lease for land already under lease. As the Department held in *L. N. Hagood*, A-26226 (October 5, 1951), also involving an oil and gas lease which had been issued on land already under lease:

> In granting the [first] lease * * * the Secretary of the Interior disposed of the entire oil and gas leasehold in the land involved. Thus, the subsequent lease purporting to grant a similar interest to the appellant conveyed nothing and the lease was a nullity.

The earlier *Hagood* case, 60 I. D. 462 (1951), cited by Mr. Whitaker, is not in point. In that case, Hagood filed an application for land included in the prior application of Richfield. Hagood's application was suspended for that reason. Later, when a lease was issued to

Richfield, Hagood's junior application for a lease on the land was not rejected, as it should have been, but remained in a suspended status. Still later, when Richfield relinquished its lease, a lease was issued to Hagood, on the basis of his suspended application. In determining that there was no sound legal basis for canceling the Hagood lease, the Department noted that the application for a lease and the issuance of the lease had been handled in a manner which contravened the established departmental practice. Nevertheless, the Department held that no provision of the Mineral Leasing Act had been violated. In that case, Hagood's application to lease was filed at a time when the land applied for was available for leasing (it was only included in a prior application) and the lease was issued to Hagood on land then available for leasing (the prior lease had been terminated). Here, the Whitaker application was filed for land not available for leasing (it was already leased) and the lease was issued for land not available for leasing (the prior lease was still outstanding). The Department had nothing to convey to Mr. Whitaker at the time of Mr. Whitaker's offer or at the time of the issuance of the lease to him. Having conveyed nothing, it was incumbent on the Department to so inform Mr. Whitaker when it discovered its error and to take corrective action. [1]

Therefore, it must be held that the action taken by the manager in revoking Mr. Whitaker's lease in part was proper.

However, the Director's holding that Mrs. Anderson is entitled to retain the land in sec. 30 in her lease is open to serious question.

Mrs. Anderson's offer was filed and the lease issued to her at a time when the Whitaker lease was still outstanding. While it is true that Mrs. Anderson did not file her offer until after the cancellation of the McClintock lease had been noted and that the lease was not issued to her until after the manager had taken action looking to the revocation of the Whitaker lease, the fact remains that the Whitaker lease was still of record when the lease was issued to Mrs. Anderson.

That the Whitaker lease on the land in sec. 30 was issued without authority and that it was a nullity insofar as it purported to vest any interest in the oil and gas deposits in that land in Mr. Whitaker did not prevent the lease from segregating the land and thus making it unavailable for further leasing until such time as final action might have been taken to correct the error made by the manager in issuing the

[1] It should be noted that the error was apparently discovered several months before corrective action was taken. The Whitaker lease as issued covered 1,991.42 acres, including the 311.42 acres in sec. 30. On September 1, 1954, Mr. Whitaker was billed for the fourth year's rental for the lease year beginning January 1, 1955, on the basis of 1,680 acres. Payment of the rental on 1,680 acres was made on September 28, 1954.

Whitaker lease and a proper notation made on the records of the local land office.

At the time Mrs. Anderson filed her offer, Mr. Whitaker had a prima facie valid lease on the land. The general rule, long recognized by the courts and by this Department, is that an entry of public land under the laws of the United States segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until that entry is officially canceled and removed. *Bunker Hill & Sullivan Mining & Concentrating Co.* v. *United States*, 226 U. S. 548 (1913); *Neff* v. *United States*, 165 Fed. 273, 281 (8th Cir. 1908), and cases there cited; *Sullivan et al.* v. *Tendolle*, 48 L. D. 337 (1921); *United States* v. *United States Borax Company*, 58 I. D. 426, 444 (1944). As stated in *California and Oregon Land Co.* v. *Hulen and Hunnicut*, 46 L. D. 55 (1917):

> * * * the orderly administration of the land laws forbids any departure by the Department from the salutary rule that land segregated from the public domain, whether by patent, reservation, entry, selection or otherwise is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office.

That rule has been followed with respect to applications for both permits and leases under the Mineral Leasing Act. In *Martin Judge*, 49 L. D. 171 (1922), decided shortly after the passage of the Mineral Leasing Act, the Department held that while a permit issued under that act does not constitute a technical segregation or entry as those terms are ordinarily used in connection with the public land laws, that fact

> * * * does not prevent the application of the principle of the general admistrative rule and until an outstanding permit is canceled by the Commissioner and the notation of the cancellation made in the local office, no other person will be permitted to gain any right to a permit for the same class of deposits by the filing of an application therefor * * *.

See also *Hill* v. *Williams and Liddell*, 59 I. D. 370 (1947); *Lula T. Pressey*, 60 I. D. 101 (1947); *cf. Hjalmer A. Jacobson, E. B. Todhunter*, 61 I. D. 116 (1953); *John J. Farrelly et al.*, 62 I. D. 1, 5 (1955).

The long-standing departmental rule has been incorporated into a regulation which, at the time when Mrs. Anderson filed her offer read in part as follows:

> * * * Where a noncompetitive lease is canceled or relinquished * * *, immediately upon the notation of the cancellation or relinquishment on the tract book of the land office * * *, the lands shall be open to further oil and gas lease offers. * * * (43 CFR 192.43.)

Under this regulation, it is apparent that a necessary condition to the initiation of any right to an oil and gas lease by Mrs. Anderson—the notation upon the record of the cancellation of Mr. Whitaker's lease—was lacking both at the time of Mrs. Anderson's offer and at the time the lease was issued to her. At those times the N½ sec.

30 was unavailable for leasing, as much so as if the land had been withdrawn.

Thus it must be held that the Director's decision holding Mrs. Anderson's lease to be valid insofar as it covers the land in sec. 30 is erroneous and it is hereby reversed. Mrs. Anderson is not entitled to retain her lease on that land and it must be canceled. *Cf. Moon* v. *Woodrow*, 51 L. D. 118 (1925).

Turning now to Mr. Whitaker's assertion that he should be accorded priority in obtaining a lease on the land because his original offer was not rejected, I find little merit in that contention. In the first place, Mr. Whitaker's original offer ripened into a lease, albeit an ineffective one, and, in the second place, the later clearing of the record by the notation of the cancellation of the McClintock lease could not validate either Mr. Whitaker's offer filed at a time when the land was not available for leasing or the lease which was issued pursuant to that offer. *Moon* v. *Woodrow*, *supra*. See also *Sam Unruh*, A–26803 (October 21, 1953), and *George B. Friden*, A–26402 (October 8, 1952).

The present record does not indicate when the error with respect to the issuance of the Whitaker lease was discovered. However, it is apparent that it was discovered prior to the time action was taken on Mrs. Anderson's offer. The Anderson lease was issued at a time when the manager's decision of March 23, 1955, was subject to the right of appeal. Such action on the part of the manager cannot be condoned. As the Anderson lease was issued before the revocation of the Whitaker lease was, by the manager's decision, to become final and as Mr. Whitaker took an appeal from that decision, presumably the notation of the revocation of Mr. Whitaker's lease has never been made on the records of the local land office.

In view of the inauspicious handling of the two lease offers by the local land office, it seems only fair to give each party an equal opportunity to file a new offer for the land when it again becomes available for leasing. Therefore, it is directed that the notation of the partial revocation of both leases be made on the same date at which time the two parties, along with the general public, will have the opportunity of filing new offers for the land.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Bureau of Land Management is affirmed insofar as it approved the revocation of Mr. Whitaker's lease Wyoming 010204 on the land in sec. 30 and the decision is reversed insofar as it held that Mrs. Anderson is entitled to retain that land in her present lease Wyoming 031810.

EDMUND T. FRITZ,
Deputy Solicitor.

U. S. GOVERNMENT PRINTING OFFICE: 1956

APPEAL OF KORSHOJ CONSTRUCTION CO., INC.

IBCA-9 *Decided May 2, 1956**

Contracts: Additional Compensation—Contracts: Specifications—Contracts: Changes and Extras—Contracts: Damages: Unliquidated Damages—Contracts: Protests

Claims for additional compensation arising out of the construction of the Fort Clark Unit of the Missouri River Basin Project must be rejected, when the claims are either based on alleged extra work which was required by the specifications, or the claims are for unliquidated damages not cognizable by the Board, or the contractor failed to protest against the alleged extra work as required by the specifications.

Contracts: Authority to Make—Contracts: Contracting Officer

Even if the location of a canal might have been materially different from that shown on the drawing, the Government would not be bound by any assurances orally given prior to the bidding by a subordinate of the contracting officer not authorized to give them. Moreover, even if so given, they would have no effect unless embodied also in the written contract, since it is well settled that the written contract merges all prior negotiations and is presumed to express the final understanding of the parties. In so far as the claim may be based upon misrepresentation, it would not be cognizable by the Board.

Contracts: Additional Compensation—Contracts: Specifications

Where in the construction of a canal, the contractor chose to construct a single "railroad" type of embankment of sufficient width to encompass both banks, and then excavated the canal prism from this embankment, the contractor is not entitled to additional compensation for re-excavating or re-handling the embankment material under specifications which left the sequence of operations entirely to the contractor, and provided that the applicable unit prices were to cover all work done. The fact that there may have been no other practicable method of constructing the canal than the one adopted does not entitle the contractor to additional compensation.

BOARD OF CONTRACT APPEALS

The Korshoj Construction Co., Inc., of Blair, Nebraska, has appealed from the findings of fact and decision of the contracting officer, dated January 19, 1954, denying its claims for additional compensation in the performance of Contract No. I79r-2334, Specifications No. 600C-80, Fort Clark Unit, Missouri River Basin Project, North Dakota, Bureau of Reclamation.

*Not released for publication in time for inclusion chronologically.

389415—56——1

The contract, which was on Standard Form No. 23, Revised April 3, 1942, and was dated March 26, 1952, required the contractor to construct the Fort Clark River Pumping Plant, and earthwork and structures for Relift Pumping Plants Nos. 1 and 2, canals, laterals and drains under Schedules Nos. 1 and 2 of the specifications. These included by reference enumerated provisions of "Standard Specifications for Construction of Canal Systems, August 1951," of the Bureau of Reclamation, which will hereinafter be referred to as the standard specifications.

Notice to proceed with the work was received by the contractor on April 25, 1952, thereby establishing, in accordance with paragraph 6 of the specifications, June 4, 1953, as the final date for the completion of the work under both Schedules Nos. 1 and 2. By findings of fact dated July 15, 1953, the time for completion of the work under Schedule No. 1 was extended to August 6, 1953, and under Schedule No. 2 to July 31, 1953, respectively. All work under Schedule No. 1 was completed on August 8, 1953, 2 days after the date set for completion, and under Schedule No. 2 on July 30, 1953. Liquidated damages in the amount of $180 were assessed for late completion of Schedule No. 1 in accordance with paragraph 7 of the specifications.

By letter dated April 4, 1953, the contractor submitted to the contracting officer six claims in specified amounts[1] for extra work, allegedly performed by its subcontractor, Hagen Construction Company, of Grafton, North Dakota, in connection with the construction of canals and drains. For convenience, this group of claims will hereinafter be referred to as Claim A.

By letter dated April 7, 1953, the contractor further submitted to the contracting officer a claim for additional compensation in an unspecified amount in connection with compacting backfill around the River Pumping Plant. This claim will hereinafter be referred to as Claim B.

Both Claims A and B were duly excepted by the contractor in executing its release on contract but were denied by the contracting officer in his findings of fact and decision of January 19, 1954.

By letter dated February 19, 1954, the contractor appealed from the contracting officer's decision, but by letter dated November 11, 1955, withdrew item No. 4 of Claim A.

[1] In each case, the contractor claimed additional allowances for overhead and profit.

On January 20, 1956, at Omaha, Nebraska, Mr. William Seagle, a member of the Board, held a pre-hearing conference, at which representatives of the contractor and subcontractor, as well as of the Government, were present. Mr. Reed O'Hanlon, Sr., counsel, appeared at the conference on behalf of the contractor, and Mr. Dewey N. Lindeman, Department Counsel, on behalf of the Government.

As a result of the pre-hearing conference, the contractor withdrew Item No. 6 of Claim A, as well as its request for an extension of time of two days for completion of the work under Schedule No. 1.

Paragraph A–12 of the standard specifications provided that if the contractor considered any work demanded of him to be outside the requirements of the contract, or considered any ruling of the contracting officer or of the inspectors to be unfair, he should immediately ask for written instructions or a decision, and within 20 calendar days of the receipt of such instructions or decision file a written protest with the contracting officer, stating clearly and in detail the basis of his protest.

As the contractor had never filed any written protests—indeed, its letter of April 4, 1953, was the first intimation which the contracting officer had of the assertion of any claims—and, as moreover, the contracting officer had invoked the requirement of protest in his findings and decision as a basis for denying Items 1 and 3 of Claim A, as well as Claim B, there was considerable discussion at the pre-hearing conference concerning the identity and authority of the Government's supervisory personnel on the job, and the actions of the contractor when the alleged extra work which formed the basis of its claims was demanded by them. In the course of the discussion, it was agreed by the representatives of the contractor as well as of the Government that Mr. C. R. Whipple, who was the Construction Engineer in Charge of the job, visited the job at least every other day, and that his subordinates included Mr. Albert Helstrom who was Field Engineer in charge of daily operations, and a number of inspectors. It was also agreed by representatives of both sides that the contractor had made only verbal protests against the allegedly extra work, and that these protests were made either to Mr. Whipple or to Mr. Helstrom, or to one of the inspectors. Other concessions made by the parties will be discussed in connection with the particular claims which the Board will now proceed to examine.

Claim A

Item No. 1, *Compacting Embankments:* This claim, which is in the amount of $25,348.91 is predicated on the theory that the contractor was entitled to be paid the higher price bid under Item No. 55 of Schedule No. 2 for "compacting embankments" rather than the lower price bid under Item No. 52 of the same schedule for "excavation for canals." The contractor contends that its subcontractor was directed to alter the work program so as to compact the embankments with loaded, as well as unloaded, tournapulls by driving over the embankment fifteen minutes out of each working hour, and so as to handpick from the compacted embankments, roots, twigs and imperfections, and scarify or plow the foundations for the compacted embankments to a depth of not less than six inches.

Various provisions of the specifications are relevant to the consideration of this claim. The contractor cites section B–14 (b) of the standard specifications which, in relevant part, provides as follows with respect to "compacting embankments":

> When the material has been conditioned as herein before specified, it shall be compacted by tamping rollers having staggered and uniformly spaced knobs and of a sufficient weight for proper compaction, or by other means or equipment approved by the contracting officer. * * *

It is apparently the theory of the contractor that the routing of the tournapulls was a "means or equipment approved by the contracting officer."

The contracting officer, on the other hand, refers to three other provisions of the specifications, which he considers inconsistent with this theory. All of these provisions relate to ordinary embankment work, payment for which was to be made at the unit price bid for "excavation for canals." Section B–9 of the standard specifications as supplemented by section 10 (c) of the specifications provides, as follows:

> Provided, that the contracting officer may require that mechanical excavating and hauling equipment be used and water for moistening the materials be furnished when placing embankment material which is below bottom grade or more than two feet below normal water surface of the canal.

Section B–9 (b) of the standard specifications contains the following provision:

> Embankments built by mechanical excavating and hauling equipment shall be made in horizontal layers and shall be kept as close to level as practicable. The travel over the embankments during construction shall be routed so as to

distribute the compacting effect of the equipment to the best practicable advantage.

Section B–9 (e) of the standard specifications provides:

> Except as otherwise provided for backfill about structures and for compacting of embankments, the costs of all work described in this paragraph shall be included in the unit prices bid in the schedule for excavation for canal.

The contracting officer held that the use of the tournapulls for compacting purposes was entirely in accord with the specifications for ordinary embankment work. He pointed out that a "large portion of the canals and laterals were so situated and designed that the water surface would be above the natural ground surface thus necessitating consolidation of the embankments during construction," and also that it was the desire of the Government "to obtain such consolidation of the embankments as could be accomplished during normal equipment travel by the judicious routing of the hauling equipment over the surface of the embankment so as to distribute the compacting effect to the best advantage." The contracting officer found no evidence that "the Government required travel of the equipment over the embankments other than as required in the normal operation of the equipment in depositing the embankment material and returning over the embankment to the excavation," although, in view of the nature of the contractor's operations, consisting of "scraper loading, travel to and from the embankment, and placement of material," it was possible that "fifteen minutes more or less (depending on proximity of excavation or borrow) out of each hour could have been spent by loaded and unloaded hauling equipment during normal travel in constructing and placing the embankments."

In support of its contention that the routing of tournapulls over the embankments for a specified time, as well as the other work on the embankments, was beyond the requirements of the specifications for ordinary embankment work, the contractor has filed affidavits made on December 17, 1952 by four employees of the subcontractor, namely Clifford Smith, James O'Regan, Erhart Bohrer, and Calvin Kilbar. All of these employees, except James O'Regan, deposed that they were ordered either by Albert Helstrom, the field engineer in charge, or by Leonard Olson or Clarence Dahl, who were inspectors on the job, to run their tournapulls, loaded or empty, over the embankments being constructed "for about fifteen minutes out of each hour for compacting purposes all of the time when the embankments were being constructed

from the borrow pits." James O'Regan, however, deposed only that "the employees on the embankment job, were required to run the loaded and unloaded tournapulls over the embankments for the purpose of packing it * * *," and that this procedure "took about fifteen minutes out of each hour." He did not assert that any minimum time for routing the tournapulls was mentioned by any of the Bureau of Reclamation employees.

It is clear that unless a minimum time was fixed or unless loaded tournapulls were required to be run back and forth across the embankments before being unloaded, that the orders given were entirely in accord with section B–9 (b) of the standard specifications, which contemplated making use of the compacting effect of the equipment. Even if a minimum of 15 minutes was fixed for the traveling time of the equipment, it is at least arguable, moreover, that the order would not be beyond the requirements of the specifications, if in fact this represented the average time which would be taken by the travel of the equipment, as the contracting officer suggests, since the order could then be regarded as a proper supervisory measure which the inspectors could adopt as a means of relieving themselves of the necessity of constantly observing the movement of the equipment. It is easy to perceive how in such circumstances misunderstanding could arise, and the discrepancy between the affidavits suggests, indeed, that there may have been such misunderstanding.

The Board does not deem it necessary to decide, however, whether the claimed order was given, or, whether if it was given, it was beyond the requirements of the specifications. If the order was given, it was given by the Field Engineer or one of the inspectors rather than by the contracting officer. The contractor conceded at the pre-hearing conference, moreover, that the order was not given by C. R. Whipple, the Construction Engineer in charge of the job who was the Field Engineer's superior. At most it was claimed only that the construction engineer was aware of it. If any protest was made against the order, it was merely a verbal protest to the inspectors. As section A–12 of the standard specifications required that a written protest be filed with the contracting officer, and he does not appear to have considered the claim on its merits,[2] the Board must hold that the claim is barred by the failure to protest.

[2] While the contracting officer commented on the requirements of the specifications, he does not appear to have gone beyond speculating upon what might have happened. Consequently, the rule of the *R. P. Shea Company* case, 62 I. D. 456 (1955), that the con-

As for the handpicking from the embankments of roots, twigs and other imperfections, this work was clearly required by section B–2 (grubbing) of the standard specifications, which provides, that "* * * the surface of all excavation that is to be used for embankments shall be cleared of all stumps, roots, and vegetable matter of every kind." It also provides that the cost of all such work, including the disposal of the grubbed materials, "shall be included in the unit prices bid in the schedule for excavation." Similarly, scarifying or plowing of the foundations for embankments was required, as the contracting officer found, by section B–8 of the standard specifications, which required the ground surface under embankments to be "scored with a plow making open furrows not less than 8 inches deep below the natural ground surface at intervals of not more than 3 feet: *Provided*, That where compacted embankments are required, the entire surfaces of the foundations for the compacted embankments shall be scarified or plowed thoroughly to a depth of not less than 6 inches in lieu of the scoring specified above." Only one of the employees who made the affidavits, namely James O'Ryan, refers to this work and he deposes merely that he was required "to do the bond plowing." Indeed, neither the grubbing nor the scoring was so much as mentioned as a basis for the embankments claim at the pre-hearing conference. If any of the grubbing or scoring work demanded of the contractor was in excess of the applicable requirements of the specifications, any claim based thereon would be barred for the same reasons as bar any claim for the routing of the hauling equipment.

Item No. 2, *Clearing and Grubbing of Canal "A"*: This claim, which is in the amount of $3,600, as originally submitted to the contracting officer, was for clearing 18 acres of the right-of-way for this canal at a price of $200 per acre. Apparently, the contractor contended that the canal as built did not correspond to the location pointed out to him prior to bidding when he visited the site. The contracting officer rejected this claim on the ground that the work was required by Section B–1 of the standard specifications which required rights-of-way to be "cleared of all trees, brush, rubbish and other objectionable matter"

tracting officer may not invoke the requirement of protest if he has considered the factual basis of a claim is not applicable. In any event, the Court of Claims has said in *Arundel Corp.* v. *United States*, 96 Ct. Cl. 77, 111 (1942), that "a waiver cannot be implied if there is an express statement that the provision for protest is not being waived, or if there are other facts in the case to rebut the implication of a waiver arising from the consideration of the claims on the merits." Here the contracting officer expressly invoked the requirement of protest.

when, in the judgment of the contracting officer, it was necessary to do so. At the pre-hearing conference the contractor localized the work done by stating that it was between stations 75+00 and 100+00, and also involved the clearing of the borrow pit adjacent. In a memorandum filed subsequent to the conference, Department Counsel reported that the acreage cleared was no more than 3.8 acres, and that there was no significant change between the as-built location of the canal and the location shown on the relevant drawing.

At the conference the President of the contractor stated that prior to the bidding the location of the canal, which had not yet been staked out, was pointed out to him by Construction Engineer G. R. Whipple. Even if the location of the canal, when staked out, might have been materially different from that originally indicated by Whipple, the Government would not be bound by any assurances orally given by him prior to the bidding unless he had been authorized to give them.[3] Moreover, even if given, they would have no effect for the purposes of this appeal unless embodied also in the written contract, since it is well settled that the written contract merges all prior negotiations and is presumed to express the final understanding of the parties.[4] While in certain circumstances the United States has been held to be liable to a contractor for misrepresentations made prior to the bidding by authorized representatives of the Government, a claim based on such a misrepresentation is one for unliquidated damages which the Board has no jurisdiction to consider or allow. Since the clearing of the right-of-way on the location ultimately staked out was expressly required by the specifications, and since the argument of the contractor that a different location was pointed out to him initially presents a matter that is outside the jurisdiction of the Board, the rejection of this claim by the contracting officer must be affirmed.

Item No. 3, *Undue Hardships on Borrow Pit:* This claim, which is in the amount of $7,034.74, is for additional compensation based on undue hardship in excavating 23,068 cubic yards of materials from

[3] Persons dealing with Government officials must at their peril inquire into the scope of their authority. See *W. H. Vaughan Construction Co.* v. *United States*, 61 Ct. Cl. 115, 117 (1925); *Bayboro Marine Ways Co.* v. *United States*, 72 F. Supp. 728, 730 (D. C. S. D., Fla., 1947); *Kelly* v. *United States*, 116 Ct. Cl. 811, 817–20 (1950); *Chalker & Lund Co.* v. *United States*, 123 Ct. Cl. 381, 408 (1952).

[4] See *Brawley* v. *United States*, 96 U. S. 168, 173 (1877); *Simpson* v. *United States*, 172 U. S. 372, 379 (1899); *Griefen* v. *United States*, 43 Ct. Cl. 107, 113 (1908); *The Callahan Construction Co.* v. *United States*, 47 Ct. Cl. 177, 181 (1912); *Walters Construction Co.*, BCA No. 119, May 21, 1943, 1 CCF 155; *Coffee Construction Co.*, BCA No. 556, Div. No. 2, May 13, 1944, 2 CCF 745.

Station 115+25 to the end of Pit A–3. It seems that in excavating this pit the operator cut an equipment-width channel with vertical sides which, as the pit became deeper, led to difficulties in the operation of the equipment in the pit. A paragraph of section B–16 of the standard specifications, headed "Borrow Pits," provides:

> Where the canal excavation at any section does not furnish sufficient suitable material for embankments, for core banks, or earth cover for membrane lining, the contracting officer will designate where additional material shall be procured. If the additional material is taken from borrow pits adjacent to the canal embankment, a berm of not less than 15 feet, or 5 feet in the case of laterals, shall be left between the outside toe of the embankment and the edge of the borrow pit, with provision for a side slope of 1½ to 1 to the bottom of the borrow pit, unless otherwise shown on the drawings or directed. The surface of borrow pits shall be left in a reasonably smooth and even condition approved by the contracting officer. Where necessary, as determined by the contracting officer, to prevent the accumulation of standing water, borrow pits shall be drained by means of open ditches.

The contracting officer found that the contractor was not limited in the sloping of the sides of the pit or in the use of ramps from the pit, and that if there were any conditions or restrictions imposed with reference to the construction of the pit, they were imposed by the Bureau engineer in charge, and could constitute only the basis for a claim for damages, which he would have to deny. At the pre-hearing conference the contractor identified Albert Helstrom, the Field Engineer, as the Government employee in charge of the construction of the borrow pit, and contended that Helstrom had directed that it be made too narrow. However, the contractor also stated that the land on one side of the borrow pit was privately owned, so that the cut had to be limited. In the memorandum filed by Department Counsel subsequent to the prehearing conference, he stated that the Government was prepared to show that "the borrow areas available to the contractor were greater in area than he actually used." The Board believes such a showing to be unnecessary, since the gravamen of the contractor's contention is that the authority of the contracting officer to fix the location and size of the borrow pits was exercised by his subordinates in an unreasonable and arbitrary manner. Such a situation falls squarely within the provision in section A–12 of the standard specifications that calls for written protest if the contractor "considers any record or ruling of the contracting officer or of the inspectors to be unfair." However, no timely written protest was

filed, and the contracting officer expressly invoked the failure to protest as a ground for his decision. It follows that the action of the contracting officer in rejecting this claim must be sustained.

Item No. 5, *Excavation of Canal Section from Embankment:* This claim, which is in the amount of $3,307.50, is for excavation of a canal section from embankment previously placed by the contractor, the amount being computed on the basis of 10,500 cubic yards of excavation at $0.315 per cubic yard. In his findings, the contracting officer thus explained this claim:

> The canal was originally staked by the Government for finished line, grade and section. In the construction of the canal embankments the contractor chose to construct a single "railroad" type of embankment which was of sufficient width to encompass both banks of the canal and at a height slightly below finish grade. At the request of and for the convenience of the contractor, cut-stakes were then set by the Government for excavation of the canal prism from this embankment and the material used to bring the two banks of the canal to finish grade. This is a procedure occasionally used by contractors in the construction of smaller canals. The contractor's claim appears to be for payment for re-excavation or re-handling of this embankment material.

The contracting officer held that there was no basis for the allowance of this claim, since the sequence of operations in the excavation of the canal was the choice of the contractor, and there was no provision in the contract for payment for rehandling excavated materials. The decision of the contracting officer must be regarded as correct. As the specifications did not prescribe the method of construction, this was left to the contractor, and its construction of the two-phase railroad type of embankment did not entitle it to additional compensation. Under sections B–5 (d), B–9 (e), and B–16 (b) of the standard specifications, the unit prices covered all work done in excavation for canals, construction of canal embankments, and excavation in borrow pits, with certain exceptions not material here. The fact that there may have been no other practicable method of constructing the canal than the one adopted does not entitle the contractor to additional compensation.

Claim B

This claim is for additional compensation for compacting backfill around the River Pumping Plant. Item 8 under Schedule No. 1 provided for backfill at 50 cents a cubic yard, while Item 9 under the same schedule provided for compacting backfill at $6 a cubic yard. Paragraph 19 of the specifications, governing backfill, provided that back-

fill around the pumping plant was to be deposited in horizontal layers not exceeding 6 inches in thickness and that travel of the hauling equipment over the layers during construction was to be directed so as to distribute the compacting effect of the equipment to the best practicable advantage, but that where the use of hauling equipment was impracticable backfill material was to be hand-tamped so as to provide approximately the same degree of compaction delivered by the hauling equipment. However, paragraph 20 of the specifications provided for compacted backfill in particular areas, or "as directed by the contracting officer," and section B–14 of the standard specifications set forth the requirements for compacting backfill, which included not only the deposit of materials in horizontal layers of not more than 6 inches in thickness, but also the moistening of the materials, their compaction by tamping rollers having staggered and uniformly spaced knobs, and other requirements more arduous than those for ordinary backfill. The limits of compacted backfill were indicated on Drawing No. 506–629–34. Apparently it is the gravamen of the contractor's complaint that it was required to place all the backfill around the River Pumping Plant in layers not exceeding six inches, to run hauling equipment back and forth across the backfill for compaction purposes, and to do a tremendous amount of hand-tamping with pneumatic tampers. In his findings the contracting officer explained that compaction with pneumatic tampers was necessary only at the confined lower elevations around the pumping plant where equipment travel was not possible, and concluded that payment for compacting backfill was due the contractor only for materials placed in the limited area shown for compacted backfill on Drawing No. 506–629–34.

In the memorandum filed by Department Counsel subsequent to the pre-hearing conference, it is stated that the Government's records show that 2,439 cubic yards of material were placed as backfill, and that 363.14 cubic yards of this total were paid for both as backfill and compacted backfill, which included the area around the perimeter of the pumping plant structure up to elevation 1,653 and under and adjacent to the switch gear slab between elevations 1,653 and 1,683.5. It is also stated in the memorandum that the contractor has been paid for the remaining 2,075.86 cubic yards of material at the contract price which, at 50 cents a cubic yard, would amount to a payment of $1,037.93. If the contractor were to be paid for the 2,075.86 cubic yards of material at the $6 price per cubic yard for compacted backfill, it would be en-

titled to $12,455.16. This would be in addition to the $1,037.93 already paid, since paragraph 20 (d) of the specifications provides that payment for compacting backfill "will be in addition to the payment made for backfill." Inasmuch as the contractor claims apparently that it should be paid for all the backfill as compacted backfill, it would seem that it is claiming the full $12,455.16.

In an affidavit sworn to November 4, 1952, the president of the contractor stated that his superintendent had told him that when they were backfilling from elevation 1,651.25 to elevation 1,655 Field Engineer Albert Helstrom "authorized, requested and insisted on compacted backfill" and that the president, therefore, "assumed" that the Government wanted compacted backfill around the River Pumping Plant. In an affidavit sworn to on the same day, the superintendent of the contractor states that when the backfill around the River Pumping Plant reached an elevation where hauling equipment could be used, Helstrom and Inspector Olson "required" that "the equipment be pulled off about every 12″ to 16″, and run over the entire area several times before the equipment could continue to bring in dirt." The record, however, contains no showing that either Helstrom or Olson had any authority to order the compacting of backfill outside of those particular portions of the area around the River Pumping Plant where compacting was specifically called for by the drawings or specifications, and no contention was made at the pre-hearing conference that either of them had been granted such authority by the contracting officer. While the affidavit of the contractor's president also states that Construction Engineer Whipple was present during a conversation in which Helstrom explained that he was requiring the backfill to be installed in layers less than 6 inches thick, this statement, in and of itself, would be insufficient to show that either Whipple or Helstrom was requiring the compacting of backfill since, as pointed out above, the specifications required all backfill, ordinary as well as compacted, to be deposited in layers not more than six inches thick. In the memorandum filed subsequent to the pre-hearing conference, Department Counsel argues that if the contractor exceeded the backfill requirement, and did work which he now contends was compacted backfill, "such action on his part was entirely of his own volition," and his assumption that the Government wanted compacted backfill cannot be regarded as a contractual requirement.

The Board does not deem it necessary to determine whether the contractor actually exceeded the requirements of the specifications.

In his findings, the contracting officer invoked the failure of the contractor to file a written protest against any extra work required. He pointed out that while the backfilling operation was substantially completed on November 21, 1952, the first written evidence of protest by the contractor was the latter's letter of April 7, 1953, which date was 137 days after the completion of the work. Under the circumstances of the case, the failure to protest to the contracting officer bars consideration by the Board of the merits of any claim for work in excess of the requirements of the specifications, even if it be assumed that no protest would have been necessary if the contracting officer had availed himself of the opportunity to direct the placing of compacted backfill in areas not shown on the drawing, or designated in the specifications.

As all of the claims included in this appeal which may involve factual issues either are barred by the failure of the contractor to protest or are supported by allegations which fall short of stating a claim allowable by the Board, no purpose would be served by directing a hearing to be held for the purpose of taking testimony.

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 claims of the contractor is affirmed.

THEODORE H. HAAS, *Chairman.*

WILLIAM SEAGLE, *Member.*

HERBERT J. SLAUGHTER, *Member.*

ESTATE OF JEANETTE SCOTT EDLAND UNALLOTTED NEZ PERCE INDIAN

IA–107 *Decided May 17, 1956*

Indians: Domestic Relations

A divorce by Indian custom may be accomplished unilaterally by either of the parties to the marriage, irrespective of the fact that one of the parties to the marital relation is of non-Indian blood. A separation, plus an intention on the part of at least one of the parties that the separation shall be permanent, is sufficient to dissolve the ties of either a ceremonial or an Indian custom marriage.

Indian Lands: Descent and Distribution: Generally—Secretary of the Interior

When the Secretary of the Interior in the process of determining who shall inherit a restricted Indian estate makes findings regarding the marital status of the deceased Indian and of any person claiming as her surviving spouse, the Secretary is not bound by State law or State orders or decrees on the subject.

Indians: Domestic Relations—Indian Lands: Descent and Distribution: Intestate Succession

Where the proof in an Indian probate proceeding indicates that there have been successive marriages and divorces by Indian custom between an Indian woman and her husbands, the record warrants a finding that the Indian decedent died unmarried and single and her heirs should be determined on that basis.

APPEAL FROM AN EXAMINER OF INHERITANCE
BUREAU OF INDIAN AFFAIRS

Carl Edland, through his attorneys, has appealed to the Secretary of the Interior from a decision by an Examiner of Inheritance, dated July 20, 1954, denying appellant's claim that he was the husband of Jeanette Scott Edland, a deceased unallotted Nez Perce Indian, at the time of her death, and determining the decedent's heirs to be her brother, Edward Scott, and her sister, Lizzie Scott Paul, each of whom was found to share equally in the estate.

The decedent appears to have died intestate on June 24, 1952, at the age of 54 years. Originally, on February 4, 1953, a decision had been made by an Examiner of Inheritance finding appellant, a white man, to be the decedent's surviving husband and her sole heir at law. A petition for rehearing was filed by Lizzie Scott Paul, and upon the denial of such petition by the Examiner and an appeal to the Secretary of the Interior, the former Solicitor for this Department found that a review of the testimony at the original hearing raised grave doubts as to whether the hearing was fully utilized to bring forth the vital facts in the case. Moreover, it was concluded by the then Solicitor on January 6, 1954, that a rehearing was required to determine whether Carl Edland was ever married to the decedent, by Indian custom or ceremony, and if so, whether such marriage was terminated by Indian custom or otherwise, and whether the decedent was married or single when she died.

Accordingly, the case was remanded to an Examiner of Inheritance for a rehearing, who, after notice, held a further hearing which ex-

tended over a period of 3 days. The appellant was present, represented by his attorneys. Lizzie Scott Paul, the sister of the decedent, was also present, and she and her brother, Edward Scott, were likewise represented by counsel. Edward Scott was not present. While Edward Scott's absence at the hearing is now questioned by the appellant, there is no indication that at the time of the rehearing any interested party deemed his presence essential. In fact, since the hearing extended over a number of days Edward Scott, if available, could have been brought in had any party regarded his testimony as vital.[1] Nevertheless, the record will be reviewed here on appeal, and a decision made as to whether the Examiner's order of July 20, 1954, should or should not be sustained on the basis of that record.

I

The first question whether appellant was ever married to the decedent must be answered in the affirmative. Appellant testified that he and the decedent were married in Lewiston, Idaho, in the year 1936 by Judge Phillips, now deceased, who was then the probate judge for Nez Perce County, Idaho. However, a search failed to disclose any written record of such a marriage.[2] In addition, the appellant testified that he and the decedent had lived together as man and wife prior to the alleged ceremonial marriage in 1936. While this prior marital relationship is stated to have begun in the year 1933, it is not clear whether it was based on Indian custom or under the common law.[3] If on the latter basis, and even assuming a ceremonial marriage later in 1936 between the parties, it has not been established that certain antecedant marital relations, shown by the record to have been entered into by the decedent with at least one other man, had been dissolved under

[1] There is included in the record a letter, dated July 16, 1953, from Edward Scott to his sister, Mrs. Lizzie Scott Paul, apparently for the purpose of authorizing the latter to act for the correspondent regarding the decedent's estate, where he stated that "I do not know very much about the matter since I have been away from home so long and have not followed my sister's marriages for the last several years. I hope that this letter will be accepted as my willingness for you to act in my stead."

[2] The present probate record contains two certificates, dated July 30, 1953, the one being by the acting probate judge for Nez Perce County who succeeded to the duties of that office upon the death of Judge Phillips, and the other by the acting clerk and recorder for Nez Perce County, both of which are to the effect that no record is shown where either the decedent or the appellant is named as a principal in a marriage ceremony or license.

[3] The State of Idaho recognizes common law marriages, and marriage may be presumed by the parties living together as man and wife. See *Dawson* v. *United States*, 10 F. 2d 106 (9th Cir. 1926), *cert. denied*, 271 U. S. 687 (1926); *Huff* v. *Huff*, 118 Pac. 1080, 1083 (1911).

the Idaho laws, i. e., by death of one of the parties or by a judgment of a court of competent jurisdiction decreeing a divorce of the parties.[4]

Irrespective, however, of any possible impediment to a legal marriage under the Idaho laws between decedent and the appellant, the record discloses that such marital ties as had existed between the decedent and Norman Smith, prior to the assumption of relations by her with the appellant, had been dissolved by an Indian custom divorce. The record shows in this respect that the decedent had separated from Norman Smith, with no apparent intention of living with him again but followed, as determined by the Examiner, by an assumption of marital relations with the appellant. Moreover, it appears that the decedent and the appellant did live together as man and wife, and that they held themselves out as such. In fact, it appears that such a relationship continued for some time until a few years before decedent's death. In these circumstances, and on the basis of well-established legal principles, a divorce from Norman Smith and a marriage to the appellant by decedent, both under the Indian custom, are clearly indicated. In this respect see Solicitor's opinion in the matter of the estate of Noah Bredell, approved by the First Assistant Secretary of the Interior on April 12, 1930,[5] dealing at some length with the broad general subject of what constitutes Indian custom marriage and divorce, and particularly with regard to the marital customs of the Nez Perce Tribe, of which both Noah Bredell and the present decedent were members.[6]

The Noah Bredell opinion upheld the validity of Indian custom marriage and divorce, which customs clearly are still being practiced by the Nez Perce Indians according to the record in the present case, and in the absence of a change in such customs by the Indians themselves, it would seem, as stated in the opinion, that it is for Congress alone to say when the customs shall cease. The decision in the Noah Bredell case clearly dispells any doubt concerning the weight or legal authority to be ascribed to the marital customs of the tribe by holding that marriage and divorce under such customs must be treated as being

[4] Idaho Code (1947) sec. 32–601. It appears from the record that the decedent had been married apparently by Indian custom, to Norman Smith, a Nez Perce Indian, and that the 1932 and 1933 census rolls of the Northern Idaho Agency listed decedent as the wife of Norman Smith.

[5] 53 I. D. 78.

[6] See also *Estate of Mary Robedeaux*, IA–106 (October 7, 1953), and *Estate of Joseph Carter*, IA–17 (December 13, 1951).

of equal validity with a ceremonial marriage and a legal divorce under the laws of the State. In fact, in that very case the parties concerned had gone through the form of a ceremonial marriage, but a subsequent divorce by Indian custom was recognized.[7] Moreover this same result occurs irrespective of the fact that one of the parties to the marital relation may be a white person or of non-Indian blood.[8] Indeed, a divorce by Indian custom may be accomplished unilaterally by one of the parties to the marriage, and the showing of a separation, plus an intention on the part of at least one of the parties that the separation shall be permanent, is sufficient to operate as a termination of any form of marriage relationship.[9]

II

Irrespective of the form of the marriage which created a marital relationship between appellant and the decedent, the Examiner concluded on July 20, 1954, that such a relationship nevertheless was terminated by an Indian custom divorce arising from decedent's separation from appellant and her subsequent relations with one Ken Maynard. The Examiner's conclusion in this respect was reached with full cognizance of the fact that on October 4, 1952, the Probate Judge for Nez Perce County had entered a decree establishing record title to the community property not subject to the jurisdiction of this Department, of the decedent and the appellant, in which decree the appellant is named as the surviving husband of the decedent. The Examiner's order of July 20, 1954, contains a statement that the only proof offered as the basis for this probate decree was an affidavit of the appellant. Nevertheless, the Secretary of the Interior, or his authorized representative, is free to conduct an independent investigation of all of the facts to ascertain the heirs of a deceased Indian owning restricted property, and in exercising his authority in that respect the Secretary likewise has the power to ascertain or determine the marital status of the decedent and of persons claiming as heirs to the decedent's

[7] To the same effect see *Estate of Mary Robedeaux,* IA–106 (October 7, 1953); *Estate of Hugh Sloat,* IA–74 (April 10, 1952); *Estate of George Bird Eagle, IA–13* (November 3, 1949).

[8] See *Estate of Lucy Dixon Lopez* (I. O. 16127/40); *Estate of Amos Seartstse* (I. O. 7738/37); *Estate of Lola DeSheuquette* (I. O. 6162/35); *Estate of Mrs. Emma Barry* (I. O. 51116/18).

[9] *Estate of Hugh Sloat,* IA–74 (April 10, 1952); *Estate of George Bird Eagle,* IA–13 (November 3, 1949); *Estate of Sarah Bruner,* IA–2 (September 28, 1949).

restricted estate without being bound or controlled by decrees or orders of the State courts.[10]

The Examiner's findings based on his independent investigation of this matter are amply supported by the entire record. While it may be somewhat difficult to fix the exact date of decedent's separation and Indian custom divorce from the appellant, the record shows nevertheless that decedent left Idaho and went to Oregon in the company of one Maynard, also a white man, approximately two years before she died. During that latter period of her life the decedent lived in what apparently was an Indian community in Oregon near Thorn Hollow, and resided at the home of a relative, Mrs. Fred Dickson (Dixon). The general reputation of the decedent and Maynard in the community was that they were married. In fact, the decedent had introduced Maynard to various persons as her husband. Moreover, the record discloses that decedent and Maynard occupied a room in Mrs. Dickson's home, where they lived together as man and wife for about two years. It is also significant that in the month of March for each of the years 1951 and 1952, which was during the period decedent lived with Maynard in Oregon, checks covering the leasing or renting of decedent's lands were made payable by the lessee to the decedent as Jeanette Scott Maynard. Furthermore, while his testimony was controverted by the appellant, a witness, Corbett Lawyer, testified without objection that appellant told him after the decedent's death that "he had been married to Jeanette Scott but had been separated for some time."

There is testimony from the appellant to the effect that the last time he saw the decedent was when she returned to Idaho for about two weeks in the fall of 1951 to care for a Nez Perce Indian, at which time he and decedent lived together as man and wife. That testimony is controverted, and there is other testimony to the effect that during the last few years of her life decedent would be absent from Oregon only a few nights at a time. While there is no firm support for the allegation that the marital relations of decedent and Maynard under the Indian custom were interrupted, nevertheless, the record shows that after the fall of 1951 and up to the last few months of her life, i. e., until the spring of 1952, decedent and Maynard associated together as husband and wife. Thus, the termination of a marriage by

[10] See *Estate of Joseph Carter*, IA–17 (December 13, 1951); Departmental rulings dated February 9, 1948 (60 I. D. 125), April 12, 1930 (53 I. D. 78, 88–89); and September 26, 1913 (42 L. D. 493).

an Indian custom divorce is accomplished where, as here, the decedent separated from appellant with the obvious intention and actions on her part to live with Maynard as her husband.

III

The question whether decedent was an unmarried woman at the time of her death, or whether her Indian custom marriage to Maynard was subsisting at that time, requires but scant comment. The fact that Maynard failed to show any manifestation of interest in the decedent's estate is reflected by his failure to appear at any of the hearings conducted in this matter. Moreover, it is plain from the record that the marital relations between him and the decedent had ceased a short time before her death. Specifically, the record discloses that a few months before the decedent died, Maynard left her and never returned to her, and neither did he provide for her. In fact, Maynard left the decedent when she needed him the most and at a time when she was helpless and bedridden during her last illness. He left her in her extremity, and apparently had no concern whether she was looked after or not. On that set of facts, the Examiner's conclusion must be affirmed that Maynard's actions terminated any rights he might otherwise have asserted as decedent's surviving husband through an Indian custom marriage. Accordingly, the decedent is regarded as having been unmarried and a single woman at the time of her death.

Therefore, 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 order of the Examiner of Inheritance, dated July 20, 1954, finding decedent's heirs to be her brother and sister, is affirmed, and the appeal is dismissed.

EDMUND T. FRITZ,
Deputy Solicitor.

AUTHORITY FOR CONTINUED APPROVAL OF TIMBER SALES ON KLAMATH RESERVATION

Indian Tribes: Terminal Legislation—Timber Sales and Disposals

The basic authority for the Secretary of the Interior to sell timber on Indian reservations is set forth in section 7 of the act of June 25, 1910 (36 Stat. 857; 25 U. S. C. sec. 407). Sale of timber on the Klamath Reservation will con-

tinue to be governed by the regulations implementing the act of June 25, 1910, until such time as tribal title is extinguished by sale or the tribal property is conveyed to a trustee, corporation or other legal entity in accordance with a plan to be prepared by management specialists pursuant to the Klamath terminal legislation (the act of August 13, 1954, 68 Stat. 718; 25 U. S. C. sec. 564).

M–36338 MAY 29, 1956.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

Certain questions have been raised with respect to the Secretary's authority to approve timber sales on the Klamath Reservation in view of the Klamath terminal legislation (68 Stat. 718; 25 U. S. C. sec. 564). The basic authority for the Secretary to sell timber on Indian reservations is set forth in section 7 of the act of June 25, 1910 (36 Stat. 857; 25 U. S. C. sec. 407), which reads:

The mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: *Provided*, That this section shall not apply to the States of Minnesota and Wisconsin. (June 25, 1910, ch. 431, sec. 7, 36 Stat. 857.)

This office has, in an opinion dated January 14, 1955 (M–36257) interpreted the act of August 13, 1954, as permitting the normal interim functioning of the tribe unless clearly inconsistent with the act. "Although no specific provision is contained in the act dealing with the performance of necessary tribal or reservation functions pending the effectuation of the purposes of the act, it is hard to believe that Congress intended to create a vacuum during the transition period which would result in a complete stoppage of the ordinary business affairs of the Klamath Tribe." Nothing in the act takes away the privilege of the tribe and the Secretary to cooperate in the sale of tribal timber provided that there is no interference with the duties of the management specialists to arrange for the sale of property needed to pay off members of the tribe electing not to continue on a collective economic basis with other tribal members. The approval by the management specialists of the timber contract is not required but as pointed out in a Solicitor's opinion dated November 17, 1955 (M–36307) it is essential that they be consulted on an advisory basis. The Secretary's authority to continue sales will thus be effective until (*a*) the timber comes under the jurisdiction of the management specialists by their

selection of it as property suitable for sale to create a fund to pay off members electing to go their separate way (section 5 (a) (3)), or (*b*) until title to the timber is transferred to the corporation or other entity created cooperatively by the management specialists, the tribe and the Secretary pursuant to section 5 (a) (5) of the act. Since one of these alternative actions will have to take place before or simultaneously with the termination proclamation (section 18 (a)), in the ordinary course of events, they will determine the Secretary's authority in this regard.

In the light of the above, the answer to your specific questions, here repeated for convenience, are as follows:

> 1. Considering sections 3 and 4 of the act of August 13, 1954, will the publishing of a final tribal roll in the Federal Register change the status of the tribal property in a manner to prevent the Secretary from authorizing sales of tribal timber thereafter?

"No." The publication of the final roll of tribal members does not change the functions of the Secretary, the tribe or the management specialists, as the case may be, but determines those eligible to participate in the benefits of membership in the tribe. As was pointed out in Solicitor's Opinion (M–36284) dated May 20, 1955,

> * * * The tribal property remains tribal property and only the interest of the individual member therein becomes personalty. Therefore, the * * * regulations * * * 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. (62 I. D. 186, 191.)

> 2. The Management Specialists have received bids for making an appraisal of the tribal estate, pursuant to section 5 (a) (1) of the act. Will the acceptance of this bid, or the completion of the appraisal, have any effect upon the Secretary's authority to authorize timber sales?

"No." The appraisal will be undertaken as called for in section 5 (a) (1) of the act as any other appraisal of a going business would be undertaken by commercial appraisers.

> 3. Section 5 (a) (2) and (3) of the act provides that the appraised value of the tribal estate will be made known to the members, who will then have an opportunity to elect whether

they wish to remain with the tribe or withdraw; whereupon the estate will be partitioned and the portion of those electing to withdraw will be sold. Will the call for this election, or the partitioning of the estate, remove the Secretary's authority to approve timber sales?

The call for the election will have no effect on the authority of the Secretary to exercise his supervisory functions with regard to the sale of timber. Further, when the Management Specialists have determined to what extent timber will be sold pursuant to section 5 (a) (3) of the act, the Secretary will direct the execution of the conveying instruments to carry these sales out, and to that extent his prior supervisory authority with respect to the timber so sold will have ceased. Finally, his authority will totally lapse when the timber is turned over to a corporation or other legal entity created under the act or when the termination is pronounced by suitable proclamation in the Federal Register.

We have been informed by representatives of the Bureau that no timber sale contract is contemplated, the period of which will extend beyond the date on which Federal supervision and control will terminate under the provisions of the Klamath Termination Act. The foregoing views have been expressed with this understanding.

J. Reuel Armstrong,
Solicitor.

CLAIM OF MRS. KATHRYN L. ROGERS

TA-125 *Decided May 31, 1956*

National Park Service Areas: Generally—Torts: Licensees and Invitees

A visitor to an area forming part of the National Park system is, under ordinary circumstances, a licensee by invitation or permission, but is not a business visitor, even though the park is one where a fee is charged.

Torts: Assumption of Risk—Torts: Licensees and Invitees—Torts: Notice—Torts: Parks

Under general principles of tort law, the United States is not liable to a visitor, whether a business visitor or a gratuitous licensee, to an area forming part of the National Park system for bodily harm caused by any dangerous condition, whether natural or artificial, on the land, if the visitor knows of the condition and realizes the risk involved or if the Government exercises

reasonable care to give adequate warning of the condition and the risk involved.

Torts: Licensees and Invitees—Torts: Parks

Under general principles of tort law, a visitor to an area forming part of the National Park system is not entitled to compensation for bodily harm resulting from a fall on a park trail if the physical condition of the trail and the extent of risk involved in its use were so apparent that the trail would not have been hazardous for persons traversing it with a reasonable degree of care for their own safety.

National Park Service Areas: Jurisdiction over Lands Within—Torts: Parks

The rights and duties of private persons within a National Park Service area over which the United States has acquired exclusive jurisdiction are governed solely by Federal law, but the law in force within the area immediately prior to the transfer of jurisdiction is considered to have been adopted by the Federal Government to the extent that it is not inconsistent with the changed legal situation brought about by the transfer or with any Federal enactment or purpose, whether existing at the time or subsequently adopted.

APPEAL FROM ADMINISTRATIVE DETERMINATION

On February 14, 1956, the Field Solicitor of the Department of the Interior at Omaha, Nebraska, denied the claim of Mrs. Kathryn L. Rogers, 9208 Hopedale Drive, St. Louis 15, Missouri, for the amount of $1,000 for compensation for injuries sustained when she fell on a trail in Yellowstone National Park.

According to the record, the accident occurred about 9:30 a. m. on July 9, 1955. The claimant was one of a group taking a guided tour of Uncle Tom's Trail near the Lower Falls in Yellowstone National Park, when she fell fracturing her right wrist. In her claim Mrs. Rogers states that the trail was strewn with pea-size gravel which had a tendency to roll, and, that it was the gravel which caused her fall. She contends that the Government was negligent in paving the path with this gravel and in failing to install handrails along the sides of the path. It appears that the claimant fell to the ground on the trail, and did not fall off the trail.

From the record it must be concluded that the trail was not one which would have been hazardous for visitors who were traversing it with a reasonable degree of care for their own safety. The statements of Mrs. Rogers, photographs of the path, and other evidence of record show quite clearly that the condition of the trail and the extent of risk involved in its use were obvious. The presence of loose pea-size gravel

on the surface of the path, the absence of handrails along certain sections of the path, and the slope of the grade were all plainly visible. In addition, the Ranger Naturalist who conducted the tour states that he cautioned the participants to be careful and to watch their step as they proceeded down the trail, and that he did this not only before starting the hike but also on several occasions during its progress.

Under the Federal Tort Claims Act (28 U. S. C. sec. 2671 *et seq.*), the United States is liable for personal injuries caused by "the negligent or wrongful act or omission" of its employees in those circumstances where a private person would be liable for such injuries "in accordance with the law of the place where the act or omission occurred." Yellowstone National Park is a place that is subject to the exclusive jurisdiction of the United States, by virtue of provisions reserving exclusive jurisdiction contained in section 2 of the statute admitting Wyoming to statehood, act of July 10, 1890 (26 Stat. 222), and reiterated in section 1 of the act of May 7, 1894 (28 Stat. 73; 16 U. S. C. sec. 24). The rights and duties of private persons within a place over which the United States has acquired exclusive jurisdiction are governed solely by Federal law, but the law in force within the place immediately prior to the transfer of jurisdiction is considered to have been adopted by the Federal Government to the extent that it is not inconsistent with the changed legal situation brought about by the transfer or with any Federal enactment or purpose, whether existing at the time or subsequently adopted.[1]

The legal status of visitors to Yellowstone National Park, as well as of those to other areas within the National Park system, has been stated in decisions of the Federal courts to be that of a licensee by invitation or permission, but not that of a business visitor.[2] In the circumstances of the present case, however, it is immaterial whether the claimant was a business visitor or a gratuitous licensee, since it is well settled that "a possessor of land is not subject to liability to his licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by any dangerous condition thereon, whether

[1] *Stewart & Co.* v. *Sadrakula,* 309 U. S. 94 (1940); *Arlington Hotel Co.* v. *Fant,* 278 U. S. 439 (1929); *Western Union Telegraph Co.* v. *Chiles,* 214 U. S. 274 (1909); *Chicago, Rock Island & Pacific Ry. Co.* v. *McGlinn,* 114 U. S. 542 (1885).

[2] *Claypool* v. *United States,* 98 F. Supp. 702 (D. C. S. D. Calif., 1951) (Yellowstone National Park); *Firfer* v. *United States,* 208 F. 2d 524 (App. D. C., 1953) (Jefferson National Memorial); see *Eulene Hawkins* v. *United States,* Civil Action No. 4602-52 (D., D. C., January 24, 1955) (Prince William Forest Park).

natural or artificial, if they know of the condition and realize the risk involved therein." [3] Nor is a possessor of land subject to liability for bodily harm caused to his licensees, whether business visitors or gratuitous licensees, by a natural or artificial condition thereon if he has exercised reasonable care to give adequate warning of the condition and the risk involved therein.[4]

These recognized principles of law, when applied to the facts of the present case, necessitate denial of the claim presented by Mrs. Rogers.

Final Determination

Therefore, in accordance with the provisions of the Federal Tort Claims Act and the authority delegated to me by the Secretary of the Interior, I affirm the determination (T–DO–12) of the Field Solicitor denying the claim of Mrs. Kathryn L. Rogers.

EDMUND T. FRITZ,
Deputy Solicitor.

APPEAL OF UNITED CONCRETE PIPE CORPORATION

IBCA–42 *Decided May 31, 1956*

Contracts: Additional Compensation—Contracts: Release

A claim for additional compensation for repairing leaks in pipes under a contract which involved the construction of pipelines may be allowed notwithstanding the execution by the contractor of a release of claims arising out of such repairs when the contractor erroneously understated the number of the leaks repaired and the Government in accepting the release had knowledge of circumstances which should have put it on notice that the amount of the claim reserved in the release was so low as to indicate that the contractor was making a mistake and that its acceptance would, therefore, be inequitable.

[3] *Restatement of the Law, Torts,* sec. 340. The comments to this section contain the following explanation of the reasons for the rule: "A licensee's privilege to enter land in the possession of another is derived solely from the possessor's consent which he is free to give or withhold, the licensee not being entitled to enter without it. The licensee is, therefore, entitled to nothing more than knowledge of the actual conditions, which he will encounter if he avails himself of the possessor's consent. If he knows the actual conditions, he has an opportunity to exercise an intelligent choice as to whether the advantage to be gained from his entry is sufficient to justify him in incurring the risk which he knows is inseparable from it."

[4] *Restatement of the Law, Torts,* secs. 342, 343.

Contracts: Release—Contracts: Appeals—Contracts: Contracting Officer

As releases obtained by the Government by means of the exertion of economic duress have been treated as unilateral decisions of the contracting officer that are subject to appeal under the disputes clause of Government construction contracts, a release which should not have been accepted by the Government may similarly be treated as the unilateral act of the contractor and may be disregarded by the administrative reviewing authority on appeal. Although such an authority may not reform contractual instruments, the disregard of the release under such circumstances does not constitute an affirmative act of reformation.

BOARD OF CONTRACT APPEALS

United Concrete Pipe Corporation, of Baldwin Park, California, filed an appeal dated May 5, 1955, from the findings of fact and decision of the contracting officer dated April 8, 1955, which denied its claim for additional compensation in the amount of $9,377.80 to cover extra costs allegedly incurred in performing Contract No. I2r–19406, dated April 16, 1951.

The contract, which was on Standard Form No. 23 (Revised April 3, 1942), called for the construction and completion of earthwork, pipelines, and structures, including reservoirs and pumping plants, Laterals 124.5E, 127.7E, and 130.4E, and Sublaterals, Unit 3, Southern San Joaquin Muncipal Utility District, Friant-Kern Canal Distribution System.

The performance of the contract included the construction of approximately 47 miles of concrete pipelines of which approximately 6 miles consisted of concrete pipe with mortar joints. The Government furnished all of the mortar-joint irrigation pipe and approximately 9 miles of rubber-gasket pipe. This distribution system was constructed as Unit 3 of the Southern San Joaquin Municipal Utility District.

Under paragraph 91 (b) of the specifications, as modified by Order for Changes No. 3, dated May 29, 1952, the contractor guaranteed for a period of 3 years all pipe constructed under the original specifications against defects in workmanship and materials furnished by the contractor, and under paragraph 91 (c) of the specifications, as modified by the same change order, the contractor guaranteed also for a period of 3 years all contractor-furnished rubber-gasket pipe against defects from any cause except those found to be due to "negligent acts of the Government or those authorized by the Government to operate

the lines, acts of third parties, acts of God or acts of the common enemy."

The Government first made beneficial use of pipelines under the system early in 1953. All construction work under the contract was considered substantially complete as of August 28, 1953, and was accepted as of that date. Final acceptance in accordance with the provisions of Order for Changes No. 3 for the purpose of starting the running of the 3-year guarantee period was made, however, on November 1, 1953.

In connection with the final payment voucher, the contractor executed a release on contract, dated December 15, 1953, but noted the following exception:

> * * * except for our claim for reimbursement, for repairing pipe lines prior to the date of final acceptance as more particularly set forth in our letter dated Dec. 15, 1953; and, also, for our claim for reimbursement for the repair of pipe lines during the three (3) year guarantee period as provided in order for Change No. 3 of this contract.

In its letter of December 15, 1953, the contractor asserted a claim of $6,240 to cover repairs made prior to the date of final acceptance.

In his findings of fact and decision of April 8, 1955, the contracting officer allowed the contractor additional compensation for costs which it had incurred in repairing 132 leaks in Government-furnished rubber-gasket pipe and 25 leaks in Government-furnished mortar-joint pipe from November 1, 1953, the acceptance date, through March 15, 1955. As the average cost of repair per leak was found by the contracting officer to be $50.38, he allowed a total of $7,909.66 for these repairs. He further found that the contractor had repaired some 310 leaks in Government-furnished pipe prior to the acceptance date, and that the contractor was entitled to $6,240, the amount which it had excepted in its release, for costs incurred by it in repairing these leaks "since the costs for repairing leaks found to be the responsibility of the Government during that period would amount to at least that much." He held that the total amount due the contractor was, therefore, $14,149.66.

In its appeal, the contractor apparently assumed that the contracting officer had found that all of the 310 leaks which it had repaired prior to the acceptance date were due to defects in Government-furnished pipe for which the Government had assumed responsibility, although actually the contracting officer had merely found that enough of these leaks were the responsibility of the Government to warrant

the payment of the whole amount excepted in the release. Calculating the cost of the repair of each of the 310 leaks at $50.38 per leak, the contractor claimed $15,617.80, less the $6,240 allowed by the contracting officer, or $9,377.80.[1] The contractor argued that the release should be disregarded, since in arriving at the amount excepted therein, it had relied on reports of its field representative, and these reports had subsequently been discovered to be erroneous.

Subsequent to the filing by Department Counsel of a motion to dismiss, the Board by memorandum dated November 22, 1955, requested that the contracting officer determine the extent of the responsibility of the Government for the 310 leaks that had occurred prior to the acceptance of the work. In order to facilitate the making of this determination, and also in order to clarify the issues in the case, the Board also determined to hold a pre-hearing conference pursuant to 43 CFR, section 4.9. This conference was held by Mr. William Seagle, a member of the Board, in Denver, Colorado, on January 18, 1956, and it was attended by representatives of the Bureau of Reclamation and the contractor. At the conference, it was agreed by the parties that the contracting officer should make a supplemental finding of fact with respect to the responsibility of the Government for the repair of leaks prior to the date of final acceptance. A supplemental findings of fact and decision were filed by the contracting officer under date of January 24, 1956.

In this document the contracting officer determined as follows:

> Of the 310 leaks, 70 were in joints of the pipeline, and substantially all of the remaining 240 leaks resulted from circumferential cracks in individual pipe sections. Since the pipe was furnished by the Government, any leaks in the line resulting from defects in the pipe are the responsibility of the Government, and leaks resulting from handling, placing, or other operations or workmanship of the contractor are the contractor's responsibility. While it is difficult to establish precisely the division of responsibility, it is my determination, on the basis of the available information, that 50 percent of the joint leaks were due to defective assembly of joints by the contractor, and the remainder were due to defects in the joints of pipe sections as furnished by the Government. As to the remaining 240 leaks, it is my determination that by far the greater portion, or 80 percent of these leaks, resulted from inherent defects in pipe sections furnished by the Government, and the remaining 20 percent of the leaks were the result of damage to pipe sections in handling, which is the responsibility of the contractor. Therefore, it is determined that if the contractor had made an exception claiming reimbursement for repairs for 310 leaks prior to acceptance

[1] Although the contractor stated in its appeal that its records "reflect the number of leaks repaired before acceptance to be 380," it agreed to reduce this number to 310, to accord with the finding of fact of the contracting officer.

of the contract, the Government would have found that 227 of these 310 leaks were the responsibility of the Government, and 83 leaks were the responsibility of the contractor, and the contractor would have been compensated at the unit price of $50.38 for 227 leaks.

The contracting officer also stated that:

* * * the contractor's exception to the release on contract did not indicate either the number of leaks for which compensation was claimed or the unit cost per leak, and the Government therefore had no knowledge as to how many leaks the contractor had repaired he considered to be his own responsibility. The Government's own estimate at that time of the unit cost per leak repaired was in the neighborhood of $20 to $25. Therefore, although the Government records showed that approximately 310 leaks had been repaired by the contractor in Government-furnished pipe, the amount claimed by the contractor of $6,240 even when divided by the total of 310 leaks approximated the estimated unit cost of $20 to $25 and, therefore, did not alert the Government to any possibility of error in the release. * * *

The contracting officer concluded on the basis of his supplemental finding and this statement that "the Government had no notice of an error in the contractor's release on contract when it was received by the Government nor did it have reason to suspect that the contractor had made an error in stating his claim for costs incurred in making repairs prior to the acceptance date." Under date of January 30, 1956, the contractor wrote a letter to the contracting officer in which it stated: "The findings of fact are acceptable to United Concrete Pipe Corporation, and it does not contemplate filing an appeal." Taken literally, this statement would really be dispositive of the appeal, but in view of the understanding which was reached by the parties at the prehearing conference, the Board construes the acceptance of the findings by the contractor, which is not represented by counsel, as extending only to the determination of the number of leaks which were the responsibility of the Government.

There is no doubt that the error made by the contractor in executing the release on contract was due to the inadequacy of its system of record keeping and was wholly inadvertent. The question arises, however, whether the release may be reformed or disregarded by the Board, or other competent authority. The law governing the reformation of releases is the same as that governing the reformation of other instruments.[2] The release, therefore, could be reformed or disregarded only if it was given under a mutual mistake of fact,[3] or if at the time of the acceptance of the release by the Government, it had reason to

[2] See 30 Comp. Gen. 335, 336 (1951).
[3] See 20 Comp. Gen. 533 (1941), and judicial authorities there cited.

suspect that the amount reserved in the release was inadequate, so that its acceptance would be inequitable.[4]

A mutual mistake exists in the making of a contract when both parties thereto, as a result of inadvertence fail to write into the contract a provision upon which they had both agreed, or write into a contract a provision which does not represent their real intentions.[5] In the case of a release, there would be a mutual mistake if it was so written as to bar claims or demands not contemplated by the parties at the time of its execution.[6] However, a release may not be avoided merely because the releasor was not aware at the time of its execution of the extent of the injury which had been suffered or the amount of damages which had accrued.[7] The mistake in such cases relates to an extrinsic fact, which might have resulted in a wholly different contract than the parties actually made.

It is clear that the mistake in the present case was not mutual, since it related to a wholly extrinsic fact, and was made solely by the contractor. The claim itself was fully identified in the release in which it was carefully described as a claim "for repairing pipe lines prior to the date of final acceptance," and clearly distinguished from the claim for the repair of pipelines during the three-year guarantee period, and the amount of the claim was limited to the amount stated in the letter of December 15, 1953, incorporated in the release by reference. Any other claim was, therefore, released. It is true that each of the parties had made different assumptions with respect to the responsibility of the Government for the repair of the leaks, and the cost of each repair. But these were not factors, which entered into the execution of the release, which excepted a claim for a lump sum. They could not, therefore, induce a mutuality of mistake.

It remains to be considered, however, whether the Government's knowledge of the number of leaks which had been repaired, and its estimate of the cost of the repair of each leak were sufficient to put it on notice that the amount of the claim reserved in the release was so low that its acceptance would be inequitable. The two crucial facts set forth in the supplemental findings are that the Government knew at the time of the execution of the release that 310 leaks had been

[4] See 45 Amer. Jur. 619–22.

[5] See, for instance, *Hygienic Fibre Co.* v. *United States,* 59 Ct. Cl. 598, 609 (1924); *International Arms & Fuze Co.* v. *United States,* 76 Ct. Cl. 424 (1932).

[6] See 30 Comp. Gen. 335, *supra; L. W. Packard & Co.* v. *United States,* 66 Ct. Cl. 184, 192 (1928); *The Ross Coddington,* 40 F. 2d 280 (D. C. W. D. N. Y., 1924); *Harrison Eng. & Constr. Co.* v. *United States,* 107 Ct. Cl. 205, 208 (1946); *Duhane et al* v. *United States,* Ct. Cl. No. 516–52, December 6, 1955.

[7] See *W. C. Shepherd* v. *United States,* 125 Ct. Cl. 724, 742 (1953); 45 Amer. Jur., p. 685.

repaired, and that it estimated the unit cost of repair per leak to be in the neighborhood of $20 to $25. While the Government had not yet determined at the time of the acceptance of the release precisely how many of the 310 leaks were its responsibility, it is apparent from both the original and supplemental findings that it would be difficult to make this determination, and that the Government might have to assume responsibility for most, if not virtually all, of the leaks.[8] As for the Government's estimate of the unit cost of repairs, the Board does not have before it any evidence from which it could itself judge whether this estimate was realistic. There is some reason to doubt that it was, however, in view of the readiness with which it subsequently accepted the contractor's figure of $50.38 as the average cost of repairing a leak.

Of course, if the unit cost of repairs was assumed to be only $20, the amount of $6,240 reserved in the release would be just about sufficient to take care of the repair of all the 310 leaks, if all of them were assumed to be the responsibility of the Government. The cost of the repairs would then be $6,200. However, if the unit cost of repairs was assumed to be $25, the amount of $6,240 reserved in the release would fall short by no less than $1,550 of taking care of the repair of all 310 leaks, if all of them were assumed to be the responsibility of the Government. Even on the basis of the 227 leaks finally found to be the responsibility of the Government, the $6,240 reserved in the release is only $565 more than the cost of repair figured at $25 a unit. The 227 figure, moreover, represents obviously a compromise rather than a scientific engineering determination, and it was advanced by the contracting officer, and accepted by the contractor merely as a basis for payment, if the validity of the claim should be upheld rather than as a basis for determining the validity of the release. If the figure were raised to only 250, the amount reserved in the release would fall a little short of taking care of all of them on the basis of the $25 unit cost of repair. Considering all the uncertainty which was apparently involved both in fixing the extent of the responsibility of the Government for the leaks, and in estimating the unit cost of repairs, a more searching inquiry into the correctness of the release might well have suggested itself to the Government. When a rather

[8] It was stated by Government representatives at the prehearing conference, indeed, that the pipes had been in operation for one and a half irrigation seasons before November 1, 1953, and that, having been long covered up, it would be prohibitively costly to make a really accurate determination of the number of leaks which were the responsibility of the Government.

unusually low bid is received, it has long been customary in Government contracting for the Government to request the bidder to verify his bid. Under all the circumstances, it would certainly have been good practice for the Government in the present case to have requested the contractor to verify the exception in its release. The Board does not believe that the failure to do so was due to anything more than thoughtlessness. Nevertheless, it must conclude that the acceptance of the release was inequitable in the circumstances in which it was given, and that it should be disregarded.

The Board has held that it lacks jurisdiction to reform instruments, such as bids [9] or change orders [10] on the ground of mutual mistake. An instrument such as a release which is given under circumstances which make its acceptance inequitable, does not require, however, an affirmative act of acceptance. To disregard it in such circumstances will in itself accomplish the ends of justice. The Armed Services Board of Contract Appeals has held that any agreement made under circumstances which amount to economic duress may be disregarded,[11] and if this be so, the same result should follow if a release is given under inequitable circumstances. It has been held that an agreement executed under duress is no more than the unilateral decision of the contracting officer, and hence is subject to appeal under a disputes clause.[12] Similarly, a release which the contracting officer should not have accepted must be regarded as the unilateral act of the contractor, which may be disregarded by the administrative reviewing authority upon appeal.

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 and decision of the contracting officer are reversed, and he is directed to pay to the contractor the sum of $5,196.26. This represents the cost of repairing 227 of the leaks at $50.38 per leak, less the $6,240 already paid to the contractor.

THEODORE H. HAAS, *Chairman.*

WILLIAM SEAGLE, *Member.*

HERBERT J. SLAUGHTER, *Member.*

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[9] See appeal of *L. D. Shilling Company, Inc.*, IBCA–23, August 19, 1955.

[10] See appeal of *Sam Bergesen*, 62 I. D. 295 (1955).

[11] See, for instance, *Parkside Clothes, Inc.*, ASBCA No. 261, January 4, 1950, 4 CCF 60, 856. There are also other unreported cases involving releases given under circumstances of economic duress.

[12] See *Fruhauf Southwest Garment Co.* v. *United States*, 126 Ct. Cl. 51, 64 (1953).

M. A. MACHRIS, MELVIN A. BROWN

A–27278 *Decided June 11, 1956*

Oil and Gas Leases: Applications—Oil and Gas Leases: Relinquishments

An application to lease land filed prior to the notation on the appropriate tract book of the relinquishment of a prior lease on the same land must be rejected because the land is not available for further leasing until such notation is made.

Oil and Gas Leases: Applications—Regulations: Applicability

A regulation which provides that where a noncompetitive oil and gas lease is relinquished the land shall become available for the filing of new lease offers upon the notation of the relinquishment on the appropriate tract book is applicable even where the notation does not take place until after the end of what would have been the 5-year term of the lease in the absence of the relinquishment, and an application filed after that time but prior to the notation is prematurely filed and must be rejected.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior by Melvin A. Brown from a decision of the Associate Director of the Bureau of Land Management dated July 11, 1955, as modified by the Director on October 10, 1955, holding that land in a relinquished oil and gas lease becomes available for leasing upon the expiration of the initial 5-year term of the lease notwithstanding the fact that the relinquishment of the lease may not have been noted on the appropriate tract book prior to that date.

Oil and gas lease Great Falls 086736 was issued on July 1, 1948, for a 5-year term expiring on June 30, 1953. It was relinquished on June 16, 1953. On July 1, 1953, M. A. Machris filed an offer to lease the land embraced in the relinquished lease. The manager held that the land applied for was not available for leasing at the time the Machris offer was filed because the relinquishment of the former lease had not been noted on the tract book until July 16, 1953. He cited 43 CFR 192.43 in support of his decision. The Associate Director reversed the manager and held that the regulation, which the manager found to be controlling, has no application after the expiration of the primary term of a lease and that to hold that the land was not available for further leasing after the expiration of such term would be violative of the provisions of section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., Supp. II, sec. 226).

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Melvin A. Brown filed his offer to lease the land on October 20, 1954, after the relinquishment of the former lease had been noted on the tract book.

Section 17 of the Mineral Leasing Act authorizes the Secretary of the Interior, in his discretion, to lease lands for oil and gas purposes. It provides:

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

It is within the province of the Secretary of the Interior to determine when land shall be available for noncompetitive lease offers, but when lands are made available for such leasing they must be leased, if they are leased at all, to the first person making application therefor who is qualified to hold such a lease.

At the time oil and gas lease Great Falls 086736 was relinquished and through the time when Mr. Brown filed his lease offer, the Secretary had provided by regulation 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 * * *, the lands shall be open to further oil and gas lease offers. * * * (43 CFR, 1953 Supp., 192.43.) [1]

Under that regulation offers to lease filed prior to notation of the appropriate tract books have consistently been held to be premature and have been rejected.[2]

The Bureau now holds that no administrative procedure such as that set forth in 43 CFR 192.43 can have the effect of extending the segregative effect of a lease beyond its statutory limit and that to rule that the Machris offer was prematurely filed would be in violation of section 17 of the Mineral Leasing Act.

I believe that the Bureau is in error in its conception both of the provisions of the Mineral Leasing Act and of the regulation. As pointed out above, it is the Secretary who determines when lands shall be available for the filing of lease offers. The Mineral Leasing Act does not make such determination. It leaves that determination to the

[1] The regulation has since been amended on March 17, 1955 (20 F. R. 1778), without change in substance. See discussion below.

[2] *George B. Friden,* A–26402 (October 8, 1952); *Barney Cockburn,* A–26303 (October 10, 1951); *David C. Colony,* A–26175 (April 26, 1951); cf. *B. E. Van Arsdale,* 62 I. D. 475 (1955).

Secretary under such rules and regulations as he may adopt (30 U. S. C., 1952 ed., sec. 189).

The Secretary has adopted the rule that land embraced in relinquished or canceled noncompetitive oil and gas leases shall not be available for further leasing until the fact of the relinquishment or cancellation has been noted on the proper tract book. The Secretary may, if he so desires, adopt a regulation under which land in a relinquished or canceled lease shall become available for further leasing on a date other than the date on which the tract book is noted [3] but unless and until the Secretary amends the existing regulation the Bureau is bound thereby.[4]

Nor does the regulation extend the segregative effect of a lease beyond its statutory limit. A relinquished noncompetitive oil and gas lease does not expire by operation of law at the end of its 5-year term in the absence of discovery or an extension, as the Bureau holds. Such a lease is terminated by the act of the lessee when he files a written relinquishment thereof in the proper land office. The relinquishment is effective as of the date of filing (30 U. S. C., 1952 ed., sec. 187b), and thereafter there is no lease in effect which could possibly expire at a later date.[5]

If the Bureau's position were followed to its logical conclusion, it would have to be held that land in a relinquished lease must be made available for further leasing immediately upon the filing of the relinquishment. If such were the case, one who knew a relinquishment was about to be filed could follow the lessee into the land office and file a lease offer as soon as the relinquishment were filed. It was to prevent just such an unfair practice and to provide equal opportunity to all parties interested in obtaining leases that the regulation in question was adopted.

It has been suggested that there is no reason to delay the making of land available for the filing of lease offers beyond the date when a lease would have expired in the absence of a relinquishment or cancellation, even though the tract books may not have been noted. This may be true. It has also been stated that prospective offerors assume that lands formerly under lease will become available for the filing of lease offers by others at the end of the primary term of a lease and that since nothing on the tract books indicates that the land will not

[3] Prior to December 29, 1948, the regulation provided that where a lease was canceled the land would become available for further leasing on the tenth business day after the notation of cancellation. See 43 CFR, 1946 Supp., 192.43.

[4] Cf. *Chapman* v. *Sheridan-Wyoming Coal Co., Inc.*, 338 U. S. 621, 629 (1950); *McKay* v. *Wahlenmaier*, 226 F. 2d 35, 43 (1955).

[5] Cf. *Thomas F. McKenna, Forrest H. Lindsay*, 62 I. D. 376 (1955).

be available for the filing of lease offers, they should not be penalized for the delay which occurs in some of the local land offices in making notations of relinquishments or cancellations of leases. This also may be true. However, the fact remains that the regulation applicable in this case provided in plain and unambiguous language that land in a relinquished lease should become available for the filing of lease offers when, and only when, the relinquishment was noted on the tract book. The regulation made no exception for a situation in which the notation might not be made until after the date when the lease would have expired in the absence of a relinquishment. The fact that the regulation might have made such an exception if such a situation had been envisioned furnishes no basis for reading such an exception into the plain provisions of the regulation.

It is open to some question, however, whether the regulation would have made such an exception. During the period of time involved in this case (i. e., June 16, 1953, to October 20, 1954), there was no regulation providing for the opening of land to filing upon the expiration of the primary term of a noncompetitive lease. However, there was an earlier regulation on the subject which was adopted on May 29, 1943 (43 CFR, 1940 ed., Cum. Supp., 192.14c). This regulation provided in part:

> * * * When a lease is terminated by reason of the expiration of the five-year term, the lands not within a known geologic structure of a producing oil or gas field automatically become subject to application for lease at the beginning of the next business day after the day on which the lease terminated. * * *

At the time when this regulation was adopted there had been in effect for slightly over a year another regulation governing cancellation of leases (43 CFR, 1940 ed., Cum. Supp., 192.14b). This regulation, adopted on May 14, 1942, set forth an elaborate procedure governing the opening to filing of land embraced in canceled leases. Briefly, it provided that cancellations would be noted on the tract books effective as of a future fixed date 10 days after the notation, that applications filed between the date of notation and the effective date of cancellation would be treated as simultaneously filed, and that a drawing, the details of which were spelled out, would be held to determine the priority of filing.

This regulation, section 192.14b, was not modified in any respect when section 192.14c was adopted a year later. Nor did section 192.14c in any way indicate that it was intended to affect the cancellation procedure spelled out in such elaborate detail in section 192.14b. On their face the two regulations covered separate subject matters which were mutually exclusive, one providing for the opening of land upon

cancellation of a lease and the other for opening land upon the normal *expiration* of a lease.

The two regulations existed side by side until October 28, 1946, when the oil and gas regulations were completely revised. At that time, the substance of section 192.14b was continued in modified form in section 192.43 (43 CFR, 1946 Supp.) but section 192.14c was dropped out. However, despite the discontinuance of section 192.14c as a regulation, the procedure set forth in the regulation was continued as a matter of administrative practice.

This situation continued unchanged until March 17, 1955, except that section 192.43 was amended on December 29, 1948, to include relinquishments (43 CFR, 1949 ed., 192.43). On March 17, 1955, section 192.43 was again amended without change in substance and at the same time there was re-adopted a regulation governing the opening of land upon the expiration of the primary term of a noncompetitive lease. The new provisions, paragraphs (*f*) and (*g*) of section 192.120, provide that if an application for a 5-year extension of the lease is timely filed, the leased lands will not become available for filing until the final action taken on the application is noted on the tract book, and that if no application for an extension is timely filed, the lands become available for filing at the end of the primary term. Here again, as in 1943, there is no suggestion that the procedure on lease expirations is intended to superimpose any additional limitation upon the procedure controlling in lease relinquishments and cancellations.

Thus, on the two occasions when the Department has had concurrent regulations governing the opening of lands in the event of lease cancellations and relinquishments on the one hand and lease expirations on the other hand there has been no hint that the procedure on expirations was intended to limit the procedure on relinquishments and cancellations. In the circumstances there is no possible basis for ruling that such a limitation occurred in the intervening period when there was no regulation on lease expirations but the administrative practice was the same.

Very recently the Department has held that where an offeror for an oil and gas lease 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. *Madison Oils, Inc., et al.*, 62 I. D. 478 (1955). The principle is applicable here. I think that any one intending to apply for land in a relinquished or canceled lease should

be entitled to rely upon the plain unambiguous language of section 192.43 without having to speculate on the possibility of an unwritten exception to the regulation which would make the land available for filing prior to the time stated in the regulation. If an exception is desirable as a matter of administrative policy, it should be expressly written into the regulation so that all may be informed of it.

Accordingly, it was error to hold that the land formerly embraced in Great Falls 086736 was available for leasing on July 1, 1953, when Mr. Machris filed his offer.

If Mr. Brown was the first person to apply for the land after the relinquishment of the prior lease was noted and if Mr. Brown is otherwise qualified to hold a lease, his statutory preference right must be honored, if the land is to be leased.[6]

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 as modified by the Director is reversed and the case is remanded to the Bureau of Land Management for appropriate action consistent with this decision.

EDMUND T. FRITZ,
Acting Solicitor.

COLUMBIAN CARBON COMPANY
MERWIN E. LISS

A–27294 *Decided June 11, 1956*

Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Applications

Where an acquired lands oil and gas lease application containing a description which does not identify the land applied for was filed after the effective date of the regulation providing that if the description in a lease application for public lands is insufficient to identify the land, the application will be rejected without priority, the acquired lands lease application must be rejected.

Oil and Gas Leases: Acquired Lands Leases

Where an acquired lands lease is issued containing an insufficient description of the land included in the lease and there are no intervening proper applications for the land, the lessee will be allowed a reasonable time in which to furnish an adequate description.

[6] *C. T. Hegwer et al.*, 62 I. D. 77 (1955).

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Columbian Carbon Company has appealed to the Secretary of the Interior from a decision of November 10, 1955, by the Director of the Bureau of Land Management which reversed a decision of August 25, 1955, by the Supervisor of the Eastern States Office dismissing a protest filed by Merwin E. Liss against the amendment of acquired lands oil and gas lease BLM–A 022926 which was issued to the Columbian Carbon Company on July 1, 1952 (30 U. S. C., 1952 ed., sec 351 *et seq.*).

On March 28, 1951, the Columbian Carbon Company applied for a lease on a parcel of land described by metes and bounds and said to contain 1,852 acres within the Monongahela National Forest, West Virginia, under the jurisdiction of the Forest Service, Department of Agriculture. The application stated that the parcel was a part of tract No. 34 acquired by the United States from Gilfillam-Neill and Company by deed dated November 29, 1927, which deed is of record in the office of the Clerk of the County Court of Pocahontas County in Deed Book 65, page 61. The boundaries of the parcel were described as beginning at corner No. 14 on the north boundary of tract No. 34, thence running westward through corners Nos. 15 and 16 to corner No. 17, thence running in a straight line southwesterly to a point on the south boundary of tract No. 34, thence running through corners Nos. 9 and 10 to corner No. 11, thence running northerly in a straight line to the point of beginning. Courses and distances were given between the corners on the north boundary and between the corners on the south boundary but were not given for the east and west boundaries of the parcel.

On April 24, 1951, the company filed an amendment of a portion of the description, stating that some calls had been omitted. This amendment extended the north boundary of the parcel from corner No. 17 to corner No. 27, from which point the west boundary of the parcel ran to the same point originally given in the south boundary of the parcel. Courses and distances were given between corners Nos. 17 and 27, but again no course or distance was given for the west boundary of the parcel. The net effect of the amended description was to add to the complete parcel originally described a substantial adjoining area on the west. However, no change was made in the acreage figure of 1,852 acres.

On June 5, 1952, lease forms were sent to the company for execution. Under section 1 of the lease, in the space where the legal descrip-

tion of the leased land is ordinarily written out appears a notation, "See attached sheet for description of land." Separate sheets containing the metes and bounds description of the land covered by the lease were attached to and made a part of the lease. This description was the original description contained in the application and omitted the additional land contained in the amended metes and bounds description. The lease recited that it contained 1,852 acres. The company executed and returned the lease forms without referring to the error. The lease was issued as of July 1, 1952.

Approximately 3 years after the lease was issued, the appellant notified the Bureau on June 27, 1955, of the omission. Thereafter, by a decision of the Eastern States Supervisor dated July 7, 1955, the lease was amended by adding to the metes and bounds description the portion of the description which had been inadvertently omitted when the lease was issued. It appears that the appellant has paid rental for 1,852 acres from the time of filing its application through 1955; that a gas well, now shut down, was drilled by the appellant within the area omitted from the description of leased lands as the lease was first issued; and that more than $25,000 has been spent on drilling the well.

On July 30, 1954, between the issuance of the lease and its amendment in 1955, Mr. Liss applied for the portion of the land which was omitted from the metes and bounds description in the appellant's lease. His application also referred to the land applied for as being a part of tract No. 34 and specifically described the boundaries of the land as beginning at corner No. 17 on the outside (north) boundary of tract No. 34, thence proceeding along the outside boundary of said tract to corner No. 27, thence proceeding in a straight line to a point in the south boundary of tract No. 34 (the same point given by the appellant for the southwest corner of the parcel applied for by the appellant), and thence in a straight line to the point of beginning. No courses and distances were given by Mr. Liss for any of the boundaries of the tract applied for. He stated that it covered approximately 640 acres and he paid the first year's rental of $320 on that basis. Subsequently, on October 25, 1954, he paid an additional $30 rental and asked that his application be amended to show that it covered 700 acres instead of 640 acres.

On August 11, 1955, a month after the appellant's lease was amended, Mr. Liss filed a protest against the amendment, claiming that his application had priority for the land included in the appellant's lease by the amendment. The protest was dismissed in a decision dated

August 25, 1955, by the Eastern States Supervisor. The Director's decision of November 10, 1955, from which the instant appeal was taken, allowed Mr. Liss' protest as to the land for which he applied and which was included by the amendment of July 7, 1955, in the metes and bounds description of lands in the appellant's lease. The Director's decision held, in effect, that Mr. Liss was entitled to lease the land covered by his application because he was the first qualified applicant therefor; that although the land in dispute was inadvertently omitted from the metes and bounds description of the lands leased to the appellant, the appellant acquiesced in the lease as it was issued until after Mr. Liss' conflicting application was filed; and that the lease could not be amended to the detriment of the intervening right which Mr. Liss obtained by applying for the land when it was not included in an outstanding lease or application.

The Director's decision allowing Mr. Liss' protest is based on the assumption that Mr. Liss is a qualified applicant for this land. However, examination of the records submitted on this appeal indicates that this assumption is incorrect and in any event, that basic questions concerning the determination of the identity and the quantity of land here involved must be settled before any application for or lease of the land can be allowed.

At the times when Mr. Liss and the appellant filed their respective applications, the pertinent regulation (43 CFR, 1949 ed., 200.5) provided with respect to land descriptions in acquired lands lease applications:

> * * * each application for a lease or permit must contain * * * (2) a complete and accurate description of the lands for which a lease or permit is desired. If surveyed according to the governmental "rectangular system," legal subdivisions should be used in the description; otherwise by metes and bounds connected with a corner of the public surveys by courses and distances, by lot numbers with reference to the appropriate recorded plat or map, or by any other method of description best suited to identify the lands most clearly and accurately. The description should, if practicable, refer to (i) the administrative unit or project of which the land is a part, the purpose for which the land was acquired by the United States, and the name of the governmental body having jurisdiction over the lands (ii) the name of the persons who conveyed the lands to the United States, (iii) the date of such conveyance, and the place, liber and page number of its official recordation.

The land involved in this appeal is located in Pocahontas County, West Virginia. The governmental rectangular system of public land surveys does not extend to land in West Virginia and the public land surveys nearest to this land are hundreds of miles away in Ohio,

making it impossible to connect a metes and bounds description of the land with a corner of the public land surveys. Therefore, the question is raised whether the methods of description employed by the appellant and Mr. Liss are "best suited to identify the lands most clearly and accurately" and furnish a "complete and accurate description of the lands."

The metes and bounds descriptions in the applications are incomplete, and the land applied for cannot be platted upon maps, since the north and south distances and courses are not given for the lines connecting the north and south boundaries of tract No. 34, although it appears probable, since certain corners are mentioned on the north boundary of tract No. 34 and on the south boundary of that tract, that the land applied for may be identified on the ground. This Department does not have a copy of the deed conveying the land to the United States or other data in its records to supply the information lacking from the metes and bounds descriptions and necessary to determine the identity and the amount of land involved. Even if the deed of conveyance to the United States were available, it would not supply the deficiencies in the appellant's and Mr. Liss' applications unless the deed contained a metes and bounds description from which the east and west boundaries of the parcels sought by the parties could be determined. In any event, as the case records stand the applications of both parties failed to comply with the requirement of the pertinent regulation that an application must contain "a complete and accurate description of the lands for which a lease * * * is desired." [1]

An accurate description is essential to enable the processing of an application and the administration of the land. It is equally essential to inform all subsequent applicants and other interested persons that an application for the land has already been filed. *Margaret Prescott*, 60 I. D. 341 (1949).

In addition to the necessity of accurately identifying the land applied for, it is fundamental that the quantity of land covered by a lease application must appear on the application or that the quantity be capable of being determined from information given in the application because provisions of the Mineral Leasing Act and regulations which are applicable to acquired lands leases limit the amount of land which may be held under lease and applications by any one person, association, or corporation, and condition the issuance of

[1] Maps were furnished with the applications but they too are deficient for the purposes of determining the east and west boundaries of the tracts applied for.

leases upon the payment of advance rental, the amount of which is based on the number of acres to be included in the prospective lease (30 U. S. C., Supp. II, secs. 184, 226; 30 U. S. C., 1952 ed., sec. 352; 43 CFR 192.3 (see *Albert C. Massa et al.*, 62 I. D. 339, 342 (1955)).

On July 2, 1954, which was after the appellant filed its application but before Mr. Liss filed his application, 43 CFR 192.42, governing offers to lease and issuance of leases on public lands, was amended (Circular No. 1875, 19 F. R. 4191) to provide in pertinent part:

> (g) (1) Except as provided in subparagraph (2) of this paragraph an offer will be rejected and returned to the offeror and will afford the applicant no priority if:
> (i) The land description is insufficient to identify the lands * * *.

There is no exception in subparagraph (2) of 192.42 (g) to the provision that if the land description is insufficient to identify the lands, the offer will be rejected without priority. 43 CFR, 1949 ed., 200.4 governing applications for acquired lands leases provided at the time:

> *Other regulations applicable.* Except as otherwise specifically provided in §§ 200.1 to 200.36, inclusive, the regulations prescribed under the mineral leasing laws and contained in Parts 70, 71 and 191 to 198, inclusive, of this chapter, shall govern the disposal and development of minerals under the act to the extent that they are not inconsistent with the provisions of the act. * * *

Since the requirement of 192.42 (g) (1) (i) that the land description be sufficient to identify the land was not excepted by any provision of sections 200.1 to 200.36, the requirement of the sufficiency of the land description was applicable to Mr. Liss' application, which was filed on July 30, 1954.[2]

Since the land description in Mr. Liss' application is insufficient to identify the land, the application must be rejected without priority as required by 192.42 (g) (1) (i). Accordingly, Mr. Liss is not a qualified applicant for the land.

With respect to the appellant's lease, as it now stands it contains an insufficient description of the land which it purports to cover. Obviously the lease cannot be allowed to stand in its present condition, with the land incapable of identification and the acreage incapable of computation for purposes of rental payments and determinations as to acreage holdings. If there were pending a proper application for all or a part of the land presumably included in the

[2] The requirement that the land description be sufficient to identify the land was expressly set forth with respect to acquired lands lease applications by amendments approved December 1, 1954 (43 CFR 200.8 (g) (1) (i); Circular 1890, 19 F. R. 8014).

appellant's lease, a serious question would be presented as to whether the lease would not have to be canceled as to the lands in conflict. However, so far as the record shows, there are no conflicting applications, once the Liss application is rejected as it must be. In the circumstances, assuming the absence of any intervening rights, the appellant will be allowed 30 days from receipt of the decision, or such additional time as the Director determines to be reasonably necessary, in which to submit a proper description of the land included in its lease.

In view of this disposition of the case, the appellant's motion for oral argument is denied.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the Director's decision is reversed and the case is remanded to the Bureau of Land Management for further action in accordance with this decision.

EDMUND T. FRITZ,
Acting Solicitor.

WALTER H. BULLWINKLE, JOSEPH E. VOGLER

A–27285 *Decided June 18, 1956*

Homesteads (Ordinary): Cultivation—Homesteads (Ordinary): Military Service

The regulatory provision in 43 CFR 181.39(a) that if a World War II veteran who is entitled to the benefits of the act of September 27, 1944, makes homestead entry but "delays the submission of proof beyond the period for which residence is required, the cultivation necessary during each annual cultivable season elapsing or reached before the submission of final proof must be shown" means cultivation necessary under the homestead laws, as modified by the act of September 27, 1944, which provides that qualified veterans shall have the period of military service, not exceeding 2 years, construed to be equivalent to residence and cultivation upon the land for the same length of time.

Homesteads (Ordinary): Cultivation—Homesteads (Ordinary): Military Service

Where an entryman claiming credit for 2 years' military service under the act of September 27, 1944, on an entry made before June 16, 1954, complied with the residence requirements of the homestead law, has a habitable house on the entry, cultivated some land for each year and one-eighth of the entry area during the final entry year, and where facts are asserted which, if

established, would justify reduction of cultivation required during the fourth entry year, a patent may be issued on the entry upon submission of evidence of military service and evidence justifying a reduction of cultivation for the fourth entry year.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Walter H. Bullwinkle has appealed to the Secretary of the Interior from a decision of October 19, 1955, for the Director of the Bureau of Land Management which held Mr. Bullwinkle's homestead entry on land in Alaska for cancellation for failure to comply with the cultivation requirements of the homestead law. 43 U. S. C., 1952 ed., secs. 161 *et seq.*; 48 U. S. C., 1952 ed., sec. 371.

Mr. Bullwinkle's application for homestead entry on 34.99 acres of land was allowed on August 1, 1947. The 5-year statutory life of the entry expired on July 31, 1952. On March 26, 1952, Joseph E. Vogler filed an application to contest Mr. Bullwinkle's entry, alleging that no cultivation had been attempted on the entry and that, to the best of the contestant's knowledge, the entryman had not lived on the land for the time required by the homestead laws.

On June 20, 1953, a hearing on the contestant's charges was held before the manager of the Fairbanks land office. At the hearing, the contestant testified that he flew over the entry area and observed it from a plane on March 24, 1952; that he first went on the property on March 25, 1952, on which date he walked down a trail along the edge of the property; and that on the following day, he and his two witnesses went on the property, found a good log cabin, saw no evidence of clearing except an area of perhaps 100 feet by 100 feet near the cabin. The ground was covered with snow on the day when the contestant and his witnesses examined the entry area and the contestant was never on the land other than the occasions just mentioned. The contestant's charges regarding the entryman's residence were based on statements of where the entryman was said to be living in March 1952 by persons who did not testify at the hearing. The testimony of the contestant's witnesses was substantially the same as that of the contestant except that their estimation of the area cleared around the entryman's cabin was smaller than the estimate of the contestant.

The entryman and his witnesses testified that residence was established on the entry about November 1, 1947; that the homestead had been the entryman's residence since that time; and that although he was away working during part of each year, he lived at the homestead 7 months during the first entry year and during the winters of

each year; that he started clearing the land in 1948 or 1949 and cleared more land each year; that by the summer of 1951, he had an area of approximately 200 feet by 70 feet cultivated; that he had 5 acres of land in cultivation during 1952 and again in 1953. Testimony for the contestee also indicated that the first cabin he had built on the entry had been burned and partially destroyed by vandals; that a second cabin which he had started was burned at the same time; and that the house on the entry was the third one which he had built there. The entryman's witnesses included one neighbor and one resident of the area who had visited the entryman several times a year from January 1948 through 1951. Both of these witnesses were familiar with the land. Although there was some vagueness in the testimony for the contestee as to the size of the area cleared and cultivated on the entry and the dates when the cultivation was completed, the weight of the evidence at the hearing clearly refuted the contest charge that no cultivation had been attempted. Uncontroverted testimony at the hearing also sustains the conclusion that the entryman resided on the entry for the time required by law.

The contestant had the burden of proving the charges by convincing evidence (*Benedict* v. *Castillo*, 49 L. D. 639 (1923)). Evidence that clearly supported the charges was not produced at the hearing. In a decision of December 28, 1953, the manager dismissed the contest on the grounds that the preponderance of the evidence at the hearing indicated that the allegations of the contest were satisfactorily refuted by the entryman and his witnesses. The decision for the Director, which reversed the manager's decision, did not hold that the contestant had proved either of the contest charges, but held that the testimony at the hearing showed that the appellant had not complied with the cultivation requirements of the homestead law.

On appeal, Mr. Bullwinkle asserts that after 32 months in the Army, he was honorably discharged and that he is therefore entitled to credit for 2 years of cultivation and residence required under the homestead laws; that the burning of a cabin on his entry was a misfortune which justifies reduction of the cultivation requirement on the entry; and that he has substantially complied with the requirements of the homestead law, as modified by the act of September 27, 1944, as amended (43 U. S. C., 1952 ed., secs. 279–284).

Mr. Bullwinkle did not file proof of military service when he submitted his final proof on January 4, 1954. By departmental regulation (43 CFR 181.37) a person claiming the benefit of military or naval ser-

vice must file, with his final proof, a photostatic or other copy (both sides) of his certificate of honorable discharge, or of an official document of his respective branch of the service which shows clearly an honorable discharge and the period of service. However, there is no provision of law which would result in a forfeiture of credit for military service solely on the ground that such evidence was not submitted with the final proof, and it will be assumed, for purposes of this decision, that the appellant will submit the necessary evidence of military service showing that he is entitled to the benefits of the act of September 27, 1944, in effect when the entry was allowed.

The decision for the Director mentioned that Mr. Bullwinkle may have been entitled to credit for military service, but held that even if this were so, he had not satisfied the cultivation requirements for final proof. The decision did not state what cultivation was required if the entryman were entitled to credit for military service.

The statutory provisions governing issuance of patent after entry under the ordinary homestead laws provide in pertinent part (43 U. S. C., 1952 ed., sec. 164):

> No certificate, however, shall be given or patent issued therefor until the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry * * * proves by himself and by two credible witnesses that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years succeeding the time of filing * * * then in such case he, she, or they * * * shall be entitled to a patent * * * *Provided further*, That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry, and until final proof * * * but the Secretary of the Interior may, upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation * * *.

The entryman's final proof in this case shows that the residence requirements of the homestead law were complied with; that there was a habitable house on the entry; and that the following cultivation was completed during the statutory life of the entry:

1948, approximately ¼ acre garden
1949, ½ acre garden and oats
1950, ¾ acre garden and wheat but no crop
1951, 1 acre cover crop
1952, 5 acres garden.

The record contains a report of a field examiner which indicates that on August 18, 1954, more than 5 acres of the entry was cultivated and

planted to grain. This evidence and the testimony at the hearing show that some cultivation was completed every year on the entry through 1954; that more than one-eighth of the entry area (4.37 acres) was cultivated during the fifth entry year and 2 years thereafter but that one-sixteenth of the entry (2.19) was not cultivated before that time.

The act of September 27, 1944 (43 U. S. C., 1952 ed., sec. 279), in effect when the appellant's entry was allowed [1] provides in relevant part that any person who has served in the military or naval forces of the United States for a period of at least 90 days at any time on or after September 16, 1940, and prior to the termination of World War II and is honorably discharged from the military or naval forces and who makes homestead entry subsequent to such discharge shall have the period of such service, not exceeding 2 years, "construed to be equivalent to residence and cultivation upon the land for the same length of time," with a proviso that no patent shall issue to any such person who has not resided upon his homestead and otherwise complied with the provisions of the homestead laws for a period of at least 1 year. Thus, an entryman with 2 or more years military service who is entitled to the benefits of this act may receive patent on a homestead after complying with the requirements of the law for 1 year because his military service not exceeding 2 years is construed to be equivalent to residence and cultivation upon the land for that length of time.

The residence requirement under the homestead law is satisfied by 7 months actual residence on the entry for each year of residence required (43 CFR 166.36). As Mr. Bullwinkle built a habitable house and established residence on the entry on November 1, 1947, and lived there during the next 7 months, he could have submitted proof of residence from November 1, 1947, through June 1, 1948, filed the necessary evidence of military service, and he would have then been entitled to receive a patent on the entry because there is no cultivation requirement under the homestead law during the first entry year. The question of what additional requirements for earning patent result from the entryman's failure to submit final proof in 1948, when he was apparently entitled to receive a patent, require consideration of the

[1] The act of June 18, 1954 (43 U. S. C., 1952 ed., Supp. II, sec. 279), amended the act of September 27, 1944, in several ways, including a provision that no patent shall issue until at least one-eighth of the area entered is cultivated. In a memorandum of December 30, 1954, from the Associate Solicitor of Public Lands to the Chief, Division of Lands, it was held that the cultivation requirement of the act of June 18, 1954, was not applicable to entries made before June 18, 1954.

departmental regulations (43 CFR 181.35 *et seq.*) issued pursuant to the act of September 27, 1944.

When the appellant's entry was allowed, the regulations governing the requirements for earning patent on this entry were reprinted in Circular 1588 of December 7, 1944 (43 CFR, 1944 Supp., 181.36–40). Effective December 30, 1948, the regulations governing homestead entries by World War II veterans were amended (Circular 1720, 13 F. R. 9564). 43 CFR 181.39 (a) in the current regulations sets forth the residence and cultivation requirements which became effective on December 30, 1948, on homestead entries by persons entitled to the benefits of the act of September 27, 1944. 43 CFR 181.39 (a) provides:

Residence and cultivation required on homesteads. (a) Before satisfactory final proof may be submitted on a homestead entry, a veteran will be required to comply with the homestead laws for a period of at least one year and for such additional period as, added to the term of the military or naval service, equals three years. During this period a veteran with 19 months' or more military service will be required to reside on the land at least seven months during the first entry year; with more than 12 and less than 19 months, he must reside on the land seven months during the first entry year and such part of the second year, as added to his excess over 12 months' service, will equal seven months, and must cultivate one-sixteenth of the area the second year; with seven and not more than 12 months, he must reside upon the land seven months during each of the first and second entry years, and cultivate one-sixteenth of the area the second year; with 90 days and less than seven months, he must reside upon the land seven months during each year for the first and second years, and such part of the third as, added to his service, will equal seven months, and cultivate one-sixteenth of the area the second year and one-eighth the third year; and with less than 90 days' service, will receive no credit therefor in lieu of residence and cultivation. A veteran will not be required to cultivate the land after he has met the requirements as set forth above: *Provided,* He promptly files notice of intention to submit proof. If, however, he delays the submission of proof beyond the period for which residence is required, the cultivation necessary during each annual cultivable season elapsing or reached before the submission of proof must be shown. He may apply for and receive a reduction in the area required to be cultivated, the same as other entrymen. In computing the required periods of residence, set forth above, there has been excluded the five months' absence each year from the land which may be taken by a homestead entryman in not more than two periods during each year after establishing residence, by giving notice to the manager as set forth in § 166.38 of this chapter. The veteran must have a habitable house on the land at the date of submitting homestead proof.

Inasmuch as the amount of cultivation required to obtain patent under the homestead laws by veterans entitled to the benefits of the act of September 27, 1944, was affected by the latter act, the regulatory provision that a veteran who delays the submission of proof beyond the period for which residence is required must show the "cultivation

necessary during each annual cultivable season elapsing or reached before the submission of proof" must mean cultivation necessary under the homestead law as modified by the act of September 27, 1944.

Cultivation of one-sixteenth of the area during the second year and of one-eighth of the area during the third, fourth, and fifth years would be required of an ordinary entryman under the homestead law if he delayed submission of final proof until the end of the fifth year, as the appellant did in this case. The appellant, however, is apparently entitled to credit for 2 years' military service which service is acceptable as constructive cultivation during 2 of the 4 entry years for which cultivation is required under the homestead laws. It will be remembered that the appellant had more than one-eighth of the entry cultivated during the fifth year but that less than one-sixteenth of the area was cultivated during the preceding years. There appears to be no objection in the instant case to allowing the 2 years' military credit which the appellant claims to be applied to the second and third year cultivation requirements under the homestead laws. As the entryman cultivated the necessary one-eighth of the area during the fifth year, and as the second and third year cultivation requirements are satisfied by construing 2 years' military service to be equivalent to cultivation for the second and third years, there remains a question regarding the cultivation on this entry during the fourth year. The entryman's final proof showing that less than one-sixteenth of the area was cultivated during the fourth year does not satisfy the requirement for obtaining patent under the homestead act that one-eighth of the entry be cultivated "beginning with the third year of the entry, and until final proof," unless there is a basis for reducing the area required to be cultivated during the fourth entry year.

The final proof form provides that if less than the amount of land required by law was cultivated in any year, the reason therefor should be given. In response thereto, the entryman replied: "Short of cash until 1952—since then have cultivated more than ⅛ of homestead." The final proof also showed that a cabin of the entryman's was burned. The decision for the Director held that being short of cash was not a misfortune within the meaning of the regulation (43 CFR 166.40) authorizing a reduction of the area required to be cultivated if the entryman, after making entry and establishing residence, has met with misfortune which renders him reasonably unable to cultivate the prescribed area.

On appeal, the entryman asserts that about April 1951, when he was away from his homestead, vandals moved on his entry, burned

the more easily cut portions of a log cabin he had started the previous year and then burned the outer walls of his frame house for firewood. Because the entryman had insufficient money to build a new house and clear more land also, he started a new house on the entry. He made this choice in part because he anticipated assistance from the Soil Conservation Service in clearing, which he claims was promised, and, if the assistance had materialized, 5 acres would have been cleared without cost to the entryman. The entryman could not receive patent unless there was a habitable house on the land.

In the case of *Henry O. Hanson*, A–25797 (March 14, 1950), it was stated that a misfortune, within the meaning of 43 CFR 166.40 authorizing the reduction of cultivation, referred to the occurrence of some unforeseeable and unfortunate event which prevents the entryman from carrying out the program of cultivation prescribed by the statute. In this case, Mr. Bullwinkle had to expend time and money to rebuild a house because of the partial destruction of one which was complete and one which was incomplete on the entry. The destruction of the entryman's houses was an unforeseeable and unfortunate event, and the time and money required to build another cabin on the entry during 1951 may well have lessened the time and money available for cultivating the land that year, which was the fourth entry year. These circumstances, if established to the satisfaction of the manager, may be regarded as amounting to a misfortune which warrants reduction of the cultivation requirement during the fourth entry year.[2]

Accordingly, if the appellant submits proper proof of military service pursuant to 43 CFR 181.37 entitling him under the act of September 27, 1944, to have 2 years' military service construed to be the equivalent of residence and cultivation under the homestead law, and if he submits satisfactory evidence of the destruction of the cabins on the entry, showing that it necessitated the building of a third cabin in 1951 and prevented him from cultivating the necessary one-eighth of the entry during that year, the entry may be allowed to go to patent if all other requirements have been met.

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 determination as to whether

[2] The vandalism on the entry was referred to briefly by the entryman and mentioned somewhat vaguely by two of his witnesses at the hearing on the contest charges (Transcript of Hearing on June 20, 1953, before the manager, Fairbanks, Alaska, in contest No. 202, pp. 28, 66, 67, 86).

The manager is authorized to allow applications for reduction of cultivation (43 CFR 166.40 (d)).

the appellant is entitled to credit for 2 years' military service and whether he is entitled to a reduction of the cultivation requirement under the homestead law for the fourth entry year.

EDMUND T. FRITZ,
Deputy Solicitor.

APPEAL OF OSBERG CONSTRUCTION COMPANY

IBCA-32 *Decided June 19, 1956*

Contracts: Specifications—Contracts: Contracting Officer

When specifications provide that a contracting officer may designate additional borrow areas not designated on the plans, the right must be exercised reasonably. The issue of reasonability may not be raised, however, by a contractor who has concurred in the opening of a borrow area.

Contracts: Interpretation—Contracts: Additional Compensation

Under article 10 of the standard form of Government construction contract which provides that the contractor "shall be responsible for all materials delivered and work performed until completion and final acceptance," and that upon completion of the contract, "the work shall be delivered complete and undamaged," the burden of repairing any damage to work prior to the acceptance thereof is put upon the contractor, notwithstanding the absence of fault on his part. Consequently, a contractor is not entitled to additional compensation when he has been required by the contracting officer to remove from a lateral material blown there by the wind before the work had been accepted.

Contracts: Additional Compensation—Contracts: Specifications—Contracts: Interpretation

A contractor is not entitled to additional compensation, under the unit of a schedule for structure excavation, for quantities excavated from previously placed embankments, above the original ground line, around constant head orifice and pipe turnouts, when the specifications contain no provisions which prescribe the nature or the sequence of the contractor's operations; when standard practice in the construction of laterals does not require that the building of the structures be deferred until after all embankment work has been completed; and when the specifications state or import that payment is to be made only for excavation that is required. The fact that in some of the paragraphs of the applicable specification, which dealt with types of structures not involved in the present claim, it was specifically stated that excavation for structures would be measured for payment "below the original ground surface" does not in itself establish an ambiguity in the applicable paragraphs, which were otherwise clear but omitted this phrase. There are many ways of expressing the same thought, and dif-

ferences in the use of language do not necessarily betoken differences in meaning and intention.

Contracts: Appeals—Contracts: Subcontractors and Suppliers—Administrative Practice

Although in general a contractor who has taken an appeal should be prepared to substantiate the claim before the Board with reasonable promptness, and should not, indeed, present the claim unless he has reason to suppose that it is meritorious, the Board will grant a request of the contractor that consideration of the claim by the Board be deferred pending the outcome of litigation between the contractor and his subcontractor when counsel for the Government does not object, and it appears from the nature of the claim that the interests of the Government will not be prejudiced. Although the present case will be marked "closed" on the Board's docket, the contractor may file a request that it be reopened, within a reasonable time after the determination of the litigation in which it is involved.

BOARD OF CONTRACT APPEALS

The Osberg Construction Company has appealed from the findings of fact and decision of the contracting officer dated February 15, 1955, denying its three claims for additional compensation in the total amount of $10,755.42 for performance of Contract No. 14–06–D–300.

The contract, which was on Standard Form No. 23 (Revised April 3, 1942) and was entered into on January 15, 1953, provided for the construction and completion of earthwork, pipelines, and structures, for the Area P–8 laterals, sublaterals and wasteways, of the Potholes East Canal Laterals, Columbia Basin Project, pursuant to Specifications No. DC–3845. These specifications incorporated by reference "Standard Specifications for Construction of Canal Systems, August 1951," of the Bureau of Reclamation, which will hereinafter be referred to as the standard specifications.

Notice to proceed with the work under the contract was received by the contractor on February 6, 1953, and the work was completed in its entirety on March 23, 1954, which was within the time set for completion.

The contractor's three claims were duly excepted in its release on contract dated October 16, 1954, and each claim will be separately considered by the Board.

Claim Item 1

This claim, which is in the amount of $876.42, is for the cost of clearing windblown material from a portion of the PE47 lateral in the vicinity of Station 100. The necessity for clearing the lateral is at-

tributed by the contractor to the opening of a borrow pit nearby which was not shown on the original plans. It contends that this subjected the area to a degree of wind erosion which did not prevail prior to the removal of the cover from the soil. It seems to concede that high winds were not unusual in the area but argues that it should not have been required to remedy the situation by removing the windblown material, since the deposit of this material in the lateral could not have been anticipated under the original plans.

The contracting officer made findings with respect to the circumstances under which the borrow area in question was opened. He found that it was done for the mutual convenience of the contractor and the Government at the oral request of a Mr. Roy Basto, who was the contractor's superintendent on the job. Thus, the contracting officer stated:

> * * * The contractor had four crawler-type tractors with scrapers available and needed a short haul for this equipment. The contractor's rubber-tired equipment was working on a long haul from the specified PE47N borrow area to the PE47 in the vicinity of Station 148. As the contractor's water hauling equipment was unable to cover embankment placing at two widely separated locations, the contractor suggested that the borrow area in question be established to enable his crawler-type tractors with scrapers to place material in the same general area as the rubber-tired equipment. The Government was agreeable to the new borrow area as it appeared that additional borrow would be required above that available in the indicated borrow areas. Approximately 14,590 cubic yards of borrow was obtained from the new area and approximately all the available borrow was removed from the indicated borrow areas. All of the borrow from the new area was removed as short haul by use of the crawler-type tractors and scrapers. The reduction in overhaul due to the use of the new borrow area was a benefit to the Government and the availability of a short haul in the vicinity of the PE47 was a benefit to the contractor as his tractors and scrapers would have been idle or operating on an inefficient haul except for the establishment of the new area.

The contracting officer also pointed out, however, that the contractor in a letter dated June 18, 1954, seemed to dispute the fact that the borrow area was established with the concurrence of the contractor. Apropos of this, the contractor stated in this letter: "We can only say that you established the borrow pit and ordered us to remove material therefrom. The need for this additional borrow area arose through no action of this company, but would seem to stem from an error or oversight in design." In the brief in support of its appeal, the contractor further stated with respect to the contracting officer's finding that the borrow area was opened at the oral request of its superintendent:

The contractor finds no written evidence of this. Furthermore, the contractor is confident that there is no field note to the effect that its Superintendent requested the opening of this borrow area.

The contractor believes that the facts are that the plans showed no borrow area adjacent to the lateral, that this was called to the attention of the Government and that the Government selected the site of the borrow area.

The Board cannot regard either of the contractor's statements as a direct and unequivocal denial of the finding of the contracting officer that its superintendent agreed to the opening of the additional borrow area. The Government has presented, on the other hand, an affidavit made on May 13, 1955, by Thomas M. Russell, the Construction Inspector on the job, in which the affiant deposes that this borrow area was opened "by mutual agreement between the contractor and the Government after a series of verbal discussions between the contractor's representatives and me," and identifies the representatives of the contractor as its superintendent and its shift boss, a Mr. Taylor. Under the circumstances, the Board finds as a fact that the borrow pit was opened with the concurrence of the contractor's superintendent who was its representative on the job, and holds, therefore, that the contractor assumed the risk of having to clear the lateral of wind-blown material from the borrow pit.

The consent of the contractor to the opening of the additional borrow pit was not necessary, moreover, since under paragraph B–16 of the standard specifications the right of designating additional borrow areas was reserved to the contracting officer. Thus, it was provided in the first sentence of this paragraph: "Where the canal excavation at any section does not furnish sufficient suitable material for embankments, for core banks, or earth covering for membrane lining, the contracting officer will designate where additional material shall be procured." To be sure, the right to open additional borrow areas had to be exercised reasonably. Such an issue can hardly be raised, however, by a contractor who has concurred in the opening of a borrow area at a particular site.

In the absence of any sound basis for a conclusion that the Government was at fault in locating a borrow pit at this point, the risk of any damage to the lateral prior to its acceptance was squarely placed upon the contractor by the terms of the contract. Article 10 of the contract included the provision that the contractor "shall be responsible for all materials delivered and work performed until completion and final acceptance. Upon completion of the contract the work shall be delivered complete and undamaged." This provision was reinforced

by paragraph B–5 of the standard specifications which stipulated that the unit prices bid in the schedule for excavation for canal should include the costs of "all work necessary to maintain the excavations in good order during construction." It has repeatedly been held that article 10 of the standard form of Government construction contract puts the burden of repairing any damage to work prior to the acceptance thereof upon the contractor, notwithstanding the absence of fault on his part.[1] The claim of the contractor for removing the windblown material from the PE47 lateral must, therefore, be rejected.

Claim Item 2

This claim, which is in the amount of $3,000, is for payment as structure excavation for quantities excavated from previously placed embankments, above the original ground line, around constant head orifice and pipe turnouts. The claim is, in other words, for payment for structure excavation performed above the original ground surface through the embankment previously constructed, and thus involves payment for re-excavation.

The claim of the contractor is based upon several contentions: (1) that it is standard construction practice that excavation for laterals shall precede excavation for the associated structures, since this is a more economical method and is necessary in the use of ditchers, whether tractor-drawn or self-powered, which dig the invert and construct the banks simultaneously; (2) that the applicable specifications do not provide specifically that payment will not be made for structure excavation above the original ground surface; and (3) that such provision has been made in other specifications under contracts subsequently made by the Bureau of Reclamation.

The specifications contain no provisions which prescribe the nature or sequence of the contractor's operations in excavating for structures. However, paragraph B–7 of the standard specifications, as modified by paragraph 42 of the Special Provisions, prescribes how measurement for payment shall be made for excavation for structures. Sub-

[1] See *De Armas* v. *United States,* 108 Ct. Cl. 436, 467 (1947), where the court said: "There are losses and misfortunes not due to the fault of anyone and their incidence cannot, therefore, be determined on the basis of fault." To the same effect have been decisions of this Department and of the Armed Services Board of Contract Appeals. See the appeals of *Morrison-Knudsen Company, Inc. and M. H. Hasler Construction Company,* CA–170, October 20, 1952; *Quick et al.,* BCA No. 315, October 19, 1943, 1 CCF 759; *John W. Ryan Construction Co., Inc.,* BCA No. 827, November 18, 1944, 3 CCF 49; *Kenney,* BCA No. 1007, May 24, 1945, 3 CCF 829; *Gould Construction Company,* BCA No. 1657, January 24, 1949, 4 CCF 60,645; *Southern Erection and Engineering Co.,* BCA No. 928, May 2, 1952, 5 CCF 61,398.

paragraph (*a*) of this paragraph contains 8 subdivisions, each of which deals with a different type or types of structure. In subdivisions (*1*), (*3*), and (*6*) of subparagraph (*a*), which deal with types of structures not involved in the present claim, it is specifically stated that excavation for structures will be measured for payment "below the original ground surface," while in subdivisions (*2*) and (*4*), the limiting phrase is not included. Subdivision (*2*) of the subparagraph which would seem to govern excavation for turnouts provides:

> Unless the contractor is directed to excavate for bridge abutments, bents, piers or footings, turnouts, and other structures lying largely outside the lateral, sublateral, or wasteway prism, in advance of the lateral, sublateral, or wasteway excavation, excavation for structures will include only the *required* excavation outside of the normal canal prism, and will be measured to dimensions 1 foot outside of the outline of the structure foundations and to slopes of 1 to 1 for common excavation and ¼ to 1 for rock excavation. [Italics supplied.]

It is not entirely clear from the record whether subdivision (*4*) of the subparagraph, which deals with excavation of trenches for concrete pipelines, is involved in the claim. In any event, it provides:

> Excavation of trenches for concrete-pipe lines as described in Paragraph 43 will be measured and paid for as provided therein. In the case of precast concrete, metal or cement-asbestos pipe portions of the above structures, excavation of the trench for a single pipe or parallel pipes will be measured to a bottom width equal to the over-all distance between the outsides of the pipe along the horizontal diameters plus 1 foot and to slopes of 1 to 1 in common excavation and ¼ to 1 in rock excavation.

Paragraph 43, in so far as at all material, provides that "measurement, for payment, of the excavation for the pipe trenches will be made to the width shown on the drawings, with vertical sides, and to the depths shown on the drawings or prescribed by the contracting officer * * *."

The contracting officer seems to have construed the provisions of both subparagraphs B–7 (a) (2) and (4) as providing for payment of excavation only when "required," and rejected the claim because the excavation above the original ground surface was not required excavation. He stated that, contrary to the contractor's contention, "it is not standard practice in the construction of laterals to construct structures after all embankment has been completed. Some contractors construct structures ahead of the lateral construction and some leave openings at the structure site. Either of these methods of operation make it unnecessary to excavate embankment material above the original ground surface at structure sites."

On the basis of the record the Board must conclude that the contractor has not met the burden of demonstrating that the contracting officer's decision was erroneous. Clearly the excavation above the original ground surface was not "required" within the meaning of paragraph B–7 (a) (2), since even the contractor does not really contend that his chosen method of operation was universal. If paragraph B–7 (a) (4) is involved in the claim, it, too, would seem to prescribe in effect that payment be made for excavation only if required, since the drawings show only the completed work, and not the excavation involved in its construction, and since the depths indicated on the drawings are referenced to prescribed elevations, rather than to either the original ground surface or the height of the embankment. In these circumstances, to permit the contractor to be compensated for such excavation would make the amount of his remuneration dependent upon whether he chose to build the embankment before the structures or the structures before the embankment. The effect would be to permit him rather than the Government to determine the costs of the job,[2] and to serve his own convenience rather than the interests of the Government.

As the contractor's chosen method of operation was not required by the specifications, it is only fair to demand of the contractor that it point to a provision for payment which clearly establishes that it is, nevertheless, entitled to payment for the whole of the excavation involved. The fact that a particular phrase is employed in some of the paragraphs of a specification but not in others does not in itself establish the existence of ambiguity even when the paragraphs are related. There are many ways of expressing the same thought, and differences in the use of language do not necessarily betoken differences in meaning and intention. Conceivably, such differences in related paragraphs might have some significance if the linguistic structure of each paragraph were exactly parallel, and dealt with parallel situations, but such is not the case in paragraph B–7 of the standard specifications. Each of its subparagraphs deals with different types of structures, which required the making of varying provisions for payment, and consequently the linguistic structure of each subparagraph varies considerably. Indeed, it is perfectly understandable why the phrase "below the original ground surface" should have been employed in subdivisions (*1*), (*3*), and (*6*) of subparagraph B–7(a), but not in the other subdivisions. Subdivision (*1*) deals with "checks, drops,

[2] See appeal of *Knisely-Moore Company*, CA–183 (March 3, 1954).

chutes, flumes, siphons and other structures which form a *continuation of the canal*," and provides that measurement for payment is to include "all required excavation for the structure and the canal below the original ground surface * * *." Subdivision (*3*) deals with utilities crossing *under the canal prism*, such as culverts, and provides that, regardless of whether the excavation and construction of such utilities "precedes or follows the excavation of the canal at the site of the structure, excavation for structures will be measured below the original ground surface * * *." Subdivision (*6*) deals with certain small structures of lateral distribution systems and, like subdivision (*1*), provides that the excavation measured for payment "will include all excavation for a structure *and the lateral* below the original ground surface * * *." The excavation provided for in each of these subdivisions includes an area within the canal or lateral prism and, therefore, it was essential to use terminology which would make it clear that the space within the prism, even though previously excavated, would be paid for as a part of the excavation for structures, rather than as a part of the canal or lateral excavation. For this purpose the use of the phrase "below the original ground surface" was only natural (if not inevitable), but it was certainly less so in subdivisions (*2*) and (*4*) of the subparagraph.

As for the subsequent revision of the specification under other contracts, this, too, does not demonstrate that the provisions in their original form harbored a serious ambiguity. There is no provision of a contract which, however clear already, cannot be made a little clearer. The Government is certainly not to be penalized in one case for attempting to improve its specifications in another. The claim of the contractor for additional compensation for excavation for structures must, therefore, also be rejected.

Claim Item 3

Claim Item 3, which is in the amount of $6,879, is for payment for 2,293 cubic yards more of compacted backfill about structures than were included in the Government's final payment. The contracting officer rejected this claim because the contractor had failed to present any data which would show in what respect the Government's calculations were in error.

The claim seems to have been presented by the contractor only because one of its subcontractors or sub-subcontractors had demanded payment of it for the amount of compacted backfill included in the

claim, and had sued the contractor to enforce the demand. The contractor requests that final determination of this claim be deferred pending the outcome of the litigation, and Department counsel does not object, apparently, to this request.

In general, a contractor who has taken an appeal should be prepared to substantiate the claim before the Board with reasonable promptness. Indeed, a claim should not be presented by a contractor unless it has reason to suppose that the claim is meritorious, but in this case the contractor is itself resisting the demand upon which the claim is based, which would indicate that the claim has been filed merely as a protection against possible defeat in the litigation, and that it will be abandoned if the contractor prevails in the litigation. The indefinite postponement of the consideration of a claim by the Board may in some instances prejudice the interests of the Government as a result of the loss of the testimony of witnesses who may have knowledge of the circumstances affecting the validity of the claim. However, this does not appear to be so in the case of the present claim, which involves a quantitative dispute that, presumably, could be disposed of on the basis of Government records. Consequently, although the present case will be marked "closed" on the Board's docket, the contractor may file a request that it be reopened within a reasonable time after the determination of the litigation in which it is involved.

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 and decision of the contracting officer are affirmed, but without prejudice to the subsequent submission and consideration of a request for reopening with respect to Claim Item 3.

THEODORE H. HAAS, *Chairman.*

WILLIAM SEAGLE, *Member.*

HERBERT J. SLAUGHTER, *Member.*

FORT BERTHOLD TRIBAL AFFAIRS

Indian Tribes: Constitutions—Indian Reorganization Act

The Secretary of the Interor has authority, under the Indian Reorganization Act (25 U. S. C. secs. 476, 477; 48 Stat. 987), to call special elections to (*a*) determine whether a majority of the adult Indians desire to vote against the application of the act itself to the reservation with which they are

connected; (*b*) to determine whether a proposed constitution and bylaws shall be ratified; (*c*) to ascertain whether such constitution and bylaws shall be amended; and (*d*) to determine whether such constitution and bylaws shall be revoked. Otherwise, in the case of tribal governments incorporated under section 16 of the Indian Reorganization Act, *supra*, the Secretary, unless granted authority by the tribal constitution or act of Congress, may not call tribal elections to elect councilmen.

M–36350 JUNE 20, 1956.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

Your memorandum of March 19, 1956, raises two questions (*1*) whether absentee balloting may be permitted in an election for the amendment of the constitution and bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation and (*2*) whether the Secretary of the Interior has the authority to call an election for the purpose of permitting the tribal members to vote on the election of councilmen on the basis of the community boundaries as now defined in article III of the Fort Berthold Constitution.

The question of absentee balloting was discussed and disposed of in our memorandum opinion (M–36346) dated June 8, 1956.

With regard to the question of whether the Secretary of the Interior has authority to call special elections for tribes incorporated under section 16 of the Indian Reorganization Act (25 U. S. C. sec. 476; 48 Stat. 987) to elect councilmen, the answer must be found either in the tribal constitution and bylaws or in the statutory law. The constitution and bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, govern the calling of elections to choose tribal councilmen. Article IV thereof provides that regular elections shall be held on the first Tuesday of September in even-numbered years and that special elections may be called by a two-thirds vote of the council or by petition signed by at least 10 percent of the qualified voters of each tribal community. Section 5 of said article IV further provides:

All elections shall be held under the supervision of the Tribal Business Council or an election board appointed by that Council, and the Tribal Business Council or the election board appointed by it, shall make rules and regulations governing all elections, and shall designate the polling places and the election officers.

It is clear from a reading of the tribal constitution that no provision is made for the calling of elections for tribal council members by the Secretary of the Interior.

There being no authority retained in or given by the tribal constitution to the Secretary of the Interior to call or supervise elections of tribal council members, does such authority exist outside the tribal constitution? This question has been raised in your memorandum to the Solicitor and on many other occasions. The question of the right of the Federal Government to intervene in tribal governmental affairs is one of long-standing importance. This is true not only of tribes incorporated under the provisions of the Indian Reorganization Act of 1934, *supra*, but also of the many tribes which have not availed themselves of the privileges of this act. The act of July 9, 1832 (4 Stat. 564), provided for the appointment of a Commissioner of Indian Affairs, then under the Secretary of War, and now under the Secretary of the Interior, "who shall * * * agreeably to such regulations as the President may, from time to time, prescribe, have the direction and management of all Indian affairs, and of all matters arising out of Indian relations * * *." (25 U. S. C. sec. 2.) The Supreme Court just previously in January of 1832 had had occasion to construe similar language in a treaty with the Cherokee Indians, *Worcester* v. *Georgia*, 6 Pet. 515 (1832). Chief Justice Marshall had before him the ninth article of The Treaty of Hopewell which had been entered into by the United States and the Cherokee Indians on November 28, 1785.

> * * * The ninth article is in these words: "for the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States, in congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, as they think proper." To construe the expression "managing all their affairs," into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade; the influence it gave, made it desirable that congress should possess it. The commissioners brought forward the claim, with the profession that their motive was "the benefit and comfort of the Indians, and the prevention of injuries or oppressions." This may be true, as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade, but cannot be true, as respects the management of all their affairs. The most important of these are the cession of their lands, and security against intruders on them. Is it credible, that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made? or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable, that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade. * * *

In view of the fact that language was used in the statute similar to that construed in Chief Justice Marshall's decision, it is apparent that the scope of this wording was well understood. The language "management of all Indian affairs" is thus limited to the supervision of the commercial and trade relationships of the Indians and not to management of their internal government.

The Indian Reorganization Act (25 U. S. C. sec. 461, etc.) had as one of its many purposes the strengthening of self-government in the Indian tribes. Commissioner John Collier testified at the hearings called in connection with the consideration of the act that the Indians "want an arrangement by which they can buttress their self-government by a statute of congress * * *." Although it is true that the Secretary of the Interior has no authority to call special elections to elect councilmen, there is no reason to doubt that he has adequate statutory authority to call special elections to consider amendments to tribal constitutions and bylaws. And further, the Commissioner is not without authority to deter abuses of tribal authority by virtue of his control over the expenditure of tribal funds, which authority stems from treaty and statute. The United States generally acts as guardian of the funds and assets of Indian tribes and as such trustee not only is held to a high degree of care in the handling of the funds and property of the Indians but exercises the ordinary supervisory restraint incident to such guardianship.

Under the Indian Reorganization Act, 1934, *supra*, there are several types of elections which may be called by the Secretary of the Interior "under such rules and regulations as he may prescribe." Section 18 of the act sets out that a special election shall be called by the Secretary of the Interior to determine whether a majority of the adult Indians desire to vote against the application of the act itself to the reservation with which they are connected (25 U. S. C. sec. 478). Section 17 of the act provides that the Secretary has the duty of calling a special election upon a petition by at least one-third of the adult Indians living on the reservation to determine whether they desire to ratify a charter of incorporation which has been issued for the conduct of business enterprise on the reservation (25 U. S. C. sec. 477). Section 16 of the act authorizes the Secretary of the Interior to call a special election to permit the adoption and ratification of a tribal governmental constitution (25 U. S. C. sec. 476). This section also may be construed to provide that the Secretary of the

Interior shall call a similar special election, open to the same voters and conducted in the same manner as the original election, to determine whether such constitution shall be revoked. Finally section 16 of the act must be construed to permit the Secretary of the Interior to call a similar special election to determine whether the constitution and bylaws can be amended.

Your memorandum of March 19, 1956, states that a great many tribal members of the Three Affiliated Tribes of the Fort Berthold Reservation are dissatisfied with the manner in which the Tribal Business Council has been conducting its affairs and are most anxious that they be given an opportunity soon to vote on the election of council members. At present, there is no authority given in the tribal constitution nor any express statutory authority to permit the Secretary to call such a tribal election. Inasmuch as the Secretary has authority to call an election to amend the constitution of the tribe, it is appropriate at this time to suggest that the tribal constitution be amended to permit the Secretary or his delegate, upon the written request of a certain number of tribal members, to call special elections to elect councilmen and other tribal officers.

If it is determined as a matter of policy by your office that such amendments be submitted to the tribal electorate, the following two additional provisions are set forth in draft form for consideration:

> Article IV—Nominations and Elections.
>
> *Section 2.* Add: Absentee ballots will be furnished to any enrolled non-resident member of the tribes upon request to the tribal secretary made 10 days before the election. The ballot must be returned to and reach the tribal secretary on or before the date of the election in order that it may be counted.
>
> *Section 3.* Add: Notice of regular elections shall be given by the secretary of the Tribal Business Council who shall give to all enrolled members of the tribe 30 days' notice of the time and place of the regular election. In the event the tribal secretary shall fail to give the appropriate notice, or in case a regular election has not been held, the Secretary of the Interior shall call such election and give 25 days notice, setting the time and place.

J. Reuel Armstrong,
Solicitor.

U. S. GOVERNMENT PRINTING OFFICE: 1956

A. BEN SHALLIT
USIBELLI COAL MINE, INC.

A–27314 *Decided July 9, 1956*

Alaska: Coal Leases and Permits

The Secretary of the Interior may grant one coal lessee a right-of-way over the lands leased to another coal lessee and may allow the former to use jointly with the other a road constructed by the latter upon suitable terms and conditions.

Administrative Procedure Act: Exemption from

A coal land lessee is not entitled to a hearing under the Administrative Procedure Act on the necessity for or terms of the grant of a right-of-way across its lease and the joint use of its roads.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Usibelli Coal Mine, Inc., has appealed to the Secretary of the Interior from a decision, dated January 5, 1956,[1] of the Director of the Bureau of Land Management which approved an application (Fairbanks 012577) by A. Ben Shallit, doing business as Cripple Creek Coal Company, for a road right-of-way across certain lands near Suntrana, Alaska.

Shallit is the lessee of a coal lease, Fairbanks 07350, issued by the United States covering certain lands near the Healy River. Adjoining Shallit's lease on the south and west lie the lands covered by a similar coal lease of the Usibelli Coal Mine, Inc., and to the west of the Usibelli lease is a lease of the Suntrana Mining Company. A spur of the Alaska Railroad runs to a point within the Suntrana lease. The Healy River runs along the southern part of the Suntrana lease, through the Usibelli lease, into the Shallit lease.

All the lessees depend upon the railroad to move their production to market. Suntrana, having the railroad on its lease, has no problem in reaching the railroad. Usibelli has constructed and maintains an all-weather road originating within its leasehold and crossing a portion of the Suntrana lease to its own loading point on the railroad. Shallit reaches the railroad by using another road partly in the bed of the Healy River through the Usibelli lease and the Suntrana lease to the railroad.

Shallit's road is within the right-of-way (Fairbanks 08832) granted him in a decision of the Assistant Secretary of the Interior dated November 5, 1954, which incorporates an agreement arrived at by Shallit and Usibelli.

On March 14, 1955, Shallit filed a request to alter the right-of-way granted him by the decision of November 5, 1954, for a distance of

[1] The decision was amended on January 30, 1956, to clarify the right-of-way granted at one point.

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1.10 miles by moving it a maximum of 400 feet away from the river. Usibelli filed a protest against the modification of the right-of-way.

Before any action was taken on Shallit's request, a hearing was held on June 1, 1955, before the Subcommittee on Territories and Insular Affairs of the Committee on Interior and Insular Affairs of the United States Senate at the instigation of Shallit concerning the failure of the Department of the Interior to build a spur line of the railroad from Suntrana through the Usibelli and Shallit leases to the adjoining Roth Reserve, a coal land area withdrawn for the Army.

At the hearing there was some discussion as to the legality and feasibility of Shallit's using the Usibelli road as part of his route to the railroad.[2]

After the hearing, Shallit, on July 11, 1955, filed his present application for a right-of-way which for part of the route runs along the Usibelli road.

On August 9, Usibelli filed a protest against the route requested by Shallit and on September 9, 1955, Suntrana filed a protest against part of the route that crossed its lease.

Subsequently, the Secretary of the Interior appointed an Engineer Advisory Group composed of representatives of the Bureau of Mines, Geological Survey, Alaska Road Commission, and the Bureau of Land Management. On September 20 and 21, 1955, this group inspected the three coal leases and held discussions with the parties or their representatives. In a report dated September 27, 1955, the advisory group submitted its report and recommendations.

As a result of one of the group's recommendations Shallit, on November 18, 1955, filed an amendment to his application of July 11, 1955.

In a decision dated January 6, 1956, the Director of the Bureau of Land Management granted Shallit an easement for a right-of-way over the Usibelli and Suntrana leases in accordance with his amended application for the beginning and end of his route and an easement for joint use of the Usibelli road across part of the Usibelli and Suntrana leases for the middle portion of his route, subject to several conditions and stipulations as to use and payment. The grant made by the Director followed the recommendations of the Engineer Advisory Group.

On February 6, 1956, Usibelli filed this appeal to the Secretary of the Interior. Suntrana has not taken an appeal.

Usibelli's objections to the Director's decision fall into four major groups: (*1*) The Secretary has no authority to authorize joint use of the Usibelli road on the Usibelli lease; (*2*) the portion of the right-of-way granted Shallit over the Usibelli lease other than over the Usibelli road will seriously and unreasonably impair Usibelli's mining

[2] Hearing, pages 18, 73, 92, 96, 97–98.

operations; (*3*) the conditions and stipulations are incomplete and inadequate and do not properly protect Usibelli; and (*4*) the right-of-way granted Shallit in the decision of November 5, 1954, was a final disposition of Shallit's right to a right-of-way.

I. The Finality of the Decision of November 5, 1954.

The decision of November 5, 1954, awarded Shallit a right-of-way substantially along the route for which he had filed an application on June 14, 1951. As has been stated above, the route was agreed upon by Shallit and Usibelli and was submitted to the Department only for formal approval. It is the essence of Usibelli's argument that once the Department has granted a right-of-way it has exhausted its authority to grant a radically different right-of-way to the same applicant. Even assuming that Shallit's present right-of-way is a reasonable, permanent, all-year round route, I can find no warrant for Usibelli's position. His contentions go solely to the question of whether the Secretary should allow a later application, not to whether the Secretary has authority to grant another route. There is nothing in the statute reserving the right-of-way over Usibelli's lease (48 U. S. C., 1952 ed., sec. 446) or in the statute under which Shallit has applied (43 U. S. C., 1952 ed., sec. 956) which limits the authority of the Secretary to revise or relocate a right-of-way when such action is warranted. Cf. 43 CFR 244.9 (m). Accordingly, it is concluded that as a matter of law the fact that the Department has approved the grant of a right-of-way to Shallit does not deprive it of authority later to issue him one for a modified or different route.

II. Joint Use of Part of Usibelli's Road.

The Director's decision granted Shallit the right, subject to certain payments and other conditions, to use a portion of the Usibelli road from a point within the Usibelli lease westward across the remainder of the Usibelli lease to a point on the Usibelli road, within the Suntrana lease. The appellant contends that the Secretary has no authority to award joint use to Shallit of the road it has constructed and maintained.

Usibelli's and Shallit's coal leases were issued pursuant to the Alaska Coal Leasing Act of October 20, 1914, 48 U. S. C., 1952 ed., sec. 432 *et seq.* Section 11 of that act (48 U. S. C., 1952 ed., sec. 446) provides:

> That any lease, entry, location, occupation, or use permitted under this Act shall reserve to the Government of the United States the right to grant or use such easements in, over, through, or upon the land leased, entered, located, occupied, or used as may be necessary or appropriate to the working of the same or other coal lands by or under authority of the Government and for other

purposes: *Provided*, That said Secretary [of the Interior], in his discretion, in making any lease under this Act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted in so far as said surface is not necessary for use by the lessee in extracting and removing the deposits of coal therein. If such reservation is made, it shall be so determined before the offering of such lease.

That the said Secretary during the life of the lease is authorized to issue such permits for easements herein provided to be reserved, and to permit the use of such other public lands in the Territory of Alaska as may be necessary for the construction and maintenance of coal washeries or other works incident to the mining or treatment of coal, which lands may be occupied and used jointly or severally by lessees or permittees, as may be determined by said Secretary.

The mandate of the statute is fulfilled in article I, section 1, of Usibelli's lease, which reads:

The lessor expressly reserves unto itself the right to grant or use such easements in, over, through, or upon the land leased, entered, located, occupied, or used as may be necessary or appropriate to the working of the same or other coal lands by or under authority of the Government and for other purposes; also the right to use, lease, or dispose of so much of the surface of the said lands as may not be actually needed, or occupied by the lessee in the conduct of mining operations.

The first clause of section 11 of the statute and article I, section 1, of the lease read by themselves appear to reserve to the Government the right to grant any easement over one coal lease which is "necessary or appropriate" to the working of other coal lands, without regard to whether or not the surface traversed by the easement is being used by the lessee under the former lease. There is nothing in the statute or lease which gives a lessee exclusive use of the surface of the leased lands. The granting clause of the lease provides as follows:

That the lessor, in consideration of the rents and royalties to be paid and the covenants to be observed as hereinafter set forth, does hereby grant and lease to the lessee, for the period of fifty years from the date hereof, the *exclusive right and privilege to mine and dispose of all the coal and associated minerals* in, upon, or under the following-described tracts of land, situated in the Territory of Alaska, to wit: * * * [land description omitted] containing 1,120 acres, more or less, together with the right to construct coke ovens, briquetting plants, by-products plants, and all such other works as may be necessary and convenient for the mining and preparation of coal and associated minerals for market, the manufacture of coke or other products of coal, and *to use so much of the surface* and the sand, stone, timber, and water thereon *as may reasonably be required* in the exercise of the rights and privileges herein granted, the use of such timber to be subject to such regulations as may be prescribed by the Secretary of the Interior under the act approved May 14, 1898 (30 Stat., 414), and the acts amendatory thereof. [Italics added.]

Thus, the lessee's right to use the surface is restricted to that portion which is reasonably required in the exercise of his rights under the lease. There is no indication that the right to use the surface is an exclusive one. The contrary is indicated by the fact that the lessee is given specifically the "exclusive" right to mine the coal.

The legislative history of the act of October 20, 1914, shows plainly that the problem of use of roads and other facilities by one lessee in or on another lease was before the Congress.[3] H. R. 13137, 63d Congress, 2d session, which formed the basis on which legislative action was taken, provided in section 11:

> That any lease, entry, location, occupation, or use permitted under this Act shall reserve to the Government of the United States the right to grant or use such easements in, over, through, or upon the land leased, entered, located, occupied, or used as may be necessary or appropriate to the working of the same or other coal lands by or under authority of the Government, and for other public purposes.

The House Committee on Public Lands, to which H. R. 13137 was referred, reported out a clean bill, H. R. 14233, which in section 9 provided as follows:

> That any lease, permit, occupation, or use permitted under this Act shall reserve to the Secretary of the Interior the right to permit, for joint or several use, such easements, including roads, rights of way, sites for coal washeries, coke ovens, tunnels in, over, through, or upon the lands leased, occupied, or used, as may be necessary or appropriate to the working of the same or other coal lands and treatment and shipment of the products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes: *Provided*, That said Secretary, in his discretion, in making any lease under this Act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease, under existing law or laws hereafter enacted, in so far as said surface is not necessary for use by the lessee in extracting and removing the deposits of coal therein: *Provided further*, That if such reservation is made it shall be so determined before the offering of such lease.
>
> That the said Secretary during the life of the lease is authorized to issue such permits for easements herein provided to be reserved, and to permit the use of such other public lands in the Territory of Alaska, as may be necessary for the construction and maintenance of coal washeries or other works incident to the mining or treatment or coal, which lands may be occupied and used jointly or severally by lessees or permittees, as may be determined by said Secretary.

The House Committee report (H. Report No. 352, 63d Cong., 2d sess.) which accompanied the bill stated:

> 15. Section 9 reserves rights to use of joint tunnels, rights of way, washeries, etc., made necessary on account of topography. (Page 15.)

After passage by the House, the bill was referred to the Senate Committee on Public Lands which amended H. R. 14233 by striking out all of it after the enacting clause and substituting a complete bill in lieu of the stricken material. Section 11 of the Senate bill, which dealt with the reservation of easements on leased land, is the same as section 11 of the act of October 20, 1914 (*supra*). It was agreed to by the conference committee (H. Repts. 1178 and 1186, 63d Cong., 2d sess.) and remained unaltered in the act as passed.

[3] Hearings on H. R. 13137, 63d Cong., 2d sess., part II, pages 108–111, 124–126, 129, 138–139.

The House Managers' report accompanying Conference Report No. 1186 stated:

> Section 11 corresponds with section 9 of the House bill and does not depart therefrom in any substantial particular.[4]

In view of the fact that the problem of joint use of facilities was clearly before the Congress and that joint use was specifically provided for in one version of the bill, that section 11, as enacted, was not considered to have altered the effect of the former version, and that the language of section 11, standing by itself, is broad enough to authorize joint use, I conclude that there is nothing in the act or in the legislative history of the act which requires the conclusion that the Secretary may not permit one coal lessee to use a road constructed by another lessee over the latter's lease.

After the act was passed, the Department issued regulations pertaining to the issuance of coal leases in Alaska (45 L. D. 113 (1916)). Part 2 of the regulations, which was entitled "Information Relating to Operation and Development," read in part as follows:

COMMENTS ON PROVISIONS OF THE LEASE.

An explanation of those articles and provisions of the lease form whose purposes may not be self-evident follows. It should be understood that this explanation is not in any sense either a part of the lease or agreement or a construction of its terms.

* * * * * * *

ARTICLE 1, SECTION 1.

RIGHTS RESERVED BY LESSOR.

The lease plainly states that the lessor (represented by the Secretary of the Interior)—

> "Reserves unto itself the right to grant or use such easements in, over, through, or upon the land leased, entered, located, occupied, or used as may be necessary or appropriate to the working of the same or other coal lands by or under the authority of the Government and for other purposes * * *."

The purpose of this provision is to permit railroads, tramways, water lines, or other necessary means of transport and communication to be constructed and operated through blocks of land not reached by these means of transportation at the time these blocks were leased, and to enable leasing blocks or units not readily accessible on the surface to be reached by tunnels, slopes, or other openings driven through the blocks already leased. Whenever it is necessary to grant or use an easement under this provision, the easement will be so arranged and located as to interfere in a minimum degree with mining operations on the blocks subject thereto. Wherever it seems advisable, *jointly operated tunnels, slopes, or shafts for transportation and ventilation may be permitted*, provided the conditions, limitations, penalties, and provisions contained in the act are observed. Whenever joint openings do not seem advisable, the openings for the operation of the subsequent leases will be required to be so driven as to interfere as little as may be with the operations of the prior lease or leases. Should there be material interference, the amount of damages to be paid to the prior

[4] One of the House Managers was Representative Ferris who had introduced H. R. 13137 and H. R. 14233 and who was chairman of the House Committee on Public Lands.

lessee will be determined by a board of arbitrators, elsewhere referred to. (See art. 7, sec. 7.) [45 L. D. 141; italics added.] [5]

The appellant argues that Secretary's authority to provide for joint use is limited to "tunnels, slopes, or shafts." However, the Secretary's authority to authorize one lessee to use another's tunnel, slope, or shaft rests upon the same provisions of the statute and lease that have been set forth above. I fail to see how these provisions can be held to authorize the joint use of tunnels, in suitable circumstances, and not to permit the joint use of a road.

Therefore, it is concluded that the plain language of section 11 of the act of October 20, 1914, the legislative history of the section, and its contemporaneous construction by the Department, all support the authority of the Secretary to permit one coal lessee to use a road constructed by another coal lessee on the latter's coal lease so long as it

[5] Article VII, section 7, of the original lease form, which is the same as article VII, section 7, of the Usibelli's lease provided:

"That in case any dispute shall arise between the lessor and lessee as to any question of fact, or as to the reasonableness of any requirement made by the lessor under the provisions of this lease, in the matter of operation, methods, means, expenditures, use of easements, compensation for joint occupancy by another lessee of a portion of the leased premises, or such other questions as are not determined by express statutory provision, such questions or disputes shall be settled by arbitration in the manner provided for by this section, and the lessor and lessee hereby covenant and agree each with the other to promptly comply with and carry out the decision or award of each and every board of arbitration appointed under this section.

"Questions in dispute to be determined by arbitration hereunder shall be referred to a board of arbitration consisting of three competent persons, one of which persons shall be selected by the lessor or its authorized representative, and one by the lessee, and the third by the two thus selected: *Provided,* That the lessor and lessee may agree upon one sole arbitrator or upon the third arbitrator. The party desiring such arbitration shall give written notice of the same to the other party, stating therein definitely the point or points in dispute, and name the person selected by such party hereto within 20 days after receiving such notice to name an arbitrator; and in the event it does not do so, the party serving such notice may select the second arbitrator and the two thus named shall select the third arbitrator. The arbitrators thus chosen shall give to each of the parties hereto written notice of the time and place of hearing, which hearing shall not be more than 30 days thereafter, and at the time and place appointed shall proceed with the hearing unless for some good cause, of which the arbitrators or a majority of them shall be the judge, it shall be postponed until some later day or date within a reasonable time. Both parties hereto shall have full opportunity to be heard on any question thus submitted, and the written determination of the board of arbitration thus constituted or of any two members thereof or, in case of the failure of any two members to agree, then the determination of the third arbitrator shall be final and conclusive upon the parties in reference to the question thus submitted. All such determinations shall be in writing, and a copy thereof shall be delivered to each of such parties.

"It is further agreed that in the event of the failure of the lessor and lessee, or of the two arbitrators selected as aforesaid by the parties hereto, within 20 days from notice to them of their selection, to agree upon the third arbitrator, then the Secretary of the Interior shall appoint such arbitrator.

"The said third arbitrator shall receive not to exceed $15 per day as full compensation for his services and for all expenses connected therewith, exclusive of transportation charges; but such compensation shall not be in excess of $150 for any arbitration. The losing party to such arbitration shall be liable for the payment of such compensation and transportation expenses of such third arbitrator."

is necessary or appropriate to enable the first lessee to work his coal lease.[6]

III. Interference with Usibelli's Mining Operations.

The right-of-way granted Shallit by the Director's decision originates at its eastern end on the north boundary of the Usibelli lease. Then running south it roughly parallels the old Cripple Creek road about 100 feet to the west of that road for a distance of approximately 3,500 feet to the point where it joins the Usibelli road near the Usibelli bridge. Usibelli contends that the road in this location will seriously interfere with its mining operations because it will cross three coal seams Nos. 4, 5, and 6, which are not fully mined.

The Engineer Advisory Group considered the objections raised by Usibelli's mine manager and found that, in the absence of any definite program for mining the seams, a stipulation that the road would be moved temporarily to permit mining the seams would sufficiently protect its interests. The Director followed the Board's recommendation.

In its brief Usibelli contends that two of the seams are necessary as an emergency reserve supply for its coal washing plant, which depends primarily upon coal from the other side of the river. This latter source, it continues, will be lost to Usibelli in flood periods when it may not be possible to haul coal across the bridge and since the coal in the seams the Shallit road will cross is a reserve supply, it is not practicable to strip and mine them in a short period.

In other words, the contention is that the use contemplated by Usibelli of these seams is such that they must remain an ever present threat to any road in the area that is not in the river plain.

Shortly after it filed its brief to the Secretary and a day before Shallit's reply brief was filed, Usibelli submitted an engineering study of the effect of the Shallit road across coal seams Nos. 4, 5, and 6. This report first contends that the courses and distances on Shallit's maps accompanying his right-of-way application do not coincide with the pictorial location of the road on that map. The report then sets out a mining plan for coal beds Nos. 4, 5, and 6. Finally, it computes the cost for coal wasted and of culverts, bridges and other structures necessary to recover all the coal in the beds based upon the pictorial location of Shallit's road and arrives at the figure of $88,250 as representing what the Shallit road would cost Usibelli.

[6] This holding disposes of Usibelli's argument based upon "pedis possessio" because the right to allow joint use of a road is one which the United States has reserved to itself in the statute and lease.

Similarly, the argument as to "eminent domain" falls because if the Secretary has the authority to allow joint use of Usibelli's road, then the lease, in article VII, section 7, clearly provides that the lessor shall first set the compensation for joint use of the road, and if the lessee is dissatisfied, the matter is to be settled by arbitration in accordance with the procedure set out in the section.

The contention that the courses and distances set out by Shallit do not coincide with the location recommended by the Engineer Advisory Group or the Director's decision is, even if correct, not serious. The location, as shown on Shallit's map submitted in November 1955, appears to follow the route recommended by the Engineer Advisory Group. There should be no difficulty in locating the road along a feasible route about 100 feet west of the present road. If the road as then laid out by engineers from both companies deviates from the map filed by Shallit, an amended map will be required.[7]

The proposed mining plan appears to present more meritorious objections to the right-of-way. Although it was not presented to the Engineer Advisory Group and, indeed, at that time, September 1955, does not appear to have been contemplated by Usibelli, it appears to be an acceptable program for mining the coal in beds Nos. 4, 5, and 6. However, there is no indication as to when it will be put into operation or if it is put into operation whether all the seams will be stripped at the same time, or if not in what sequence they will be prepared for mining. Until some steps to carry out the mining plan are taken the right-of-way granted Shallit will not interfere with Usibelli's operations.

Therefore, it appears that at this time the Department may meet its obligations to both Usibelli and Shallit under paragraph 5 of the conditions and stipulations set out in the Director's decision by granting Shallit the right-of-way he has requested.[8] Then Usibelli would have the right to cut Shallit's road at any time that its operations make such action necessary, provided that when Usibelli cuts Shallit's road, it shall provide temporary by-passes or permit Shallit to use Usibelli roads so that Shallit shall at all times have an uninterrupted transit by road over the Usibelli leasehold.

Usibelli further contends that most of its road from the bridge to the Suntrana-Usibelli boundary is not a "permanent" road and that operating necessities and safety hazards will not permit its use by other than Usibelli traffic. From all available evidence, it appears that the Usibelli road is one which is usable throughout the year and which for the purposes of both Usibelli and Shallit will provide year-round access for the transportation of coal.

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[7] This procedure was followed in the resurvey of Shallit's present right-of-way. *A. Ben Shallit et al.*, A–26673, November 5, 1954 (p. 2).

[8] Paragraph 5 of the conditions and stipulations reads as follows:

> "Within the limits of the lease of Usibelli Coal Mine, Inc., Usibelli shall have the right to cut the road built by Cripple Creek or its own road from time to time as may be reasonably necessary to its operations; provided, however, that when such cuts are made Usibelli shall construct temporary by-passes or permit use by Cripple Creek of Usibelli roads in order to assure uninterrupted transit by road over the Usibelli leasehold. Usibelli shall have the right to flag Cripple Creek trucks when necessary to allow landing and take-off planes using the Usibelli airstrip."

In view of the present demand for coal in the area, it does not appear that joint use of the Usibelli road would seriously increase the amount of traffic, aggravate the dust situation, or materially increase the problem of using part of the road as an airstrip, if this use continues.

IV. The Conditions and Stipulations.

Usibelli raises several objections to the conditions and stipulations to which the Director subjected the right-of-way granted to Shallit.

The Director's decision imposes on Shallit a charge of 15 cents per ton for each ton hauled over the joint-use portion of Usibelli's road. One-half of the 15 cents is to be allocated to construction costs and paid until $50,000, or one-half of the Engineer Advisory Group's estimate of what the Usibelli road cost, is paid. The other 7½ cents is to be allocated to maintenance costs and paid so long as Shallit uses this portion of the road.

In the first place, Usibelli attacks the concept of a toll charge and contends that Shallit should be required to reimburse Usibelli in a lump sum for one-half of the original investment and capital improvements it has made in the road and that Shallit pay one-half of future capital improvement expenditures and one-half of future maintenance costs, regardless of tonnage hauled by either mine. Usibelli states that a more accurate figure for the cost of original investment and capital improvements is $175,000 (Brief, p. 72). It is not clear whether this figure represents the costs for the entire Usibelli road or only for the joint-use portion.

In view of the facts that Usibelli is by far the larger producer of coal (at the rate of 4 to 1, Shallit's brief, p. 26) and greater user of the road, that Shallit has had substantial expenses in building and maintaining his present right-of-way across the Usibelli leasehold (Hearings, pp. 28–29), that the right-of-way granted Shallit will terminate if the Alaska Railroad is extended to his lease or the right-of-way is required by the Alaska Road Commission for highway purposes, and that it is doubtful whether accurate cost figures are available, it is my opinion that a toll charge is the proper method of charging Shallit for the use of a portion of the Usibelli road.

The Director adopted the Engineer Advisory Group's suggestion that the toll be 15 cents per ton, of which 7½ cents were to be applied to construction costs and 7½ cents to maintenance. After the sum of $50,000 is paid in for construction costs, the toll is to be reduced to 7½ cents per ton.

There are many factors important to the proper determination of the toll to be charged Shallit as to which detailed information is not found in the record. For example, the construction cost of the joint-use portion of the Usibelli road is at best an estimate and is not supported by any evidence. The same observations apply to the

maintenance cost. However, Usibelli has not demonstrated that the toll charge is unfair or unrealistic.

The rates, therefore, while not supported by definitive cost figures, represent the considered opinion of experienced engineers. Under these circumstances, it seems best to adopt these rates, subject to adjustment, if experience proves them to be unfair, either by the Department or by arbitration under article VII, section 7, of the lease.

Usibelli also argues that the Director's decision does not adequately dispose of all problems relating to relocation, abandonment, and maintenance of the joint-use road. In my opinion, paragraphs 6, 7, and 8 of the Director's conditions and stipulations provide solutions for the questions Usibelli raises.

Usibelli, in its brief (p. 82), asks that Shallit be prohibited from walking cleated track equipment over the joint-use road on the grounds that such use is damaging to a gravel road. Shallit did not discuss this point in his brief. Therefore, it may be assumed that Usibelli's contention is correct or that the matter is of no great importance to Shallit. In either event, in the absence of any evidence to the contrary, Usibelli's request appears reasonable and is granted.

Usibelli also points out that its road on the Healy Gorge in the tipple area is being endangered by river erosion of the slope below it and asks that Shallit be prohibited from borrowing road material from the toe of the slope. This request appears proper and the right-of-way granted Shallit is made subject to the further condition that Shallit's road building and maintenance activities shall be carried out without subjecting Usibelli's road in the tipple area to additional difficulties.

Usibelli next points out that the insurance provision only requires Shallit to pay for any increase in the present rate of liability insurance paid by Usibelli which results from the joint use of the haulage road (paragraph 13, Conditions and Stipulations, Director's decision). Shallit does not discuss this point in his brief at all and Usibelli's comments are summary and general. Thus the record does not contain sufficient information on which to decide in detail the types and amounts of insurance that Shallit should be required to carry. The parties are therefore directed to attempt in good faith to reach agreement on the liability insurance Shallit should carry and to submit evidence of their agreement to the land office manager within 30 days of the date hereof or to submit the matter to arbitration in accordance with the arbitration provisions of their leases.

Finally, Usibelli raises other problems which will arise from the joint use of the road. Without discussing them in detail, it is my opinion that the toll charge formula, either at the rate adopted by this decision, or at a rate later found to be reasonable, renders these problems illusory or unimportant.

Usibelli also contends that certain stipulations contained in the 1954 decision were omitted from the Director's decision. The first one it refers to relates to the stipulation then agreed to by the parties that Usibelli's lease would be the dominant lease and that Usibelli could cut Shallit's road. The same provision is found in the Director's decision, except that Usibelli's lease is not stated to be the dominant use. While the parties were free to agree to whatever stipulation they desired, their agreement did not bind the United States. The Department is not ready to admit that a coal lease is dominant to the reserved right-of-way.[9] Therefore, in the absence of an agreement between the parties, the provision that Usibelli may cut Shallit's road, on certain conditions, is considered adequate protection for Usibelli's operations.

Next, Usibelli requests that stipulations 4 and 7 of the 1954 decision be incorporated in the new grant of a right-of-way.[10] This request is reasonable and is granted.

Usibelli also contends that it is entitled to a hearing pursuant to the provisions of the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1004). However, the provisions 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 requiring a hearing with respect to a grant of a right-of-way for joint use of an existing road over public lands in Alaska included within a coal lease. Consequently, the provisions of the Administrative Procedure Act do not apply to this proceeding. *Northern Pacific Railway Company, Ralph L. Basset*, 62 I. D. 401 (1955).

Usibelli cites *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950), which held that the provisions of the Administrative Procedure Act apply to proceedings in which a hearing is required by due process of law as well as those in which the pertinent statute provides for a hearing (*id.*, p. 50). However, before this case becomes pertinent, it must first be shown that the appellant is entitled to a hearing as a matter of due process. The appellant has not made such a showing.

The authority to grant the right-of-way applied for is reserved to the United States, and given to the Secretary to exercise, by the statute under which Usibelli's lease was issued. The lease, in turn, sets out the reservation and, as to the joint-use portion, provides for arbitration if the Secretary's terms are not acceptable. The lessee accepted its lease subject to the reservation to the United States of the right to grant

[9] *Albert W. C. Smith*, 47 L. D. 158 (1919); *Healy River Coal Co.*, 48 L. D. 443 (1922).

[10] Stipulations 4 and 7 read as follows:

"4. Shallit shall take no tailings, ravel or other material as borrow, which has been accumulated by Usibelli, in the construction and maintenance of his road, without express authorization from Usibelli."

"7. The right-of-way at such points on the Usibelli lease where it passes any building (including the tipple and washing plant), pump ponds, and roads intersections is limited to the average width of the road, but in no event is the right-of-way in such areas to exceed 25 feet."

rights-of-way across the lease and provide for joint use of a portion of the leased premises. The exercise of the reserved rights does not deprive the lessee of any vested right or impose on the Secretary, as a prerequisite, the additional obligation to hold a formal hearing.

Thus, there is no constitutional requirement that the lessee have a hearing before the Secretary allows a right-of-way and, in the absence of a constitutional right, the *Wong Yang Sung* case is inapplicable.

Finally, while this decision disposes of the issues raised in the appeal, I realize that in view of the physical conditions under which the mines are operated and the fluctuation from year to year in the amount of coal produced, the terms and conditions imposed may not now be nor remain completely satisfactory to either party. Insofar as the terms and conditions under which the right-of-way is now granted are concerned Usibelli has the right to ask for arbitration under article VII, section 7, of its lease. If experience or changed conditions in the future bring out serious defects in the arrangements, either party may request its modification. However, before considering any request for modification, the Department will have to be convinced that both parties have made every reasonable effort in good faith to reach a proper solution of their difficulties. The Department will also refuse to consider any request for modification that is not fully supported by complete and accurate data and that is based upon speculative and conjectural assumptions.

Therefore, the decision of the Director of the Bureau of Land Management, as modified herein, is affirmed.

WESLEY A. D'EWART,
Assistant Secretary of the Interior.

BISMARK MOSIER

IA–150 *Decided July 20, 1956*

Indian Lands: Descent and Distribution: Wills

A will executed pursuant to a contract to make a will is revocable and is not entitled to probate if a revoking will is executed.

Contracts: Authority to Make—Indian Lands: Individual Rights in Tribal Property: Osage Headrights

A contract by an Osage Indian to make a will disposing of his Osage Indian headright is invalid because an interest in such headright owned by a person of Indian blood cannot be alienated.

Indian Lands: Descent and Distribution: Wills

The restricted headright of a qualified Osage Indian may be disposed of under a will approved by the Secretary of the Interior or his authorized representative. *Held*, that the approved last will and testament of the Osage Indian decedent, revoking all prior wills, complied with legal requirements, and a disposition by the decedent of his estate under the will to his widow in preference to surviving issue was natural and not inequitable, unfair or unjust in the circumstances.

APPEAL FROM THE SUPERINTENDENT OF THE OSAGE INDIAN AGENCY

Etta Mosier, Juanita Fenno, Beatrice Spry, and Claude Clifford Mosier have, through counsel, appealed to the Commissioner of Indian Affairs from a decision of the Superintendent of the Osage Indian Agency, dated September 30, 1954, approving the last will and testament of Bismark Mosier, deceased Osage allottee No. 1583.[1] Etta Mosier is a former wife of the decedent, from whom he was divorced on October 4, 1926, by decree of the District Court for Osage County, Oklahoma. The other three appellants are the unallotted children of the decedent. The decedent was also survived by his wife, Rowe Gertrude Mosier, whom he married on December 18, 1926, by another child, Thelma V. Gilliland, and by three grandchildren, the issue of a deceased daughter of the decedent. The restricted estate of the decedent, subject to the jurisdiction of this Department, appears to consist of one Osage headright.

The last will and testament of the decedent is dated January 10, 1947, and was made at a time when all of his children had become adults. The widow is the principal beneficiary under this will, with nominal bequests being made to the children and grandchildren. Decedent's death occurred on October 22, 1953. The appellants request that the 1947 will be disapproved, and that a prior will of the decedent, dated May 20, 1926, be approved. The initial objections filed by appellants to the approval of the 1947 will were that certain general legal requirements had not been met in connection with the execution, witnessing, and publication of that will; that testator lacked testamentary capacity and was acting under duress, menace, fraud and undue influence; and that the 1947 will violated the terms of a contract entered into by the decedent, under the terms of which he had agreed to keep in effect the terms of the will executed on May 20, 1926, devising his estate, including his Osage headright, to his then wife, Etta Mosier, and his three unallotted children, who

[1] Under section 8 of the act of April 18, 1912 (37 Stat. 86), adult members of the Osage Tribe of Indians not mentally incompetent may dispose of their restricted estates by will in accordance with the laws of the State of Oklahoma, and subject to the approval of the Secretary of the Interior. The function of approval or disapproval in this respect was delegated to the Superintendent of the Osage Agency under the regulations of the Department (25 CFR 83.12). Although section 83.14 of those regulations provides for an appeal from the Superintendent's action to the Commissioner of Indian Affairs, and for a further appeal to the Secretary, for administrative reasons the Commissioner of Indian Affairs has referred the present appeal directly to the Secretary of the Interior for action.

are the above appellants. Subsequently, at the hearing on the will conducted by Field Solicitor Hugh A. White, the attorney for the appellants agreed with the stated understanding of the Field Solicitor that the 1947 will was being contested on appeal not because of any legal impediment to its approval but as a means to enable "the Secretary of the Interior to exercise his discretion with regard as to whether the will should be approved as a matter of right, equity and justice."[2]

I

The Field Solicitor's findings that the will of January 10, 1947, was executed in conformity with law, and that the testator had testamentary capacity and did not act under fraud, duress, or undue influence is supported by the record.

II

The purported contract of the decedent wherein he had agreed to make provision during his lifetime, and by will after his death, for Etta Mosier and three of his children, is dated September 30, 1926. Since a will becomes effective only at the death of the testator, and hence may be revoked at any time during his lifetime, the general rule is that a will executed pursuant to a contract to make a will is revocable and is not entitled to probate if a revoking will is executed.[3] For a stronger reason, however, the contract of September 30, 1926, cannot be regarded as enforceable since it purports to create as of its date an interest in the restricted Osage headright of the decedent. The contract was not submitted to the Secretary of the Interior for approval, and even if it had been submitted to the Secretary he would have had no authority to approve it. Under the act of April 12, 1924 (43 Stat. 94), the Secretary of the Interior is authorized to approve the sale, assignment or transfer of interests in Osage Indian headrights only when those interests are held by non-Indian owners. Such dispositions of a headright interest owned by a person of Indian blood are invalid, which would include the contract executed by Bismark Mosier on September 30, 1926, to the extent that it purported to effect an alienation of his restricted Osage headright.[4]

III

Of course, the decedent had the power under the act of April 18, 1912, *supra*, to dispose of any or all of his restricted property by a will approved by the Secretary of the Interior or by the latter's authorized

[2] Trans., p. 21.

[3] See 57 Am. Juris., sec. 458, and cases there cited.

[4] See *Taylor* v. *Tayrien*, 51 F. 2d 884 (10th Cir. 1931), *cert. denied*, 284 U. S. 672; *Taylor* v. *Jones*, 51 F. 2d 892 (10th Cir. 1931), *cert. denied*, 284 U. S. 663; *In re Kohpay's Estate*, 245 P. 2d 79 (1952); *Wah-hrah-lum-pah* v. *To-wah-e-he*, 188 Pac. 106 (1920).

representative. Decedent's will of May 20, 1926, if approved, would have disposed of his restricted Osage headright. However, decedent's subsequent will of January 10, 1947, revoked and canceled all other or former wills made by him. Moreover, that last will is a valid dispositive instrument of the decedent's estate, including his headright. Although the appellants have appealed to the Secretary to exercise his discretion in this matter and to disapprove the 1947 will on the basis of right, equity and justice, no good reason is seen for invoking such administrative action.

It is true that the last will of the decedent disinherits to all intents and purposes the issue of the decedent in favor of the surviving wife, Rowe Gertrude Mosier. However, it is a universally accepted fact that among the purposes desired to be accomplished by the making of a will is the altering of the normal course of descent which would otherwise occur in the absence of a testamentary disposition. It can also be mentioned as a general proposition that a will which may be regarded by some as unjust and unnatural, does not by reason of those circumstances alone become invalid.[5] Nevertheless, no such characterizations can be made regarding the will executed by the decedent on January 10, 1947. Gertrude Mosier lived with the decedent as his wife for over 26 years until his death in 1953. It appears from the record that the marriage which those parties had assumed and maintained with each other over that long period of time was a true and harmonious marital relationship. They were a devoted and happy couple; in fact, when financial problems arose the wife worked to pay the family's bills. Thus, it is but a natural circumstance that the affection apparently bestowed by a good and faithful wife upon her husband for many years, should result in the granting to her of the husband's testamentary bounty. In *Canfield* v. *Canfield*, 31 P. 2d 152 (1934), the Supreme Court of Oklahoma so aptly described this relationship between husband and wife that we believe it deserves quotation here, to wit:

> * * * But the law looks with disfavor upon a claim that a wife, showing affection and sympathy, who has remained faithful unto the end, should not be the beneficiary of the worldly goods of him unto whom she has ministered. The courts will not seize upon kindness, sympathy, and manifested affection to deprive a faithful spouse of that which has been bestowed upon her by one whose life has been sweetened by the perfume of such wifely fidelity. (P. 158.)

Accordingly, the action of the Superintendent of the Osage Agency, approving the last will and testament of Bismark Mosier, dated January 10, 1947, is affirmed.

WESLEY A. D'EWART,
Assistant Secretary of the Interior.

[5] Page on Wills (1941 ed.), vol. 1, p. 73.

APPEAL OF PAUL C. HELMICK CO.

IBCA-39 *Decided July 31, 1956*

Contracts: Delays of Government—Bonneville Power Administration

The judicial doctrine that even though the parties to a contract contemplate delay in performance, and under the terms of the contract the Government is expressly exculpated from liability for damages, by reason of the delay, the contract is nevertheless subject to an implied condition that the Government will not cause unreasonable delay was clearly applicable to a contract between the Bonneville Power Administration and a contractor for the construction of a transmission line when the specifications under the contract included a provision that the Government would make "every reasonable effort" to secure rights-of-way for the contractor in advance of its clearing operations.

Contracts: Delays of Government—Eminent Domain

The Government was not liable for its delay in making available to the contractor two tracts of the right-of-way which were to be acquired from the Northern Pacific Railroad when the Government was diligent both in initiating and prosecuting the negotiations for the acquisition of these tracts. The obstacles which the Government encountered were wholly unexpected, and could not be overcome by any measures on its part short of the institution of condemnation proceedings, which were ordinarily undertaken only as a last resort, and the Government, moreover, was encouraged to be patient by a statement of the contractor's chief officer that he was not planning to operate on these tracts that year. Statements made by Government personnel at an award meeting concerning the probable date of the acquisition of these tracts were mere statements of expectations, and hence cannot be regarded as promissory in nature. While the contract provided that the Government would make every reasonable effort to secure the rights-of-way in advance of clearing operations, this was not tantamount to a promise that the rights-of-way would be available within a reasonable time.

Contracts: Notices—Contracts: Damages: Generally

The contractor was proceeding legally at its own risk in moving men and equipment to tracts of the right-of-way prior to the receipt of formal written notice that the tracts were available, and hence the Government was not liable for any damages which the contractor may have sustained as a result of its premature occupation of the tracts.

Contracts: Delays of Government—Contracts: Contractor—Contracts: Damages: Unliquidated Damages

The Government was, however, liable for damages for its delay in making available to the contractor a number of danger tree strips adjacent to certain special tracts from which the owners of the tracts rather than the contractor were to remove the merchantable timber. Although these danger tree strips were not made available to the contractor until shortly before the final date for completion of the contract, the Government has failed to offer any reasonable explanation for the delay. In this case, the delay must be regarded as especially serious, since it was implicit in the requirements of the contract that the clearing of the special tracts and the felling of the adjacent danger trees would be a related operation.

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Contracts: Specifications—Contracts: Interpretation—Rights-of-Way: Generally

Where the parties to a contract for the clearing of a right-of-way have construed the provisions of the specifications applicable, strictly speaking, only to the right-of-way itself as applicable also to adjacent danger tree areas, the Board will adopt the practical construction put upon the requirements of the contract by the parties themselves.

Contracts: Damages: Liquidated Damages—Contracts: Changes and Extras

Although the contracting officer in this case, after the completion of the contract, granted an extension of time to the contractor exactly equal to the completion date of the contract, in order to compensate for the delays of the Government, such an extension of time seems more in the nature of a waiver of liquidated damages than a determination of the actual right of the contractor to an extension of time. While the mere delay of the contracting officer in granting an extension of time, or his mere failure to act on the contractor's request for such an extension, may not obligate the Government to make good the losses which may have been suffered by the contractor as a result, the case may be otherwise when the contracting officer has put pressure on the contractor to accelerate his operations. Such pressure may amount to a change in the requirements of the contract.

Contracts: Specifications—Contracts: Interpretation—Contracts: Contracting Officer

When the specification governing the clearing of the special tracts and adjacent danger tree strips provided that the landowners would "remove any merchantable timber required to be cut by these specifications," the specification was ambiguous. When all the officers of the Government supervising the performance of the contract, including presumably the contracting officer, assumed that the landowners would both cut and remove the merchantable timber on these tracts and adjacent danger tree strips, and indeed negotiated with the contractor for a long time with respect to additional compensation for cutting the merchantable timber on the danger tree strips, the Board will adopt the practical construction put upon the contract by the parties, especially in view of the familiar rule that any ambiguity in a Government construction contract must be resolved against the Government. Consequently, the contractor is entitled to additional compensation for the extra work which was the subject of the negotiations.

Contracts: Specifications—Contracts: Changes and Extras—Contracts: Additional Compensation—Contracts: Performance—Contracts: Payments

Nevertheless, the Board must reject the contractor's claim that it is entitled to additional compensation for cutting the merchantable timber on the special tracts themselves. The contractor performed this work without making any effort to obtain an extra work order in writing as required by the contract and specifications. The performance of the work without obtaining an extra work order made it voluntary, and it has long been settled that a contractor is not entitled to additional compensation for voluntary work. The fact that partial payments were made during the progress of the work is also without significance, since such payments were only provisional; nor did the performance of the work with knowledge of the Government inspectors improve the contractor's position. A contractor may have reasons of his own for undertaking work not required by the specifications, and the inspectors would not interfere with him unless the work affected the in-

terests of the Government. If the presence of inspectors could validate work undertaken without a written extra work order, the requirement that such an order be obtained would be rendered nugatory, since Government inspectors are always present at the sites of the work. Furthermore, the contractor has failed to show convincingly that the so-called merchantable timber cut from the special tracts was in fact merchantable. Since the definition of merchantability in the specifications was rather vague, the parties solved this problem practically by arranging to have the merchantable trees marked with yellow paint. The evidence does not warrant the conclusion, however, that the trees were so marked.

Contracts: Damages: Unliquidated Damages—Bonneville Power Administration

While traditionally claims of contractors based on delays of the Government in furnishing materials, facilities or rights under Government construction contracts have been regarded as claims for unliquidated damages which may not be administratively settled, the Administrator of the Bonneville Power Administration possesses such authority under the Bonneville Project Act, as amended, which gives him power to make and modify contracts and compromise or finally settle any claim arising thereunder. As the Bonneville Administrator possesses such a power, and is subject to the supervisory authority of the Secretary of the Interior, the power may also be exercised by the Board in a proper case in the application of its delegated supervisory authority.

Contracts: Specifications—Contracts: Additional Compensation—Contracts: Contractor—Contracts: Contracting Officer—Contracts: Payments

When in the course of clearing the right-of-way a forest fire occurred, the contractor was required under the applicable specifications to make every reasonable effort to suppress the fire, and hence is not entitled to additional compensation to cover its costs of suppressing the fire. It is immaterial that the fire may not have been caused by its operations, and that orders to suppress the fire were issued to the contractor by the contracting officer upon request of the United States Forest Service. If the fire was caused by the contractor's operations, it was liable, moreover, to pay to the Forest Service its costs of suppressing the fire, and damages for injury to National Forest lands, and the contracting officer was justified in withholding from payments due to the contractor an amount sufficient to cover this contingent liability. Although the contracting officer has found that the fire was caused by the contractor's operations, and is liable to the Forest Service for its costs and damages, his finding is a mere conclusion wholly unsupported by evidentiary facts, and he is directed to revise his finding to remedy this defect.

BOARD OF CONTRACT APPEALS

This is an appeal by Paul C. Helmick Company from the findings of fact and decision of the contracting officer dated April 15, 1955, under Contract No. 14–03–001–10444 with the Bonneville Power Administration.[1] The contract, which was on U. S. Standard Form No. 23 (revised April 3, 1942), and was dated August 10, 1953, provided that, for a consideration of $446,662.50, the contractor would,

[1] It will hereinafter be referred to as Bonneville, or the BPA.

under Schedule I thereof, remove and dispose of merchantable timber, clear the right-of-way and construct access roads for the Columbia River-Halford Section of the Chief Joseph-Snohomish 345-KV Transmission Line.

Under paragraph 102 of the specifications the contractor was to commence work under the contract within 10 days of receipt of notice to proceed, and to prosecute the work to completion within 430 calendar days after receipt of such notice, which was received by the contractor on August 17, 1953. The date for completion of the work was, therefore, October 21, 1954.

In his findings of fact and decision of April 15, 1955, which were issued prior to completion of the work, the contracting officer denied the contractor's claims for additional compensation but indicated his willingness to give consideration to requests of the contractor for extensions of time to complete performance under the contract. In a letter dated June 24, 1955, from John M. Rathbun, Chief of the Branch of Supply of the Bonneville Power Administration, who was then the contracting officer, the contractor was informed that, in view of delays of the Government "in not furnishing you entry to certain tracts as required for clearing and removal of danger trees," [2] its time for performance of the contract was extended by 208 days. This extension of time was sufficient to cover the actual completion of the work, which was accomplished on May 17, 1955, and thus no liquidated damages were assessed against the contractor, although such damages had been provided for in Paragraph 102 C of the specifications.

A hearing on the contractor's claims was held in the Court Room, Federal Building, Seattle, Washington, from October 3 to October 5, 1955, inclusive, before the Chairman of the Board, Mr. Theodore H. Haas. The contractor was represented by Messrs. Lyle L. Iversen and Josef Diamond, of the firm of Lycette, Diamond & Sylvester, and Messrs. Dean F. Ratzman and David E. Lofgren, Jr., of the office of the Regional Solicitor, Portland, Oregon, represented the Government. Subsequent to the hearing, the record was supplemented by interrogatories addressed to George F. Englesby, a retired official of the Bonneville Power Administration, who had been involved in the acquisition of some of the rights-of-way for the project which was the subject of the hearing, and who had not been available for questioning at the hearing. The interrogatories were also taken in the presence of the Chairman of the Board in the Interior Building in Washington, D. C., on November 9, 1955.

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[2] "Danger trees" were defined in paragraph 402, subdivision 4, of the specifications as "all trees (regardless of condition), brush and snags, outside the right-of-way to be cleared, which in falling directly toward the lines would extend within 45 feet of the center lines." It was also stipulated that trees, brush and snags leaning away from the right-of-way should be included in this definition.

In his findings the contracting officer identified five separate claims of the contractor. Three of these claims, which are for additional compensation, relate to the clearing of the right-of-way, and are based on delays of the Government in making parts of the right-of-way available, and in granting extensions of time to compensate for these delays, as well as upon an order of the contracting officer that the contractor cut and remove from parts of the right-of-way merchantable trees, which, the contractor contends, should have been cut and removed by the owners from whom these parts of the right-of-way had been acquired by the Government. The two other claims arise out of a forest fire which occurred on September 15, 1953, on Nason Ridge,[3] near Merritt, Washington, in the vicinity of the right-of-way, and which the contractor was required to suppress.

As the claims arising out of the clearing of the right-of-way are interrelated, and to some extent are overlapping, and the fire suppression claims are also interrelated, it would seem desirable to consider the claims in each category together, and to preface this consideration with a sketch of the background out of which all the claims arise, including a preliminary summary of the contractual provisions on which they are based.

The Requirements of the Contract

In so far as clearing of the right-of-way was concerned, paragraph 101 B, subdivision 1, of the specifications provided that the contractor should not only clear the right-of-way but also fell danger trees and dispose of cleared materials from the right-of-way and danger tree areas. Substantially the same requirements were imposed by paragraphs 201, 202, and 401 of the specifications. Under paragraph 406 A of the specifications, it was provided that the contractor was to fell all danger trees designated by the contracting officer, and under subdivision C of the same paragraph it was provided as follows:

> Danger trees which fall on the right-of-way or in open or cultivated fields shall be disposed of in the same manner as material from the right-of-way. Danger trees which fall outside the right-of-way in wooded areas shall be limbed, topped to a diameter of not less than eight inches and the logs may be left on the ground provided they are separated from other logs so as to avoid a fire danger. The tops, limbs, exposed roots and other waste materials resulting from felling danger trees shall be burned within the right-of-way.

As there were substantial quantities of merchantable timber on the project, paragraph 101 B, subdivision 3, of the specifications declared that unless otherwise provided in paragraph 409, "all timber required to be cut by these specifications will become the property of the contractor and may be disposed of by him to his best advantage." Para-

[3] This is sometimes erroneously referred to in the transcript of the hearing as Mason Ridge.

graph 402, subdivision 6, defined merchantable forest products as products which might consist of "pulp wood, poles, piling or saw logs, depending on the species, locality and marketability," and added: "Products which are uneconomical to remove to the market may be treated as unmerchantable unless the specifications require that they be left on the right-of-way." The exception to the provision that all timber cut was to become the property of the contractor was contained in paragraph 409 B, subdivision 10, which provided that the owners of Tracts FC–S–118, 120, 174, 176 and 178, which will hereinafter be referred to as "the special tracts," would "remove any merchantable timber required to be cut by these specifications," and also provided that the contractor was not to enter these special tracts for clearing operations "until notified to do so by the contracting officer."

Paragraph 101 F of the specifications imposed a special requirement on the contractor in his clearing operations. It stipulated that by July 1, 1954, the contractor should clear and grub the approximately 148 tower sites between Stations 4681+00 and 6111+34 and should remove all obstructions placed by him which would prevent access to these tower sites. So important was this requirement that it was also stipulated in this paragraph that if, after July 1, 1954, the construction contractor were required, in order to proceed with his contract, to clear and grub tower sites or remove obstructions placed by the clearing contractor, amounts would be withheld from payments due the clearing contractor, which would be equal to the construction contractor's actual cost, plus 15 percent profit for such clearing, grubbing and removal work.

Paragraph 301 of the specifications provided that immediately following the award of the contract, the contracting officer would inform the contractor concerning "the status of right-of-way acquisition," and that upon receipt of this information the contractor would furnish the contracting officer with "a written clearing program, outlining in reasonable detail his proposed sequence of operations." It was also provided in this paragraph as follows:

> The contracting officer shall have the right to require revision of the clearing program at any time to meet requirements of timely completion of the clearing. Revision may also be required in view of changes in the status of right-of-way acquisition. The contractor shall at no time change his clearing program without approval of the contracting officer. Approval by the contracing officer referred to herein shall in no event be construed as relieving the contractor of any responsibility in connection with his performance of the work in the time specified.

Under the terms of the contract, the Government was to acquire and provide the necessary rights-of-way for the transmission line,[4] and shortly after the contract was signed the process of acquisition was 95.1

[4] Paragraph 308 of the specifications so provided.

percent complete.[5] One of the reasons for this was that much of the land needed for the transmission line was Forest Service land, and was thus already owned by the Government. Another reason was that the special tracts, which constituted part of the right-of-way, had been acquired by the Government as a danger tree area in connection with the construction of another line, the Foster Creek-Snohomish Transmission Line.[6] Among the rights that had not yet been acquired, however, were those involving danger tree strips adjacent to the special tracts, and Tracts CJ–S–185 and 187, which were owned by the Northern Pacific Railroad, and will hereinafter be referred to as "the Northern Pacific tracts."

As the acquisition of the rights-of-way was not entirely complete, paragraph 308 of the specifications included the following provisions:

> * * * The Government will make every reasonable effort to secure the right-of-way in advance of clearing operations and to make the right-of-way available in sections of such length that the agreed schedule of clearing and date of completion may be met.
>
> However, should it appear at any time that the Government has not acquired the right-of-way necessary for the performance of the work agreed upon and the work of the contractor is delayed, the contractor shall be entitled to no extra compensation or damages on account of such delay and the only adjustment that will be made will be the granting of an appropriate extension of time within the provisions of the contract.
>
> Before proceeding with the work on any portion of the right-of-way, the contractor shall request and the contracting officer will issue notice that the property involved is available for clearing. Should the contractor be the first Government contractor to enter the property, the notice will be written in duplicate. The contractor shall indicate on one copy of the notice the date he first entered the property, sign and return it to the contracting officer. Should the contractor proceed without such notice, he shall be liable for any claims for damages to property which may arise, and such procedure shall be entirely at his own risk.

The contract itself also contained the usual provisions relating to changes (article 3), changed conditions (article 4), extras (article 5), inspection (article 6), delays (article 9), disputes (article 15), and payments to contractors (article 16), and some of these provisions were reiterated in slightly different form in the specifications. Thus paragraph 204 of the specifications provided for partial progress payments, including a provision that the contracting officer would not approve any clearing for payment "until all timber is down, all brush is cut, all danger trees are down, and all logs are limbed and topped." Paragraph 205 of the specifications not only provided that extras must be ordered in writing by the contracting officer but also added that verbal instructions, agreements or understandings would not be

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[5] See Government Exhibit 5, a weekly clearing progress report for the week ending September 3, 1953, and also the transcript of the hearing at pages 224–25.

[6] See Tr., p. 391. Such tracts are identified by the letters FC–S.

recognized as proper authorization; paragraphs 214 and 215 of the specifications provided *inter alia* that all questions relating to the interpretation of the specifications should be decided by the contracting officer, subject only to an intermediate right of appeal in certain cases to the Administrator of the Bonneville Power Administration, and to a final right of appeal as provided in article 15 of the contract; and, finally, paragraph 311 provided for inspection of the work, subject to the following provision:

> The presence of the inspector shall not relieve the contractor or his responsible agent of any responsibility for the proper execution of the work.

The Award Meeting

On August 10, 1953, which was the day the contract was awarded and executed, the parties met in the office of the Assistant Chief Engineer of the Bonneville Power Administration at Portland, Oregon, to discuss the terms of the contract and various phases of the prospective operations of the contractor thereunder. Messrs. Paul C. Helmick, the owner and manager of the Helmick Company, and various officials of Bonneville were present at the meeting. Among the latter were V. E. Taylor, Chief of the Branch of Construction, James D. Bell, Chief of the Line Construction Section, William C. Shirran, the area construction engineer on the job, and Harold H. Heath, the clearing inspector and project engineer on the job.

The meeting so held has been referred to by the participating parties as the "award meeting," or conference. It is obviously of prime importance in evaluating the intentions of the parties, and in understanding the practical construction which they were to accord to the terms of the contract. Among the topics chiefly discussed at the meeting were such questions as (*1*) when the tracts to which the Government had not yet obtained rights could be made available to the contractor, (*2*) what was to be understood by merchantable timber, (*3*) what the obligation of the owners of the special tracts would be in removing merchantable timber, and (*4*) when the clearing of the tower sites would have to be completed.

Englesby, as the official in charge of the acquisition of the rights-of-way, reported that while the special tracts had already been obtained, the danger tree strips were not yet available. He added the assurance, however, that "we will get the danger trees right away." [7] As for the Northern Pacific tracts, Englesby commented later in the meeting that he should have had those "a long time ago," and, he added: "I can't promise the Northern Pacific right away because everybody they have are in Montana. They are cooperating with me to get it as quickly as they can take a look at it." [8] This prompted

[7] Minutes of the award meeting, p. 2.
[8] *Ibid.*, p. 6.

Helmick to remark: "We definitely won't have an operation there this year." Nevertheless, Englesby replied: "I think I will have it within ten days." [9]

Englesby's mention of the problem of acquiring the rights involving the danger tree strips precipitated the discussion of what would happen in connection with the removal of such danger trees as were merchantable. In answer to a question from Helmick whether there would be "extra money for the merchantable stuff that isn't removed by these other people (namely, the owners)," he was told that the intent was that "the owner will take merchantable timber and everything he leaves is to be taken care of by the clearing contractor. It is quite possible he might leave what you think would be a merchantable tree. No additional payment for that tract is in order just because the owner left something that you might think is merchantable." [10] This led Helmick to inquire whether the Forest Service definition of merchantable timber would be applicable but he was told that legally it could not apply to private lands. As to such lands, it was indicated that "it may consist of practically anything that is saleable." [11] Helmick also inquired whether he would have "to clean up" after the owners who removed merchantable timber. This was denominated a "good question," but the discussion of it was at first rather inconclusive. Shirran commented: "I don't think they are responsible for cleaning it up," but Englesby remarked to Helmick: "I don't believe that you should be compelled to clean up the slash." Finally, Shirran, however, remarked: "The Forest (Forest Service) and the State know that Sawyer or Peshastin (the owners of the tracts) are in there doing this clearing, knocking down trees. If they leave a mess in there, they are responsible for it and we will see to it that they are responsible * * *." [12] It was also brought out in the course of this discussion that the merchantable trees would be marked with a yellow paint.

The subject of the tower sites was introduced by Helmick with the remark: "Those tower sites are a must." Shirran replied: "Yes, according to the specifications." In the ensuing discussion, the Bonneville personnel emphasized the importance of clearing the tower sites, and of removing all obstructions which would prevent access to them by July 1, 1954. Helmick pointed to the difficulties which would exist in accomplishing this objective, in view of adverse weather conditions and the non-availability of some of the tracts constituting the right-of-way. Shirran remarked: "There is some of that right-of-way you can work the year round." [13] A little later, however, Helmick stated:

[9] *Ibid.*, p. 6.
[10] *Ibid.*, p. 3.
[11] *Ibid.*, p. 4.
[12] *Ibid.*, p. 5.
[13] *Ibid.*, p. 7.

"We are looking at a split operation and two different seasons here. By the time we get setup it will be September 1, and all that we are looking at is 30 days." [14] It seems finally to have been conceded that if the contractor were to be delayed because of the non-availability of parts of the right-of-way, he would be entitled to an extension of time. But Taylor remarked: "I am not sure Johnny Rathbun would." [15]

The Basis of the Claims

Although the contract contemplated that a clearing program would be established, and the Board assumes that it was submitted by the contractor and approved by the contracting officer, it has not been made part of the record in the case. Various phases of the clearing program which are involved in the contractor's claims were developed, however, at the hearing.

As so frequently happens, the expectations of the Government were not fulfilled in various respects. Considerable delay occurred in making the Northern Pacific tracts available to the contractor in their entirety, and in securing the danger tree strips adjacent to the special tracts. The owners of these special tracts also failed to remove the merchantable timber either from the tracts themselves or from the adjacent danger tree strips.

In at least one respect the contractor encountered a more favorable condition than it had expected. While normally work in the mountains would have to be abandoned early in November, and could not be resumed until the following April or May, unusually mild weather prevailed in the winter of 1953, and the contractor was able to prosecute his operations "right up until December of 1953." [16]

The negotiations for the Northern Pacific tracts had been commenced by Englesby on January 29, 1953, but they were covered with 12 to 18 feet of snow, and the necessary timber cruise could not be made at that time. In the summer of 1953, Englesby contacted Donald E. Deering, the Seattle representative of the Northern Pacific, a number of times but no one was then available to do the necessary field work for the Northern Pacific. The field men were at work in Montana where large areas of Northern Pacific timber had been infested with bugs. On September 16, 1953, Englesby again called Deering who told him that he still had no field men available, although he had expected them prior to this date.

A part of one of the Northern Pacific tracts, Tract CJ–S–185, was made available to the contractor in the fall of 1953. In October of 1953, Bell called Englesby and told him that the contractor had equipment on the summit of the Cascades—both of the Northern Pacific

[14] *Ibid.*, p. 9.
[15] *Ibid.*, p. 10.
[16] See Tr., p. 307.

tracts were located on top of Stevens Pass [17]—and had expressed a desire to go down the east slope. Englesby, therefore, called Deering who gave permission for the contractor to operate on the east slope.[18] The railroad ordinarily required a timber cruise before granting a right-of-way on land which it owned [19] but there was no timber on the summit of the Cascades. For the same reason, however, there was little clearing to be done on the east slope of the tract.[20]

Just prior to May 26, 1954, the Northern Pacific field men finally went over the timber on the tracts, and their report was forwarded by Deering to the railroad's home office in St. Paul. In June of 1954, Deering informed Englesby by telephone that the tracts had been released, and the release was confirmed in writing some time after June 9, 1954.

Shortly before this Helmick had written a letter dated May 24, 1954, to Bell stating that the operations of his subcontractor, Stewart Trombley, who was expected to do the clearing of the Northern Pacific tracts,[21] were seasonal in nature, and that any further delay in securing these tracts might prevent completion of the work in this area in 1954. He received in reply a letter dated June 4, 1954, and signed by Arnold A. Huff, Acting Chief of the Line Construction Section of Bonneville, in which it was stated that Tract CJ–S–187 [22] "should be released to you not later than June 10, 1954." When this expectation was not realized, Helmick again wrote to Bell under date of June 15, 1954,[23] calling his attention to the fact that the Northern Pacific tracts were still not available, and stating: "Men and equipment were ready to enter these areas in October 1953, but were prevented from performing any work. We were advised that Tract CJ–S–187 would be available on June 10, 1954, and men and equipment were again moved to the area and have been standing by since June 10, 1954." Helmick also warned Bell that he would expect an extension of time, as well as additional compensation, because of the unreasonable delays. Verbal permission to enter the Northern Pacific tracts was finally given by Bonneville on June 18, 1954, and this was confirmed in writing by a letter from Bell to Helmick dated June 28, 1954, which was received by the contractor on the following day.[24] In this letter, Bell stated that the contractor "should exert every effort to complete the work as required under paragraph 101–F of the specifications as soon after

[17] See Tr., p. 396.
[18] See Englesby interrogatories, p. 3, and Tr., p. 305.
[19] See Tr., p. 398.
[20] See Tr., p. 305.
[21] See Tr., pp. 218, 309.
[22] It should be noted that no reference is made in this letter to the west slope of Tract CJ–S–185, although the record indicates that this part of the tract had not yet been made available to the contractor. The reference to Tract CJ–S–187 was apparently intended by the parties to be a sort of shorthand description of both tracts.
[23] This letter is Appellant's Exhibit 3.
[24] See Tr., p. 27, and Appellant's Exhibit 4.

July 1, 1954 as possible." He added: "On the basis of the alleged delays as set forth in your letter, we do not feel that you are entitled to an extension of time on your contract at this time. If, nevertheless, you wish immediate formal consideration of your extension request by the contracting officer, please so advise us." In a letter to Bell dated July 6, 1954, the contractor duly requested this time extension, and at the same time proceeded with the clearing of the Northern Pacific tracts. The Helmick Company worked on the bulk of Tract CJ–S–185, while Tract CJ–S–187 was Trombley's responsibility exclusively.[25] The subcontractor experienced difficulty in performing its share of the operations, however, and the Helmick Company had to come to his assistance, and take over part of his work.[26] The contractor attributes the troubles of the subcontractor to the delay in making the Northern Pacific tracts available, while the witnesses for Bonneville attribute them to the subcontractor's mode of operations [27] and to the inadequacy of his equipment and personnel, as well as to adverse weather conditions.[28] In any event, the work of clearing the Northern Pacific tracts was completed by November 1954.[29]

The special tracts themselves had been made available to the contractor for clearing by a letter from Bell dated September 18, 1953. Although the owners of these tracts had not removed any of the merchantable timber on these tracts, which the specifications contemplated that they would be entitled to take, the contractor both cut and removed all of the trees without filing any claim for additional compensation at this time except that he commented to Shirran and Heath that the owners should have cut and removed the merchantable timber.[30] However, in its letter of June 15, 1954, to which reference has already been made, the contractor did make a claim for additional compensation for cutting and removing the merchantable timber on the special tracts. "The timber and debris has not been removed, as provided in the specifications," the contractor stated, "and these changed conditions will increase our costs in these tracts." In a letter dated October 12, 1954, to Bell, Helmick stated: "All told, there was 1,105 merchantable trees that were to have been removed by the owners in accordance with the specifications." [31] The timber on the special tracts had been cut and removed with the knowledge, of course, of the

[25] See Tr., p. 309.
[26] See Tr., pp. 218–20, 227–31, 298, 309.
[27] See Tr., p. 219. As Trombley was primarily a logger, he was more interested in getting the timber to market where he could realize funds on its sale than in pursuing the clearing operation which did not return such an immediate profit.
[28] See Tr., pp. 227–31.
[29] See Tr., p. 259.
[30] See Tr., p. 242.
[31] The letter is Appellant's Exhibit 8.

Government inspectors.[32] Moreover, the contractor has sold this timber, which amounted to 95,260 board feet, for a price of $2,857.80.[33]

Delay was experienced by the Government, however, in securing rights to cut the danger trees on the strips adjacent to the special tracts which were on the north side of the right-of-way.[34] These tracts will hereinafter be referred to as the adjacent danger tree strips or areas. The contractor had been working in the vicinity of the special tracts in October and November 1953, and again during the summer and fall of 1954, but the adjacent danger tree strips had not then been available for cutting.[35] The Government had to resort eventually to condemnation proceedings to obtain the rights to the adjacent danger tree strips, and an order of possession was obtained on August 18, 1954, from the United States District Court for the Eastern District of Washington.[36] Heath testified that on August 4, 1954, which date, if correct, would be actually before the order of possession was entered, he told Casebeer, one of the contractor's foremen on the job, that the adjacent danger tree strips were now available for cutting.[37] Shirran testified that at about the same time, he told Helmick to cut the adjacent danger trees because he was right in the area where they were, and it would not then be a costly operation. Helmick replied, however, that he thought that "he had an extra coming on that," and Shirran agreed with him but suggested that they discuss this later on. Shirran reported the conversation to the Bonneville construction office, which asked him to contact Helmick, and get him to "put in a figure of how much he would charge us to do this extra work * * *."[38] The official notice to Helmick that the adjacent danger tree strips were now available was given in a letter from Shirran to him under date of September 3, 1954, and in the same letter Shirran asked for a price quotation for removing the danger trees. "Since the specifications state the owners will remove the merchantable timber in these tracts," he declared, "you are not held responsible for these danger trees."[39] There ensued a rather protracted period of negotiation which was carried on by correspondence between Helmick and the officials in Bonneville's central office in Portland, including Taylor,

[32] See Tr., pp. 41, 366.
[33] See Tr., pp. 41, 352.
[34] See Tr., p. 61.
[35] See Tr., p. 45.
[36] See Tr., p. 115 and Appellant's Exhibit 14. The finding of the contracting officer (page 3) that the order of possession was obtained on August 6, 1954, would seem to be in error.
[37] See Tr., pp. 369–70.
[38] See Tr., p. 188.
[39] See Tr., p. 42, and Appellant's Exhibit 5.

Bell, and Huff.[40] None of these officials questioned the contractor's right to additional compensation for removing the danger trees which the owners had failed to cut but they thought that the price asked by Helmick was much too high. He first asked for $21,344 for cutting the merchantable timber not only on the danger strips but also on the right-of-way itself. He finally came down to $12,000. As the Government, however, had secured estimates of $7,000 to $10,000,[41] even the $12,000 offer of Helmick was turned down. Indeed, the Bonneville officials, having in the meantime consulted their legal advisors, and having received an opinion to the effect that under the terms of the specifications the contractor was bound to cut the merchantable timber on both the special tracts and the adjacent danger tree strips, finally ordered the contractor to proceed with this work without additional compensation. As it was then, however, past the middle of November 1954, snow was on the ground, and the contractor had moved off the job, the work could not be immediately accomplished.[42] During the winter there was further correspondence between the contractor's attorneys, and the Government's attorneys concerning the requirements of the contract in so far as the danger trees were concerned.[43] Of particular significance was the letter dated February 25, 1955 from Dean F. Ratzman, Acting Assistant Regional Solicitor, who is one of the Department's counsel handling the present appeal, to the contractor's attorneys, in which the contractor was instructed as follows:

> The Bonneville Power Administration must proceed with its plans for the construction of the transmission line, and the danger tree removal must be finished *not later than September 1, 1955.* [Italics supplied.]

When the spring of 1955 arrived the contractor moved back on the job, although there was still a good deal of snow on the ground, and the work of cutting the danger trees on the strips adjacent to the special tracts was accomplished in April and May of 1955.[44] Shirran testified that he did not tell Helmick to remove the adjacent danger trees in the spring of 1955 when there was snow on the ground, and that this work could have been done in October 1955.[45] Apparently, however, Shirran was ignorant of the instruction which the contractor had been given in the letter of February 25, 1955 to complete the

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[40] See letters of September 22, 1954, from Taylor to Helmick; of October 6, 1954, from Helmick to Bell; of October 7, 1954, from Taylor to Helmick; of October 12 and November 1, 1954, from Helmick to Bell; of November 1, 1954, from Taylor to Helmick; of November 4, 1954, from Helmick to Bell; and November 19, 1954, from Taylor to Helmick.

[41] See the Findings of the Contracting Officer, p. 5.

[42] See Tr., p. 46.

[43] The most important of these letters are Appellant's Exhibits 21, 22, and 23. See also Tr., pp. 265–66.

[44] See Tr., p. 47.

[45] See Tr., pp. 222–23.

danger tree removal not later than September 1, 1955.[46] In performing this work the contractor had the assistance of another subcontractor, the firm of Christofferson & Stakkeland.[47] The contractor was not permitted to remove and sell the merchantable timber from the danger tree strips outside the special tracts, and at the time of the hearing it was still lying on the ground.[48] The Government had, indeed, advertised this timber for sale but had not then succeeded in disposing of it.[49]

In view of the difficulties it encountered in performing the contract, the contractor has advanced three claims in specific amounts. It claims additional compensation in the amount of $6,919 [50] for clearing the Northern Pacific tracts; $9,344 for cutting and removing the merchantable timber from the special tracts; [51] and $15,329.29 for moving back on the job and cutting the adjacent danger trees. In so far as these claims are based on delays of the Government in making the tracts available, they are based on a common theory. This is that the Government's delays were unreasonable, and made it necessary for the contractor to perform its work under more difficult conditions; and that, moreover, by failing to give the contractor extensions of time while the work was in progress, the Government caused the contractor to speed up its activities and incur extra costs for overtime and equipment, in order to complete the work as originally scheduled. In so far as the adjacent danger tree strips are concerned, the gravamen of the contractor's complaint seems to be the failure of the Government to make the special tracts and the adjacent danger tree strips available simultaneously. In requesting additional compensation for cutting as well as removing the merchantable trees on the special tracts and adjacent danger tree strips, the contractor challenges the contracting officer's interpretation of the requirements of the specifications, which was that the timber the owners were to have removed was first to have been cut by the contractor.

The Merits of the Claims

As the contractor claims that the delays of the Government in acquiring the Northern Pacific tracts were unreasonable, it is necessary

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[46] See Tr., p. 265. Ryan, the contractor's superintendent, pointed this out in testifying that they could not have waited for the snow to be cleared because the contracting officer had ordered them to have the work done before September 1, 1955.

[47] See Tr., p. 66–67.

[48] See Tr., pp. 40, 80, 205, 270.

[49] See Appellant's Exhibit 15.

[50] The contracting officer assumed that this claim was in the amount of $7,000 but Helmick's testimony at the hearing supports only the claim in the lesser amount. See Tr., p. 33.

[51] The contractor's claim for this operation was actually $12,201.80, but it gave the Government a credit of $2,857.80 for the value of the timber which it had sold, which left a balance of $9,344 (Tr., p. 41).

to consider first whether the Government delayed unnecessarily in making the tracts available to the contractor, or was otherwise at fault. The contract obviously contemplated that there might be some delay in the acquisition of some of the rights-of-way, since it provided expressly that the contractor would be entitled only to an extension of time by way of adjustment if such delay actually occurred.

In *United States* v. *Rice*, 317 U. S. 61 (1942), the Supreme Court held that a delay resulting from permitted changes by the Government or from the discovery of changed conditions does not constitute a breach of contract by the Government for which damages are payable by it to the contractor, the only obligation of the Government in such cases being to grant to the contractor an extension of time for the completion of the contract. In *United States* v. *Foley Co.*, 329 U. S. 64 (1946), a case involving a contract for the installation of lighting of the runways of the Washington National Airport in the performance of which the contractor was delayed by reason of the failure of the Government to make the runways available on time, the Supreme Court again declined to hold the Government liable to respond in damages for the delay, but appears to have conceded at least *arguendo* that the Government might be liable to pay damages for its delays if it was at fault in meeting its obligations under a contract.

The Court of Claims has shown great reluctance in following the decisions in the *Rice* and *Foley* cases. In *Walter A. Rogers et al., Trustees* v. *United States*, 99 Ct. Cl. 393 (1943), a case in which the Government had caused delay by failure to remove railroad tracks as required by the contract, and was held liable for damages, the court said: "We do not construe the *Rice* case as holding that affirmative wrongful action or failure of the defendant to discharge its obligations under the contract could be cured by simply waiving liquidated damages." Indeed, it added that the Government could not "kick the contractor all over the lot." In two other cases which followed, *Magoba Construction Co.* v. *United States*, 99 Ct. Cl. 662 (1943), and *Langevin* v. *United States*, 100 Ct. Cl. 15 (1943), the liability of the Government for damages for delay was denied on the ground that the changes made by the Government had been reasonable and made with reasonable promptness. However, in *Harwood-Nebel Construction Co.* v. *United States*, 105 Ct. Cl. 116 (1945), the court held the Government liable for damages for its delays because changes had not been made in a reasonable time, and declared that notwithstanding the *Rice* case, the Government must be held liable for any unreasonable delay. The doctrine that the Government was liable for "any unnecessary delay" was announced in *James Stewart & Co.* v. *United States*, 105 Ct. Cl. 284 (1946).

After the *Foley* decision, the Court of Claims in *J. J. Kelly Co.* v. *United States*, 107 Ct. Cl. 594 (1947), indicated that it believed the

principle of that decision would extend to delays that were the fault of the Government. "While, probably due to our own fault and limitations," said the court, referring to the *Foley* case, "we do not find ourselves completely in accord with the logic of that decision, yet, since under our system the Supreme Court is the final arbiter in these matters * * * we accept and apply the principle laid down by that court." (P. 602.) Nevertheless, in *George A. Fuller Co.* v. *United States*, 108 Ct. Cl. 70 (1947), the court held the Goverment liable in damages for its delay in furnishing models required by the contractor in constructing the Archives Building in Washington, D. C., and insisted that even the Supreme Court would hold that the Government was liable for breaching an implied condition that it would not delay the contractor, and was excused only when the contract expressly provided otherwise, or the delay was incident to permitted changes. Again, in *The Kehm Corp.* v. *United States*, 119 Ct. Cl. 454 (1950), a case which involved a contract for the manufacture of concrete bombs for which the Government was to supply the tails, the court held the Government liable for its delay in furnishing them, and declared: "Logic would seem to require that a contract binding one party to fabricate goods for another by a certain time out of material to be furnished by the other must perforce be held also to bind the other party to supply the material sufficiently early for the work to be done as promised * * *." However, in the last few years, the Court of Claims seems to have finally reconciled itself to the doctrine, which is the essence of the *Foley* case, that the Government is liable for its delay only if negligence on its part can be shown,[52] and it has allowed recovery only where negligence on the part of the Government has been affirmatively shown,[53] or it found in the nature of the contract what was tantamount to an undertaking on the part of the Government not to delay the contractor.[54]

In some of the cases decided by the Court of Claims the specifications included provisions like those in the present case expressly exculpating the Government from any liability for delay by way of damages but the court nevertheless held that, even though the parties had contemplated delay, the contract was subject to an implied condition that the Government was not to cause unreasonable delay.[55] The Board is clear that the doctrine of cases of this kind is certainly applicable to the present case in which the specifications *expressly* provided that the Government would make "every reasonable effort" to secure the rights-

[52] See *Raymond J. Daum* v. *United States*, 120 Ct. Cl. 192 (1951); *Otis Williams & Co.* v. *United States*, 120 Ct. Cl. 249 (1951); *Barling* v. *United States*, 126 Ct. Cl. 34 (1953).

[53] See *Matt J. Walsh* v. *United States*, 121 Ct. Cl. 546 (1952); *Rafael Torres, Jr.* v. *United States*, 126 Ct. Cl. 76 (1953).

[54] See *Fern E. Chalender* v. *United States*, 127 Ct. Cl. 557 (1954); *William G. Thompson* v. *United States*, 130 Ct. Cl. 1 (1954).

[55] See, for instance, *Wm. Eisenberg & Sons, Inc.* v. *United States*, 110 Ct. Cl. 388, 430 (1948), and *J. A. Ross & Co.* v. *United States*, 126 Ct. Cl. 323, 333 (1953).

of-way in advance of clearing operations. The Board is convinced, however, that the Government did make every reasonable effort to secure the Northern Pacific tracts as early as possible, and that the delay which it encountered was due to circumstances entirely beyond its control.

Since the record shows that the Government began its efforts to acquire the Northern Pacific tracts long before the contract was awarded, it certainly manifested due diligence in initiating negotiations, and since the obstacles that it encountered were wholly unexpected and could not be overcome by any measures on its part, it cannot be said that it was not diligent in prosecuting the negotiations. The Government, to be sure, could have instituted condemnation proceedings to acquire the tracts, but even such proceedings take several months, since surveys and cruises are necessary prior to condemnation, and cannot be accomplished when snow is on the ground.[56] Condemnation proceedings involve, moreover, questions of public policy in the relations of the Government with its citizens,[57] and have been instituted by Bonneville in only 3 percent of its cases.[58] In such matters, moreover, hindsight is always better than foresight. It is apparent from the record that the Government was constantly led on to believe that the tracts would be acquired much sooner than they actually were, and it would certainly be difficult to fix the point at which its patience should have been exhausted. The Government was, indeed, encouraged to be patient by the statement of Helmick at the award meeting that he would not operate on the west side of the Cascades in 1953. In his testimony at the hearing, Helmick, while conceding that he had made the statement attributed to him at the award meeting, contended that he was not permitted to carry out his expressed intention. "We were ordered to put crews in there," he testified, "and to accomplish the work as soon as we possibly could," and he added that "it was definitely understood that we had to put crews in there, and we did put crews in on the tracts that were available." [59] Helmick did not define precisely what he meant by "in there," but it is difficult to perceive how an order to operate on the tracts that were available would have any bearing on his intentions with respect to the Northern Pacific tracts that were not available. There is, moreover, testimony of Englesby that he "distinctly" remembered that when some time subsequent to the award meeting, namely in October or early November 1953, he explained to Helmick the difficulties which he was encountering in securing the Northern Pacific tracts, the latter had reiterated that "he did not intend operations on the

[56] See Tr., p. 124.
[57] See Tr., p. 94.
[58] See Tr., p. 128.
[59] See Tr., pp. 353–54, and compare Tr., p. 176.

west side of the Cascades in 1953."[60] Englesby, who was concerned solely with the negotiations for the Northern Pacific tracts, certainly had a right to rely on this statement of Helmick's in carrying on the negotiations and in deciding whether condemnation would be necessary.

Helmick testified that he was notified at the award meeting that "all of the tracts would be available not later than, I think it was either the 20th or the 24th of August 1953."[61] The minutes of the meeting show, however, that the tracts promised by August 24 were only tracts CJ–S–100, 109, 110, 111 and 112, which are not even involved in the present proceeding, and Helmick's testimony that he was promised all the tracts then still unavailable must be rejected.[62] Even if such a promissory statement had been made at the award meeting, moreover, it could not be regarded as binding, since it would be inconsistent with the provision of the written contract with respect to the availability of the right-of-way. The contractor seems to regard the statements made at the award meeting as definite representations or assurances, but it is clear that they were no more than statements of the Government's expectations at that time.

An even more basic fallacy underlies the contractor's position with respect to the availability of the right-of-way. While the contract provided that the Government would make *every reasonable effort* to secure the rights-of-way in advance of clearing operations, this was not tantamount to a promise that the rights-of-way would be available *within a reasonable time*. Notwithstanding every reasonable effort on the part of the Government, a very considerable time could elapse before the rights-of-way were secured. Moreover, even if it were to be assumed that the unavailable tracts had to be furnished within a reasonable time, it would be doubtful under the circumstances of the present case that a delay of approximately ten months in making the Northern Pacific tracts available to the contractor was an unreasonable delay. The Board must conclude, therefore, that the contractor is not entitled to additional compensation merely by reason of the delay in making these tracts available.

The contractor puts special emphasis on the delay which occurred between June 10 and 18 in making the Northern Pacific tracts available, and which, it asserts, resulted in the idling of its men and equip-

[60] See Englesby interrogatories, p. 4.

[61] See Tr., pp. 38–39.

[62] Helmick's memory seems to have been particularly fallible when it came to associating dates with particular phases of his operations. See, for instance, his erroneous testimony that he was not given access to the danger trees outside the special tracts until April 15, 1955 (Tr., p. 132). This was actually when the work of clearing the danger trees was done. See also his wholly inconsistent testimony that the same danger trees were not made available until October 2, 1954 (Tr., pp. 169–70). The notification that these danger trees were available was given by the letter from Shirran to Helmick dated September 3, 1954.

ment. It may be that the Government was remiss in leading the contractor to believe that these tracts would be released "not later than June 10, 1954," but again this appears to be only a statement of an expectation, unless, indeed, the letter which contained this statement was intended to be the written notice of availability contemplated by paragraph 308 of the specifications. This, apparently, is not quite the contention of the contractor but, if it were, the contractor quite clearly would have no case, for then it would be bound to proceed with the clearing operation, and there would be no justification for keeping its men and equipment in a state of inactivity. On the other hand, if the written notice of availability was the letter of June 28 rather than that of June 4, the case of the contractor is no better since it would be proceeding legally at its own risk in moving men and equipment to the tracts prior to the receipt of written notice, as, indeed, paragraph 308 of the specifications expressly provides. The record shows that it was not uncommon practice for the contractor to jump the gun, so to speak,[63] but this practice did not set aside the formal requirements of the specifications.

The contractor has not succeeded, moreover, in establishing satisfactorily that the men and equipment moved to the Northern Pacific tracts were actually idle during most of the ten-day period. Although Helmick, while he was testifying, apparently had payrolls before him concerning the extra costs allegedly incurred by reason of the ten-day delay, the payrolls were not introduced in evidence. Even if they had been introduced, however, they would not by themselves establish that the men and items of equipment listed therein were actually idle. When asked what the men did during the ten-day period, Helmick replied: "I don't know what they did do," [64] and revealed that he was testifying on the basis of information furnished to him by Stewart Trombley, his subcontractor, who did not himself testify at the hearing, as well as by two of his foremen. Helmick himself visited the job site only on June 15, and while he testified that no work was then being done, he conceded that a few trees had been felled, and that the road may have been opened up. When Heath visited the site on June 9 nobody was on the tracts, but he noticed that about 80,000 feet of timber (which would be a small quantity) had been felled. However, Trombley was operating when Heath visited the site again on June 16. He found that the roads had been graded and the snow had been taken out, and logging was actually in progress. Apparently, Trombley was stopped by the Bonneville engineers from doing any

[63] Shirran said in reference to this practice that "it isn't out of the ordinary." But, he added, that the contractor "could surely get himself in trouble" if he did not have the written notice. (Tr., p. 189.)

[64] See Tr., p. 19.

further work because there had been some delay in securing the release of the Northern Pacific tracts.[65]

In view of the legal and factual situation involved in the premature occupation by the contractor of the Northern Pacific tracts, any increased costs which the contractor may have sustained as a result thereof cannot be allowed.

A more perplexing problem is presented, however, by the delay of the Government in making available to the contractor the danger strips adjacent to the special tracts. This perplexity is the result both of the obscurity of the applicable specifications and of the vagueness of the record.

It should be noted that paragraph 409 B, subdivision 10, which relates to the special tracts, does not expressly mention the adjacent danger tree strips. Moreover, there are provisions in the specifications which appear to make a distinction between the right-of-way itself and danger tree areas. This distinction is clearly made in paragraph 101 B, subdivision 1, in imposing the obligation on the contractor to "dispose of cleared materials from the right-of-way and danger tree areas." The same distinction is also implied in paragraph 406 C of the specifications which refers to the falling of danger trees on the right-of-way, or "outside the right-of-way." In view of the distinction the question at once arises whether the failure to mention the danger tree strips in paragraph 409 B, subdivision 10, of the specifications has the effect of excluding them from the provision of that paragraph which contemplates that the owners will remove any merchantable timber. Indeed, the question also arises whether the provision of the specifications exculpating the Government from liability for damages in case of failure to secure the rights-of-way in advance of clearing operations is applicable in case of delay in making danger tree areas available to the contractor. Yet it is perfectly plain from the course of dealing revealed by the record that the contractor, as well as the Government, construed the specifications as subjecting the adjacent danger tree areas to the same provisions which governed the special tracts themselves. In view of the familiar canon that the practical construction which the parties to an ambiguous contract have given to its provisions is entitled to great weight,[66] the Board is constrained to accept this construction.

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[65] The testimony relating to the final ten-day delay in making the Northern Pacific tracts available is to be found in the transcript of the hearing at pages 10, 19, 20–21, 23, 24, 311, 312, 364–66.

[66] See *District of Columbia* v. *Gallaher*, 124 U. S. 505, 510 (1888); *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 118 (1913); *Zimmerman et al.* v. *United States*, 43 Ct. Cl. 525, 564 (1908); *Maneely* v. *United States*, 68 Ct. Cl. 623, 631 (1929); *North Pacific Emergency Export Assn.* v. *United States*, 95 Ct. Cl. 430, 449 (1942); *Central Eng. & Constr. Co.* v. *United States*, 103 Ct. Cl. 440, 465 (1945); *Franklinville Realty Co.* v. *Arnold Constr. Co.*, 120 F. 2d 144, 148 (5th Cir. 1941); *Pasquel* v. *Owen*, 186 F. 2d 263, 268 (8th Cir. 1950), and other cases there cited.

It is implicit in this conception of the requirements of the contract, however, that the clearing of the right-of-way itself and the felling of adjacent danger trees should be regarded as a related operation. In other words, the contractor would normally expect that the danger trees adjacent to a tract would be available for felling at the same time that the tract itself was being cleared. Indeed, it may plausibly be argued that this was a requirement of the contract, since paragraph 204 B, subdivision 1, states that the contracting officer is not to approve payments for clearing work "until all timber is down, all brush is cut, *all danger trees are down*, and all logs are limbed and topped." (Italics supplied.) It is, however, unnecessary to read such a requirement into the contract to give effect to what must reasonably have been assumed to be the expectations of the parties. It is necessary only to assess the delays of the Government in making the danger tree areas adjacent to the special tracts available to the contractor in the light of these expectations.

Now, approached from this point of view, it becomes immediately apparent that there is a very serious question whether the delay of the Government in this instance can be justified. While the special tracts were made available to the contractor in September 1953, the adjacent danger trees were not made available until September 1954. Calculating on the basis of the time elapsing between the date of the notice to proceed and the date when the adjacent danger tree strips were made available, the total delay was almost thirteen months. It is true that this delay was only approximately three months longer than in the case of the Northern Pacific tracts but, since the delay made it impossible to carry out what was expected to be a related operation, it must be far more seriously regarded. Moreover, the delay brought the contractor far closer to the final date for the completion of the contract. Indeed, when the adjacent danger trees were finally made available to the contractor this date was less than seven weeks away.

It may be assumed that the ultimate burden of proving that the Government did not make every reasonable effort to make the adjacent danger trees available is on the contractor. In view of the nature and duration of the delay, however, the burden must be regarded as shifting to the Government to offer some reasonable explanation of the delay.[67] The record is, however, devoid of any such explanation. While it shows that condemnation proceedings were eventually instituted to acquire the adjacent danger trees, it does not show precisely why there was such a long delay in instituting these proceedings. Indeed, the Government in propounding the interrogatories to

[67] The Court of Claims has recognized that, when the Government has delayed performance, it is under a duty to offer an explanation of the delay. See *John C. Rodgers et al. v. United States*, 48 Ct. Cl. 443, 448 (1913), and *Henry Ericsson Co. v. United States*, 104 Ct. Cl. 397, 426 (1945).

Englesby, who was in charge of acquisition matters, included not so much as a single question relating to the acquisition of the adjacent danger tree strips. This was certainly in strange contrast to the fullness of information which it sought to elicit and did elicit in the case of the Northern Pacific tracts. As the Government has failed to offer any explanation of the long and protracted delay, the Board is constrained to conclude that it did not make every reasonable effort to secure the danger tree areas adjacent to the special tracts in advance of the contractor's clearing operations.

Before leaving the subject of the Government's delays, there must also be considered the contractor's claim that its operations were accelerated, and hence its costs increased, by the delay of the Government in granting an extension of time. Under the terms of the contract, the contractor was clearly entitled to an extension of time to compensate for any delay to which it was actually subjected even though the Government had made every reasonable effort, as in the case of the Northern Pacific tracts, to make a particular portion of the right-of-way available. The timely granting of an appropriate extension of time was particularly important in relation to these tracts because the specifications fixed, so to speak, an intermediate completion date for part of the work (namely, the tower sites) in addition to the final completion date for all work under the contract, and buttressed the intermediate completion date with penalties which might prove as severe as the provision for liquidated damages. When the contractor was told in Bell's letter of June 28, 1954, that it should exert every effort to complete work on the tower sites "as soon after July 1, 1954 as possible," although this date had virtually arrived, it is apparent that the Government was exerting pressure on the contractor to speed up its operations. This pressure was only increased by the statement of Bell that he felt that the contractor was not then entitled to an extension of time, despite the fact that it was coupled with an offer to transmit any request for an extension of time to the contracting officer. It must be remembered that the writer was not merely a local official at the job site, but the Chief of Bonneville's Line Construction Section, located at Bonneville's central headquarters, and hence, presumably, in touch with the contracting officer. It is highly interesting to note that in his findings the contracting officer characterized the action of Bell as a denial of the contractor's requested extension of time.[68] Thus, he stated: "The Government gave oral permission to enter the tracts on June 18, which was confirmed by letter on June 28, *but denied the Contractor's request for a time extension.*" [Italics supplied.]

It is true that eventually the contracting officer did grant an extension of time which was exactly enough to save the contractor from

[68] See Findings, p. 1.

the imposition of liquidated damages. The extension of time of 208 days granted by the contracting officer was far less than the period of delay in making the Northern Pacific tracts and the danger tree strips adjacent to the special tracts available to the contractor. But without passing on the question whether the extension of time granted was adequate [69]—except to say that an extension of time exactly equal to the actual completion date of a contract seems more in the nature of a waiver of liquidated damages than a determination of the actual right of the contractor to an extension of time—it is apparent that the action finally taken on the contractor's request could not undo the effect of the pressure already exerted by the Government. The Board knows of no case, to be sure, which holds that the mere delay of the Government in granting an extension of time for performance of a contract, or the mere failure of the Government to act on a contractor's request for such an extension, obligates the Government to make good the losses suffered by the contractor as a result.[70] Obviously, however, the Government went far beyond this in the present case.

Notwithstanding the pressure to accelerate its operations undoubtedly exerted on the contractor by the Government, the Board finds no satisfactory evidence that the contractor incurred additional costs as a result of its operations on the Northern Pacific tracts. The mere fact that the contractor had to come to the rescue of its subcontractor because he was falling behind schedule indicates that this state of affairs rather than the conduct of the Government was responsible for any special effort which the contractor may have made. Also the fact that the work was not completed until November 1944, or more than 4 months after the Northern Pacific tracts were made available, although both tracts together did not extend apparently for more than about a mile and a half,[71] would suggest that the contractor was not exerting unusual efforts. There is no evidence of the employment by the contractor of an increased number of men or items of equipment. The record suggests, on the contrary, a paucity of men and equipment. As the burden of proof in establishing the

[69] It is interesting to note that in the Statement of the Government's Position is contained a statement, made with respect to the contractor's request for an extension of time on account of the delay in making the danger tree strips available, which appears to indicate that the Government regarded an extension of time less as a matter of right than as a reward for the contractor's diligence. "Action was delayed," it is explained, "on the requested time extension for this work because the exact amount of time involved was not known. This depended upon accessibility of the trees due to weather conditions and *the diligence with which the Contractor pursued the work when conditions permitted.*" [Italics supplied.]

[70] Such a case as *Peter Kiewit Sons' Co.* v. *United States,* 101 Ct. Cl. 715, 729 (1944) suggests, indeed, the contrary of such a proposition. Compare also the appeal of *Strick Company,* ASBCA No. 2416 (April 7, 1956), holding that the Government is not liable for delay in making payment under a change order, despite the economic disadvantage to the contractor.

[71] See Tr., p. 126.

basis of the claim is on the contractor, the Board cannot allow additional compensation for any accelerated operations on the Northern Pacific tracts.

The Government exerted even more extreme pressure in getting the contractor to cut the danger trees on the strips adjacent to the special tracts, perhaps for the very reason that its delay had been longer. Indeed, in this instance, by instructing the contractor definitely to complete the danger tree removal not later than September 1, 1955, it failed to observe the requirements of the contract, if in fact the contractor was entitled to a longer extension of time than would be covered by this date. There is no necessity for determining this, however, since the contractor would in any event be entitled to additional compensation by reason of the Government's unjustified delay in making available to the contractor the adjacent danger tree strips. The Government contends, to be sure, that the contractor could have minimized the extent of the delay, and its results by accomplishing the danger tree removal in the summer or fall of 1954, but the contractor was not bound to act on the basis of the informal requests of Shirran and Heath, nor was he bound to do this work, if not required by the specifications, unless a change order to cover the work were issued by the contracting officer.

The contractor's request for the issuance of such an order poses, perhaps, the most important question involved in the clearing claims, namely, whether the contractor was bound to cut the merchantable timber that was to be removed by the owners from the special tracts and adjacent danger tree strips. The Government takes the position that there was absolutely no ambiguity in the provision of paragraph 409 B, subdivision 10, that the owners of the special tracts would remove all the merchantable timber "required to be cut by these specifications." The Government argues in support of this position that the term "remove" does not imply that the owners would cut the timber before removing it, since the contractor only was required to cut timber under the terms of the specifications, and that it was, therefore, the duty of the contractor to cut the timber prior to its removal by the owners. The contractor challenges, of course, the validity of this argument, and has gone pretty far afield in marshalling cases involving interpretations of the term "remove" and in pointing to later contracts made by the Government in which owners of rights-of-way acquired by it were expressly required or authorized to cut *and* remove timber. The cases do not seem to the Board to be in point since they involve a question that presents different considerations of policy, namely, the question whether a purchaser of timber has the right to enter on the land after the expiration of the time specified in the contract to remove the timber cut by him prior thereto. As for the later contracts, the Board has said that the Government is not to be penalized for

attempting to clarify contractual provisions which have become the subject of controversy.[72] The real question whether the provision clarified was ambiguous, therefore, remains.

It seems to the Board that this question must now be approached from a practical and realistic point of view rather than as an exercise in juristic hermeneutics. The contractor complains rather bitterly of the sudden reversal of position by the Government, and the complaint must be regarded as justified. There is no doubt that from the very beginning of the administration of the contract all the officers of the Government from the contracting officer to the local project officers shared the contractor's view of the requirements of the specifications. The minutes of the award meeting indicate clearly that all the Bonneville officials except the contracting officer—he was not present at the meeting—thought that the contractor would not be required to cut the merchantable timber that was to be removed by the owners from the special tracts and adjacent danger tree strips. They would hardly have spoken of the owners taking timber and knocking down trees if they thought otherwise. While there is no direct evidence of the contracting officer's views, it can hardly be supposed that his subordinates at the central headquarters of Bonneville would have carried on long negotiations with the contractor if their views did not have his approval. The negotiations finally broke down not because the parties were at loggerheads on a question of interpretation, but simply because they could not agree on the amount of additional compensation for what they undoubtedly regarded as extra work.

Under these circumstances it would be extraordinary, indeed, if the Board should conclude that there was not the slightest element of ambiguity in the provisions of the specifications. Actually it does not require any too great a degree of ingenuity to find several sources of ambiguity. So far as the danger trees adjacent to the special tracts themselves are concerned, there was the failure to mention them specifically in paragraph 409 B, subdivision 10, of the specifications. Then there was the ambiguity in the uses of the word "remove" which, depending on circumstances, could or could not imply also the act of cutting. Finally, there was the failure to refer specifically to the contractor in providing that the owners would remove "any merchantable timber required to be cut by these specifications." If this provision had been to the effect that the owners would remove any merchantable timber required to be cut *by the contractor* by these specifications, the element of ambiguity would have been completely removed. It is, perhaps, the better view that a specific reference to the contractor was not necessary. Nevertheless, in the absence of such a specific reference, it could be argued that it was intended to be stated in this provision that the owners of the special tracts would rid these tracts of mer-

[72] See appeal of *Osberg Construction Company*, 63 I.D. 180 (1956).

chantable timber to an extent that would satisfy the cutting requirements for merchantable timber elsewhere spelled out in the specifications. Applying the familiar rule of interpretation that any ambiguity in a Government construction contract must be resolved against the Government, since it drafted the document,[73] the Board must conclude that the contractor was not required by the specifications to cut the merchantable timber on the special tracts and adjacent danger tree areas. The application of this rule is especially called for when the interpretation urged by the contractor was shared by the Government officers administering the contract who gave it the practical construction which the Board has adopted.

Nevertheless, the Board must reject the contractor's claim that it is entitled to additional compensation for cutting the merchantable timber on the special tracts themselves. The contractor performed this work without making any effort to obtain an extra work order in writing as required by the contract and specifications, and the failure to obtain such an order bars consideration of the claim.[74] Helmick's comments about this matter to Shirran and Heath can only be regarded by the Board as a bit of grumbling. The performance of the work without obtaining an extra work order made it voluntary, and it has long been settled that a contractor is not entitled to additional compensation for voluntary work.[75] The fact that partial payments were made during the progress of the work is also without significance, since this is only provisional and does not amount to final acceptance. Nor does the fact that the work was performed with the knowledge of the Government inspectors improve the contractor's position. A contractor may have reasons of his own for undertaking work not required by the specifications, and the inspectors would not interfere with him unless the work affected adversely the interests of the Government. If the presence of inspectors could validate work undertaken without a written extra work order, the requirement that such an order be obtained would be rendered nugatory, since Government inspectors are always present at the site of the work. In the present case it was expressly provided, moreover, that the presence of inspectors would not relieve the contractor of any of his responsibilities.[76]

Furthermore, even if all these difficulties could be overcome, the Board would have to reject the claim on the ground that the contractor has failed to show convincingly that the so-called merchantable timber

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[73] See appeal of *Fluor Corporation, Ltd.*, 63 I. D. 24 (1956), and other judicial and administrative authorities there cited.

[74] See *Plumley* v. *United States*, 226 U. S. 545, 547 (1913); *Globe Indemnity Co.* v. *United States*, 102 Ct. Cl. 21, 37–38 (1944); *Shepherd* v. *United States*, 125 Ct. Cl. 724, 734 (1953).

[75] 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); appeal of *Carson Construction Co.*, 62 I. D. 422 (1955).

[76] See *Olson Construction Co. et al.*, BCA No. 92, June 3, 1943, 1 CCF 174.

cut from the special tracts was in fact merchantable. The definition of merchantability in terms of species, locality and marketability was obviously rather vague. However, the record shows quite clearly that as a practical matter the parties solved this problem by arranging to have the merchantable trees marked with yellow paint.[77] Helmick at first testified that there were "1,100 some-odd trees" (meaning presumably the 1,105 trees mentioned in his letter of October 12, 1954, to Bell) that were so marked,[78] but this assertion was considerably shaken in the course of his subsequent examination. It became apparent that he was not too sure of his recollections, and indeed conceded as much. He did not distinctly remember either the number of the merchantable trees or their location—whether they were located on the special tracts themselves or the adjacent danger tree areas.[79] On the other hand, neither Shirran nor Heath considered any of the trees on the special tracts as merchantable, and Heath in testifying on the subject emphatically denied that any of the trees on the special tracts had been marked with yellow paint. Thus Heath testified:

> Q. Did you consider the trees on the right-of-way to be merchantable within the definition that you have referred to as merchantable timber which, I believe, it was 402.6?
> A. No, we didn't.
> Q. When the trees were marked with paint, were any trees on the right-of-way marked with paint as showing them to be merchantable?
> A. Not that I know of.[80]

As the special tracts had previously been logged as a danger tree area in connection with the clearing of the Foster Creek-Snohomish line, it is indeed in the highest degree improbable that there could have been 1,105 merchantable trees on the special tracts. In view of this circumstance, and Heath's positive testimony that the trees on the special tracts were not marked, the Board is compelled to reach the conclusion that the trees on these tracts were not merchantable. Indeed, if the Board were to reach the opposite conclusion, it would have to direct that the contractor refund to the Government the $2,857.80 which it realized on the sale of this timber. The contractor contends, to be sure, that it was entitled to the merchantable timber that was removed both from the special tracts and the adjacent danger tree areas but this contention is plainly untenable. The provision of the specifications which declared that the timber required to be cut under the terms thereof was to become the property of the contractor was not applicable to merchantable timber on the special tracts and adjacent danger tree areas. If the Government had entered a change order providing for the cutting of the merchantable timber from these

[77] See Tr., pp. 56–7, 63, 134, 239, 341, 349, 367–68, 381.
[78] See Tr., p. 341.
[79] Compare Tr., p. 341 with p. 349.
[80] See Tr., p. 368.

tracts, it would have been privileged to make any provision which it pleased with reference to the disposition of this timber.

To summarize the Board's conclusions with respect to the special tracts and adjacent danger tree areas: The Board holds that the contractor is not entitled to additional compensation for any part of the clearing of the special tracts themselves, but is entitled to additional compensation by reason of the extra work that it was required to perform in clearing the merchantable timber from the danger tree areas and by reason of the Government's delay in making these areas available to the contractor.

Although the Government apparently questions the right of the contractor to the $15,329.29 which it claims, it did not produce any evidence at the hearing which casts substantial doubt upon the correctness of the items of cost included in the contractor's claim.[81] As the items of cost were duly verified by the testimony of the contractor's chief officer, and by the testimony of its subcontractor's bookkeeper, the Board can find no basis for not allowing them. Moreover, taking into account the rather difficult conditions under which the work had to be performed, the Board is satisfied that the claimed costs are not unduly high. The only substantial reason suggested by the Government for thinking that the contractor's costs may be exaggerated is to be found in the contention that it was not more costly for the contractor to clear and burn simultaneously while snow was still on the ground. This contention seems to be based on Shirran's testimony, that it was not uncommon practice to do so,[82] but this sort of testimony must be regarded as equivocal. The Board is inclined to accept the testimony of both Helmick and Ryan that burning without curing was more expensive,[83] especially since common experience would seem to indicate that green timber would not burn as readily as properly cured timber.

The Government also seeks a way out of its dilemma by contending now that none of the timber cut from the adjacent danger tree strips was in fact merchantable! This contention seems to be based upon the provision of paragraph 402, subdivision 6, which declares that

[81] The contractor submitted a breakdown showing the division of the expenses as between the contractor and its subcontractor, Christofferson & Stakkeland, and also as between the moving of men and equipment in and out of the work areas and the performance of the work itself. This breakdown, which appears at page 135 of the transcript, is as follows:

Paul C. Helmick Co.	
Cost of moving	$3,077.63
Cost of work	9,039.92
Christofferson & Stakkeland	
Cost of moving	349.00
Cost of work	2,862.74
Total	$15,329.29

[82] See Tr., pp. 236–37.

[83] See Tr., pp. 30 and 265.

forest products which are uneconomical to remove to the market may be treated as unmerchantable unless the specifications require that they be left on the right-of-way, and also upon the difficulties which the Government apparently has experienced in disposing of the timber which it ordered the contractor to leave along the right-of-way. Based on the premise of the unmarketability of the timber, the Government argues further that, since the contractor was required to clear unmerchantable timber, it was only performing its obligation under the contract, and the case is one of *damnum absque injuria*. Whatever the theoretical justification for taking into consideration the factor of economy of removal to market, the Board cannot regard this factor as established by the Government's failure to dispose of the timber at a time when it would probably have had to be moved in the dead of winter. Furthermore, the contracting officer himself found that 205 of the danger trees involved were merchantable. The evidence submitted at the hearing would hardly warrant a conclusion that the number was less.

The Board does not deem it necessary to determine just how many of the trees cut from the adjacent danger tree strips were merchantable and how many were unmerchantable, if indeed such a determination is still possible at this late date. The distinction between the two categories of trees was important in carrying out the original scheme of the contract which contemplated that the owners would remove the merchantable timber but when this scheme had to be abandoned, the distinction ceased to have much relevance. The questions for determination now are the extent of the contractor's damages by reason of the Government's delay and the extent of the additional compensation to which it is entitled by reason of the extra work which it was required to perform. The contractor is entitled to the costs which it actually and necessarily incurred in clearing both the merchantable and unmerchantable timber from the danger tree areas under the more difficult conditions that prevailed at the time the work was done, plus a reasonable allowance for overhead and profit. From the record as a whole the Board finds that these items amount to the sum claimed by the contractor, $15,329.29.

The Government, on the other hand, is entitled to a credit for the cost which the contractor would have incurred if the unmerchantable timber had been cleared from the danger tree strips at the same time that the special tracts were cleared, since the clearing of this timber was required by the specifications and is covered by the contract price. Helmick testified that if the work on the danger tree strips had been accomplished concurrently with that on the adjacent right-of-way, "it probably could have been accomplished for about twenty-five to twenty-six hundred dollars."[84] This figure, however, includes the

[84] See Tr., p. 136.

cost of clearing the merchantable timber and, therefore, appears to be very much greater than the amount of the credit to which the Government is entitled. Considering all of the evidence bearing on the contractor's operations and its probable costs, the Board finds that the contractor would have been able to clear the unmerchantable timber from the adjacent danger tree strips, had this work been accomplished concurrently with the clearing of the special tracts, at a cost of $650. This would amount to one-fourth of the higher of the two figures given by the contractor as the estimated cost of clearing both the merchantable and unmerchantable timber under the conditions just mentioned. The sum of $650, consequently, must be credited against the $15,329.29 claimed by the contractor, leaving a balance due of $14,679.29. Accordingly, the contracting officer is directed to enter into a supplementary modification agreement with the contractor of the type discussed below, providing for payment to it in the amount of $14,679.29, and to make payment to it pursuant thereto.

The Power of Bonneville to Settle Claims for Unliquidated Damages

Traditionally, claims of contractors based on delays of the Government in furnishing materials, facilities, or rights under Government construction contracts have been regarded as claims for unliquidated damages which may not be administratively settled. Department counsel contend also, therefore, that even if the claim of the contractor based on the delay of Bonneville in making rights-of-way available in the present case should have merit, it could not be allowed by the Board. This contention overlooks, however, the special powers possessed by Bonneville under the Bonneville Project Act of August 20, 1937 (50 Stat. 731), as amended (16 U. S. C., 1952 ed., sec. 832).

Section 2 (f) of the 1937 act, as amended by section 1 of the act of October 23, 1945 (59 Stat. 546), reads as follows:

> Subject only to the provisions of this Act, the Administrator is authorized to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancellation thereof and the compromise or final settlement of any claim arising thereunder, and to make such expenditures, upon such terms and conditions and in such manner as he may deem necessary.[85]

It is apparent from the sweeping language of this provision that the Administrator has been given wide powers over the making of any contracts which may be necessary to carry out the purposes of the act, the modification of such contracts, and the final settlement of any claims arising thereunder. The legislative history of the provision amply confirms the conclusion which is deducible from this language itself. The purpose of the bill, H. R. 2690, which became the act of

[85] This is now 16 U. S. C., 1952 ed., sec. 832 (a), subdivision (f).

October 23, 1945, was stated to be to "enable the Administrator to employ business principles and methods in the operation of a business enterprise and would eliminate some hampering procedures designed primarily for agencies conducting governmental regulatory programs." [86] In other words, he was to function with the same flexibility as a private utility rather than under the more rigid limitations to which governmental agencies are subject. As for the specific purpose of section 1 of the bill, its purpose was explained in the committee reports as follows:

> Section 1 authorizes the Administrator to amend, modify, and cancel contracts. Strong contracts, containing provisions in favor of the United States sufficient to permit it to control situations where such control is necessary, should be required. At the same time Bonneville should have authority to relax the contracts when good business dictates that it do so. Now the Administration may modify a contract only if it is in the interest of the Government that it do so, which has been construed to mean not only that there must be a new legal consideration for the amendment, but also that the United States must derive some substantial benefit to warrant any change in the contract. The alternative of compelling the execution of weak contracts in order to avoid unjust results and hardship on purchasers does not further the interest of the Government. The Administrator's discretion in this respect is subject to the supervision and direction of the Secretary of the Interior, pursuant to section 2 (a) of the Bonneville Project Act, as amended by the act of March 6, 1940.
>
> The section also permits the Administrator to compromise claims arising out of contracts he has executed. The Administrator is a responsible officer of the Government and is the one who is the most familiar with the claim and the facts out of which it arose. The discretion to compromise and settle it should be a part of Bonneville's business operations. It should not be compelled to lose, or run the risk of losing, advantageous settlements because of the delay in sending offers back and forth across the continent for consideration by a number of agencies before acceptance is possible.[87]

The General Counsel of the Bonneville Power Administration had testified in similar vein before the Committee on Rivers and Harbors of the House of Representatives when it was considering the legislation. Thus, speaking of section 1 of the bill, he said:

> The Administrator would be authorized to compromise claims arising out of contracts which he executed. These claims may now be compromised by only a few officers of the United States, and the extent of the jurisdiction of each is not entirely certain. A major factor in inducing a party to compromise a claim is the prospect of a prompt settlement and final disposition of the dispute. That incentive is made impossible if an offer to compromise even the smallest claim must be sent back and forth across the continent for consideration by a number of agencies before it can be accepted. The Administrator is a responsible officer of the Government. He has charge of a business producing an annual revenue of more than $20,000,000, but he cannot compromise a claim of $20. That is neither good business nor good government. The Administrator is the one who is the most familiar with the claim and the facts out of which it arose. He should

[86] See H. Rept. 777, 79th Cong., 1st sess., p. 3, and S. Rept. 469, 79th Cong., 1st sess., p. 4.
[87] See H. Rept. 777, 79th Cong., 1st sess., p. 4, and S. Rept. 469, 79th Cong., 1st sess., p. 5.

have the discretion to compromise and settle it as a part of his normal business operations.[88]

Indeed, in the form in which it was originally introduced into the House, section 1 of H. R. 2690 provided that notwithstanding the provisions of other laws governing the expenditures of public funds "the General Accounting Office in the settlement of the accounts of the Administrator shall not disallow credit for nor withhold funds because of any expenditure * * * which the Administrator shall determine to have been necessary to carry out the provisions of this Act." Because of objections of the Comptroller General and the Attorney General this provision was deleted from the bill, and the Comptroller General thus retained his authority to control the funds of the Bonneville Power Administration and to disallow expenditures which, in his judgment, were not in accordance with law. Of course, the preservation of this authority does not in itself indicate the scope of the power to settle claims which the law confers on the Administrator of the Bonneville Power Administration.

To be sure, section 1 of the act of October 23, 1945, does not in so many words confer the power on the Administrator of the Bonneville Power Administration to settle claims for unliquidated damages, nor is such a power expressly discussed in the legislative history. The objective of eliminating other agencies in the settlement of claims, which was stressed by the administrative proponents of the legislation, was, moreover, not fully accomplished, since the Comptroller General retained his authority to disallow expenditures. Conceivably, it might be argued that the provision of the statute should be construed, so as to empower the Administrator to settle only such claims as an administrative officer might otherwise legitimately settle, which would exclude claims for unliquidated damages. However, to read such a limitation into the statutory provision by implication would be to render the seeming grant of power virtually nugatory. The statutory provision gives the Administrator the power to settle "any claim," and if he possesses power to settle any claim, he must be also able necessarily to settle even a claim for unliquidated damages. The Comptroller General himself has recognized that the purpose of section 1 of the act of October 23, 1945 was "to free the Administration from the requirements and restrictions ordinarily applicable to the conduct of Government business and to enable the Administrator to conduct the business of the project with a freedom similar to that which has been conferred on public corporations carrying on similar or comparable activities." [89]

The Board must conclude that the Administrator of the Bonneville Power Administration has statutory authority to settle claims for

[88] See Hearings on H. R. 2690 and H. R. 2693 (Wash., 1945), p. 4.

[89] See Op. Comp. Gen. B–105397, dated September 21, 1951 (File "Administrative General, Artificial Precipitation," 1–112 General, Part 2).

unliquidated damages under the Bonneville Project Act. It would appear that no unliquidated claims for damages have ever been paid by Bonneville as such, but the failure to exercise this power has not abrogated it. Moreover, the Board takes official notice of a practice which has long prevailed in Bonneville of entering into supplemental agreements with contractors under which the original contract has been modified to provide payment for extra costs resulting from various acts of the Government. Typical cases have been those in which the contractor has been entitled to a time extension by reason of the Government's failure to supply materials or rights-of-way and has waived his right to a time extension for a money payment which has been reasonably related to the costs attributable to the delay and to his expedients to hasten completion of the contract. It is apparent that in cases in which the accelerated dates of completion under the supplemental agreements have been rather close to the original dates of completion and the additional considerations paid to the contractors under the agreements have also been close to the amounts of the damages which they apparently had suffered as a result of the Government's delays, the supplementary modification agreements would be in substance agreements for the payment of unliquidated damages, and would be fully justified only if in fact Bonneville did possess power to settle claims even for unliquidated damages. As Bonneville possesses such a power, and is subject to the supervisory authority of the Secretary of the Interior, the power may also be exercised by the Board, in a proper case, in the application of its delegated supervisory authority.[90]

The Fire Suppression Claims

There remain to be considered the claims arising out of the forest fire of September 15, 1953. This occurred on National Forest lands, and the contractor's operations on such lands were subject to the conditions of a special use permit issued to Bonneville by the United States Forest Service, Department of Agriculture. The conditions of this permit were incorporated in various paragraphs of the specifications, and were assumed by the contractor. These paragraphs of the specifications regulated in considerable detail the type of equipment which the contractor was to have on hand for fighting fires, specified certain precautionary measures which were to be taken

[90] Section 2 (a) of the Bonneville Project Act, as amended by the Act of March 6, 1940, 54 Stat. 47; 16 U. S. C., 1952 ed., sec. 832a, subdivision (a) provides that: "All functions vested in the Administrator of the Bonneville project under this act may be exercised by the Secretary of the Interior and, subject to his supervision and direction, by the Administrator and other personnel of the project." Reorganization Plan No. 3 of 1950 (64 Stat. 1262; 5 U. S. C., 1952 ed., sec. 133z–15 note) transferred to the Secretary of the Interior, with exceptions not here material, all functions of the several officers, agencies and employees of the Department of the Interior; and authorizes the Secretary to delegate any of his functions, including those so transferred, to any officer, agency or employee of the Department. The Secretary redelegated his functions to officers of the Department by Order No. 2563.

by the contractor, and defined the obligations of the contractor with reference to the suppression of fires. Thus paragraph 603 A provided:

> The contractor shall do everything reasonable within his power and shall require his employees to do everything reasonably within their power, both independently and upon request of officers of the Forest Service, to prevent and suppress fires *on or near* any lands to be occupied under this permit. The contractor shall pay the United States Forest Service, or other duly authorized protective agency, the suppression costs and damages resulting from any fires *caused by his operations.* [Italics supplied.]

And Paragraph 603 L provided:

> The forest officer, or state warden, shall be notified at once of the escape of fire and may, in his discretion, take charge of fire control work. The contractor shall place at the disposal of the forest officer such men, tools and equipment as the forest officer may consider necessary to extinguish the fire in the shortest possible time. Such action shall not minimize the liability of the contractor for damages and costs of controlling the fire.

According to the contractor's own witnesses, the fire broke out at a point 200 to 300 feet from the right-of-way.[91] After the fire started, the contractor, of its own volition made some efforts to control the fire.[92] When Forest Service officers later arrived at the site of the fire, the contractor refused to act on their orders, insisting that it receive daily written orders from Bonneville, and, at the request of the Forest Service, these orders were given.[93] The contractor now contends that these orders constituted orders for extra work within the meaning of the contract provisions, and claims $7,945.24 as its costs of suppressing the fire.

The contracting officer rejected this claim, and the Board finds no error in his decision. As the fire obviously occurred "near" the right-of-way, the contractor was clearly obligated, under paragraph 603 A to suppress the fire and to cooperate with the officers of the Forest Service in their efforts to the same end. The obligation to suppress fires imposed upon the contractor by the first sentence of paragraph 603 A is not qualified by any language that directly or inferentially limits this obligation to situations where the fire results from the contractor's operations. The significance of this omission is sharply emphasized by the fact that the second sentence of the same paragraph, which obligates the contractor to pay fire damages and suppression costs incurred by the Forest Service or other protective agencies, is expressly confined to fires caused by the contractor's operations. It is further emphasized by the last sentence of paragraph 603 L, which cautions the contractor that, notwithstanding his compliance with instructions to place men, tools and equipment at

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[91] See Tr., pp. 157, 249–50.
[92] See Tr., pp. 249–52.
[93] See Tr., pp. 152, 153, 155, 251–52. The orders themselves constitute Appellant's Exhibit 16.

the disposal of the forest officer, his liability for damages and costs of controlling any fire will not be minimized. The specific instructions with respect to the numbers of men and amounts of equipment to be used in fighting the fire that appeared in the daily orders given the contractor by Bonneville were determined by the Forest Service, and, under paragraph 603 L, it was the duty of the contractor to observe and follow these instructions. Thus the orders received by the contractor merely told it to do what the contract required it to do, and, hence, were not orders for extra work. Paragraph 603 A, to be sure, only required the contractor to do what was reasonably within its power to suppress a fire but the record furnishes not the slightest basis for any inference that the contractor was required to take any measures in suppressing the fire that were unreasonable. The specifications contained no provision, moreover, for paying the contractor its costs of suppressing the fire from Bonneville funds, and it was, therefore, required to take this action gratuitously. The agreement to do this work was simply part of the consideration moving to the Government for the contract.

The contractor also complains that the Government is now withholding from payments due to it under the contract the sum of $10,445.40.[94] This amount is being withheld because the United States Forest Service filed with Bonneville a claim in this amount against the contractor by reason of the forest fire. The Forest Service claims $8,537.63 as its cost of suppressing the fire, and $1,907.77 as damages for injury to National Forest lands, making up the total of $10,445.40.

The Forest Service contends that the fire resulted from the operations of the contractor, while the contractor maintains that its operations had nothing to do with the starting of the fire. In his original findings the contracting officer did not resolve this disputed question of fact (except perhaps by inference), but under date of July 12, 1955, the claim of the Forest Service against the contractor was referred by him to the Comptroller General for settlement pursuant to the procedure set forth in circular, B–97385, dated May 18, 1954.[95] In replying to this referral, under date of March 21, 1956, the Comptroller General took the position that the dispute was a subject for determination under Article 15, the disputes clause of the contract, and instructed the contracting officer to determine the question of fact whether the forest fire had been caused by the contractor's operations. Under date of June 25, 1956, the contracting officer issued, therefore, a supplemental finding of fact and decision as follows:

I find that the suppression costs and damages in question were incurred by the Forest Service in the full amount reported by that agency ($10,445.40), and that

[94] Originally the contracting officer withheld the sum of $23,505.48, but this also covered other contingencies which were subsequently eliminated.

[95] See 33 Comp. Gen. 682.

the Nason Ridge Fire was caused by the operations of the Paul C. Helmick Company under Contract No. 14–03–001–10444. Accordingly, the withholding of the funds claimed by the Forest Service is proper, and the contractor's request for release of those funds is denied.

At the same time, the contracting officer informed the contractor that his finding was subject to appeal to the Board within 30 days of the receipt thereof. The contractor has appealed to the Board from the finding and decision of the contracting officer and the notice of appeal was received by the contracting officer on July 10, 1956.

In the hearing held in this case the contractor was permitted to present evidence in support of its contention that the forest fire was not caused by his operations, although Department counsel objected thereto on the ground that the Board lacked jurisdiction to consider the question, since the contracting officer had not determined the responsibility of the contractor for the fire, and also on the ground that the proffered testimony was hearsay. Ryan, the contractor's superintendent, was the only witness on behalf of the contractor who was at or near the scene when the fire started. While the contractor offered in evidence statements taken from the employees of Helmick who were at the scene of the fire, the Government had no opportunity to cross-examine the makers of the statements, and the statements themselves are unsworn.

Unfortunately, the contracting officer's supplemental finding does not help to clarify the situation. It is obviously a mere conclusion, and is wholly unsupported by evidentiary facts. These should have been set forth in sufficient detail to enable the Board, as well as the contractor, to understand the basis for the conclusion. Although the contractor has not yet filed a statement in support of its appeal, it is apparent that no purpose would be served by waiting for such statement to arrive before requiring the contracting officer to revise the supplemental finding, so that it will set forth the evidence upon which he relied in making his decision, as well as his reasons therefor. The evidence set forth should be sufficient not only to enable the Board to determine whether the fire was caused by the contractor's operations but also whether the claim of the Forest Service for reimbursement in the amount of $10,445.40 is fully justified. The contracting officer is directed to make the supplemental finding within 30 days from the date of this decision. The contractor will then have 30 days from the receipt of the revised finding to submit any comments thereon to the Board.

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 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.*

WILLIAM SEAGLE, *Member.*

HERBERT J. SLAUGHTER, *Member.*

EXTENSION OF THE PORTION OF A LEASE OUTSIDE OF AND SEGREGATED AS THE RESULT OF THE CREATION OF A UNIT PLAN

Oil and Gas Leases: Extensions

When the law provides for the segregation of an oil and gas lease and that the segregated portion "shall continue in force and effect for the term thereof but for not less than two years * * *," it means the entire term of the lease or the period that the lease had to run, whether that period was definite or indefinite, as it existed on the date of the segregation.

M-36349 AUGUST 10, 1956

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT
DIRECTOR, GEOLOGICAL SURVEY

In connection with the pending proposed Little Eddy Unit Plan in New Mexico, the question has been raised as to the interpretation of the words "the term thereof" in the following provision of the act of July 29, 1954 (68 Stat. 583):

> * * * Any lease hereafter committed to any such plan [unit plan] embracing lands that are in part within and in part outside of the area covered by any such plan shall be segregated into separate leases as to the lands committed and the lands not committed as of the effective date of unitization: *Provided, however,* That any such lease as to the nonunitized portion shall continue in force and effect for the term thereof but for not less than two years from the date of such segregation and so long thereafter as oil or gas is produced in paying quantities.

It is my opinion that the words "the term thereof" means the term of the lease as it exists at the time of the segregation, whatever that "term" may then be.

Ordinarily, the word "term" when used with reference to a lease means the entire estate demised by the lease. *Sanderson* v. *City of Scranton*, 105 Pa. 469, 472 (1884); *Hurd* v. *Whitsett*, 4 Colo. 77, 84 (1878); *Barnes* v. *Standard Oil Co. of Calif.*, 9 P. 2d 1095, 1099 (Wash. 1932); *Weander* v. *Claussen Brewing Assn.*, 84 Pac. 735 (1906); 114 Am. St. Rep. 110; 7 Am. Cas. 536. By definition, therefore, the word "term" when used alone applies to the whole estate and not to the fixed period specified.

That Congress was cognizant of that meaning of the word and that it customarily used it in that sense when standing alone is evident

from a consideration of its use of it in the Mineral Leasing Act, as amended. Attachment "A" lists most, if not all, of the several uses of the word in the act, either by itself or modified and shows a consistent purpose to distinguish between the entire term and segments thereof and to expressly define the latter by the use of words of limitation. Thus, where Congress has wanted the law to apply to different fixed periods only, to wit, to 20–year and 5–year terms, it has used the words "the original term" (par. 4, sec. 17 (b) and sec. 30 (a), act of August 8, 1946). The Solicitor has so construed the word. On March 24, 1950, in a memorandum to the Director, Bureau of Land Management, 60 I. D. 408, he said:

> The "term" of a lease is the period which is scheduled to elapse between its effective date and its expiration date. If, during the life of a lease, its expiration date is projected into the future as a result of some occurrence, the lease has a new "term," extending from the effective date of the lease to the new expiration date. The time between the initial expiration date and the new expiration date is as much a part of the "term" of the lease as the time between the effective date of the lease and the initial expiration date.

He also found that the legislative history of section 39 as first enacted February 9, 1933 (47 Stat. 798), tended to confirm his construction of the word "term."

There is evidence in the act of 1954, itself, that the word "term" was intentionally used in this connection without modification to mean the period for which the lease was to run as of the crucial date and not as definitive of any particular period or periods of *years*. The second sentence of the fourth paragraph of section 17 (b) as enacted August 8, 1946, had provided that any lease other than one issued for a term of 20 years thereafter committed to a unit plan should continue for the life of the plan if oil or gas was discovered under the plan "prior to the expiration date of the primary term of such lease." The 1954 act amended the above quoted portion of that provision to eliminate the word "primary." While there are other "terms" or parts of terms of leases than an extended term because of production, the legislative history shows that the intent was said by the Department in testifying on S. 2380 to be "extend all leases, whether in their primary term or secondary term or of whatever nature. * * *." (Hearings, page 40.) In its report incorporated in S. Rept. 1609 on the bill at pages 5, 6, and 7, the Department said (page 6):

> There is no reason to limit the extension privilege to the case where discovery is made during the primary term of the lease. Since the right of individual leaseholders to drill on leases committed to a plan are severely curtailed, none of them could be penalized because of necessary delays in obtaining production from the unit area.

The provision under consideration in this opinion was drafted in the Department and submitted with that same report for inclusion imme-

diately following the one discussed above. Although the language in its report in relation to it is not as clear and definitive as that quoted above it would be unrealistic to conclude that the word "term" as used in one sentence had a different, and a narrower meaning than as used in a sentence immediately preceding that one in the same amendatory act. The construction here given accords with that given by the Congress to the same word in the preceding sentence and, absent a contrary intent, it logically has the same meaning.

J. REUEL ARMSTRONG,
Solicitor.

ATTACHMENT "A"

"Term" as used in the Mineral Leasing Act, as Amended

The general practice of Congress has been to specially designate the initial term of a lease when that term is meant and to use other language when something else is meant.

Thus, in 1920, section 6 provides that coal leases shall be "for indeterminate periods." The same in section 8 as to phosphate leases, and in section 21 as to oil shale leases and section 24 as to sodium leases.

Section 14 (oil and gas) "Such leases shall be for a term of twenty years * * * with the right of renewal as provided in section 17 hereof."

Section 17–"Leases shall be for a period of twenty years, with the preferential right in the lessee to renew the same for successive periods of ten years * * *."

Act of July 3, 1930, amending sections 17 and 27 of Mineral Leasing Act, first proviso, any lease committed to plan "shall continue in force beyond said period of 20 years until the termination of such plan."

Act of March 4, 1931, amending sections 17 and 27 of Mineral Leasing Act, first proviso, any lease committed to plan "shall continue in force beyond said period of twenty years until the termination of such plan." Act of February 9, 1933, added section 39 (suspension of operations and production), provides that with respect to any lease on which operations and production is suspended "and the *term* of such lease shall be extended by adding any such suspension period thereto: * * *." [Italics added.]

Act of August 21, 1935. Section 17, third paragraph "Leases hereafter issued under this section shall be for a period of five years and so long thereafter as oil or gas is produced in paying quantities" when land is not on geologic structure of a production oil and gas field and 10 years, etc., when on such a structure.

Same language as in act of July 3, 1930, as to leases issued prior to August 21, 1935.

Act of July 29, 1942, granted preference right to new lease for land not on geologic structure of a producing oil and gas field "upon the expiration of the five-year term."

Act of December 22, 1943, "the term of any five-year lease for which no preference right to a new lease is granted by this section is hereby extended to December 31, 1944." Two later acts used same language except as to date.

Act of August 8, 1946, section 17, first paragraph, "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."

Second paragraph provides that any lease on which there is production on or after "the primary term" shall not terminate when production ceases if diligent drilling operations are in progress during the period of nonproduction.

Third paragraph provides for a single extension of "the primary term" in certain cases and that the extension shall be subject to the regulations in force at the expiration of the "initial five-year term."

In other circumstances at the end of the "primary term the lease shall continue (under specified conditions) for a period of two years and so long thereafter as oil or gas is produced in paying quantities."

Fifth paragraph, "the primary term of any lease for which compensatory royalty is being paid shall be extended * * *."

Section 17 (a) provides for exchange of old lease for new lease "to be for a primary term of two years and so long thereafter as oil or gas is produced in paying quantities * * *."

Section 17 (b), paragraph 4, "Any lease issued for a term of twenty years" shall continue, etc. "Any other lease shall continue * * * provided oil or gas is discovered under the plan prior to the expiration date of the primary term of such lease." Any lease excluded from the plan or on plans termination "shall continue in effect for the *original* term thereof but * * *." [Italics added.]

Section 30 (a). A lease segregated by assignment "shall continue * * * for the primary term of the original lease * * *. Assignments * * * may also be made of parts of leases which are in their *extended term* because of production * * *." [Italics added.]

Act of June 3, 1948, amending section 10 of the 1920 act, provides the coal leases "shall be for a term of twenty years and so long thereafter as the lessee complies with the terms and conditions of the lease * * *."

The act of July 29, 1954 (68 Stat. 583), amends the third paragraph of section 17 of the 1920 act and refers in two places to "the initial five-year term"; in the amendment to the fifth paragraph reference is made to "the primary term including any extensions thereof"; in amending the fourth paragraph the word "term" is substituted for the words "primary term" as used in the 1946 act. An added provision for segregating any part of a lease which is outside of the limits of a unit plan also provides that the lease as to that segregated portion shall continue "for the term thereof but for not less than two years from the date of such segregation and so long thereafter as oil or gas is produced in paying quantities."

HOMER WHEELER MANNIX ET AL.

A–26964 (Supp.) *Decided August 13, 1956*

Color or Claim of Title: Improvements

It is questionable whether such work as clearing brush and cutting trails on land, which has only a short-lived effect, constitutes the placing of "valuable improvements" on land within the meaning of the Color of Title Act.

Color or Claim of Title: Improvements

An application for patent under the Color of Title Act will be denied where the applicant fails to show to the satisfaction of the Secretary of the Interior that valuable improvements have been placed on the land applied for as required by the act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This decision arises as a supplement to the Department's decision of November 23, 1954 [unpublished], which remanded this case to the Bureau of Land Management for a new field examination and a return of the case to this office with the new field report when the examination was completed.

Simply stated, the facts of the case are as follows: On February 18, 1952, Mr. and Mrs. Ernest Lambert applied to purchase the NE¼SW¼ sec. 6, T. 13 N., R. 14 W., M. D. M., California, under the Color of Title Act, as then amended (43 U. S. C., 1952 ed., sec. 1068). On April 30, 1951, Homer Wheeler Mannix and William Clark Mannix had filed a joint application in the Sacramento land office for the public sale of the same land under section 2455 of the Revised Statutes, as amended (43 U. S. C., 1952 ed., sec. 1171). This application was rejected on May 14, 1953, on the ground that the Lamberts had established entitlement to purchase the tract under their conflicting color of title application.

On May 20, 1953, the manager allowed the Lambert application, subject to publication of notice of the proposed sale and payment of the appraised price of the land and timber. The Assistant Director of the Bureau of Land Management affirmed the manager's decision rejecting the public sale application which had the effect of affirming the acceptance of the Lambert color of title application.

The Mannix brothers then appealed to the Secretary. The basis of their appeal was that the land had not had valuable improvements placed on it, nor had any part of it been reduced to cultivation, and therefore it is not subject to disposal under the Color of Title Act.

In their color of title application, and supporting affidavits, the Lamberts had stated that they (principally Ernest Lambert), or their predecessors in interest, had made fire trails through the brush and chamiso in 1930, burned an area of approximately 10 acres on the land, cut one quarter mile of trail in 1931, and constructed other trails which were maintained from year to year. They also alleged that because of the nature of the land, i. e., steep and rough, it is not subject to cultivation and is only suitable for the grazing of sheep. Finally, they alleged that the work of improvement required 100 days and represents the maximum improvement for which the lands are suited.

On the other hand, the Mannix brothers contended that the "improvements" alleged by the Lamberts were largely nonexistent and grossly exaggerated; that the largest clearing on the land is estimated to be 200 by 45 yards; and that no man-made trails are in evidence.

It was thus apparent that the sole issue in the case was the factual question of whether or not the color of title applicants or their pred-

ecessors in interest had placed "valuable improvements" upon the land within the meaning of the applicable statute. Because the report of the field examination in the record at the time this case was first before the Department was not deemed to be sufficiently complete to determine whether or not the improvements claimed by the Lamberts existed on the land, another field examination was directed to be made.

The record now contains the report of field examination approved May 30, 1956. This report states that the examiner was accompanied on the examination, which was made on October 12, 1955, by Mr. Homer Mannix and Mr. M. W. Tindall, lessee of the Lambert ranch. In regard to improvements on the subject tract, the report states:

> No improvements were found on the land, nor was any evidence of any work of man seen other than a fire trail crossing the land as shown on the attached sketch, which fire trail was built in 1955 by Mr. Tindall, while leasing the private property of Lambert. The site is fairly mesic, and vegetative growth and decay take place rapidly. It is therefore highly possible that the improvements as claimed by Mr. Lambert were actually made but have been obscured by vegetation during the interim. At any rate, no trace of them remains on the ground.

Mr. Mannix and Mr. Tindall signed the original field notes as made in the field.

Section 1 of the Color of Title Act, as amended (43 U. S. C., 1952 ed., Supp. III, sec. 1068), states in part as follows:

> * * * the Secretary of the Interior (a) shall, whenever it shall be shown *to his satisfaction* that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation * * * issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than $1.25 per acre. [Italics supplied.]

As emphasized above, the statute places the burden upon an applicant for the benefit of the Color of Title Act to show to the Secretary's satisfaction that the conditions prescribed by section 1 of the act have been complied with.

In *Ben S. Miller*, 55 I. D. 73 (1934), it was stated that land can be improved and its value enhanced by taking things off the land which impair its value and interfere with its use, as well as by placing things upon it to improve it. Therefore, it was indicated that the removal of loose stone to render land more arable, the clearing of brush to render it tillable, the diversion of water from swamp land to render it reclaimable, and similar acts may be considered as placing valuable improvements on the land. In a subsequent case, however, it was held that the mere cutting of underbrush would not be considered a valuable improvement which would support a claim under the Color of Title Act in the absence of a showing that the cutting of underbrush made the land more usable for agricultural purposes, promoted the growth

of timber, lessened the hazards of fire, or achieved some other objective which would constitute a valuable improvement. See *Helen M. Forsyth et al.*, A–25365 (November 30, 1948).

Under these two cases, it is apparent that work of the nature claimed by the Lamberts can constitute a valuable improvement if it promotes the use of the land. However, there is one factor present in this case which was not discussed in the other cases. Whatever improvements the Lamberts have made on the land have disappeared. Can the improvements therefore constitute "valuable improvements" within the meaning of the statute? The legislative history of the act sheds no light on the meaning of the term but it can reasonably be concluded that it was not intended that improvements of absolute permanence should be required. On the other hand, it seems equally reasonable that the improvements must be more than something which would vanish over night. The act does not require only the making of "improvements," which term in itself connotes something of value, but the making of "valuable improvements," which term seems to emphasize that the improvements must have more than transitory value.

In any event, assuming that the improvements claimed to have been made by the Lamberts could constitute valuable improvements, the question remains whether it has been shown to the satisfaction of the Secretary that the improvements were made on the land involved in this appeal. It is admittedly possible that the improvements allegedly placed on the land several years ago in the form of clearings, trails and fire trails, may have disappeared or become obscured by vegetation in the interim as suggested by the field examiner. However, it is difficult to reconcile the present status of the land with the assertions made by Ernest Lambert in a statement dated April 11, 1952, filed in support of the Lambert's application. In that statement Ernest Lambert stated that all the trails on the land "now exist." It appears somewhat improbable that three and one-half years later, while this controversy was pending, no trace of any trails remained on the ground. At this point it will be recalled, as pointed out in the Department's decision of November 23, 1954, that the first field examiner who examined the land on March 31, 1953, less than one year after Mr. Lambert's statement was made, reported with respect to the item "Present improvements" that there were "None." Thus two field examiners have been unable to find any evidence of improvements on the land within one year and three and one-half years after trails were claimed to exist.

Under these circumstances, it cannot be held that a showing has been made to the satisfaction of the Secretary that valuable improve-

ments have been placed on the land as required by the Color of Title Act, and the Lamberts' application cannot be allowed.[1]

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Assistant Director of the Bureau of Land Management is reversed and the case is remanded to the Bureau of Land Management with instructions to deny the color of title application and, unless there is some reason not appearing in the record, to offer the land involved for public sale pursuant to the Mannix public sale application. The color of title applicants, as adjoining landowners, will have a preference right to purchase the land at the sale.

EDMUND T. FRITZ,
Deputy Solicitor.

STATE JURISDICTION OVER CRIMINAL TRESPASS ACTIONS ON KLAMATH INDIAN RESERVATION

Indians: Criminal Jurisdiction—Indians: Hunting and Fishing

Jurisdiction over offenses including trespass committed by or against Indians on the Klamath Reservation in the State of Oregon and actions for damages sounding in tort in that connection are within the jurisdiction of the legislature and courts of the State of Oregon by virtue of the act of August 15, 1953 (67 Stat. 588; 18 U. S. C. sec. 1162). The act does not give the State jurisdiction to tax or otherwise affect the Federal trust status of any real or personal property belonging to individual Indians or the Indian tribes in Oregon. Neither does it bestow a power to regulate the use of such property in a manner inconsistent with any Federal treaty, agreement or statute governing Indian property. The privileges and rights enjoyed by Indians with regard to hunting, trapping, or fishing are likewise not affected by this act of August 15, 1953. With these limitations, the State of Oregon has the some jurisdiction with regard to criminal matters on the Klamath Reservation that it has over any other land in Oregon.

M–36362 AUGUST 13, 1956.

TO THE REGIONAL SOLICITOR, PORTLAND.

This refers to your memorandum of June 30, 1956, enclosing a copy of an opinion by the Attorney General of Oregon concerning the criminal prosecution under State law of trespassers on lands of the Klamath Reservation.

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[1] Compare *Harold K. Butson,* A–26285 (December 29, 1951), wherein it was held that an application under section 2372 of the Revised Statutes, as amended, could not be allowed where the applicant for the amendment of a patent covering a tract of land not intended to be covered, could not show "that every reasonable precaution and exertion was used to avoid the error" and the Secretary was not "entirely satisfied" that such precautions and exertions had been made to avoid the error, as required by the section.

It is the opinion of this office that jurisdiction over offenses including trespass committed by or against Indians on the Klamath Reservation in the State of Oregon and actions for damages sounding in tort in that connection are within the jurisdiction of the legislature and courts of the State of Oregon by virtue of the act of August 15, 1953 (67 Stat. 588; 18 U. S. C., 1952 ed., Supp. I, sec. 1162). The act does not give the State jurisdiction to tax or otherwise affect the Federal trust status of any real or personal property belonging to individual Indians or the Indian tribes in Oregon. Neither does it bestow a power to regulate the use of such property in a manner inconsistent with any Federal treaty, agreement or statute governing Indian property. The privileges and rights enjoyed by Indians with regard to hunting, trapping or fishing are likewise not affected by this act of August 15, 1953. With these limitations, the State of Oregon has the same jurisdiction with regard to criminal matters on the Klamath Reservation that it has over any other land in Oregon.

There is no question but that lands allotted to Indians which are held in trust by the United States for them or their heirs, or otherwise restricted by the Federal Government, are during the trust or other period of restriction under the exclusive jurisdiction and control of the Congress and Executive branch of the Federal Government for all governmental purposes relating to guardianship and property rights of the Indians (*United States* v. *Rickert*, 188 U. S. 432 (1903)). Indian allotments are one of the three large classes of land which by definition in Federal statute come within the meaning of the phrase "Indian country." (18 U. S. C. sec. 1151.) Without more it would be clear that trespass actions concerning trust and restricted land would be matters exclusively within the jurisdiction of the Federal and Indian rather than State courts. Section 1152 of Title 18, United States Code, implicitly recognizes that in certain cases by treaty stipulation exclusive jurisdiction over offenses committed by one Indian against the person or property of another Indian, or over any Indian committing an offense in Indian country is placed in the tribal Government for punishment by the local tribal law (62 Stat. 757). However, the enactment of the act of August 15, 1953 (67 Stat. 588; 18 U. S. C. sec. 1162), marked a change in the jurisdictional relationships of the Federal Government to the State of Oregon with regard to criminal and civil matters arising in Indian country. By virtue of this act, Oregon has the same jurisdiction over offenses committed within Indian country that it has elsewhere within the State. In addition, the act of August 15, 1953, gives the State of Oregon jurisdiction over civil causes of action between Indians or to which Indians

are parties which arise in Indian country, and such actions are to be treated under the civil laws of the State the same as all actions applicable to non-Indians. The statute, however, does not give the State any administrative jurisdiction over trust or restricted property of Indians, nor does it authorize the State to regulate the use of such property inconsistent with any Federal treaty, agreement, statute or regulation.

It is the opinion of this office that it was the intent of Congress in giving to the State of Oregon criminal jurisdiction on Indian reservations and other portions of Indian country that all crimes against the persons or property of Indians would be punished under the laws of Oregon. Trespass is made a crime in Oregon to protect the owner of land from illegal entry by outsiders. By the 1953 act Congress did not intend, when it reserved to the Federal Government administrative jurisdiction to determine matters affecting the ownership of Indian property, to remove that very ownership from the statutory and judicial protection of the State. We do not believe that prosecution for the crime of trespass would be construed as authorizing the alienation or taxation of Indian property or the regulation of use or encumbrance of Indian property in a manner inconsistent with any Federal treaty, agreement, statute or regulation, or deprive any Indian property owner of any right, privilege or immunity. On the contrary, it prevents the forceful alienation of property by illegal entry, guarantees the Indian owner the use of his property in a manner consistent with Federal policy and protects the privileges and immunities of Indians. On the other hand, it is equally clear that any action in which the right of an Indian owner to his property is contested will continue to be a Federal and not a State responsibility by the express terms of the act.

Nothing in *Ohio* v. *Thomas* (173 U. S. 276 (1899)), which was cited in your memorandum, can be construed as affecting the right of a State to extend its criminal or civil jurisdiction over lands in an Indian reservation or in a former Indian reservation when such jurisdiction is expressly granted to it by Federal statute. *Ohio* v. *Thomas* is authority for the self-evident proposition that State criminal procedure may not prevent a Federal officer from pursuing his Federal duties under Federal statute keeping in mind that he does not secure a total immunity from State law while acting in the course of his employment. Similarly, we do not believe that *Johnson* v. *Maryland* (254 U. S. 51 (1920)) is applicable to the question under consideration. *Johnson* v. *Maryland* was merely a restatement of the principle that a State cannot by statute interfere with action by the Federal Government.

We conclude that the opinion of the Attorney General of Oregon (No. 3254 of December 1955) relative to the feasibility of criminal prosecution in the State courts of trespassers on unenclosed lands within the Klamath Indian Reservation is correct.

J. REUEL ARMSTRONG,
Solicitor.

U. S. GOVERNMENT PRINTING OFFICE: 1956

D. MILLER

A–27338 *Decided August 13, 1956*

Oil and Gas Leases: Six-Mile Square Rule

Where an oil and gas lease is issued by the manager of a land office covering lands which cannot be included within the six-mile square area limit fixed by the Department's regulation and the rights of third persons are not prejudiced thereby, it is proper to deny a request by the lessee that the lease be canceled in part as to the land outside the six-mile square and a separate lease issued to him for that land.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

D. Miller has appealed to the Secretary of the Interior from a decision dated February 7, 1956, of the Acting Director, Bureau of Land Management, holding that noncompetitive oil and gas lease, Salt Lake 066179, as amended, is a valid lease and that the fourth year's rental was due on both the lands covered by the original lease and the amendment.

On August 15, 1946, Miller filed an application (Salt Lake 066179) for several tracts of land in T. 3 S., R. 20 E., T. 3 S., R. 21 E., and T. 4 S., R. 21 E., S. L. M., Utah. On January 10, 1952, Miller filed a substitute lease offer for the same lands in T. 3 S., R. 21 E., and part of those in T. 4 S., R. 21 E. By a decision dated January 23, 1952, the manager approved the substitute lease offer under the same number as the original offer, issued a lease for the lands in the substitute offer, and closed out the original offer. On June 4, 1952, Miller filed a request to reinstate his original offer as to the lands not included in the lease issued, stating that the substituted lease offer "was only intended to be a substitute for the land described." Thereupon on June 9, 1952, the manager held that Miller could have his lease amended to include the remaining lands available for leasing if he requested an amendment and tendered the first year's rental on the acreage (721.04 acres). Apparently, appellant paid the additional rental on July 21, 1952, and in December 1952 he submitted two lease offer forms, one for the land in T. 3 S., R. 20 E., and the other for the land in T. 4 S., R. 21 E. On December 16, 1952, the manager held that an amendment No. 1 to lease S. L. 066179 would issue for these tracts. The manager also returned to Miller all copies of his two lease offers filed in December 1952 except for a copy of each for the files. The amendment, with an effective date of February 1, 1952, added 721.04 acres to the lease, and neither by itself nor when added to the land covered by the original lease could be included in a 6-mile square.

For 2 years the status of the lease remained unchanged. However, when Miller was billed for the fourth year's rental in September of 1954, he replied that rental was due only on the 483.27 acres of the

original lease and not on the acreage set out in amendment No. 1, saying the amendment was invalid since it placed in the lease acreage that could not be included in a 6-mile square. Miller later paid the entire rental under protest and then appealed to the Director to correct the alleged errors involved in this lease. From the Acting Director's decision affirming the manager's action, Miller has taken this appeal.

At the time Miller filed his original application, an application for lands which could not be included within a 6-mile square could be rejected or allowed to stand in the discretion of the Department. *Levi A. Hughes et al.*, 61 I. D. 145, 147 (1953). Even after the pertinent oil and gas regulation was revised to make mandatory the rejection of such applications, pending applications were not affected. (*Id.*)

As Miller points out, the proper precedure would have been to issue him two or more separate leases, each of which covered only such tracts as could be included in a 6-mile square. (*Id.*; 43 CFR, 1949 ed., 192.40.) It is also true that the pertinent regulation stated that: "* * * No single lease will be issued embracing lands that cannot be included within a six-mile square area. * * *" (*Id.*)

However, the Department has held that a lease issued in disregard of the comparable restriction does not invalidate the lease, nor warrant its cancellation if the rights of other persons are not involved. *Earl W. Hamilton*, 61 I. D. 129 (1953).

There is no indication in the record that any other person has rights which will be prejudiced by Miller's lease. Accordingly, in view of the Department's policy there is no reason to cancel the lease and it will stand.

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.

HAMILTON H. FOX

A–27258 *Decided August 14, 1956*

Grazing Leases: Preference Right Applicants

A corporation whose claim to a preference right to a lease under section 15 of the Taylor Grazing Act is predicated upon the fact that members of the corporation own or lease lands contiguous to the land applied for is not a preference right claimant unless it can show that it at least occupies such contiguous lands.

Grazing Leases: Apportionment of Land

Where land available for leasing under section 15 of the Taylor Grazing Act is not sufficient to enable each preference right applicant to receive sufficient

land to permit the proper use of his contiguous land, an apportionment of the available land among the preference right applicants must be made.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior by Hamilton H. Fox from a decision by the Director of the Bureau of Land Management which affirmed the action of the District Forester, Medford Forest District, Bureau of Land Management, in rejecting in part Mr. Fox's application for a grazing lease on certain lands in Ts. 40 and 41 S., R. 4 E., W. M., Oregon.

On February 8, 1954, Mr. Fox applied for a lease on approximately 2,870 acres of land in the two townships. His application showed that he owns 320 acres of land, part of which is in sec. 33, T. 40 S., R. 4 E., and the remainder of which is in secs. 3 and 4, T. 41 S., R. 4 E. He stated that he had a lease pending covering 400 additional acres. The description of the lands to be covered by the pending lease was not given.[1] On March 11, 1954, Mr. Fox was informed that 1,960 acres of the land for which he had applied were already under lease to the Greensprings Cattlemen's Corporation,[2] that approximately 60 acres were under lease to Clyde Laird, and that 80 acres were under lease to Melvin McCollum. He was offered a lease on 769 acres of land in sec. 33, T. 40 S., R. 4 E., and sec. 4, T. 41 S., R. 4 E., adjoining the property which he owns. Mr. Fox appealed to the Director of the Bureau of Land Management.

The Director, in his decision of August 10, 1955, from which the present appeal is taken, found that, as to the lands for which both Mr. Fox and the Greensprings Cattlemen's Corporation had applied, the corporation had a preference right to a lease on the lands equal to that of Mr. Fox, that the two parties had failed to come to an amicable agreement as to a division of the available range between them, and that the division of the lands between the two applicants made by the District Forester was proper. He found no reason to cancel the Laird and McCollum leases and affirmed the action of the District Forester in rejecting Mr. Fox's application for a lease on the lands embraced in those leases.

Mr. Fox's appeal is limited to that part of the Director's decision which affirmed the rejection of his application for the lands awarded to the Greensprings Cattlemen's Corporation. He denies that the corporation has a preference right to a lease equal to his and he states that even if the corporation does have a preference right to a lease the

[1] Mr. Fox later submitted a copy of a lease to him of certain land in secs. 8 and 9, T. 41 S., R. 4 E. That lease is shown to have been executed on March 16, 1954, and apparently covers slightly more than 240 acres.

[2] The appellant asserts that the proper name of the corporation is the Green Springs Cattle Corporation. The name given in the text, however, is the one generally used in the record and will be used here.

decision is erroneous because it fails to allow him his preference right to the extent necessary to permit the proper use of his contiguous land.[3] He submitted a certificate dated September 19, 1955, from the County Assessor for Jackson County, Oregon, the county in which Ts. 40 and 41 S., R. 4 E., are located, stating that the corporation does not appear of record to be the owner, homesteader, lessee or other lawful occupant of any lands in the two townships.

The lands involved in this appeal are in part revested Oregon and California Railroad grant lands, usually referred to as O & C lands, and in part public domain lands.

The O & C lands are subject to lease under the provisions of section 4 of the act of August 28, 1937 (43 U. S. C., 1952 ed., sec. 1181 (d)), which provides that:

> The Secretary of the Interior is authorized, in his discretion, to lease for grazing any of said revested or reconveyed lands which may be so used without interfering with the production of timber or other purposes of this Act as stated in section 1: * * * *Provided further*, That the Secretary is also authorized to formulate rules and regulations for the use, protection, improvement, and rehabilitation of such grazing lands.

The public domain lands are subject to lease under the provisions of section 15 of the Taylor Grazing Act, as amended (43 U. S. C., 1952 ed., sec. 315m), which provides that:

> The Secretary of the Interior is further authorized, in his discretion, where vacant, unappropriated, and unreserved lands of the public domain are so situated as not to justify their inclusion in any grazing district to be established pursuant to this Act, to lease any such lands for grazing purposes, upon such terms and conditions as the Secretary may prescribe: *Provided*, That preference shall be given to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands * * *.

For some years prior to 1950, O & C lands, including the O & C lands applied for in 1954 by both Mr. Fox and the Greensprings Cattlemen's Corporation, were leased to the Pilot Rock Grazing District, a grazing district organized under the laws of Oregon, under an arrangement by which the District apportioned the grazing privileges on the leased lands among Oregon and California stockmen owning or leasing private property in the area of the leased lands. In 1950, the District had a 1-year grazing lease on 23,135.5 acres of O & C lands. On July 11, 1950, the Department adopted the policy of leasing the intermingled public domain lands in the area of the O & C lands with the O & C lands for grazing purposes. 15 F. R. 4503. Applications for grazing leases on O & C lands and intermingled public domain lands and the issuance of leases covering such lands were made subject to the regulations governing the issuance of grazing leases under section

[3] The record indicates that Mr. Fox amended his application several times and that he now feels that he needs 2,400 acres to satisfy his demand.

15 of the Taylor Grazing Act (43 CFR, Part 160). Among the regulations governing the issuance of grazing leases under section 15 of the Taylor Grazing Act is that contained in 43 CFR 160.3, which sets forth the preference right provisions of section 15 of the Taylor Grazing Act, quoted above.

For the lease year commencing on June 15, 1951, the District held a lease on the O & C lands leased by it in the previous years and, in addition, on 11,107.3 acres of public domain land, including the public domain land applied for by Mr. Fox in his application of February 8, 1954. Friction arose between the Oregon and California stockmen over the distribution of grazing privileges by the District and the District's lease for the year commencing on June 15, 1952, covering the same lands, stated that it was understood that before that lease expired the California and Oregon stockmen who were established users of the range in the leased area and who owned adjacent and commensurate property would attempt to agree on an equitable distribution of grazing privileges or preference rights in the leased area.

On November 13, 1952, the Forester informed the stockmen grazing in the area, including Mr. Fox, that from then on grazing privileges would be issued by the Bureau and that if the stockmen wished to apply for such privileges they should do so within 10 days. In response to this invitation, Mr. Fox and others applied for grazing privileges. Mr. Fox stated that he had 314 acres of base property, and that his range use in the Pilot Rock area over the 5-year period 1947–1952 varied from 20 cattle in 1947 to 29 cattle in 1952. On December 15, 1952, the Forester notified the stockmen, including Mr. Fox, that there would be a general meeting on December 30, 1952, of all those interested in securing grazing privileges in the Pilot Rock area. All interested in obtaining rights to graze in the area were urged to attend. At the meeting held on December 30, 1952, representatives of the Bureau urged that the stockmen come to an agreement as to an equitable distribution of the grazing privileges in the area. The Bureau representatives pointed out that if the Bureau made an adjudication it would do so under the regulations embodied in 43 CFR, Part 160, but that if the stockmen came to an equitable agreement for a division of the range, the Bureau would issue separate leases to the California group and to the Oregon group, if that was what the stockmen wanted.

On November 23, 1953, the two groups came to an agreement as to a division of the area formerly leased to the District. The agreement recited that the Greensprings Cattlemen's Corporation had been organized in September 1953, and that the officers and directors of the corporation and all of the individual members were the same as the former permittees and officers of the Pilot Rock Grazing District insofar as Oregon residents were concerned and that the members of the Camp

Creek Cattlemen's Association superseded the members and permittees in the Pilot Rock Grazing District insofar as the California residents were concerned. The agreement further recited that one of the purposes of the corporation and the association was to lease for grazing purposes certain Federal and private lands formerly leased by the Pilot Rock Grazing District and that the corporation and the association had acquired or were in the process of acquiring most of the rights and privileges of the Pilot Rock Grazing District. It was mutually agreed that all lands embraced within the Pilot Rock Grazing District and within the State of Oregon lying north of a division line, designated on an accompanying map as the Greensprings Corporation use area, would be utilized by the corporation subject to the rules and regulations of the Bureau of Land Management insofar as the Federal lands in the area were concerned and that the lands south of the division line, designated on the accompanying map as the Camp Creek Association use area, would be utilized under the same terms and conditions by the association. The agreement was approved by the District Forester, apparently on the assumption that all of the stockmen grazing in the area under the District's lease were represented by the corporation or the association. Mr. Fox seems to be the only stockman among the Oregon residents who had grazed in the area under the District's lease who refused to join the corporation.

On December 16, 1953, the corporation offered to permit Mr. Fox to graze in common with it in any lease which it might receive to the extent of 86 head of cattle, as a mutual member of the corporation. The District Forester reports that this figure was arrived at through the voluntary reduction of their own use of the range by individual stockmen who would graze under the corporation's lease and that it represented a substantial increase over the 30 head of cattle for which Mr. Fox, or his predecessor, the former owner of the Fox property, had been licensed under the District's lease. Mr. Fox refused that offer.

The District Forester, knowing of Mr. Fox's refusal to join with the corporation in its application for a lease, omitted from the corporation's lease the 769 acres of land adjacent to the Fox property. A lease covering 18,579.79 acres of land was, on February 2, 1954, awarded to the corporation. Among the stipulations contained in the corporation's lease are that the corporation shall observe the conditions of the agreement of November 23, 1953; that the corporation shall furnish the District Forester on or before February 1 of each year with a list of its members who run livestock on the leased lands, together with the number of cattle and the period of use for each such member; that the lessee shall limit the number of livestock on the grazing unit (including unfenced private lands) to 1,331 head of cattle; and that the lessee shall not permit grazing usage of the leased area to begin earlier than April 1 of each year or to extend beyond October 31.

As stated above, on March 11, 1954, Mr. Fox was offered a lease on the land adjoining his property. However, because of Mr. Fox's dissatisfaction with the lease offered to him and in an effort to have the parties reach an amicable solution of the matter, if possible, the District Forester called a meeting of the stockmen who had joined the corporation and Mr. Fox. At that meeting, held on May 26, 1954, Mr. Fox refused to compromise and the other stockmen refused to agree that Mr. Fox could graze in common with the members of the corporation under the corporation's lease.

In view of the failure of the parties to reach an amicable settlement of their differences, it becomes necessary to determine, in the circumstances presented by this case, whether the Director was correct in holding that the corporation has a preference right to a lease on the lands sought by Mr. Fox equal to the preference right admittedly enjoyed by Mr. Fox as the owner of contiguous land, and, further, whether the contiguous land offered to Mr. Fox is sufficient to permit the proper use of his land.

While the Department would not be disposed to question the arrangement which has been worked out by the Bureau and the corporation under which individual stockmen in the area who are members of the corporation are to graze under the blanket lease issued to the corporation where no question of a preference right to a lease arises, the situation changes where a preference right claimant challenges the assertion of a preference right by the corporation. Prior to this time, there has been no occasion to determine whether the corporation is a preference right claimant within the terms of the Taylor Grazing Act and the regulations of the Department, i. e., whether it is the owner, homesteader, lessee, or other lawful occupant of contiguous lands.

Although the Director found that the corporation or its individual members own or control land contiguous to the land sought by Mr. Fox and awarded to the corporation, there is nothing in the present record to substantiate a finding that the corporation owns or leases in its own name any land contiguous to the land in conflict, or that it, as an entity apart from its individual members, occupies any of the lands of its members which are contiguous to the land in conflict. The certificate furnished by the appellant is evidence to the contrary. The application submitted by the corporation states merely that "Members of the Greensprings Cattlemen's Corporation have commensurate property adjacent to or near the lands applied for." While the record seems to indicate that members of the corporation own or lease over 15,000 acres of land in the vicinity of the lands awarded to the corporation, most of this privately owned or controlled land seems to be located at some distance from the area sought by Mr. Fox and not to be contiguous to that area. Furthermore, although the agreement en-

tered into on November 23, 1953, recited that the corporation was in the process of acquiring rights and privileges in the area, nothing in the present record indicates the extent to which such rights and privileges may have been acquired or what those rights and privileges may be.

The fact that members of the corporation may own or lease land contiguous to the land sought by Mr. Fox is not sufficient to vest control over those lands in the corporation. Nothing in the record shows that the corporation leases the lands from its members or that it occupies its members' lands in any way. While it may be true that the members of the corporation have voluntarily surrendered their rights to obtain individual leases on available lands contiguous to their owned or leased property in order that a blanket lease may be issued to the corporation covering the entire area, that fact, without more, does not satisfy the requirements of the statute that in order to obtain a preference right lease one must be, at least, a lawful occupant of contiguous land. A corporation is a legal entity separate and apart from its individual members. Acts of the latter are not acts of the corporation unless the members of the corporation are authorized to and act on behalf of the corporation.

Unless the corporation can show that it actually owns or leases land contiguous to the land sought by Mr. Fox or that it, as distinguished from its members, actually occupies such contiguous lands, the corporation may not be considered a preference right applicant for the lands sought by Mr. Fox.

The corporation should be given an opportunity to supplement the record in these respects.

However, even if the corporation cannot meet the requirements of the statute as a preference right claimant, it does not necessarily follow that Mr. Fox would be entitled to a lease on all of the lands for which he applied.

While it is impossible to determine from the present record who they are, there obviously are individual stockmen who own or lease lands contiguous to the lands applied for by Mr. Fox and who have joined the corporation. Such stockmen would, of course, in the absence of the corporation's claim, be preference right claimants for the land sought by Mr. Fox and their claims to available lands would be equal to those of Mr. Fox to the extent necessary to permit the proper use of their lands. If the corporation's lease is to be canceled as to the lands in conflict on the ground that Mr. Fox is and the corporation is not a preference right claimant for a lease, those individual stockmen who expected to share in the benefits of the corporation's lease and whose interests would be adversely affected by the elimination from the corporation's lease of the lands sought by Mr. Fox, must be given an opportunity to apply for individual leases on the lands for which

Mr. Fox applied and consideration must be given to their needs for the available land in order that they may properly use the land now owned or leased by them.

With respect to Mr. Fox's contention that the decision appealed from is erroneous because it failed to award him sufficient land to permit the proper use of his contiguous land, it should be pointed out that in determining what amount of land is necessary to permit the proper use of an applicant's property, consideration must also be given to the amount of land available for leasing and the preference right claims of others who own, lease, or occupy land contiguous to the available land. In other words, when only a limited amount of land is available for leasing, it is sometimes impossible to satisfy completely the demands of all preference right claimants and distribution of the available land must be made by taking into account the needs of all preference right claimants. Where the needs of all preference right claimants on an equal footing cannot be met, there must be an apportionment of the lands among the conflicting applicants according to those needs. In this case, it may be that other preference right claimants have better productivity of forage from their base property than Mr. Fox has, in which event they would be able to suport more livestock and their need for additional land would be greater than is that of Mr. Fox.

Mr. Fox contends that the Director erred in determining the extent of Mr. Fox's need for land to permit the proper use of his land on the basis of the past use of that land. While the Director did recite that operations from the Fox property during the past had not involved the use of the Federal range for more than 29 head of cattle in any one year, it cannot be said that the Director predicated his decision on the factor of past use alone. The Director correctly pointed out that what constitutes "proper use" is not dependent on the wishes of an applicant or on his plans to enlarge his operations but is a question for determination by the Bureau on the basis, among other factors, of good range management as limited by the amount of range available for distribution to the applicant and others with equal preference rights.

The Director found that the land offered to Mr. Fox is sufficient to support 35 head of cattle during the grazing season and he found it to be sufficient to permit the proper use of Mr. Fox's land. Mr. Fox has presented nothing to refute this finding. However, since the Director's finding was based on the assumption that Mr. Fox stood on an equal footing with the corporation as a preference right claimant and since the corporation has not as yet proved its claim as a preference right applicant, that finding may or may not be correct.

In the absence of a satisfactory showing that the corporation is a preference right claimant or a showing as to the extent to which the

lands in conflict may be needed by individuals who may file applications for the lands if the corporation cannot satisfy the requirements of the statute as a preference right claimant, no determination will be made at this time as to whether the land awarded to Mr. Fox is sufficient to meet his needs.

Therefore, the case will be remanded to the Bureau of Land Management with instructions to grant to the Greensprings Cattlemen's Corporation an opportunity to show whether it meets the requirements of a preference right claimant. In the event the corporation is unable to make a satisfactory showing in this respect, the Bureau should call upon those individual stockmen who own or lease land contiguous to the land sought by Mr. Fox and who now graze under the corporation's lease to present individual applications for the lands on which they customarily graze. Those applications should be adjudicated in connection with Mr. Fox's application and in accordance with the principles above set forth. In the event individual leases are granted covering any of the lands now under lease to the corporation, the corporation's lease, to that extent, should be canceled.

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.

EDMUND T. FRITZ,
Deputy Solicitor.

JAMES A. NEAL
GUY B. AND WILDA J. SEIBERT

A–27309 *Decided August 15, 1956*

Public Sales: Award of Lands

Where a single subdivision of public land is offered for public sale on the Government's own motion, and two or more adjoining land owners assert preference rights to purchase the land offered, an award should be made after a determination of each party's relative need for the land, considering such factors as historic use, land pattern, etc., and the award should not be made simply to the first person asserting his preference right to purchase.

Public Sales: Award of Lands

Where two or more preference right claimants assert a preference right to purchase a single subdivision of public land offered for public sale, and the record does not contain sufficient evidence concerning the relative needs of the parties for the land offered, the case will be remanded to the Bureau of Land Management for further consideration and a field examination, if necessary.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

James A. Neal has appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated November 3, 1955, which affirmed the decision of the Eastern States

Office, dated December 13, 1954, dismissing his protest against the award to Guy B. and Wilda J. Seibert of an isolated 40-acre tract of land that had been offered into public sale on Government motion pursuant to section 2455 of the Revised Statutes, as amended (43 U. S. C., 1952 ed., sec. 1171).

The land involved, along with other lands, was offered for public sale on June 11, 1954. On June 14, 1954, the highest bidders for the offered lands were declared, and the sale was suspended for a period of 30 days to permit the owners of adjoining lands to assert preference rights to purchase, as provided by section 2455 of the Revised Statutes, *supra*. Guy B. and Wilda J. Seibert were declared the highest bidders for the land involved in this appeal (tract 12 of the public sale, which comprises the NE¼NE¼ sec. 18, T. 18 N., R. 24 W., 5th P. M., Arkansas). Within the 30-day preference right period James A. Neal submitted a preference right claim and met the high bid of the Seiberts. By a decision dated July 26, 1954, the tract was awarded to James Neal, subject to his submission of satisfactory proof of ownership of adjoining land. The required proof was submitted within the allowed time, but the Seiberts protested the award on the grounds that they had asserted a prior preference right.

By a decision dated November 12, 1954, the award to Neal was vacated, it being stated that an examination of the record showed that the Seiberts had asserted ownership of adjoining land in a form statement dated June 11, 1954. The Seiberts were therefore allowed 10 days in which to submit proof of their ownership of adjoining land and they submitted such proof. Neal protested this decision but his protest was dismissed by the Eastern States Office in a decision dated December 13, 1954, which awarded the land to the Seiberts for the reason that they were the first ones to assert a preference right to purchase the land. From the decision of the Acting Director of the Bureau of Land Management affirming the dismissal of his protest, Neal has appealed to the Secretary.

The Acting Director based his decision dismissing the protest and vacating the award to the appellant on the ground that where a single subdivision of public land is offered at public sale on the Government's own motion, and two or more preference rights are asserted for the tract, an award should be made to the first person asserting his preference right. In this case it appears from the record that a preference right was asserted by the Seiberts on the day of the sale, whereas the appellant did not assert a preference right to purchase until July 2, 1954. For this reason the Bureau held that as they were the persons first asserting a preference right to purchase the tract, an award should be made to the Seiberts.

The governing statute and the Department's regulations (43 CFR, Part 250), are silent insofar as the declaration of purchasers of lands

offered at public sale where the sale is held on the Government's own motion is concerned. Nor does there appear to be any departmental decision on this point. The Acting Director cited no cases in support of his position. The Eastern States Office cited in its decision of December 13, 1954, only the case of *Alzada C. Carlisle et al.*, A–25671 (November 17, 1949). The *Carlisle* decision does contain a general statement that where only one legal subdivision is offered at public sale and two or more preference right claims are asserted for the land, the land will ordinarily be awarded to the applicant first asserting his preference right. However, that case did not involve a public sale held on the Government's own motion but a sale held on the basis of an application by one of the preference right claimants.

In instances where a sale is held pursuant to an application to have public lands ordered into market, the pertinent regulation provides that where only one subdivision is offered for sale and it adjoins the lands of two or more preference right claimants, the land will be awarded to the applicant for the sale, absent equitable considerations requiring otherwise. 43 CFR 250.11 (b) (3). In such cases the applicant for the sale stands in a favored position because of his interest in the land as evidenced by his filing application for it. However, where the land is offered for sale on the Government's own motion, there is no proper basis for holding that the first person asserting a valid preference right should be favored solely because of his priority of assertion. All preference right claimants should be regarded as standing on an equal footing with one another, and no one of them in any kind of a favored position. In such a situation determination should be made as to the relative need for the land offered of all of the owners of adjoining lands who assert their preference right to purchase. In order to reach such a determination the Bureau should consider individually the needs of the preference right claimants and not merely award the tract to the first claimant in point of time. Consideration should be given to the factors of desirable land use, land pattern, historical use, and other factors which will provide for the proper utilization of the land offered for sale.

Properly, only in a case where all the factors of land use, land pattern, historical use, and other factors in regard to proper utilization of the land are equal so that no one preference right claimant has a greater need for the lands offered, should the land be awarded to the first adjoining landowner asserting a preference right.

Therefore, I believe that the tract involved should not have been awarded to the Seiberts purely on the basis of the fact that they asserted a preference right first.

The record shows that James Neal is the owner of the NW¼NE¼ and the SE¼NE¼ sec. 18, T. 18 N., R. 24 W., which adjoin tract No. 12 on the west and south, respectively. Neal has stated that he needs

tract 12 to square up his privately owned lands and to give him passageway to and from his two 40-acre tracts which only corner each other. The Seiberts own land adjoining tract No. 12 on the north only, and their only statement in the record regarding their need for the land is that "We want the land to develop into pasture land." However, the record does not show that any field examination of the land has ever been made, or any consideration given to the respective needs of the parties for the land, so that the record does not contain sufficient evidence on this point upon which the Department could base an award to either party. In fact, both parties now assert or indicate that the other party has sold his adjoining land or moved away.

Therefore, the case is remanded to the Bureau of Land Management for consideration of the relative needs of Neal and the Seiberts for the land involved and, if necessary, for a field examination. If, after further consideration, it is determined that equitable factors favor neither party, the tract may be awarded to the Seiberts as the persons first asserting a preference right to purchase the tract. On the other hand, if it should appear that the appellant's contention is valid and that he needs the land to block up his adjoining land and as a passageway between his two tracts of adjoining land, and there are no counterbalancing factors in favor of the Seiberts, an award should be made to the appellant.

FRED G. AANDAHL,
Assistant Secretary.

M. F. SULLIVAN ET AL.

A-27329 *Decided August 20, 1956*

Grazing Permits and Licenses: Adjudication

Where, after hearing on the denial of a grazing permittee's application for use of a specific portion of the Federal range, the examiner found that the permittee's livestock used the area in question during the priority period, an apparent conclusion in the decision on appeal from the examiner's decision will be set aside where it is inconsistent with the examiner's finding regarding use of the area in dispute during the priority period, where substantial evidence upon which such conclusion is based is not set forth, and where such conclusion might later prejudice the interests of the permittee.

Administrative Procedure Act: Hearings

Failure of the range manager to state, in the notice of adverse action upon an application, all of the reasons upon which the action is based is contrary to departmental regulation and, in hearings cases, may violate the provision in the Administrative Procedure Act which requires that persons entitled to notice of an agency hearing shall be timely informed of the matters of fact and law asserted; but the defect is not a basis for modifying the outcome of a proceeding which is now moot.

Grazing Permits and Licenses: Apportionment of Federal Range

A grazing permittee who appeals from a denial of an application for allotment of a specific area of the Federal range should show, in addition to the fact that he used the area during the priority period, that he has not been allotted grazing privileges to which he is entitled or that exclusion from a specific area is detrimental to his livestock operation.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

M. F. Sullivan has appealed to the Secretary of the Interior from a decision of February 10, 1956, by the Director of the Bureau of Land Management which affirmed a hearing examiner's decision rejecting Mr. Sullivan's applications for grazing privileges to the extent that the applicant requested that his allotment include grazing privileges at the head of Deep Creek, an area within the Medicine Lodge Unit, Idaho Grazing District No. 3 (43 U. S. C., 1952 ed., sec. 315b).

In decisions of March 7, 1952, and March 13, 1953, by the district range manager, Mr. Sullivan's applications of January 12, 1952, and January 15, 1953, were rejected insofar as the applications requested that the appellant's grazing allotment include the head of Deep Creek. Both of the decisions restricted the appellant's use of the range to the Crooked Creek-Warm Creek-Lidy Hot Springs areas and rejected the applications for range use at the head of Deep Creek for the reason that during the priority period, Mr. Sullivan did not establish dependency by use in the Deep Creek area from his base properties. Mr. Sullivan appealed therefrom and on February 8, 1955, a hearing was held on the appeal before a hearings officer at Idaho Falls, Idaho.[1]

The appellant has been engaged in the livestock business since 1904 near Dubois, Idaho, and has used the public domain in connection with his livestock operations continuously since that time. In November 1936, Idaho Grazing District No. 3 was established and the appellant's use of the Federal range in the Medicine Lodge Unit from 1937 until the present time has been under permits and licenses issued in accordance with the Taylor Grazing Act. The Medicine Lodge Unit of Idaho Grazing District No. 3 includes, among others, the Lidy Hot Springs, Warm Springs Creek, Deep Creek, Blue Creek, and Crooked Creek areas which, for many years after the enactment of the Taylor Grazing Act, were used in common without any particular area of use being assigned to individual licensees and permittees. For example, licenses issued to the appellant from 1937 through 1944 either contained no specific statement as to area of use or else stated that the appellant's livestock were to graze in Medicine Lodge Unit "In common on the same accessible available vacant Federal range which was used in livestock operations in connection with the property you

[1] Page numbers hereafter given in this decision refer to the transcript of the hearing.

now control for any three or any two consecutive years between 1929 and 1934." A 10-year permit was issued effective July 1, 1943, to the appellant which authorized grazing privileges in "Crooked Creek-Warm Creek & Liday Hot Springs areas of Medicine Lodge Division." This permit was canceled for correction February 12, 1947, and effective July 1, 1947, a 6-year permit was issued to the appellant authorizing use in the Medicine Lodge Unit in common, a use identical with that authorized by the earlier licenses. This permit in turn was superseded by a permit effective July 1, 1950, to June 30, 1953, which authorized grazing privileges in the "Crooked Creek-Warm Creek, Liddy Hot Springs areas." The appellant contends that during the priority years, for many years previous to that time, and apparently until the time of this proceeding, his livestock grazed in the Deep Creek area which, he asserts, is really a part of the Warm Springs Creek area.

Information in the appellant's official grazing file indicates that the range in the area north of Lidy Hot Springs in the Medicine Lodge Unit, including the Deep Creek, Blue Creek, Warm Creek, and Crooked Creek areas, was used in common for many years after the enactment of the Taylor Grazing Act; that there was dissatisfaction by, and conflict between, the cattle and sheep owners as to use of this range; that, in 1947, there had not been a clear understanding on range use or range lines; and that all licenses were written on a common use basis.[2] There is some indication that between 1948 and 1950 attempts were made to reach agreement about apportioning the range among individual users but the record does not show what the outcome of these attempts may have been. It is clear, however, that from 1937 until approximately 1949, the area north of Lidy Hot Springs, including the Deep Creek area here in dispute, was used in common, and the fact that the appellant's permits and licenses did not specify use in the Deep Creek area by name is not a basis for assuming that use in that area was not authorized under the permits and licenses. In this connection, it may be noted that the appellant's assertion on appeal that he never was excluded from the Deep Creek area until 1952 is consistent with the information in the official file.

At the hearing on the rejection of Mr. Sullivan's application to use the head of Deep Creek, the appellant was represented by counsel, and five witnesses testified in behalf of the appellant. Vernon Ball and W. C. Olsen were recognized as intervenors. They were represented by counsel and three witnesses testified for them. The district range manager and the assistant district range manager testified for the Bureau.

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[2] See district grazier's memoranda of February 13, 1947, and March 25, 1947; letter of January 8, 1947, from district grazier to appellant.
The appellant's file was put into evidence at the hearing by the Bureau (p. 9).

The Bureau contended at the hearing that, regardless of the outcome of the priority issue, the decision to exclude the appellant from use of the Federal range at the head of Deep Creek was a discretionary matter and that the decision was based upon the desire to maintain good range management (pp. 2–4). The issues, as formulated by the hearings officer, were (*1*) whether the appellant utilized the Deep Creek area of the Federal range in his livestock operations during the priority period, and (*2*) whether the exclusion of the appellant from the Deep Creek area is necessary or desirable in the interests of good range management (p. 4). Counsel for the appellant objected to the inclusion of the second issue because the appellant had not been notified that the rejection of his application to use the head of Deep Creek was based upon anything other than lack of priority (pp. 3–4).

With respect to the question whether Mr. Sullivan utilized the Deep Creek area in his livestock operation during the priority period, the testimony of the appellant and of four of his witnesses was that the appellant's horses had grazed in the Deep Creek area during the priority years (pp. 36–39, 55–57, 59–60, 64, 69). The Bureau did not rely on evidence which directly contradicted this testimony of the appellant and his witnesses (the assistant district range manager stated (p. 32) "I don't think we are trying to deny that back during the priority years some of Sullivan's horses did graze on the east side and in the drainage of Deep Creek"). However, the Bureau submitted into evidence the appellant's official case file and referred to Mr. Sullivan's application dated December 14, 1936, and to an affidavit of April 5, 1938, filed as part of the appellant's grazing application for 1938 regarding the area of Federal range ordinarily used by the applicant's livestock. The district range manager pointed out that neither the application nor the affidavit included the head of Deep Creek (pp. 10–11). Mr. Sullivan explained his failure to include the Deep Creek area in his original application was a result of miscalculation of distances (p. 41). The appellant testified further, and asserts on appeal, that the reference in the affidavit to the natural drainage area of Warm Springs Creek included the head of Deep Creek and was always understood to include the Deep Creek area (p. 41). There was independent testimony at the hearing tending to support this assertion (pp. 58, 60, 64, 69, 73, 74). It is also noted that the legal description in the appellant's affidavit of April 5, 1938, of the Federal range used for the past 20 years seems to include at least a part of the Deep Creek area as shown on a map of the Medicine Lodge area which was put in evidence as the Bureau's exhibit No. 1 (p. 8).

Three witnesses for the intervenors testified that there was a difference between the Deep Creek and Warm Springs-Crooked Creek areas, and also that cattle of the appellant did not run in the Deep Creek area between 1937 and 1950. This testimony did not contradict the testi-

mony for the appellant about use of the Deep Creek area by the appellant's horses during the priority period, but did conflict with the appellant's assertion that his livestock has continuously used the Deep Creek area. (The appellant apparently sold most of his horses in 1938 and his assertions as to use of the Deep Creek area after 1938 would refer to use by cattle.)

For private property to have priority, it must have been used as base in connection with the Federal range for 2 consecutive years or for any 3 years of the priority period. Both the hearing examiner's and the Director's decisions raised a question as to whether priority was established by the appellant's horse operation.

Mr. Sullivan testified at the hearing that during the priority period, he didn't round up his horses completely, that he rounded up only the mares and colts and the others were on the range during the entire year because he wasn't selling them (pp. 48, 49). The appellant's son testified, in effect, that his father probably raised about 250 to 300 tons of hay in 1929; that about 100 tons of hay and some straw were fed on the base lands to livestock, including horses, during each of the priority years; that the amount fed to livestock on the base lands probably increased after 1929; that there were 75 or 80 head of horses, yearlings, colts and a few gelding which were fed on the home ranch during the winter months of the priority years (pp. 72, 73, 75, 76). In addition to the testimony at the hearing on this question, the appellant's file contains a report of board action dated May 10, 1938, which states that Mr. Sullivan's horses were off the range on private feed for an average of about 2½ months. The report was made after a question had been raised about the qualification of Mr. Sullivan's base because of evidence that some of his horses had been on the range on a year-long basis during some years of the priority period. In this connection, the appellant's application dated December 14, 1936, states that livestock, including horses which customarily used the public domain, grazed on the Federal range between April 1 and January 1 and that the appellant usually fed 150 tons of hay to this livestock. A letter of December 27, 1944, from the appellant to the district grazier also states that Mr. Sullivan fed his mares and colts in winter.

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). As there is no evidence in this record that Mr. Sullivan's mares, colts, yearlings, and some geldings were not cared for and fed on the base property during the winter months, the record supports a finding that the base land may be regarded as having some dependency by

use or priority by reason of the horse operation. No finding has been made, however, as to the extent of the dependency by use, that is, there has been no adjudication in this proceeding of the grazing privileges to which the appellant may be entitled as a result of the horse operation.[3]

After raising a question whether priority by use was established by the appellant through his horse operation but not answering that question, the examiner's decision stated:

> But, assuming that a priority by use was established by appellant's horses, the area of that use was in the Deep Creek portion of the Federal range as well as the Crooked Creek-Warm Creek area.

That is, the examiner found that the appellant's horses had grazed in the Deep Creek area during the priority years, but raised a question as to whether priority was established through that operation. The Director's decision states that it would appear that the appellant has failed to establish such customary use in the Deep Creek area as to amount to a substantial dependency thereon. This statement is not consistent with the hearing examiner's ruling about customary use in the Deep Creek area. The statement in the Director's decision which, in effect, denied dependency of use of the appellant's base on the Deep Creek area was based on (*1*) conflicting evidence before the examiner relative to priority and (*2*) the area of customary use described in the appellant's application of December 14, 1936.

In view of the testimony and evidence at the hearing, none of which expressly denied, and the great preponderance of which tended to establish use by the appellant's horses of the Deep Creek area during the priority years, the appellant's failure to include the area in the application of December 14, 1936, cannot be regarded as outweighing the effect of all of the rest of the evidence on this matter at the hearing. The only conflict in evidence at the hearing regarding priority arose because the appellant stated that his horses were on the range year-long during the priority period. However, the appellant qualified this statement to say that he fed colts and mares during the winter; his son testified that colts, mares, yearlings, and some gelding were fed in the winter; and the official case file shows that the horses were fed (presumably from the base lands) on an average of 2½ months a year. As has already been stated, the preponderance of evidence on this matter supports a finding that the appellant's base has priority by reason of use of the Federal range and the base lands in connection with the appellant's horse operation, although the extent of the priority was not adjudicated in this proceeding. It is possible that the reference in the Director's decision to a conflict of evidence relative to priority may concern matters of record apart from the question of whether the

[3] In recent years, Mr. Sullivan has been authorized to graze livestock to the extent of 1,000 AUM's.

appellant's horses were actually on the range year-long during the entire priority period. However, if the Director's decision reached a conclusion about priority by reason of evidence other than the matters referred to, such evidence should have been set forth in support of the statement about priority. Although the Director's decision goes on to state that no question will be raised about class 1 priority of the base, another statement near the end of the decision again suggests lack of priority of the appellant's base on the Deep Creek area.

As the record stands, grazing licenses and permits have been issued to the appellant since 1937 and it was not the propriety of the issuance of these permits which was brought into question at the hearing, but rather the principal question raised concerned the portion of the range which was customarily used by the appellant's livestock. In view of the hearing examiner's ruling as to customary area of use and of the evidence upon which it was based as well as the record evidence already mentioned, the statement in the Director's decision that the appellant failed to establish such customary use in the Deep Creek area as to amount to substantial dependency is unsupported by substantial evidence (see *Frank Halls, A. J. Redd*, 62 I. D. 344, 363 (1955)). Although it is possible that the statement might be found to be correct in a proceeding involving an adjudication of the extent of grazing privileges to which the appellant is entitled, it cannot be sustained on the basis of the findings of fact or conclusions of law reached as a result of the hearing in this proceeding or on the basis of any other evidence referred to in the Director's decision. Accordingly, in order to avoid the possibility that the appellant might be prejudiced thereby, and to eliminate uncertainty, the statement in the Director's decision as to the lack of substantial dependency by use of the appellant's base on the Deep Creek area will be set aside. The only conclusion on the issue of priority of the appellant's base which resulted from this proceeding is the third conclusion of law stated in the hearing examiner's decision of February 18, 1955, as follows:

> Appellant is entitled to obtain forage from the Federal range in an amount necessary to satisfy his class 1 demand in an area of use designated by the Bureau which is accessible from his property.

With respect to the second issue raised at the hearing, whether the appellant was properly excluded from grazing in the Deep Creek area as a matter of proper range management, the hearing examiner and the Director held that the appellant is not entitled to any specific area of the Federal range solely by reason of having utilized the area during the priority period. This conclusion was based upon decisions holding that there is no right, as a matter of law, to demand that a license or permit shall confer grazing privileges in any particular part of the grazing district. *National Livestock Co. and Zack Cox*, A–21222 (July 7, 1938). It is contended on appeal that the Director's

decision should be reversed on the ground that there is no sufficient showing that the exclusion of appellant from the Deep Creek area is dictated by the requirements of good range management. Several procedural matters require consideration before determining the merits of this assertion.

The issue at the hearing regarding proper range management was formulated by the examiner at the request of counsel for the Bureau. Counsel for the appellant objected to consideration of the issue because the notices rejecting Mr. Sullivan's applications for grazing privileges at the head of Deep Creek referred only to the question of priority of the appellant's base. 43 CFR 161.9 (b), which governs hearings on protests by applicants, reconsideration by the advisory boards, and service of notice to applicants, provided in pertinent part at the time when the hearing in this case was held:

> * * * If the recommendation [upon an applicant's protest] is to any extent adverse, and the range manager approves, a notice giving the reason or reasons therefor will be served on the applicant either personally * * * or by registered letter * * *. Such notices will constitute the range manager's final decisions for purposes of appeal.

The Director held that the examiner was acting within the provisions of the range code when he formulated the second issue at the hearing and referred to 43 CFR 161.9 (f), regarding the conduct of hearings before an examiner, which provided:

> The appellant, the range manager, and recognized interveners will stipulate as far as possible all material facts and the issue or issues involved. The examiner will state any other issues on which he may wish to have evidence presented * * *.

The latter regulatory provision did not justify disregard by the Bureau of the requirement that the range manager should state in a notice of adverse action the reason or reasons therefor and that such notice would constitute the range manager's final decision for purposes of appeal. The regulatory requirement regarding notice of decisions and statement of reasons for the decision was in accordance with section 5 (a) of the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1004) which is applicable to this proceeding and which provides:

> Persons entitled to notice of an agency hearing shall be timely informed of * * * the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law * * *.

One of the purposes of the statutory and regulatory provisions regarding notice of issues is to give parties an opportunity to present evidence at the hearing on the relevant matters which affect the determination of rights and privileges.[4] It is true that the examiner

[4] Notice of hearing is adequate which defines and limits the area of inquiry, and information as to evidence to be adduced has also been supplied (*Universal Service Corp., Inc.*, (5 Pike & Fischer, Admin. L. 2d 737 (S. E. C., 1955)).

stated at the hearing that the appellant's counsel would have an opportunity to present additional evidence on the question if he wished to do so, by a continuation of the hearing if necessary (pp. 4, 89), and that counsel for the appellant indicated that he did not wish to submit any further evidence on the issue (p. 89). Nonetheless the Bureau's disregard of the notice provisions of 43 CFR 161.9 (b) and of section 5 (a) of the Administrative Procedure Act in failing to give proper notice of the issues in this case cannot be condoned.

The question then is what effect this procedural error should have upon the disposition of this case. It is necessary to consider first just what the examiner and the Director held with respect to the improperly raised issue. The examiner declared that the real question was whether the obligation in the Warm Creek area, where the appellant was permitted to graze, on the basis of available forage is greater or less than the obligation in the Deep Creek area, from which the appellant was excluded. The examiner stated that neither the Bureau nor the appellant had presented any evidence of probative value on this question and concluded that "It cannot, therefore, be determined upon this record whether good range management necessitates appellant's use of or exclusion from the Deep Creek area."

However, having said this, the examiner continued to say that the burden of showing qualification for range use is upon one seeking benefits under the Taylor Grazing Act; that to discharge this burden the appellant would, in addition to establishing the use of the Deep Creek area during the priority period, be required to show that the forage in the area assigned for his use was inadequate to completely satisfy his recognized demand and that the area to which he seeks to extend his use contains forage which is not obligated to the use of other licensees; and that the appellant had not done this. Therefore, the examiner dismissed the appeal. However, he said the dismissal would not preclude possible future adjustments as to area of use when the results of a range survey, which the Bureau was making, become available.

As stated above, the Director held that the second issue could properly be raised under 43 CFR 161.9 (f). He also said that the designation of areas of use is an administrative function clearly within the scope of the Bureau's authority; that no allegation had been made or convincing evidence adduced by the appellant to show that there is inadequate forage on his allotment to meet his demand; that, however, the appellant would not be excluded from the Deep Creek area if his admission is consistent with good range management practices and is without detriment to existing allottees in the area. The Director therefore affirmed the examiner's decision but directed the range manager to complete the range survey and to make such adjustments in range use, including area of use, as the survey may warrant.

It is apparent that both the examiner and the Director placed upon the appellant the burden of showing that his exclusion from the Deep Creek area was not required by principles of proper range management. If the appellant's applications had been rejected by the range manager on the ground that proper range management required his exclusion from Deep Creek and he had appealed from that determination, there is no question but that the burden would have been upon him to show that his rejection on that ground was erroneous,[5] just as the burden was on him at the hearing to show that he had utilized the Deep Creek area in his livestock operations during the priority period. But the issue of range management was not raised in the rejection of the appellant's application. It was raised by the Bureau for the first time at the hearing and over the appellant's objection. It is inconceivable then that the appellant should have the burden thrust upon him to show that his exclusion from the Deep Creek area was not contrary to principles of good range management. The burden was clearly on the Bureau as the proponent of the issue.[6] The examiner and the Director were therefore in error in holding or implying that the burden of proof with respect to the second issue rested on the appellant.

Normally the remedy for such an error would be to return the case for another hearing, with the burden properly placed, where the appellant's rights have been adversely affected by the error. But the remedy would be ineffectual in the circumstances of this case. This case concerns the appellant's applications for grazing privileges for the years 1952 and 1953. Those years have since gone by and no determination made now could possibly affect those years. It is true that in many grazing cases where applications are for annual licenses decisions on appeals cannot be rendered in time to affect the year concerned but decisions are rendered nonetheless because the issue is a continuing one which will apply to future applications for grazing privileges. This would be true, for example, in a case where the issue is whether an applicant has base property that is dependent by use. But in a case like this, where proper range management is the issue, a determination made now that proper range management factors did not justify exclusion of the appellant from Deep Creek in 1952 and

[5] It has already been pointed out that an applicant has no right, as a matter of law, to demand that a license or permit shall confer grazing privileges in any particular part of a grazing district (*National Livestock Co. and Zack Cox, supra*). The Department also held in the *National Livestock* case that an applicant must justify his request for a specific portion of the range by showing a real detriment to his livestock operations, such as endangering his continuance in the livestock business, before a denial to use a particular portion of the range would be considered an abuse of discretion. Consequently, to overcome a denial of an application for grazing privileges in a particular area, the applicant must show detriment resulting from the denial or that he is entitled to privileges which have not been recognized.

[6] Section 7 (c) of the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1006 (c)) provides that "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof."

1953 would not preclude a determination that such factors would warrant his exclusion from Deep Creek in 1957. Or the reverse could be true, as suggested by the examiner and the Director in referring to the range survey which was being made but had not been completed.

Accordingly, since the issue of proper range management is now moot for the years and the applications involved in this proceeding and since the issue must be decided afresh on a new application by the appellant for grazing privileges, the decisions below will not be disturbed except to the extent indicated in this decision. Future proceedings on applications by the appellant should conform to the principles set forth in this decision. It may be observed at this point that holding any future hearing on the issue of proper range management would seem to be futile until the range survey has been completed or sufficient information has been developed in the survey upon the basis of which a proper determination can be made as to the areas involved in this case.

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

EDMUND T. FRITZ,
Deputy Solicitor.

ALBERT C. MASSA ET AL.

A–27158 (Supp.) *Decided August 28, 1956*

Oil and Gas Leases: Acreage Limitations—Oil and Gas Leases: Assignments or Transfers

Where an assignment of an oil and gas lease is not approved during the month in which the assignment is filed, the acreage covered by the assignment remains charged to the assignor's acreage account only until the subsequent approval date. To charge the assignor's acreage account with that acreage after that approval date is error.

Oil and Gas Leases: Acreage Limitations—Oil and Gas Leases: Assignments or Transfers

Acreage included in assignments of interests in oil and gas leases not yet issued remains charged to the acreage account of the assignor until the leases are issued and the assignments are approved.

Oil and Gas Leases: Acreage Limitations

Where the manager, on the assumption that, for the purpose of computing chargeable acreage, assignments of oil and gas leases were effective when filed, determined that an offeror did not hold in leases plus lease offers more than the prescribed limitation and where, after the issuance of the lease, the Department determined that for the purpose of computing acreage holdings assignments filed but not yet approved remain charged to the assignor's acreage account and that the offeror did in fact hold more than the prescribed limitation in leases plus lease offers when his offer was filed, the

offeror will be granted the 30-day grace period accorded by 43 CFR 192.3 (c) within which to show his qualifications as an offeror.

Oil and Gas Leases: Applications—Oil and Gas Leases: Lands Subject to

Lands included within an outstanding oil and gas lease, whether such lease is void, voidable, or valid, are not available for leasing to others and applications filed for such lands must be rejected.

SUPPLEMENTAL DECISION

On September 6, 1955, this office considered the appeal of Albert C. Massa and others from the rejection, in whole or in part, of their four offers (Utah 010806, 010844, 010881, and 010886) to lease certain land 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). Mr. Massa and the other appellants contended that Lewis H. Larsen, to whom three oil and gas leases (Utah 010760, 010762, and 010763) covering land sought by the appellants had been issued, was not a qualified offeror at the time he filed his offers on November 12, 1953, because he held in leases and lease offers more than 15,360 acres of land in the State of Utah, and that on the dates they filed their offers, November 18, November 24, December 4, and December 9, 1953, Mr. Larsen still held in oil and gas leases and lease offers in excess of 15,360 acres, the amount then permitted to be held in one State in leases and lease offers. The appellants contended that the manager of the land and survey office at Salt Lake City, Utah, and the Acting Director of the Bureau of Land Management had erred 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, on the other hand, contended that he had reduced his acreage holdings by assignments of leases filed prior to the dates when the leases were issued to him and that he was thus qualified to receive the leases. We found it impossible, on the basis of the record then before the Department, to determine whether Mr. Larsen was a qualified offeror when he filed his offers or whether, if he had been granted 30 days within which to reduce his acreage holdings (43 CFR 192.3 (c)), he had effectively reduced those holdings within the time allowed. We pointed out that the mere filing of an assignment of a lease does not divest the assignor of chargeable acreage but that the acreage remains chargeable to the acreage account of the assignor until the first day of the month following the filing of the assignment, if the assignment is approved within the month in which it is filed, or until the approval date, if the assignment is not approved within the month in which it is filed. The case was remanded to the Bureau of Land Management for a redetermination of the qualifications of Mr. Larsen as an offeror in the light of that decision, with instructions to the Bureau to take such further action with respect to the leases then held by Mr. Larsen and the offers of the appellants as the facts dis-

closed by a further study of the acreage account of Mr. Larsen might warrant. *Albert C. Massa et al.*, 62 I. D. 339 (1955).

Thereafter Mr. Larsen petitioned for a reconsideration of our decision on the ground that the manager had never made a determination that Mr. Larsen's acreage account exceeded the 15,360 acre limitation then in effect and that Mr. Larsen did not receive the benefit of the grace period accorded by 43 CFR 192.3 (c), which regulation provides:

> No lease will be issued and no transfer will be approved until it has been shown * * * that the lessee or transferee is entitled to hold the acreage. Any party found to hold or control accountable acreage * * * 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.

The petition requested that the decision of September 6, 1955, be revised and that the case be remanded to the Bureau of Land Management with instructions to determine whether Mr. Larsen's chargeable acreage exceeded the limitation on November 12, 1953, and, further, if the Bureau determined that Mr. Larsen's chargeable acreage did exceed the limitation on November 12, 1953, to give Mr. Larsen the 30-day grace period provided for in the regulation, from and after that determination. The petition for reconsideration was denied. However, we did on December 28, 1955,[1] modify the decision of September 6, 1955, to the extent of requiring the Bureau of Land Management to determine:

> (*1*) Whether Mr. Larsen, immediately prior to filing offers Utah 010760, 010762, and 010763 on November 12, 1953, held in outstanding leases 15,360 acres or more;
>
> (*2*) Whether Mr. Larsen, if he did not hold at that time 15,360 acres or more in leases, held that amount in leases and lease offers;
>
> (*3*) Whether Mr. Larsen was ever accorded the grace period prescribed in 43 CFR 192.3 (c) for reducing excess acreage and, if so, the basis upon which it was thought or determined that he had excess acreage; and
>
> (*4*) Whether, if the 30-day grace period was granted, Mr. Larsen's holdings in leases and lease offers were reduced to 15,360 acres or less at the end of the grace period.

We required that the case be resubmitted to this office with the evidence supporting the Bureau's determinations, in order that there might be a departmental decision on the issues raised as the result of the Massa appeal.

The Bureau has submitted its determinations. It found that Mr. Larsen did not hold 15,360 acres in outstanding leases when the offers were filed; that he did hold in leases and lease offers more than 15,360 acres when the offers were filed; that Mr. Larsen was never given

[1] See letter to W. G. Howell, attorney for Mr. Larsen.

written notice to reduce excess acreage; and that he was not required to submit proof of the reduction of his holdings to the prescribed limit.

The Larsen acreage account submitted by the Bureau shows only leases effective as of November 1, 1953, or earlier, offers pending as of November 12, 1953, assignments of outstanding leases, and assignments involving offers which had been filed as of November 12, 1953. It does not indicate whether any leases, based on previously filed offers, were issued to Mr. Larsen prior to the issuance of the leases in controversy nor does it indicate whether additional offers were filed by Mr. Larsen after November 12, 1953. The appellants submitted a statement relating to Mr. Larsen's acreage account which indicates that additional leases were issued to Mr. Larsen effective as of December 1, 1953, based on offers filed prior to November 12, 1953; that six additional offers covering 9,038.88 acres were filed through November 23, 1953; that by December 1, 1953, Mr. Larsen had filed assignments of undivided interests in three of those offers, accounting for 3,280 acres; and that leases were issued on the six offers effective as of January 1, 1954.

We note certain discrepancies between the two statements and we note certain errors in the Bureau's account. However, it is believed that the information now before us forms a sufficient basis for a proper disposition of the Massa appeal.

A careful analysis of the acreage account submitted by the Bureau shows that as of October 6, 1953, Mr. Larsen had under lease 11,538.14 acres. Of that amount, assignments by him of interests in six leases amounting to 3,892.5 acres had been filed but not yet approved, although the assignments had been pending in the local office since November 1952, approximately 11 months. Mr. Larsen had no offers pending at that time. From October 7, 1953, through November 4, 1953, Mr. Larsen filed three offers totaling 2,560 acres. Thus, on November 4, 1953, Mr. Larsen had properly chargeable to him in his acreage account, made up of leases (including assignments by him of interests not yet approved) and lease offers, 14,098.14 acres.

On November 9, 1953, Mr. Larsen filed five additional offers, totaling 8,075.79 acres and on November 10, 1953, he filed five more offers, totaling 9,459.25 acres. At about that time, although the record is not specific as to the exact date, an informal discussion took place between Mr. Larsen and personnel of the local office regarding his acreage account. He was told that his recent offers would probably bring his acreage account above the prescribed limitation and he was advised to reduce his holdings, although at that time no determination had been made as to whether Mr. Larsen held accountable acreage in excess of the prescribed limitation.

Of the five offers filed on November 10, 1953, three, Utah 010760,

010762, and 010763, were rejected on that date because of insufficiency in the description of the land applied for and another, Utah 010761, for 1,920 acres, was also rejected, although the reason for that rejection is not clear. After the rejection of four of the five offers filed on November 10, 1953, covering 8,819.25 acres, Mr. Larsen's account stood at 22,813.93 acres.

On November 12, 1953, Mr. Larsen resubmitted the four offers rejected on November 10, 1953. At the same time, Mr. Larsen filed eight assignments, totaling 12,235.79 acres. Some of the assignments were of leases already issued and some were assignments of leases which had not to date been issued. On November 16, 1953, Mr. Larsen filed an assignment of an undivided one-half interest in Utah 010760, which at that time was still an offer, and, on November 23, 1953, he filed an assignment of an undivided one-half interest in Utah 010762, also, at that time, still an offer. Thereafter, in December 1953, he filed six additional assignments covering 2,894 acres.

The Bureau statement indicates that six of the eight assignments filed on November 12, 1953, covering 8,320 acres, were approved effective January 1, 1954. Of this amount 3,840 represented leases which were outstanding in the name of Mr. Larsen at the time he filed the assignments and 4,480 acres covered leases which apparently did not become effective until January 1, 1954. Assignments totaling 10,248.29 acres are listed as effective February 1, 1954. These approvals included five of the six assignments of interests in leases filed during the month of November 1952, covering 3,022.50 acres, plus 7,225.79 acres represented by offers filed but not acted upon when the assignments were filed. Evidently these assignments last mentioned were approved after the issuance of the leases. In fact, two of the assignments listed as effective February 1, 1954, are of interests in leases Utah 010760 and 010762, shown by the case files to have been approved on January 12, 1954. Assignments covering 2,094 acres in leases which were outstanding on November 12, 1953, are listed as effective March 1, 1954, and one assignment covering a one-half undivided interest in 1,740 acres under lease, which assignment had been filed on November 18, 1952, is listed as effective December 1, 1954.

Therefore, on November 12, 1953, when offers Utah 010760, 010762, and 010763 were filed, Mr. Larsen had under lease 11,538.14 acres and he already had under offer 11,275.79 acres. That acreage, plus the acreage included in the four offers filed on November 12, 1953, brought his acreage account in leases plus offers to 31,633.18 acres, or over twice the permitted amount. It should be noted here that offer Utah 010763 was for 1,880 acres and it has been so counted in our analysis. While it remained an offer, Mr. Larsen's account was properly chargeable with that amount. However, it is listed in both the Bureau's statement and the appellants' statement as being for only 680 acres.

As stated above, Mr. Larsen, on November 12, 1953, filed assignments covering 12,235.79 acres which, with the assignments of leases already

on file, accounted for 16,128.29 acres. Those assignments, if they had been effective when filed, would have reduced Mr. Larsen's acreage account to 15,504.89 acres, or slightly more than the 15,360 acres permitted, and, if the offer Utah 010763 had in fact been for only 680 acres, as shown on the statements, this would have reduced the account by 1,200 acres and brought it down to 14,304.89 acres, below the permitted maximum. Furthermore, had the assignments of undivided interests in Utah 010760 and 010762, filed on November 16 and November 23, 1953, respectively, been effective when filed, they would have reduced Mr. Larsen's acreage account by 2,510 acres. On November 25, 1953, before any of the Larsen leases here in controversy were issued, Mr. Larsen's offer Utah 010764, filed on November 10, 1953, for 640 acres, was rejected, thus reducing his acreage account by that amount, and on December 8, 1953, simultaneously with the issuance of lease Utah 010763 for 680 acres, that offer was rejected as to 1,200 acres, reducing his acreage account by that amount.

The manager, on the assumption that, for the purpose of computing chargeable acreage, assignments were effective when filed, determined that Mr. Larsen had reduced his acreage account below the prescribed limitation and accordingly issued two of the leases here in controversy to Mr. Larsen on December 3, 1953, and the third lease on December 8, 1953, all to be effective as of January 1, 1954. He did not require Mr. Larsen to file proof of the reduction of his holdings.

However, under the rule laid down in our decision of September 6, 1955, none of the assignments of leases filed by Mr. Larsen but not yet approved were effective to reduce his acreage account. Nor were the assignments of interests in leases not yet issued, under the same principle, effective to reduce that account. Those assignments did not purport to be assignments of offers but, instead, assignments of leases or of interests in leases. They could not be approved until after the leases had issued to the offeror (43 CFR 192.42 (k)) and until the assignments were approved they remained chargeable to the acreage account of the offeror. In fact, the record shows that the assignments of undivided interests in leases Utah 010760 and 010762 were approved on January 12, 1954, after those leases had been issued.

On the basis of the Bureau statement it is apparent that it was not until the approval of the assignments which the Bureau lists as being effective as of February 1, 1954, that Mr. Larsen's acreage account was effectively reduced below the prescribed limitation. In other words, of the 31,633.18 acres which Mr. Larsen had under lease or lease offer on November 12, 1953, his account was reduced on November 25, 1953, by 640 acres, by the rejection of his offer Utah 010764, and again on December 8, 1953, when his offer Utah 010763 was rejected as to 1,200 acres. Thus, prior to the approval of the assignments which the Bureau lists as effective as of January 1, 1954, his account stood at 29,793.18 acres. Deducting the approvals of assignments which the Bureau lists as effective as of January 1 and February 1, 1954, totaling 18,568.29 acres, we find that thereafter his chargeable acreage was 11,224.89 acres.

But if to this figure we add the offers which the appellants state Mr. Larsen filed after November 12, 1953, his account would be increased by 9,038.88 acres, for a total of 20,263.77 acres. As leases covering those offers are said to have been issued to Mr. Larsen as of January 1, 1954, it seems safe to assume that the assignments affecting those leases, which the appellants state were filed by December 1, 1953, were approved during the month of January 1954, shortly after the issuance of the leases. Even on the basis of this assumption it would appear that his account may have covered 16,983.77 acres after the approval of the assignments listed by the Bureau as effective on February 1, 1954, and that it was not until the approval of the assignments which the Bureau lists as effective on March 1, 1954, that Mr. Larsen's account was effectively reduced to 14,889.77 acres, or slightly less than the amount then permitted to be held. This, of course, is on the assumption that no additional offers were filed, that no pending offers were rejected, and that no additional assignments were approved during the period now under discussion.

However, it is noted that the effective approval date of all assignments is listed by the Bureau as the first day of the month. As the assignments listed are not shown to have been approved during the month in which they were filed, it seems obvious that the approval dates listed by the Bureau, insofar as the computation of acreage is concerned, are erroneous. The Bureau has evidently misconstrued our former decision in this case. There we held that, for the purpose of computing acreage holdings, where the approval of an assignment is not given during the month in which the assignment is filed, the acreage covered by the assignment remains chargeable to the acreage account of the assignor *until the approval date.* Thus while the assignments of undivided interests in leases Utah 010760 and 010762 were approved on January 12, 1954, the Bureau lists them as remaining chargeable to Mr. Larsen's acreage account until February 1, 1954. This is not correct. That acreage, amounting to 2,510 acres, should have been deducted from Mr. Larsen's account on January 12, 1954. Furthermore, if the assignments of leases already issued, filed on November 12, 1953, and listed as effective on January 1, 1954, were actually approved during the month of December 1953, they were effective, for the purpose of reducing Mr. Larsen's acreage account, on the dates in December 1953, when the assignments were actually approved.

Thus, while we are still unable to determine from the records before us the exact date on which Mr. Larsen's acreage account was brought within the limitation, there is no question but that Mr. Larsen, on November 12, 1953, when he filed the three offers here in controversy, held in leases and lease offers more than the 15,360 acres then permitted to be held and that his account was not effectively reduced below that figure either by the time the various Massa offers were filed or by the time the leases were issued to Mr. Larsen. There is no question either but that the manager issued the Larsen leases on the erroneous assumption that Mr. Larsen did not hold in leases plus lease offers more than

the permitted amount. However, it was not until September 6, 1955, when we remanded the matter to the Bureau for further consideration, that the Department formally set forth the proper basis for the charging of acreage included in assignments filed but not yet approved. It is not set forth in the regulations. (43 CFR, Part 192.)

It having been established that the manager erroneously computed Mr. Larsen's acreage account and that Mr. Larsen in fact held more than the prescribed limitation in leases plus lease offers both at the time he filed the offers here in controversy and at the time the appellants' offers were filed, we turn now to the appellants' contention that since Mr. Larsen was not qualified to maintain his offers at the time they filed their offers, they were the first qualified offerors for the land and that Mr. Larsen's leases must be canceled in order that their statutory preference right to leases on the land may be honored.

Assuming that the appellants are qualified to hold leases on the land for which they applied, we note that offer Utah 010806, filed on November 18, 1953, conflicts with the Larsen lease Utah 010763 issued on December 8, 1953, as to 320 acres and that a lease was issued to Albert C. Massa covering the balance of the land applied for under that offer; that offer Utah 010844, filed on November 24, 1953, for 200 acres also conflicts in its entirety with the Larsen lease Utah 010763; that offer Utah 010881 for 960 acres, filed on December 4, 1953, conflicts as to 800 acres with the Larsen lease Utah 010760, issued to Mr. Larsen on December 3, 1953, before the Massa offer was filed, and as to 160 acres with the Larsen lease Utah 010763; and, finally, that the appellants' offer Utah 010886 for 2,560 acres, filed on December 9, 1953, conflicts as to 1,200 acres with the Larsen lease Utah 010760 and as to 1,360 acres with the Larsen lease Utah 010762, both of which leases were issued to Mr. Larsen on December 3, 1953, prior to the filing of the appellants' offer. In other words, all of the land in offers Utah 010760 and 010762 for which the appellants applied had been leased to Mr. Larsen prior to the time the appellants' individual offers for that land were filed. Thus of the approximately 4,040 acres of land for which the appellants filed offers in conflict with the Larsen offers filed on November 12, 1953, 3,360 acres were under lease to Mr. Larsen at the time the appellants' offers were filed.

Under well established principles, recently reiterated by the Department, lands included in outstanding oil and gas leases, whether those leases be void, voidable, or valid, are not available for leasing to others and applications filed for such lands must be rejected. The Department is without authority to issue leases for lands already under lease and while an outstanding lease may be subject to cancellation the lease itself, while it is outstanding, segregates the land and makes it unavailable for further leasing until such time as final action is taken on the outstanding lease and its cancellation, if it is subject to cancellation, is noted on the records of the local land office. See *Joyce A. Cabot, Allen B. Cabot, Walter G. Davis et al.*, 63 I. D. 122 (1956), and *R. B. Whitaker, Mrs. Jacqueline Anderson*, 63 I. D. 124 (1956), and cases there cited.

Thus, it must be held that, as to part of the land covered by the Massa offer Utah 010881 and as to the other appellants' offer Utah 010886 in its entirety, those offers were properly subject to rejection because that land was already included in outstanding leases when the appellants' offers were filed and it is for this reason that the rejection of those offers, in whole or in part, must be affirmed.

This leaves for consideration the Larsen lease Utah 010763, issued on December 8, 1953, while the Massa offers Utah 010806, 010844, and 010881, covering land then available for leasing, were pending. That lease covers 680 acres. It includes 320 acres covered by the Massa offer Utah 010806, 200 acres covered by the Massa offer Utah 010844, and 160 acres covered by the Massa offer Utah 010881.

Section 17 of the Mineral Leasing Act confers upon the first person making application for land available for leasing who is qualified to hold a lease under that act a preference right to a lease which must be honored if the land is to be leased.

Mr. Larsen was the first person to make application for the land. He was qualified to hold a lease under the act. He did not hold, at the time his offer was filed, more than the 15,360 acres in outstanding leases then permitted, by section 27 of the act (30 U. S. C., 1952 ed., sec. 184), to be held by any one person in any one State.

Prior to the issuance of the lease to Mr. Larsen it had been determined, although erroneously, that Mr. Larsen did not hold in leases plus lease offers more than 15,360 acres. It now having been determined that Mr. Larsen's acreage account was erroneously computed and that he did, in fact, hold more than 15,360 acres in leases plus lease offers, the question arises whether Mr. Larsen may now be permitted to qualify himself as an offeror. We believe that under the provisions of 43 CFR 192.3 (c), quoted above, he should be granted the opportunity to do so.

It may be admitted that if a proper computation had been made of Mr. Larsen's acreage account at any time before the issuance of the lease to him and if it had been determined that his acreage holdings in leases plus lease offers exceeded 15,360 acres, Mr. Larsen would not have been considered to be a qualified offeror for this land. But upon that determination and under the construction of 43 CFR 192.3 (c) adopted by the Department in *John H. Trigg et al.*, A–24483 (April 8, 1949), and followed in *Yakutat Development Company*, 63 I. D. 97 (1956), he would have been entitled to 30 days within which to reduce his holdings and become a qualified offeror for this particular land, without the loss of priority of his offer. Had he done so, there would be no question of priority of offers as between Mr. Larsen and Mr. Massa. The fact that an erroneous determination of Mr. Larsen's acreage account was made and that it was not until after the lease had been issued to him that his acreage account was called into question should not deprive him of the opportunity accorded to him by 43 CFR 192.3 (c).

While the Department has administratively extended the limitation imposed by section 27 of the Mineral Leasing Act[2] on the holding of leases to include lease offers as well as leases, it has at the same time granted the offeror who is determined to be over the limitation 30 days within which to reduce his holdings and it has not required that those offers which may increase the offeror's chargeable acreage above the prescribed limitation be rejected summarily. It has given such an offeror the choice of which among his holdings he will dispose of in order to qualify his offer. Thus the offeror may, if he does so effectively within 30 days after a determination that he holds excess acreage, dispose of his interests in either outstanding leases or in pending offers.

Therefore, Mr. Larsen will be granted the 30 days provided for in the regulation within which to file proof that he does not at this time hold acreage in leases plus lease offers, including the 1,880 acres applied for on November 12, 1953, under his offer Utah 010763,[3] in excess of the prescribed limitation.

In the event Mr. Larsen makes such a showing, he will be considered to be a qualified offeror for the land and his lease will be permitted to stand. Otherwise, he will be considered to be unqualified as an offeror, in which event his lease must be canceled in order that Mr. Massa, as the first qualified offeror for the land, may obtain a lease.

Accordingly, Mr. Larsen is granted 30 days from the receipt by him of this decision within which to file with the State Supervisor for Utah, Post Office Box No. 77, Salt Lake City 10, Utah, proof of his qualifications as an offeror. The State Supervisor should forward any showing which Mr. Larsen may file within the 30-day period to the Director of the Bureau of Land Management accompanied by a statement as to whether, in the opinion of the State Supervisor, Mr. Larsen has qualified himself as an offeror within the time permitted.

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), no action will be taken by the Department with respect to the two leases, Utah 010760 and 010762, issued to Mr. Larsen on December 3, 1953, unless it is shown that Mr. Larsen holds in leases more than the statutory limitation and the decision of the Acting Director of the Bureau of Land Management dated December 29, 1954, insofar as that decision affirmed the rejection of offer Utah 010881 as to the 800 acres of land included in the Larsen lease Utah 010760, and insofar as it affirmed the rejection of offer Utah 010886 in its entirety, is affirmed and the case is remanded to the Bureau of Land Management for action consistent with this decision.

EDMUND T. FRITZ,
Acting Solicitor.

[2] The limitation was raised to 46,080 acres by the act of August 2, 1954 (60 Stat. 648).
[3] While the lease as issued to Mr. Larsen was for only 680 acres, and while the record shows that effective April 1, 1954, an assignment by Mr. Larsen of an undivided one-half interest in the lease was approved, Mr. Larsen was at the time the Massa offers were filed maintaining the offer for 1,880 acres. He must therefore qualify himself to maintain an offer for that acreage.

APPEAL OF J. D. ARMSTRONG COMPANY, INC.

IBCA-40 *Decided August 17, 1956**

Contracts: Additional Compensation—Contracts: Changed Conditions

A contractor that encountered shale in working on sections of the Franklin Canal, a part of the Missouri River Basin Project, is not entitled to an equitable adjustment under the "changed conditions" article of its contract when the specifications called for unclassified excavation; the records of the subsurface investigations were not guaranteed; there were shale exposures in the vicinity; shale had been encountered under other contracts in the same vicinity; the generally known geological conditions in the neighborhood indicated the presence of shale; and the quantity of shale excavated amounted to only approximately 6 percent of the total structure excavation, and to less than two-tenths of 1 percent of the total excavation. The contractor could not insist that it would handle only such an amount or kind of shale as could be excavated with normal excavating equipment. As the specifications did not prescribe the type of equipment it was to employ, it was required to have such equipment as could take care of such hard material as might actually be encountered. It also could not rely on an alleged custom in the construction industry, requiring the payment of ten times the dirt price when a hard material was encountered, since such a custom even if adequately established could not override the express provisions of the specifications.

Contracts: Additional Compensation—Contracts: Changes and Extras—Labor: Wage Rates—Contracts: Bids: Generally

A contractor who prior to the acceptance of its bid agreed to be bound by an expected redetermination of minimum wage rates by the Department of Labor is not entitled to additional compensation by reason of paying such wage rates, which were generally higher than the previous ones, when under the regulations of the Department of Labor governing wage determinations, such determinations did not become obsolete until more than 90 days had elapsed since the award of the contract to which the rates applied, and the contract was awarded within this period. Under the circumstances of the present case, the contract was awarded when the contracting officer finally notified the contractor that he had been awarded the contract rather than when the contract and bond forms were forwarded to the contractor for preliminary examination and execution.

Contracts: Additional Compensation—Contracts: Changes and Extras—Contracts: Drawings—Contracts: Specifications

A contractor is not entitled to additional compensation by reason of an overrun in compacted embankment work over the estimated amount of such work indicated in the schedule, notwithstanding that this estimate was erroneous, when the specifications included an approximate quantities provision; when the amount of compaction work actually required of the contractor conformed to the dimensions and standards prescribed by the drawings and specifications; and when the contractor could have roughly computed this amount from the drawings before submitting its bid. A memorandum issued by one of the Government engineers to the contractor at its request in

*Not released for publication in time for inclusion chronologically.

which the compacted and uncompacted embankment work remaining to be done was computed in tabular form in general conformity with the requirements of the specifications and drawings did not constitute a change within the meaning of the "changes" article of the contract, and hence did not entitle the contractor to additional compensation.

Contracts: Specifications—Contracts: Interpretation

Although approximate quantities provisions included in specifications have varied greatly in their phraseology, and these variations, particularly when coupled with differences in other provisions of the contract, could conceivably affect the result in individual cases, such provisions have been generally held to mean that the quantities of work actually required to be performed under the contract, whether greater or less than the quantities stated in the schedule, are to be paid for at the unit prices bid by the contractor, and that the mere existence of an overrun above or an underrun below the schedule quantities is not sufficient cause for the allowance of an equitable adjustment predicated on the actual cost of the work done by the contractor.

Contracts: Damages: Unliquidated Damages

A claim for compensation on account of damage to one of the tractor bulldozers operated by the contractor, and loss of its use while under repair, allegedly caused when the bulldozer struck an underground gas company pipe line, is a claim for unliquidated damages, which may not administratively be settled.

Contracts: Damages: Unliquidated Damages—Contracts: Delays of Government—Contracts: Suspension and Termination

A claim of a contractor based on increased costs sustained as a result of an alleged suspension of work by the Government is a claim for unliquidated damages which may not be administratively allowed, notwithstanding the inclusion in the specifications of a provision relating to costs involved in suspension of work where the contracting officer never entered a written suspension order.

Contracts: Changes and Extras—Contracts: Damages: Generally

A contractor is not entitled to additional compensation for the construction of a berm when the record is so obscure that the contractor cannot be said to have established either that the work performed did not come under provisions of the specifications which would require the performance of the work at the bid prices, or that it actually sustained the additional costs claimed.

Contracts: Protests

A waiver of the failure of a contractor to comply with the provisions of the specifications relating to protest cannot appropriately be implied when the contracting officer considered some aspects of the merits of the claim only because he was under the impression that the claim had been withdrawn.

BOARD OF CONTRACT APPEALS

J. D. Armstrong Company, Inc. has appealed from the findings of fact and decision of the contracting officer dated April 15, 1955, denying claims Nos. 1, 3, and 8 under Contract No. 14–06–D–374, dated May 29, 1953, with the Bureau of Reclamation; and from a decision

of the contracting officer in the form of a letter dated March 28, 1955, denying claims Nos. 2, 4, and 5 under the same contract on the ground that they were claims for unliquidated damages which could not be determined by an administrative official. At the contractor's request, the appeals were consolidated.[1]

The contract, which was on Standard Form No. 23 (revised April 3, 1942), required the contractor to furnish the materials and perform the work for construction and completion of earthwork and structures for Franklin Canal from Station 750+00 to Station 1454+00, a total distance of approximately 13 miles, and for adjacent drains and structures, under Schedules 2, 3 and 4, Bostwick Division, Nebraska-Kansas, Missouri River Basin Project. The work was situated in the vicinity of Franklin and Riverton, Nebraska.

Notice to proceed was received by the contractor on June 2, 1953, thereby establishing September 5, 1954, as the final date for completion of all work under the contract, in accordance with the provisions of Paragraph 6 of the specifications. By findings of fact dated September 30, 1954, the time for completion of Schedule No. 2 was extended to November 15, 1954. All work was completed within the contract time, except the work on Schedule No. 2, which was completed within the extended time.

A hearing was held on the appeals before the Chairman of the Board, Theodore H. Haas, in the Council Room, City Auditorium, Superior, Nebraska, from October 17 to October 19, 1955, inclusive. The Department counsel was Palmer King, and the contractor was represented by Raymond M. Crossman, Jr., and Raymond M. Crossman, Sr., both of Omaha, Nebraska, as well as by Marion Hirschberg, of Ames, Iowa.

At the request of counsel for the Government, the hearing official accompanied by counsel and witnesses for both parties visited the site of the work on October 17, 1955, prior to the taking of testimony at the hearing. He was driven over the right-of-way, and exposures of shale and other points of interest which were to be the subject of testimony at the hearing were pointed out to him.

In accordance with an agreement entered into at the hearing, Department counsel filed a post-hearing brief and counsel for the contractor filed a reply brief. Department counsel then proceeded to file a rebuttal brief, and counsel for the contractor moved to strike the rebuttal brief from the appeal file. In the circumstances, the Board considers that the filing of the rebuttal brief, without first obtaining the consent of counsel for the contractor or seeking leave from the Board, was improper. The rebuttal brief, therefore, has not been considered by the Board in arriving at its decision.

[1] No appeal was taken from the portion of the findings of fact and decision of April 15, 1955, which covered claims Nos. 6, 7, and 9.

Each of the claims as to which an appeal was taken by the contractor will be discussed seriatim.

Claim No. 1: Shale Excavation

This is a claim for additional compensation in the amount of $17,688.91 for increased costs of the contractor allegedly due to excavating 3,124 cubic yards of hard shale in ten locations, and is based on article 4 of the contract providing for an equitable adjustment in case of the discovery of "subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications * * * ."

Paragraph 38 of the specifications provided: "Materials excavated will not be classified for payment. Excavation shall be performed in accordance with subparagraph B–4(b)." This referred to a provision of the "Standard Specifications for Construction of Canal Systems, August 1951" of the Bureau of Reclamation (hereinafter denominated the standard specifications), which in pertinent part provided:

> Materials excavated will not be classified for payment. * * * Bidders and the contractor must assume all responsibility for deductions and conclusions as to the nature of the materials to be excavated and the difficulties of making and maintaining the required excavations.

Paragraph A–24 of the standard specifications, entitled "Records of subsurface investigations," provided further, as follows:

> The drawings included in these specifications show the available records of subsurface investigations for the work covered by these specifications. The Government does not represent that the available records show completely the existing conditions and does not guarantee any interpretation of these records or the correctness of any information shown on the drawings relative to geological conditions. Geological data are shown on the drawings for informational purposes only. Bidders and the contractor must assume all responsibility for deductions and conclusions which may be made as to the nature of the materials to be excavated, the difficulties of making and maintaining the required excavations, and of doing other work affected by the geology at the site of the work.

Sheets 38, 39, and 40 of the drawings attached to the specifications, denominated "Logs of exploration," constituted the record of subsurface investigations referred to in paragraph A–24 of the standard specifications. As the test holes were bored with a hand auger rather than with a machine, they did not, however, penetrate to grade (Tr., p. 118). While the logs of exploration showed primarily sand, silt, and clay, interspersed with fragments of limestone and chalk, a number of them showed also fragments of rock and slate.[2] Although the

[2] This was true of test holes 225, 252, 286, 290, 294, 295, 297, 298.

contractor claims that it was misled by the logs of exploration, it does not assert that the Government was guilty of misrepresentation (Tr., pp. 38, 66).

Having excavated two or three siphons with tractors and scrapers, the contractor first encountered shale during the latter part of September 1953, at a siphon designated as 906 (Tr., pp. 26, 45). The Project Engineer was notified that shale had been found and he and the Chief Inspector for the Government came to the project site and observed the shale. Two or three days later the Project Engineer or the Chief Inspector told the contractor to go ahead with the excavation and finish the work (Tr., pp. 26–27, 33). Subsequently, it was found that of the fourteen blow-off structures [3] at the bottom of the siphons, all but four were set on a shale base (Tr., pp. 27, 45–46). No change order or written instructions were issued (Tr., p. 33).

The terrain traversed by the canal was broken by numerous draws, watercourses, and creeks which the canal crossed either by siphons or earth fills. The earth sections of the canal comprised about 11.5 miles of the total length of canal, and the 14 siphons comprised 1.8 miles. Wasteway structures, by means of which surplus water was to be wasted into the creek channels, were constructed at the sites of two creek crossings. The shale was generally encountered in the deepest part of the excavation in the draws and creek bottoms (Tr., p. 27). It was also found, however, in some instances, as in the case of the wasteways, in excavating down steep slopes for the construction of concrete chutes to carry waste water from the elevation of the earth section of the canal to the creek bed.

At the hearing, J. D. Armstrong, President of the contractor, testified concerning his investigation of the site of the job, and his actual experience after work commenced. He first read and studied the logs of exploration (Tr., pp. 14–15). Subsequently, he made three trips to the site of the right-of-way, which was in the Republican River Valley, to investigate the terrain and look for any apparent hazards. During the third trip, he flew over the terrain by plane (Tr., p. 22). On the second trip at least, he appears to have been accompanied by Olin Gray, the Project Engineer, who, he asserted, told him that he need not be concerned about encountering any "hazardous foreign materials" (Tr., p. 21). He also talked with several farmers in the vicinity of the right-of-way. The first farmer told him that in the area of siphon 906 there would be a considerable amount of gravel and sandy material (Tr., p. 23). Another farmer, in the vicinity of siphon 1068, where there was some loose rock, told him that it was only

[3] A blow-off structure is located at the lowest elevation of the pipe. It releases the water to permit repair work (Tr., p. 27).

a short ledge, but he was not concerned because it was 10 to 20 feet above the blow-off excavation (Tr., p. 23). Although he observed outcroppings of shale during his trips, he did not, for various reasons, attach much significance to them, or attempt to estimate the amount of shale that might be encountered. The shale was at such a low elevation that he assumed that the Franklin Canal would be above the shale (Tr., p. 24). He relied on the centerline borings which showed no solid mass of shale (Tr., p. 32). He knew that the logs of exploration themselves did not penetrate to grade (Tr., p. 38). A ledge of shale which he saw at Riverton was at an undetermined elevation, and he had no fear of any shale 4,000 feet north of the excavation. While he expected to encounter shale, he was apprehensive only about encountering a shale that could not be handled with normal excavating equipment (Tr., p. 43). Instead, there was encountered a ledge of solid shale that could not be handled with such equipment, which consisted of scrapers and rippers (Tr., p. 31) but had to be drilled or augered and shot with dynamite (Tr., p. 38).

It is apparent from Armstrong's own testimony that the presence of shale was indicated in the area of his prospective operations. The probability that shale would be found is made even more apparent by the testimony of the Government witnesses, which in several respects also casts doubt upon the accuracy of some of Armstrong's recollections.

Robert L. Boyce, the Construction Engineer, testified that he saw shale exposures in the area of the contract from Riverton to Franklin, and that as a reasonably prudent engineer he would inquire whether there was similar construction work in the neighborhood, and that if he observed shale outcroppings either above or below the elevation of a prospective excavation and within a distance of ten miles thereof he would anticipate that shale would be encountered (Tr., pp. 83–85). Furthermore, he testified that shale had actually been encountered before the Armstrong job was advertised for bidding in the first section of the Superior Canal, the first section of the Franklin Canal, and the first section of the Courtland Canal, all of which were in the vicinity of Franklin, Nebraska (Tr., p. 91).

Olin Gray, Resident Engineer on the job, supplied further details with reference to the shale encountered on these jobs prior to the letting of the Armstrong contract. He testified that more shale in proportion to the percentage of excavation had been encountered under these contracts than in the case of the Armstrong contract, and that only one of these contracts (for the Superior-Courtland Diversion Dam) had a shale classification (Tr., pp. 105–06). Although he did not call to Armstrong's attention, when he accompanied him on the tour of the site, that shale had been encountered under each of these other contracts, he did tell the contractor that shale had been encoun-

tered in the first section of the Bushman construction [4] (Tr., p. 114). The reason for Gray's failure to mention the shale encountered under the other contracts is particularly interesting. It was due to the fact that Armstrong had stated that "he wasn't worried about shale excavation as his equipment would move it" (Tr., p. 105). Apparently, the contractor did not limit his reference to equipment to "normal equipment." Gray also attributed to the type of equipment used by the contractor, which was not suitable for operations at close quarters, the necessity for blasting in four of the ten places where shale was ultimately encountered, and expressed the opinion that the character of the material that was loosened by blasting was no different from the harder material that was removed by ripping (Tr., pp. 108–09).

Arnold D. Stoecker, Party Chief in Charge of Surveys and Computations for the Bureau of Reclamation, gave testimony with respect to a luncheon meeting on the day the bids were opened at the Dudley Hotel in Superior, Nebraska, which was attended by him, the contractor, Gray, and Ellis J. Peterson, Chief Inspector of the Bureau of Reclamation. Stoecker testified that it was his recollection that when he asked Armstrong "what percent of siphon excavation he considered shale," the latter replied that he anticipated about 5 percent of shale in the siphon excavation (Tr., p. 128). Armstrong testified that he had no recollection of making any such statement (Tr., p. 60). As both Stoecker and Armstrong were testifying only according to their best recollection, and a long time had elapsed since the conversation was supposed to have taken place, the Board is not inclined to attach much importance to this testimony. However, all three members of the Bureau of Reclamation party were positive in their testimony that Armstrong stated during the luncheon meeting that he was not worried about shale, since he had the equipment that could handle it (Tr., pp. 123, 128, 178). This testimony, which is important, the Board accepts.

Charles S. Osborn, head of the Geology and Exploration Section of the Kansas River District of the Bureau of Reclamation, a trained geologist with two decades of experience, testified concerning the geological characteristics of the Republican River Valley. According to his testimony, an extensive sedimentary seam of shale, into which the Republican River cuts to quite a depth, underlies the whole of the ancestral river valley, but is covered with a blanket or mantle of loess, and the main part of the valley has been partially refilled with sand and gravel. However, the shale formation is quite erratic, and it is difficult to predict at what elevation it will be found at any given

[4] The witness did not at this point further identify this construction, or its relation to the three contracts previously mentioned by him. However, he later stated that the Bushman construction was part of the three jobs where shale had been exposed prior to the letting of the Armstrong contract.

place. The fact that shale was found at a low elevation at a given place would not necessarily have a bearing on the elevation where it would be found at another place. It could reasonably be anticipated that shale might be found in the bottom portions of draws in the Republican River Valley. Moreover, the geological condition of the valley was a matter of common knowledge. It was known not only to professional geologists but also to farmers and well drillers in the area (Tr., pp. 154–57).

On the basis of the record the Board must conclude that the present case does not call for the application of the "changed conditions" article. Conditions cannot be said to be "unknown" within the meaning of that article when they are foreseeable or ascertainable with the exercise of ordinary prudence, nor can conditions be said to be "unusual" within the meaning of the same article unless they turn out to be substantially worse than might reasonably be anticipated under the circumstances of the case.[5] Under specifications which called for unclassified excavation, the contractor could well expect to encounter a substantial amount of hard material, and it was further put on notice that a shale problem might be encountered by the shale exposures, the logs of exploration (which, moreover, were not guaranteed), experience under the other contracts in the same vicinity, and the general knowledge of geological conditions in the neighborhood. The contractor could not insist that he would handle only such an amount or kind of shale as could be excavated with normal excavating equipment. The specifications did not specify the type of equipment he was to employ, and he was, therefore, required to have such equipment as could take care of such hard material as might actually be encountered. The contractor also apparently relied on an alleged custom in the construction industry requiring the payment of ten times the dirt price when a hard material was encountered, but obviously such a custom could not override the express provisions of the specifications, even if the existence of the custom had been adequately established at the hearing (which it was not). From a purely quantitative point of view, moreover, the contractor has failed to lay a basis for the application of the changed conditions article. The Government challenges the contention of the contractor that it had to excavate 3,124 cubic yards of hard shale, and contends that the quantity of shale excavated was only 2,600 cubic yards. But, even accepting the contractor's figure, the quantity of shale excavated would amount to only approximately 6 percent of the total structure excavation, which was 51,206 cubic yards, and to less than two-tenths of 1 percent of the total excavation, which was 1,706,543 cubic yards.[6] As

[5] *L. D. Shilling Co., Inc.*, 63 I. D. 105 (1956), a case that bears many marked resemblances to the present one.

[6] The actual quantities of excavation are shown by the final payment voucher which is in evidence as Government Exhibit 6.

a matter of law, such a quantity of shale cannot be regarded as a greater quantity than might reasonably have been expected,[7] and the claim for additional compensation must be rejected.

Claim No. 2: Increased Minimum Wage Rates

This claim, in the amount of $27,135.44, is based upon increased wage costs alleged by the contractor to have been due to erroneous action by the contracting officer. Pursuant to the provisions of the Davis-Bacon Act, as amended and supplemented,[8] paragraph 4 of the special provisions of the specifications, as originally submitted to prospective bidders, prescribed certain minimum rates per hour to be paid by the contractor to its mechanics and laborers for the various classifications of work covered by the contract. As these rates had become obsolete, however, prior to the opening of bids, and further changes in wage rates were expected, the contracting officer issued two supplemental notices to prospective bidders modifying the provisions of paragraph 4 of the specifications. By Supplemental Notice No. 2, dated March 18, 1953, the rates of wages specified by the Department of Labor in its decision, M–8835, dated January 30, 1953, were substituted for the minimum rates originally prescribed in paragraph 4 of the specifications. By Supplemental Notice No. 3, dated March 19, 1953, the specifications were further amended by inserting in them a new paragraph, numbered 4A, which reads as follows:

> 4A. *Changes in minimum wage rates.* The wage rates set forth in Paragraph 4 of the specifications are the rates currently established by the Department of Labor as the prevailing rates in the area in which the work will be performed. These wage rates are currently the subject of proceedings by the Department of Labor and hearings are scheduled during April 1953, in the area, for the purpose of redetermination of prevailing rates. In the event of any redetermination resulting from these proceedings, the Labor Department's new schedule of classifications and rates will be substituted for those included in Paragraph 4 of the specifications. Such new rates will become the applicable minimum rates for work performed thereafter under these specifications. Such substitution of wage rates, if any, will be made as soon as possible following the above hearings, and no increase in the contract prices will be allowed because of such substitution.

Both supplemental notices were accepted by the contractor on March 24, 1953, prior to the opening of bids, which occurred on March 26, 1953, and thereby became part of the contract. Having been awarded the contract, and received notice to proceed on June 2, 1953, the contractor commenced operations. A new minimum wage rate sched-

[7] Compare *Huffman Construction Co.* v. *United States,* 100 Ct. Cl. 80 (1943), a case involving a dredging contract, which indicated that there would be "some hardpan." Although 11 percent of the total excavation of 175,000 cubic yards turned out to be hardpan, recovery was denied.

[8] 40 U. S. C., 1952 ed., secs. 276a–276c.

ule covering work to be performed under the contract having been established by the Department of Labor in its decision, M–17467, dated June 18, 1953, the contracting officer informed the contractor of these rates in a letter dated June 23, 1953, in which he stated:

> In accordance with Paragraph 4A, Changes in Minimum Wage Rates, of the contract specifications, the classifications and rates above listed are hereby substituted for the classifications and rates listed in Paragraph 4 and now become the applicable classifications and minimum rates for work performed hereafter under the contract.

The contractor received the letter on June 25, 1953, and proceeded to pay its employees in accordance with the wage rates prescribed by decision M–17467. On August 1, 1953, however, it wrote to the contracting officer a letter contending that these rates, which were generally higher than the rates payable under decision M–8835, were inapplicable to its operations under the contract. In prosecuting its appeal, the contractor has taken the position that the contract was awarded on or before April 2, 1953, the date on which the contract and bond forms were forwarded to the contractor for execution by it, rather than on May 29, 1953, the date on which the contracting officer sent the contractor a telegram stating that the latter was "hereby awarded" the contract, as the Government contends. From this premise the contractor argues that under the minimum wage regulations prescribed by the Secretary of Labor for Government contract work that were in force at the time of the making of the contract, the minimum wage rates set forth in decision M-8835 continued to be applicable. The pertinent portion of these regulations [9] reads as follows:

> § 5.4 *Use of wage determinations.* (a) If the proposed contract for which determination was sought has not been awarded * * * within 90 calendar days from the date of the original wage determination such determination shall be deemed obsolete and the Agency Head shall request a new wage determination before the award of such contract * * *.
>
> (b) All actions changing or modifying an original wage determination prior to the award of the contract or contracts for which the determination was sought shall be applicable thereto but modifications received by the agency later than 5 days before the opening of bids shall not be effective if the award is made within 30 days after the opening of the bids or 90 days from the date of the original wage determination whichever is the earlier. * * *

The contention of the Government concerning the date of the award is supported by the considerations outlined below.

First, the bid itself, as signed by the president of the contractor under date of March 24, 1953, states that the bidder:

> * * * agrees that, upon receipt of written notice that a preliminary examination of the bids indicates that he will be the successful bidder, or upon written notice of the acceptance of this bid within 60 days after the date of opening of the bids (if no shorter period be specified), whichever of these events oc-

[9] 16 F. R. 4431; 29 CFR 5.4.

curs first, he will within 10 days (unless a longer period is allowed) after the prescribed forms are presented for signature, execute U. S. Standard Form of Contract No. 23, in accordance with the bid as accepted, and give performance bond on U. S. Standard Form No. 25 and payment bond on U. S. Standard Form No. 25A, with good and sufficient surety or sureties: *Provided*, that contract and bond forms furnished by the bidder prior to award of contract will become effective only if his bid actually is accepted within said 60 days after the date of opening of the bids (or within such shorter period as may be specified in the bid).

This language clearly distinguishes between the actual acceptance of a bid, on the one hand, and the giving of notice of the results of the preliminary examination, on the other; and also clearly indicates that the actual acceptance may be deferred until some time after the contract and bond forms have been presented to, and executed by, the contractor.

Second, on May 21, 1953, which was four days before the 60-day period for acceptance specified in the bid was due to expire, R. B. Starke, the chief legal officer of the Bureau of Reclamation office concerned, wired the contractor as follows:

Please grant extension thirty days for acceptance your bid for earthwork and structures, Franklin Canal, under Schedules 2, 3 and 4, Specifications DC-3891, Missouri River Basin Project. If extension granted have your surety notify us of concurrence.

On the same day the contractor wired Mr. Starke as follows:

Retel received your telegram May 21 advise and agree that extension is granted per your request. Our bid for earthwork and structures Franklin Canal under Schedules 2 3 and 4 Specifications DC-3891 Missouri River Basin Project.

This exchange of telegrams is persuasive evidence that on May 21, 1953, both the contractor and the officials of the Bureau of Reclamation considered that the bid had not been accepted as yet.

Third, the delegations of authority made by the Commissioner of Reclamation and published in the Federal Register that were in effect during the period of the making of the contract reserved to the Commissioner and the Assistant Commissioners of the Bureau of Reclamation the authority to authorize the execution of construction or supply contracts involving amounts in excess of $200,000.[10] Hence the bid involved in the present case, being for an amount in excess of $200,000, could not have been accepted by the contracting officer on his own motion, but had to be referred to the Washington office of the Bureau in order to determine whether specific authorization for its acceptance would be granted. The requisite authorization was not granted until May 25, 1953, when Assistant Commissioner Kenneth Markwell sent a teletype to the contracting officer stating that the latter was "authorized to award and execute" the contract and was to advise the Wash-

[10] Commissioner's Circular Letter 3509, dated August 20, 1947, 12 F. R. 8896; Commissioner's Order 13, dated July 14, 1952, 17 F. R. 6751, 6925.

ington office "when contract awarded and NTP [notice to proceed] issued."

The contractor bases its contention concerning the date of the award primarily upon the considerations outlined below.

First, on March 20, 1953, Assistant Commissioner Markwell sent the Solicitor of the Department of Labor a letter, discussing the minimum wage provisions of the specifications for the present contract, in which Mr. Markwell stated that "arrangements are being made for the opening of bids and award of contracts on the above specifications within the next week or ten days." This statement, made six days before the opening of the bids, and while their terms necessarily remained unknown to the writer, offers no trustworthy basis, however, for an inference that the contract was, in fact, awarded within the time forecast by Mr. Markwell. Such an inference would be a mere surmise, predicated upon circumstances that would support equally as well a surmise that the writer underestimated the time which would be consumed in evaluating and processing the bids to the point where an award would be in order.

Second, at the hearing two witnesses testified with respect to the existence of a custom in the construction industry governing the time factor in the award of contracts. Armstrong testified:

> We feel, and it is our opinion, that we are awarded the contract when the bids have been opened, the contracting officer that has read the bid recommends the award and our bond has been executed and signed and received by same. (Tr., p. 189.)

A. A. Baustian, the bonding company agent who wrote the contractor's bond, testified:

> The general practice is that as soon as the bids have been opened and tabulated, and the low bidder determined, and the contracting officer has designated acceptance of the bid, and the bond filed that the contractor is authorized to proceed or to start work, or plan to work (Tr., p. 192.)

The testimony of the witnesses, however, falls far short of establishing a business custom of such widespread acceptance and general notoriety as to make the custom relevant in interpreting the provisions of the minimum wage regulations of the Department of Labor, or even the provisions of the contract documents here involved. As the testimony was drawn from the personal experiences of two individuals, neither of whom was in a position to speak authoritatively with respect to the practices of the construction industry and Government contracting agencies as a whole, it would seem to be of rather limited scope. The testimony is, moreover, equivocal. Thus, while Armstrong would appear to say that the time of award is the time when the bond is received by the contracting officer, Baustian could have meant that the award does not take place until the notice to proceed is received by the contractor. Again, while Armstrong speaks of the action of the

contracting officer in recommending an award, Baustian refers to his action in designating acceptance of the bid—a difference that would be quite important in a case where, as here, the contracting officer could recommend an award but could not, until specific authorization was obtained from a superior, accept a bid or execute a contract. Furthermore, the testimony is, in essence, an expression of the opinion of interested witnesses regarding the legal effect of the actions in which they were involved, rather than objective testimony concerning the nature of a business custom.

In the circumstances revealed by the foregoing discussion of the documents of record and the oral testimony, the Board finds that the contract was awarded not earlier than May 25, 1953, the date on which Assistant Commissioner Markwell authorized the contracting officer to award and execute the contract. Since at that time more than 90 calendar days had elapsed from January 30, 1953, the date of issuance of Department of Labor decision M–8835, that decision had become obsolete, within the meaning of the minimum wage regulations hereinbefore quoted, prior to the award of the contract.

The status of Department of Labor decision M–17467 remains to be considered. That decision was not issued until June 18, 1953, which was after the contract had been executed by both parties as well as awarded; and the minimum wage rates prescribed by its provisions were not at any time incorporated verbatim in the specifications. The case for the applicability of decision M–17467 is placed by the Government squarely on the terms of Supplemental Notice No. 3, which added to the specifications paragraph 4A.

The letter from Assistant Commissioner Markwell to the Solicitor of the Department of Labor, mentioned previously, indicates that this change in the terms of the contract was adopted with the concurrence of the Department of Labor and for the express purpose of making applicable to the contract such new minimum wage determinations as might ensue from the hearings, then scheduled to commence on April 16, 1953, which resulted in the issuance of decision M–17467 on June 18, 1953.[11] But even if this indication of the intent underlying paragraph 4A were not available, its meaning would still be perfectly clear. The paragraph plainly states that in the event new minimum wage rates are prescribed by the Department of Labor—as a result of the hearings scheduled to be held during April 1953—these wage rates will become applicable to work subsequently performed under the contract, in substitution for the wage rates set forth in paragraph 4, and that "no increase in the contract prices will be allowed because of such substitution."

[11] The hearings also appear to have resulted in two intervening decisions, M–14701, dated May 4, 1953, and M–17235, dated June 10, 1953, both of which were ultimately withdrawn and superseded by M–17467.

The application, moreover, of paragraph 4A to the situation here involved, namely, the substitution of a wage determination made after the contract award for a wage determination that had become obsolete prior to the contract award, involves no conflict with the provisions of the minimum wage regulations hereinbefore quoted. The portion of those regulations which defines the effect of actions changing or modifying an original wage determination is limited to situations where the change or modification is made prior to the award, and where the award is made while the 90-day period of effectiveness of the original determination is still running.

In claiming reimbursement for the increased wage costs incurred under decision M–17467, the contractor chooses to disregard entirely both the express authorization in paragraph 4A of the specifications for the application of newly-determined wage rates, and the express prohibition in the same paragraph against the allowance of any increase in the contract prices because of such application. Under contractual provisions having the same substantive purport as those of paragraph 4A, recovery of additional wage costs, incurred following a re-determination of minimum wage rates made by the Department of Labor after the contract had been awarded and executed, has been denied by the Court of Claims.[12]

In these circumstances the Board finds that decision M–17467 was applicable to work performed under the contract after June 23, 1953; that the action of the contracting officer in requiring the contractor to abide by the minimum wage rates set forth in that decision was proper; and that the contractor is not entitled to any adjustment of the contract prices because of this action. It follows that the claim of the contractor for reimbursement of the additional wage costs incurred by it in complying with decision M–17467 must be denied on its merits.

In view of this conclusion, the Board deems it unnecessary to consider the other defenses to this claim interposed by the Government, namely that the claim is barred by failure of the contractor to file timely written protest in accordance with paragraph A–12 of the standard specifications, and that the claim, if meritorious, would constitute a claim for unliquidated damages, growing out of an alleged breach of contract by the United States, which the Board would lack jurisdiction to consider and settle.

[12] *A. J. Paretta Contracting Co., Inc.* v. *United States*, 109 Ct. Cl. 324 (1947), *cert. denied*, 333 U. S. 832 (1948). Counsel for the contractor cites another portion of this decision in which recovery was allowed for additional wage costs incurred as a result of an increase in minimum wage rates ordered by the project engineer, but not based on any re-determination by the Department of Labor. Comparing this portion of the decision with the portion in which recovery was denied, it is evident that the court regarded the presence or absence of a re-determination by the Department of Labor as being the controlling factor. Where no such re-determination had been made, the court held that the action of the project engineer in ordering an increase of wages was a wrongful act for which the Government was liable. Conversely, where the increase was based upon a re-

Claim No. 3: Compacted Embankment Overrun

This claim is for additional compensation in the amount of $17,569.34[13] on account of an overrun in the quantities of compacted embankment work required under Schedule No. 4 of the contract, and seems to be predicated on the theory that a change entitling the contractor to an equitable adjustment under article 3 of the contract[14] was effected by the so-called Stoecker memorandum of September 29, 1953.[15] In this document Stoecker indicated the quantities of excavation that would be required to provide quantities of compacted and uncompacted embankments for all fill sections for that part of the contract extending from Station 1117+96 to Station 1424+70, in accordance with specification drawings.

The earthwork for the Franklin Canal was divided into two schedules, Nos. 3 and 4. Item 84 under Schedule No. 3 was an estimate of 1,104,000 cubic yards of "Excavation for Canal," and Item 87 under the same schedule an estimate of 126,000 cubic yards of compacted embankments. Item 126 of Schedule No. 4 was an estimate of 391,000 cubic yards of "Excavation for Canal," and Item 129 of the same schedule an estimate of 113,000 cubic yards of compacted embankment, which, however, was erroneous. In his findings the contracting officer explained how this error had been made. It seems that when the original design was submitted by the field office to the Chief Engineer's office for review and approval the drawings for certain fill sections where the canal crossed culverts were changed so as to substitute embankments wholly compacted for embankments partially compacted, but the estimated quantity of compacted embankment shown under Item 129 of Schedule No. 4 was not revised, prior to the bidding, to reflect these changes.

The contractor commenced his operations at the westerly end of the canal, which was included in Schedule No. 3, and worked his way to the east, although at the meeting at the Dudley Hotel following the award of the contract, Government personnel had discussed with the contractor the desirability of starting at the east end where there were more fills to be placed, in comparison with the amount of required

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determination of rates by the Department of Labor, the court held that the provision in the specifications, to the effect that additional compensation would not be paid because of wage increases, precluded recovery by the contractor.

[13] The claim was originally for $17,768.44 but was reduced by an amendment made at the hearing (Tr., p. 193).

[14] Article 3 of the contract authorized the contracting officer to make changes in the drawings and/or specifications of the contract and within the general scope thereof, but provided that an equitable adjustment should be made if such changes caused an increase or decrease in the amount due under the contract, or in the time required for its performance.

[15] The memorandum was actually in the form of a letter to the contractor, but has been referred to throughout the proceeding as the Stoecker memorandum.

excavation, than at the west end (Tr., pp. 223–25). The advantage of this procedure would have been "to work the waste out" during the freezing weather when no work could be performed on compacted embankments (Tr., pp. 246–47). However, the procedure of the contractor in working from west to east during the months of July, August and September 1953 was to concentrate its efforts upon the excavation and wasting of the material not wet enough for compacting embankments, which it did at the rate of approximately 325,000 cubic yards a month (Tr., pp. 205–06, 210–11, 222–23). It is deducible from this mode of operation that the contractor must have been planning to work the canal a second time after wasting this material, at which time the remaining material would be excavated and used for constructing the remaining embankments.

As the contractor reached the end of the sections of the canal under Schedule No. 3, it requested Stoecker to supply the information contained in his memorandum (Tr., p. 236), presumably so that it could plan its further operations in the performance of Schedule No. 4. For the reaches of the canal between Stations 1117+96 and 1424+70, the memorandum showed that 335,324.65 cubic yards of excavation would be required for compacted embankments and 34,724.33 cubic yards of excavation for uncompacted embankments, which would make a total of 370,048.98 cubic yards of material in excavation that would be needed for these purposes. It was further stated in the memorandum that the total canal excavation between Stations 1107+00 and 1424+70 would be 376,036.94 cubic yards, plus a small additional amount because of excavation for drains. However, the first entry in the memorandum, which covered the distance between Stations 1117+96 and 1123+00, and showed the amount of compacted embankment between these stations to be 49,745.80 cubic yards, represented a reach of the canal which was within Schedule No. 3 (Tr., p. 207). Deducting this amount from the total of 335,324.65 cubic yards of excavated material required for compacted embankments, the total for Schedule No. 4 would be 285,578.85 cubic yards. As it is common knowledge that excavated material is reduced in volume by compaction,—and laboratory tests showed that in this particular instance 1.43 cubic yards of excavation were required to obtain one cubic yard of compacted embankment—the total estimate of compacted embankment for that schedule would be 199,705.49 cubic yards (285,578.85/1.43). This figure is only a little less than the 209,789 cubic yards of compacted embankment actually placed and paid for under Item 129 of Schedule No. 4 at the bid price of 2 cents per cubic yard.

The contractor asserts that it had planned its operations on the basis of the erroneous estimate of 113,000 cubic yards of compacted embankment in Item 129 of Schedule No. 4, and that the issuance of

the Stoecker memorandum threw its work schedule "out of joint." It alleges that in order to complete the compacted embankment work it had to secure additional watering equipment and that, until this could be accomplished, it had to shut down some of its excavating equipment. In his decision the contracting officer held, however, that notwithstanding the error, the contractor could have roughly computed the amount of compacted embankment work which it would have to perform, since the drawings included in the specifications contained sufficient data for this purpose, and since such a computation could also have been made from mass diagrams which were available to the contractor.[16] Thus, the contracting officer stated:

> The contracting officer is informed that about the middle of June 1953, Mr. Armstrong and his Superintendent were in the Franklin office at which time they were shown the incomplete mass diagrams for haul purposes, and were advised as to the total compacted embankment requirements for both Schedules No. 3 and 4. Later in August the contractor was given a print of the complete mass diagram from Station 1068 to the end of Schedule No. 4. Therefore, the contractor was informed by the Government of the anticipated overrun in compacted embankment on Schedule No. 4 as early as three months prior to the gratuitous issuance of the Stoecker memorandum on September 29, 1953.

The contracting officer concluded that the Stoecker memorandum did not constitute a change within the meaning of article 3, and that additional compensation by reason of the overrun in the compacted embankment work was barred by paragraph A–4 of the standard specifications, which reads as follows:

> 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.

Paragraph A–4 is typical of the "approximate quantities" provisions frequently inserted in the specifications for Government construction contracts made on a unit-price basis. These provisions sometimes have varied considerably in their phraseology and these variations, particularly when coupled with differences in other provisions of the contract, could conceivably affect the result in individual cases. Nevertheless, they have been generally held to mean that the quantities of work actually required to be performed under the contract, whether greater or less than the quantities stated in the schedule, are to be paid for at the unit prices bid by the contractor, and that the mere existence of an overrun above or an underrun below the schedule quantities is not

[16] The mass diagrams were graphs showing the location and size of the cuts and fills for the canal, the amounts of earth in each cut, the amounts of earth needed for each fill, and the manner in which the canal could be constructed with a minimum amount of hauling from and to the cuts and fills.

sufficient cause for the allowance of an equitable adjustment predicated on the actual cost of the work done by the contractor.[17] Thus the Court of Claims has declared that the presence of an "approximate quantities" provision must be deemed to "put all bidders on notice that they had to make their own estimates" of the number of units of work to be done.[18] The Supreme Court has likewise said, with respect to analogous contractual provisions, that "the naming of quantities cannot be regarded as in the nature of a warranty, but merely as an estimate of the probable amounts in reference to which good faith only could be required of the party making it." [19] Where a contract contained an "approximate quantities" provision, neither the fact that the discrepancy between the quantities stated in the schedule and the quantities actually required for completion of the contract was comparable in size to the one here involved,[20] nor the fact that the discrepancy was due to a miscalculation by the Government in making up its estimates,[21] nor the fact that the actual cost per unit of the work performed by the contractor in completing the contract was more than his bid price per unit,[22] has been considered sufficient in itself to entitle the contractor to additional compensation over and above the unit prices bid by him.

The cases in which the presence of an "approximate quantities" provision has been held not to preclude an award of additional compensation have dealt with special situations where the contractor could not, in fact, have verified the estimated quantities stated in the contract by making an independent computation from the drawings and specifications, assisted by an independent investigation of the site of the work, so that it could be said that the parties had contracted under a mutual mistake of fact or had encountered a "changed condition" within the meaning of the contract provision on that subject, and where the nature of the ensuing overrun or underrun was such that it, in fact, caused the cost per unit of the work actually done to exceed the cost per unit that would have been incurred if the contractor's bid had been entirely provident, and if the Government's estimates had been accurate.[23] The provision has also been held to be inapplicable

[17] *Thompson* v. *United States,* 130 Ct. Cl. 1 (1954); *Russ Mitchell, Inc.* v. *United States,* 121 Ct. Cl. 582 (1952); *Morris & Cumings Dredging Co., Inc.* v. *United States,* 78 Ct. Cl. 511 (1933); *S & S Engineering Corp.,* 61 I. D. 427 (1954); *George P. Henly Construction Co.,* CA–120 (Nov. 1, 1951); *C. F. Lytle Co. and Green Construction Co.,* CA–99 (May 3, 1951); see *Dawson & Corbett,* CA–89 (April 3, 1951).

[18] *Hirsch* v. *United States,* 104 Ct. Cl. 45, 56 (1945).

[19] *Lipshitz & Cohen* v. *United States,* 269 U. S. 90, 92 (1925).

[20] *Hirsch* v. *United States,* 104 Ct. Cl. 45 (1945); *Peter Kiewit Sons' Co.,* Comp. Gen. B–83024 (May 20, 1949).

[21] *General-Shea-Morrison,* Comp. Gen. B–114585 (June 19, 1953); *Neely,* BCA No. 589, 2 CCF 953 (July 10, 1944).

[22] *Hirsch* v. *United States,* 104 Ct. Cl. 45 (1945); see *Peter Kiewit Sons' Co.* v. *United States,* 109 Ct. Cl. 517, 523 (1947).

[23] *Chernus* v. *United States,* 110 Ct. Cl. 264 (1948); *Peter Kiewit Sons' Co.* v. *United States,* 109 Ct. Cl. 517 (1947).

to those overruns or underruns that, in fact, result from affirmative action of the Government in altering the nature of the work to be performed under the contract through the exercise of its reserved power to make changes in the plans subsequent to the letting of the contract.[24]

The basic contention of the contractor is that the estimates in the Stoecker memorandum of the amounts of excavated materials required for compacted embankments constituted "changes in the drawings and/or specifications" within the meaning of Article 3 of the contract, and that the contractor is, therefore, entitled to an equitable adjustment under that article. In support of this contention the contractor points to the conceded facts that not only the 199,705 cubic yards of compacted embankments which, the memorandum indicated, would probably need to be put in place under Schedule No. 4, but also the 209,789 cubic yards of compacted embankments which the contractor was actually required to put in place under Schedule No. 4, were, respectively, almost double the 113,000 cubic yards of compacted embankments specifically called for by the words of the schedule itself.

It seems to the Board, however, that the Stoecker memorandum possesses none of the elements of a change in the "drawings and/or specifications" within the meaning of article 3. The memorandum simply consists of a station-to-station computation of quantities of compacted and uncompacted embankment work, together with an estimate of the total amount of excavation for the same reaches of the canal, followed by these statements:

> Compacted embankment and embankment quantities shown are the cubic yards of excavation required to make the fills listed.
>
> I would not advise to waste any dirt in the waste area until all the compacted embankments and embankments are put in.

This phraseology conveys no hint of an intention to change the requirements of the drawings and specifications, except in so far as such an intention might be suggested by the existence of a variation, if there were one, between the quantities computed in the memorandum and those called for by the drawings and specifications.

Nor is there any basis in the record for a finding that the quantities computed in the memorandum were materially different from those actually needed in order to build the canal embankments to the dimensions and compaction standards prescribed by the drawings and specifications. Stoecker in his testimony supported the contracting officer's finding that the quantities stated in the memorandum were computed in accordance with the contract drawings (Tr., p. 236). The contractor did not seek to rebut this testimony, but, rather, con-

[24] *M. Hoard,* IBCA–6 (May 11, 1955); *S & S Engineering Corp.,* 61 I. D. 427 (1954); *Durham & Sauer,* CA–124 (Dec. 19, 1951); see *Neely,* BCA No. 589, 2 CCF 953 (July 10, 1944).

ceded that the work performed pursuant to the Stoecker memorandum was in substantial conformity with the contract drawings. Thus, the contractor by its notice of appeal admitted the findings of the contracting officer that "the estimated quantities of compacted embankment represented by the excavation requirements stated in Mr. Stoecker's memorandum were within approximately 10,000 cubic yards or 5 percent of the actual quantities required by the specifications drawings";[25] that "the quantities of compacted embankment actually placed by the contractor and paid for under applicable schedule items were essentially as shown on the specifications drawings, and in accordance with Mr. Stoecker's memorandum";[26] and that "the specifications drawings require the placement of some 200,000 cubic yards of compacted embankment whereas schedule pay Item 129 disclosed an estimate of only 113,000 cubic yards of compacted embankment."[27] Finally, counsel for the contractor in his reply brief of March 5, 1956, stated that there was no change in the drawings as such.

The real pith of what the contractor contends is that the quantities of compacted embankment called for by the Stoecker memorandum and subsequently put in place by the contractor necessarily amounted to a change because they were nearly twice the quantities stated in the schedule. This contention is not compatible with the provisions of the contract. The authorities previously cited established that where the only basis for a claim is a difference between the number of units of work listed in the schedule of a contract and the number of units of work that need to be done in order to complete the job to the dimensions and standards elsewhere set out in the drawings and specifications, the effect of the "approximate quantities" provision is to cause those dimensions and standards to prevail over the estimated quantities of the schedule. The Stoecker memorandum in computing the work requirements of the contract on the basis of what was set out in the drawings, rather than on the basis of what was set out in the schedule, resolved the discrepancy between these two portions of the contract in exactly the way that the contract commanded and, therefore, made no change in the contract.

While this disposes of the principal line of argument on which the contractor rests its case, certain subsidiary arguments advanced by it in support of the contention that a change occurred need to be evaluated.

The first is that the drawings failed to show all of the dimensions to which the embankments were to be compacted. At the hearing Armstrong testified at some length on this subject (Tr., pp. 199–204, 259). The Board has examined the portions of the drawings that

[25] See footnote to paragraph 14 of the findings.
[26] *Ibid.*, paragraph 16.
[27] *Ibid.*, paragraph 16.

were referred to in the course of his testimony, and finds they did adequately show the dimensions claimed to be lacking. In any event, this line of objection would seem to have been abandoned, since counsel for the contractor in his reply brief of March 5, 1956, stated that it "appears to be immaterial" whether the drawings were ambiguous or not.

The next argument is that the Government did not furnish the contractor, prior to the bidding, with any cross-sections, mass diagrams, or other data from which the contractor could have accurately related the dimensions given in the drawings to the actual topography of the land across which the canal cuts and fills were to be made. This is true, but it does not follow that the contractor was thereby left without any reasonable means of finding out, independently of the figures contained in the schedule, what were the approximate quantities of compacted embankment that would be needed in order to comply with the requirements of the drawings and specifications. The topography of the canal route was, of course, a surface condition that could be seen and, if the contractor wished, measured. Stoecker testified that a rough estimate of the quantities of material needed for the construction of the embankments, which would probably have involved a margin of error of not more than 15 percent, could have been made from the information given in the specifications (Tr., pp. 253–254). Armstrong testified that he "could have" roughly computed these quantities from the information given on the drawings, but that it would have been "very impractical," and that he did not do so because "it wasn't my responsibility * * *" (Tr., p. 214). On the record as a whole, the Board finds that the contractor could have determined, by reasonable efforts in advance of the making and opening of its bid, that the quantities of compacted embankment called for by the drawings and specifications were substantially larger than those stated in the schedule.

The contractor's argument that it was taken by surprise by the Stoecker memorandum is also lacking in persuasiveness. The record would seem to indicate that the disruption of the contractor's operations was caused by the vagaries of nature and its own neglect in taking advantage of available sources of information, rather than by that memorandum. The contractor began work on the portion of the canal covered by Schedule No. 3 in June 1953, performed a large part of the excavation work and some of the compaction work under that schedule during the summer, and by the end of September 1953 was in a position to start excavation work on the portion of the canal covered by Schedule No. 4. According to his testimony, it would appear that Armstrong thought or hoped that enough naturally moist soil might be found in the lower parts of the deeper cuts, or

might be provided by rainfall while the work was in progress, to admit of the construction of the Schedule No. 4 embankments with the same amount of watering equipment that was used for the Schedule No. 3 embankments (Tr., pp. 206, 221–223, 226). This result, however, would be harder to achieve for Schedule No. 4 than for Schedule No. 3, because, as already indicated, the fills on Schedule No. 4 would consume a much larger proportion of the material from the cuts than was true of Schedule No. 3. The summer of 1953, moreover, turned out to be unusually dry. Then, on September 29 the Stoecker memorandum brought home the hard fact that the compacted embankments along the as-yet unexcavated reaches of the canal would consume about 335,324 cubic yards out of excavations that were apt to aggregate not a great deal more than 376,036 cubic yards. Hence, it is easy to agree with the contractor that, in the light of the facts indicated by the memorandum, the watering equipment then on the job was inadequate to admit of the work on Schedule No. 4 being prosecuted at the pace which the excavation equipment could otherwise have maintained.

But this does not mean that it was the Stoecker memorandum which threw the contractor's work schedule "out of joint." On the contrary, the weight of the evidence is to the effect that the contracting officer was quite correct in concluding that the information contained in the memorandum was information of which the contractor could have readily availed itself in time to avoid any disruption of its operations, since the figures set forth in the memorandum were a presentation in tabular form of data that also appeared in the mass diagrams. The preparation of mass diagrams is a customary excavation job procedure with which Armstrong was familiar. At the hearing, it was stipulated that Armstrong "was in the Bureau's office on two or more occasions at which time he was shown certain mass diagrams by Mr. Nelson and Mr. Stoecker, which included mass diagrams for Schedule No. 4," and that "the two or more occasions on which Mr. Armstrong visited the Bureau's office and was shown the mass diagrams was in the month of June 1953" (Tr., p. 256). Stoecker, who had immediate supervision over the preparation of the mass diagrams, and Olin Gray, his superior, both testified that the mass diagrams, including those for Schedule No. 4, were completed during the first part of the month of June 1953, and that the earth quantities then shown on the diagrams were not subsequently changed to any material extent (Tr. pp. 231, 237, 238, 243, 244). In the light of all the evidence it is a fair inference that the contractor could easily have obtained, shortly after receiving the notice to proceed on June 2, 1953, the identical information on which it bases its claim of surprise.

The one remaining question is whether an equitable adjustment is due the contractor for a part of the overrun in compacted embankment

work that seems to have been brought about by minor revisions in the plans for this work made after the specifications were issued for bidding. The contracting officer did not particularize these revisions other than by saying that "in some instances sections of full compaction were extended longitudinally approximately 8 feet beyond the limiting stations shown on specifications drawings," and by indicating that there were "other minor revisions." He found that the increase in quantities attributable to the revisions amounted to approximately 4,150 cubic yards, or slightly less than 2 percent of the total amount of compaction work performed under Schedule No. 4, and also found that this increase in quantities "could not have affected the contractor's operations appreciably." [28] The contractor specifically admitted these findings in its notice of appeal, and did not press the issue either in its briefs or at the hearing. Moreover, the record contains no evidence to show that the particular 4,150 cubic yards of overrun that resulted from these revisions in the plans in any way increased the contractor's costs. Because of these circumstances, the Board cannot consider this minor part of the overrun as a factor in the appeal.

In view of the established facts and applicable legal authorities, the Board must conclude that the so-called Stoecker memorandum did not amount to a change and that the contractor is not entitled to an equitable adjustment either by reason of the issuance of the memorandum, or by reason of the erroneous estimate of compacted embankment work included in Schedule No. 4, or by reason of the quantities of such work actually performed under the contract. It follows that this claim must be denied.

Claim No. 4: Damage to Tractor Bulldozer

This is a claim for compensation in the amount of $5,417.62 on account of damage to one of the tractor bulldozers operated by the contractor, and for loss of its use while under repair. It is alleged that the bulldozer was damaged in the course of the contractor's operations when it struck an underground gas pipe line belonging to the Kansas-Nebraska Natural Gas Company.

The accident occurred while the contractor was grading the right-of-way for a road, required by the contract, that intersected the pipe line. The contractor contends that the location of the pipe line was not accurately revealed either by the contract drawings or by the stakes which had been set to show the line and grade of the road. The Government contends that the true location of the pipe line was revealed by one of the drawings, although on another an incorrect location was given, and that the stake which was supposed to show

[28] See paragraph 16 of the findings.

the place where the pipe line would be found had been set by an employee of the gas company, rather than by Government personnel.

The contracting officer denied the claim on the ground that it constituted a claim for unliquidated damages which the provisions of the contract gave him no authority to entertain and settle. At the hearing, counsel for both the contractor and the Government indicated, without waiving any rights, that they acquiesced in this conclusion, but asked that the Board make an independent determination of the jurisdictional question (Tr., p. 261).

The Board considers that the instant claim is based either on an alleged breach of contract by the Government, or on an alleged tortious act of the Government. In either event, neither the Board nor the contracting officer has authority under the terms of the contract to determine the dispute. A like decision was recently rendered by the Board in a case where damage to, and loss of use of, a contractor's equipment was alleged to have resulted from the manner in which the equipment had to be operated in order to carry out the work instructions given by Government personnel.[29] Accordingly, the appeal, in so far as it involves this claim, is dismissed for want of jurisdiction.

Claim No. 5: Suspension of Work

This is a claim for compensation in the amount of $3,018.92 based upon the contention that the Government ordered a suspension of work and that the delays thereby brought about increased the contractor's costs by the amount stated.

The alleged suspension involved portions of the contract work that affected pipe lines of the Kansas-Nebraska Natural Gas Company, and that necessitated the working out of arrangements with the latter for the protection of the pipe lines. The contractor appears to maintain that, under date of December 15, 1953, the authorized representative of the contracting officer wrote a letter, addressed either to the contractor or to one of its subcontractors, ordering that work on the pipe line crossings be suspended; and that this suspension continued in effect until January 8, 1954. This letter was not produced by the contractor, and the Government asserts that a search of the files has revealed no evidence that such a letter was ever written or sent. The Government also maintains that any work stoppages which occurred during the period of the alleged suspension were due to disputes or misunderstandings between the contractor and the gas company.

In the absence of the production of a written suspension order or of clear and convincing evidence that such an order was actually issued, the Board finds that the contractor has not met the burden of

[29] *Goodfellow Bros., Inc.*, IBCA–17 (Jan. 10, 1955).

proving that a suspension of work was, in fact, ordered by the Government.

The standard form Government contracts have been consistently construed as not authorizing administrative consideration and settlement of claims for increased costs incurred solely by reason of delays of the Government, unless an express authorization for the administrative allowance of such claims has been included in the contract. The only provision in the present contract which conceivably could be read as constituting such an authorization is paragraph A–14 of the standard specifications, entitled "Suspension of Work." It provides as follows:

> The Government may at any time suspend the whole or any portion of the work under this contract but this right to suspend the work shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspensions, it being understood that expenses will not be allowed for such suspensions when ordered by the Government on account of weather conditions or on account of the failure of Congress to make the necessary appropriations for expenditures under the contract.

This paragraph, however, obviously has no application to a situation where, as here, there is no showing that the performance of the work was suspended in any way by the Government.[30]

The instant claim was denied by the contracting officer on the ground that it constituted a claim for unliquidated damages which the provisions of the contract gave him no authority to entertain and settle. At the hearing, counsel for both the contractor and the Government indicated, without waiving any rights, that they acquiesced in this conclusion, but asked that the Board make an independent determination of the jurisdictional question (Tr., p. 261).

The Board considers that the claim is, for the reasons indicated in the preceding discussion, one which neither it nor the contracting officer has authority to decide under the terms of the contract. Accordingly, the appeal, in so far as it involves this claim, is dismissed for want of jurisdiction.

Claim No. 8: Extra Work in Construction of a Berm

Claim No. 8, as presented to the contracting officer, consisted of three subitems, to which a fourth was later added by the contractor. No appeal was taken from the contracting officer's decision on subitem 3. At the hearing subitem 4 was withdrawn by the contractor, and subitem 1 was remanded to the contracting officer for further consideration. Accordingly, subitem 2 is the only part of claim No. 8 now before the Board.

This subitem is for additional compensation in the amount of $1,500 for extra work alleged to have been performed by the con-

[30] See *Electric Engineering and Construction Service, Inc.*, 63 I. D. 75 (1956).

tractor in the construction of a berm in the vicinity of Station 1392. At the time the contracting officer made his findings with respect to this claim, he was under the impression that as a result of a conference which he had had with the president of the contractor the claim was being withdrawn, and he did not, therefore, go into much detail concerning its nature. Unfortunately, the testimony taken at the hearing still leaves in considerable uncertainty both the particulars of the work claimed to be extra and the precise circumstances that led to its performance. Seemingly, the construction of the berm necessitated the excavation of additional earth from areas already graded, with the result that some of the grading had to be done over again, and, apparently, it is this grading work for which the contractor claims additional compensation. It is also not entirely clear whether the berm had to be constructed as a result of an error made by Government personnel, or as a result of a change in plans by the Government. The situation is further complicated by a dispute between the Government and the contractor over the issue whether the work performed was covered by a binding oral agreement under which the contractor was to perform all of the additional work, including the grading, at the unit price for excavation fixed by the contract, this being 18 cents per cubic yard.[31] The Government contends that such an agreement was made by Roy Cheek, the contractor's superintendent, who had been authorized to act for it, and by Stoecker and Gray as representatives of the United States.

Only Armstrong testified on behalf of the contractor concerning this agreement. The Board does not construe his testimony as amounting to a denial that the agreement was made as alleged. Payment was made to the contractor pursuant to the agreement, and Armstrong knew that a change was being made in the plans for he testified that, although he was not present when the work was commenced, he "had seen the stakes as they were reset" (Tr., p. 140). Moreover, the contractor did not call Cheek to testify either that he had not made the agreement, or that he was not authorized to make the agreement. Armstrong himself testified that Cheek was not authorized to make the agreement, although at the request of the Government, he had written a letter to Boyce, the Construction Engineer, under date of August 21, 1956, in which he had stated: "This is to advise you that in my absence, Roy Cheek will be the one for your representatives to contact with reference to any portion of the construction work." [32] Armstrong did not consider this letter applicable, however, because, as he testified, he was in his office in Franklin or

[31] No written orders for the performance of the work were given (Tr., p. 151).

[32] Apparently this letter was written to carry out article 8 of the contract which provided: "The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him."

with the siphon crews at the time the agreement was made, and his superintendent was not authorized to make any agreement which would result in a change in the work.

The Board has no doubt that the agreement concerning the construction of the berm was made in the form and manner alleged by the Government. It does not deem it necessary to decide, however, whether the agreement was binding on the contractor, and whether consideration of the present claim is barred thereby.

The burden of proving a claim for additional compensation is always on the contractor, and it had not met this burden in at least two important respects.

In the first place, the record gives no satisfactory answer to the question whether the work performed was work that did not come under paragraph B–5(a) of the standard specifications, which permits variations in "the slopes of excavations or the slopes of embankments and the dimensions dependent thereon," and stipulates that payment for such work will be made at unit prices unless the contracting officer has determined that unit costs have been increased or decreased as a result of the variation; or under paragraphs B–11(a) and (b) of the standard specifications which include provisions that embankments shall be compacted "to the elevation and to the top widths and side slopes shown on the drawings or prescribed by the contracting officer," and that payment will be made at unit prices for such work.

In the second place, assuming that the work performed was not covered by the foregoing provisions, and constituted, therefore, a change in the specifications which entitled the contractor to an equitable adjustment, the contractor has failed to establish that the $1,500 which it claims is the amount which should be allowed. It is important to note that the contract made no provision for payment for grading work as such. Paragraphs B–5 and B-9 of the standard specifications define excavation as including, among other things, the grading of the floor, slopes, and other features of the canal and its embankments. Under these paragraphs, payment for the excavation of a given area, at the applicable unit price, constitutes payment as well for the grading of the canal areas from which the earth is removed and of the embankment areas in which it is placed. Since the contractor, admittedly, has been paid for the work on the berm at the excavation unit price, it is apparent that its claim is one for additional compensation on account of work for which it has already been paid at the contract rate.

The evidence is quite insufficient to support a claim of this character. Armstrong testified that the $1,500 sought by the contractor did not

represent the cost of additional labor, but only an additional charge for the machinery involved in the grading incident to the construction of the berm. "That is only the charge for the machinery that it took to re-do the sloping and get it back into the same shape that we had gone through before," he testified. Then the question was put to him: "There is no damage factor in here for having to bring back this equipment to do this work and taking it off some other project?", and he replied: "No, we didn't. The equipment was there." (Tr., p. 137.) There is nothing in the record to show that the construction of the berm necessitated more extensive use of grading machinery in proportion to the volume of material excavated than did the construction of the other features of the canal. Absent such a showing, it would be hard to find that the unit price for which the contractor was willing to grade, as well as excavate, a number of miles of canal was less than a fair price for the excavation, including grading, of this particular berm. Moreover, Armstrong also testified that, although he had received payment for the berm at the excavation unit price, he had not allowed the Government any credit for this payment in computing the amount of the claim (Tr., p. 140). Even if the $1,500 were to be accepted as a fair measure of the cost of the grading work, the contractor would not be entitled to recover more than the difference between this amount and the sums already paid on account of the same work. There is no way of determining from the record what this difference would be, and, conceivably, the $1,500 could be less than the sums already paid. The Court of Claims has uniformly held that if uncertainty as to the amount of damages goes to the point where there is no reasonable basis for ascertaining the amount, recovery cannot be allowed.[33] The Board believes that the same rule should be followed in determining additional compensation.

Finally, whatever may be the merits of the claim, the contractor has not complied with the protest provision of paragraph A–12 of the standard specifications. This provision states that a contractor who "considers any work demanded of him to be outside of the requirements of the contract" shall immediately ask, in writing, for a written instruction or decision and shall, within 20 days after its receipt, file a written protest with the contracting officer; and declares that "except for such protests as are made of record" in the manner and within the time limit just stated, the decisions of the contracting officer shall be "final and conclusive." Although the record does not show pre-

[33] *Eastern Contracting Co.* v. *United States,* 97 Ct. Cl. 341, 355 (1943); *Addison Miller, Inc.* v. *United States,* 108 Ct. Cl. 513, 557, *cert. denied,* 332 U. S. 836 (1947); *Shepherd* v. *United States,* 125 Ct. Cl. 724, 736 (1953).

cisely when the work on the berm was done, the president of the contractor knew that it had been done, and did not protest or make a claim for additional compensation until he executed a release on contract on December 20, 1954, which was three and a half months after September 5, 1954, when the portion of the canal involved in the claim had been completed and accepted. Under the authorities the right of a contractor to an equitable adjustment is dependent upon timely compliance with the protest provision.[34] It has been held, to be sure, that the protest requirement must be deemed to have been waived if the contracting officer has considered the claim on the merits.[35] While the contracting officer in this case did to an extent discuss the merits of the claim, he did so only because he was under the impression that the claim had been withdrawn. In such a situation, it would hardly be appropriate to imply a waiver. Nor do the circumstances of the present case offer sufficient ground for now waiving the failure to protest. It may well be that the uncertainties and perplexities revealed by the record in the present case would not exist if timely protest had been made. The Court of Claims has emphasized the importance of procedural requirements in enabling the contracting officer to investigate a claim while its basis can still be ascertained readily.[36]

Hence the claim for additional compensation under subitem 2 of Claim No. 8 must be denied.

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 decisions of the contracting officer dated April 15, 1955, and March 28, 1955, denying the claims of the contractor described in and covered by this decision, are affirmed.

Theodore H. Haas, *Chairman*

William Seagle, *Member*

Herbert J. Slaughter, *Member.*

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[34] *United States* v. *Moorman,* 338 U. S. 457 (1950); *J. A. Ross & Co.* v. *United States,* 126 Ct. Cl. 323 (1953); *Cauldwell-Wingate Co.* v. *United States,* 109 Ct. Cl. 193 (1947); *United States* v. *Madsen Construction Co.,* 139 F. 2d 613 (6th Cir. 1943); *Welch Industries, Inc.,* 61 I. D. 63 (1952).

[35] *Charles Thompson* v. *United States,* 91 Ct. Cl. 166, 179 (1940); *Callahan Construction Co.* v. *United States,* 91 Ct. Cl. 538, 610–11 (1940); *Grier-Lowrance Construction Co., Inc.* v. *United States,* 98 Ct. Cl. 434, 461–62 (1943); *Jack Willson,* 62 I. D. 225 (1955); *R. P. Shea Co.,* 62 I. D. 456 (1955); *Korshoj Construction Co., Inc.,* 63 I. D. 129 (1956).

[36] See, for instance, *J. A. Ross & Co.* v. *United States,* 126 Ct. Cl. 323, 329–30 (1953), and *Cauldwell-Wingate Co.* v. *United States,* 109 Ct. Cl. 193, 224 (1947).

UNITED STATES STEEL CORPORATION

A–27271

Decided September 10, 1956

Rules of Practice: Private Contests

An application to contest outstanding coal prospecting permits will not be allowed where the allegations of the applicant, even if proved, would not affect the validity or legality of the permits.

Rules of Practice: Private Contests

One who merely hopes to lease land is not qualified as a contestant under that provision of the rules of practice which permits those "seeking to acquire title to or claiming an interest in the land involved" to apply to contest the claims of others in the public lands.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The United States Steel Corporation has appealed to the Secretary of the Interior from a decision by the Acting Director of the Bureau of Land Management dated September 2, 1955, wherein it was held that it was proper for the manager of the land office at Denver, Colorado, to treat as a protest a document filed by the corporation—designated by the corporation as a "contest"—and to dismiss the protest without ordering that a hearing be held on the allegations made therein against the validity of two coal prospecting permits (Colorado 08172 and 08173) issued to the Larsen Mining Company.

The two prospecting permits were applied for by the company on March 24, 1954, and were issued to the company on June 16, 1954, pursuant to the provisions of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 181 *et seq.*). Those provisions of the act relating to coal lands and pertinent to this appeal are contained in section 2 of the act, which, as amended by the act of June 3, 1948 (30 U. S. C., 1952 ed., sec. 201), provides:

> Sec. 2. (a) The Secretary of the Interior is authorized to divide any of the coal lands or the deposits of coal, classified and unclassified, owned by the United States, outside of the Territory of Alaska, into leasing tracts of forty acres each, or multiples thereof, and in such form as, in his opinion, will permit the most economical mining of the coal in such tracts, but in no case exceeding two thousand five hundred and sixty acres in any one leasing tract, and thereafter he shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands or deposits of coal for leasing, and shall award leases thereon by competitive bidding or by such other methods as he may by general regulations adopt, to any qualified applicant. * * *
>
> (b) Where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area, the Secretary of the Interior may issue * * * prospecting permits for a

term of two years, for not exceeding two thousand five hundred and sixty acres; * * *.

On June 23, 1954, shortly after the issuance of the permits, the document which gives rise to this appeal was filed in the Denver land office. The corporation alleged that at the time the applications for the permits were filed and long prior thereto the lands embraced in the prospecting permits were not lands on which prospecting or exploratory work was necessary to determine the existence or workability of the coal deposits therein, that the Larsen Mining Company knew at the time it filed its applications that the lands contained mineable and workable coal beds, and that the company knew of the corporation's plan to file applications for coal leases on those lands. The corporation requested that it be given an opportunity to appear before appropriate officials of the Department for the purpose of proving its allegations. It requested that the prospecting permits issued to the company be canceled and that the lands be offered for leasing by competitive bidding.

In his decision dated July 28, 1954, the manager, reciting that the permits had been issued after the receipt of a report from the Geological Survey which stated that the lands may contain deposits of coal but that prospecting was necessary to determine the presence of coal beds of workable thickness and extent and that the lands were properly subject to the prospecting provisions of the act and reciting, further, that after the receipt of the document in question the Geological Survey had again been called upon for a report, which report reaffirmed the previous recommendation of the Geological Survey, dismissed the protest and denied the corporation's request that the permits be canceled and its request that the lands be offered for lease by competitive bidding.

The Acting Director, in affirming the action of the manager, held that the corporation could not contest the issuance of the permits, that the manager was correct in treating the document as a protest, and that the rules of practice of the Department, 43 CFR, Part 221,[1] do not require that a hearing be accorded on a protest.

In its appeal, the corporation contends that the Acting Director erred in holding that the document was a protest; that the erroneous determination by the Geological Survey that the lands require additional prospecting to determine the existence and workability of the

[1] The rules of practice were completely revised on March 20, 1956 (21 F. R. 1860). The revision became effective on May 1, 1956, as to contests and protests initiated or filed on or after that date. The revised rules governing contests and protests appear under subpart C of 43 CFR, Part 221 (21 F. R. 1862). The rules as they existed prior to the revision and as they appear in the 1954 edition of Title 43 of the Code of Federal Regulations continue to apply with respect to contests and protests initiated or filed prior to that date; consequently all references to the rules of practice in this decision are to the 1954 edition of 43 CFR.

coal deposits and the misrepresentations of the Larsen Mining Company as to the need for additional prospecting work materially affect the legality and validity of the permits in a manner not shown by the records of the Bureau of Land Management. It contends that the document actually initiated a contest and gave the corporation the status of a contestant because it is one "seeking to acquire title to or claiming an interest in" the lands included in the coal prospecting permits and that it is entitled to a hearing on the charges made.

The rule upon which the corporation relies (43 CFR 221.1 (a)) provides:

> Contests may be initiated by any person seeking to acquire title to, or claiming an interest in, the land involved, against a party to any entry, filing, or other claim under laws of Congress relating to the public lands, because of priority of claim, or for any sufficient cause affecting the legality or validity of the claim, not shown by the records of the Bureau of Land Management.

Under the rule, contests may be initiated only by private parties "seeking to acquire title to, or claiming an interest in" land embraced in claims of other private parties in the public lands. If a person can qualify as a contestant within the meaning of the quoted phrase, he can bring a contest on two grounds only: first, that he has a prior claim to the land, or, second, that there is a sufficient cause affecting the legality or validity of the challenged claim not shown by the records of the Bureau of Land Management.

The corporation does not assert any prior claim to the lands involved in the coal prospecting permits. It does contend, however, that the allegations in its document show sufficient cause affecting the legality or validity of the coal prospecting permits not shown by the records of the Bureau of Land Management to entitle it to a hearing.

Assuming for the present that the corporation meets the requirements of a contestant under the rule, the question arises whether the permits can be attacked by way of a contest on the basis of an alleged erroneous determination by the Geological Survey that the lands are subject to the prospecting provisions of the Mineral Leasing Act rather than to the leasing provisions of that act.

The law under which the coal prospecting permits in question were issued vests in the Secretary of the Interior authority to divide coal lands into leasing tracts in such a manner as, in his opinion, will permit the most economical mining of the coal in such tracts and to determine whether prospecting or exploratory work is necessary to show the existence or workability of coal deposits on the public domain. Until he has sufficient information upon which to base an intelligent opinion as to how the coal lands should be divided into economical leasing units, it is obvious that he cannot offer the lands for lease. He may, however, issue prospecting permits covering lands which, in his judgment, require prospecting or exploratory work to

determine the existence or workability of coal deposits in any unclaimed, undeveloped area.

The corporation's allegations that the lands covered by the prospecting permits are not lands where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits and that this condition was well known at the time are in reality attacks on the judgment of the Secretary. The records of the Bureau of Land Management contain reports from the Geological Survey which amply support the judgment that when the applications for the permits were filed, when the permits were issued, and when the document in question was filed, the lands required prospecting in order to determine the workability of coal deposits which the Geological Survey stated might be expected, by geologic inference, to underlie the lands for which the permits were applied.

In a memorandum dated May 27, 1954, prior to the issuance of the permits, the Geological Survey stated that the deposits are not exposed "being underlain with cover varying from 300 feet to 2,000 feet." The report continued:

> Prospecting by drilling is therefore necessary as it is not known if this formation contains coal seams of workable thickness and extent. The lands are therefore properly subject to the prospecting provisions of the Act.

Again, after the application to contest was filed, the Geological Survey, in a report dated July 23, 1954, noted the statement contained in the application to contest that:

> On the basis of evidence derived from varied sources, it has been determined and is generally known that said lands contain workable coal deposits.

The report stated with respect to this statement:

> A complete review has been made of the information available, which includes records of field work of geologists of the Geological Survey in this area, and a field report of a mining engineer of the Geological Survey concerning the permits.
>
> This review shows that the Geological Survey has no knowledge of any evidence "* * * whereby it has been determined and is generally known that such lands contain workable coal deposits", and the review substantiates the Survey's original recommendation that prospecting be authorized.
>
> Survey records show that the lands involved lie at distances of ½ to 1½ miles from any known coal exposures, that measurements at ¾-mile intervals of these same coal exposures have been made by the Survey and the evidence secured from these measurements indicates that, while the lands in the Larsen permits may possibly be underlain by the coal measures, the evidence is not sufficient to predict the thickness of the beds away from the outcrop, as the seams vary considerably in thickness from place to place along the outcrop, and elsewhere the thickness of coal seams in these Mesaverde formations have proven to be erratic.
>
> A review of the reports from the field of the Mining Branch shows that, except by inference, there is no evidence known that the lands involved contain any seams of coal, and that, in the absence of any data on the coal seams that may be there contained, it is impossible to recommend a logical division of these lands

into leasing tracts in such form as would permit the most economical mining of the coal in the tracts, as required by the Leasing Act, or to recommend equitable lease terms as to required investment and royalty rates.

Thus it would appear that at the time the permits were issued the Department was without sufficient information to enable it to divide the lands applied for into leasing tracts which would permit the most economical mining of the coal, if any, in such tracts and that prospecting work was necessary to determine the thickness of the seams which might exist in the lands and their workability. *Cf. Emil Usibelli, A. Ben Shallit*, unreported (A–26277, Oct. 2, 1951).

The corporation is contending, basically, that, although the Department may not have had sufficient information at the time the permits were issued to make a determination that the lands were subject to leasing, the corporation does have such information and is entitled to present it by way of a contest proceeding. Under the rule on contests, however, the corporation is entitled to present the information only if it would affect the legality or validity of the permits that have been issued. This raises the question whether the Secretary, having made a determination of fact that land is subject to prospecting only and having acted upon that determination by issuing a permit, can later cancel the permit upon acquiring information which, had it been in his possession earlier, would have led him to make a determination that the land was subject only to leasing.

The issuance of a permit creates a legal relationship between the Government and the permittee under which the latter obtains certain rights with respect to the land included in the coal prospecting permit. The corporation has pointed to no authority, and the Department is aware of none, which would permit the termination of that legal relationship on the ground that the Secretary was wrong in his determination that the land requires additional prospecting.

While the Department has stated by way of dictum in *Purvis v. Witt*, 49 L. D. 260 (1922), that a duly corroborated document sufficiently alleging failure on the part of an oil and gas permittee, not shown by the records of the Bureau of Land Management, to comply with statutory requirements of the Mineral Leasing Act should be received and that it may, if found proper and sufficient, form the basis of an order for a hearing, that decision is not authority for the proposition that one may challenge a prospecting permit on the ground that the lands are not in need of prospecting. There the Department was concerned with an allegation that the permittee, after the issuance of his permit, had failed to comply with a condition of his permit, required by the Mineral Leasing Act, and that therefore the permit should be canceled. The Department stressed that compliance with the condition involved, the monumenting of the ground,

was ordinarily not a matter of record or actually known to the Department. Here the charge is that the permits should not have been issued to the Larsen Mining Company, not that the company has violated a condition of the permits. And the charge is that the Secretary erred in a determination of fact which he was required to make, and did make, prior to the issuance of the permits.

The Department has held that prospecting permits, once issued, are not subject to collateral attack and that an attempt, after the issuance of the permits, to show that the information upon which the Department acted in issuing the permits was erroneous, comes too late. *Carl Nyman*, 59 I. D. 238 (1946); *cf. Emil Usibelli and A. Ben Shallit*, 60 I. D. 515 (1951).

The corporation contends that the *Nyman* case is not applicable to the present situation because, in that case, the attack was a collateral one which came some 3 years after the issuance of the permit, while it filed its application to contest almost immediately after the permits were issued. The corporation argues that its application to contest was timely filed and that it is a direct attack. However, the fact remains that the corporation's document was not filed until after the permits had been issued and until after a valid right had vested in the permittee to prospect the lands for a given time. The *Nyman* case, like the reported *Usibelli* case, holds that the issuance of prospecting permits creates certain rights in the permittee which are not subject to attack on the basis of an allegation that the lands are subject to the leasing rather than the prospecting provisions of the Mineral Leasing Act.

A recent decision of the Department is in point. Under section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226), lands believed to contain oil or gas deposits are subject to leasing by the Secretary. Section 17 provides that when the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased by competitive bidding. When the lands are not so situated, they are to be leased to the first qualified applicant. Section 32 of the act authorizes the Secretary to fix and determine the boundaries of any structure or oil or gas field (30 U. S. C., 1952 ed., sec. 189). These provisions of the Mineral Leasing Act, which apply to public lands, are made applicable to acquired lands by section 3 of the Mineral Leasing Act for Acquired Lands (30 U. S. C., 1952 ed., sec. 352).

In *Max Barash, The Texas Company*, 63 I. D. 51 (1956), the Department was confronted with some acquired lands leases which had been issued upon competitive bidding pursuant to a recommendation of the Geological Survey. Subsequently, the Geological Survey reported that it had not at the time of its earlier recommendation determined

that the lands were situated on a known geological structure of a producing field and that in fact only a small portion of the lands was so situated. Thereupon the Director of the Bureau of Land Management canceled the leases as to the lands reported not to be on a structure. In the decision cited, the Director's decision was reversed, the Department holding that the first recommendation of the Geological Survey amounted to a determination that the lands in question were situated on a known geologic structure and that, there being no intervening rights, there was no justifiable basis for canceling the leases because the Geological Survey had later determined that the lands were not situated on a known geologic structure.

It is clear, therefore, that although the information asserted to be in the possession of the corporation might have caused the Department to refuse to issue permits for the lands in question and to offer the lands for leasing instead, the Department now has no valid basis for canceling the permits. It follows that any such information which the corporation might have would not affect the legality or validity of the permits issued to the Larsen Mining Company. It further follows that the allegations respecting the erroneous determination as to the availability of the lands for prospecting permits are not sufficient cause to support a contest and that unless the corporation's other allegations show such cause it is not entitled to have its document treated as a contest or to demand a hearing thereon.

The allegation that the Larsen Mining Company knew of the corporation's intention to apply for leases on the lands would not, if proved, affect either the legality or the validity of the prospecting permits and the allegation that the company, in its applications for the permits, misrepresented the true facts with respect to the lands is not borne out by the applications themselves, which are a part of the records of the Bureau of Land Management. The applications, in fact, made no representations respecting the character of the coal deposits in the lands or that the lands were undeveloped lands where prospecting or exploratory work was necessary to determine the existence or workability of coal deposits. The company merely applied for the permits, stating that it had an agreement to work certain adjacent fee lands and stating that if prospecting work should prove successful it might be possible to work the lands applied for together with the fee lands or that it might be necessary to operate each unit separately, depending upon the results of the prospecting. The company then outlined its proposed method of prospecting. Nothing in its applications can be said to have misrepresented the facts relating to the need for prospecting. In any event, the Department makes its own investigations and determinations with respect to the need for prospecting, regardless of what representations an application for a coal prospecting permit may contain. *Cf. Ted C. Mathews*, A–26928 (January 6,

1954), wherein a decision that lands were not in need of additional prospecting work was upheld on the basis of a report from the Geological Survey which showed that such work was not necessary, notwithstanding the statements of the applicant to the contrary.

Therefore, the corporation, having failed to show sufficient cause affecting the legality or validity of the coal prospecting permits not shown on the records of the Bureau of Land Management, was not entitled to have its document treated as an application to contest or to demand a hearing on the allegations therein.

It becomes unnecessary, therefore, to determine whether the corporation has the qualifications of a contestant. It should be noted, however, that the mere hope that one may, in the future, acquire a lease on the land under the provisions of the Mineral Leasing Act is not sufficient. The rule limits contestants to those "seeking to acquire title to or claiming an interest in, the land involved." The corporation claims no interests in the lands included in the prospecting permits but it contends that it is within the rule because it seeks to acquire title to the lands by bidding for leases thereon in the event the permits are canceled and the lands are offered for lease by competitive bidding. While the corporation contends that a mere statement of intent to acquire title has uniformly been held by the Department to be sufficient to qualify a person as a contestant, it cites only one case, that of *Herrin* v. *Stanley*, 44 L. D. 579 (1916), to support its contention. There Herrin applied to contest a desert land entry, alleging failure on the part of the entryman to comply with the desert land law. Herrin stated, in response to the requirement that an applicant to contest state the law under which he intends to acquire title (43 CFR 221.2 (e)), that if the entry were canceled it was his intention to acquire title to the land under the provisions of the isolated tract law (43 U. S. C., 1952 ed., sec. 1171). The Commissioner of the General Land Office rejected the application to contest on the ground that the method of acquisition of title proposed by the applicant did not carry any assurance that he would be entitled to acquire title under the isolated tract law since there was no assurance that he would be the highest bidder in the event the land were offered at public sale and, further, that it would be impossible for the applicant, if successful in his contest, to exercise the preference right accorded by the act of May 14, 1880 (43 U. S. C., 1952 ed., sec. 185), within the time allowed. The act of May 14, 1880, confers on any person who procures the cancellation of a homestead entry a preferred right to enter the land for a period of 30 days after the cancellation. The Department, in reversing the Commissioner, held that while it was true that the applicant, if successful in his contest, probably would not be able to secure the ordering into market of an isolated tract and its sale within the period of preference right accorded by the 1880 act, nevertheless,

his contest, if successful, would result in clearing from the records the desert land entry and subject the land to appropriate disposition under the public land laws. The Department noted that if the land were vacant and isolated, as alleged, the applicant could apply to have the same ordered into market and sold and if he were the highest bidder at the sale and qualified, as stated in his affidavit to contest, could secure the land. The Department held that the contest affidavit stated a sufficient cause affecting the legality of the desert land entry and further that the method by which the contestant hoped to secure title to the land was a sufficient compliance with the act of 1880 and was not inharmonious with the spirit and intent of the rule of practice.

That case, while it represents a perhaps too liberal construction of the preference right accorded by the 1880 act, nevertheless indicates the Department's long time policy of allowing contests by those who assert no prior interest in the land only in those cases where, by statute, the successful contestant may assert a preference right to enter the land. Prior to the revision of the rules of practice effective February 1, 1911 (39 L. D. 395), there was no requirement that one who sought to contest the entry of another must be seeking to acquire the land himself or must specify the law under which he sought to acquire the land. Under the old rules, rule 1 provided that contests might be initiated by an adverse party or other person against any entry, filing or claim under laws of Congress relating to the public lands for any sufficient cause affecting the legality or validity of the claim. Rule 2 provided that in every case of application for a hearing an affidavit must be filed by the contestant, fully setting forth the facts which constituted the grounds of contest (31 L. D. 528 (1901)). But since the revision made in 1911, contestants, aside from those claiming a prior interest in the land, have been limited to those *seeking to acquire title to* land embraced in the claims of others. Since that time, contest applications have been required to contain a statement of the law under which the applicant intends to acquire title and facts showing clearly that the applicant is qualified to do so. Under the revised rules, contest applications by those "seeking to acquire title to" the land have been rejected where the entry or filing challenged was made under a law which did not accord a preference right of entry. See *Malone* v. *State of Montana*, 41 L. D. 379 (1912); *Starrs et al.* v. *State of Oregon*, 42 L. D. 205 (1913); *Horace G. Weese*, 45 L. D. 201 (1916); *Gauss et al.* v. *State of Montana*, 45 L. D. 458 (1916).

The same test was applied in the case of *Tieck* v. *McNeil*, 48 L. D. 158 (1921). There the Department held that an oil and gas prospecting permit issued under the Mineral Leasing Act was not subject to a contest. The Department said:

> The only question raised by the protest is whether an oil and gas permit is subject to contest by a third party. The only parties in the case of an oil and gas

permit is the permittee and the United States and a contestant could acquire no preference right to a permit though the contest was sustained and the permit canceled. The enforcement of the stipulation [to mark the corners of the permit with substantial monuments] in a permit rests with the Department and evidence that the permittee is not complying with the terms of his permit is welcome but a contest by a third party is not the proper procedure and the application is, therefore, denied and the protest dismissed without right of appeal.

Although the Department in *Purvis* v. *Witt*, *supra*, modified that case and held that it overlooked the distinction between a contest or protest which sets out material allegations of fact not disclosed by the records or known to the Department and a contest or protest which sets up matters which are disclosed by the records, known to the Department, or which involve some matter not required to be performed by the law or regulations, the *Purvis* case makes no attempt to distinguish between a contest and a protest, nor does it discuss the qualifications of a contestant. There, a protest had been filed and, while the Department found the protest to be insufficient and dismissed it, it held that a duly corroborated protest or contest sufficiently alleging failure to comply with the law on the part of an oil and gas permittee should be received and, if found proper and sufficient, might form the basis of an order for a hearing. The case did not hold that a contest application against a permit issued under the Mineral Leasing Act filed by one merely hoping to acquire a prospecting permit for himself would be allowed as such. The Department may, of course, order a hearing whenever a violation of the terms of a lease or permit is brought to its attention. No case has been found which would support the corporation's contention that one who merely hopes to lease land and who is not seeking to acquire title to the land is entitled to have his contest application allowed and to demand a hearing thereon.

In the circumstances and after a thorough consideration of the brief submitted by the corporation, the oral argument presented on behalf of the corporation in this office on July 16, 1956, at which representatives of the Larsen Mining Company participated, and of the reply memorandum which the corporation has submitted in refutation of the written summary or its oral argument filed on behalf of the Larsen Mining Company, it must be held that the United States Steel Corporation has not established its right to maintain a contest against the Larsen Mining Company or to demand a hearing on the allegations made by it that the coal prospecting permits issued to that company should be canceled.

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

EDMUND T. FRITZ,
Deputy Solicitor.

ARNOLD R. GILBERT

A-27303 *Decided September 10, 1956*

Oil and Gas Leases: Cancellation—Oil and Gas Leases: Six-mile Square Rule

An offer to lease land which cannot be encompassed within a six-mile square is subject to rejection and where a lease is issued for part of the land embraced in the offer it must be canceled as to that land which is embraced in a proper offer filed prior to the issuance of the lease in order that the statutory preference right of the party first making a proper offer may be honored.

Oil and Gas Leases: Lands Subject to

Land included in an outstanding oil and gas lease is not available for leasing to others and an offer to lease such land must be rejected.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Arnold R. Gilbert has appealed to the Secretary of the Interior from a decision by the Director of the Bureau of Land Management, dated November 21, 1955, which affirmed the action of the manager of the Colorado land and survey office in rejecting Mr. Gilbert's two offers, Colorado 09382 and 09639, to lease certain land in Colorado under the provisions of section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226).

On June 25, 1954, Mrs. Doris K. Miller filed an offer, Colorado 08865, for, among other land, the S½ sec. 36, T. 1 S., R. 97 W., 6th P. M., Colorado. On September 14, 1954, the manager rejected Mrs. Miller's offer as to the S½ sec. 36 because that land was included in outstanding leases. The manager noted that the rejected portion of Mrs. Miller's offer was not within a 6-mile square with the balance of the land included in the offer.

On October 12, 1954, Mr. Gilbert filed an offer, Colorado 09382, for portions of the land previously applied for by Mrs. Miller and, on November 10, 1954, Mr. Gilbert filed another offer, Colorado 09639, to lease the balance of the land originally applied for by Mrs. Miller, except that in sec. 36, T. 1 S., R. 97 W.

In the interval between the filing of the two Gilbert offers, the manager, on October 19, 1954, issued a lease to Mrs. Miller covering all of the land remaining in her offer after his rejection of September 14, 1954. On January 20, 1955, the manager rejected both of Mr. Gilbert's offers because the land was then under lease to Mrs. Miller.

Mr. Gilbert contends that the Miller lease is invalid and subject to cancellation. He contends that the lease was issued in violation of departmental regulations 43 CFR, 1953 Supp., 192.42 (d) and

192.42 (g) then in effect and in violation of Item 9 of the General Instructions printed on the back of the "Offer to Lease and Lease" form.

Section 17 of the Mineral Leasing Act, as amended, under which the Miller lease was issued, provides that land which is available for noncompetitive leasing shall be leased to the first party making application for the land who is qualified to hold a lease. Implicit in the requirement that the land 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. *Madison Oils, Inc., T. F. Hodge*, 62 I. D. 478 (1955); cf. *McKay* v. *Wahlenmaier*, 226 F. 2d 35 (App. D. C., 1955).

The pertinent provision of the first regulation referred to by Mr. Gilbert is as follows:

> * * * Each offer * * * must cover only lands entirely within a six-mile square. * * *

The second regulation referred to provided:

> 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 number 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.[1]

The instruction to which Mr. Gilbert refers reads:

> The offer will be rejected and returned to the offeror and will afford the applicant no priority if * * * the lands are not entirely within a 6-mile square * * *.

The Miller offer, at the time it was filed, was for land which could not be embraced within a 6-mile square. Under the regulations and the instruction quoted above, it is obvious that the offer was subject to rejection. It conferred no priority on Mrs. Miller and, because it did not comply with the requirements of the Department, Mrs. Miller enjoyed no advantage over subsequent offerors for the same land by virtue of having filed an application which was subject to rejection. In other words, she was not the first qualified applicant.

Apparently Mr. Gilbert's offer Colorado 09382, filed on October 12, 1954, for a portion of the land embraced in the Miller offer, was the first offer filed subsequent to Mrs. Miller's offer and, if Mr. Gilbert

[1] 43 CFR 192.42 was revised on December 7, 1954 (19 F. R. 9275). No change was made in the requirement quoted above from sec. 192.42 (d). Under sec. 192.42 (g), as revised, offerors are no longer given 30 days within which to file new offers.

was otherwise qualified to hold a lease under the provisions of the Mineral Leasing Act, he was entitled to the lease as the first party applying for the land. Mr. Gilbert enjoyed a statutory preference right to a lease on that land and his right to the lease was prejudiced by the issuance of the lease to Mrs. Miller.

In such a situation, the Miller lease must be canceled as to that portion thereof which is embraced in Mr. Gilbert's first offer, Colorado 09382. Cf. *Russell Hunter Reay* v. *Gertrude H. Lackie*, 60 I. D. 29 (1947); *Transco Gas & Oil Corp.*, 61 I. D. 85 (1952); *C. T. Hegwer et al.*, 62 I. D. 77 (1955). Therefore, the decision of the Director of the Bureau of Land Management, insofar as it affirmed the rejection of Mr. Gilbert's lease offer Colorado 09382 must be reversed.

However, the situation is different with respect to the second offer, Colorado 09639, filed by Mr. Gilbert on November 10, 1954. That offer was filed after the Miller lease had been issued. Even though the Miller lease was erroneously issued, the issuance of the lease segregated the land and made it unavailable for leasing to others. *R. B. Whitaker, Mrs. Jacqueline Anderson*, 63 I. D. 124 (1956). As the land embraced in that offer was not available to leasing at the time Mr. Gilbert filed his offer, his rights have not been prejudiced in any way by the rejection of his second offer. Accordingly, the decision of the Director, affirming the rejection of that offer, is affirmed.

In view of the fact that the rights of no third party are shown to have been prejudiced by the issuance of the lease to Mrs. Miller on that portion of the land covered by Mr. Gilbert's second offer, there would appear to be no reason for canceling Mrs. Miller's lease insofar as it covers that land and the Department is not disposed to take any further action with respect to that portion of Mrs. Miller's lease.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), and for the reasons set forth above, the decision of the Director of the Bureau of Land Management is reversed insofar as it rejected Mr. Gilbert's first offer, Colorado 09382, and the decision is affirmed insofar as it rejected Mr. Gilbert's second offer, Colorado 09639.

EDMUND T. FRITZ,
Deputy Solicitor.

GERHARD EVENSON

A–27383 *Decided September 11, 1956*

Rules of Practice: Appeals: Statement of Grounds

An appeal to the Secretary of the Interior will be dismissed where the appellant does not file a statement of reasons in support of his appeal within the time required by the revised rules of practice, effective May 1, 1956.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Gerhard Evenson has appealed to the Secretary of the Interior from a decision dated May 24, 1956, of the Director of the Bureau of Land Management which awarded all of Tract 1 offered at public sale to Delbert Pollard.

The next to the last paragraph of the Director's decision stated:

> The right of appeal to the Secretary of the Interior is allowed. If such appeal is taken it must be received in this office within 30 days from notice hereof and must be accompanied by a $5.00 filing fee. *Strict compliance must be made with 43 CFR Sections 221.31 to 221.34 inclusive, and other pertinent sections of the Rules of Practice, effective May 1, 1956.* See Information Sheet attached. [Italics added.]

43 CFR 221.32 (21 F. R. 1862) provides that a person wishing to appeal to the Secretary from a decision of the Director must file in the office of the Director a notice of appeal which must be received within 30 days after the appellant received the Director's decision. Section 221.32 concludes as follows:

> * * * The notice of appeal may include a statement of the reasons for the appeal and any arguments the appellant wishes to make.

The next section of the rules of practice, 43 CFR 221.33 (21 F. R. 1862), provides:

> *Statement of reasons; written arguments; briefs.* If the notice of appeal did not include a statement of the reasons for the appeal, such a statement *must be filed* in the office of the Secretary *within 30 days* after the notice of appeal is filed. Failure to file the statement of reasons within the time required will subject the appeal to summary dismissal as provided in section 221.98. * * * [Italics added.]

43 CFR 221.98 (21 F. R. 1864) provides:

> *Summary dismissal.* An appeal to the Director or to the Secretary will be subject to summary dismissal by the officer to whom it is made for any of the following causes:
>
> (a) If a statement of the reasons for the appeal is not included in the notice of appeal and is not filed within the time required; * * *.

The information sheet enclosed with the Director's decision repeats almost verbatim the language of sections 221.32 and 221.33.

Mr. Evenson, through his attorney, filed a timely notice of appeal on June 25, 1956. The notice of appeal contained no statement of reasons but said: "A statement of the reasons for this appeal will be filed with the Secretary of the Interior within the time allowed by 43 CFR Section 221.32." Since section 221.32 does not state the time within which a statement of reasons must be filed, it is obvious that the appellant intended to refer to section 221.33. It is equally obvious that the appellent knew the provisions of section 221.33.

The statement of reasons was due on July 25, 1956, the thirtieth day following the filing of the notice of appeal. On July 26, one day later, a brief of the appellant was received in the Washington office of the Bureau of Land Management. The brief was mailed from Meeker, Colorado, with a letter of transmittal dated July 23, 1956.

It is plain that under sections 221.33 and 221.98 Mr. Evenson's appeal is subject to summary dismissal because the statement of reasons was not filed within the time required, albeit the delay was only one day. Under the rules of practice prior to their amendment effective May 1, 1956, notices of appeal to the Secretary were required to state the grounds for appeal and were required to be filed within 30 days from service of the Director's decision upon the appellant (43 CFR 221.75 (a) and (b)). Appeals which did not comply with this requirement were made "subject to summary dismissal" (43 CFR 221.75 (d)). Without exception the Department dismissed summarily appeals which were filed only one day late [1] and appeals which did not state grounds for appeal.[2]

The current rules relaxed the former requirements to the extent that the statement of grounds need not be included in the notice of appeal but can be filed 30 days after the notice of appeal, thus in effect allowing 60 days after service of a copy of the Director's decision for filing a statement of reasons. Moreover, section 221.97 (21 F. R. 1864) of the current rules provides that the time for filing any document, except a notice of appeal, may be extended by the officer to whom the appeal is taken. The section requires only that a request for extension be filed within the time allowed for the filing of the document. Thus, in this case, the appellant could have at any time on or before July 25, 1956, when his statement of reasons was due, filed a request for an extension of time in which to file his statement of reasons. He did not make any such request.

In the face of the consistent rulings of the Department under the former rules of practice, there is no possible basis for not summarily dismissing the appeal.

[1] *Barbara M. Smoot,* 61 I. D. 337 (1954); *D. Miller,* A–27343 (July 3, 1956); *Lee R. Ormiston,* A–27355 (May 14, 1956); *Albert N. Froom,* A–27124 (May 23, 1955); *Alaska Coal Company,* A–26859 (July 1, 1954); *Bonelli Cattle Company,* A–26709 (June 18, 1953); *Southern California Edison Company,* A–26542 (Dec. 10, 1952).

[2] *Patricia Sayers,* A–27310 (May 14, 1956); *Hector Aitchison,* A–27226 (Nov. 21, 1955); *William C. Parson,* A–27089 (April 12, 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 appeal is dismissed.

EDMUND T. FRITZ,
Deputy Solicitor.

ORGANIZATION OF SCHOOL DISTRICTS ON INDIAN RESERVATIONS IN ALASKA

Alaska: Indian and Native Affairs

There is no Federal law which prohibits the Territory of Alaska from creating school districts in territory set aside for Alaskan Indians.

Alaska: Territorial Agencies

A school district is usually a separate taxing district for school purposes.

Indians: Taxation: Generally

The power of local taxation cannot be asserted against the property of the Alaskan Indians without congressional authorization.

M-36367 SEPTEMBER 17, 1956.

TO THE ATTORNEY GENERAL, JUNEAU, ALASKA.

This refers to your inquiry of June 12, 1956, requesting a review of the following question: May a school district be organized under the laws of the Territory of Alaska, in country set aside by the Federal Government for the use and occupancy of Indian tribes of Alaska?

Prior to the Organic Act of Alaska on August 24, 1912 (37 Stat. 512), it appears that schools outside of incorporated towns were supported by annual appropriation made by Congress. Starting with the act of January 27, 1905 (33 Stat. 616), a provision was made that "The education of the Eskimos and Indians in the district of Alaska shall remain under the direction and control of the Secretary of the Interior, and schools for and among the Eskimos and Indians of Alaska shall be provided for by an annual appropriation * * *." Each of the subsequent provisions of acts making appropriations for the support of schools among the natives of Alaska contained a like provision that the appropriations for the support of schools for natives of Alaska shall be under the direction of the Secretary of the Interior. A school system under the direction of the Secretary had become pretty well recognized by the time the Territory of Alaska was created by the act of August 24, 1912, *supra*, in that it was provided in section 3 thereof that "the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the [act of January 27, 1905, *supra*,] and the several acts amendatory

thereof," which act provides that "schools for and among the Eskimos and Indians of Alaska shall be provided for by an annual appropriation." Evidently, Congress intended to continue its education program for children of non-taxpaying natives and this provision of the Organic Act of Alaska served to extend and preserve the system of education that had been established by congressional appropriation under the direction of the Secretary of the Interior.

Although Congress made sure that its schools for the native children of the far-reaching Alaskan rural areas were preserved, in no way did Congress attempt to restrict the maintenance and establishment of schools by the Territorial Legislature of Alaska. In fact, Congress expressly granted to the Territory power of legislation for school purposes by the act of March 3, 1917 (39 Stat. 1131). It was after the enactment of this act that Territorial schools came more and more into existence. The ultimate result was, of course, a dual system of schools in Alaska. There were those for the education of white and colored children and "children of mixed blood who lead a civilized life," established and maintained by appropriation from Territorial funds; and those for education of Indians, and other natives provided for by the annual appropriations of Congress.

The problems that arose between the United States Government's school program and the Territorial school program nearly always resulted in the encouragement and expansion of the Territorial school system. The decision in the case of *Jones* v. *Ellis*, 8 Alaska 146 (1929), directed the Territorial school officials to admit both white and native children. This decision indicates a directive by the court requiring the Territorial legislature to expand its school system.

Later, action was taken by Congress which helped and encouraged the Territorial Legislature of Alaska to expand its school facilities. Congress authorized the annual appropriation to be used by the Secretary of the Interior in the support of both the Territorial schools of incorporated towns as well as the rural schools. It soon became a matter of mutual assistance and cooperation between the Secretary and the Territorial School Boards.

On May 14, 1930 (46 Stat. 321), Congress authorized the Secretary to contract with the Territory's school boards that maintained schools in certain cities and towns for the education of nontaxpaying natives, including those of mixed native and white blood, and Congress authorized the leasing of school buildings owned by the United States to such school boards, and to pay the school boards for services rendered an amount not in excess of the cost of operating a school for natives under present appropriations in such town. Thereafter Congress enacted the Johnson-O'Malley Act on April 16, 1934 (48 Stat. 596, as amended, 49 Stat. 1458; 25 U. S. C. secs. 452, 454), and the Ter-

ritorial Legislature authorized the Board of Administration of the Territory of Alaska to enter into contracts with the Secretary of the Interior for education and welfare work among the Alaskan natives. (Chapter 85, Laws of Alaska, 1935.)

This concept of mutuality of interest between the United States Government and the Territorial Government of Alaska in providing for education of Alaskan children has been prevalent throughout the whole struggle for Alaskan school facilities. Because of the diversified population of Alaska, it is only natural for the Territory of Alaska to concentrate on the densely populated areas, while the United States Government shoulders the burden of providing schools in the more isolated areas where non-taxpaying natives are located. The later extension of the Territorial schools into areas where native children were located was in no way discouraged by the United States Government. In fact, I am aware of no laws passed by Congress which would even indicate an attempt to restrict this expansion of Territorial schools. Actually, the record shows that Congress at all times attempted to encourage and support the establishment of a Territorial school system which would reach out and be available for all the children of Alaska, including the Indian and native children.

In my opinion, this historical background of the education program of Alaska clearly indicates that there is no Federal order, decision or statute which prohibits the Territory of Alaska from extending its school system into territory set aside for Alaskan Indians.

A study of the 1949 Compiled Laws of Alaska providing for the incorporation of school districts indicates that the purpose of their incorporation is to provide a school board elected according to the laws therein provided for the purpose of managing and administering all school matters of the district under such rules and regulations as might be promulgated by the Commissioner of Education of the Territory of Alaska. In other words, the district electors themselves elect a school board to whom they may look to for the purposes of the erection, maintenance and support of schools. In fact, the school board of the particular school district is restricted to the purpose of providing an administrative body for the sole purpose of maintenance and support of public schools. This being the purpose of a school district of Alaska, there is no objection legally or morally to their creation to include lands set aside by the Federal Government for the use and occupancy of the Indians of Alaska.

In this respect, it should be observed that the courts within the United States have refused to object to the incorporation of school districts on Indian reservations. *Lebo* v. *Griffith*, 173 N. W. 840 (1919); *State ex rel. Baker* v. *Mountrail County*, 149 N. W. 120 (1914). It is also well recognized that in many respects natives of

Alaska are wards of the Government at least to such an extent to bring them within the spirit, if not within the exact letter of the laws relating to American Indians (49 L. D. 592). Other cases have expressly said that Indians and natives of Alaska are in the same category as the Indians of the United States (50 L. D. 315).

The fact must not be overlooked, however, that a school district is also vested with certain recognized powers as a body politic. And, although the law will not prevent their creation, the powers of the district may come into direct conflict with Federal laws protecting the rights of Indians.

The laws of the Territory of Alaska expressly provide that the school board shall have the power and it shall be their duty to appoint an assessor who shall act as a tax collector. Sections 3–12 and 3–23 of Title 37 of the Alaskan Compiled Laws, 1949, provide that the school board shall have the power to levy and collect taxes upon real and personal property within the limits of their respective district not exempt therefrom by existing law, and not to exceed 2 percent of the assessed value of such property. It is this power that the Federal Government and the Federal courts have consistently refused to recognize if asserted against Indian property within the protective scope of Federal Indian law. 50 L. D. 315; 51 L. D. 155; *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78 (1918); *Territory of Alaska* v. *Annette Island Packing Co.*, 289 Fed. 671 (1923).

On the other hand, although the Territory may not tax property owned and occupied by an Alaskan Indian tribe, there is no law which prevents its taxation of the property of non-Indians even though a non-Indian's property is located upon tribal land under lease from the Indians. *Thomas* v. *Gay*, 169 U. S. 264 (1898). The Supreme Court in *Helvering* v. *Producers Corp.*, 303 U. S. 376 (1938), held that immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in an operation under a Government contract or lease cannot be supported by merely theoretical conceptions of interference with the function of Government. In upholding a tax upon profits of a private individual operating under a Government contract, the Court, in the *Helvering* case, said: "* * * there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote" (p. 387). Furthermore, it is well established that, if the land of the Indian tribe passes from the tribe or individual Indian to a non-Indian, such property becomes subject to real and personal property taxation. *Choctaw, O. & G. R. R.* v. *Mackey*, 256 U. S. 531 (1921).

J. REUEL ARMSTRONG,
Solicitor.

AUTHORITY TO EXTEND THE TERMS OF OIL AND GAS LEASES ON THE OUTER CONTINENTAL SHELF FOR A PERIOD EQUIVALENT TO THE PERIOD DURING WHICH DEVELOPMENT OF THE LEASES IS PREVENTED AS THE RESULT OF LITIGATION INSTITUTED BY THE LESSOR

Outer Continental Shelf Lands Act: State Leases: Generally—Oil and Gas Leases: Extensions

Undeveloped oil and gas leases determined by the Secretary to be entitled to receive the benefits provided for by subsection 6 (b) of the Outer Continental Shelf Lands Act may be extended under that subsection for a period equivalent to the period that their development is prevented by the Supreme Court's order of June 11, 1956, issued in the case of *United States* v. *State of Louisiana*, Original No. 15 (351 U. S. 978), or for a period equivalent to the remainder of their primary terms as extended as of June 11, 1956, whichever is shorter.

M–36364 SEPTEMBER 19, 1956

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

The holder of certain oil and gas leases on the Outer Continental Shelf off the coast of Louisiana, the initial terms of which will soon expire, has asked that the terms of all such leases be extended for a period equivalent to the period that development is prohibited by the order of the Court issued in connection with pending litigation brought by the United States against the State of Louisiana. The leases in question are former Louisiana State leases with respect to which favorable determinations have been made pursuant to section 6 of the Outer Continental Shelf Lands Act of August 7, 1953 (67 Stat. 462; 43 U. S. C. sec. 1331), hereinafter called "the act." The litigation is that involved in *United States* v. *Louisiana*, Original No. 15 (351 U. S. 978), in the Supreme Court of the United States. The order which prevented development under the terms of the leases and said section 6 of the act was issued by the Supreme Court on June 11, 1956, as an outgrowth of the institution of the suit, and provides as follows:

> It is further ordered that the State of Louisiana and the United States of America are enjoined from leasing or beginning the drilling of new wells in the disputed tidelands area pending further order of this Court unless by agreement of the parties filed here.

The leases involved, as amended and supplemented by section 6 of the act, grant the lessees the right at any time within the primary

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period of 5 years or as extended to commence drilling and provide for the continuance of such leases thereafter so long as oil or gas is produced or operations for drilling are continued. The leases in question are not producing oil or gas, and no new operations for drilling or drilling operations can be conducted thereon because of the order of the Court, unless and until the agreement authorized therein is executed and filed with the Court. Efforts to reach such an agreement have thus far proved fruitless and some leases may expire before an agreement can be reached and those that remain unexpired at the time an agreement is made will have lost months out of the period granted for development.

The question raised by the request for extension is whether or not there is authority to extend the section 6 leases on the ground stated,[1] i. e., that the laws of Louisiana extended to the area by section 4 (a) (2) of the act authorize such an extension. These leases contain no extension provisions. Therefore, if they are to be extended under any authority that authority must flow from the authority granted to the Secretary of the Interior by section 5 of the act, from the laws of the State of Louisiana as such laws as existed prior to the date of the act were extended to the Outer Continental Shelf by section 4 (a) (2) of the act or by those laws as authorized by section 6 (b) of the act.

As I read section 5 of the act, the Secretary's authority to extend leases granted therein exists only when such extension is indicated as the outgrowth of a suspension of operations or other action taken in the interest of conservation and even there the authority must be implied for it is nowhere expressly conferred. That section authorizes the Secretary to "administer the provisions of this Act * * * and * * * prescribe such rules and regulations as may be necessary to carry out such provisions." The remainder of the section contains express authorization to do certain acts and the implied authority to extend the terms of leases but is limited by the requirement that everything that is authorized must be "in the interest of conservation." While the specific authorization to act in particular matters is prefaced by the words "Without limiting the generality of the foregoing provisions of this section * * *," the said "foregoing provisions" do not of themselves confer authority to extend leases and if such authority exists other than "in the interest of conservation" as impliedly provided in section 5, it must be in section 4 (a) (2) or section 6 (b), since it is not contained elsewhere in the act. I am unable to perceive how the extension of these leases solely because of the order pro-

[1] There is no question but that as a matter of equity extensions are warranted.

hibiting the drilling of new wells would be in the interest of conservation and I conclude that section 5 does not, of itself, authorize the requested extension.

Section 4 (a) (2) which extends "the civil and criminal laws" of Louisiana to the Outer Continental Shelf "To the extent that they are applicable and not inconsistent with this Act or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted * * * " is not limited in its application to section 6 leases but is general in its nature. There is no statute of Louisiana, in terms, authorizing such an extension as to State issued leases. The State court, however, has invoked section 2040 of the Civil Code relating to the conditions of private contracts as authority for extending leases where the prohibition against development resulted from action by the lessor. *State ex rel. Porterie* v. *Grace*, 166 So. 133, 138 (1936). I am not prepared to agree that section 4 (a) (2) was intended to have so broad a result as is implied. The history of the act does not so indicate. The testimony of witnesses representing the States and other interested parties shows that what was sought was to provide laws to serve local and domestic needs. The sway of State laws over the public lands of the United States was referred to as comparable to what was desired. References were made to the criminal laws, tax and conservation laws, the police powers of the State, laws relating to contracts and those governing the relationship of humans. An alternate suggestion, apparently designed to achieve the same purpose, was that the laws of the District of Columbia be extended to the area. There was no indication of any intent to extend the laws applicable to State oil and gas leases. Of course, if one such law was extended all would be and there would result the problem of determining in each case not specifically covered by the act whether any provision in the State leasing laws was applicable. It seems apparent from the history of the act and from the general policy of Congress respecting the applicability of State law to Federal lands that there was no purpose to extend any State laws which would directly affect the issuance or continuance of Federal leases. It is generally considered that oil and gas leases issued under authority of an act of Congress prescribing the conditions for their issuance and continuance are not governed by the general laws of the States applicable to private leases or contracts even though these general laws apply over the area covered by the Federal leases. For this and other reasons stated, I do not believe that an application to State leases by

State court decree of a law otherwise inapplicable is by virtue of the provisions of section 4 (a) (2) binding on the United States.

Attention should be called to the fact that although State tax and conservation laws were discussed in connection with the proposed extension of State laws, section 4 (a) (2) in terms excludes State tax laws, and section 5 of the act confers discretionary authority on the Secretary in the matter of conservation.

There remains to consider the provisions of section 6 (b) of the act relating to undeveloped leases validated under section 6 (a). Section 6 (b) authorizes the maintenance of such validated leases and the conduct of operations thereunder in accordance with the term thereof and of "any extensions, renewals or replacements authorized therein or heretofore authorized by the laws of such State."

I do not believe that the same reasons exist with respect to this provision as those outlined with regard to section 4 (a) (2). The latter constitutes a general adoption and extension of State laws, the former is limited to laws applicable to the leases involved. Subsection 6 (b) gives assurance to the lessees that nothing shall be done to adversely affect their leases as to the term thereof or any extensions authorized in the lease or authorized by the laws of the State on the effective date of the act. I take this to mean that Congress intended that each such lease should continue according to its terms and the then existing laws of the State issuing it in the same manner and to the same extent as it would have done had it remained under the jurisdiction of the State, except as otherwise limited by the provisions of section 6 and subject to all of the conditions of that section, including the same right to have it extended. The legislative history supports this conclusion. As pointed out in S. Rept. No. 411, 83d Cong., Congress recognized that the highest officials both of the then and the preceding Federal administration had recommended "that any legislation enacted should give full recognition to the equities and investments of the holders of existing State-issued mineral leases." Attention was also called to the implicit recognition of these leases by the Supreme Court, the fact that large investments had been made, and that the United States had received revenues from the leases after December 11, 1950.

There can be no doubt but that if the section 6 leases were now under State jurisdiction and if the State had caused the suspension of drilling by bringing a suit, the Supreme Court of the State, unless it departed from precedent, would allow an extension of time for the period of enforced non-development. Such a conclusion is supported by the State Supreme Court's decisions in *State ex rel. Porterie* v. *Grace*, *supra*, and cases cited and *Baker* v. *Potter*, 65 So. 2d 598, 601 (1953).

(The *Porterie* case is directly in point because it involved a State lease.) The interpretation and application of the law of the State of Louisiana by the highest court of that State is determinative of the question in the absence of any question that the law contravenes the Constitution of the United States and no such question is presented here. See *Warren* v. *United States*, 340 U. S. 523, 526 (1951).

I, therefore, conclude that existing section 6 leases may be extended as indicated in the preceding paragraph under the authority contained in subsection 6 (b).

J. REUEL ARMSTRONG,
Solicitor.

UNITED STATES

v.

KEITH V. O'LEARY ET AL.

A–27260 *Decided September 28, 1956*

Mining Claims: Determination of Validity

A mining claim is a claim to property which may not be declared invalid without proper notice and adequate hearing and in accordance with due process of law although there is no statutory requirement that a hearing be held to determine the validity of such a claim.

Administrative Procedure Act: Hearings

The courts have held that administrative proceedings in which a hearing is necessary in order to satisfy the requirements of due process must comply with the Administrative Procedure Act, even though there is no statute requiring that the matter be determined on the record after opportunity for an agency hearing, and proceedings to determine the validity of mining claims will be held in compliance with that act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior by Keith V. O'Leary and Donald K. Moore from a decision of August 17, 1955, by the Acting Director, Bureau of Land Management, which held null and void a mining location by Mr. O'Leary and Mr. Moore, known as the Kay placer mining claim, located on June 13, 1950, on the N½SW¼SW¼, N½S½SW¼SW¼ sec. 4, T. 8 N., R. 13 E., M. D. M., California. The Acting Director's decision affirmed a decision by the manager of the Sacramento land office which held that the charges brought by the Government against the validity of the Kay placer

had been sustained at a hearing before the manager on May 12, 1953, and which held the claim invalid.

By notice of August 7, 1952, the appellants were notified that charges had been filed against the validity of the Kay placer on the grounds (*1*) that the land embraced in the claim was nonmineral in character and (*2*) that minerals had not been found within the limits of the claim in sufficient quantities to constitute a valid discovery. The appellants answered the charges and filed a motion to dismiss the contest. In a decision of September 15, 1952, the manager denied the motion to dismiss. His action was sustained by the Director of the Bureau of Land Management in a decision approved by the Assistant Secretary on December 24, 1952. A purported appeal from this decision was dismissed by a departmental decision, *United States* v. *Keith V. O'Leary and Donald K. Moore*, A–26683 (February 26, 1953).[1] Thereafter, on May 12, 1953, a hearing was held before the manager on the charges against the Kay placer. Contestees were represented by counsel at the hearing and the Assistant Regional Counsel, Bureau of Land Management, Region II, represented the United States.

Before testimony was taken at the hearing, counsel for the contestees filed a formal demurrer and motion to dismiss on a number of grounds including the assertion that the Department was required, and failed, to comply with the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1001 *et seq.*), pp. 1–13.[2] After some discussion of the motion, it was overruled by the manager (pp. 13–19). The only basis of the appellant's motion to dismiss which requires consideration in this proceeding is the contention that in hearings on contests involving the validity of mining claims, the Department must comply with the provisions of the Administrative Procedure Act.

[1] A hearing on the validity of the claim had been set for January 7, 1953, after the manager had denied the motion to dismiss. At the hearing, no appearance was made on behalf of the contestees (appellants), but their counsel filed with the manager a motion for abatement of the hearing or continuance based on the appeal by the contestees to the Secretary from the decision of December 24, 1952. As the decision of December 24, 1952, was approved by the Assistant Secretary without allowing a right of appeal, the manager held at the hearing on January 7, 1953, that no appeal was pending before the Secretary and overruled contestees' motion for abatement of the hearing or continuance. Thereafter, the manager proceeded to hear the evidence offered by the Government in support of the charges against the claim (transcript of hearing on Contest No. 5168 before the manager, Sacramento land office, January 7, 1953).

In the decision of February 26, 1953, the Department dismissed the appeal but also affirmed the denial of the motion to dismiss and remanded the case with instructions that another hearing in this matter be held to allow the contestees to participate and submit their case on the merits.

[2] Page numbers, unless otherwise indicated, refer to the transcript of the hearing on May 12, 1953, in Contest No. 5168, *United States* v. *Keith V. O'Leary and Donald K. Moore.*

The Administrative Procedure Act of June 11, 1946, prescribes certain procedures and practices to be followed by administrative agencies of the executive branch of the Federal Government, with a number of exceptions not here relevant. In the 10 years since its enactment, the Department apparently has never considered, on appeal to the Secretary, the question whether hearings on the validity of mining claims come within the scope of the act. In many respects, the requirements of the act are similar to this Department's rules of practice governing procedures in contest cases and appeals (see 43 CFR, Part 221; 21 F. R. 1860), but the Department's practice of holding hearings on contested mining claims before managers (formerly registers) of local land offices differs substantially from the provisions of the act regarding officers qualified to preside at quasi-judicial hearings.

Section 5 of the act (*supra*, sec. 1004) sets forth procedures to be complied with "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," with certain exceptions which need not be considered here. Section 5 (c) provides, *inter alia*, that no officer shall preside at the reception of evidence at hearings covered by section 5 (a) of the act if such officer is "responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions" for the agency. Section 7 of the act (*supra*, sec. 1006) requires that either the head of an agency (or a member or members of the body which comprises it) or hearing examiners appointed under the act preside at hearings which are required by section 5 (a) to conform with the procedures established by the act. Section 11 of the act (*supra*, sec. 1010) provides for the appointment of hearing examiners under the act.

There is no statutory requirement for a hearing in contest cases involving the validity of a mining claim, and this Department continued, after the enactment of the Administrative Procedure Act, to hold hearings on contested mining claims in accordance with the rules of practice which have been in effect for many years. This practice was based on the assumption that sections 5 and 7 of the act were applicable only to hearings which were required to be held by reason of a statutory provision to that effect. The hearing in the instant case, conducted in accordance with the Department's rules of practice, was held before the manager of the land office, Sacramento, California. The manager is not an officer authorized by section 7 of the act to preside at hearings.

The appellants contend that in the determination as to whether there has been a discovery of valuable minerals on the Kay placer, they are entitled to a hearing on this question presided at by an examiner appointed under section 11 of the act, and that a hearing presided at by the manager of the land office violated the act. If the requirements of the Administrative Procedure Act are applicable to this proceeding, it is clear that the hearing held on the validity of the Kay placer violated various provisions of the act.

A valid mining claim gives an exclusive right of possession and enjoyment, and the claim is property in the fullest sense. *Cole* v. *Ralph*, 252 U. S. 286, 295 (1920). Thus, a hearing on the validity of a mining claim is a hearing on a claim to property. Although there are no statutory requirements that a hearing be held before the Department declares a mining claim null and void, it has long been recognized that the power of this Department to determine that such a claim is invalid requires an adequate hearing, and that an equitable or legal claim to property against the United States may not be invalidated except in accordance with the requirements of due process of law. In *Cameron* v. *United States*, 252 U. S. 450, 460, 461 (1920), it was stated:

> Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void. This is well illustrated in *Orchard* v. *Alexander*, 157 U. S. 372, 383, where * * * this court said: "The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed. His interest is subject to state taxation. * * * The government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department."

The appellants have cited the case of *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950), in support of their contention that the requirements of the Administrative Procedure Act are applicable to the hearing in this case. The *Wong Yang Sung* case involved deportation proceedings with respect to which the Government argued that since there was no express requirement for any hearing or adjudication in the statute authorizing deportation, the requirements of the Administrative Procedure Act relative to adjudications were not applicable. The Court held that the constitutional requirement of procedural due process required a fair hearing in deportation proceedings; that sec-

tion 5 of the act was applicable to such proceedings; and that the other requirements of the act must be complied with if orders resulting from deportation proceedings were to have validity.

Riss & Co., Inc. v. *United States et al.*, 341 U. S. 907 (1951), is a per curiam decision following *Wong Yang Sung* v. *McGrath* in which it was held, in effect, that the principle announced in the *Wong Yang Sung* case applied in cases involving property interests as well as those involving personal liberty. The *Riss* decision reversed a lower court which had held that the Administrative Procedure Act was not applicable to hearings before the Interstate Commerce Commission for certificates of public convenience and necessity since there were no statutory requirements for hearings in such proceedings.

In *Cates* v. *Haderlein*, 342 U. S. 804 (1951), the Court reversed a circuit court decision which held that the Administrative Procedure Act was not applicable to the issuance of fraud orders by the Postmaster General because there was no statutory requirement for a hearing in connection with the issuance of such orders.

In the case of *Door* v. *Donaldson*, 195 F. 2d 764, 766 (App. D. C., 1952), it was stated that where a hearing is required by ideas of due process, section 5 of the Administrative Procedure Act applies to the hearing. It has been held also that the failure of the Interstate Commerce Commission to hold a hearing in accordance with the Administrative Procedure Act on granting a certificate of public convenience and necessity to a motor carrier is a defect which invalidates the entire proceeding (*Pinkett* v. *United States*, 105 F. Supp. 67, 73 (D. Md., 1952)).

These cases have been consistently followed except in situations where a timely objection was not made during the agency hearing against the failure of the agency to follow the requirements of the act (*United States* v. *Tucker Truck Lines*, 344 U. S. 33 (1952)).

Inasmuch as a mining claim is a property claim which may not be invalidated without due process of law, hearings on the validity of such claims seem clearly to be within the scope of the court decisions referred to above holding that administrative proceedings in which a hearing is necessary in order to satisfy the requirements of due process must comply with the Administrative Procedure Act, even though there is no statute requiring that the matter be determined on the record after opportunity for an agency hearing. In accordance with those decisions, the Department concludes that the hearing requirements of the Administrative Procedure Act are applicable to hearings on the validity of mining claims. Accordingly, this case will be

remanded for rehearing in conformity with the requirements of the act, and the Department's rules of practice governing hearings on contest cases of this kind will be revised to comply with the act.

Therefore, the Acting Director's decision is set aside and the case is remanded for action consistent with this decision.

FRED A. SEATON,
Secretary of the Interior.

METALLIFEROUS MINING LOCATIONS WITHIN* A PETROLEUM RESERVE

Withdrawals and Reservations: Temporary Withdrawals—Mining Claims: Withdrawn Land

A petroleum reserve created by a withdrawal made under and pursuant to the provisions of the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497; 43 U. S. C. secs. 141, 142), is a temporary withdrawal which, in and of itself, does not prevent the location of mining claims for metalliferous minerals.

Mineral Leasing Act: Generally—Withdrawals and Reservations: Effect of—Mining Claims: Lands Subject to

Metalliferous mining locations could be made within petroleum reserves prior to the act of February 25, 1920 (41 Stat. 437; 30 U. S. C. sec. 181), even if the land was then known to contain oil or gas. After that enactment and prior to the enactment of the acts of August 12, 1953 (Public Law 250; 67 Stat. 539), and August 13, 1954 (Public Law 585; 68 Stat. 708), lands valuable for oil or gas were not subject to location under the United States mining laws. But only lands known to contain those minerals were excluded from location for metalliferous minerals.

Mineral Lands: Determination of Character of

If the creation of a petroleum reserve is tantamount to the classification of the reserved lands as mineral, valuable for oil and gas, the rule applicable to lands classified as valuable for coal and, subsequent to the act of February 25, 1920, *supra*, oil shale would apply to them. That rule is that the locator of a mining claim or lands so classified may defeat the classification by proving, in a proper proceeding, that the land is, in fact, not valuable for the coal, oil shale, or oil and gas, whichever was named in the order classifying the land. Since the petroleum reserve stamps the land as *prima facie* valuable for oil or gas, the burden of proof rests upon the mining claimant.

*Not released for publication in time for inclusion chronologically.

M-36375 MAY 3, 1956.

TO THE REGIONAL COUNSEL, DENVER, COLORADO.

This is in reference to your memorandum of April 19, enclosing a proposed memorandum to Paul B. Martin, Assistant General Counsel, Atomic Energy Commission, Grand Junction, Colorado.

I do not agree with your conclusion that the creation of a petroleum reserve is sufficient to establish the oil and gas character of the withdrawn lands so as to require that one who located a mining claim prior to the enactment of Public Law 250 (67 Stat. 539), or Public Law 585 (68 Stat. 708), 83d Congress, comply with the applicable provisions of one or the other of those acts. At most it would result only that such character was *prima facie* established.

State of California et al., 40 L. D. 301, 302 (1911), and other cases cited by you, held that lands placed in a petroleum reserve "were classified as oil lands, and were placed in petroleum reserve No. 2 by Executive Order of July 2, 1910." The Executive Order actually withdrew the lands "*for classification* and in aid of legislation" [italics added]. The holding in 40 L. D. 301 is dictum since the force of the withdrawal "for classification and in aid of legislation" alone prevented all disposals except those permitted by section 2 of the act of June 25, 1910 (36 Stat. 847). (The exceptions were locations for coal, oil, gas, and phosphates.)

Later, on April 12, 1920, in *State of Louisiana et al.*, 47 L. D. 366 (1920), involving a swamp land *grant* it was held that a "petroleum withdrawal" impressed lands with a *prima facie* mineral character. Since the "withdrawal" there considered was a numbered one (No. 48, La. No. 2) and was effected by Presidential action, it was necessarily a "petroleum reserve." For the same holding in cases involving *entries* see *Anna M. Baxter* (on petition), 48 L. D. 126 (1921); *Tilmon D. Mabry* (on rehearing), *Id.* 155 (1921). *State of Utah*, 53 I. D. 224 (1930), is not to the contrary. In essence, that case held that title to a school section in a petroleum reserve did not vest in the State under the act of January 25, 1927 (44 Stat. 1026), because reserved, that so long as classed as mineral lands it would continue to be reserved, but that if restored as nonmineral title would vest in the State. Under the law as it then was title to mineral lands embraced in reservations on the date of the act could never pass to the State. Thus, it was by virtue of the effect of the 1927 act that the reservation effectively prevented title from passing. However, the effect of the decision was the same as the prior State of Louisiana

decision in that a determination of nonmineral character was possible as to lands in petroleum reserves.

The only differences between the rulings in 40 Land Decisions and those that followed in 47 and 48 Land Decisions were that (*1*) by the act of July 17, 1914 (38 Stat. 509; 30 U. S. C. sec. 121), nonmineral entries could be made for lands within a petroleum reserve with a reservation of minerals but Congress permitted entrymen, grantees, etc., to prove, if they could, the non-oil character of the lands so that they could be patented without the mineral reservation and (*2*) the later decisions hold that the petroleum reservation merely *prima facie* stamps the land with a mineral character.

But even if the reservation so stamps the land that, of itself, does not prevent mining location for metalliferous minerals. Such locations were precluded only by the act of February 25, 1920 (41 Stat. 437; 30 U. S. C. sec. 181 *et seq.*), specifically by sections 1 and 37. Section 1 in material part by the words "Deposits of * * * oil, oil shale, or gas * * * and lands containing such deposits * * * shall be subject to disposition in the form and manner provided by this Act * * *" and section 37 in the same language plus the interposition of the word "only" immediately after the clause "shall be subject to disposition" and using the word "in" instead of "and" between the recital of the several minerals and the word "lands." Thus, only "lands containing" the leasable minerals *and* those minerals are reserved from location under the mining laws. The language of the act requires proof of knowledge of oil and gas, etc., character, not merely their "*prima facie*" existence. It is true that *prima facie* evidence of known oil and gas character is sufficient until rebutted. It is also true that it puts the burden on the locator when it would otherwise be on the Government. But it does not conclusively and irrevocably determine that the land is known to contain oil and gas. The very use of the words "*prima facie*" connotes something that is capable of being disproved.

Notwithstanding the dictum in *State of California et al.*, *supra*, the Executive Order creating the petroleum reserve—and all other petroleum reserves—in terms withdrew the land "for classification and in aid of legislation." The reserves are all made under and pursuant to the provisions of the act of June 25, 1910, as amended by the act of August 24, 1912 (43 U. S. C. secs. 141, 142), and subject to the provisions of the act of July 17, 1914. Their effect obviously is not to *classify* the land as known oil and gas land. Even if they had that effect, however, it would not necessarily be conclusive. The Department held in *John McFayden et al.*, 51 L. D. 436 (1926), that

lands actually classified as coal lands must actually possess value for coal in order to prevent location (in that case a location for oil and gas).

Therefore, if a petroleum reserve is considered to be a classification of oil and gas value it would take the same rule as a classification of coal value. Whether considered as a classification or as a withdrawal creating a *prima facie* oil and gas value, a mining claimant would have the right to prove, if he could, that the land has no known oil and gas value. It may be noted that *State of Louisiana, supra*, does not involve the July 17, 1914, act and, therefore, the right to disprove the *prima facie* mineral character is not limited to cases which fall under the specific provisions of that act granting the right to disprove the alleged mineral character of the lands.

Oil shale is affected by the act of February 25, 1920, to the same extent as oil and gas. By Executive Order No. 5327 of April 15, 1930, (10 years after the date of the Mineral Leasing Act of February 25, 1920), made under the same authority as petroleum reserves but only for "investigation, examination, and classification" and not "in aid of legislation" all Federal oil shale deposits were withdrawn. By Instruction of June 9, 1930 (Circular No. 1220, 53 I. D. 127), the Department designated the "known [oil shale] areas affected by the order" but even with respect to such areas stated "and you will therefore reject all applications for such lands, except applications for patent under the mining laws for metalliferous mining claims, or applications under other public land laws which are based on claims to the lands initiated prior to the date of the withdrawal." (Note from the language that the metalliferous claims included those made after the withdrawal.) Almost 3 years later in *Langdon H. Larwill*, 54 I. D. 190 (1933), the Department again recognized that the withdrawal did not prevent the location of the lands for metalliferous minerals. It is true that no rule was applied in either the circular mentioned or the *Larwill* case, but it is evident that the purpose of the exception in the order was to permit of a determination with respect to the validity of the locations which could only involve the question whether or not oil shale was known to exist in the located land. The cases you have cited are not to the contrary. The *Empire Gas and Fuel Company* case, 51 L. D. 424 (1926), itself refers to *Arthur K. Lee*, 51 L. D. 119 (1925), which is cited in *McFayden et al., supra*, as authority for the proposition that classified coal land to prevent mining location must also be valuable for coal. The *Filtrol* case, 51 L. D. 649 (1926), also cited, is authority for the proposition that an

oil and gas prospecting permit application *segregates* the land against mining location. It does not prove the oil and gas value of the land and need not in order to segregate it. *United States* v. *U. S. Borax Co.*, 58 I. D. 426 (1943), follows the *Filtrol* case. *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639 (1935), is at least implied authority for the proposition that leasable minerals are not subject to location but it does not bear on the question before us here. *Percy Field Jebson et al.*, A–26596, June 11, 1953, follows the *Filtrol* and like cases but adds that upon cancellation of an outstanding oil and gas permit a valid location can be made. This but emphasizes the segregative effect of a permit.

While I appreciate the fact that a petroleum reserve is "in aid of legislation" in addition to "for classification" while a coal or oil shale withdrawal is not inclusive of the former phrase, I deem that immaterial since the question here is not the effect of the reserve as a withdrawal but as a classification. As clearly pointed out, a classification whether for coal, oil shale, or oil and gas is not sacrosanct but may be disproved by one seeking the land under a law other than the mineral leasing law. I, therefore, conclude that metalliferous mining locations made within a petroleum reserve *after* February 25, 1920, are not *ipso facto* valid claims but that the locators may, if they so desire, ask for a hearing to disprove the validity of the "*prima facie*" oil and gas classification. In such a case the burden of proof rests on the locators (or owners) of the claims and if they fail to sustain that burden, their claims must be deemed to be null and void unless they have complied with the applicable provisions of Public Law 250 (67 Stat. 539) or Public Law 585 of the 83d Congress (68 Stat. 708). Absent such proof the locators must have complied with the applicable one of these acts.

You should so inform the Assistant General Counsel of the Atomic Energy Commission, Grand Junction, Colorado.

J. REUEL ARMSTRONG,
Solicitor.

PROPOSED REGULATIONS UNDER THE ALASKA MENTAL HEALTH ENABLING ACT

Accounts: Fees and Commissions

The fee required by Revised Statutes, Section 2238, is inapplicable to a selection of public lands by the Territory of Alaska under the authority of the Alaska Mental Health Enabling Act. Nothing in this opinion should be construed as

determining the applicability of Section 2238 to selections under any law other than the Alaska Mental Health Enabling Act.

M–36371 OCTOBER 30, 1956.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

Your Bureau's memoranda of August 22 and 29 asked for our review of the above cited proposed regulations and requested our opinion as to whether the act of July 1, 1864 (13 Stat. 335) applies to a selection of public lands under the Alaska Mental Health Enabling Act of July 28, 1956 (70 Stat. 709). Paragraph (b) of section 76.9 of the proposed regulations (43 CFR 76.7 to 76.12) apparently was included on the assumption that the 1864 act required the establishment of a $2 fee for each 160 acres or fraction thereof selected by Alaska under the 1956 act.

The provisions of the 1864 act relating to fees were incorporated into the Revised Statutes, section 2238, and are contained in the sixth paragraph of 43 U. S. C. sec. 82. That paragraph refers to locations

> * * * by States and corporations under grants from Congress for railroads and other purposes (except for agricultural colleges), a fee of $1 for each final location of one hundred and sixty acres; to be paid by the State or corporation making such location.

Title II of the Alaska Mental Health Enabling Act provides financial and other assistance to Alaska for the care of its mentally ill. The land grant is only one part of the mental health assistance program contemplated by the act and should be construed in the light of the overall purpose of Congress to advance that program.

The language of the grant, moreover, expressly provides in subsection 202 (b) of the act that the lands

> shall be selected in such manner as the laws of the Territory may provide, and in conformity with such regulations as the Secretary of the Interior may prescribe.

The regulations presumably would provide for the manner of application and other provisions necessary for the transfer of title. There seems to be sufficient authority under this provision for the Secretary to determine what fees, if any, should be paid in accordance with the provisions of the act of August 31, 1951 (5 U. S. C. sec. 140). The latter statute provides for the charge of fees to put Federal services on a "self-sustaining basis to the full extent possible" taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts. There is nothing in the language of the grant or the legislative history of the Alaska Mental Health Enabling Act which expressly, or by inference,

shows any congressional intent to incorporate the provisions of Section 2238 of the Revised Statutes.

This opinion would not affect the determinations made in earlier departmental decisions like those in 26 L. D. 536 (1898), 29 L. D. 72 (1899), and 27 L. D. 284 (1898), however, concerning the applicability of Section 2238 of the Revised Statutes to school indemnity selections by the Territories of Oklahoma and New Mexico. In holding Section 2238 applicable to such selections, as indicated by the decision in 26 L. D. 536, 538, it is very apparent the Department was influenced by the fact that the fees

> constitute part of the emoluments of an officer of the United States * * *.

The law is clear, however, that the abandonment of the practice of paying registers out of fees collected was not intended to change the then operative fee requirements. (Act of October 9, 1942 (48 U. S. C. sec. 367a).) There was strong reason in 26 L. D. 536 and 29 L. D. 72, moreover, to apply the provisions of Section 2238, since those decisions construed section 4 of the act of January 18, 1897 (29 Stat. 490, 491), which authorized the selections "as provided by law." Our holding in this opinion, therefore, should not be extended beyond its intended scope of interpreting only the Alaska Mental Health Enabling Act, *supra*.

J. REUEL ARMSTRONG,
Solicitor.

DAVID H. EVANS ET AL.

A-27353 *Decided October 31, 1956*

Homesteads (Ordinary): Military Service

A person who, in addition to regular college courses, is enrolled in advanced ROTC under an agreement to continue taking such courses, to accept a reserve commission, and thereafter to serve two years on active duty is not engaged in military service within the meaning of the provision of the Soldiers' and Sailors' Civil Relief Act that military service includes education and training under the supervision of the United States preliminary to induction; and one who succeeds to the rights of an entryman, while taking advanced ROTC, cannot be considered to have initiated or acquired such rights during a period of military service as defined by the Relief Act.

Homesteads (Ordinary): Military Service

The Soldiers' and Sailors' Civil Relief Act of 1940 does not protect a homestead entryman from failures to comply with the homestead laws before he enters military service.

Homesteads (Ordinary): Contests—Contests and Protests

Under the regulations of the Department a contest can be initiated against a homestead entry on grounds other than abandonment although the entryman has gone into military service.

Homesteads (Ordinary): Contests—Contests and Protests

If a homestead entryman goes into military service after a contest is initiated against his entry, the contest will not be dismissed but the proceedings will be suspended during his period of military service.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On April 14, 1950, Walter R. Cupp was granted a preference right to apply for an established farm unit in the Payette Division, Boise (Central Snake River) Reclamation Project, pursuant to Public Notice 41 (14 F. R. 6068). Thereafter, Mr. Cupp applied to make reclamation homestead entry on tract "B," sec. 33, T. 5 N., R. 3 W., B. M., Idaho, containing 114.27 acres of which 88.6 acres are irrigable. The application, Idaho 01073, was allowed on June 1, 1950. Because of illness, Mr. Cupp was granted an extension of time until June 1, 1951, within which to establish residence on the entry (43 CFR 166.26). The entryman died before the end of the period within which he was allowed to establish residence.

In the event of the death of an entryman before submitting final proof, his widow, or, if there be none, his heirs or devisees (unless all of the heirs are minor children) succeed to his rights in the entry (43 U. S. C., 1952 ed., sec. 164; 43 CFR 166.64). After Mr. Cupp's death the administrator of his estate notified the manager that there were six heirs of the entryman and stated that there might be a seventh. As the record does not indicate that a widow survived Mr. Cupp or that the heirs were minor children, the heirs became entitled, at the date of the entryman's death, to the entryman's rights in the homestead; that is, they acquired a preferential right to perfect the entry, but at that time each of the known heirs had only a one-sixth interest in the entry.

In letters of October 25, 1951, to each of the heirs, the manager explained their statutory right to succeed to the entry, requested that the heirs notify the land office within 30 days from receipt of the letter whether any of them desired to exercise the right of entry, and stated that failure to respond would result in closing the case, in which event the farm unit would be awarded to another. In a letter of November 14, 1951, to the manager, Mr. Little expressed an interest in acquiring the entry and stated that he was circulating a petition to get the consent of the other heirs to exercise their rights in the entry without

which Mr. Little would not have been entitled to an exclusive right in the entry. The other known heirs of Mr. Cupp signed a release of their rights in the entry to Mr. Little in order to permit him to exercise their rights in the entry, and the release was filed on January 2, 1952.

On April 21, 1952, Mr. Little requested a year's extension within which to begin work on the entry. Although the record contains no answer to this request, Mr. Little has stated in a later letter dated February 1, 1954, that the request was granted. It appears that in 1952 Mr. Little was attending the University of Idaho; that he had entered into a contract on September 24, 1951, under which he agreed to take advanced ROTC training, to complete the reserve training while attending college, and to accept a reserve commission. This contract was approved on October 24, 1951, by signatures of the professor of Military Science and Tactics, an infantry Colonel, and by the President of the University of Idaho. About the same time, Mr. Little also executed a standard deferment agreement by which he agreed to serve at least 2 years on active duty following receipt of a commission. These agreements were apparently the basis for Mr. Little's deferment from induction under the Universal Military Training and Service Act (50 U. S. C. App., 1952 ed., sec. 456 (d) (1)). Mr. Little states that at any time he could have left college, broken the agreements, and, without doubt, would have been drafted. However, he completed the ROTC course and in June 1953 was commissioned a second lieutenant in the United States Army. An order, dated July 3, 1953, from an Assistant Adjutant General, required Mr. Little to report to Infantry School, Fort Benning, Georgia, for active duty not later than November 12, 1953. Mr. Little reported for duty on November 4, 1953, and has been on active military duty since that time.

On October 16, 1953, David H. Evans filed an application to contest Mr. Little's entry on the ground that the lands had not been reclaimed as required by departmental regulations governing reclamation homestead entries.[1] The contestant asserted that the entry is subject to cancellation because one-fourth of the irrigable area was not reclaimed

[1] By decision of October 26, 1951, the manager dismissed two contests filed against Mr. Cupp's entry, one of which was filed on August 23, 1951, by Mr. Evans, alleging failure of the entryman to reside upon or improve the property. The manager held that the applications to contest were prematurely filed because the widow, heirs, or devisees of a homestead entryman who succeed to his rights under the entry are not required to live upon the land.

Mr. Evans filed another application to contest this entry on June 2, 1952, charging that neither the original entryman nor his successors in interest ever cultivated or improved any part of the land. The manager did not formally reject this application to contest,

within three full irrigation seasons after allowance of the entry as required by section 8 of the Reclamation Extension Act of August 13, 1914 (43 U. S. C., 1952 ed., sec. 440), and by departmental regulation (43 CFR 230.51, formerly numbered 230.61; see 43 CFR, 1949 ed.).

In a decision of September 10, 1954, the manager suspended the contest proceedings until 6 months after the date of Mr. Little's separation from the armed forces. The decision was based on the assumption that, because Mr. Little received active duty orders about July 3, 1953, which date preceded the date on which default was said to have occurred under the reclamation laws, Mr. Little was protected by several provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (50 U. S. C. App., 1952 ed., secs. 510–590).

Mr. Evans appealed to the Director of the Bureau of Land Management from the manager's decision, and in a decision of February 8, 1956, the Acting Director of the Bureau dismissed the contest, holding that Mr. Little's entry is protected by the Civil Relief Act of 1940; that the contest against the entry was prematurely filed; and that the statutory life of the entry should be extended, after Mr. Little's discharge, for the length of military service completed. The decision was apparently based upon the assumption that Mr. Little entered military service, as defined by the Civil Relief Act, when he enrolled in advanced ROTC at the University of Idaho. The instant proceeding is an appeal by Mr. Evans to the Secretary of the Interior from the Bureau's decision dismissing the contest.

The Selective Service Act of 1948, as amended (50 U. S. C. App., 1952 ed., sec. 464), extended the Civil Relief Act of 1940 to all persons in the armed forces until termination of the latter act by a subsequent act of Congress. Although the decision of February 8 does not so state, it is apparent that the Bureau's action in dismissing the contest was based upon the first provision of section 501 of the Civil Relief Act of 1940 (50 U. S. C. App., 1952 ed., sec. 561 (1)) that:

> No right to any lands owned or controlled by the United States initiated or acquired under any laws of the United States, including the mining and mineral leasing laws, by any person prior to entering military service shall during the period of such service be forfeited or prejudiced by reason of his absence from the land or his failure to perform any work or make any improvements thereon or his failure to do any other act required by or under such laws.

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but stated in a letter of June 9, 1952, to counsel for Mr. Evans that the application of June 2, 1952, was prematurely filed.

On February 25, 1953, Mr. Evans again filed application to contest Mr. Little's entry which was based upon the same allegations as those in the application of June 2, 1952. In a decision of February 26, 1953, the manager dismissed this application to contest on the ground that the heirs of the entryman need only submit final reclamation proof in order to obtain patent and that there is no time limit within which they are required to begin reclamation and cultivation.

This provision protects against forfeiture rights in lands which were initiated or acquired by a person before entering military service. With respect to the almost identical provision (section 501) in the Soldiers' and Sailors' Civil Relief Act of 1918 (40 Stat. 440, 448), the Department has held that the provision unquestionably suspends the payment of any installments that may become due from a soldier entryman of lands under a reclamation project, during the period of his service, provided the entry was initiated prior to entering the service, and relieves him from any liability on account of his failure, by reason of his absence, to perform any work or make any improvements on the land. *Instructions*, 46 L. D. 343 (1918). However, in *Warehime* v. *Forsyth*, 46 L. D. 488 (1918), the Department held that the provisions relieving public land claimants from the penalty of forfeiture for failure to do any act required by the law under which their claims were made, during the period of military service, do not accord protection in cases where the failure to comply with law occurred prior to entry into the military service. The contestant asserts that Mr. Little defaulted before he entered military service, or, in the alternative, assuming that Mr. Little's military service began when the ROTC contract was approved on October 24, 1951, that Mr. Little acquired the entry after he entered military service and therefore the entry is not protected by section 501 of the Relief Act.

Section 101 (1) of Article I of the act (50 U. S. C. App., 1952 ed., sec. 511 (1)) contains the pertinent definition of "military service." Section 101 (1) provides in part that:

> The term "persons in military service" and the term "persons in the military service of the United States", as used in this Act, shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy. The term "military service", as used in this Act, shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service. * * *

It is undisputed that the latest date on which Mr. Little could be considered to have entered military service was November 4, 1953, the date on which he reported for active duty. By that time, of course, Mr. Little had succeeded, first, to a one-sixth interest in the entry (prior to June 1, 1951) and then to the entire interest in the entry (on January 2, 1952, when the release by the other heirs to Mr. Little was filed). He would then have to be considered as having met the requirement of section 501 of the Civil Relief Act that his right to the entry was "initiated or acquired" prior to his entering military service.

However, it will be recalled that the appellant's contest, filed on October 16, 1953, charged that the entry is subject to cancellation because the requisite one-fourth of the irrigable area was not reclaimed within three full irrigation seasons after the entry was allowed. It seems to be accepted in the record that the third full irrigation season ended on October 15, 1953. Since the alleged default occurred before November 4, 1953, it would seem clear under the ruling in *Warehime* v. *Forsyth*, *supra*, that section 501 of the Civil Relief Act would be of no avail to Mr. Little.

The decisions of the manager and of the Acting Director are not at all clear as to the basis upon which they thought Mr. Little was entitled to relief. However, both referred to the provision in section 101 (1) of the Civil Relief Act which states that "military service" includes "training or education under the supervision of the United States preliminary to induction into the military service." Both apparently assumed, although the Acting Director expressed some qualification, that Mr. Little's advanced ROTC training constituted military service under the provision just quoted.

The soundness of this conclusion is open to serious question.

No cases have been found which discuss the meaning of the provision and there is nothing in the published legislative history of the act to clarify the meaning of the phrase "training or education under the supervision of the United States preliminary to induction into the military service." However, a member of the Judge Advocate General's Office of the Army has stated informally, in response to oral inquiry by this office, that ROTC courses could not be regarded as military service within the scope of the provision, that the legislative history of the provision indicates that it was intended to cover persons who are called for induction and for some reason receive training under supervision of the United States for a relatively short time immediately before induction. This opinion is reenforced if the agreements which Mr. Little undertook to perform are considered individually. Certainly, the promise to take advanced ROTC courses, the promise to accept appointment as a reserve officer, and the promise to serve at least 2 years thereafter, considered either singly or together do not constitute training or education. The question which must be answered is whether enrollment in ROTC courses in connection with regular college work is training or education under the supervision of the United States. The reason for supposing that ROTC might come within the provision is that instruction in such courses is given by persons in the armed services (10 U. S. C., 1952 ed., secs. 381–390).

However, ordinary ROTC students do not need the protection of the Civil Relief Act because enrollment in an ROTC course does not put them in a situation comparable to that of one on active military duty, where civil rights might be prejudiced if certain legal proceedings are not suspended. ROTC is not a part of the Army Reserve (50 U. S. C., 1952 ed., sec. 1023) and it seems most unlikely that students enrolled in ROTC courses were intended to receive the benefits given by the act to persons on active military duty, because, among other reasons, whether a student enrolled in ROTC will ever serve on active duty is not certain.[2]

Moreover, Mr. Little's ROTC courses were not "preliminary to induction" because he was not inducted, but instead he accepted appointment as an officer in the Army Reserve in June 1953, and reported for active duty on November 4 as an officer of the Reserve. The Judge Advocate General's Office stated informally that acceptance of an appointment as an officer in a reserve component may not properly be referred to as induction. Although the matter is not entirely free from doubt, it is concluded that, in the circumstances of this case, Mr. Little was not in the military service, as defined by the Civil Relief Act, while he was receiving advanced ROTC instruction at the University of Idaho.[3]

Beyond section 501 of the Civil Relief Act, there seems to be no other provision of the act which would afford Mr. Little relief in the circumstances of this case. I am not unmindful of the fact that the courts have construed the act liberally in favor of men in military service. *Boone* v. *Lightner*, 319 U. S. 561, 575 (1943). However, before a liberal construction can be given, there must be some provision of the act which can be interpreted to cover the circumstances of the case. No such provision can be found. It must be concluded, therefore, that there is nothing in the Civil Relief Act which barred the initiation of the contest by the appellant on October 16, 1953, which was before Mr. Little entered military service.

As a matter of fact, the act itself implies that contests may be initiated against homestead entries even after the entrymen have

[2] The provision here involved was not in the 1918 Relief Act. However, section 101 of the 1918 act (*supra*) contained the following provision showing clearly that persons in a reserve status were not covered by the act until ordered to active service:

"* * * The term 'military service' as used in this definition, shall signify active service in any branch of service heretofore mentioned or referred to, but reserves and persons on the retired list shall not be included in the term 'persons in military service' until ordered to active service * * *."

[3] Even if Mr. Little's ROTC training constituted military service, he would be protected under section 501 of the Civil Relief Act only as to his one-sixth interest in the entry. His remaining interest was not acquired until after October 24, 1951, when his ROTC contract was approved.

entered military service. Section 502 of the act (50 U. S. C. App., 1952 ed., sec. 562) grants credit for military service against residence and cultivation requirements to a person who enters military service after his entry has been allowed. Section 502 then provides that—

> * * * From the effective date of this Act no contest shall be initiated on the ground of abandonment and no allegation of abandonment shall be sustained against *any such person*, unless it shall be alleged in the preliminary affidavit or affidavits of contest and proved at the hearing in cases initiated subsequent to the effective date of this Act that the alleged absence from the land was not due to such military service. * * * [Italics added.]

The clear implication of the quoted provision is that a contest can be initiated against an entry while the entryman is in military service on some ground other than abandonment or, even on the ground of abandonment, where it is alleged that the abandonment was not due to military service. Of course, the default of the entryman must have occurred prior to his entry into military service, else he would be protected by section 501.

The Department has adopted this view in its regulations. 43 CFR 181.27 (e) provides as follows:

> (1) On and after October 17, 1940, and as long as the Soldiers' and Sailors' Civil Relief Act of 1940 remains in force, no application to contest a homestead entry made or applied for prior to the entrance of the entryman into the military service, will be allowed, or adverse proceedings against such entry ordered, on the ground of abandonment, unless there is an allegation therein that the entryman's alleged absence from the land was not due to his military service. No allegation of abandonment will be sustained against a homestead settler or entryman in connection with such contest, unless it is proved at the hearing, if one be had, that the claimant's alleged absence from the land was not due to such military service.
>
> (2) The manager will reject an application to contest a homestead entry on the charge of abandonment, if he finds that it was filed during the period of the entryman's military service, or during any period of hospitalization of the claimant because of wounds received or disability incurred in the line of duty. If any charge other than or in addition to abandonment is made, or if the claimant enters the military service or is hospitalized after the contest application is filed, the proceedings will be suspended for the period of such service or hospitalization.

Note that under this regulation the only contest application that is to be rejected is one filed during the period of the entryman's service alleging abandonment. Contest applications filed during the period of military service on other grounds or those filed before the entryman enters military service are not to be rejected; proceedings in such cases are only to be suspended for the period of military service.

This regulation controls this case. The appellant's application to contest was filed before Mr. Little entered military service. Conse-

quently proceedings in the contest must be suspended for the duration of Mr. Little's military service. The propriety of the suspension is not open to question. The application to contest was not served on Mr. Little until October 31, 1953. Under the Department's rules of practice he had 30 days from that date, or until November 30, 1953, in which to file an answer. However, within 4 days he had entered on military service. Obviously he would have been handicapped in defending against the contest. Cf. *Roy Everett Ladd*, 58 I. D. 138 (1942). Of course, if Mr. Little wishes to waive his rights under the regulation, he is at liberty to do so, but unless and until he does, the proceedings in the contest must be suspended.

It should be cautioned here that the suspension of the contest proceedings is not to be construed as an extension of time within which Mr. Little may meet the reclamation requirements on his entry. As we have seen, there is nothing in the Civil Relief Act which would help him on that score.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Acting Director of the Bureau of Land Management is reversed and the case is remanded for further handling in accordance with this decision.

EDMUND T. FRITZ,
Deputy Solicitor.

RICHARD P. COSSEY

A–27391 *Decided October 31, 1956*

Small Tract Act: Sales

An application by a small tract lessee to purchase the land in his lease is properly rejected where he makes a substantially false statement in his application that the application is for his own use and benefit and where in fact it appears that he has entered into an agreement with other persons whereby the latter have agreed to build, and have built, the necessary improvements on the leased land and the lessee has agreed, upon issuance of a patent, to convey to the other parties 2 acres of the leased land including the land on which the improvements are situated.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Richard P. Cossey has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated April 24, 1956, which affirmed the decision of the land office manager, Reno, Nevada, dated April 30, 1954, holding his small tract lease

Nevada 04976 for cancellation, and rejected his application to purchase the leased land.

The record shows that on January 23, 1951, a lease was issued to the appellant under the terms of the Small Tract Act of June 1, 1938, as amended (43 U. S. C., 1952 ed., sec. 682a). On January 20, 1954, the appellant made application to purchase the tract. The manager's decision of April 30, 1954, stated that a field examination of the tract was made in March 1954, which revealed that the lessee's statement in his application to purchase that the application was solely for his own use and benefit was erroneous inasmuch as he had entered into an agreement with other parties that the other parties would make improvements on the land and that these improvements, together with the land, would revert to them when the lessee had received patent. The manager also said that the statement in the application to purchase that the land was not improved, occupied, or used by anyone other than the lessee was erroneous inasmuch as the field examination revealed the land and improvements were occupied by persons other than the lessee. Subsequent to the manager's decision several facts were developed which showed the manager's decision was inaccurate on the question of occupancy.

The parties occupying the premises leased by the lessee at the time of the field examination were Mr. and Mrs. Glen F. Ernest. The Ernests had moved onto the premises on January 30, 1954, after signing an agreement to purchase the tract and improvements from Mr. H. A. Castleman. They have stated that they were completely unaware of the fact the land was under lease to the appellant and did not learn of this fact until so informed by the field examiner of the Bureau of Land Management in March 1954. Therefore, the statement in the manager's decision to the effect that the appellant's statement in his application to purchase that the land was not improved, occupied, or used by anyone other than himself was erroneous as the record shows that occupation by the Ernests did not begin until after the appellant filed his application to purchase on January 20, 1954.

This error in the manager's decision was conceded in the Director's decision. It would not be mentioned here except for the fact that the appellant has made an issue of it in his present appeal. This issue aside, the question is whether other grounds existed for canceling the appellant's lease and rejecting his application to purchase.

With his appeal the appellant has submitted a photostatic copy of an agreement between Mr. Cossey and Messrs. Castleman, O. O. Ressel and Earl Younker whereby the latter parties agreed to construct a house upon the lessee's tract. This document is signed by Richard P. Cossey and O. O. Ressel. The agreement is dated December 20, 1953.

Under the terms of the agreement Ressel and the others agreed to construct a dwelling house upon the Government property included in the appellant's lease, to be completed on or before December 31, 1953, or January 15, 1954. Mr. Cossey agreed that upon completion of the house, and after approval thereof by the Department of Interior, he would deed to Castleman, Ressel and Younker 2 acres of the land included in his lease, "being a subparcel of the aforementioned tract on which said dwelling is constructed." In other words, Ressel and the others were to get two-fifths of Cossey's lease holding, together with the house they built on the land, leaving Cossey with 3 acres of undeveloped land to which he would hold patent.

The appellant contends in his appeal that he entered into the agreement in order to comply with the rules and regulations of the Department of the Interior requiring him to construct improvements upon the tract; that logically and legally the agreement was for the use and benefit solely of the lessee in that it enabled him to perfect his title to the tract; that investigative personnel of the Bureau of Land Management are aware of a number of similar transactions in Clark County and that none of the other parties had experienced any difficulty whatsoever in securing patents to their lands; that under the rules and regulations of the Department an assignment of a small tract lease or a portion thereof cannot be made and will not be accepted until substantial improvements have been made upon the property; and that the appellant "could have directly or indirectly assigned all of his right, title and interest in and to all or any portion of the property described to any party chosen by the appellant" after placing the required improvements on the tract.

At this point it seems well to consider just what issue or issues are before the Department at this time. The manager in his decision of April 30, 1954, gave the appellant 30 days to show cause why his lease should not be canceled. The Director canceled the lease and rejected the appellant's application to purchase. But, the appellant's lease was issued only for a period of 3 years from January 23, 1951. As it was for land classified for lease and sale, it was not subject to renewal under the circumstances of this case (43 CFR 257.14 (c)). Thus the term of the lease had expired over 3 months before the manager acted and long before the Director purported to cancel the lease. Consequently there was no lease in existence to cancel at the time when the manager and Director rendered their respective decisions.

Also, there is no need to consider what rights the appellant had to make assignments under the lease. He never purported to make any assignments. The only issue then that seems to be present is whether the appellant's application to purchase was properly rejected.

The appellant's application to purchase, which was on the required form 4–775a (43 CFR 257.13 (b)), contained this question: "Is this application for your own use and benefit?" To this question the appellant answered "Yes." From the facts recited above it seems clear that the appellant knew or should have known that this answer was not substantially true. At the time he gave that answer he had bound himself by contract to convey to parties who were complete strangers to his lease with the United States 2 of the 5 acres that he was applying to buy. Not only that, but the 2 acres were to contain the house without which he could not apply to purchase the land. The net effect of the transaction was that the appellant would have wound up with title to 3 acres of public land on which there were absolutely no improvements and Messrs. Ressel, Castleman, and Younker would have obtained title to 2 acres of public land without having had to proceed in accordance with the requirements of the Small Tract Act. A more palpable scheme to evade the intent and purposes of the Small Tract Act and regulations would be difficult to conceive.

The appellant's attempted justification of the transaction is totally lacking in conviction. He asserts that the local building requirements were very stringent at the time and that, since small tract lessees had no title, they could not secure financing to build except in the manner followed by the appellant. Therefore, he concludes, the arrangement was for the use and benefit, *solely*, of the lessees entering into such agreements. This argument requires no answer.

It is concluded that the appellant made a substantially false statement in his application to purchase and that he has not in good faith met the requirements for the purchase of the land in his lease.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the Director's decision is affirmed insofar as it rejected the appellant's application to purchase the land in his small tract lease.

EDMUND T. FRITZ,
Deputy Solicitor.

APPEAL OF PAUL C. HELMICK COMPANY*

IBCA–39 *Decided October 31, 1956*

Contracts: Appeals

An appeal may be decided upon a theory not advanced by the parties if such theory is consistent with the facts of record or legitimate inferences from such facts.

*On request for reconsideration of decision of July 31, 1956, p. 209.

Contracts: Appeals

A motion for reconsideration based upon the existence of an alleged practice or custom not established by the record must be denied when the party alleging such practice or custom had an opportunity to prove its existence at the hearing, when the practice or custom is not alleged to be invariable, when the record reveals circumstances inconsistent with the alleged practice or custom, and when it is doubtful that proof of the existence of the practice or custom would justify a different decision than was rendered.

Contracts: Contracting Officer—Contracts: Interpretation

In construing an ambiguous provision of a contract weight may be given to the practical interpretation placed upon the provision by principal subordinates of the contracting officer who participated actively in its administration.

BOARD OF CONTRACT APPEALS

Under date of August 22, 1956, Department Counsel filed on behalf of the Government a motion for reconsideration of that portion of the Board's decision allowing the claim of the contractor in the amount of $14,679.29 for the extra costs that it had incurred in clearing the danger tree strips adjacent to Tracts FC–S–118, 120, 174, 176, and 180, denominated in the decision (July 31, 1956, p. 209) as the "special tracts."

The first ground upon which the motion for reconsideration appears to be based is that the Board predicated the allowance of the claim upon the theory that the Government unreasonably delayed in making the adjacent danger tree strips available to the contractor, although the issue of delay had never been raised at any stage of the appeal process. "To decide the claim on facts not placed in issue or proved by the appellant," counsel argues, "has resulted in a denial of substantial rights of the Government."

While it is true that the Board did discuss the claim partially in terms of the delay of the Government, the Board indicated that the theoretical basis of the claim was rather confused. In the very passage on page 223 of the Board's decision from which counsel quote in support of their argument, the Board first stated the claim to be "for moving back on the job and cutting the adjacent danger trees," and also commented as follows:

* * * *In so far as the adjacent danger tree strips are concerned, the gravamen of the contractor's complaint seems to be the failure of the Government to make the special tracts and the adjacent danger tree strips available simultaneously.* * * * [Italics supplied.]

After discussing first the delays of the Government in making the Northern Pacific tracts available to the contractor, the Board intro-

duced its discussion of the danger tree strips adjacent to the special tracts by saying, at page 229:

> A more perplexing problem is presented, however, by the delay of the Government in making available to the contractor the danger strips adjacent to the special tracts. This perplexity is the result both of the *obscurity of the applicable specifications* and of *the vagueness of the record.* [Italics supplied.]

There is, indeed, a great deal of confusion in the record concerning the precise basis for the contractor's claim. Sometimes this seems to be the increased costs sustained as a result of the acceleration of its operations because of the delay of the Government in granting extensions of time. Sometimes it seems to be the cost of moving back after the contractor had left the danger tree area. Again the claim is stated in terms of "changed conditions," although probably the contractor really meant to refer to "changes." And, sometimes, the claim is stated, contrary to the assertions of Department Counsel, in terms of delay, either directly or by necessary inference. Thus, it is stated on page 9 of the statement of the Government's position:

> The danger trees also come within the provisions of Paragraph 409–B–10,[1] insofar as the duties of the contractor were concerned. They could not be cut until August 1954, because the Government was not able to acquire the necessary rights from the owners before that date, and any *delays* encountered were adequately covered by Paragraph 308,[2] under which an order granting an extension of time is being processed at the time of writing this brief. [Italics supplied.]

Thus, too, the contracting officer, in discussing the claim on page 8 of his findings states, as follows:

> No determination is made in this finding as to any extension of time due the contractor for *delay* in making danger trees available. [Italics supplied.]

Finally, the contracting officer, in granting an extension of time to the contractor, wrote in his letter of June 24, 1955, as follows:

> You were *delayed* in the completion of this work due to unforeseeable causes beyond your control and without your fault or negligence; namely acts of the Government in not furnishing you entry to certain tracts as required for clearing and *removal of danger trees.* [Italics supplied.]

In any event, the Board is not necessarily precluded from deciding a claim upon a theory not advanced by the parties. As the Court of Claims said in the recent case of *John A. Johnson Contracting Corp.* v. *United States*, 132 Ct. Cl. 645, 656 (1955): "The plaintiff's failure

[1] This provision stated that the owners of the special tracts would remove any merchantable timber required to be cut by the specifications.

[2] This provision related to the availability of the rights-of-way, and provided for appropriate extensions of time in case of delay in making any tracts available to the contractor.

to analyze with greater nicety the appropriate theory for its claim should not have the effect of a forfeiture of its rights." The theory should, to be sure, be consistent with the facts of record, or legitimate inferences from such facts. But the Board cannot agree that Department Counsel are correct in asserting that the Board decided the claim upon facts not placed in issue or proved. In so far as the unreasonableness of the delay by the Government in making the adjacent danger trees available was inferred by the Board, the inference was based upon a presumption which, under applicable judicial precedents, could properly be drawn from the facts of record, and hence was based upon the application of a recognized legal principle to facts that were either proven or admitted.

In discussing the question of delay, Department Counsel do advance what appears to be one new argument, which, in effect, is that the contractor in the present case was no worse off than any other Bonneville contractor. This argument is stated in the following terms:

> Concerning the issue of delay, however, the availability of danger trees to the appellant does not differ materially from the situation in other Bonneville Power Administration contracts. *In many cases* the number and location of danger trees cannot be ascertained at the time land buyers are negotiating with property owners. A complete check of all trees with measuring instruments cannot be made until normal clearing of the right-of-way is completed. Therefore it is *common practice* for danger trees to be purchased throughout the time a clearing contractor is operating, and it is necessary for the contractor on *almost* every BPA contract to return to areas for danger tree removal. [Italics supplied.]

This argument is not based, however, on any testimony in the present record. If the facts were as counsel contend, they failed to establish them at the hearing, although it lasted three days, and they had ample opportunity to prove every part of the Government's case. Moreover, the Board would hardly be justified in subjecting the contractor to the delay, trouble and expense involved in another hearing unless it were thoroughly convinced that it would lead to a different result. There are many reasons, however, for doubting this. The argument itself does not go to the length of asserting that the practice on which it is based is universal. The practice is said to obtain only in many cases, and to be common. Conceivably particular BPA contracts could include specifications which would be wholly inconsistent with any common or general practice of the nature alleged. One such inconsistent specification, at least, appears in the contract here involved, as is pointed out at page 230 of the Board's opinion.

Moreover, much of the evidence in the present record seems to be wholly inconsistent with the asserted practice. Englesby, the official in charge of acquisition, stated at the award meeting that "we will get the danger trees right away," and the record shows that efforts

were made to get them in advance of clearing operations. In this case, the merchantable danger trees must have been known, for the record shows that they were marked with yellow paint long before the contemplated clearing operation. The fact that the right-of-way for the special tracts themselves had previously been acquired by the Government in connection with the construction of another line may have facilitated marking and clearing procedures on the strips adjacent to the special tracts. Again, circumstances existed in the present case which would argue in favor of the contractor even if the asserted practice did exist. One of these circumstances is to be found in the fact that the contractor had to do the clearing under pressure at a season of the year which made his operations much more expensive. And, finally, the Board could hardly concede that a practice of requiring the contractor to return in order to remove danger trees after the right-of-way had been cleared could have been applicable to the merchantable danger trees in a case in which it has held that the contractor was not bound to remove these trees at all!

A second ground upon which the motion for reconsideration is based is that the Board in deciding that the contractor was not bound to cut the merchantable timber that was to be removed by the owners from the special tracts and adjacent danger tree strips was greatly influenced by an incorrect assumption that the contracting officer agreed with the interpretation of the other officials at Bonneville's central headquarters. The Board was well aware that there was no direct evidence of the contracting officer's views [3] but the assumption which it made was the only rational one on the basis of the record.[4] Notwithstanding the assertions of counsel, the Board still finds it very difficult to believe that the contracting officer did not at least have knowledge of the negotiations with the contractor, and if he had such knowledge, it would be immaterial that he did not actually concur in their views.[5] The contracting officer cannot allow his subordinates to act as if they were administering the contract without taking responsibility for their acts. The burden of proving under the circumstances of the present case that the subordinates here involved

[3] The Boardd so stated on page 234 of its decision.

[4] The Board suggests that in this connection counsel re-read the comment made by it on page 231 of its decision, as follows: "It is highly interesting to note that in his findings the contracting officer characterized the action of Bell as a denial of the contractor's requested extension of time. Thus he stated: 'The Government gave oral permission to enter the tracts on June 18, which was confirmed by letter on June 28, *but denied the Contractor's request for a time extension.*'" It is apparent that the contracting officer not only assumed that this particular official at Bonneville's central headquarters had authority to grant extensions of time, but also equated him with the Government in a matter of contract administration.

[5] Compare *The Great Lakes Dredge & Dock Co.* v. *United States*, 116 Ct. Cl. 679, 681 (1950), where the court said that if something were done with the full knowledge of the contracting officer "it must be presumed that it had his approval."

did not speak for the contracting officer was on the Government.[6] It is significant that counsel did not put on the stand the Bonneville official who was the contracting officer at the time of the negotiations and call upon him to deny all knowledge of them.

In any event, the Board's interpretation does not necessarily depend on the theory that the contracting officer actually agreed with the officials who were carrying on the negotiations. It rests upon the ambiguity of the language of the specifications and upon the interpretation placed on that language, at the award meeting and subsequently, by Bonneville officials who actively participated in the administration of the contract, including the negotiations with the contractor. In view of the status of these officials great weight must be accorded to their understanding as a practical construction of the requirements of the contract.

Apparently a third ground of the motion is that there was no basis for allowing the contractor his moving in and out costs. Department counsel aver that, since the contractor was in the area adjacent to the danger trees at a time when he could have performed the work without incurring these costs, namely in the Fall of 1954, the reasons for allowing these costs escape them.[7] Apparently counsel have chosen to ignore the Board's conclusion that the contractor was not bound to act on the basis of informal notifications that the adjacent danger tree strips were available, or to cut the merchantable danger trees without a change order. Even if the contractor had cut the nonmerchantable danger trees in the Fall of 1954, it would still have had to move back to the area in the Spring of 1955 to cut the merchantable danger trees, since at the former of these periods the question of its obligation to cut merchantable trees was still unsettled. If the contractor was, indeed, enabled to take advantage of the Government's necessities, it was only because the Government failed to exercise the remedy which was available to it. This was to order the contractor then and there to do the work. Instead the Government entered into protracted negotiations with the contractor for a change order, and entered the order to do the work only when it could no longer be accomplished that season.

Accordingly, the motion for reconsideration is denied.

THEODORE H. HAAS, *Chairman.*

WILLIAM SEAGLE, *Member.*

HERBERT J. SLAUGHTER, *Member.*

[6] See *Ashby Corum* v. *United States,* 112 Ct. Cl. 479, 519 (1949).

[7] The relevant facts are set forth at pages 221 to 223 of the decision, and the relevant comments of the Board are to be found on page 233 of the decision.

U. S. GOVERNMENT PRINTING OFFICE: 1956

UNITED STATES v. ESTATE OF VICTOR E. HANNY

A–27362 *Decided November 9, 1956*

Mining Claims: Determination of Validity

Where a deposit of slate is shown to be not marketable, although it is of commercial quality, it is not a valuable mineral deposit and it is not subject to patent under the mining laws.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On August 3, 1948, Alice Hughes Hanny, as heir and devisee of Victor E. Hanny, for the heirs and devisees, and as executrix of the Victor E. Hanny estate, filed an application for a mineral patent on the Arizona Placer Mining Claim, comprising 158.51 acres of land located in secs. 22 and 27, T. 3 N., R. 3 E., G. & S. R. B. & M., Maricopa County, Arizona. Adversary proceedings were instituted against the claim on December 9, 1949. After a hearing held on May 23, 1950, the manager of the Phoenix land and survey office rejected the application for patent and held the claim to be null and void. On appeal, the Associate Director of the Bureau of Land Management on June 1, 1951, affirmed the manager's actions. Upon further appeal to the Secretary of the Interior, the Solicitor, acting for the Secretary, remanded the case "to the Bureau of Land Management for a further hearing upon the question whether the slate on the claim constitutes a valuable deposit, and for such further action as may appear to be appropriate in the light of the information developed as a result of such hearing." *Estate of Victor E. Hanny*, A–26280 (March 5, 1952).

Thereupon, a second hearing was held on October 1, 1953, and the manager again, on August 11, 1954, rejected the application for patent and held the claim to be null and void. Upon appeal, on March 20, 1956, the Director of the Bureau of Land Management affirmed the manager's action and the claimant has taken this appeal to the Secretary of the Interior.

The Director held that the land embraced by the mining claim is more valuable now for homesite development than for building stone (slate) and that the claim does not contain slate in paying quantities either because of its quality or because of the lack of a market for it.

In its decision of March 5, 1952, the Department agreed with the finding of the Associate Director of the Bureau of Land Management in his decision of June 1, 1951, that the only value of the land when the claim was located on January 1, 1912, was for its slate deposit. Although the Government introduced more testimony at the second hearing as to the present value of the land for homesites, it offered

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nothing new bearing on this question as of the date of location. The Department also held that the date of location of the claim is the date on which the land must be chiefly valuable for building stone. Accordingly, the finding that on the date of location the land was chiefly valuable for building stone is reaffirmed.

The next issue is whether the slate on the claim is of commercial quality. (There does not appear to be any question but that slate exists in sufficient quantity on the claim.) Although the Government witnesses who testified as to the quality of the slate were of the opinion that it was of poor quality, the contestee offered several witnesses who stated that the slate was of commercial quality. One of these was Dr. C. H. Behre, Jr., an expert on slate, whose qualifications and testimony are fully summarized in the Director's decision. Without repeating the evidence, it is sufficient to say that Dr. Behre met all the objections to the quality of the slate raised by the Government's witnesses and subjected the slate to far more detailed and extensive testing than the latter did. Dr. Behre's testimony was not weakened in cross-examination or rebuttal by further testimony. Consequently, in view of his vast experience with slate and the detailed tests he made, I am persuaded that the slate on the claim is of commercial quality.

There remains the question of the marketability of the deposit. The pertinent considerations were summarized in *United States* v. *Strauss et al.*, 59 I. D. 129 (1945), as follows:

> Gypsum, clay, limestone, and the other kinds of stone here involved have been held to be minerals. *W. H. Hooper*, 1 L. D. 560 (1881); *Alldritt* v. *Northern Pac. R. R. Co.*, 25 L. D. 349 (1897); *United States* v. *Barngrover et al.*, 57 I. D. 533 (1942). But whether particular deposits of these and other mineral substances of wide occurrence are *valuable* mineral deposits within the contemplation of the mining laws and whether the lands containing them are therefore subject to location and purchase under the mining laws are questions of fact, *held to depend upon the marketability of the deposit.* The rule long laid down by both the courts and the Department requires that to justify his possession the mineral locator or applicant must show that by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed, and disposed of at a profit. *Ickes* v. *Underwood et al.*, 78 App. D. C. 396, 141 F. (2d) 546 (1944); *opinion of Acting Solicitor*, 54 I. D. 294 (1933); *Layman* v. *Ellis*, 52 L. D. 714 (1929). In *Big Pine Mining Corp.*, 53 I. D. 410, 412 (1931), the syllabus said:
>
> > "Lands containing limestone or other minerals, which under the conditions shown in the particular case cannot probably be successfully mined and marketed, are not valuable because of their mineral content, nor subject to location under the mining law." [1]

[1] Lindley refers to the commercial value of a deposit, i. e., one near enough to a market to have value, as the real test of whether land is mineral and subject to placer location. 1 *Lindley on Mines* (3d ed. 1914) 156, 2 *id.* 984, 996. See also memorandum from Associate Solicitor, Division of Public Lands, to Director, Bureau of Land Management (M–36295), August 1, 1955.

Of the several factors listed, the ones most pertinent to the issue on which the case was remanded to the Bureau of Land Management, that is, the commercial or economic value of the deposit, are the existence of a present demand for the slate and its proximity to market.

On this issue of marketability the Government presented the testimony of Paul F. Cutter, mining engineer in the employ of the Bureau of Land Management, that, together with Donald F. Reed, another bureau mining engineer, he interviewed three roofing and building supply houses and two stone contractors, carrying with him samples of slate from the claim, and found no interest whatsoever in slate as a commercial item which could be sold in the Phoenix area (1953 Tr., pp. 5–12, 30, 31, 35, 36).

Douglas R. Haug, an estimator for the Standard Roofing and Supply Company, one of the companies visited by Messrs. Cutter and Reed, then testified for the Government. He testified that his company, which sold roofing material throughout the State, carried no slate roofing whatsoever, that there "has never been a market here for slate," and that his company "never had a call for it" (1953 Tr., pp. 55, 56, 62, 66).

J. G. Glen, one of the stone contractors interviewed by Messrs. Cutter and Reed, also testified. However, his testimony on marketability was indirect. He stated that he had located some slate claims in 1927 on New River, did some work on them but allowed them to lapse during the depression, and then took them up again in 1949 or 1950. He said he sent some samples to the University of Pennsylvania and was told it was good slate (1953 Tr., p. 74). However, he said he had not sold any slate from his claims and had installed only one little piece of work on contract (1953 Tr., p. 83). His claims are 25 or 30 miles farther from market than the Hanny claim (1953 Tr., p. 84).

The contestee offered practically no direct evidence on the marketability of slate from the Arizona placer. It called James Copenhaver, a stone mason, who testified he had used "a little slate" (1953 Tr., p. 108). Dr. Behre said he thought the slate on the Arizona placer was marketable but marketing was not his specialty (1953 Tr., p. 126). Charles E. Blaine, a traffic manager, testified that from an examination of freight bills he observed that during the last 10 years (prior to 1953) there had been an increasing volume of slate moving from eastern points into Arizona (1953 Tr., p. 148), but he did not say what amounts or values were involved per year or in total for the period of his observation. Stephen B. Rayburn, one of the attorneys for the contestee, testified that his offer to Mrs. Hanny of $10,000 for the claim was still outstanding and that he thought the slate could be used profitably and sold (1953 Tr., pp. 168, 169).

Other than this, the contestee's only other evidence on marketability was developed on cross-examination of Mr. Haug. Mr. Haug testified that there was no demand for slate because of its excessive cost and that there might be a market for it if it could be sold competitively with other roofing products. However, his testimony was given solely in response to questions by contestee's counsel which were based on the assumption that slate could be produced in the Phoenix area at a reasonable competitive cost. Contestee produced no evidence establishing or even indicating that slate could be produced from the Arizona placer at a reasonable competitive cost. (1953 Tr., pp. 60, 61, 63–67.)

The contrary is strongly indicated by the fact that since the Arizona placer was located in 1912 and through 1948, when the application for patent was filed, until the present time, there has been no slate produced or sold from the claim. If, as the contestee has sought to show, there is little or no market for slate in the Phoenix area solely because of its high cost and if the high cost is due to the high freight charges for shipping slate from the east, there is no reason why there should not have been a ready market in Phoenix for slate from the Arizona placer during the 36–year period from 1912 to 1948.

The contestee attempts to explain away this great inaction on developing and producing the claim on the grounds that Victor E. Hanny was a poor business man, that he was ill for many years, that his wife was ill, that he could not interest capital, etc., but the explanations are unconvincing. Mr. Rayburn testified that he was willing to invest $20,000 now in developing and operating the claim (1953 Tr., p. 168). Dr. Behre testified that $20,000 would be a small and very simple operation that would be feasible and successful (1953 Tr., p. 140). Considering the present day value of the dollar, it is fair to conclude that much less, perhaps half as much, would have been required to conduct a small operation on the claim at some time between 1912 and 1948. In view of the small amount necessary to conduct a successful operation on the claim, the fact that no production was obtained or even attempted in 36 years strongly militates against the assertions that there is a market for the slate.

In fact, testimony on behalf of the contestee itself rather definitely demonstrates that lack of a market, rather than lack of capital and business acumen, has been the reason why the claim was never developed for production. B. B. Smith, Mr. Hanny's son-in-law, testified as follows at the 1950 hearing:

* * * Mr. Hanny told me at the time he established this slate quarry that it was high quality slate and shortly after—there was a market for this slate at the time he took this claim out and *shortly after that the market went down on slate.* He had ideas then to hold it and *maybe* the slate business would come back and he could eventually develop it. *He had finances at that time to develop*

it but with the drop in the market on slate the financial backing backed off. (1950 Tr., pp. 94-95; italics added.)

Viewing the testimony and evidence as a whole, I believe that the Government has established that there is no market for the slate found on the Arizona placer.

Although it is unnecessary to this conclusion, it may be noted that the existence of this deposit has been known since at least 1906. It and other deposits of slate in the same area have remained undeveloped although the Phoenix region has undergone a tremendous growth. In 1949 the Arizona Bureau of Mines issued a bulletin entitled "Arizona Non Metallics, A Summary of Past Production and Present Operations" (Arizona Bureau of Mines, Mineral Technology Series, No. 42, Bulletin No. 155), which stated:

> Slate occurs in many of the schist areas of Arizona, as in the Phoenix, Estrella, Mazatzal, and Sierra Ancha mountains. A sample from the Phoenix Mountains was considered by Dale [76] to be of commercial quality. Because of the small local demand, low market value, and transportation costs, none has been produced commercially in the State. (P. 49.)
>
> [76] * * * * * * *
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> T. N. Dale, Slate in the United States: U. S. Geol. Survey Bull. 586 (1914).
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> * * * * * * *

The same combination of an adequate supply of and lack of demand for slate has been noted in California. There slate has at one time or another been produced in nine counties, but in 1947 only one mine, producing granules and dust, was in operation.[2]

The known existence of slate deposits in Arizona for many years and the complete absence of any evidence of their commercial development substantiates the conclusion that there is no market for the slate from the Arizona placer claim. In the absence of marketability, the deposits of slate are not valuable mineral deposits within the meaning of the mining law. *United States* v. *Strauss et al., supra.*

On May 14, 1956, the appellant filed a request for oral argument. The granting of oral argument on appeal to the Secretary lies within his discretion (43 CFR 221.77 now 221.36 (21 F. R. 1862)). Upon careful consideration, I am of the opinion that oral argument would serve no useful purpose and therefore the appellant's request is denied.

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

EDMUND T. FRITZ,
Deputy Solicitor.

[2] "Slate," by Mort D. Turner in *Mineral Commodities of California,* Division of Mines, State of California, Bulletin 156 (1950) pp. 258–260.

STATUS OF OSAGE OIL AND GAS LEASES AFTER TERMINATION OF PERIOD DURING WHICH OIL, GAS, AND OTHER MINERALS ARE RESERVED TO THE OSAGE TRIBE

Indian Lands: Leases and Permits: Oil and Gas

The language of the act of March 3, 1921, 41 Stat. 1249, providing that all valid existing oil and gas leases on the seventh day of April 1931, are hereby renewed upon the same terms and extended until the eighth day of April 1946, and as long thereafter as oil or gas is found in paying quantities, extended the leases for the period during which oil and gas are reserved to the Osage Tribe and for a period so long thereafter as oil or gas is found in paying quantities.

Indian Lands: Leases and Permits: Oil and Gas

The acts of March 2, 1929, 45 Stat. 1478, and June 24, 1938, 52 Stat. 1034, both contain language providing that any valid existing leases for oil or gas shall continue as long as gas or oil is found in paying quantities.

Indian Lands: Leases and Permits: Oil and Gas

The term of oil and gas leases executed subsequent to the last extension act of June 24, 1938, 52 Stat. 1034, is fixed by the terms of the lease contracts themselves as provided for by the broad authority conferred upon the Osage Tribe and the Secretary of the Interior under the Allotment Act of June 28, 1906, 34 Stat. 539, as amended.

Indian Lands: Leases and Permits: Oil and Gas

In the event the present period during which the oil, gas, and other minerals are reserved to the Osage Tribe should expire and the oil, gas, and mineral title is individualized, the transfer of such title will be subject to any valid subsisting oil or gas lease.

M–36381 NOVEMBER 9, 1956.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

In a recent memorandum, our Regional Solicitor at Tulsa, Oklahoma, requested my opinion for use of the Osage Tribal Council upon the following question:

> If there is no action by Congress extending the period during which oil, gas and other minerals under Osage lands are reserved to the Osage Tribe beyond April 8, 1983, the date of termination of the reservation of the minerals to the tribe as now prescribed by law, will oil and gas leases made by the Osage Tribe for terms extending beyond April 8, 1983, terminate upon that date or will such leases continue in effect until the expiration of the terms prescribed by the lease, i. e., for primary terms and as long thereafter as oil or gas is produced in paying quantities?

The original Osage Allotment Act of June 28, 1906, 34 Stat. 539, provided for the allotment of the Osage Reservation to individual members of the tribe and the making of a final roll of tribal membership. Section 3 of the act reserved for the benefit of the Osage Tribe in common all the minerals covered by the lands to be alloted under the act, for a period of 25 years from and after April 8, 1906. It provided for the

leasing of the lands for oil, gas, and other mineral development purposes by the Osage Tribal Council subject to the approval of the Secretary of the Interior. This leasing provision of the act reads as follows:

> * * * and leases for all oil, gas, and other minerals, covered by selections and division of land herein provided for, may be made by the Osage Tribe of Indians through its Tribal Council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe * * *.

At an early date the Secretary of the Interior and the Osage Tribal Council adopted the plan of leasing separately the oil and gas underlying the lands of the Osage Reservation. Blanket gas leases covering virtually the entire reservation area were made and approved. Oil leases were offered from time to time on numerous units of approximately 160 acres each for lease to the highest responsible bidder. Both forms of lease provided for a term that should in no event extend beyond April 8, 1931, the date upon which the tribal title to the mineral estate in the lands would terminate. As this date approached, the Osage Tribe was faced with the condition of extreme concern. New leases for the short period of tribal ownership remaining were not attractive to the industry. Time was running out on the operation of existing leases, and this brought about intensive and wasteful efforts on the part of the operators to get the oil out of the sands in the shortest possible time. These aggravated conditions led the tribe and the Department to seek legislation which would extend the period of tribal ownership of the minerals and which would also provide for a leasing period long enough to assure orderly development and an adequate return to the tribe for its mineral resources. Earlier versions of this proposed legislation (see S. 4039, 63d Cong., 3d sess., 1921) proposed to extend the period of tribal ownership of the minerals and to extend for a like period existing oil and gas leases which would otherwise expire by their terms in 1931. This earlier proposed legislation also contained a further provision to the effect that the extended leases should not run longer than the period of tribal ownership of the minerals. This latter provision, however, was stricken, and the legislation as finally enacted into the act of March 3, 1921, 41 Stat. 1249, reads:

> * * * That all valid existing oil and gas leases on the 7th day of April, 1931, are hereby renewed upon the same terms and extended, subject to all other conditions and provisions thereof, until the 8th day of April, 1946, and as long thereafter as oil or gas is found in paying quantities * * *.

It is quite clear from the foregoing language that all oil and gas leases which were in force on April 7, 1931, were renewed and extended not only for the extended priod of tribal ownership of the minerals but beyond that period so long as the leases produced oil or gas in paying quantities.

By the acts of March 2, 1929, 45 Stat. 1478, and June 24, 1938, 52 Stat. 1034, the period of tribal ownership of the minerals was again extended. The 1929 act extended this period to April 8, 1958, and the 1938 act extended the period to April 8, 1983. These two acts contain identical provisions with respect to the extension of existing leases. It is quoted below from the 1938 act:

> * * * That nothing herein contained shall be construed as affecting any valid existing lease for oil or gas or other minerals, but all such leases shall continue as long as gas, oil, or other minerals are found in paying quantities.

By this statutory declaration there was written into each valid oil and gas lease then in force on Osage lands the indefinite term that they were to remain in effect for as long as oil or gas is found in paying quantities. The statute contains no other limitation which would operate to terminate the leases with the termination of the period of tribal ownership of the minerals. Such a limitation was deliberately and advisedly omitted by the Congress for, as we have seen, good reason. If there should be no further extension of the period of tribal ownership of the minerals, it is, therefore, my opinion that all such leases, if in good standing and if producing in paying quantities in 1983, will remain in full force and effect so long as such production continues.

There can be no question concerning the power of the Congress to extend these leases. The power of the Congress to extend the period of tribal ownership of the minerals was considered and upheld in *Adams* v. *Osage Tribe of Indians*, 59 F. 2d 653 (10th Cir. 1932), *cert. denied* 287 U. S. 652. In so holding, the court said:

> * * * The Congress had full power, when it passed the Allotment Act, to make such provisions for safeguarding and administering the communal estate of the tribe, and dividing it in severalty among the members of the tribe, as its informed judgment might dictate, for the benefit of all concerned—whether it would be equitable and just that all tribal property, including minerals under the land, be at once allotted among the members in severalty. There must have been a doubt, well founded in later developments, that the minerals, since proven to be of great wealth, could not then be equitably divided, and so Congress chose a method by which that could be and is being accomplished. For that purpose the act provided that minerals under lands to be allotted were reserved to the Osage Tribe and were not to be sold. The necessary effect of this was to withhold the minerals from division, and set them apart from the lands to be divided, for the use and benefit of the tribe, not disturbing the tribe's communal equitable estate in them. It further provided that the minerals should become the property of the individual owners of the allotted lands at the expiration of twenty-five years from and after April 8, 1906, unless otherwise provided for by act of Congress, and during those twenty-five years, while the minerals remained communal property, the two acts against which attack is here made extended the reservation of the minerals in the tribe "until the eighth day of April, 1958, unless otherwise provided by Act of Congress. * * *" The purpose of Congress as disclosed in the

Allotment Act and the extension acts is plain. The contention of appellants is without merit. And so we say the reservation in the Allotment Act and the Acts of March 3, 1921, and March 2, 1929, were "but an exertion of the administrative control of the government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued." Gritts v. Fisher, 224 U. S. 640, 648, 32 S. Ct. 580, 583, 56 L. Ed. 928.

Like reasoning, of course, supports the action of the Congress with respect to the leases on the oil and gas deposits. The individuals who would succeed to the mineral title in the event the Congress fails to extend the period of tribal ownership in 1983 have no vested estate in the minerals, either present or in remainder. *Adams* v. *Osage Tribe of Indians*, *supra*. If and when they succeed to the mineral title, they take that title subject to valid subsisting leases. Indeed this is the normal situation where the tribal title to lands covered by existing leases is individualized through the allotment process.

One further question needs to be considered. This question relates to oil and gas leases executed and approved subsequent to the last extension act of 1938. Under the broad authority conferred on the Osage Tribe and the Secretary of the Interior by the Allotment Act of 1906 and each of the subsequent extension acts, it is quite competent for the tribe and the Secretary to fix the period of leases, and the lease contracts themselves will thus be controlling with respect to the question whether they will endure beyond the period of tribal ownership of the minerals. As pointed out above, the oil and gas deposits underlying the Osage Reservation lands are leased separately. The oil lease form in use subsequent to 1938 provides for a term of 5 years "and as long thereafter as oil is produced in paying quantities." Leases executed and approved on such forms will accordingly remain in force, if otherwise in good standing, as long as production continues, even though the tribal ownership of the mineral deposits may have terminated in the meantime. In such event, the individual owners who succeed to the tribal title would take that title burdened with the existing leases.

The gas lease form in use subsequent to 1938, like the oil lease form, provides for a period of 5 years "and as long thereafter as gas is produced in paying quantities." Unlike the oil lease form, however, the gas lease form contains the additional limitation that nothing contained therein "shall be construed as extending this lease beyond the Trust Period of the Osage Tribe." Gas leases executed and approved on this form subsequent to 1938 will not survive the period of tribal ownership of the minerals.

J. REUEL ARMSTRONG,
Solicitor.

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APPEAL OF GILA CONSTRUCTION COMPANY, INC.

IBCA–79 *Decided September 21, 1956* *

Contracts: Appeals

The Board of Contract Appeals is not authorized to determine an appeal by a contractor in the absence of a finding of fact or decision by the contracting officer.

Contracts: Contracting Officer

When the contracting officer has furnished to the Comptroller General, in response to the latter's request, information about a claim, which the contracting officer expected to be determined and settled by the Comptroller General, the furnishing of such information does not constitute a finding of fact or decision within the meaning of the disputes article of the present standard form of construction contract, or of the regulations of the Department of the Interior defining the authority of the Board.

Contracts: Comptroller General

The Board is not authorized to review a determination by the Comptroller General relative to the final settlement of a contract.

BOARD OF CONTRACT APPEALS

Gila Construction Company, Inc., has submitted to the Board a notice of appeal dated July 30, 1956, in which, after referring to Contract No. 14–20–450–364, involving construction work on the Camp Verde Indian Reservation, Arizona, the contractor states that it appeals to the Board "from all decisions and findings of fact made by the contracting officer," "from the findings of fact made by the contracting officer in a letter dated January 27, 1956," and "from all findings of fact and conclusions made by the Comptroller General" in a letter dated July 17, 1956.

From the papers submitted to the Board, it appears that prior to any of the above-mentioned dates, the contractor held some conferences with the contracting officer and various officials of the Bureau of Indian Affairs, relative to claims for additional compensation and remission of liquidated damages, because of alleged changes or extra work in the contract. It appears, however, that no written proposal on which change orders could be issued was ever submitted to the contracting officer. Instead, the claims were brought to the attention of the General Accounting Office, seemingly for the purpose of having them settled directly by the Comptroller General. In the course of the ensuing investigation of the claims, a registered engineer, Bernard Touhey, acting as agent for the contractor, submitted to the investigator of the General Accounting Office a report, dated January 21, 1956, setting forth the details of the alleged claims.

*Not released for publication in time for inclusion chronologically.

This report was submitted for comment to the contracting officer by the Office of Investigations of the General Accounting Office at Phoenix, Arizona. In a letter dated January 27, 1956, the contracting officer replied to the inquiry, stating, among other things, that, despite repeated attempts to secure a written claim from the contractor, the report of Bernard Touhey was the first semblance of a claim from the contractor on this contract that had been received. The letter concluded as follows:

> We trust the foregoing information which sets forth the Contracting Officer's opinion provides your office with the necessary information to make final settlement of this contract.

In a letter to the contractor dated July 17, 1956, the Comptroller General indicated that the General Accounting Office "would take no further action on the claims, at least until your company's administrative remedies under the contracts have become exhausted." The letter summarized the claims asserted in the engineering report submitted by Mr. Touhey on behalf of the contractor and the sums apparently allowed and disallowed on the basis of the contracting officer's letter dated January 27, 1956, and was accompanied by a copy of a voucher and supporting tabulations stated in the amount of $7,241.04. A copy of this letter, together with a photostatic copy of the engineering report of Mr. Touhey, was sent to the Secretary of the Interior by the General Counsel of the General Accounting Office with a letter dated August 17, 1956 (Comp. Gen. B–126109). At the same time, the General Counsel also forwarded for appropriate action by this Department the notice of appeal mentioned at the beginning of this decision, which, although addressed to the Board, had been sent to the General Accounting Office by the contractor, and requested that the Comptroller General be furnished a copy of the final decision rendered under the disputes articles of the contracts.[1]

The contract here involved is understood to have been on Standard Form 23A (March 1953). Article 6 of that form provides that the contractor may appeal from the written decision of the contracting officer to the head of the Department or his duly authorized representatives. The head of the Department of the Interior has authorized this Board to exercise his authority in deciding appeals from findings of fact or decisions by contracting officers of any constituent agency of the Department (43 CFR 4.4), and has prescribed the rules of procedure to be followed in such cases (43 CFR 4.1–4.16). Section 4.5 of these

[1] The mention of "contracts" in the letters of July 17 and August 27, 1956, is attributable to the fact that these letters also dealt with claims of the same contractor arising under another contract, No. 14–20–450–362, involving construction on the Chui-Chui Indian Reservation, Arizona. In a decision dated December 20, 1955, the Board affirmed the findings of fact and decision of the contracting officer dated May 31, 1955, which denied in part the request of the contractor for an extension of time for the performance of this other contract (IBCA–46).

rules requires that the notice of appeal specify the portion of the findings of fact or decision from which the appeal is taken, and the reasons why the findings or decision are deemed erroneous. Section 4.6 requires the contracting officer to submit to the Department Counsel, within 15 days after receipt of notice of the appeal, the appeal file, which shall include, among other things, "the findings of fact or decision."

In the present case no findings of fact or decision appear to have been made by the contracting officer. An examination of the letter of January 27, 1955, from the contracting officer to the investigators of the General Accounting Office indicates that this letter was intended to serve merely as a means for providing that office with information about a claim which the contracting officer considered would be determined and settled by the Comptroller General. That this was the intention of the letter is borne out by the fact that the contracting officer did not send a copy of it to the contractor, as he would have been bound to do if the letter had been meant to serve as a decision under article 6. When a contracting officer makes a decision under that article, he acts in a quasi-judicial capacity, and is bound to observe a high standard of impartiality, whereas an officer who is merely making a recommendation or referral to another is ordinarily free to assume the role of an advocate. The Board concludes, therefore, that the letter in question does not constitute a finding of fact or decision within the meaning of article 6, the "Disputes" article of the contract.

The conclusion of the Board is in accord with decisions of the Court of Claims and the Armed Services Board of Contract Appeals which have held that recommendations or referrals by the contracting officer to the Comptroller General do not constitute findings of fact and decisions and are not conclusive upon the contractor or the courts, *N. P. Severin Company*, ASBCA No. 17, BCA No. 1731 (January 24, 1950); *Phoenix Bridge Company* v. *United States*, 85 Ct. Cl. 603 (1937).

Under article 6, as implemented by the rules of procedure, the Board lacks jurisdiction with respect to an appeal that involves a dispute as to which the contracting officer has not issued any findings of fact or decision. The portion of the notice of appeal which refers to the findings of fact and conclusions set forth in the Comptroller General's letter of July 17, 1956, also fails to bring before the Board any matter on which the Board could now act, since the Board has no authority to review the determinations of the Comptroller General. Consequently, as the Board has no present jurisdiction in the absence of a finding of fact or decision made by the contracting officer pursuant to the contract, this appeal must be dismissed.

The file is hereby remanded to the contracting officer in order that findings of fact and decision may be made by him, from which the

contractor may, if it desires, appeal to the Board, under the terms of the disputes clause and in accordance with the rules of procedure of the Board.

THEODORE H. HAAS, *Chairman.*
WILLIAM SEAGLE, *Member.*
HERBERT J. SLAUGHTER, *Member.*

APPEAL OF URBAN PLUMBING AND HEATING COMPANY

Decided November 21, 1956

IBCA–43

Contracts: Appeals

Under the "disputes" clause of the standard form Government contracts, the Board of Contract Appeals is without jurisdiction to entertain a claim upon which no finding of fact or decision has been made by the contracting officer, even though such claim is presented to the Board in the same appeal with another claim that is within the jurisdiction of the Board.

Contracts: Damages: Liquidated Damages—Contracts: Performance

The test for determining whether the work under a Government contract has been completed, within the intent of provisions imposing liquidated damages for failure to complete the work by a prescribed date, is not whether every jot and tittle of the work has been done, but whether the contractor has substantially performed the work required by the contract. Evidence that the job of building a particular structure has been substantially completed may be found in the relative inconsequentiality, both as to character and amount, of the work remaining to be done; in the successful use of the structure for its intended purpose, nothwithstanding some uncorrected defects; and in the expert opinions of the chiefs of the engineering and administrative services of the bureau that made the contract and supervised its administration to the effect that the contract work had been substantially completed.

Contracts: Appeals—Contracts: Unforeseeable Causes

Where the record before the Board of Contract Appeals with respect to a claim for extensions of time by reason of various unforeseeable causes of delay contains material information that was not before the contracting officer, but where this information is not sufficient to enable the Board to determine the precise extensions of time to which the appellant may be entitled, the Board will remand the case to the contracting officer for redetermination of the merits of the claim in the light of such additional information, any supporting proof that the appellant may choose to submit, and the comments of the Board as to the legal principles that should be applied by the contracting officer in making such redetermination.

Contracts: Changes and Extras—Contracts: Unforeseeable Causes

A contractor who is directed to perform extra work after the completion date of the contract has passed is entitled to an extension of time equal to the

number of days from the date the work was directed until the date when it is completed, provided the contractor has not delayed the extra work unnecessarily. The time consumed by the Government in determining the substance of the extra work to be directed is likewise excusable if the work is needed in order to correct a condition that was brought about by an error of the Government and that obstructs the orderly performance of the original contract work.

Contracts: Suspension and Termination—Contracts: Unforeseeable Causes

Under a contract which gives the Government Engineer authority to suspend the work in whole or in part because of "unsuitable weather," the existence of weather conditions that would justify the exercise of this authority constitutes sufficient ground for an extension of the contract performance time. Such authority may be exercised retroactively after a period of unsuitable weather has commenced or, indeed, after the period has ended.

BOARD OF CONTRACT APPEALS

Urban Plumbing and Heating Company, 2904 Southwest First Avenue, Portland 1, Oregon, has appealed from a decision of the Regional Director of the Fish and Wildlife Service at Portland, Oregon, dated May 31, 1955, in which the Regional Director denied the claim of the Company for extension of the time for performance under Contract No. 14–19–008–2183, entered into on December 3, 1953, with the Fish and Wildlife Service.

The contract, which is on the standard form for Government construction contracts (Form No. 23, Revised April 3, 1942), provided that appellant would construct a fish trap at the Washington Shore Fish Ladder, Bonneville Dam, Bonneville, Oregon, for the contract price of $41,890.

The officer who executed the contract on behalf of the United States was the Chief, Branch of Finance and Procurement, Fish and Wildlife Service. The contracting officer, shortly after executing the contract, designated the Regional Director, Fish and Wildlife Service, Portland, Oregon, as his duly authorized representative. Pursuant to this designation the actual administration of the contract was handled by the Regional Director, together with his subordinates, and the decision appealed from was rendered by the Regional Director in his capacity as authorized representative of the contracting officer.

The appellant in its notice of appeal, dated June 24, 1955, asserts a claim for additional compensation, on account of various items of extra shop work, as well as the claim for extension of the time for performance that was the subject of the Regional Director's decision.

1. The Claim for Additional Compensation

Appellant claims that it is entitled to additional compensation in the amount of $1,121.25 for extra shop work alleged to have been

occasioned by errors or discrepancies in the contract drawings and specifications. The sum claimed is based on an itemization of nine such occurrences. Performance of the contract necessitated the fabrication of a number of pieces of metal work. It is asserted that the lengths, location of holes for bolt, and other requisites of some of these pieces were not correctly shown in the drawings and specifications, with the result that they would not fit properly and had to be partially refabricated.

The record shows, however, that this claim is not within the compass of the decision from which the present appeal is taken. That decision bears the heading "Objections to Assessment of Liquidated Damages for Delay in Performance." Its text consists primarily of an analysis and appraisal of the timeliness of the manner in which the contract work was performed, although the question of additional costs is occasionally discussed in passing. The Regional Director's conclusion is that "the contractor has not set forth a valid basis for granting additional extensions of time by the Government, except for the one delay discussed above, or for remission of liquidated damages heretofore deducted by the Government from the final voucher in settlement of the contract." Nowhere in the decision is there a clear intimation that a claim for additional compensation had been presented by appellant or was being passed upon by the Regional Director. Finally, appellant itself appears to regard the claim here in question as one that was not before the Regional Director for decision, for the notice of appeal states that "no previous application has been made for additional compensation" on account of the extra shop work items.

As the Board has jurisdiction to entertain only those claims upon which a decision has previously been made by the contracting officer, or by someone duly empowered to act in his stead,[1] it is evident that the claim for additional compensation on account of extra shop work is not a claim that properly could be included within the present appeal. Accordingly, the claim is remanded to the contracting officer, with instructions to make findings of fact with respect to the claim and a decision as to whether it should be allowed, in whole or in part.

While a suggestion has been made on behalf of the Government that the claim is barred in its entirety by the terms of the final payment voucher,[2] this question is one that may involve issues of fact as to the

[1] *Gila Construction Co., Inc.*, IBCA-79 (September 21, 1956) p. 378. *John Andresen & Co., Inc.*, ASBCA No. 633 (December 13, 1950).

[2] This suggestion is contained in a statement dated February 16, 1956, of the Chief, Division of Administration, Fish and Wildlife Service. Other suggestions with respect to the disposition of the appeal are contained in a memorandum dated November 22, 1955, from the Chief, Branch of Engineering, to the Chief, Division of Administration, Fish and Wildlife Service. No copy of either the statement or the memorandum was ever sent to the appellant for his comment. Although a Department Counsel was appointed to represent

intent of the parties, and, consequently, is one that should be passed upon by the contracting officer in the first instance. In the event his decision is not acceptable to the contractor, the latter may then take an appeal to the Board within the time prescribed by article 15, and in accordance with the rules governing procedure before the Board.[3]

2. The Assessment of Liquidated Damages

Appellant claims that liquidated damages in the amount of $2,900 were improperly deducted from the contract price in computing the amount of the final payment voucher.

Article 1 of the contract provided that "the work shall be commenced within 10 calendar days after the date of receipt of notice to proceed and shall be completed within 110 calendar days after the date of receipt of notice to proceed or by April 15, 1954 whichever occurs last." Notice to proceed was received by appellant on December 18, 1953, which was more than 110 days before April 15, 1954, and, therefore, the latter date became the controlling one. By Change Order No. 5, dated April 23, 1954, two additional days were allowed for performance; and by Change Order No. 6, dated May 26, 1954, three more days were allowed. These actions had the effect of extending the completion date to April 20, 1954.

Section 20 of the General Conditions of the contract provided that the engineer placed in charge of the work by the Government "shall have authority to suspend the work, either wholly or in part, for such period or periods as he may deem necessary, because of unsuitable weather or such other conditions as he may consider unfavorable for the prosecution of the work," and stated that "extensions of time will be allowed as provided in article 9," the "Delays-Damages" clause of the contract. Pursuant to this authorization the Regional Director, by an order dated July 21, 1954, directed appellant to suspend all work under the contract "because high water conditions and operation schedules are not suitable for performance of work under way." The order stated that the suspension was to be effective as of July 9, 1954, and that the time elapsing during the suspension should not be charged as contract performance time. By an order dated October 8, 1954, the Regional Director directed that work be resumed, effective as of October 18, 1954.

Section 31 of the General Conditions provided that:

> The contractor shall notify the Engineer at least ten (10) days prior to the anticipated date of completion of all work specified in the contract. Upon completion of the work, the Engineer shall proceed with final inspection and shall complete such inspection as promptly as practicable. The time required for

the Government in the appeal, he never filed a statement of the Government's position, as required by Section 4.7 (b) of the Board's regulations, and thus the occasion for the filing of a reply thereto by the appellant never arose.

[3] 43 CFR, secs. 4.1–4.16.

such inspection and the making of any corrections as a result thereof shall be included in the contract performance time.

A general inspection of the work was had on June 30, 1954, and a letter itemizing the corrections required was sent to appellant by the Regional Director under date of July 2, 1954. During the next few days a number of the required corrections were made, and an operation test was had on or before July 9, 1954. From July 9 to October 18 no work was done, in compliance with the suspension order. At intervals after the latter date the remaining corrections were made, the last item being finished on or before November 23, 1954. A final inspection was had on that date, whereupon the work was accepted as complete.

Under article 9 of the contract, sections 26 and 27 of the General Conditions, and section 10 of the Special Conditions, liquidated damages could be imposed in the amount of $25 per day for each calendar day of delay for failure to complete the work within the specified time.

The deduction for liquidated damages made in the final payment voucher was evidently computed on the basis of the assumptions (1) that the work was not completed until November 23, 1954, and (2) that the only extensions of time to which appellant was entitled were those allowed by Change Orders Nos. 5 and 6 and by the suspension order. On this basis liquidated damages would be chargeable for the period of 79 days beginning on April 21 and ending on July 8, and for the period of 37 days beginning on October 18 and ending on November 23. This gives a total of 116 days of unexcused delay which, at the contract rate of $25 per day, equals the sum of $2,900 actually deducted. The Regional Director in the decision appealed from found, in effect, that these assumptions and computations were correct.

The first point presented in connection with the imposition of liquidated damages is whether the work was completed on November 23, 1954, or on some prior date. The contention of the appellant is understood to be that the work was completed, within the meaning of the contract provisions relating to liquidated damages, on July 9, 1954, the date as of which the suspension became effective, and that, therefore, the assessment of liquidated damages for the period of 37 days after the termination of the suspension was improper. The Board considers that this contention is sound.

The items of work that remained undone on July 9 were (*1*) the patching of the concrete revetment on which the fish trap had been constructed, by filling in holes made to facilitate the construction operations and by chipping away surplus concrete that had escaped from the forms during these operations, in order to leave unimpaired the appearance of the revetment; (*2*) the replacement of fittings for the

brail gate cables that had been disapproved as not conforming to the specifications, and the replacements for which had not yet been obtained by appellant from the manufacturer; (*3*) the touching up of deficiencies in the painting; and (*4*) replacement of a motor cover, repair of a grating, and installation of straps on a drain pipe. The monthly construction report for June 1, 1954, indicates that as of that date slightly more than 93 percent of the job had been completed, and the inspector's log reveals that substantial further progress was made between that date and July 9.[4] Some of the work remaining undone on the latter date could not be performed immediately because the water in the fishways was too high and because the salmon run was in progress. Moreover, the Government wished to use the fish trap for transporting a part of the run to holding ponds, from which the salmon would be ultimately transplanted to new spawning grounds. On July 12, 13, and 14, the trap was operated for this purpose by employees of the Fish and Wildlife Service and appears to have functioned in a reasonably satisfactory manner. During the period after the termination of the suspension on October 18, there were a number of days when the weather was rainy or otherwise unsuitable for painting operations. According to the inspector's log, it would appear that appellant had men at work at the job site on only about 3 or 4 days during this period. In the documents filed in this case by two of the officers of the Fish and Wildlife Service,[5] the opinion is expressed that the contract work was in fact accepted as of July 9, 1954, and that liquidated damages should not have been assessed for any period after that date.

The test for determining whether the work under a Government contract has been completed, within the intent of the provisions relating to liquidated damages, is not whether every jot and tittle of the work has been done, but whether the contractor has substantially performed the work required by the terms of the contract.[6] On the record as a whole the Board finds that the work under the contract was completed, within the meaning of articles 1 and 9, sections 26 and 27 of the General Conditions, and section 10 of the Special Conditions, on July 9, 1954. By that date, appellant had substantially performed the job of building the fish trap. Evidence that this was so is to be found in the relative inconsequentiality, both as to character and amount, of the work that was done after that date; in the successful use of the fish trap for its intended purpose, notwithstanding the uncorrected defects; and in the expert opinions of the chiefs of the engineering and administrative services of the bureau that made the contract and supervised its administration.

[4] The record contains no monthly reports for the interval between June 1 and November 23.

[5] See footnote 2.

[6] *Ed. L. Powers Contracting Co.*, ASBCA No. 1430 (August 31, 1953); *Rogers t/a O. H. Rogers Electric Co.*, BCA No. 197 (November 15, 1943); see *Burlington Mills Corporation*, ASBCA No. 1520 (June 30, 1953).

The second point presented in connection with the imposition of liquidated damages is whether appellant is entitled to additional extensions of time, thereby making improper the assessment of liquidated damages for some part or all of the period beginning on April 21, 1954, and ending on July 8, 1954. Article 9 of the contract, which included a provision for liquidated damages, also provided that the contractor should not be charged with liquidated damages "because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor," including certain enumerated causes among which were "acts of the Government" and "unusually severe weather." Article 3 provided for extensions of time where the time required for performance of the work was increased by reason of changes in the drawings or specifications ordered by the contracting officer. Section 20 of the General Conditions authorized, as already mentioned, extensions of time where performance of the work had been suspended.

The claim for extension of the time for performance, in the form in which it was passed upon by the Regional Director, was embodied in a letter from appellant, dated December 31, 1954. This letter enumerated about 23 separate alleged causes of delay, of which some were attributed to specific acts on the part of the Government, such as errors or discrepancies in the contract drawings and specifications, and others were of a general nature, such as methods of inspection. No figures were given to show the amount of time lost on account of any of the individual causes of delay asserted. The Regional Director considered each of the enumerated items, and ruled that none of them (except the one hereinafter referred to as item 8) constituted a valid basis for the allowance of an extension of time.

The notice of appeal repeats most of the causes of delay asserted in the letter of December 31, 1954, but contains also a general allegation that in addition to the enumerated causes of delay "there were situations, too numerous to mention, of fabrication delays, due to uncertainty and the receipt of pending decisions from inspection personnel." For ten causes of delay, all claimed to be attributable to errors or omissions in the plans, on which appellant relies most strongly, time figures are given.[7] These figures are stated in terms of the number of hours of extra shop work that had to be performed in refabricating pieces of metal work for the purpose of correcting defects which, appellant alleges, were due to such errors or omissions.

With respect to items 1 (Cutoff and reweld flat bars), 2 (Cutoff and change angle clips), 3 (Angle cross braces wrong length on top frame), 4 (Angle cross braces wrong length on side frame columns), 5 (Holes in column plates shown incorrectly), and 7 (Redrill pipe

[7] These ten items, less item 6, make up the nine items for which additional compensation is also claimed.

railing socket plates) of these causes of delay, the Regional Director conceded that there had been errors or discrepancies in the specifications, but held either that the time and cost of correction had been negligible or that appellant had not given the Government timely notice of the circumstances. With respect to item 6, he pointed out that the contractor had accepted a change order (No. 1), which expressly stated that no change in the contract performance time would be allowed under the order covering this item. With respect to item 8 (Rebuild loading gate), he stated that according to Government records some delay had been incurred because of errors in the specifications, and that, upon a satisfactory showing by appellant of the actual additional time involved, consideration would be given to granting a change order.[8] He held items 9 (Fabricating new counter weights) and 10 (Manner of mounting gears on hoist devices) to be unmeritorious on the ground that the devices involved, as originally fabricated, did not conform to the specifications or to accepted manufacturing and installation practices.

These findings are all challenged in the notice of appeal. Thus, for example, appellant specifically asserts that the devices involved in item 9, as initially fabricated, did conform to the specifications, and that a change, which called for special pattern and machine work, was ordered by the Government in the case of item 10. In addition, the time figures given in the notice of appeal, if accurate, would indicate that the corrective work was of substantial proportions.[9]

The notice of appeal is not verified, however, and is not supported by proof that the extra work was performed and actually caused delay in completion of the total job. Generally speaking, shop hours are not necessarily equivalent to lost time. For example, they may have been arrived at by adding together the labor of several employees who worked simultaneously on the same job, or they may represent periods when the contractor may not have been ready to put in place the component on which work was being done even if that component had been complete.

Inasmuch as the present record is not sufficient to enable the Board to determine the precise extensions of time to which appellant may be entitled, the Board considers that the interests of justice will be best served by remanding the case to the contracting officer for redetermination of the merits of the claim in the light of the statements contained in the notice of appeal and of such supporting proof, if any, as appellant may choose to submit. On the present record, the

[8] The Regional Director also stated that some extra cost had been incurred and that, upon a satisfactory showing of its amount, consideration would be given to its inclusion in the change order.

[9] The hours of shop work listed are: for items 1, 2 and 7, six hours each; for items 3, 8 and 9, twelve hours each; for item 4, eight hours; for item 5, twenty-one hours; for item 6, ninety hours; for item 10, one hundred twelve hours.

Board considers that it can do no more than comment upon the general considerations which should guide the contracting officer in reviewing appellant's requests for extensions of time, and upon two specific phases of the case as to which significant facts appear to have escaped the attention of some of the officers of the Fish and Wildlife Service.

The contracting officer need consider only claims for extensions of time that are definite and attributable to specific causes. Causes of delay that are "too numerous to mention" are too nebulous to form the basis of extensions of time. Apart from the two specific phases of the case hereinafter discussed, the only causes of delay that would seem to be sufficiently definite on the present record are the ten items of extra shop work for which time figures are given in the notice of appeal. The contracting officer should also bear in mind that not every change necessarily involves additional time for its performance. A change may increase the cost of performance without involving additional time for performance. And, of course, no extensions of time can be allowed in a situation where, as in the case of item 6, a change order that expressly negatives the allowance of additional time has been accepted by the contractor.[10]

On the other hand, extensions of time should not be denied merely on the ground that the time lost was negligible unless this is clearly so, and, in determining whether it is so, consideration should be given to the fact that a series of "negligible" delays may add up to a total that is more than "negligible." As the provision for liquidated damages is substantial, the contracting officer should be slow to dismiss any cause of delay as negligible. Even a few hours of excusable delay for a particular cause may have the result of saving the contractor from being assessed liquidated damages for a whole day, and the multiplication of such causes may appreciably reduce the amount of liquidated damages assessed.

Finally, the contracting officer should remember that, while under article 9 of the contract the contractor must have given timely notice of any excusable cause of delay, this requirement may be waived by him in appropriate circumstances[11] with the approval of the head of the Department or his duly authorized representative. It would seem that in the present case the power to waive the requirement has been appropriately delegated to the Director of the Fish and Wildlife Service who, by section 1 of the General Conditions, is made a duly authorized representative of the head of the Department for the purpose of granting time extensions under article 9 of the contract.

[10] *Samuel N. Zarpas, Inc.*, 63 I. D. 1 (1956); *Sam Bergesen*, 62 I. D. 295 (1955).

[11] These circumstances are explained in *Campbell Construction & Equipment Co.*, 62 I. D. 6 (1955), the relevant portion of which is quoted at page 10 of the Regional Director's decision, and in *S. J. Groves & Sons Co.*, 62 I. D. 145 (1955).

The first of the two questions requiring specific comment is whether the 3-day extension of time allowed under Change Order No. 6 was adequate. A contractor who is directed to perform extra work after the completion date of the contract has passed is entitled to an extension of time equal to the number of days from the date the work was directed until the date when it is completed, provided the contractor has not delayed the extra work unnecessarily.[12] The time consumed by the Government in determining the substance of the extra work to be directed is likewise excusable if the work is needed in order to correct a condition that was brought about by an error of the Government and that obstructs the orderly performance of the original contract work.[13] Change Order No. 6 appears to have been issued for the purpose of ratifying oral instructions previously given by engineering personnel of the Regional Director's office concerning the correction of certain errors made by the Government in designing a brail hoist motor. The errors were discovered on May 18, 1954, when the motor was tested. In a memorandum signed by the Acting Regional Director under date of June 2, 1954, it is stated that the reinstallation of the motor was completed and satisfactorily tested on May 25, 1954, and this would seem to be confirmed by the inspector's log for the latter date. Unless the statement of the Acting Regional Director is based upon some misunderstanding, the basis of which is not apparent from the record, it would seem that the extension of time to which the contractor would be entitled on account of the change of design of the brail hoist motor would be 7 calendar days, or 4 more than the number allowed under Change Order No. 6.

The second question that needs specific comment is whether some of the delays may be excusable by reason of unsuitable weather. This subject was not specifically mentioned in appellant's letter of December 31, 1954, or in the Regional Director's decision. Such a cause of delay was, however, advanced in the notice of appeal, and in his statement of February 16, 1956, the Chief of the Division of Administration discussed it in the following terms:

> Two extended periods of snowy and freezing weather occurred—January 16 to January 24, inclusive, and February 6 to February 21, 1954, inclusive—which required that concrete work be suspended. The Engineer would have been justified in issuing work suspension orders for these periods.
>
> It is considered that the contractor is entitled to a time allowance for these periods aggregating 25 calendar days.

The existence of the snowy and freezing weather is confirmed by the inspector's log. It indicates that the first period of snowy and freezing weather occurred after the pouring of concrete had begun. While some work was performed on the site during this period, no work at all seems to have been performed on the site during the second period.

[12] *Peter Kiewit Sons' Co.*, 34 Comp. Gen. 230 (1954).
[13] *Lincoln Industries, Inc.*, ASBCA No. 334 (March 15, 1951).

The inspector's log contains an entry under the date of February 5 which reads: "As cold weather exists work was stopped on concrete work." The log contains no entries at all for the period from February 6 to 21, inclusive, but this would only indicate, although in negative fashion, that no work at all was performed during this period.

The contract documents contain two provisions under which weather delays could conceivably be excused. One is article 9 of the contract which made "unusually severe weather" an excusable cause of delay, and the other is section 20 of the General Conditions which gave the engineer authority to suspend work in whole or in part because of "unsuitable weather."

The difficulty with applying the provision of article 9 is that the phrase "unusually severe weather" has been construed to mean not any and all weather that prevents work under a contract, but only such weather as surpasses in severity the weather usually encountered or reasonably to be expected in the particular locality during the time involved in the contract,[14] and the record in the present case does not show precisely to what extent the weather encountered during the two periods of snowy and freezing weather was abnormal.

No such limitation exists, however, with respect to the application of section 20 of the General Conditions which refers merely to "unsuitable weather." This provision would permit the engineer to enter even now a work suspension order covering the two periods of unsuitable weather, since he would normally have entered such an order retroactively at some time after a period of unsuitable weather had commenced or, quite possibly, when the period had ended and its duration had become susceptible of determination. The existence of weather conditions justifying such an order would, in turn, form a basis for the allowance of a commensurate extension of the time for performance.

Whether the circumstances relating to the two periods of snowy and freezing weather are such as would warrant a time extension and, if so, whether the extension should encompass all of the 25 days in question are issues that cannot fairly be determined from the present record. The first two days of each of the periods of unsuitable weather, namely, January 16 and 17, and February 6 and 7, 1954, appear to have been Saturdays and Sundays. If work would not in any event have been performed on these days, there would seem to be no need to commence any period of suspension or extension with either of such days. Moreover, should it be that the snowy and freezing weather did not preclude the contractor from going ahead with some of the

[14] *Jeneckes'*, 62 I. D. 449 (1955); 11 Comp. Gen. 442, 443 (1932); 14 Comp. Gen. 431, 433 (1934); 16 Comp. Gen. 936 (1937); *Dunnigan Construction Co.*, BCA No. 213 (November 8, 1943), 1 CCF 816; *Atwood Construction Co.*, BCA No. 391 (September 30, 1944), 2 CCF 1173.

contract work—shop work, for example—this circumstance should be taken into consideration in determining the extent to which the unsuitable weather delayed performance of the job as a whole. Indeed, the record seems to indicate that some work—apart from shop work—was done during the first period of unsuitable weather, and if such work was in fact substantial, the suspension order covering this period might well be partial only.

To summarize the Board's conclusions with respect to the assessment of liquidated damages: First, the computation of liquidated damages was erroneous in that the period of 116 days used in making the computation included 37 days that occurred after the work on the contract had been substantially completed. The contracting officer should revise the computation so as to exclude these 37 days. Second, the question of whether some part or all of the remaining 79 days constituted excusable days of delay is to be redetermined by the contracting officer in conformity with the legal principles, and in the light of the other comments in this decision. If the contracting officer decides that these 79 days of delay are excusable, in whole or in part, a change order extending the time for performance by the number of days found to be excusable should be entered. In the event his decision is not acceptable to appellant, the latter may thereupon take a further appeal to the Board in the prescribed manner.

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 and decision of the Regional Director are reversed, and the contracting officer is directed to proceed as outlined above.

THEODORE H. HAAS, *Chairman.*
WILLIAM SEAGLE, *Member.*
HERBERT J. SLAUGHTER, *Member.*

MORTON OIL COMPANY

A–27392 *Decided November 26, 1956*

Oil and Gas Leases: Extensions

Where under the law then in effect, an oil and gas lease upon which production had ceased could only have been extended by the fact that "diligent drilling operations" were being conducted on the lease, "reworking" operations conducted over a year after production ceased would not have the effect of extending the lease beyond its primary term.

Words and Phrases

The phrase "diligent drilling operations" in the second paragraph of section 17 of the Mineral Leasing Act, as amended by act of August 8, 1946, cannot be construed as having the same meaning as "reworking operations" inasmuch as the common usage of the expression "drilling operations" is in reference

to the act of digging or deepening a well, whereas "reworking operations" refer to efforts to restore production such as repairing, swabbing, bailing, etc.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Morton Oil Company has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated June 15, 1956, which affirmed the decision of the manager, Cheyenne, Wyoming, land office, dated March 31, 1955, holding that oil and gas lease Buffalo 044049 terminated on October 31, 1951.

The record shows that oil and gas lease Buffalo 044049 containing 160 acres was created as a separate and distinct lease by an assignment, approved on March 29, 1949, from oil and gas lease Buffalo 037848, issued for a period of 5 years, beginning November 1, 1946. The appellant company became the titleholder of the lease through an assignment from the Crusader Corporation filed January 14, 1953, and approved on May 6, 1953, effective as of May 1, 1953.

A report from the Geological Survey dated March 17, 1955, shows that production was obtained from the lease commencing on March 12, 1949.[1] The report summarized subsequent operations on the lease as follows:

Operations summary: One well plugged and abandoned, one well productive; cleaning out and repair operations conducted intermittently from April 1951 to June 1954; swabbing well, running and pulling tubing October, November and December 1951; expiration of primary term October 31, 1951; further efforts to restore production April, May, October, November, December, 1952, May 1953, June 1954.

Production summary: Well produced continuously from March 1949 through February 1950, except a shut-down in August 1949 for repairs; suspension and repairs March through May; resumed production June, July, and August 1950. No further production was had until June 1954 when, notwithstanding previous warnings of possible lease expiration in 1951, the casing was perforated near the producing sand, and the well flowed between 10 and 12 barrels daily.

The Geological Survey report further states that as of October 31, 1951, the lease had not produced for over a year, although reasonably diligent efforts were made during that period and at least until the summer of 1952 to restore production by cleaning out and repair operations. After the swabbing operations in June 1952 failed to recover oil, the rig was moved out in July, and no further work was done until October 1952.

On the basis of this report from the Geological Survey the Director concluded that the lease had expired since there were no drilling operations being conducted under the lease on the date of expiration of the primary term to perpetuate the lease under the following por-

[1] This well was completed on the NE¼SW¼ sec. 24, T. 44 N., R. 62 W., 6th P. M., Wyoming, and was deemed by the Geological Survey on April 14, 1949, to mark an extension of the Skull Creek field. The Southeast Skull Creek field was defined October 19, 1954, to include the NE¼SW¼ sec. 24. The remaining 120 acres in the lease are not situated on the known geologic structure of a producing oil or gas field.

tion of the third paragraph of section 17 of the Mineral Leasing Act, which provided at that time:

> 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. (30 U. S. C., 1952 ed., sec. 226.)[2]

At the time when the appellant's lease was issued (i. e., when the parent lease out of which appellant's lease was created by assignment was issued), the first paragraph of section 17 of the Mineral Leasing Act, as then amended (30 U. S. C., 1952 ed., sec. 226), provided, and still provides, that noncompetitive 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." In order for a lease to be extended beyond its primary term under this provision, it must be actually producing oil or gas in paying quantities on and after the expiration date of the primary term of the lease. *H. K. Riddle*, 62 I. D. 81 (1955); Solicitor's opinion, 60 I. D. 260 (1948). As the appellant makes no claim that there was any production from its lease on October 31, 1951, the lease was not extended under the first paragraph of section 17 of the Mineral Leasing Act.

The Director considered only whether the lease was entitled to an extension under the third paragraph of section 17 of the Mineral Leasing Act. On the expiration date of the primary term of the appellant's lease, the third paragraph provided that holders of noncompetitive leases were entitled to an extension of 5 years as to leased land which was not situated on the known geologic structure of a producing oil or gas field. As to land so situated, the third paragraph provided as quoted above, i. e., that the lease would be extended for 2 years as to such land provided drilling operations were being diligently prosecuted on the land at the expiration of the primary term.

It will be observed that the third paragraph would not help the appellant to any great extent. Only 40 of the 160 acres in the appellant's lease have been determined to be situated on the known geologic structure of a producing field (see footnote 1). If there had been diligent drilling operations on the 40 acres, such operations would have extended the lease for 2 years only as to the 40 acres. The remaining 120 acres were presumably eligible for a 5-year extension but the right to an extension was lost when the then record titleholder of the lease did not apply for a 5-year extension prior to the end of the primary term of the lease, as required by the third paragraph of section 17.

[2] The quoted portion of section 17 was amended by the act of July 29, 1954, to eliminate the requirement for drilling as a prerequisite to securing a 2-year extension (30 U. S. C., 1952 ed., Supp. III, sec. 226).

The Director failed to consider what appears to be the most applicable provision of the Mineral Leasing Act to the appellant's situation, namely, the second paragraph of section 17 of the Mineral Leasing Act. At the time in question, October 31, 1951, the second paragraph provided as follows:

> 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. [Italics added.]

The second paragraph of section 17 was subsequently amended by the act of July 29, 1954 (30 U. S. C., 1952 ed., Supp. III, sec. 226), to read in part as follows:

> Any lease issued under this Act which is subject to termination by reason of cessation of production shall not terminate if within sixty days after production ceases, *reworking* or *drilling* operations are commenced on the land under lease and are therafter conducted with reasonable diligence during such period of nonproduction * * *. [Italics supplied.]

It will be noted that prior to July 29, 1954, the second paragraph of section 17 permitted an extension only if "drilling" operations were in progress during the period of nonproduction. After the amendment of July 29, 1954, the second paragraph provided for an extension if "drilling" or "reworking" operations were in progress. The legislative history of the 1954 amendment shows that the amendment was proposed by this Department. However, the explanation given for it by the Department was not especially illuminating so far as the issue involved in this appeal is concerned.

In its report of April 20, 1954, to the chairman of the Senate Committee on Interior and Insular Affairs on S. 2380 (which became the act of July 29, 1954), the Department said:

> (1) *Section 17, paragraph 2*—This paragraph of the Mineral Leasing Act would be amended to make it clear that a lease, on which production has ceased, will not expire if within 60 days thereafter reworking or drilling operations are commenced and continued with reasonable diligence. This provision accords with one in the Continental Shelf Lands Act of August 7, 1953 (67 Stat. 462), and the same reason exists for it as to public land leases as it does as to leases under that Act. (S. Rept. No. 1609, 83d Cong., 2d sess., p. 5.)

During the hearings on the bill, Mr. Lewis E. Hoffman, Chief of the Division of Minerals, Bureau of Land Management, at the request of Senator Barrett, submitted an explanation of the amendments proposed by the Department. As to the amendment of section 17, paragraph 2, the following explanation was given:

> * * * (1) *Section 17, paragraph 2*—Under existing law, a lease does not terminate if production is had after the primary term when such production ceases if drilling operations are in progress on the land under lease during such period of nonproduction.

Unfortunately, by opinions of the Solicitor of the Department, it was held that when production ceases and no actual drilling operations are being conducted on the lease, it terminates immediately upon cessation of such production. The proposed amendment would rectify this, that a lease will not expire, once it was under a state of production after production ceases, for a period of 60 days thereafter, to give the lessee an opportunity during that period to commence reworking or drilling operations. In other words, under the present law, as interpreted, he must commence reworking and drilling operations immediately upon cessation of production. Under the proposed amendment, he would have 60 days within which to do so, without danger of losing his lease. (Hearings on S. 2380, 2381, 2382, Subcommittee on Public Lands, Senate Committee on Interior and Insular Affairs, 83d Cong., 2d sess., pp. 39–40.)

It is significant to note that until passage of the act of July 29, 1954, there was no reference to "reworking" operations in section 17 of the Mineral Leasing Act. It is also significant that the words "reworking" and "drilling" are used in the disjunctive in the amendment. From these facts it is reasonable to assume that Congress did not intend that the term "diligent drilling operations," as used in section 17 prior to its amendment, should encompass reworking operations. The common usage of the phrase "drilling operations" within the oil and gas industry is in reference to the actual digging or deepening of a hole with a string of drill tools, whereas swabbing, bailing, sand fracturing, etc., are known as reworking operations performed to restore the flow of oil in an existing well which has ceased to flow or has diminished in production.

Thus, in *Texas Co.* v. *Leach*, 53 So. 2d 786 (La., 1951), where a well stopped producing because of a burst tubing and continuation of the lease depended upon the commencement of "drilling or reworking operations" within 60 days, operations by the lessee, including pulling tubing, preparatory to restoring production were considered to be reworking operations. And, in *Johnson* v. *Houston Oil Company of Texas*, 86 So. 2d 97 (La., 1956), where a well not completed to production but showing the presence of oil was plugged with concrete, it was held that moving a drilling rig on the property later and commencing to drill out the cement plug constituted "reworking operations" under a sublease which required that "drilling or reworking operations" be conducted by a certain date.

The significant question in this case, therefore, is whether or not the operations conducted on the lease involved constituted drilling operations and, if so, were these operations diligently performed during the period of nonproduction from the lease.

On the basis of the record before me I am of the opinion that diligent drilling operations were not performed upon the lease. The report from the Geological Survey shows that production on the well ceased in August 1950, so that on the expiration of the primary term of the lease (October 31, 1951) the lease had not produced for over a year. Further, the only operations conducted on the lease

appear to have been cleaning out and repair operations conducted on the existing well long after production had ceased in August 1950. Under the second paragraph of section 17 as it read on October 31, 1951, such operations must be deemed not to have constituted "diligent drilling operations" for the reasons stated; they were typical reworking operations.

As diligent drilling operations were not being prosecuted on the expiration date of the lease, and there was no production in paying quantities, there is no basis for extending the lease and it is properly deemed to have expired on October 31, 1951.

The appellant contends that various actions, or lack of action, of the Bureau of Land Management, i. e., failure to disapprove the operations on the lease in 1952 and 1953, and approval of an assignment of the lease from the Crusader Corporation to the appellant on May 6, 1953, should be deemed to have been an affirmation of the fact that the lease was still in effect. The argument overlooks the fact that the sole authority of the Secretary of the Interior (or his delegate) to extend an oil and gas lease is derived from the provisions of the Mineral Leasing Act. Any lease, extension of lease, or approval of assignment of a lease issued or granted in violation of the pertinent statutory provision is void or voidable and is subject to cancellation. *Transco Gas & Oil Corporation, Joan Ford*, 61 I. D. 85 (1952); *Hjalmer A. Jacobson et al.*, 61 I. D. 116 (1953). Accordingly, the approval of the assignment from the Crusader Corporation to the appellant company after the lease had expired by operation of law at the end of its primary term was a nullity in that no lease existed on January 14, 1953, which could be assigned. *James Shelton*, 62 I. D. 236 (1955). Therefore, although it is regrettable that the Bureau of Land Management did not determine that the lease involved had terminated at an earlier date, it is fundamental that the United States cannot be bound by the unauthorized acts or omissions of its agents.

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, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

DONALD C. INGERSOLL

A-27306 *Decided December 5, 1956*

Notice

The publication in the Federal Register of an Executive Order which in terms merely transfers lands from one land district to another is not necessarily notice to a lessee under an oil and gas lease that an application for the

extension of his lease must be filed in the land district to which the lands covered by his lease have been transferred.

Oil and Gas Leases: Extensions

An application for the extension of an oil and gas lease on lands in California filed in the land office out of which the lease issued prior to the expiration date of the initial 5-year term of the lease is timely filed, even though jurisdiction over the lands covered by the lease has been transferred to another land district in the State, in the absence of clear notice to the lessee that he must file his application in the land office for the latter district.

Regulations: Interpretation—Administrative Practice

Where an applicant is to be deprived of a statutory preference right because of his failure to comply with the requirements of a regulation, that regulation should be so clear that there is no basis for the applicant's noncompliance therewith.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Donald C. Ingersoll has appealed to the Secretary of the Interior from a decision dated December 5, 1955, by the Acting Director of the Bureau of Land Management, which affirmed the action of the manager of the land office at Los Angeles, California, in rejecting Mr. Ingersoll's offer, filed on March 1, 1955, to lease the W½ sec. 17 and the NE¼ sec. 18, T. 9 N., R. 26 W., S. B. M., California, under section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., Supp. III, sec. 226). The Acting Director held that, since the record titleholders of a prior lease on the land had filed a timely application for an extension of their lease, Mr. Ingersoll's offer was properly rejected.

The prior lease, Sacramento 042552, was issued to Signal Oil and Gas Company as of March 1, 1950, for an initial term of 5 years, by the manager of the Sacramento land office. Assignments of undivided interests in the lease in favor of Loren L. Hillman, Inc., and Fred Goodstein were approved by the manager of the Sacramento land office on January 18, 1951. On February 28, 1955, there was filed in the Sacramento land office an application for a 5-year extension of Sacramento 042552. The application was made on form 4-1238, signed by the record titleholders of the lease, and was accompanied by the sixth year's rental. The application and rental payment were forwarded to the Los Angeles land office by the Sacramento land office, where they were received on March 1, 1955. This action was taken because, by Executive Order No. 10248, dated June 2, 1951, the lands in T. 9 N., R. 26 W., S. B. M., California, had been, with other lands, transferred from the Sacramento land district to the Los Angeles land district, effective June 16, 1951 (16 F. R. 5197).

The appellant contends that, by virtue of the Executive Order, the Los Angeles land office was the proper land office for the filing of the application for extension and that since the application was not re-

ceived in that office until March 1, 1955, after the expiration of the initial 5-year term of the lease, the application was not timely filed.

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

> Upon the expiration of the initial five-year 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 * * *. No extension shall be granted, however, unless within a period of ninety days prior to such expiration date an application therefor is filed by the record titleholder * * *.

Thus the statute itself does not specify where an application for an extension is to be filed.

The regulation governing such applications (43 CFR 192.120) is also silent as to where the applications should be filed. It does require, however, that such applications be made on form 4–1238, which form carries an instruction that the form must be filed "in the proper land office." The regulation and the form further provide that applications for extensions should be accompanied by the sixth year's rental.

The regulation governing the payment of rentals on oil and gas leases, in effect when this application for an extension was filed (43 CFR 191.12), provides, with certain exceptions not here material, that rentals "shall be paid to the Manager of the land office in the State in which the lands are located." Thus no clear directive is included in that regulation with respect to lands in California which may be under the jurisdiction of either the Sacramento or the Los Angeles land office.

The record shows that although some time after the date of the Executive Order the lease file was transferred to the Los Angeles land office, where it was redesignated with a Los Angeles serial number (Los Angeles 088842), the lessees under Sacramento 042552 were never notified of this fact. The record also shows that rental payments for the fourth and fifth years of the lease were sent to the Sacramento office under the Sacramento serial number and that although those payments were apparently forwarded to the Los Angeles office, where they were credited on the lease account of Los Angeles 088842, the record titleholders were not apprised of the fact that their lease was then under the jurisdiction of the Los Angeles office. This was in apparent violation of instructions issued by the Director of the Bureau of Land Management that with the first decision or action taken by the Los Angeles office on cases in the transferred area a mimeographed form notice should be sent to applicants informing them that the lands were then under the Los Angeles land office where they had been given Los Angeles serial numbers and that any future correspondence should be directed to that office under the new Los Angeles serial numbers.[1]

[1] See memorandum to the Regional Administrator, Region II, dated May 16, 1951.

While the appellant contends that the lessees under Sacramento 042522, later designated Los Angeles 088842, had constructive notice of the transfer of jurisdiction over their lease from the land office at Sacramento to the land office at Los Angeles, through the publication of the Executive Order in the Federal Register, the Department is not convinced that that order was sufficiently specific to charge the lessees with notice that any application for an extension of their lease must be filed with the Los Angeles land office. All that the Executive Order did was to transfer certain described lands from one district to another. It did not in terms transfer jurisdiction over leases issued by one land office to another land office. Nothing is said in the order with respect to subsequent transactions relating to lands already leased by the Sacramento land office.

Here the lease issued out of the Sacramento land office. It carried a Sacramento serial number. It would not appear unreasonable to assume that, in the absence of notice to the contrary, the Sacramento land office was the proper office in which to file an application for its extension. This is particularly true where there is no clear directive in the regulations as to where applications for extensions are to be filed or, in the case of California lands, where rentals are to be paid.

The Department has recently held that when an applicant is to be deprived of a statutory preference right because of his failure to comply with the requirements of a regulation, that regulation should be spelled out so clearly that there is no basis for disregarding his noncompliance. *Madison Oils, Inc., T. F. Hodge*, 62 I. D. 478 (1955); *M. A. Machris, Melvin A. Brown*, 63 I. D. 161 (1956). That holding is clearly applicable to the present situation.

The right to a 5-year extension of an oil and gas lease is a right accorded by statute provided the conditions of the statute are met. Anyone intending to apply for such an extension should be able to ascertain with certainty from the governing regulations where the application should be filed and the rentals paid and not have to speculate as to whether, in the case of lands in California, the "proper land office" is the Sacramento or the Los Angeles office.

In the circumstances of this case, the application having been filed in the Sacramento land office before the expiration of the initial 5-year term of the lease, it must be held that the regulation was not violated and that the application was timely filed. Accordingly, there is no reason to disturb the decision of the Acting Director.

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 is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

APPEAL OF A. S. HORNER CONSTRUCTION CO.

IBCA–75

Decided December 20, 1956

Contracts: Contracting Officer—Contracts: Contractor—Contracts: Specifications

When a specification requires that the contractor shall submit a construction program to the contracting officer but does not provide for its approval by him, it must be assumed that it was submitted merely for the information of the Government. Moreover, even if provision had been made for the approval of the construction program, such approval could not be given by the construction engineer unless authorized to do so by the contracting officer. Consequently, although the Government had undertaken to furnish certain equipment to the contractor, it was not obligated, merely because of the submission of the construction program, to furnish such equipment in such sequence as would enable the contractor to fulfill the construction program without incurring the assessment of liquidated damages.

Contracts: Damages: Unliquidated Damages—Contracts: Delays of Government

Notwithstanding the submission of a construction program by the contractor, a claim for additional compensation based on the alleged failure of the Government to furnish promised equipment in the sequence stipulated in such program is a claim for the allowance of consequential damages for the Government's delay, which the contracting officer was justified in rejecting as a claim for unliquidated damages that could not be settled administratively.

Contracts: Changes and Extras—Contracts: Delays of Government

Extra work, made necessary by a change ordered by the contracting officer in the prescribed sequences or modes of operation, conceivably might be the basis of a valid claim for additional compensation which could administratively be allowed, notwithstanding the fact that the work was ordered for the purpose of avoiding or mitigating delays caused by failure of the Government to furnish equipment on time. The requisites for an administrative allowance of additional compensation, however, do not exist in a case where the sequences or modes of operation were not prescribed by the contract or an approved construction program; where the work performed for the purpose of avoiding or mitigating the Government-caused delays was work of a type provided for in the specifications; and where, in any event, there is no showing that the work was performed as an extra.

Contracts: Additional Compensation—Contracts: Damages: Unliquidated Damages

A claim for additional compensation based on variations from estimated quantities, which were not the result of any changes in the contract's requirements but were due to faulty estimates originally made by the Government and which, although considerable, were not so great that bad faith on the part of the Government in preparing the specifications could be implied, does not furnish a basis for an equitable adjustment. Although

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one item in the schedule was entirely deleted, it was only one of a considerable group of closely related items, and it was so trivial in amount compared to the total amount involved in the contract that it would not in itself seem to call for an equitable adjustment. Moreover, in so far as this item or any other item in the contractor's claim may be based on the contention of bad faith on the part of the Government or such unreasonableness of the Government's estimates as would amount to a breach of contract, it would constitute a claim for unliquidated damages which could not be allowed administratively.

BOARD OF CONTRACT APPEALS

This is an appeal by A. S. Horner Construction Company, a partnership of the city of Denver, Colorado, from findings of fact and decision of the contracting officer, dated April 23, 1956, under Contract No. I2r–19686.

The contract, which was dated December 5, 1951, and was on U. S. Standard Form No. 23 (revised April 3, 1942), provided for the construction and completion of the Alcova Power Plant and appurtenant works under Specifications No. DC–3564, Kendrick Project, Wyoming, Bureau of Reclamation. Payments in the amount of $2,365,050 were to be made to the contractor at the unit and lump sum prices stated in the schedule for the contract, less a deduction of $40,825.65 for the purchase of materials from the Government by the contractor under Item No. 230 of the schedule.

The claim, as excepted in the release on contract dated December 16, 1954, was in the total amount of $152,275.30, but the contractor, by letter dated October 14, 1955, reduced it to $123,156.57. The major portion of this claim in the amount of $119,591.41 is based on the delay of the Government in furnishing to the contractor and various of its subcontractors major items of equipment, such as a 100–ton traveling crane, butterfly valves and turbines, which the Government was required to furnish under paragraph 25 of the specifications. The balance of the claim, originally in the amount of $3,565.16, is based on a claim of the Sturgeon Electric Company, Inc., a subcontractor, for underruns in scheduled quantities of conduit and multiple conductor cable. Subsequent to the filing of the appeal this portion of the claim was reduced by the contractor to $3,263.35 by allowing the Government a credit in the amount of $301.81 for the salvage value of surplus cable disposed of by the subcontractor. The claim now involved in the appeal is, therefore, $122,854.76.

The claim in the amount of $119,591.41, arising from the delay of the Government in furnishing equipment, is predicated by the contractor on paragraphs 20, 21, and 22 of the specifications, as amended by Supplemental Notice No. 1. Paragraph 20 divided the work into five different parts, and provided for the commencement, prosecution

and completion of each part within a specified number of calendar days from the date of notice to proceed. Paragraph 21 provided for the assessment of liquidated damages in case of delay in the completion of the respective parts of the work. Paragraph 22 provided that the contractor should furnish the contracting officer with initial and revised construction programs showing in detail its proposed program of operations. "The construction program," it was provided, "shall be in such form and such detail as to show properly the sequence of operations, the period of time required for completion of the work under each item or group of like items of the schedule, and the contractor's estimate of earnings by months."

The contractor alleges that it had submitted prior to the commencement of the work a construction program, as required by paragraph 22 of the specifications, which would have assured the completion of the various parts of the work by the times indicated in paragraph 20 of the specifications, and also that such program had been accepted as feasible by the construction engineer on the job. It is apparently the theory of the contractor that, in view of the submission and acceptance of the construction program, the Government became obligated to furnish the equipment which it had promised in such sequence and at such times as would enable the contractor to fulfill the program without incurring the assessment of liquidated damages.

It is further alleged by the contractor that as a consequence of the failure of the Government to meet its obligation the contractor and its subcontractors incurred increased costs in maintaining equipment, facilities, and personnel and in meeting interest charges. This clearly is, however, a claim for the allowance of consequential damages for the Government's delay,[1] which the contracting officer was entirely justified in rejecting as a claim for unliquidated damages, which could not be settled administratively. Neither the contracting officer nor the Board has jurisdiction to consider or allow a claim based on alleged breach of contract by the United States.

In addition, the contractor appears to allege, however, that as a direct result of the Government's delays in the delivery of the equipment, particularly the butterfly valves, it was compelled to engage in additional pumping at an increased cost of $3,846.66, as well as in the stockpiling and rehandling of backfill materials at an increased cost of $1,029.94. The contractor does not explain in detail how the Government's delays resulted in a need for increased pumping. With respect to the backfill operations the contractor states, in substance, that the

[1] See *Langevin* v. *United States*, 100 Ct. Cl. 15, 31 (1943); *Electric Engineering and Construction Service*, 63 I. D. 75 (1956); *Froeming Bros. Inc. of Texas*, BCA No. 526 (April 19, 1944), 2 CCF 633; *Pintural General, S. A.*, BCA No. 521 (May 10, 1944), 2 CCF 725; *The Flour City Ornamental Iron Co.*, ASBCA No. 2884 (November 10, 1949), 4 CCF 60,791; *Creech Construction Co.*, ASBCA No. 506 (February 26, 1944); *Chas. H. Tompkins Co.*, ASBCA No. 570 (April 27, 1950).

material placed in the cofferdam was to be used in the backfill around and over the anchor block of the downstream Y of the penstock, that the completion of the anchor block was dependent on the positioning of the Government-furnished butterfly valves, and that, in order to avoid a year's delay in the testing of the turbines, the contractor was required to remove the cofferdam before all of the butterfly valves had been received, with the result that the backfill material had to be stored until such time as the anchor block could be completed.

Conceivably, if the additional pumping and rehandling of backfill material constituted extra work, made necessary by a change ordered by the contracting officer in the prescribed sequences or modes of operation, a valid claim for additional compensation might exist which could administratively be allowed, notwithstanding the fact that the change was ordered for the purpose of avoiding or mitigating delays caused by failure of the Government to furnish equipment on time. Paragraph 9 of the General Conditions of the specifications in this case expressly provided for the performance of extra work when ordered in writing by the contracting officer.

However, the burden of proving a claim for additional compensation is always on the contractor, and the Board is unable on the basis of the record to conclude that the additional pumping and rehandling of backfill materials constituted compensable extra work. The Board cannot accept the contractor's basic assumption that it was operating under an approved construction program. While paragraph 22 of the specifications provided for the submission of a construction program to the contracting officer, it did not provide for its approval by him. It must be assumed, therefore, that it was to be submitted merely for the information of the Government. Moreover, even if provision had been made for the approval of the construction program, such approval could not be given by the construction engineer unless authorized to do so by the contracting officer, and there is no proof in the record of such authorization.

As there was no approved construction program, the Board must look to the specifications themselves to determine whether any extra work was required. Except that the work was divided into different parts for the purpose of completion, there was no prescribed sequence of operations. As for the modes of operation, the provisions of the specifications governing pumping and the handling of backfill material appear, generally speaking, to have been framed on the principle that the contractor would have the right to do the job by whatever methods it considered best suited to the circumstances of the case, and that the amount of its remuneration would be the same whether the circumstances necessitated the doing of the job by expensive methods or admitted of its being done by inexpensive ones. Thus, it

would seem that under paragraphs 39 (a) and (c) the lump sum price bid in the schedule for "Protection of work and unwatering foundations" included all necessary pumping and excavation work in connection therewith. Likewise, it would seem that under paragraph 45, when read in the light of paragraphs 42 (d) and 44 of the specifications, the unit price bid in the schedule for "Backfill" included any stockpiling and rehandling incident to the use of cofferdam material for backfill around the anchor block.

In any event, the additional work alleged to have been performed could be regarded as compensable extra work only if it had been performed with the approval of the contracting officer, or the contractor had requested additional compensation at the time the work was performed, and it has been denied by the contracting officer on the ground that the work was not extra. The contractor makes no allegations, however, that such was the case, and if the work performed was, indeed, extra, it must be regarded as having been voluntarily performed rather than required.[2] The Board must conclude, therefore, that the $3,846.66 claimed for additional pumping and the $1,029.94 claimed for the rehandling of backfill materials cannot be allowed as compensation for extra work.

There remains to be considered the claim in the amount of $3,263.35 for underruns in scheduled quantities of multiple conductor cable and of conduit. The contracting officer found that the quantity of cable excess to the contract's requirements was not the result of any changes made in them by the Government but was due to a faulty estimate originally made by the Government, and held that the approximate quantities provision contained in paragraph 4 of the General Conditions of the specifications[3] precluded any adjustment because of the underruns with respect to either the cable or the conduit. As the contractor had seemed to allege in submitting the claim, however, that at least some of the underruns were due to changes, the Board requested that the contractor make its claim more definite and certain by specifying the nature of the changes. When the contractor complied with this request by filing a supplementary statement dated August 20, 1956, it was manifest that no changes had been made in the requirements of the contract except in respects that had been covered by a change order, accepted by the contractor. The items of "tabulated changes," listed in the supplemental statement include overruns as well as underruns, and among the latter are many items not included in the original claim. The new items in the supplemental

[2] See *Paul C. Helmick Co.*, 63 I. D. 209, 235 (1956), and other authorities there cited.
[3] This provided that 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."

statement, whether involving overruns or underruns are barred by the failure to include them in the original claim.[4] As for the underruns on the 17 items included in the original claim, these range from 24 percent to 100 percent, but in the case of 8 of the 17 items the underruns are below 50 percent. As the claim appears to be based solely on quantitative factors, and the variances, although considerable, are not so great that bad faith on the part of the Government may be implied, the Board must conclude that there is no basis for an equitable adjustment in this case.[5] To be sure, an underrun of 100 percent which occurred in one of the items[6] is in effect a deletion, and hence it is more difficult to regard it as a mere variation from an estimated quantity. But this item, which is only one of a considerable group of closely related items, and which is trivial in amount compared to the total involved in the contract, would not in itself seem to call for an equitable adjustment. Moreover, in so far as this item or the other items in the claim of the contractor may be based on the contention of bad faith on the part of the Government or such unreasonableness of the Government's estimates as would amount to a breach of contract, they would constitute claims for unliquidated damages which could not be allowed administratively.[7]

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 April 23, 1956, denying the claim of the contractor in its entirety, is affirmed.

THEODORE H. HAAS, *Chairman.*

WILLIAM SEAGLE, *Member.*

HERBERT J. SLAUGHTER, *Member.*

AUTHORITY TO EXTEND THE TERMS OF OIL AND GAS LEASES ISSUED UNDER SECTION 8 OF THE OUTER CONTINENTAL SHELF LANDS ACT

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

The Outer Continental Shelf Lands Act does not contain authority for the extension of leases issued under section 8 of that act because the lessee was unable to develop his lease for any period when the lease was involved in litigation. In the absence of a law authorizing such action, the term of an oil and gas lease may not be extended.

[4] *S & S Engineering Corp.*, 61 I. D. 427, 431 (1954).

[5] For a fuller discussion of the principles applicable in cases of this kind, see *J. D. Armstrong Co., Inc.*, 63 I. D. 289, 305–307 (1956).

[6] This is Item 119, which called for the furnishing and installation of 250 lineal feet of ½ inch conduit at 55 cents a lineal foot, or for the price of $137.50.

[7] See *R. P. Shea Company*, 62 I. D. 456, 463 (1955).

M–36392 DECEMBER 21, 1956.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

My attention has been called to the fact that by decision of November 14, 1956, the Manager of the New Orleans land office has extended all leases on the Outer Continental Shelf for a period of 124 days, including as well leases *issued* by the United States as those former State leases continued pursuant to section 6 of the act.

In my memorandum opinion of September 19, 1956, M–36364 (p. 337), I considered the question whether former State leases to which section 6 of the above act is applicable, could be extended for a period equivalent to the period during which drilling operations were suspended pursuant to the Supreme Court's order of June 11, 1956, in *United States* v. *Louisiana*, Original No. 15 (351 U. S. 978).

In that opinion I discussed section 6 leases only and concluded that they could not be extended under sections 4 (a) (2) or 5, but that they could be extended under section 6 (b). I pointed out that the three provisions mentioned were the only ones that authorized extensions. Since section 8 leases obviously could not be extended under anything in section 6 which is, in terms limited in its application to former State leases, and since it was concluded that extensions for the reason here involved could not be granted under either of the other sections, it was implicit that there is no legal authority for extending section 8 leases. See also my memorandum to you of October 22 [unpublished], transmitting the opinion calling attention to the fact that it related only to section 6 leases.

I am unable to find any authority for extending section 8 leases in the Outer Continental Shelf Lands Act. Further, it is my considered opinion that legal authority must be found before any such lease can be validly extended. I base this conclusion on the fact that Congress has seen fit, on numerous occasions, to provide specially for the extension of mineral leases and prospecting permits. Examples: the acts of January 11, 1922 (42 Stat. 356), April 5, 1926 (44 Stat. 236), March 9, 1928 (45 Stat. 252), January 23, 1930 (46 Stat. 58), June 30, 1932 (47 Stat. 445), and August 26, 1937 (50 Stat. 842), extending or authorizing the extension of prospecting permits; the acts of February 9, 1933 (47 Stat. 798), December 22, 1943 (57 Stat. 608), which was *twice extended by later acts, August 8, 1946 (60 Stat. 950), and July 29, 1954 (68 Stat. 585), granting or authorizing the extension of oil and gas leases issued under the Mineral Leasing Act. The history of this legislation shows that the Department has never assumed that it had authority to extend oil and gas leases in the absence of a law authorizing such action. In fact some of the legislation was sought by the Department because of the existence of equities in oil

*This refers to the act of December 22, 1943. [Ed.]

and gas lessees which could not be recognized in the absence of statutory authority for extension of their leases.

It is, of course, axiomatic that the Department may not do any act unless authorized by statute. While it is true that the Secretary has been given rather broad discretionary powers under the several mineral leasing laws, those powers do not apply when Congress has specifically fixed the term of years for which leases may be issued. In such cases the Secretary may only extend the period where authorized by law to do so.

J. REUEL ARMSTRONG,
Solicitor.

OWNERSHIP OF MINERALS UNDERLYING LANDS ON THE BLACKFEET INDIAN RESERVATION IN MONTANA AS BETWEEN THE BLACKFEET TRIBE AND INDIVIDUAL MEMBERS OF THE TRIBE

Indian Lands: Allotments: Generally

In exchanges of land between the Blackfeet Tribe and its individual members, occurring between the Supplemental Allotment Act of June 30, 1919, and June 18, 1934, the date of the enactment of the Indian Reorganization Act, the question whether mineral reservations should be included in, or excluded from, patents issued to the individual members is controlled by rules issued by the Secretary of the Interior on October 3, 1926.

Indian Lands: Minerals

The provisions of the act of June 30, 1919, reserving to the Blackfeet Tribe the minerals underlying lands on the Blackfeet Reservation were superseded or supplemented by the provisions of the Indian Reorganization Act of 1934, under which it is permissible for the Secretary of the Interior to approve exchange of land between the tribe and its individual members with or without mineral reservations.

Indian Reorganization Act

Whether or not the minerals were reserved to the tribe or conveyed to the allottee, in exchanges occurring subsequent to the enactment of the Indian Reorganization Act of 1934, depends on the facts in each case, and in the absence of any binding agreement to the contrary, ownership of the minerals will be controlled by the recitals contained in the instruments of conveyance.

Indian Lands: Patents

Where the record relating to an exchange of lands between the tribe and an individual member of the tribe shows that the exchanged lands were of equal value with no indication of any intent on the part of the tribe to reserve the underlying minerals, a trust patent issued to the individual member without a mineral reservation must be held to constitute a valid conveyance not only of surface, but also of whatever mineral rights the tribe had in the lands.

M–36393 DECEMBER 26, 1956.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

In connection with the application of Helen Conway Brown, a member of the Blackfeet Tribe of Indians in Montana, for a patent in fee covering lands described as the SE/4SW/4 and SW/4SE/4 of section 8, T. 33 N., R. 6 W., you have requested the opinion of this office as to whether the patent should contain a reservation of minerals to the Blackfeet Tribe. The title of Helen Conway Brown to this 80-acre tract of land was acquired pursuant to an exchange of lands between the tribe and Mrs. Brown in 1952. The consideration of this question has been delayed because of the receipt of a number of inquiries from representatives of oil companies who purchased oil leases on Blackfeet lands involved in similar exchanges between the tribe and individual members of the tribe. The inquiry in each case is provoked by the fact that the act of June 30, 1919 (41 Stat. 3, 16–17), which authorized the making of additional allotments on the Blackfeet Reservation to members of the tribe contained provisions reserving all underlying minerals to the Blackfeet Tribe and requiring that all patents thereafter issued "shall contain a reservation accordingly." The prior allotment laws, under which a large number of allotments were made to members of the tribe contained no such provision, and the allotments under those laws carried full title to both surface and minerals. The inquiries received indicate that some of the exchanges involved occurred between the date of the 1919 enactment and June 18, 1934, the date of the enactment of the Indian Reorganization Act (48 Stat. 984; 25 U. S. C. secs. 461–479), which is applicable to the Blackfeet Tribe, and that other exchanges occurred after the enactment of the Indian Reorganization Act of 1934.

Insofar as exchanges occurring between 1919 and 1934 are concerned, I find that the subject is covered by instructions issued on October 3, 1926, to the Commissioner of the General Land Office (now Bureau of Land Management) [unpublished], relating in particular to the inclusion in or exclusion from patents issued to the individuals of the underlying minerals. After pointing out that the mineral reservation made in the 1919 act for tribal benefit did not apply to prior allotted and patented lands, and that it did apply to all lands allotted under the 1919 act irrespective of whether the lands were classified as mineral or nonmineral, the following rules were laid down:

1. Where allotments made prior to the 1919 act were the subject of exchange between the allottees, the tribal mineral reservation does not apply, and the new patents should not contain the mineral reservation.

2. Where allotments made prior to the 1919 act were relinquished to the tribe after 1919 in exchange for tribal land, the relinquished allotment fell back into the class of unallotted tribal lands and thereupon became subject to the provisions of the 1919 act with respect to the mineral reservation, and if thereafter reallotted, the patent must contain the mineral reservation. Under this rule, it may be added that the patent issued to the allottee for the lieu tribal land involved in the initial exchange process should also contain the mineral reservation.

3. The following quotation from the 1926 instructions lays down the rule to be followed where partial or mixed allotment exchanges are involved:

> It is understood that it is the practice in the matter of exchanges for the allottee to relinquish all the land in his former patent and to receive a new patent for all the land even though only a portion is actually involved in the exchange. In that event the mineral reservation should apply only to the portion not covered by the former patent. As the acts in question authorized persons already allotted to take additional lands, there may be situations where part of the lands to be partitioned or exchanged were allotted prior and part subsequently to said acts. Neither of the above instances seemingly present a difficult situation. The lands can be described in the patents as recommended in each instance, and the description followed by appropriate reservation of minerals as to the particular lands allotted subsequently to the acts requiring such reservations.

The application of the foregoing rules, which do not appear to have been modified, to exchange transactions occurring between 1919 and 1934 should provide a ready answer in each case. If a situation not covered by the rules should exist, or if the rules have been disregarded or departed from in any particular case, I shall be pleased to consider the particular question involved upon the submission of a request accompanied by a full statement of the pertinent facts.

With respect to exchange transactions occurring after 1934, the controlling law, in my opinion, is found in the Indian Reorganization Act of 1934, under which the Blackfeet Tribe has organized and incorporated. Although that act contained general prohibitions against the alienation of tribal and allotted Indian lands, it also contained specific authorizations in the broadest terms in aid of the consolidation of tribal lands and the acquisition of lands for both tribes and individual Indians. These authorizations, which are found in sections 4 and 5 of the act (25 U. S. C., secs. 464 and 465), permit exchanges of land of equal value and the acquisition:

> * * * through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased * * *.

This broad language clearly permits the Secretary of the Interior, in furtherance of the objectives of the act, to approve exchanges between the tribe and its individual members, with or without mineral reservations, and to that extent must be regarded as superseding the requirement in the 1919 act that all minerals shall be reserved for the benefit of the tribe. Whether or not the minerals were reserved to the tribe or conveyed to the allottee in exchanges occurring subsequent to 1934, will therefore depend on the facts of each particular case, and in the absence of any binding agreement to the contrary, ownership of the minerals will be controlled by the recitals contained in the instruments of conveyance.

Recurring to the application of Helen Conway Brown for a patent in fee, it is to be observed that the two 40-acre tracts of land involved in the application were not allotted to her under the 1919 act or the prior allotment laws. They were allotted to other members of the Blackfeet Tribe under the allotment laws in force prior to 1919, which contained no provision for a mineral reservation to the tribe. The lands subsequently passed into unrestricted private ownership and were purchased from the private owners in 1940 under authority contained in the Indian Reorganization Act of 1934. Under the provisions of that act, the title was conveyed to the United States in trust for the Blackfeet Tribe. In an exchange transaction between the tribe and Helen Conway Brown, the latter, who had received in allotments some 400 acres under the 1919 act conveyed those lands to the United States in trust for the Blackfeet Tribe, and in exchange therefor received a trust patent dated October 2, 1952, for the 80 acres of land embraced in her application for a patent in fee. The record relating to this transaction shows that the lands involved were of equal value and there is nothing to indicate any intent on the part of the Blackfeet Tribe to reserve the underlying minerals. The trust patent issued to Mrs. Brown contains no mineral reservation, and under the rule announced above, that patent must be held to constitute a valid conveyance not only of the surface but also of whatever mineral rights the Blackfeet Tribe had in the lands.

The record does show, however, that the 1940 conveyance to the United States in trust for the Blackfeet Tribe contained the following exception and reservation:

> * * * Excepting and reserving, however, from the last above described lands, 2½% of all minerals and mineral rights and oil and gas royalty lying in and under, and which may be produced from the said last above described land to the same extent and in the same manner as the same have been heretofore reserved by predecessors in title of the parties of the first part herein. The interest so excepted and reserved is intended to include and does include all the interest in said minerals heretofore reserved and is not in addition thereto.

Subject to the foregoing exception and reservation, and subject also to any other valid and subsisting encumbrances of record, it is my opinion that a patent in fee should be issued to Mrs. Brown as applied for. Authority for the issuance of such patent in fee is found in the act of May 14, 1948 (62 Stat. 236; 25 U. S. C. sec. 483).

J. REUEL ARMSTRONG,
Solicitor.

INDEX-DIGEST

NOTE.—In the front of this volume are the following tables: (1) Decisions Reported; (2) Opinions Reported; (3) Cases Cited; (4) Overruled and Modified Cases; (5) Statutes Cited: (A) Acts of Congress; (B) Revised Statutes; (C) United States Code; (6) Reorganization Plans Cited; (7) Executive Orders and Proclamations Cited; (8) Treaties Cited; (9) Departmental Orders and Regulations Cited.

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